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11 **BEFORE THE**
12 **STATE WATER RESOURCES CONTROL BOARD**
13 **STATE OF CALIFORNIA**

14
15 In re Petition of Imperial Irrigation District and) **PETITIONER SAN DIEGO COUNTY**
San Diego County Water Authority for Approval) **WATER AUTHORITY'S CLOSING BRIEF**
16 of Long-Term Transfer of Conserved Water)
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7	<u>Peabody v. City of Vallejo</u>	
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21	(1939) 13 Cal.2d 343	8, 74, 116
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24	(1995) 41 Cal.App.4th 303 [48 Cal.Rptr.2d 696]	90
25	<u>United States v. Alpine Land and Reservoir Co.</u>	
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26	<u>United States v. SWRCB</u>	
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MISCELLANEOUS

2 American Jurisprudence, 2nd edition (2002)
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TABLE OF EXHIBITS

I. Petitioner, Imperial Irrigation District

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IID Exh. 7	Agreement for Transfer of Conserved Water by and between Imperial Irrigation District and San Diego County Water Authority dated April 29, 1998; Amendment No. 1; Amendment No. 2; Amendment No. 3
IID Exh. 11	IID Use of Colorado River Water (summary graph)
IID Exh. 12	IID canals
IID Exh. 13	Sample IID data collection forms
IID Exh. 15	Agreement for the Implementation of a Water Conservation Program and Use of Conserved Water between IID and MWD (12/10/88)
IID Exh. 22	(a) Quantification Settlement Agreement (6/6/01 draft) (b) Agreement for Acquisition of Conserved Water between IID and CVWD (6/6/01 draft) (c) Agreement for Acquisition of Conserved Water between IID and MWD (6/6/01 draft) (d) Agreement for Acquisition of Water between CVWD and MWD (6/6/01 draft) (e) Implementation Agreement (12/12/00 draft)
IID Exh. 23	Protest Dismissal Agreement by and among IID, SDCWA, CVWD and MWD
IID Exh. 28	Boulder Canyon Project - All-American Canal United States and IID Contract, 12/1/32
IID Exh. 53	Draft Environmental Impact Statement for Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions, January 2002 (Volume 1 and Appendices)
IID Exh. 55	Imperial Irrigation District Water Conservation and Transfer Project Draft Habitat Conservation Plan, Draft Environmental Impact Report/Environmental Impact Statement, January 2002

II. Petitioner, San Diego County Water Authority

Exhibit No.	Description
SDCWA Exh. 1	Expert Testimony of Maureen Stapleton
SDCWA Exh. 2	Expert Testimony of Kenneth Weinberg
SDCWA Exh. 3	Expert Testimony of Thomas Levy
SDCWA Exh. 4	Expert Testimony of Dennis Underwood

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Exhibit No.	Description
SDCWA Exh. 5	Expert Testimony of Steve Macaulay
SDCWA Exh. 7	San Diego County Water Authority, 2000 Urban Water Management Plan (Dec., 2000)
SDCWA Exh. 9	San Diego County Water Authority (Water Resources Dept.), <i>Water Resources Plan</i> (Feb., 1997)
SDCWA Exh. 10	San Diego County Water Authority, <i>A Common Need. With Shared Solutions: 2001 Annual Report</i> (2001)
SDCWA Exh. 11	<i>Memorandum of Understanding between Imperial Irrigation District and San Diego County Water Authority</i> (Sept. 19, 1995)
SDCWA Exh. 14	<i>Agreement Between the Metropolitan Water District of Southern California and the San Diego County Water Authority for the Exchange of Water</i> (Nov. 10, 1998)
SDCWA Exh. 15	Colorado River Board of California, (Draft) <i>California's Colorado River Water Use Plan</i> (May 11, 2000)
SDCWA Exh. 16	Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 17, 7772-7782 (Jan. 25, 2001)
SDCWA Exh. 17	San Diego Association of Governments, <i>INFO: A Million More People in the Region by 2020</i> (May - June, 1999)
SDCWA Exh. 18	San Diego Association of Governments, <i>INFO: 2020 Cities/County Forecast for the San Diego Region</i> (Sept. - Oct., 1999)
SDCWA Exh. 19	San Diego Association of Governments, <i>2020 Cities/County Forecast: Overview</i> , Vol. 1 (Dec., 1998)
SDCWA Exh. 20	<i>Memorandum of Agreement between the San Diego County Water Authority and the San Diego Association of Governments (SANDAG) Establishing Implementation of the Regional Growth Management Strategy's Section on Water</i> (Oct. 8, 1992)
SDCWA Exh. 21	<i>Resolution of the Board of Directors of the San Diego County Water Authority Adopting the Water Portion of the Regional Growth Management Strategy Produced by the San Diego Association of Governments (SANDAG)</i> (Sept. 10, 1992)
SDCWA Exh. 29	<i>Ordinance No. 91-1 - Ordinance of the San Diego County Water Authority Declaring the Existence of a Water Shortage Emergency Condition and Establishing Procedures To Preserve And Allocate Available Water Supplies</i> (Mar. 14, 1991)
SDCWA Exh. 39	Expert Testimony of Michael McLaughlin
SDCWA Exh. 40	Expert Testimony of Laurence Purcell
SDCWA Exh. 43	Notice of Exemption for MWD/SDCWA Exchange Agreement
SDCWA Exh. 47	Outline of Expert Testimony of Maureen Stapleton
SDCWA Exh. 48	Outline of Expert Testimony of Dennis Underwood

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Exhibit No.	Description
SDCWA Exh. 49	Outline of Expert Testimony of Thomas Levy
SDCWA Exh. 50	Palo Verde Irrigation District, DRAFT Environmental Impact Report for the Proposed Palo Verde Irrigation District Land Management, Crop Rotation and Water Supply Program (May 2002)
SDCWA Exh. 60	Correspondence from Michael Valentine, Department of Fish and Game, to Maureen Stapleton and John Carter (May 29, 2002)

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III. Pacific Conservation League

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PCL Exh. 31	Regional Economic Impacts of the Palo Verde Test Land Fallowing Program

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NWF Exh. 14	Written Testimony of Suzanne Michel, Ph.d.

V. State Water Resource Control Board

Exhibit No.	Description
SWRCB Exh. 1a	Permit No. 7643

VI. Colorado River Indian Tribes

Exhibit No.	Description
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VII. California Farm Bureau Federation

Exhibit No.	Description
CFBF Exh. 1	Written Testimony of Henry E. Rodegerts
CFBF Exh. 2	93640 at Risk: Farmers, Workers and Townspeople in an Era of Water Uncertainty. By Don Villarejo, March 1996 (published by California Institute for Rural Studies, Inc.)
CFBF Exh. 3	Impact of Reduced Water Supplies on Central Valley Agriculture by Don Villarejo, February 1995 (published by The California Institute for Rural Studies)

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VIII. Salton Sea Authority

Exhibit No.	Description
SSA Exh. 6	Excerpts from Guide to the Salton Sea Restoration Project Alternatives
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SSA Exh. 9	Salton Sea Reclamation Act of 1998
SSA Exh. 11	Draft Assessment of Salinity and Elevation Control for Varied Inflow

IX. County of Imperial

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Imperial Exh. 5	Letter from Metropolitan Water District to Thomas Hannigan, Director, California Department of Water Resources

TABLE OF ABBREVIATIONS

1		
2	1964 Decree	Decree in <u>Arizona v. California</u> (1964)
3	1988 IID/MWD Agreement	Agreement for Implementation of a Water Conservation Program and Use of Conserved Water
4	AAC	All-American Canal
	AF	acre-foot
5	AFY	acre-foot per year
6	Alternative Four	Alternative described in Draft EIR/EIS, involving following as the exclusive means of conservation of up to 300,000 AFY for transfer
7	Amended Petition	IID/SDCWA Petition for Approval of Long-Term Transfer of Conserved Water, as amended on Oct. 8, 1998 and Dec. 11, 2001
	Basin	Colorado River Basin
8	Bay-Delta	San Francisco Bay/Sacramento-San Joaquin Delta
	BCPA	Boulder Canyon Project Act of 1928
9	BMP	Best Management Practice
10	CALFED	The program organized pursuant to the terms of the CALFED Bay-Delta Program Implementation Memorandum of Understanding (Aug. 28, 2000)
11	California Plan	California's Colorado River Water Use Plan
12	C.C.R.	California Code of Regulations
	CDFG	California Department of Fish and Game
13	CEQA	California Environmental Quality Act
	CESA	California Endangered Species Act
14	CFBF	California Farm Bureau Federation
	CFR	Code of Federal Regulations
15	cfs	cubic feet per second
	Colorado River Basin	The drainage basin of the Colorado River in the United States
16	Conservation and Transfer Project	The programs for which SWRCB approval is sought and which are described in the Amended Petition – conservation of up to 300 KAFY and the subsequent transfer of up to 200 KAFY to SDCWA and acquisition of up to 100 KAFY by CVWD/MWD
17		
18	CRA	Colorado River Aqueduct
	CRB RWQCB	Colorado River Basin Regional Water Quality Control Board
19	CRIT	Colorado River Indian Tribes
	CVWD	Coachella Valley Water District
20	CWA	Clean Water Act
	DFG	California Department of Fish and Game
21	DOI	United States Department of the Interior
	DOW	Defenders of Wildlife
22	Draft EIR/EIS	Draft Environmental Impact Report/Environmental Impact Statement
23	Draft EIR/EIS	Draft Environmental Impact Report/Environmental Impact Statement
	DWR	California Department of Water Resources
24	EIR	Environmental Impact Report
	Final EIR/EIS	Final Environmental Impact Report/Environmental Impact Statement
25	Four Agencies	MWD, SDCWA, IID and CVWD
	Guidelines	Colorado River Interim Surplus Guidelines
26	HCP	Habitat Conservation Plan (as described in the Final EIR/EIS)
27	HCP1	Habitat Conservation Plan Number 1 (as described in the Final EIR/EIS)
28	HCP2	Habitat Conservation Plan Number 2 (as described in the Final EIR/EIS)

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IID/SDCWA Transfer	Transfer of up to 200 KAFY of conserved water from IID to SDCWA, as further described in the Transfer Agreement
IID	Imperial Irrigation District
IID Board	IID Board of Directors
Implementation Agreement	Secretarial Implementation Agreement
IOP	Inadvertent Overrun and Payback Policy
KAF	thousand acre-feet
KAFY	thousand acre-feet per year
Key Terms	Key Terms for Quantification Settlement Agreement
LCR	Lower Colorado River
Lower Basin States	Arizona, Nevada, California
LROC	Criteria for Coordinated Long-Range Operation of the Colorado River Reservoirs Pursuant to the Colorado River Basin Act of September 30, 1968
MAF	million acre-feet
MAFY	million acre-feet per year
MOU	Memorandum of Understanding
MWD	Metropolitan Water District of Southern California
MWDOC	Municipal Water District of Orange County
NEPA	National Environmental Protection Act
NOD	Notice of Determination
NOE	Notice of Exemption
NOI	Notice of Intent
Notice re: Implementation of Guidelines	Colorado River Interim Surplus Guidelines, Notice Regarding Implementation of Guidelines
NWF	National Wildlife Federation
PCL	Planning and Conservation League
PDA	Protest Dismissal Agreement
PEIR	Programmatic Environmental Impact Report
Phase I	Phase I of SWRCB Hearings
Phase II	Phase II of SWRCB Hearings
PM10	Particulate matter above 10 microns
PVID Program	35-year Land Management, Crop Rotation, and Water Supply Program
PVID	Palo Verde Irrigation District
QSA	Quantification Settlement Agreement
Reasonable Use Doctrine	Doctrine of reasonable use outlined in Article X, Section 2 of the California Constitution
RWQCB	Regional Water Quality Control Board
SANDAG	San Diego Association of Governments
SB	Senate Bill
SDCWA	San Diego County Water Authority
Secretary	Secretary of the Interior
Seven-Party Agreement	California Seven-Party Agreement of 1931
SSA	Salton Sea Authority
SWP	State Water Project
SWRCB	California State Water Resources Control Board
Transfer Agreement	1998 Transfer Agreement between IID & SDCWA
USBR	United States Department of Interior Bureau of Reclamation
USC	United States Code
USFWS	United States Fish and Wildlife Service
UWMP	Urban Water Management Plan
Water Code	California Water Code

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Santa Barbara, CA 93101

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1 **I. INTRODUCTION**

2 The San Diego County Water Authority (SDCWA) requests that the State Water Resources
3 Control Board (SWRCB) approve the Amended Petition for Approval of Long-Term Conserved Water
4 Transfer (Amended Petition) and clear the path for the timely and successful implementation of the
5 California’s Colorado River Water Use Plan (California Plan).

6 The benefits of implementing the California Plan to California are overwhelming while the
7 consequences for failing to succeed with timely implementation are literally catastrophic to California’s
8 economy and our existing quality of life. A consistent application of existing law and a fair consideration
9 of the record developed in this case, compels the conclusion that the SWRCB should approve the
10 Amended Petition and issue the findings requested by the parties to the Protest Dismissal Agreement
11 (PDA).

12 The Colorado River is a shared resource. California does not have the ability to act alone and
13 without regard to demands of the other Colorado River Basin States or the United States government. For
14 the better part of a century, legislative measures, agreements among various stakeholders and judicial
15 precedent have joined to create a vast web of rights and obligations often referred to as the “Law of the
16 River.” Despite the apparent lack of a consensus in all quarters regarding the precise meaning of the “Law
17 of the River,” it is presently beyond dispute that California has neither the first or the last word on the
18 subject. It does, however, have the power to control its destiny.

19 California has long held a substantial interest in the subject matter of this proceeding. It has an
20 interest in maximizing reasonable and beneficial use of water, in voluntary water transfers, in the coordinated
21 administration of water rights and the efficient use of water in accordance with Article X, Section 2 of the
22 California Constitution. It has a direct and paramount interest in the California Plan for the Colorado River.
23 (Wat. Code § 12560(b).)

24 The SWRCB identified several “Key Issues” for the hearing on the Amended Petition in its Revised
25 Notice of Hearing dated February 5, 2002. This Closing Brief responds to those key issues in detail
26 below, but first, a few salient points deserve special emphasis.

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28 ///

1 **A. SUMMARY OF BENEFITS**

2 The California Plan will allow California to maintain its present supply of Colorado River water
3 against threats by the other states and the United States Government to reduce California’s use to its basic
4 legal entitlement of 4.4 million acre-feet per year (MAFY); about 800,000 acre-feet (AF) less than its
5 present use. In fact, the genesis of this Amended Petition is the 1998 Transfer Agreement between the
6 Imperial Irrigation District (IID) and SDCWA (Transfer Agreement), which is the lynch-pin of the
7 California Plan. The California Plan is comprised of a series of related agreements, the most notable of
8 which are the Transfer Agreement and Quantification Settlement Agreement (QSA) between IID, the
9 Metropolitan Water District (MWD) and the Coachella Valley Water District (CVWD).

10 While the SWRCB’s review of this Amended Petition is grounded in Water Code Section 1735
11 *et seq.*, it should not be considered in isolation from the unique context in which it is presented. On its face,
12 the Amended Petition contemplates the conservation of up to 300,000 acre-feet per year (AFY) by IID
13 and the transfer of up to 200,000 AFY of the conserved water to SDCWA. In context of the extensive
14 record in this case and the implementation of the California Plan, it means much more.

15 **1. Continuation of Colorado River Water Deliveries to California in Excess**
16 **of its Basic Entitlement to 4.4 MAFY**

17 The water appropriated by MWD from the Colorado River has been dedicated to a public use in
18 accordance with the provisions of Article X, Section 5 of the California Constitution. It has been applied
19 to support existing municipal and industrial uses on the coastal plain for decades. An entire economy has
20 grown up relying upon the Colorado River supply. The failure to continue this important resource would
21 harm all Californians.

22 Maintaining the existing level of deliveries serves to dampen the demands of Southern California
23 on other imported water supply projects. California is presently using approximately 800,000 AFY more
24 than its basic entitlement of Colorado River water. (SDCWA Exh. 15, at 78; SDCWA Exh. 16, at 4.)
25 By most estimates, California is already short of water and it simply does not have 800,000 AF to spare.
26 The loss of 800,000 AF of water would do more harm to California, its people and economy than any
27 other suite of actions presently within contemplation.

28 **2. Coordinated Water Rights Administration Among California Colorado**
 River Users and Increased Efficiency of Use.

1 California has long held a strong interest in the coordinated administration of water use and water
2 rights. Coordinated water use results in increased efficiency and facilitates the maximum beneficial use of
3 water among competing uses. (In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339,
4 355-57; People ex rel. State Water Resources Control Bd. v. Forni (1976) 54 Cal.App.3d 743 [126
5 Cal.Rptr. 851].)

6 Under the QSA and the Amended Petition, previously unquantified agricultural priorities will be
7 quantified; a benefit traditionally only associated with adjudication. As such, the priorities and entitlements
8 of all users are made more certain. In the arid west, increased certainty is equated with prudent
9 management and more efficient use. (In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d
10 339, 355-57; Arizona v. California (1983) 460 U.S. 605, 620 [103 S.Ct. 1382].) In addition, a
11 comprehensive and elaborate system of agreements among Colorado River users will ensure an agreed
12 upon distribution of Colorado River water by the Secretary of the Interior (Secretary). The State's interest
13 in efficient administration of water should be no less important simply because Colorado River management
14 is shared with the Secretary.

15 3. More Efficient Use of Water by All California Colorado River Users

16 Much has been made as to whether IID's proposed conservation program will increase irrigation
17 efficiency. While SDCWA supports continuing improvements in irrigation efficiency by IID and proper
18 records and protections for its efforts, conservation and more efficient use will result in conserved water
19 through fallowing.

20 *Irrigation inefficiency* is not the only meaning of waste contemplated by Article X, Section 2 of
21 the California Constitution. In many ways, the QSA and the California Plan function as a "physical
22 solution" among the existing users of Colorado River water. Through the Transfer Agreement and the
23 QSA, potentially competing claims to Colorado River water are resolved with the consent of IID, MWD
24 and CVWD as well as the State of California and the Secretary. Through consensual adjustments among
25 competing claimants to Colorado River water, scheduling of water use and transfer agreements, historical
26 practices are adjusted and existing resources are stretched further. Indeed, in WR 88-20, the SWRCB
27 once deliberated the prospect of an imposed physical solution. (*In re Waste and Unreasonable Use*
28 (1988) WR 88-20, at 54-55.) Given the comprehensive support for the QSA and Transfer Agreement

1 among the Colorado River users, the once contemplated hypothetical physical solution is now both real and
2 voluntary.

3 **4. Resolution of Competing Claims Among Colorado River Users Under**
4 **Terms Acceptable to All Vested Rights**

5 The Amended Petition is also unlike the garden variety transfer or change petitions that find their
6 way to the SWRCB for other reasons. In this case, there is a basis for agreement among the vested water
7 right holders that might otherwise be impacted by the Transfer Agreement. There is also the basis for an
8 agreement with the Secretary of the Interior that would ensure the coordinated delivery of water. The
9 consent of the other Colorado River Basin states to allow California to continue to receive surplus
10 Colorado River water during a 15-year “ramp up” period for the California Plan already exists through the
11 Secretary’s publication of Surplus Criteria guidelines.

12 Because of the complexity of the overlapping interests and relationships, the California Department
13 of Water Resources (DWR), the Petitioners and others have spent years attempting to achieve a consensual
14 approach for implementation of the California Plan. The Legislature adopted special legislation to facilitate
15 an agreement between SDCWA and MWD for the transportation of water from IID to SDCWA in 1997.
16 (*See* Wat. Code § 1812.5.) It has also previously authorized the expenditure of \$200 million toward the
17 lining of the All-American Canal (AAC).

18 The PDA continues the momentum and embodies a settlement among competing claimants to
19 Colorado River water. The law has long favored the policy of settlements and compromise. Indeed, the
20 very process and procedure of change petitions before this SWRCB is designed to encourage settlement
21 of disputes prior to hearing. In this case, the parties to the PDA took this challenge seriously and they have
22 managed to succeed in their efforts.

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25 **B. THE EVIDENCE SUPPORTS THE REQUESTED AND STATUTORY**
26 **FINDINGS**

27 **1. There Is *No* Substantial Evidence That SWRCB’s Approval of the**
28 **Amended Petition Will Cause Injury to Any Legal User of Water**

1 The record does not reflect a single substantiated claim of legal injury on vested rights grounds.
2 Consistent with the State policy of facilitating voluntary transfers, IID and SDCWA have reached a
3 consensual arrangement for the transfer of conserved water and also secured the support of junior priorities.
4 The Conservation and Transfer Project will be carried out with the consent and support of the MWD and
5 the CVWD, two junior priority rights to Colorado River water. By written agreement, MWD and CVWD
6 have pledged their support for the SWRCB's approval of the Amended Petition.

7 **2. If the Amended Petition Is Approved, IID Has Agreed to Quantify its**
8 **Water Use at 3.1 MAFY**

9 IID holds a permit to use the Colorado River. In accordance with the Seven-Party Agreement and
10 its contract with the Secretary, IID holds the third priority of use of an agricultural entitlement of 3.85
11 MAFY. However, the amount to the IID entitlement is not quantified. In some years it has used more than
12 3.1 MAFY and in some years, it has used less. If the Amended Petition is approved and the QSA is
13 implemented, IID will agree to quantify its appropriative rights at 3.1 MAFY. Accordingly, there will be
14 a fixed number of AF against which the Secretary will reduce deliveries of water to IID and whereby the
15 SWRCB and others can be assured that IID has reduced its use of water in an amount equal to the transfer.

16 **3. The Secretarial Implementation Agreement Guarantees Successful**
17 **“Conservation” by IID**

18 Colorado River water is delivered among the various right holders in California pursuant to
19 agreements with the Secretary. In this case, the proposed Secretarial Implementation Agreement
20 (Implementation Agreement) will result in a legal guarantee that the precise quantities of water pledged for
21 transfer will be met. Once all the necessary approvals are issued, the Secretary will agree to deliver
22 Colorado River water as provided in the Implementation Agreement. Therefore, IID will be required to
23 *reduce* its diversion and use below the quantified amount of 3.1 MAFY, without regard to whether its
24 chosen conservation program actually meets its projected targets in any given year. In other words, IID
25 is promising the success of its program and the Implementation Agreement is the legal instrument that will
26 guarantee the promise.

27 **4. Given That IID Accepts Responsibility for the Success of the Conser-**
28 **vation Program under the Implementation Agreement, it is Reasonable for**
the SWRCB to Allow IID the Discretion to Develop the Specifics of a
Conservation Program That Is Bounded by its Commitment to Quantify at

1 **3.1 MAFY and Reduce its Use by the Amounts to be Made Available to**
2 **SDCWA and CVWD/MWD**

3 With IID’s commitment to quantify, and the Secretary’s duty to deliver water in accordance with
4 the Implementation Agreement, it is reasonable to leave the precise methods of conservation to the
5 discretion of IID so long as it does not engage in *permanent* following. IID therefore retains maximum
6 flexibility in meeting the customized needs of its community without injuring any legal user. The
7 Implementation Agreement assures IID will receive a specific quantity of water irrespective of the specific
8 mix of conservation measures ultimately chosen by IID.

9 Likewise, to the extent that the *conservation* portion of this project would cause a foreseeable,
10 unreasonable effect on fish and wildlife through its approval of the Amended Petition, the SWRCB can set
11 parameters of a conservation program so as to assure that if the Conservation and Transfer Project
12 proceeds, it will mitigate any unreasonable impacts on fish and wildlife. In this regard, the HCP serves to
13 maintain flows to the Salton Sea in a manner consistent with the “no-project” condition.

14 **5. Delivery of the Water to SDCWA Will Be Accomplished via an Exchange**
15 **That Relies Completely upon Existing Facilities**

16 SDCWA plans to take delivery of the water conserved by IID through an exchange and without
17 the construction of any new facilities. The delivery of the water to the SDCWA under the Implementation
18 Agreement will be accomplished through an exchange of water with MWD and use *existing* facilities,
19 including the Colorado River Aqueduct (CRA). There has been no credible testimony that the act of
20 exchange or transportation of the water to SDCWA will cause injury to a legal user of water or any
21 instream use.

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23 **C. ADDRESSING CONCERNS OVER THE METHOD OF CONSERVATION**

24 Concerns over the Conservation and Transfer Program expressed to various parties to the
25 proceeding are fairly grouped into four categories: (1) effects on fish and wildlife; (2) growth inducement;
26 (3) socioeconomic impacts within Imperial County; and (4) the economics of the conservation program.
27 Only one of these, injury to fish and wildlife, can be considered a traditional water rights matter. In this
28 case, the evidence of such effects is tenuous, at best.

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1. To Deny the Petition, the Alleged Unmitigated Effects on Fish and Wildlife Must be Unreasonable. Any Unmitigated Effects on Fish and Wildlife Must be Balanced Against the Benefits of the Transfer Agreement and the QSA.

A fair consideration of the record reflects that the Conservation and Transfer Project will not unreasonably affect fish, wildlife or other instream uses. Generally, the allegations are that, if unmitigated, on-farm conservation efforts will cause reduced inflows into the Salton Sea, raise salinity and unreasonably impact fish and wildlife. The extent of that effect, however, is dependent upon a number of variables, including the method of conservation ultimately selected by IID.

The alleged injury to fish and wildlife is attributable generally to lowering elevations of the Salton Sea as conservation programs are implemented. However, impacts to fish, wildlife and other instream uses are fully mitigated with implementation of the proposed HCP so long as the selected method of conservation is fallowing. Further, if a temporary/rotational fallowing program is employed as the method of conservation, potentially significant air quality impacts could be reduced to less than significant levels.

Assuming for purposes of argument that the record does demonstrate the existence of a measurable injury to fish and wildlife, that fact alone is not sufficient to deny the Amended Petition. Water Code Section 1736 provides that the effect must also be *unreasonable*. A determination of what impacts are “unreasonable” requires a comparative consideration of the relevant benefits described above in addition to an appreciation of the peculiar standing of the fish and wildlife uses that may be adversely affected by IID’s conservation efforts.

In the instant case, it is important to note that the locus of claimed injuries to fish and wildlife is the Salton Sea, an artificial water body – not instream uses in the Colorado River. There is no credible evidence that the exchange of water through existing facilities the CRA or the temporary fluctuation in flow rates in the Lower Colorado River (LCR) will cause unmitigated injury to fish and wildlife and other instream uses.

The fact is that the prior diversions by IID have been, as to the Colorado River system, completely consumptive. The Colorado River itself does not receive any return flows from IID’s water use.

a. The Salton Sea Is an Artificial Body of Water Comprised of Foreign and Non-native Source of Imported Supplies from the Colorado River

1 The Salton Sea was initially filled by a flood event and a discharge from the Colorado River.
2 Moreover, the very existence of the Sea, at least for the lion's share of the last century, is dependent upon
3 the quantity of orders of Colorado River water made by IID and the water conservation practices of its
4 farmers. IID is under no contractual obligation to order water from the Secretary, and IID's customers
5 are under no contractual obligation to order water from IID. Thus, IID's diversions from the Colorado
6 River, subject to the limitations prescribed by the law of Seven-Party Agreement and other aspects of the
7 Law of the River, are wholly within IID's discretion.

8 **b. As the Importer of Foreign Water, IID Cannot Be Compelled to**
9 **Continue the Importation and Discharge of Foreign Water for the**
10 **Benefit of Third Parties**

11 A junior appropriator cannot compel an appropriative right holder to continue the importation of
12 foreign water or claim injury if the importer opts to reclaim or recapture the return flow and sell it to another
13 user. (Stevens v. Oakdale Irr. Dist. (1939) 13 Cal.2d 343, 348-53; City of Los Angeles v. City of San
14 Fernando (1975) 14 Cal.3d 199, 259-61; Haun v. De Vours (1950) 97 Cal.App.2d 841, 844.) Similarly,
15 riparian right holders have no right to use return flow from foreign water because riparian right holders have
16 no right to use return flow from foreign water. Riparian rights extend only to the natural flow of the stream.
17 (Bloss v. Rahilly (1940) 16 Cal.2d 70, 74-76.)

18 If the SWRCB were to require IID to reclaim return flows to mitigate alleged injuries to fish and
19 wildlife as a condition of approving the Conservation and Transfer Project, then fish and wildlife in the
20 Salton Sea would acquire a right to an abandoned imported supply and as such achieve a higher standing
21 than any other water right presently recognized under California law. Accordingly, a construction of Water
22 Code Section 1736 in a manner that compels IID, an appropriative user, to maintain the importation and
23 discharge of a foreign water supply for the benefit of instream uses should be carefully considered and
24 cautiously applied.

25 **c. The Degree of Impacts on Salton Sea Elevations, Salinity and Thus**
26 **Fish and Wildlife Are Dependent on the Form of Conservation**
27 **Selected by IID**

28 The record reflects that the alleged adverse impacts to non-fish and wildlife resource areas, such
as air quality, are almost exclusively related to the form of conservation to be pursued by IID. If

1 temporary/rotational fallowing were employed as the preferred method of on-farm conservation, impacts
2 would be dramatically reduced.

3 **d. Any Effects on Fish and Wildlife That are Attributable to the**
4 **Transfer Can be Fully Mitigated by Implementation of the HCP**

5 The SWRCB may condition its approval of the Conservation and Transfer Project to maintain
6 inflows into the Salton Sea at an amount generally equivalent to the “no project” alternative set forth in the
7 EIR/EIS. As a consequence, Salton Sea elevations would approximate existing conditions but for
8 implementation of the Conservation Project.

9 This conditional approval would still allow IID the discretion to implement an “on-farm” con-
10 servation program that includes temporary/rotational¹ fallowing in addition to implementation of the
11 proposed Habitat Conservation Plan (HCP) and subsequently file its conservation program and fallowing
12 plan with the SWRCB in accordance with Water Code Section 1011(a) and as requested in the findings
13 enclosed. (See Attachment “A” to this Closing Brief, incorporated herein by this reference. Attachment
14 “B” to this Closing Brief, also incorporated herein by this reference, is a restatement of the Proposed
15 Findings and Conclusions of Law with supporting citations to the record.)

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18 **2. Consistent SWRCB Precedent Reserves Consideration of Growth**
Inducement Impacts to the Local Planning Agency

19 The subject of growth inducement remains a red-herring. The SWRCB has consistently refused
20 to enter the debate over growth inducement in administration of its water rights. No good reason has been
21 presented for it to depart from that precedent in this case.

22 **3. Socioeconomic Impacts are Not a Legally Recognizable Form of Injury**

23 There is no reported case or SWRCB decision that requires either conservation or transfer to
24 mitigate for socioeconomic impacts. There is no fair or reasonable standard to compare the impacts or
25 benefits against bad public policy. Not even the California Environmental Quality Act (CEQA) requires
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27 ^{1/} Parties to this hearing have used a variety of terms to refer to a fallowing program that includes the
28 fallowing of individual parcels for some period of time and in some manner other than the permanent
retirement of land. For ease of reference only, fallowing, as discussed herein, is referred to as either
rotational fallowing or permanent fallowing.

1 an analysis of socioeconomic impacts that may be attributable to the Conservation and Transfer Project.

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3 Moreover, the alleged impacts are directly associated with only one possible method of con-
4 servation, *permanent* fallowing, not the transfer of water *per se*. Finally, it is not such a question of
5 compensation provided to address socioeconomic impacts as it is a question of how it is divided. Other
6 important considerations include the following:

- 7 (a) The water is not a native supply to the Salton Sea and is dependent upon
8 IID's orders of Colorado River water;
9 (b) The transfer is voluntary between two public agencies;
10 (c) IID has discretion to design a conservation program with the input of the
11 entire community, including Imperial County;
12 (d) IID will be well compensated for conserving the water; and
13 (e) Less than 10 percent of IID's water will be transferred.

14 The SDCWA was willing to provide billions of dollars to fund farm efficiency improvements by IID
15 and its farmers. If a temporary/rotational fallowing program is pursued, the hard costs of conservation are
16 reduced, thereby leaving sufficient funding, if necessary, to mitigate for any socioeconomic impacts. IID,
17 with its popularly elected Board of Directors, is well situated to make that determination. The method of
18 allocating measures by a local government agency is, however, a political question.

19 **4. The Absence of the Conservation Program Specifics Are by Design and**
20 **Subject to Cure Before the Project Proceeds**

21 Some concern has been expressed that the actual details of the conservation program have not
22 been established. The present ambiguity is by design. IID has reserved its discretion to design a program
23 that will entice enough participants. IID intends to provide greater specifics if the SWRCB has granted
24 approval. It will customize the program to meet the specific needs of its farmers and address the concerns
25 of the greater community. For the SWRCB's purposes, the Implementation Agreement assures that IID's
26 deliveries will be reduced by the amounts provided therein and that an equivalent amount of water will be
27 made available to SDCWA and CVWD.

28 **II. PROCEDURAL HISTORY**

1 The events that have contributed to the formulation of Petitioners' Amended Petition date back
2 over 100 years. A summary of those essential milestones in the development of the Law of the River,²
3 IID's water rights, IID's conservation programs, and the need to reduce California's Colorado River water
4 use to 4.4 MAFY follows below:

5 **A. IID'S PERMITTED WATER RIGHTS AND SUMMARY OF THE DEVELOPMENT OF THE LAW OF THE RIVER**

6 **1. The Seven-Party Agreement Priority System**

7
8 California's Colorado River supply is limited to a basic apportionment of 4.4 MAFY. In 1931,
9 the California agencies using Colorado River water entered into the Seven-Party Priority Agreement in
10 which they allocated California's 4.4 MAF among the right holders and prioritized each user's shares.
11 Allocation was also made of amounts in excess of 4.4 MAFY in the event that surplus water or unused
12 apportionment of other states is available. Priorities 1 through 4, if fully utilized, account for 4.4 MAFY.
13 Allocation volumes for each diverter are not specific within agricultural Priorities 1-3 and 6, but they are
14 quantified with an aggregate maximum limitation. That is, the individual diverters do not have exact
15 apportionments, but the sum of their respective apportionments are capped at an aggregate, maximum
16 amount. For example, first priority goes to Palos Verdes Irrigation District (PVID) for water needed to
17 irrigate 104,500 acres; second priority goes to the Yuma Project to irrigate up to 25,000 acres; and third
18 priority goes to IID to irrigate lands in the Imperial and Coachella Valleys. IID shares priority 3a and 6a
19 with CVWD.³ Together, agricultural Priorities 1 through 3 total 3.85 MAF of the 4.4 MAFY California
20 share. There is no further written division of the first three priorities' right to the use of the 3.85 MAFY.
21 (SDCWA Exh. 4, at 4.)

22 This lack of further quantification makes it difficult to develop and implement cooperative water
23 supply programs and can cast uncertainty as to water supply reliability, thereby limiting the ability of all
24

25 2/ Over the years, common law, federal and state laws, interstate compacts, an international treaty,
26 court decisions, federal contracts, federal and state regulations, and multi-party agreements have developed
27 to collectively govern the use of the Colorado River. This body of law is commonly referred to as the "Law
of the River."

28 3/ In 1934, IID and CVWD executed a compromise agreement whereby CVWD agreed to
subordinate its Colorado River entitlement in perpetuity to IID's entitlement.

1 users to plan, finance and implement the necessary programs to meet future water supply and management
2 needs. Thus, the need for quantification of the third priority's rights to the Colorado River and
3 accommodation of unresolved differences among those users precipitated the development of the QSA.
4 (SDCWA Exh. 3, at 3; RT, at 139:24 - 140:18.)

5 The fourth priority right to 550 KAFY is held by MWD. This is the last priority within California's
6 annual basis apportionment of 4.4 MAFY. MWD also holds the fifth priority to 662 KAFY, which is in
7 excess of California's annual basic apportionment. (SDCWA Exh. 4, at 4.) The maximum amount of
8 Colorado River water rights under the Seven-Party Agreement, except for an undetermined amount in
9 Priority 7, is 5.362 MAF, or 0.962 MAF more than California's total basic apportionment of 4.4 MAF
10 in a normal year. Therefore, diversion of more than 4.4 MAF under Priorities 5a, 5b, and 6 are dependent
11 on surplus water being available, or on Arizona or Nevada not diverting their full apportionments.⁴

12 2. IID's Water Rights

13 Following execution of the Seven-Party Agreement, between 1933 and 1936, IID filed eight
14 California applications to appropriate water pursuant to the California Water Commission Act. IID filed
15 these applications without waiving its rights as a pre-1914 appropriator,⁵ and the applications sought,
16 through state proceedings, rights to the same quantity of Colorado River water as had been originally
17 appropriated by IID's predecessors-in-interest –more than 7 MAFY. However, the applications also
18 incorporated the terms of the Seven-Party Agreement, thus incorporating the apportionment and priority
19 parameters of the Seven-Party Agreement into IID's appropriative applications. Permit 7643, which is
20 the subject of the Amended Petition, among others, was granted in 1950.

23 ^{4/} The 1964 Decree entered in Arizona v. California provides the Secretary with authority to make
24 available water apportioned to but unused by a state during a particular year for consumptive use in another
25 Lower Division state. (Arizona v. California (1964) 376 U.S., at 340.) Such apportionment does not give
26 any right to the use of that water in subsequent years. California has been the beneficiary of this provision
27 in that it has historically been allowed to divert water that was allocated to but not used by Arizona and
28 Nevada. Specifically, MWD has been able to take advantage of its fifth priority right as a result of the
availability of surplus water and Colorado River water apportioned but unused by Arizona and Nevada
and as a result, over the last ten years, California has diverted up to 5.3 MAFY from the Colorado River.

^{5/} A detailed description of IID's California appropriative rights, initiated in 1885, is set forth in the
Petition at page 13 and is incorporated herein by this reference.

1 In short summary, IID has senior water rights to the Colorado River established under state law,
2 when California is limited to 4.4 MAFY, in the amount of 3.85 MAFY minus the amounts used by Priorities
3 1 and 2. Although Priorities 1 and 2 are not fixed quantities, the average annual use for Priorities 1 and 2
4 (minus return flows) is approximately 420,000 AFY, leaving *approximately* 3.4 MAFY for use by IID.

5 **B. DEC. 1600 AND WR 88-20**

6 IID's initial interest in developing water conservation and transfer projects was a response to
7 proceedings before the SWRCB in the 1980s regarding IID's use of water. In both Decision 1600 and
8 WR Order 88-20 (*In the Matter of Alleged Waste and Unreasonable Use of Water by Imperial*
9 *Irrigation District* (1984) Dec. 1600 and *In the Matter of Alleged Waste and Unreasonable Use of*
10 *Water by Imperial Irrigation District* (1988) Ord. WR 88-20), the SWRCB ordered IID to develop
11 and implement a meaningful water conservation plan. It considered the prospect of a voluntary
12 conservation program and the imposition of a physical solution.

13 In response to an investigation by DWR prompted by a letter by John Elmore, a farmer, alleging
14 misuse of water by IID, the SWRCB instituted its own investigation. (Dec. 1600, at 1.) The SWRCB held
15 hearings pursuant to Title 23, Section 4004 of the California Code of Regulations (C.C.R). It concluded
16 that IID's failure to implement additional water conservation measures was unreasonable and would be a
17 misuse of water in contravention of both California Statute and Constitution. (Dec. 1600, at 31.) The
18 Board ordered IID to develop water conservation measures that would assist in reducing the amount of
19 water lost, while not limiting the amount of water necessary for irrigation and leaching of fields. (Dec. 1600,
20 at 31.)

21 In March, 1988, after a series of judicial proceedings initiated by IID relating to the SWRCB's
22 jurisdiction over IID's water usage under pre-1914 rights (WR 88-20, at 1-2), SWRCB hearings were
23 held to receive evidence regarding IID's compliance with Decision 1600. Later that year, the Board issued
24 its ruling in response to these hearings in Order WR 88-20. (WR Ord. 88-20, at 2.) The Board found
25 it imperative that IID establish a definite schedule for the implementation of a comprehensive water
26 conservation plan and begin this implementation as soon as possible. (WR Ord. 88-20, at 20.) IID was
27 required to submit a plan including measures sufficient to conserve at least 100,000 AFY by January of
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1 1994. In addition, the Board found that the conservation of 367,900 AFY was a reasonable long-term
2 goal which will assist in meeting long-term water demands. (WR Ord. 88-20, at 21.)

3 **C. 1998 IID/MWD AGREEMENT**

4 In response to the above-referenced directive to IID to submit a plan for the conservation of at
5 least 100,000 AFY of water, in 1988, IID and MWD entered into an Agreement for Implementation of
6 a Water Conservation Program and Use of Conserved Water (1988 IID/MWD Agreement) which
7 provided for MWD to bear the costs of various conservation projects implemented by IID within the IID
8 water service area. (IID Exh. 15, at 3.) As compensation for these costs, MWD is entitled to divert from
9 the Colorado River an amount of water equal to the amount conserved by IID's conservation projects.
10 (IID Exh. 15, at 18.) The estimated amount of conserved water generated by the projects at full
11 implementation is approximately 100,000 to 110,000 AFY. (SDCWA Exh. 15, at 4.) The term of the
12 Exchange Agreement is 35 years. (SDCWA Exh. 15, at 35.)

13 **D. SDCWA**

14 Petitioner SDCWA is a MWD member agency, having annexed to MWD in 1946. (SDCWA
15 Exh. 1, at 3.) SDCWA purchases 100 percent of its imported water supply, which makes up between 75
16 to 95 percent of the SDCWA service area's total water supply, from MWD. (RT, at 138:2-8.) In 1990,
17 SDCWA purchased more than 640 KAF from MWD. (SDCWA Exh. 1, at 3.) As such, SDCWA relies
18 heavily on the availability of MWD supplies to meet the needs of SDCWA's own 23 member agencies.

19
20 Although MWD has assured its member agencies that it will have sufficient water supplies to meet
21 the needs of its member agencies (MWD Admin. Code § 4202), by the mid-1980s, SDCWA became
22 very concerned about whether MWD could fulfill its promise. The drought of 1987-92 demonstrated that
23 SDCWA's fears regarding the reliability of MWD's water supply were well founded.

24 In 1991, as a result of severe water shortages in the State Water Project – one of the two major
25 sources of supply for MWD, MWD water deliveries to SDCWA were cut by 31 percent and 50 percent
26 reductions were threatened. (SDCWA Exh. 1, at 5; RT, at 290:3-10.) Additionally, despite the fact that
27 MWD did not experience shortages in its Colorado River supplies and thus was able to keep its CRA full
28 during the drought, it became clear that Arizona and Nevada would soon be taking their full Colorado River

1 apportionments in the near future, thereby potentially jeopardizing MWD’s Colorado River water supply
2 as well. (SDCWA Exh. 1, at 6.)

3 As a result, SDCWA began to explore the possibility of purchasing Colorado River water directly
4 in order to reduce its reliance on MWD. The logical seller was IID, which holds senior priority waters to
5 over 3 MAFY of Colorado River water. IID’s senior water rights ensured that SDCWA’s needs would
6 be satisfied even during normal or shortage years on the Colorado River, when even MWD’s basic
7 apportionment was curtailed. (SDCWA Exh. 1, at 6.)

8 IID and SDCWA began discussions for a water conservation and transfer agreement in mid-1995
9 and in September, 1995, entered into a Memorandum of Agreement which memorialized the key terms
10 of the two parties’ agreement to pursue an agriculture to urban water transfer. (*See* SDCWA Exh. 11.)

11 SDCWA’s main objective in its negotiations with IID was to secure a “drought-proof” long-term reliable
12 water supply that would be competitive with the price SDCWA otherwise would pay MWD. (SDCWA
13 Exh. 1, at 7; RT, at 391:7-10.)

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1 **E. 1998 TRANSFER AGREEMENT**

2 On April 29, 1998, IID and SDCWA signed the Transfer Agreement. (IID Exh. 7.) The Transfer
3 Agreement has been amended on three occasions: first on April 27, 2000, then on December 31, 2000,
4 and finally on December 31, 2001. (*See* IID Exh. 7.)⁶ The Transfer Agreement is the result of intense
5 negotiations and thus reflects a series of compromises as to the transfer quantity, price, duration of the
6 agreement and allocation of risks. (SDCWA, Exh. 1, at 7.) The Transfer Agreement is considered by
7 each party to be viable and mutually beneficial.⁷

8 Subject to the terms and conditions of the Transfer Agreement, IID may undertake and agrees to
9 contract with landowners to undertake water conservation efforts pursuant to Water Code sections 1011
10 and 1012 and divert less Colorado River water by an amount equal to the conserved water created. (As
11 discussed herein, pursuant to the proposed QSA, IID has further agreed to limit its total diversions from
12 the Colorado River to 3.1 MAFY.) The transfer occurs by IID leaving water in the Colorado River at
13 Lake Havasu (the point at which MWD, pursuant to the Exchange Agreement, will take delivery of the
14 conserved water). SDCWA pays IID for the quantity of water conserved. (IID Exh. 7, at 2.) The
15 transfer is for a term of 45 years with a conditional 30-year renewal period, for a total of 75 years. (IID
16 Exh. 7, at 20.) Because the term of the agreement is potentially for 75 years, the Transfer Agreement
17 contains provisions that allow for variations in price based on objective criteria. (IID Exh. 7, at 25; *see*
18 *also* SDCWA Exh. 1, at 7; SDCWA Exh. 2, at 16-17.)⁸

19 The Transfer Agreement is conditioned upon, among other things, appropriate environmental
20 review and approval by the SWRCB and the DOI. (IID Exh. 7, at 41.)

21 _____
22 6/ All references herein to the Transfer Agreement are to the agreement as amended.

23 7/ For example, SDCWA's General Manager testified to the fact that: "In SDCWA's assessment
24 the price for water established in the Transfer Agreement reflects all of the following factors: • The cost of
25 conservation, environmental mitigation, administration and the desire to avoid socioeconomic impacts. •
26 The cost of alternative water available to SDCWA from MWD. The emerging California water market
27 and the concept that certain types of comparable transactions would be useful in establishing price. In my
view, the Transfer Agreement effectively blends these factors in reaching a pricing structure that is fair to
both IID and to SDCWA. • The cost of transporting the water to SDCWA. • The proven reliability of
IID's water as compared to other sources of supply." (SDCWA Exh. 47, at 6-7.)

28 8/ A more detailed discussion of the mechanics of the proposed Transfer Agreement, including
discussion of the quantity, term and renewal, pricing, and provisions for shortage, is provided in the Petition.
(*See* Amended Petition, at 8-12.)

1 **F. EXCHANGE AGREEMENT**

2 In 1997, by urgency legislation, Water Code Section 1812.5 was added to facilitate the implemen-
3 tation of the pending Transfer Agreement. Because of the critical importance of the proposed
4 IID/SDCWA Transfer, the Legislature appointed the Director of the Department of Water Resources to
5 make a recommendation concerning the transportation of water to San Diego County. (Water Code §
6 1812.5.)

7 The next year, the Legislature further embraced the transfer and sought to facilitate the California
8 Plan through the adoption of Water Code Section 12562. The Legislature appropriated \$200 million for
9 the lining of the AAC and another \$35 million for conjunctive use. However, the Legislature can require
10 a “payback” of the \$200 million if the IID/SDCWA water transfer is not implemented. (*See* Wat. Code
11 §§ 12563, 12564.)

12 Having secured a pledge of \$200 million for lining of the AAC from the State, MWD converted
13 the MOU to a more comprehensive agreement with the SDCWA in November of 1998. The Exchange
14 Agreement (SDCWA Exh. 14) accomplished the physical conveyance of the water purchased from IID
15 pursuant to the Transfer Agreement. (SDCWA Exh. 1, at 7.) In accordance with the Exchange
16 Agreement, an amount of water equal to the amount of water conserved by IID for transfer to SDCWA
17 will be diverted into the CRA, and, in exchange, MWD will deliver water in a like quantity and quality to
18 SDCWA via MWD’s conveyance facilities. (SDCWA Exh. 1, at 7-8; RT, at 393:24 - 394:5.) As a
19 result of the Exchange Agreement, no new facilities will be constructed, or operations or maintenance
20 practices changed, to convey, receive or use water transferred by IID to SDCWA. In fact, MWD will
21 deliver water pursuant to the Exchange Agreement in the same manner and along with SDCWA’s regular
22 purchases. (SDCWA Exh. 2, at 17.)

23 **G. COLORADO RIVER 4.4 PLAN**

24 In 1996, the Secretary deferred further consideration of any long-term Colorado River surplus
25 guidelines until California put in place a realistic strategy to ensure that it would be able to reduce its annual
26 use of Colorado River water to 4.4 MAFY in normal years – its basic apportionment (Arizona v.
27 California (1964) 376 U.S. 340) – or to meet its needs from sources that would not jeopardize the
28 apportionments of others. By 1998, California had long become dependent upon using up to 5.2 MAFY,

1 800 KAFY more than its basic apportionment. Development of a strategy for relieving use of Colorado
2 River Water was considered by the Secretary to be a prerequisite for approval of any further cooperative
3 Colorado River water transfers between California agencies. (SDCWA Exh. 15, at 78; SDCWA Exh.
4 16, at 4; SDCWA Exh. 1, at 8.)

5 In an effort to prepare for likely reductions of Colorado River water available to California, the
6 Colorado River Board of California prepared the California Plan, which was released in draft form in May
7 2000. The California Plan, inclusive of the Transfer Agreement, was the result of intense negotiations
8 among the Four Agencies and other members of the Colorado River Board. (SDCWA Exh. 1, at 8.)

9 The California Plan provides a framework for the state to coordinate and assist in the cooperative
10 implementation of diverse programs, projects, and other activities that would reduce California's use of
11 Colorado River water and facilitate conformance with California's annual apportionment. It involves the
12 conservation of water within southern California and the transfer of conserved water from agricultural to
13 predominantly urban uses. It also identifies future groundwater conjunctive use projects that would store
14 Colorado River water when available. (SDCWA Exh. 15, at 38; Water Code § 12562.)

15 The proposed QSA includes key contractual arrangements among IID, MWD, and CVWD, which
16 are needed to implement major components of the California Plan. (SDCWA Exh. 15, at 20.) The
17 Conservation and Transfer Project, whether implemented with or without the QSA, would accomplish a
18 key goal of the California Plan by transferring up to 300 KAFY of Colorado River water from IID to other
19 users. (SDCWA Exh. 15, at 32.)

20 **H. QSA AND RELATED AGREEMENTS**

21 Subsequent to execution of the Transfer Agreement and in furtherance of the strategy set forth in
22 the California Plan, IID, CVWD, and the MWD negotiated the terms of the proposed QSA. On October
23 15, 1999, IID, MWD and CVWD published the "Key Terms for Quantification Settlement Agreement"
24 (Key Terms), which will allow for implementation of many of the actions identified in the California Plan.
25 (SDCWA Exh. 1, at 8-9.) Although not a signatory to the "Key Terms" or the proposed QSA, SDCWA
26 is a member agency of MWD. SDCWA participated in the proposed QSA negotiations and benefits or
27 is affected by certain of its terms, specifically those relating to the Transfer Agreement.
28

1 The QSA is a distribution reallocation of Colorado River water based on a series of proposed
2 agreements that includes water conservation/transfer and exchange projects among IID, CVWD, and
3 MWD, and, among other things, quantifies IID's and CVWD's third priority apportionments. (See IID
4 Exh. 22a-e; SDCWA Exh. 3, at 4; RT, at 139:24 140:18.) Additionally, the Transfer Agreement is
5 incorporated into the QSA. It is the largest water transfer identified in the QSA and is the linchpin for the
6 QSA's success. (SDCWA Exh. 1, at 9; SDCWA Exh. 3, at 4; RT, at 396:16 - 397:2; RT, at 399:9-13.)
7 Together, these QSA projects will help MWD, SDCWA, IID and CVWD to achieve an adequate and
8 reliable water supply. (SDCWA Exh. 3, at 4; RT, at 139-141.)

9 As described above, the proposed QSA provides part of the mechanism for California to reduce
10 its water diversions from the Colorado River in normal years to its apportioned amount of 4.4 MAF under
11 the California Plan. The implementation of the proposed QSA, which includes water conservation and
12 water transfers from agricultural use to principally urban use, would result in a net reduction of Colorado
13 River diversions to California.

14 If the QSA is approved by the participating agencies and if the conditions to implementation of the
15 QSA are satisfied or waived, SDCWA would be limited to the primary amount (130 to 200 KAFY) of
16 transferred water under the Transfer Agreement, CVWD would have an option to acquire up to 100
17 KAFY, and MWD would have an option to acquire any portion of the 100 KAFY that CVWD elects not
18 to acquire. (SDCWA Exh. 3, at 2; IID Exh. 23, at 22.) The Conservation and Transfer Project, which
19 is evaluated in the EIR/EIS, and which is the subject of the Amended Petition, provides for the water
20 transfers that will apply if the QSA is executed and implemented.

21 **I. SECRETARIAL IMPLEMENTATION AGREEMENT AND INADVERTENT**
22 **OVERRUN POLICY**

23 The Implementation Agreement is one of the several agreements on which the QSA is based. (IID
24 Exh. 22e.) Implementation of the QSA is an express condition precedent to the Implementation
25 Agreement. (IID Exh. 22e, at ¶ A(13).) Parties to the Implementation Agreement include: the Secretary,
26 IID, CVWD, MWD and SDCWA.

27 The Implementation Agreement provides the method under which the amounts of water conserved
28 by IID will be delivered under the priorities outlined in the Seven-Party Agreement. (IID Exh. 22e, at ¶

1 A13.) Under the Implementation Agreement, which is to be coterminous with the “Quantification Period”
2 outlined in the QSA, the Secretary will deliver Colorado River water as set forth in the Implementation
3 Agreement. (IID Exh. 22e, at ¶ B2a.) The Implementation Agreement provides that IID’s water will be
4 restricted by the amount it conserves for the purpose of providing water to CVWD, MWD, and SDCWA,
5 and the Secretary agrees to deliver to CVWD, MWD, and SDCWA the water conserved by IID for their
6 benefit. (IID Exh. 22e, at ¶ B3.) The Agreement outlines the exact quantities of Colorado River water,
7 under priorities 3a, 4, 5, and 6a of the QSA, to which IID, CVWD, MWD, SDCWA will be entitled.

8 The Inadvertent Overrun Policy and Payback Program (IOP) provides a structure to pay back the
9 amount of water diverted, pumped or received that results in consumptive use in excess of entitlement.
10 Inadvertent overrun is a consumptive use overrun that the Secretary determines resulted from conditions,
11 occurrences or events that were not within the control of the entitlement holder — for example, the lawful
12 but unanticipated higher use by a higher-priority entitlement holder. The IOP does not create any right of
13 entitlement to this water, nor does it expand the underlying entitlement in any way. An entitlement holder
14 has no right to plan to receive an inadvertent overrun. If, however, water is diverted, pumped or received
15 inadvertently in excess of entitlement, and the state's apportionment of Colorado River water for that year
16 is exceeded, the IOP will govern the payback. (IID Exh. 22a (Exh. F).)

17 **J. INTERIM SURPLUS GUIDELINES**

18 On January 25, 2001, the Secretary of the Interior issued its Colorado River Interim Surplus
19 Guidelines (Guidelines). (SDCWA Exh. 16 (66 Fed. Reg. at 7772-7782).) These Guidelines were issued
20 in accordance with the Secretary’s authority over Colorado River matters.

21 The Secretary is vested with responsibility of managing the mainstream waters of the lower
22 Colorado River pursuant to federal law, including the 1964 Decree in Arizona v. California (Arizona v.
23 California (1964) 376 U.S., at 340) (1964 Decree), the Colorado River Basin Project Act of 1968, and
24 the Criteria for Coordinated Long-Range Operation of the Colorado River Reservoirs Pursuant to the
25 Colorado River Basin Act of September 30, 1968 (LROC). The 1964 Decree provides that when there
26 is sufficient water available in a single year to satisfy the annual consumptive use in Arizona, Nevada and
27 California in excess of 7.5 MAF, such excess consumptive use is “surplus” and the Secretary is authorized
28 to determine the conditions upon which such water may be made available. (66 Fed. Reg. at 7773.)

1 Generally, the LROC are utilized by the Secretary, on an annual basis, to make determinations with respect
2 to operations of the Lower Colorado River (LCR), including “surplus” water determinations.

3 However, due to an increasing demand for surplus water (as a result of the fact that Arizona and
4 Nevada are at or near full use of their Colorado River apportionments), the Secretary determined that there
5 was a need for more specific surplus guidelines, consistent with federal law, to assist the Secretary’s annual
6 decision-making during the interim period between the effective date of the Guidelines and December 31,
7 2015. (66 Fed. Reg. at 7782.)

8 The Guidelines are intended to “recognize California’s plan to reduce reliance on surplus deliveries,
9 to assist California in moving toward its allocated share of Colorado River water, and to avoid hindering
10 such efforts.” (66 Fed. Reg. at 7774.) As such, the Guidelines provide an enormous benefit to California
11 by providing the State with a grace period within which to make such reductions and greater certainty as
12 to the available of Colorado River to California during the interim period.

13 [T]hrough adoption of specific interim surplus guidelines, the Secretary will
14 be able to afford mainstream users of Colorado River water, particularly
15 those in California who currently utilize surplus flows, a greater degree of
predictability with respect to the likely existence, or lack thereof, of
surplus conditions on the river in a given year.

16 (66 Fed. Reg. at 7774.)

17 More recently, on June 19, 2002, the Secretary issued Guidelines, Notice Regarding Implemen-
18 tation of Guidelines (Notice re. Implementation of Guidelines). (*See* 67 Fed. Reg. at 41733-41735. The
19 purpose of the Notice re. Implementation of Guidelines is to respond to comments received by the
20 Secretary regarding implementation of the Guidelines.

21 The Notice re. Implementation of Guidelines, which clarifies the meaning of several provisions
22 contained within the Guidelines, is discussed in more detail herein.

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1 **K. CO-PETITION AND AMENDED PETITIONS**

2 On July 22, 1998, IID and SDCWA filed with their Petition with the SWRCB seeking approval
3 of a long-term transfer of conserved water from IID to SDCWA. On October 8, 1998, IID and SDCWA
4 filed a First Amendment to the Petition, and on December 11, 2001, a Second Amendment was filed
5 (collectively, “Amended Petition”).

6 The Amended Petition seeks approval of a transfer of up to 200,000 AFY of conserved water
7 from IID to SDCWA. The Amended Petition requests an expansion of the authorized place of use to
8 include the SDCWA service area; a change in the authorized point of diversion from Imperial Dam (IID’s
9 existing point of diversion) to Lake Havasu (MWD’s point of diversion on the Colorado River); and an
10 expansion in the authorized purpose of use to include municipal use.

11 The Amended Petition also requests findings of fact and conclusions of law regarding the
12 conservation of an additional 100,000 AFY of water by IID to be acquired by CVWD and/or MWD for
13 irrigation or municipal use, respectively, within the CVWD and/or MWD service area, respectively, and
14 regarding a change in the point of diversion to Lake Havasu with respect to the acquisition by MWD. In
15 the event the conserved water is acquired by CVWD, the Amended Petition requests an expansion of the
16 authorized place of use to include the CVWD service area; no change in point of diversion or purpose of
17 use would be required.

18 Lastly, the Amended Petition requests that the SWRCB make certain findings of fact and
19 conclusions of law regarding IID’s water rights and proposed water conservation program. This request
20 is essentially incorporated into the SWRCB’s Notice of Hearing of February 5, 2002. In furtherance of
21 the good faith settlement that gave rise to the QSA and the PDA, these findings are a condition precedent
22 to the successful implementation of the PDA, the QSA and ultimately the Amended Petition itself.

23 The programs for which SWRCB approval is sought and which are described in the Amended
24 Petition – conservation of up to 300 KAFY and the subsequent transfer of up to 200 KAFY to SDCWA
25 and acquisition of up to 100 KAFY by CVWD/MWD – are together described as the Conservation and
26 Transfer Project for purposes of this Closing Brief. In short summary, the essential elements of the
27 Conservation and Transfer Project are:

- 28 • IID’s agreement to reduce its diversions from a quantified basic
 apportionment of 3.1 MAFY to implement the QSA;

- 1 • IID's conservation of water through various methods to generate sufficient
- 2 water for: (a) transfer to SDCWA, and CVWD/MWD; (b) compliance
- 3 with the IOP; and (3) mitigation of any impacts associated with the either
- 4 of the above;
- 5 • the Secretary's agreement to deliver the water as provided in the
- 6 Implementation Agreement;
- 7 • acquisition of up to 200 KAFY to SDCWA under the terms of the
- 8 Transfer Agreement;
- 9 • transfer of up to 100 KAFY to CVWD and/or MWD under the terms of
- 10 the QSA; and
- 11 • implementation of the HCP.

12 **L. PROTESTS**

13 **1. The Protests of MWD and CVWD Have Been Resolved by the PDA**

14 MWD and CVWD have legal rights to Colorado River water as determined by the Seven-Party
15 Agreement, each agency's water service delivery contracts with the Secretary, and generally the Law of
16 the River, protested the Petition on the grounds that the proposed Conservation and Transfer Project would
17 result in substantial injury to a legal user of water. Additionally, they protested on the basis that the Petition
18 would unreasonably affect fish, wildlife and other instream beneficial uses. (*See* Protest by CVWD (Sept.
19 22, 1999); Protest by MWD (Sept. 21, 1999).)

20 Subsequently, as a result of the execution of the Key Terms, dated October 15, 1999, and the
21 development of the QSA, MWD and CVWD agreed to resolve their respective protests to the Petition
22 (and Amended Petition) under certain conditions as provided in the PDA. (SDCWA Exh. 3, at 5;
23 SDCWA Exh. 4, at 3.) The PDA, which memorializes MWD and CVWD's agreement to withdraw their
24 protests, incorporates the QSA and related agreements and comprehensively addresses and settles the
25 concerns raised by MWD and CVWD in their protests. (IID Exh. 23, ¶ L.) The essential terms of the
26 PDA are as follows:

- 27 • The hearing on the Petition should encompass the conservation of up to
28 300,000 AFY of Colorado River water, the transfer of up to 200,000
AFY of conserved water to SDCWA, and the acquisition of any
additional 100,000 AFY of conserved water by CVWD and MWD, and
the corresponding changes in point of diversion, place of use, and purpose
of use to be made to IID Permit 7643 (IID Exh. 23, ¶ 2);
- Notwithstanding the continuing disagreement among the parties to the
PDA about the jurisdiction of the SWRCB over the Amended Petition,

1 the SWRCB hearing should take place so long as the findings, order
2 and/or decision it makes are affirmatively designated by the SWRCB to
be non-precedential (IID Exh. 23, ¶¶ 2-3);

- 3 • The parties to the PDA will cooperate with each other to urge the
4 SWRCB to make the statutory and other conclusions of law and findings
of fact set forth in the PDA at paragraph 3.a. (IID Exh. 23, ¶ 3);
- 5 • Each and all of the above-referenced conclusions of law and findings of
6 fact are necessary conditions precedent to implementation of the QSA and
the Transfer Agreement and thus are a required element of the SWRCB's
7 approval of the Amended Petition (IID Exh. 23, ¶¶ K, 3);
- 8 • MWD and CVWD will formally withdraw their filed protests (IID Exh.
23, ¶ 4); and
- 9 • Agreement of the parties to the PDA is based on the continuing
effectiveness of the QSA (IID Exh. 23, ¶ L).

10 As a result of the PDA, both MWD and CVWD support the Amended Petition. (SDCWA Exh.
11 3, at 4-5; SDCWA Exh. 4, at 3; RT, 142:15-19.)

12 **2. Several Parties (Some of Whom Formally Protested the Petition) Appeared** 13 **at Hearing**

14 In addition to Petitioners IID and SDCWA, the following parties appeared at the Hearing: three
15 parties representing the interests of farmers: Gilbert, DuBois and the CFBF; one regulatory agency, the
16 RWQCB for the Colorado River Region; several environmental organizations, namely the SSA, DOW,
17 PCL, Audubon, Sierra Club, Pacific Institute, and the NWF; as well as the CRIT and the County of
18 Imperial. Messrs. Gilbert and DuBois, the CFBF and the CRIT appeared in Phases I and II; the remaining
19 parties appeared in Phase II only.

20 **M. HEARING ON UNRESOLVED ISSUES**

21 Having concluded that at least one of the protests to the Amended Petition would not be resolved,
22 the SWRCB set the matter for hearing and issued several notices relating to the procedural matters for
23 hearing. (*See, e.g.*, Revised Notice of Hearing, (Feb. 5, 2002).) The scope of the hearing was established
24 by the SWRCB's Revised Notice of Hearing wherein the SWRCB identified four "key issues" for the
25 SWRCB's consideration. Subsequently, by letter dated June 14, 2002, the SWRCB identified two
26 additional "key issues" and requested briefing by the parties to the hearing on all six "key issues."

27 The hearing was conducted in phases. Phase I, which addressed the question of whether the
28 Amended Petition, if approved, would result in "substantial injury to any legal user of water," was held on

1 the following dates, before the SWRCB and its staff: April 22 (policy statements only), 24, and 29. Phase
2 II, which concerned the question of whether the Amended Petition, if approved, would “unreasonably affect
3 fish, wildlife, or other instream beneficial uses,” was held on the following dates, before the SWRCB and
4 its staff: April 30, May 1, 13 - 17. Rebuttal testimony was heard by the SWRCB and its staff on May 28 -
5 30.

6 All persons and parties who followed the requirements for participation in the petitioning process,
7 set forth in California Code of Regulations, Title 23, were provided the opportunity to present policy
8 statements, legal arguments, evidence in the form of both oral and written testimony, and were allowed to
9 examine each witness offered, in compliance with the requirements for hearings outlined in Water Code
10 Section 1704. Accordingly, each protesting party has been afforded the due process to which they are
11 entitled under California law.

12 **N. PETITIONERS’ COMPLIANCE WITH ENVIRONMENTAL LAWS**

13 **1. CEQA/NEPA**

14 To address the potential environmental effects that could be associated with IID’s implementation
15 of the Conservation and Transfer Project, and in accordance with the requirements of NEPA and CEQA,
16 IID, together with the United States Bureau of Reclamation (USBR), has prepared an Environmental
17 Impact Report/Environmental Impact Statement for the Water Conservation and Transfer Project
18 (EIR/EIS).⁹ The USBR is the federal Lead Agency under NEPA, and IID is the state Lead Agency under
19 CEQA. (IID Exh. 55, Vol. 1, at 1-1.) SDCWA, the SWRCB and DFG are Responsible Agencies. (IID
20 Exh. 55, Vol. 1, at 1-47.) On On January 18, 2002, IID and the USBR released the Draft EIR/EIS for
21 public comment and review. On June 28, 2002, IID certified the Final EIR/EIS.

22 The EIR/EIS analyzes, at a project level, the effects of the conservation of water within the IID
23 water service area to the extent required to implement the Conservation and Transfer Project, the effects
24 of a change in the point of diversion on the Colorado River in order to transfer conserved water to
25 SDCWA or MWD, and the effects of receipt and use of conserved water by SDCWA within SDCWA’s
26 service area. (IID Exh. 55, Vol. 1, at 1-37.)

27 _____
28 ^{9/} Unless otherwise specified, all references to the EIR/EIS (either Draft or Final) are to the
environmental documentation prepared for the Conservation and Transfer Project.

1 The principal subject of the EIR/EIS is the environmental impacts associated with the conservation
2 by IID of up to 300,000 AFY of water, and transfer of that water to SDCWA, and CVWD and/or MWD.
3 (IID Exh. 55, Vol. 1, at ES-3 - ES-4.) The geographic area studied includes the LCR area, the IID water
4 service area and the AAC, the Salton Sea, the SDCWA service area, the MWD service area, and the
5 CVWD service area. (IID Exh. 55, Vol. 1, at ES-2 - ES-3.)

6 The EIR/EIS is designed to serve as the complete environmental documentation for the
7 Reclamation's compliance with NEPA and the SWRCB's and DFG's compliance with CEQA for the
8 Conservation and Transfer Project. (IID Exh. 55, Vol. 1, at 1-43 to 1-45.) The EIR/EIS specifically
9 states that it "provides CEQA compliance for the SWRCB's approval of IID's water conservation and
10 transfers." (IID Exh. 55, Vol. 1, at 1-45.)

11 IID intends to await SWRCB decision on the Amended Petition before approving a "project" and
12 issuing a Notice of Determination (NOD) pursuant to CEQA. (Final EIR/EIS, at 1-2.)¹⁰

13 The lead agencies for the Final Program EIR for Implementation of the Colorado River Quanti-
14 fication Settlement certified that document pursuant to the QSA as follows: SDCWA certified it on June
15 27; MWD certified it on June 24; CVWD certified the PEIR on June 25; and IID certified it on June 28.

16
17 With regard to the Exchange Agreement, SDCWA and MWD approved a Notice of Exemption
18 (NOE) providing that the exchange is categorically exempt from assessment under CEQA. The NOE for
19 the Exchange Agreement was filed on November 25, 1998 (*see* SDCWA Exh. 43) and was not
20 challenged. (RT, at 1095:4-6.) As a result, the EIR/EIS does not assess the physical conveyance of water
21 via the CRA or the water exchange between SDCWA and MWD. (IID Exh. 55, Vol. 1, at 1-37.)

22 2. Endangered Species Act

23
24 10/ The Final EIR/EIS, including the documents incorporated therein by reference (see Final EIR/EIS,
25 at 1-1) was accepted into evidence by the SWRCB on July 8, 2001. However, given that it was not
26 identified by an exhibit number, it is cited herein as "Final EIR/EIS." The following related environmental
27 documents are incorporated into the Final EIR/EIS: (1) The Final EIS (Vol. 1 and Appendix I) of the
28 Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions, dated
June 2002, by USBR. (2) The Final Program EIR for Implementation of the Colorado River Quantification
Settlement Agreement, June 2002, by MWD, IID, CVWD and SDCWA. (3) The Biological Opinion for
Interim Surplus Criteria, Secretarial Implementation Agreements, and Conservation Measures on the LCR,
Lake Mead to the Southerly International Border of Arizona, California and Nevada, January, 2001. (*See*
Final EIR/EIS, at 1-1.)

1 An HCP has been prepared in conjunction with the Conservation and Transfer Project and other
2 actions to support IID’s application for issuance of incidental take permits under the federal and state
3 Endangered Species Acts. Through the HCP, IID commits to certain management and other actions that
4 will minimize and mitigate the potential impacts of any “take” of covered species that may occur as a result
5 of IID’s implementation of the Transfer Agreement and the proposed QSA, and related activities.

6 The Draft EIR/EIS described two “approaches” to mitigate the potential take of fish-eating birds
7 in the Salton Sea (HCP1 and HCP2). Subsequently, however, IID was advised by the United States Fish
8 and Wildlife Service (USFWS) that HCP1, which proposed a hatchery and habitat replacement approach,
9 is “not permissible.” (SDCWA Exh. 47, at 8; SDCWA Exh. 60.) As a result, the approach formerly
10 identified as HCP2, which proposes the use of conservation water as mitigation, constitutes the proposed
11 HCP for the Conservation and Transfer Project.

12 The HCP and incidental take permits, if issued, would cover the activities necessary to implement
13 the Conservation and Transfer Project that would be undertaken within IID’s water service area.
14 Additionally, they would also cover ongoing activities such as water conservation and water use activities,
15 activities by IID in connection with the delivery of Colorado River water to users within IID, and activities
16 by IID in connection with the collection of irrigation or drainage waters within the IID service area and
17 conveyance to the Salton Sea. (IID Exh. 55, Vol. 1, at 2-42.) The geographical area covered by the HCP
18 would include: all lands within the IID water service area, the Salton Sea, lands owned by IID outside of
19 its water service area that are currently submerged beneath the Salton Sea, and IID’s rights of way along
20 the AAC downstream from the point of diversion on the LCR. (*See* IID Exh. 55, Vol. 1, 2-41 to 2-45.)
21

22 The HCP would avoid or mitigate project-related reductions in flow to the Salton Sea until such
23 time as the Salton Sea reaches 60 parts per thousand which is the threshold above which fish production
24 and bird use will decline at the sea. This mitigation strategy would maintain salinity and elevation changes
25 on the baseline trajectory, thereby avoiding salinity increases and elevation decreases otherwise resulting
26 from implementation of the Conservation and Transfer Project.

27 With implementation of the HCP, water for mitigation purposes would be provided from conserved
28 water – i.e., water which could be generated from one or more of the following activities: (1) on-farm

1 water use and conservation activities, including: (a) facility improvements (i.e., tailwater return systems,
2 etc.), (b) irrigation management, or (c) land use practices (i.e., “fallowing”)¹¹; and (2) system-based water
3 conservation, including: (a) canal lining and piping, (b) lateral interceptors, (c) reservoirs, and (d) seepage
4 recovery systems. (IID Exh. 55, Vol. 1, at 2-52.)

5 **III. JURISDICTION**

6 **A. SWRCB’S JURISDICTION UNDER WATER CODE**

7 The SWRCB has jurisdiction over the Amended Petition by virtue of California statutes and by its
8 retained jurisdiction over IID’s conservation activities under both SWRCB Decision 1600 and Order WR
9 88-20.

10 **1. The SWRCB’s Retained Jurisdiction**

11 The Amended Petition is a direct result of the SWRCB’s previous instructions to the IID to seek
12 opportunities to conserve water and to finance such conservation with funds from urban water transferees,
13 if possible. In SWRCB Decision 1600 and Order 88-20, the SWRCB specified measures the IID was to
14 take to develop a meaningful water conservation plan, including implementing conservation opportunities
15 which could be funded by urban water agencies such as SDCWA. The SWRCB expressly retained
16 jurisdiction over the IID to monitor compliance.

17 Decision 1600 directed IID to “take several actions to improve its water conservation program, as
18 specified in this decision.” (Dec. 1600, at 1.)

19 The Board reserves jurisdiction in this matter for the purposes of reviewing
20 the adequacy of the required plans and the District actions, to monitor the
21 progress of the District in carrying out the various elements of the water
22 conservation plan, and to take such other action as may be appropriate.
The Board will continue to reserve jurisdiction until it determines that the
requirements of Article X, Section 2 of the California Constitution are
being met.

23 (Dec. 1600, at 33.)

24 In 1988, four years after SWRCB Decision 1600, the SWRCB conducted further hearings to
25 review the status of the IID’s water conservation program and plans. The SWRCB thereafter issued Order

26 _____
27 ^{11/} Land management practices, or fallowing, would include: (a) long-term retirement (greater than 1
28 year), whereby crop production ceases indefinitely or during the term of the project (a cover crop may be
maintained during the fallowed period); (b) rotational fallowing, whereby crop production ceases for one
calendar year (no water is applied, and no cover crop is grown); or (c) single crop fallowing, whereby
multiple crops are reduced to a single crop rotation on an annual or longer term basis.

1 WR 88-20. A central element of Order 88-20 is the prospect for a conserved water transfer by the IID.
2 (*See* Ord. WR 88-20, at 4-5.) The SWRCB recognized that one of the main problems for IID was
3 funding conservation that would allow such transfers (Ord. WR 88-20, at 18), and identified urban areas
4 in need of water, such as the Southern California region, as potential purchasers of the conserved water.
5 (Ord. WR 88-20, at 20.)

6 Having determined that voluntary transfers of water or water rights from agricultural to urban areas
7 in need of the water was a means of meeting the State’s growing water needs (Ord. WR 88-20, at 3), the
8 SWRCB required IID to complete “an executed agreement with a separate entity willing to finance water
9 conservation measures in Imperial Irrigation District,” or take other measures which would achieve equally
10 beneficial results. (Ord. WR 88-20, at 21.) The SWRCB retained “jurisdiction to review implementation
11 of the initial plan and future water conservation measures.” (Ord. WR 88-20, at 21.)

12 2. The SWRCB’s Statutory Jurisdiction

13 IID’s Colorado River water rights are held as both California pre-1914 appropriative rights and
14 as permitted appropriative rights. (*See* SWRCB Exh. 1a.) Petitioners IID and SDCWA have petitioned
15 the SWRCB for changes to Permit No. 7643’s authorized point of diversion, purpose of use and place of
16 use pursuant to Water Code Sections 1700 *et seq.*, 1735 *et seq.* and 1011 - 1012. (Amended Petition.)

17 Water Code Section 1701 allows such changes only upon permission of the SWRCB. Sections
18 1704 and 1736 expressly provide the SWRCB with jurisdiction to review and the power to grant approval
19 of such requested changes. Specifically, Section 1736 provides in part:

20 The board, after providing notice and opportunity for a hearing . . . may
21 approve such a petition for a long-term transfer where [1] the change
22 would not result in substantial injury to any legal user of water and [2]
would not unreasonably affect fish, wildlife, or other instream beneficial
uses.

23 (Wat. Code § 1736.) In other words, the SWRCB’s approval requires Petitioners to make a *prima facie*
24 showing that the proposed Conservation and Transfer Program will not result in *substantial* injury to any
25 legal user of water, and would not *unreasonably* affect fish, wildlife, or other instream beneficial uses.

26 Further, when, as in the case of the Amended Petition, a transfer of water is to be made possible
27 as a result of the conservation of water by the transferor, Water Code Section 1011 authorizes the
28 SWRCB to impose additional reporting requirements on the transferor regarding the specifics of the

1 conservation program. (*In the Matter of Natomas Central Mutual Water Company* (2000) Ord. WR
2 2000-01, at 3; *In the Matter of Natomas Central Mutual Water Company* (1999) WR 99-12, at 6-7,
3 9-11.) Thus, if the transferor desires statutory protection against “non-use” provided by Water Code
4 Section 1011, it is obliged to comply with the additional reporting requirements that may be required by
5 the SWRCB.

6 “The board may require that any user of water who seeks the benefit of
7 this section file periodic reports describing the extent and amount of the
8 reduction in water use due to conservation efforts”. (Water Code §
9 1011(a).)

10 The Legislature identifies in Water Code Section 174 *et seq.* the role of the SWRCB, and in
11 Section 179 grants to the SWRCB broad powers and jurisdiction over water resource issues. (*See also*
12 *Imperial Irrigation District v. State Water Resources Control Board* (1986) 186 Cal.App.3d 1160, 1162-
13 1169 (detailing SWRCB’s extensive authority).) Additionally, the SWRCB’s general authority over all
14 water matters related to this Amended Petition is derived from Water Code Sections 100 and 275, as well
15 as the California Constitution at Article X, Section 2 which is self-executing. Collectively, these statutory
16 provisions and cited court precedents construing the SWRCB’s power to safeguard the State’s paramount
17 interests in the subject matter of this proceeding, broadly endow the SWRCB with jurisdiction to approve
18 the Amended Petition on the terms requested.

19 3. No Party Has Contested the SWRCB’s Jurisdiction

20 No party appearing before the SWRCB in this hearing has contested the SWRCB’s jurisdiction
21 over this matter. Although MWD and CVWD, among others,¹² previously protested the Petition on the
22 basis that the SWRCB jurisdiction over the matter was preempted by the federal government’s control of
23 the Colorado River (*see* Protest by CVWD, at 2 (Sept. 22, 1999); Protest by MWD, Attach. B (Sept.
24 21, 1999)), MWD and CVWD, together with Petitioners IID and SDCWA, have agreed to put aside their
25 continuing disagreement as to the jurisdiction of the SWRCB over the Petition pursuant to a settlement
26 agreement, the PDA, that resolves the MWD and CVWD protests. (*See* IID Exh. 23, at ¶¶ 2-3.)
27 However, resolution of the MWD and CVWD protests is contingent upon a finding by the SWRCB that

28 12/ As discussed herein, all other protests on this ground have been resolved or should be dismissed.

1 the SWRCB’s decision, order and all findings of fact and conclusions of law, with the exception of those
2 relating to standing, shall have no precedential effect and shall not establish the applicability or
3 nonapplicability of California or federal law to any matter raised by the Amended Petition. (*See* IID Exh.
4 23, at ¶ 3.a.)

5 **4. Any Party, Including Protestants, Who Failed to Appear Before SWRCB**
6 **Waived Their Right to Be Heard and Their Protests Should Be Dismissed**

7 Water Code Section 1352 and the SWRCB’s regulations demonstrate that any party, including
8 a protestant, who fails to appear at a hearing or show good cause within five days thereafter for his failure,
9 abandons any claims that it may have against the applicant/petitioner and its protest may be dismissed in
10 the discretion of the SWRCB. (23 C.C.R. § 766 (citing Wat. Code §§ 183, 1058, 1352).) On numerous
11 occasions, the SWRCB has applied this provision and dismissed the claims of parties who failed to appear
12 and did not provide good cause. (*See, e.g., In the Matter of Calaveras County Water District* (1997)
13 Ord. WR 97-05, at 6 (dismissing the protests of California Sportfishing Alliance, Stanislaus River Council,
14 California Trout, and Friends of the River “for failure to appear at the hearing or show good cause within
15 five days for such failure”); *In the Matter of City of Morro Bay* (1995) Dec. 1633, at 19 (“failure to
16 appear at a hearing may, in the discretion of the Board, be interpreted as an abandonment of interest in the
17 application”); (*In the Matter of Petitions to Add Uses of Water to Licenses 465, 466, and 4822* (1995)
18 Ord. WR 95-1, at 4).)

19 The following protestants did not appear at the hearing and did not show good cause for their
20 failure to do so.¹³ As such, their protests should be dismissed:

- 21 • City of Los Angeles
- 22 • Central Basin Municipal Water District
- 23 • Municipal Water District of Orange County (MWDOC) and Coastal Municipal
24 Water District (now merged with MWDOC)
- 25 • Riverside County Farm Bureau

26 **B. SWRCB’S DUTIES AS A RESPONSIBLE AGENCY UNDER CEQA**

27 _____
28 ^{13/} The protests of Cliff Hurley, Linda Moiola, Aaronberg Improvement Association and Fort Mojave
Indian Tribes were withdrawn or dismissed by the SWRCB prior to the hearing in this matter. (Telephone
Conference with Tom Peltier, Hearing Officer, SWRCB (Feb. 6, 2002).)

1 **1. Traditional Responsibilities**

2 The SWRCB is a Responsible Agency under CEQA. (Pub. Res. Code § 21069; 14 C.C.R. §
3 15381.) Generally, a Responsible Agency must actively participate in the CEQA process, review the lead
4 agency’s CEQA document, and use that document when making its own decision about whether to
5 approve the project. (14 C.C.R. § 15096.)

6 The SWRCB must review the Final EIR/EIS and determine that it is adequate under CEQA for
7 its purposes prior to issuing an approval of the Amended Petition. If the SWRCB determines that the Final
8 EIR/EIS satisfies CEQA requirements, the SWRCB must confirm the adequacy of the document, make
9 the appropriate environmental findings, and issue an NOD.

10 As a Responsible Agency, the SWRCB’s role is dissimilar from IID’s (the Lead Agency) in three
11 important respects: First, the SWRCB is not required to take the same action as IID. As a Responsible
12 Agency, the SWRCB may adopt alternatives or mitigation measures:

13 (g) Adoption of Alternatives or Mitigation Measures.

14 (1) When considering alternatives and mitigation measures, a
15 responsible agency is more limited than a lead agency. A responsible
16 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.

17 (2) When an EIR has been prepared for a project, the Responsible
18 Agency shall not approve the project as proposed if the agency finds any
feasible alternative or feasible mitigation measures within its powers that
19 would substantially lessen or avoid any significant effect the project would
have on the environment....

20 (14 C.C.R. § 15096.)

21 Second, as a Responsible Agency under CEQA the SWRCB’s role is more limited than that of
22 the Lead Agency, the SWRCB is required to assure mitigation of only those effects that are within its
23 jurisdiction.

24 As a responsible agency, the SWRCB has a more limited role than
25 [petitioner lead agency]. The SWRCB must review and consider the
environmental effects of the project identified in the Final EIR, and any
26 other relevant evidence in the hearing record, and reach its own
conclusions on whether and how to approve the project involved. (14
27 C.C.R. § 15096, subd. (a).) The SWRCB is responsible for mitigating or
avoiding only the significant environmental effects of those parts of the
project that it decides to approve. (14 C.C.R. § 15096, subd. (g).)

1 *(In the Matter of the Petition for Extension of Time of the City of San Luis Obispo* (2000) Order WR
2 2000-13, at 13 (emphasis added).) In other words, “The SWRCB is . . . responsible for requiring
3 mitigation of significant environmental impacts of those parts of the project subject to its jurisdiction which
4 it decides to approve.” *(In The Matter of Water Right Application 29408 And Waste Water Change*
5 *Petition WW-6, City of Thousand Oaks* (1997) Dec. 1638, at 28.)

6 Third, if no action or proceeding alleging that an EIR does not comply with CEQA is commenced
7 during the 30-day period after the NOD is filed, the EIR is *conclusively presumed* to comply with CEQA
8 for purposes of its use by responsible agencies. As the responsible agency, the SWRCB does not have
9 the authority to make a determination concerning the adequacy of the IID’s EIR/EIS. That determination
10 is left to the courts. *(In the Matter of the Petition for Extension of Time of the City of San Luis Obispo*
11 *Permit 5882* (2000) WR 2000-13, at 13-15.) The SWRCB must presume the EIR/EIS is adequate.
12 *(Id.)*

13
14 **2. The SWRCB’s Hearing Upon a Certified EIR Is Customary Practice and**
15 **Not Premature**

16 The fact that IID has not approved the project is immaterial. CEQA does not require that the
17 SWRCB await IID’s approval of the project before considering the certified EIR as part of its review of
18 the Amended Petition. *(See* 14 C.C.R. § 15096; *In the Matter of the Petition for Extension of Time*
19 *of the City of San Luis Obispo Permit 5882* (2000) WR 2000-13, at 13-15.) In the WR 2000-13, this
20 precise argument was made by the City of Paso Robles and rejected by the SWRCB as being without
21 merit. *(Id.)* The SWRCB routinely holds hearings to consider water rights matters which require
22 compliance with CEQA *without* the lead agency’s prior approval of the project. *(See, e.g., In the Matter*
23 *of the Petition for Extension of Time of the City of San Luis Obispo Permit 5882* (2000) WR Ord.
24 2000-13, at 13-15; *In the Matter of Cambria Community Services Dist.* (1989) D-1624.)

25 **IV. IS THE AMOUNT OF WATER THAT IS PROPOSED TO BE TRANSFERRED,**
26 **WATER THAT IS CONSERVED IN ACCORDANCE WITH WATER CODE**
SECTION 1011?

27 **A. IID HAS ANNOUNCED ITS INTENTION TO CONSERVE WATER IN**
28 **ADVANCE OF THE TRANSFER IN ACCORDANCE WITH WATER CODE**
SECTION 1011

1 The SWRCB identified as a “Key Issue” whether the water that will be transferred by IID is eligible
2 for consideration under Water Code Section 1011.

3 First, it should be noted that not all transfers of water require compliance with Water Code Section
4 1011. In fact, the protections afforded by Water Code Section 1011 exist without regard to whether the
5 conservation efforts undertaken by a right holder are for the purpose of, or actually result in, a transfer of
6 the conserved water. (Wat. Code § 1011(a); *In the Matter of Natomas Central Mutual Water*
7 *Company* (2000) Ord. WR 2000-01, at 3.) In this case, however, Petitioners have expressly requested
8 the SWRCB’s approval pursuant to Water Code section 1011, among others, so that IID may be afforded
9 the statute’s protections against forfeiture of the quantity of water conserved and transferred pursuant to
10 the Conservation and Transfer Project. (*See Amended Petition*, at 1.)

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13 The record in this case demonstrates that the protections afforded by Water Code section 1011
14 are unavailable to IID, so long as water is conserved by methods other than *permanent* following.

15 First, there can be little doubt that IID is seeking to conserve up to 300,000 AFY, potentially
16 through a variety of conservation methods presently under consideration. (*See, e.g.*, IID Exh. 55, Vol. 1,
17 Chp. 2; IID Exh. 7.) While the transferor’s expression of an “intent to conserve” is not required (*see In*
18 *the Matter of Natomas Central Mutual Water Company* (2000) Ord. WR 2000-01, at 3), IID’s stated
19 intention prior to project implementation is significant in that it allows the SWRCB, in advance of IID’s
20 action, to provide IID with guidance as to the propriety of the conservation program or particular
21 conservation methodology. In this way, the risk of accepting a subsequent rationalization of the transferor’s
22 reduced use is not present. (*See In the Matter of Natomas Central Mutual Water Company* (2000)
23 Ord. WR 2000-01 (generally denying petitioners’ motion for reconsideration).) In other words, the
24 SWRCB can be confident that the proposed reduction in IID’s Colorado River diversions, and thus water
25 use, is the result of true conservation as opposed to fortuitous “non-use.” (*Id.*)

26 Second, because IID has announced its intention to avail itself of the protections afforded by
27 Water Code Section 1011(a) (Amended Petition), the SWRCB is free to require IID, through the
28 imposition of a reporting requirement, to describe the extent and the amount of the reduction in water use

1 as a result of water conservation. (Water Code § 1011(a).) IID has already volunteered to prepare and
2 file such reports. (IID Exh. 23, ¶ 3.i.) In accordance with Water Code Section 1011(a), to “the maximum
3 extent possible,” such a reporting requirement could be coupled with IID’s existing reporting requirements
4 under Decision 1600 and WR 88-20. (See IID Exh. 23, ¶ 3.i.)

5 **B. TEMPORARY FALLOWING AND CROP ROTATION IS WITHIN THE**
6 **MEANING OF WATER CODE SECTION 1011**

7 The only remaining question is: which of the several conservation methods presently under
8 consideration by IID meet the statutory definition of conservation set forth in Water Code Section 1011(a)?
9 The answer is, as a matter of law, all conservation methods satisfy the statute *except* “permanent fallowing.”
10 To the extent that IID elects to pursue on farm conservation measures other than through permanent
11 fallowing, such methods are clearly encompassed within Water Code Section 1011(a).

12 Temporary land fallowing and crop rotation are expressly recognized as water conservation under
13 Section 1011. (Wat. Code § 1011(a).) Water Code Section 1011(a) provides in pertinent part that when
14 “water appropriated for irrigation purposes is not used as a result of *temporary land fallowing or crop*
15 *rotation*, the reduced usage shall be deemed water conservation under this section.” Land fallowing and
16 crop rotation, as defined by Water Code Section 1011, are “those respective land practices, involving the
17 *nonuse of water*, used in the course of normal and customary agricultural production to maintain or
18 promote the productivity of the agricultural land.” (Wat. Code § 1011(a).)

19 Section 1011 was amended by Senate Bill (“SB”) 970 (Costa), effective January 1, 2000 (Stats.
20 1999, ch. 938, § 2). SB 970 revised section 1011 “to clarify that temporary land fallowing, as opposed
21 to permanent land fallowing or land retirement is within the definition of conservation for purposes of water
22 transfers.” (Senate Rules Committee, Senate Analysis of SB 970, at 2 (May 29, 1999).) Accordingly,
23 so long as fallowing meets a two pronged test of being (i) temporary, and (ii) customary to maintain or
24 promote productivity of the agricultural land, it satisfies the requirements of Water Code Section 1011.

25 **C. THE SWRCB’S CONSTRUCTION OF THE TERM “TEMPORARY FAL-**
26 **LOWING” SHOULD BE ENTITLED TO GREAT WEIGHT**

27 Water Code Section 1011 does not define the duration of time that constitutes “temporary” for
28 purposes of the statute. Conflicting testimony was presented on this issue. Mr. Tom Kirk from the Salton

1 Sea Authority (SSA) thought anything short of permanent was temporary. (RT, at 1393:1-6.) Other
2 witnesses were not sure or their definitions differed. (RT, at 2178:22 - 2179:4; RT, at 508-509; RT, at
3 621.) However, there was a general consistency in the testimony that after about ten years, land may no
4 longer be productive if it were kept in a fallow condition without undertaking extensive land rehabilitation.
5 (*See, e.g.*, RT, at 2549.)

6 In any event, the SWRCB, as the administrative agency with regulatory power implementation of
7 the statute, can provide the necessary guidance on this issue. The SWRCB has reasonable discretion to
8 construe the term “temporary fallowing” and its interpretation is entitled to great weight by the courts.
9 (McPherson v. City of Manhattan Beach (2000) 78 Cal.App.4th 1252, 1266.) The Legislature has
10 invested the power to administer water and water rights in the SWRCB. (Wat. Code § 174). With this
11 power, the SWRCB is required to take all appropriate actions to prevent, waste and unreasonable use
12 (Water Code § 275), and to facilitate and to approve transfers generally. (Water Code § 1700, *et seq.*)
13 Even more specifically, given that the SWRCB has express authority to require the filing of reports in
14 connection with water conservation efforts under Water Code Section 1011, its authority to interpret and
15 apply the statute cannot be questioned. Having not formally adopted a regulation on the subject, it is free
16 to act by administrative decision.

17 Additionally, or alternatively, the SWRCB might provide further definition on this issue in its
18 decision or order on the matter. The SWRCB has previously, in other proceedings, construed the
19 provisions of Water Code Section 1011(a) in determining whether particular actions qualified for
20 recognition as conservation. (*See In the Matter of Natomas Central Mutual Water Company* (2000)
21 WR 2001-01; *In the Matter of Natomas Central Mutual Water Company* (1999) WR 99-12.) For
22 example, in *Natomas*, the SWRCB considered whether the reason or “intent” of the transferor was
23 required. The SWRCB stated:

24 The express language of [Section 1011] requires that a deliberate effort
25 be made or program implemented that results in a water savings. The
26 SWRCB agrees with [Petitioner] that it makes little sense to require a
27 water user to establish the reason why a given water ... conservation effort
28 was made, so long as the effect results in water savings. The water user
must be aware that the [conservation] efforts result in a water savings,
however, in order to fulfill the reporting requirements.

(*In the Matter of Natomas Central Mutual Water Company* (2000) WR 2001-01, at 3.)

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IID’s constituents could be assured that the protections of Water Code Section 1011 are available.

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D. SUBSTANTIAL EVIDENCE INDICATES THAT A LAND MANAGEMENT PROGRAM SIMILAR TO THAT PROPOSED BY MWD FOR PVID COULD BE IMPLEMENTED BY IID USING FOLLOWING MEASURES THAT ARE BOTH TEMPORARY AND CUSTOMARY AGRICULTURAL PRACTICES

A land management conservation program that employs land management techniques inclusive of fallowing in a manner similar to those utilized in the PVID Test Program and presently contemplated by MWD in its proposed PVID Land Management Program (*see* SDCWA Exh. 50) is consistent with Water Code Section 1011. (RT, at 2575.) As described by Mr. Underwood, and corroborated by Mr. Levy, such a land management program would satisfy both prongs of section 1011: it utilizes temporary fallowing and crop rotation, and (2) it is within the course of normal and customary agricultural production to maintain or promote the productivity of the land. (RT, at 2699.)

Mr. Underwood and Mr. Levy testified that under such a program, farmers could commit to IID through contracts not to irrigate designated portions of farmland for a temporary period. (RT, at 2549 - 2550.) At the end of the temporary period, the specific non-irrigated section of farmland would be rotated. Rotations would continue at least every five years for the term of the transfer, or until alternative methods of conservation could be employed consistent with program objectives. (RT, at 2549:4-18.) Participating farmers would have discretion under the program to rotate non-irrigated farmland, consistent with agricultural management practices and needs. (RT, at 2664.) IID would make available for transfer or acquisition the amount of water equal to the water savings credited to the crop rotations, less the water needed for land management activities to maintain the productivity of the agricultural soil. In other words, the program would continue to utilize a portion of the water otherwise consumptively used for continuing maintenance of the fallowed field.

1 The land management conservation program identified by Mr. Levy and Mr. Underwood does not
2 incorporate permanent fallowing or land retirement. (RT, at 2542.) In any event, the SWRCB could
3 condition its approval of the Amended Petition to prohibit the use of such measures. The SWRCB, in
4 defining eligibility for protection under Water Code Section 1011, and IID, in designing, implementing and
5 enforcing the program, could require that the land participating in the program would not be planted with
6 crops for a defined temporary period, during which time other land management activities would occur on
7 the land, and to continually rotate non-irrigated lands so as to provide both the traditional agricultural
8 benefits associated with fallowing – i.e, the conservation of water, while simultaneously avoiding the adverse
9 impacts associated with leaving land out of production. (RT, at 2549.)

10 The proposed land management program must also satisfy the second prong of Water Code
11 section 1011 by being “normal and customary” to maintain or promote the “productivity of agricultural
12 land.” Therefore the land management practices employed by IID would include crop rotation and land
13 management measures that maintain and promote the agricultural productivity of the lands participating in
14 the program. (RT, at 2549, 2689.)

15 A component of the program might include activities to eradicate invasive weed growth and wind
16 erosion that would otherwise occur on the non-irrigated parcels, as well as other techniques to prevent the
17 spread of plant disease, insects, and other pests. (RT, at 2549, 2617.) Erosion of agricultural soils could
18 be reduced by providing stubble, sod remnants, or ‘clod plowing’ techniques in order to maintain the
19 viability of the land for agricultural and irrigation uses. (RT, at 2618.) The program would include
20 provisions for monitoring and inspection of participating lands to ensure that land management measures
21 have been implemented and are maintaining the non-irrigated land for future uses. (RT, at 2545, SDCWA
22 Exh.50, at ES-5, 3-8.)

23 Farmers routinely fallow land within IID and acknowledge the benefits of temporary fallowing.
24 (RT, at 508-510.) For example, temporary and rotational fallowing offers soil benefits, among other
25 things. When water is applied to the land as part of a maintenance program, additional benefits accrue
26 while also potentially reducing or mitigating potentially adverse environmental consequences of fallowing
27 such as dust and air quality emissions. (RT, at 2606, 2618.) Section 1011 requires only that the temporary
28 fallowing in farming operations and crop rotation practices be consistent with normal and customary

1 agricultural practices for maintaining or promoting the productivity of agricultural land. There is *no* evidence
2 in the record to suggest that it is not.

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7 **E. A LAND MANAGEMENT PROGRAM THAT ALLOWS FOR THE APPLI-**
8 **CATION OF WATER TO LAND FOR LEACHING, PRE-IRRIGATION AND**
9 **DUST SUPPRESSION IS CONSISTENT WITH WATER CODE SECTION**
10 **1011, MAY HELP TO REDUCE ANY ADVERSE EFFECTS ON FISH AND**
11 **WILDLIFE IN THE SALTON SEA, AND THUS MAY EVEN REDUCE THE**
12 **MITIGATION REQUIREMENTS UNDER THE HCP**

13 Temporary fallowing is acknowledged to provide soil benefits and is traditionally associated with
14 agricultural farming practices. Land management measures to control weed growth and wind erosion
15 would be an integral part of a program. (SDCWA Exh. 48 at 3; RT 2617) Irrigation of the fallowed land
16 may be important element of the land management effort. (RT, at 2617, 2618). Dust control might even
17 be better than if the lands were being actively farmed. (RT, at 2618.)

18 A land management effort could be adopted by IID consistent with the parameters of the
19 MWD/PVID test program. (RT, at 2605.) The PVID test program as well as proposed long-term
20 program between PVID and MWD both included the concept of rotational fallowing to avoid adverse
21 socioeconomic impacts and to incorporate fallowing and land management practices that farmers find
22 beneficial.

23 A incidental benefit and one of critical importance in this proceeding, is that the fallowing program
24 could serve to preserve inflows to the Salton Sea and minimize adverse impacts on fish and wildlife. The
25 following exchange between Mr. Kirk and Mr. Underwood is instructive:

- 26 • Mr. Kirk: Do you believe that we could... conserve and transfer water
27 and maintain flows to the Salton Sea?
- 28 • Mr. Underwood: If the water was used in terms of the contract purpose
and in accordance with the contracts.
- Mr. Kirk: Do you believe that could be accomplished here?
- Mr. Underwood: There is a way, yes.

- 1 • Mr. Kirk: What is that way?
- 2 • Mr. Underwood: ...If you take direct water, direct fallowing, it was all
- 3 waters that were going to be potentially applied to the lands. If you do
- 4 what we refer to as evapo-transpirational fallowing, then you are just
- 5 taking the waters that would be used, that would have been lost any how.
- 6 [That water] wouldn't have gone to the Sea anyhow because it is
- 7 evapotranspiration, consumptive use. The waters that otherwise would
- 8 have gone to the Sea you apply for land maintenance and management
- 9 since that would be consistent with contract purpose.

Basically, you would have those waters end up in the Sea. It would help those lands that are being rotated, the same way you rotate a crop, that would rotate for the maintenance of those lands. In effect, you have no impact on the Sea.

10 (RT, at 2610-2611.)

11 Lastly, as testified by Mr. Underwood and Mr. Levy, the proposed PVID deal and a program that

12 might be developed by IID are still consistent with the ability to make a long-term water supply commitment

13 such as required by the QSA. (RT, at 2549; RT, at 2556). In short summary, such an approach would

14 include long-term commitments by farmers to IID and from IID to SDCWA and CVWD. The long-term

15 commitment would secure an obligation by the farmer to fallow certain lands within a designated area and

16 then rotate the fallowing over the period of the agreement. When asked whether such an arrangement

17 could be made compatible with the long-term commitments expected under the QSA, Mr. Levy believed

18 it could.

- 19 • Mr. Slater: ...Are measures identified in [the PVID] program and measures you
- 20 have discussed compatible with Imperial still making a long-term commitment to
- 21 transfer water to San Diego and Coachella?"
- 22 • Mr. Levy: Yes.

(RT, at 2556.) Mr. Underwood saw no inconsistencies between a fallowing program and a long-term commitment. (RT, at 2549-2550.)

23 **F. IID REQUIRES DISCRETION TO DEVELOP A CONSERVATION PLAN**

24 **THAT COMPORTS WITH WATER CODE SECTION 1011, THAT BEST**

25 **MEETS ITS NEEDS**

26 The Conservation and Transfer Project, as presently described in the Amended Petition, is

27 sufficiently defined for the SWRCB's purposes. IID has certified the EIR/EIS for the Conservation and

28 Transfer Project. The EIR/EIS adequately and completely evaluates the environmental impacts that would be associated with a broad array of conservation measures and programs, including a program that utilizes

1 following as the exclusive method of conservation. (*See* IID Exh. 55, Vol. 1, at 2-57.) The only prohibition
2 on fallowing is contained in the Transfer Agreement (IID Exh. 7, ¶ 14.2.), which, as SDCWA’s General
3 Manager testified, can be revised.

4 From the outset, SDCWA acknowledged the need to provide IID’s Board of Directors with
5 sufficient discretion to select a conservation methodology and prepare a conservation program that
6 comports with its own desires but minimizes potentially significant environmental impacts. Thus, the
7 Transfer Agreement itself contemplates that IID farmers would not be required to subscribe to a
8 conservation program until *after* the SWRCB has approved the IID/SDCWA Transfer and the Final EIR
9 has been certified. (IID Exh. 7, at 44-45.)

10 Further, given that IID has agreed to forebear from its diversion of 3.1 MAF (i.e., not take delivery
11 of up to 200 KAFY) and the Secretary agrees to make conserved water available to SDCWA,
12 responsibility for structuring and implementing the conservation program properly lies with IID. The existing
13 uncertainty regarding the specific methodology that will be adopted by IID to conserve the water for
14 transfer will not make the bargained-for savings any less real. (SDCWA Exh. 47, at 7.) Moreover, any
15 uncertainty is only temporary – with environmental review and compliance and the SWRCB process nearly
16 complete, IID should be able to craft a conservation program from among the various options analyzed and
17 evaluated in the EIR/EIS. IID farmers will have far greater certainty regarding the parameters and financial
18 risks associated with the specific program once approved by IID’s Board of Directors.

19 **G. THE SWRCB MAY REQUIRE IID TO FILE PERIODIC REPORTS TO**
20 **VERIFY THE FACT THAT WATER CONSERVED AND TRANSFERRED IS**
BEING USED REASONABLY AND BENEFICIALLY

21 The SWRCB may condition its approval of the Amended Petition and the initiation of the
22 conservation program on the filing of a report in accordance with Water Code Section 1011(a). If the
23 SWRCB determined that the proposed conservation program is consistent with the parameters established
24 by its order on this proceeding, the SWRCB could then accept the report and notify IID, SDCWA and
25 the parties to this matter that IID may proceed with the actual conservation and transfer of water pursuant
26 to the approved Conservation and Transfer Project. (SDCWA Exh. 47, at 8.)

27 To verify the fact that water is being conserved and transferred in accordance with the SWRCB’s
28 order, IID should be required to submit annual reports outlining the conservation program to be utilized in

1 generating conserved water for transfer within a defined period following the Board’s conditional approval.
2 (See Attachment “A” to this Closing Brief.) A similar process was authorized by the SWRCB in WR 88-
3 20. It provides:

4 In view of the progress made to date, and in view of the fact that the
5 Superior Court review of Decision 1600 was concluded only recently, the
6 Board concludes that IID should be given until January 1, 1989 to submit
7 a written plan and definite implementation schedule for the additional water
8 conservation measures which IID selects. The plan should specify water
9 conservation measures estimated to conserve at least 100,000 acre-feet
10 per annum by January 1, 1994. The conservation of at least 100,000
11 acre-feet per annum as proposed in the plan shall be in addition to water
12 conservation due to previous actions or improvements.

13 (Ord. WR 88-20, at 20.)

14 WR 88-20 expressly linked the proposed conservation measures under Article X, Section 2, of
15 the California Constitution with Water Code Section 1011 by stating: “[A]n established water right can be
16 protected most effectively by reducing the quantity of water used through implementing water conservation
17 measures. (See generally Water Code Section 1011.)” (WR Ord. 88-20, at 17.) Last, the Board stated:
18 “Specific authorization for the transfer of water made available through water conservation efforts is
19 provided by subdivision (b) of Water Code Section 1011.” (WR Ord. 88-20, at 18.) IID could be
20 required to do exactly the same thing again now.

21 **H. REAL, WET WATER WILL BE CONSERVED FOR TRANSFER**

22 Water Code Section 1011 also presumes that there will actually be savings in an amount sufficient
23 to support the transfer. Specifically, Water Code Section 1011(b) provided that “[W]ater or the right to
24 the use of water, the use of which has ceased or been reduced as a result of conservation” may be
25 transferred. Irrespective of the conservation method ultimately selected by IID, real, wet water (as
26 opposed to paper water) will be transferred. So long as IID agrees to quantify its use of 3.1 MAF and to
27 forebear from its diversions so that water can be transferred to SDCWA in accordance with the
28 Implementation Agreement, there is no question that the program will yield conserved water for transfer.”
(SDCWA Exh. 47, at 7.)

Given that the water conserved by IID will be made available to SDCWA through the
Implementation Agreement, and exchanged with MWD under the Exchange Agreement, there is no

1 possibility that the conserved water will be taken up by others. In other words, all of the water conserved
2 by IID can be made available for transfer to SDCWA.

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1 **V. WOULD THE PROPOSED TRANSFER RESULT IN SUBSTANTIAL INJURY TO**
2 **ANY LEGAL USER OF WATER?**

3 **A. THE PETITIONERS HAVE DEMONSTRATED BY SUBSTANTIAL EVI-**
4 **DENCE THAT THE CONSERVATION AND TRANSFER PROGRAM WILL**
5 **NOT RESULT IN SUBSTANTIAL INJURY TO ANY LEGAL USER OF**
6 **WATER**

7 Section 1736 allows the SWRCB to approve a long-term transfer “where the change would not
8 result in a substantial injury to any legal user of water” (Emphasis added; *see also* Wat. Code § 1702
9 (“will not unreasonably affect any legal user of water”).) These provisions have been construed in a
10 consistent manner. (*See In the Matter of Merced Irrigation District* (1998) Ord. WR 98-01, at 3.)

11 First, Sections 1702 and 1736 protect only “legal users of water.” The statutory protections for
12 legal users of water contained in the Water Code are simply codifications of the common law “no injury”
13 rule. (*See In the Matter of Merced Irrigation District* (1998) Ord. WR 98-01, at 3.) The common law
14 “no injury” rule only recognized protection of other legal users of water. (*Ramelli v. Irish* (1892) 96 Cal.
15 214, 217; *Barton v. Riverside Water Co.* (1909) 155 Cal. 509, 517; *City of San Bernardino v. City of*
16 *Riverside* (1921) 186 Cal. 7, 28-29; *Scott v. Fruit Growers’ Supply Co.* (1927) 202 Cal. 47, 52-53;
17 *Orange County Water District v. City of Riverside* (1950) 173 Cal.App.2d 137.) Legal users of water
18 are those that have a legal right to the same water source from which the change is sought, not third parties
19 having no claim of right to the water proposed to be transferred.¹⁴ (*See In the Matter of Merced*
20 *Irrigation District* (1998) Ord. WR 98-01, at 3.)

21 ^{14/} In this matter, the SWRCB has already made clear that third parties without Colorado River water
22 rights are not legal users of water for the purposes of Section 1736:

23 In determining whether a proposed transfer will result in substantial injury
24 to any legal user of water within the meaning of Water Code section 1736,
25 the SWRCB normally looks at potential effects on the holders of any
26 underlying water rights involved. If the petitioners requesting a transfer
and the holders of potentially affected water rights [i.e., MWD] reach
agreement on conditions to avoid substantial injury to the water right
holders, then the SWRCB would not consider alleged impacts to other
parties as constituting an injury to other legal users of water under section
1736.

27 (Letter to the City of Los Angeles from SWRCB (June 20, 2000) (emphasis added).) Moreover, the
28 County’s amended Notice of Intent to Appear (April 1, 2002) confirms the County’s own belief that it
does not have standing as a vested user of water. The County’s notice indicates that the County will be
providing its case-in-chief in Phase 2, examining harm to beneficial instream uses, only.

1 The SWRCB has repeatedly confirmed that the protections afforded under the “no injury” rule are
2 only the maintenance of the quantity and quality of water supplying the protestant’s water right. (*See, e.g.,*
3 *In the Matter of El Dorado Irrigation District* (1995) Ord. WR 95-9); *In the Matter of Conditional*
4 *Temporary Urgency Change Order* (1996) Ord. WR 96-03 (applying Section 1435 no injury standard
5 in urgent temporary change); *In the Matter of Implementation of Water Quality Objectives for the San*
6 *Francisco Bay/Sacramento-San Joaquin Delta Estuary* (1999) WR 2000-02, at 12 (stating that
7 SWRCB has previously interpreted “legal user of water” as meaning a legally protectable right to use the
8 water in question); *In the Matter of Extension of Order WR 95-6* (1999) WR 99-22 (no injury rule is
9 common law rule designed to protect rights of third party water right holders).

10 Second, only the existence of “substantial injury” requires disapproval. (Wat. Code § 1736; *In*
11 *the Matter of Natomas Central Mutual Water Company* (2000) Ord. WR 2000-01.)

12 **B. PETITIONERS HAVE DEMONSTRATED BY SUBSTANTIAL EVIDENCE**
13 **THAT THE CONSERVATION AND TRANSFER PROJECT WILL NOT**
14 **SUBSTANTIALLY INJURE ANY LEGAL USER OF WATER**

14 Petitioners IID and SDCWA have demonstrated by substantial evidence that no Colorado River
15 water right holders (i.e., “legal users” with standing to object to the proposed transfer) will be harmed as
16 a result of the SWRCB’s approval of the Amended Petition.

17 As described in herein, IID will transfer only newly conserved water to SDCWA and
18 CVWD/MWD in accordance with Water Code Sections 1011 and 1012. Senior water right holders,
19 PVID and the Yuma Project, will continue to take the full amount of their contract entitlement. Junior water
20 right holders, CVWD and MWD, have agreed to withdraw their protests to the Amended Petition in
21 consideration for IID’s agreement to further quantify its Colorado River water right to 3.1 MAFY (in prior
22 years, IID’s diversions have exceeded 3.1 MAFY (*see* IID Exh. 11)) and to forebear (i.e., not place an
23 order with the USBR for release from Parker Dam) from diverting the quantity of water conserved by IID
24 pursuant to the Transfer Agreement and QSA for transfer to SDCWA and/or CVWD/MWD respectively,
25 among other things. (*See* IID Exh. 22, at ¶ G.)

26 IID Exhibit 1A graphically illustrates the manner by which IID will conserve water below its 3.1
27 MAFY quantified right and will forebear from diverting the quantity of water conserved. IID’s diversions
28 will be limited to the balance – i.e., 3.1 MAF minus the quantity of water conserved and allotted pursuant

1 to the Transfer Agreement and the QSA equals the maximum quantity that IID will be entitled to divert.
2 (See IID Exh. 1A (“IID Diversions” in blue); RT, at 180:14 to 181:21.)

3 The Implementation Agreement operates to enforce these promises. The Secretary has agreed to
4 deliver water to IID, CVWD and MWD in the manner set forth in the Implementation Agreement for the
5 term of the QSA. (IID Exh. 22e, ¶ B.2.a.) The Implementation Agreement limits IID’s total consumptive
6 use to 3.1 MAFY (IID Exh. 22e, ¶ B.3.a.) and to deliver water conserved by IID to SDCWA and/or
7 CVWD/MWD in accordance with the terms of the QSA.

8 No party has disputed these facts.

9 **1. No Legal User Has Demonstrated Substantial Injury.**

10 In addition to Petitioners IID and SDCWA, the following parties appeared and presented evidence
11 in Phase I of this matter: the CRIT, Mr. DuBois, Mr. Gilbert, and the California Farm Bureau Federation
12 (CFBF). Each of these party’s claims is addressed below.

13 The County of Imperial had originally noticed its intention to appear in Phase I, but later withdrew
14 this notice and elected to appear in Phase II only. (RT, at 81.) The County exercised its right to cross-
15 examine the witnesses who testified but submitted no testimony or other evidence for the purpose of
16 establishing a right or potential injury pursuant to Water Code Section 1736.

17 Defenders of Wildlife (DOW) and the Sierra Club provided notice of their intent to appear in Phase
18 I, but only for the purpose of cross-examination and rebuttal and therefore submitted no testimony or other
19 evidence for the purpose of establishing a right or potential injury pursuant to Water Code Section 1736.
20 (See April 18, 2002 correspondence from Chairman Baggett to Service List (designating the order in which
21 parties to the hearing would appear).) During the hearing, the Chairman granted other parties (Planning
22 and Conservation League (PCL), et al.) the opportunity to cross-examine as well.

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27 **2. Colorado River Indian Tribes Are Not Legal Users Within the Meaning**
28 **of Water Code Section 1736**

1 As discussed in detail in IID’s June 4, 2002 correspondence to Chairman Baggett,¹⁵ CRIT
2 established no “water right” which will suffer any potential injury. Petitioners acknowledge that CRIT is
3 a legal user of water. However, CRIT acknowledges that its legal use will not be affected by the
4 Conservation and Transfer Project. (RT, at 455:13 to 456:7.) Instead, CRIT desires to claim injury based
5 upon a loss of water for power generation. The scope of CRIT’s right, however, does not include ordering
6 water for power generation. (RT, at 456:8-16.) CRIT has no right to order water for power generation
7 from the USBR at Parker Dam. Rather, its ability to produce power is dependent on the quantity of water
8 ordered by other legal users, including IID. (RT, at 456: 8-16, 459:9-17.) In other words, power
9 generation at Headgate Rock Dam emanates from whatever water flows through the dam after CRIT
10 diverts its water. (RT, at 452:20-22, 454:24 to 455:4, 458:8-17.) CRIT has no right to demand that
11 other legal users continue to order flows to sustain CRIT’s existing level of power production. (*In the*
12 *Matter of License 11395, Merced Irrigation District* (1997) WR Ord. 99-12, at 3 (holding that the
13 South Delta Water Agency, having no right to the water at issue, had no right to require the release of
14 Merced Irrigation District’s reservoir at a time that would benefit SDCWA).)

15 Moreover, even if CRIT did have such a right, substantial evidence demonstrates that the alleged
16 injury is not substantial and therefore would not constitute a basis for denial of the Amended Petition under
17 Water Code Section 1736. CRIT’s own exhibits admit that the potential power loss is only about six
18 percent. (CRIT Exh. 5, at 3.3-13.) Further, the USBR’s Draft EIR/EIS for the Implementation Agreement
19 states that such a power loss is minimal. (RT, at 460: 8-11; IID Exh. 53, at 3.12-11.) Without regard
20 to the proposed transfer, the flow of the Colorado River varies by hundreds of thousands of acre-feet
21 yearly, in part because IID’s orders fluctuate significantly. (IID Exh. 11.) Thus, a six percent loss in the
22 ability to generate power as a result of reduced flows through Headgate Rock Dam is insignificant and thus
23 there is no “substantial” injury to CRIT.

24 **3. Mr. DuBois and Mr. Gilbert, Farmer/Landowners in Imperial Valley, Are**
25 **Not Legal Users Within the Meaning of Water Code Section 1736**
26

27 _____
28 ^{15/} The argument made in IID’s June 4, 2002 correspondence to Chairman Baggett decisively resolves
any question as to whether the proposed Conservation and Transfer Project will injure the CRIT withing
the meaning of Water Code Section 1736. A short summary of that argument is set forth herein.

1 Mr. DuBois, an Imperial Valley landowner, and Mr. Gilbert, an Imperial Valley landowner and
2 farmer, presented testimony and evidence generally relating to their concerns with “the details” of IID’s
3 conservation plan and certain provisions in the Transfer Agreement, such as the potential liability of
4 landowners and farmers for environmental impacts associated with the Conservation and Transfer Project,
5 the pricing structure of the deal, and the method by which IID might calculate each farmer’s water
6 conservation, among others. (RT, at 491-494; RT, at 523-526, 550-561.) However, neither Mr. DuBois
7 nor Mr. Gilbert is a legal user of water within the meaning of Water Code Section 1736. Neither party
8 presented any evidence tending to show that either party has a legal right to divert water from the Colorado
9 River – i.e., a contract with the USBR.

10 Rather, IID holds water rights in trust for the farmers within its boundaries, including Mr. DuBois
11 and Mr. Gilbert. (IID Exh. 1, at 5:11-12; IID Exh. 28; RT, at 169:19-22; RT, at 229:3-5.) Thus, Mr.
12 DuBois and Mr. Gilbert, have no standing to object to the SWRCB’s approval of the Amended Petition.

13
14 Mr. DuBois’ and Mr. Gilbert’s concerns with the actual manner in which the Conservation and
15 Transfer Project is implemented are more appropriately directed to the IID Board of Directors (IID
16 Board). In the event Mr. DuBois and Mr. Gilbert (and/or Mr. Gilbert’s witnesses, Mr. Walker and Mr.
17 Cox) continue to have concerns with the Conservation and Transfer Project they may exercise their right
18 to vote. (RT, at 500, 611-612.)

19 **4. California Farm Bureau Federation Is Not A Legal User Within the**
20 **Meaning of Water Code Section 1736**

21 Mr. Rodegerdts appeared both as counsel and witness on behalf of the CFBF. (*See* CFBF Exh.
22 1; RT, at 476-477.) CFBF’s admitted sole concern with the proposed Conservation and Transfer Project
23 “are the third-party impacts [specifically, socioeconomic impacts] that might arise out of the contemplated
24 transfer.” (RT, at 476; CFBF Exh. 1, at 4-6.) However, CFBF presented no evidence whatsoever that
25 either CFBF or its constituents, are “legal users” of water within the meaning of Water Code Section 1736
26 or that substantial injury would result to a legal user of water as a result of the proposed project. (*See*
27 *generally* RT, at 476-486; CFBF Exh. 1-3.) As such, CFBF failed to demonstrate that the Conservation
28 and Transfer Project would result in substantial injury to a legal user of water.

1 **VI. SHOULD THE SWRCB MAKE ANY ADDITIONAL FINDINGS OR REACH ANY**
2 **ADDITIONAL CONCLUSIONS CONCERNING THE TRANSFER, IID'S WATER**
3 **RIGHTS, OR IID'S WATER CONSERVATION PROGRAM AS REQUESTED BY**
4 **PETITIONERS?**

5 The SWRCB must make additional findings and conclusions regarding the conservation and transfer
6 provided in the Amended Petition if the Transfer Agreement and the QSA are to move forward. The State
7 of California has a paramount interest in the success of the Amended Petition and the implementation of
8 the California Plan. Specifically, SDCWA's request that the SWRCB make the findings requested in the
9 PDA, set forth in the SWRCB's hearing notice of February 5, 2002 as well as those set forth in Attachment
10 "A," below, should be understood in the context of the over-riding state interest in the subject matter.

11 **A. STATE LAW AND POLICY IS PRO-VOLUNTARY TRANSFER**

12 Water transfers are recognized as an important means of meeting California's increasing water
13 demands without injuring the environment. On the heels of the recommendations to facilitate water transfers
14 made by the 1978 Governor's Commission to Review Water Rights Law, the California Legislature began
15 to enact a series of statutes that, taken together, provide a strong policy preference in favor of voluntary
16 transfers such as the Conservation and Transfer Project. Water Code Section 1011 was added in 1979.

17 Section 109, enacted in 1980, declares it to be the policy of the state to facilitate voluntary transfers
18 of water and specifically directs the SWRCB to encourage such transfers:

19 (a) The Legislature hereby finds and declares that the growing water
20 needs of the state require the use of water in an efficient manner and that
21 the efficient use of water requires certainty in the definition of property
22 rights to the use of water and transferability of such rights. It is hereby
23 declared to be the established policy of this state to facilitate the voluntary
24 transfer of water and water rights where consistent with the public welfare
25 of the place of export and the place of import.

26 (b) The Legislature hereby directs the Department of Water
27 Resources, the State Water Resources Control Board, and all other
28 appropriate state agencies to encourage voluntary transfers of water and
water rights. . .

In 1986, the Legislature enacted additional statutes expressly designed to further promote water
transfers:

The Legislature hereby finds and declares that voluntary water transfers
between water users can result in a more efficient use of water, benefitting
both the buyer and the seller. . .

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The Legislature further finds and declares that it is in the public interest to conserve all available water resources, and that this interest requires the coordinated assistance of state agencies for voluntary water transfers to allow more intensive use of developed water resources in a manner that fully protects the interests of other entities which have rights to, or rely on, the water covered by a proposed transfer.

(Wat. Code § 475.)

The Legislature hereby finds and declares as follows: (d) It is the policy of the state to facilitate the voluntary sale, lease, or exchange of water or water rights in order to promote efficient use.

(See note re Stats. 1986 ch. 918, Deering’s Ann. Wat. Code (2002).)

Both the SWRCB and DWR, the two state agencies responsible for regulating and managing the State’s water resources, recognize that the California Legislature had gone “on record” in “favor of promoting voluntary transfers of water or water rights as a means of meeting the State’s growing water needs.” (Ord. WR 88-20, at 18.) In prior decisions relating to IID’s water rights, the SWRCB has acknowledged that:

Water Code Section 1011 expressly authorizes the sale, lease, exchange or other transfer of water saved through conservation efforts. Under appropriate circumstances, the maximum beneficial use provision of Article X, Section 2 of the California Constitution may mandate the transfer of surplus water to water-short areas.

(Dec. 1600, at 8.)

[T]he California Water Code not only authorizes the voluntary transfer of water made available through implementation of conservation measures, but it actively encourages such transfers and protects the underlying water right of the agency which conserves the water.

(Ord. WR 88-20, at 19.)

In this matter, Mr. Macaulay, Chief Deputy Director of DWR, an expert in water resources management with extensive experience in the field of water transfers, testified that:

Water transfers are an important and necessary part of California’s water picture. State law supports voluntary water transfers, and directs State agencies to encourage and facilitate voluntary transfers in a manner that protects existing water uses. State law and policy further direct State agencies to provide technical assistance to parties to implement water conservation measures that will make additional water available for transfers.

(SDCWA Exh. 5, at 3-4 .)

1 The general expression of support for voluntary and conservation based transfers is further
2 buttressed by the Legislature’s adoption of Water Code Section 1012, enacted in 1984. The Legislature’s
3 express support for conservation of the type envisioned by this Conservation and Transfer Project is
4 abundantly clear:

5 Notwithstanding any other provision of law, where a person, public
6 agency, or agency of the United States undertakes any water conservation
7 effort, either separately or jointly with others entitled to delivery of water
8 from the Colorado River under contracts with the United States, which
9 results in reduced use of Colorado River water within the Imperial
10 Irrigation District, no forfeiture, diminution, or impairment of the right to
11 use the water conserved shall occur, except as set forth in the agreements
12 between the parties and the United States.¹⁶

13 (Wat. Code § 1012.)

14 The Legislature has also been vocal in expressing its support regarding the transfer of water by IID
15 to the Authority. An urgency measure was adopted in 1997 and appointed the Director of the Department
16 of Water Resources to recommend terms and conditions for the transfer of water through the CRA. In
17 relevant part, the Legislature declared:

18 [T]he proposed transfer of conserved water from the Imperial Irrigation
19 District to the San Diego County Water Authority is a matter of statewide
20 interest in that it addresses a significant need for water in the southern state
21 through the conservation of water now being consumed there. . .

22 It is of vital state interest that every effort be made to ensure that the
23 Colorado River Aqueduct continues to operate at its full capacity at fair
24 and reasonable terms in order to minimize statewide disruptions from
25 diminishing Colorado River supplies.

26 (Wat. Code § 1812.5 (repealed 1999).)

27 While the negotiations between MWD and SDCWA regarding the method under which the
28 conserved water to San Diego County stalled in 1998, the Legislature broke the log jam. Through urgency
legislation, in 1998, California appropriated \$200 million for the lining of the AAC and another \$35 million
to DWR to finance conjunctive use projects. (Wat. Code § 12562(a)(1).) Both of these expenditures were

¹⁶ The uncodified portion of Section 1012 states: “The Legislature finds and declares that the enactment of Section 1012 of the Water Code is intended to clarify and make specific existing California law in regard to water conservation measures which may be taken within the Imperial Valley. In enacting Section 1012 of the Water Code, it is not the intent of the Legislature to alter the relationship of state and federal law, as each may apply to the distribution and use of Colorado River water.” (Cal. Wat. § 1012, History and Statutory Note (Sec. 2 of Stats. 1984, c. 429).)

1 contingent upon the completion of the Transfer Agreement and for the express purposes of securing the
2 adopted implementation of the California Plan. (Wat. Code § 12560(b); Wat. Code § 12562(a)(1) and
3 (b)(1).)

4 **B. THE STATE HAS A PARAMOUNT INTEREST IN MAXIMIZING THE**
5 **REASONABLE AND BENEFICIAL USE OF COLORADO RIVER WATER**

6 It is the policy of the State to utilize all water available and both the public interest and the California
7 Constitution mandate the maximization of the reasonable and beneficial uses of that water. (Tulare
8 Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist. (1935) 3 Cal.2d 489, 547 [45 P.2d 972]; Allen v.
9 California Water & Telephone Co. (1946) 29 Cal.2d 466, 488 [176 P.2d 8]; Pasadena v. Alhambra,
10 (1949) 33 Cal.2d 908, 925-926 [207 P.2d 17]; *In the Matter of Fishery Resources and Water Right*
11 *Issues of the Lower Yuba River* (2001) Dec. 1644, at 34.) As the California Appeals Court stated, “[t]he
12 overriding constitutional consideration is to put the water resources of the state to a reasonable use and
13 make them available for the constantly increasing needs of all the people.” (People ex rel. State Water
14 Resources Control Board v. Forni (1976) 54 Cal.App.3d 743, 751 [126 Cal.Rptr. 851].) Article X,
15 Section 2 of the Constitution states, and courts have recognized, that this mandate is self-executing.
16 (Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (1980) 26 Cal.3d 183 [161
17 Cal.Rptr. 466]). This provision applies to all water in this State, including the Colorado River. (Imperial
18 Irrigation District v. SWRCB (1990) 225 Cal.App.3d 548; Imperial Irrigation District v. SWRCB (1986)
19 186 Cal.App.3d 1160.)

20 Uncontroverted substantial evidence in the record demonstrates that if the State of California is
21 unsuccessful in implementation of the California Plan through the QSA, the State will stand to lose hundreds
22 of thousands of acre-feet of water every year, beginning in 2003, when surplus water is no longer available.
23 (RT, at 820:23 to 821:14.) The water loss will be immediate and the economic consequences draconian.
24 (RT, at 116:17-23.)

25 If California shall fail in its effort to implement the QSA and the Surplus Guidelines are interrupted,
26 California will have essentially forever forfeited the right to recapture that water that would have otherwise
27 have been made available for so long as the interruption occurs. There is no mechanism whereby the water
28 not distributed in 2003 can be recaptured by California in later years. To provide an order of magnitude

1 on the loss of surplus criteria, at approximately 800,000 AF, it is more than all the water from all sources
2 that would be used within SDCWA's boundaries in a year. (See SDCWA Exh. 7.)

3 **C. THE STATE HAS A PARAMOUNT INTEREST IN THE COORDINATED**
4 **ADMINISTRATION AND EFFICIENT USE OF COLORADO RIVER WATER**
5 **AND WATER RIGHTS**

6 California has long asserted a strong interest in coordinated water rights administration. (In re
7 Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 355-57; In re Water of Hallett Creek
8 Stream System (1988) 44 Cal.3d 448, 472 [749 P.2d 324].) While the Law of the River may reserve
9 certain subjects to the Secretary and even have a dominant federal character, California's interest in
10 *successful* Colorado River management is not diminished simply because water management may be
11 shared by the State and Federal Governments. The Colorado River is a critically important water supply
12 to California. As such, inefficient operations that may result in less than the maximum beneficial use of
13 water among competing claims should be discouraged.

14 To the extent the IID's use may fluctuate from year to year depending on a variety of conditions,
15 it has the potential for affecting the quantity of supply available to other users within California's basic
16 entitlement. (RT, at 183 -185.) The result is that the junior priorities, such as those held by MWD and
17 CVWD, are subject to the vagaries of economic conditions and water orders within Imperial. As such,
18 inefficiency may result. Although the CRA has remained full in the past, as the other Colorado River Basin
19 states and the federal government insist on California's living within its basic entitlement of 4.4 MAFY, the
20 impact of the fluctuations would be significant. The fluctuations in use serve to create uncertainty.

21 Certainty of water rights is the cornerstone of prudent water right administration. (In re Waters of
22 Long Valley Creek Stream System (1979) 25 Cal.3d 339, 355-57; see Wright v. Goleta Water District
23 (1985) 174 Cal.App.3d 74 [219 Cal.Rptr. 740]; see further Arizona v. California (1983) 460 U.S. 605,
24 620 [103 S.Ct. 1382].) The SWRCB and the California Supreme Court have acknowledged that the
25 existence of unquantified rights may lead to uncertainty and inefficient use. (In re Waters of Long Valley
26 Creek Stream System (1979) 25 Cal.3d 339, 355-57.)

27 In the quest to provide greater certainty, the SWRCB itself has been extended great latitude to
28 pursue efficient administration of competing water rights claims. (See In re Waters of Long Valley Creek
Stream System (1979) 25 Cal.3d 339, 355-57; People ex rel. State Water Resources Control Bd. v. Forni

1 (1976) 54 Cal.App.3d 743 [126 Cal. Rptr. 851].) Here, substantial evidence demonstrates that although
2 a statutory adjudication is not the chosen tool, a consensual and comprehensive administration of Colorado
3 River water and water rights will result through the implementation of the QSA. (RT, at 396-398.)

4 Through the QSA, presently unquantified agricultural priorities to Colorado River water will be
5 quantified. Competing claims regarding the Colorado River water use will be withdrawn for so long as the
6 QSA remains in effect. In fact, the quantification achieved through the QSA meets many of the goals
7 typically only attained through a comprehensive adjudication; that is, certainty. (In re Waters of Long Valley
8 Creek Stream System (1979) 25 Cal.3d 339, 355-57.) Given that the term of the QSA is 75 years, it is
9 difficult to imagine a more sanguine outcome for the State's interest in improved efficiency and it should be
10 entitled to great weight in the SWRCB's deliberation on whether to grant the Amended Petition.

11 **D. THE STATE HAS A PARAMOUNT INTEREST IN PROMOTING A CON-**
12 **SENSUAL PHYSICAL SOLUTION**

13 In many ways, the QSA and the California Plan operate to effectuate a "physical solution" among
14 the existing users of Colorado River water. In other words, the QSA provides a practical remedy whereby
15 existing water supplies are maintained against loss, more efficient water rights administration is achieved,
16 and additional water is made available to new uses. At the same time the QSA does not adversely affect
17 any party's water rights to Colorado River water. (*See City of Barstow v. Mojave Water Agency* (2000)
18 23 Cal.4th 1224, 1250 [99Cal.Rptr.2d 294, 312].)

19 IID has senior water rights to Colorado River water. SDCWA and junior users have sought to
20 finance IID's conservation efforts to make the water available for transfer under a cost structure that will
21 not cause substantial injury or material expense to IID, the senior right holder. As such, the necessary
22 elements of a physical solution are satisfied. Such a possibility was considered by the SWRCB in WR 88-
23 20. The affected parties have now come to voluntary agreements on how the plan should be implemented.
24 It was also previously considered by the SWRCB in WR 88-20 and the possibility of ordering such a
25 solution if one should become available. (*See In the Matter of Waste and Unreasonable Use by Imperial*
26 *Irrigation District* (1988) WR 88-20, at 54-55.)

27 Although a voluntary agreement between IID and other parties interested
28 in the use of conserved water appears to provide the most feasible way
of achieving significant water conservation in the near future, the failure of
the affected parties to reach an agreement would not preclude the Board

1 or the courts from developing and ordering a “physical solution” to the
2 dispute.

3 WR Ord. 88-20 at 54-55.)

4 Through consensual arrangements among competing claimants to Colorado River water and with
5 the concurrence with the Secretary of the Interior, scheduling of water use and voluntary transfer
6 agreements, historical water use practices are adjusted and thereby available resources are stretched
7 among competing uses. A more classic example of a physical solution, one that makes added water
8 available but that does not cause material expense or substantial injury to senior water right holders, could
9 not be found. (*See City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 [99 Cal.Rptr.2d
10 294]; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351 [40 P.2d 486]; *City of Lodi v. East Bay Municipal*
11 *Utility Dist.* (1936) 7 Cal.2d 316, 339-41 [60 P.2d 439]; *Rancho Santa Margarita v. Vail* (1938) 11
12 Cal.2d 501 [81 P.2d 533].)

13 Where the SWRCB has been presented with physical solutions in the past, it has a record of
14 supporting such measures in accordance with its duties under Article X, Section 2 of the California
15 Constitution. (*In the Matter of Appropriative Water Right Subject to Condition 12, United States*
16 *Bureau of Reclamation Permit Applications 11199 etc.* (1996) WR 96-02, at 50-51.) As the Petition
17 and the implementation of the QSA parties present the SWRCB with a comprehensive and consensual
18 physical solution that meets the goals of Article X, Section 2, it should be approved.

19 **E. CONSISTENT WITH STATE POLICY, APPROVAL OF THE PETITION WILL**
20 **ENCOURAGE FURTHER CONSERVATION OF WATER**

21 As the SWRCB acknowledged in WR 88-20, voluntary water transfers can provide the financial
22 resources that many water users need to engage in conservation. In Decision 1600, the SWRCB
23 acknowledged the economic benefits that a water conservation program could provide for IID. (Dec.
24 1600, at 26.) Indeed in WR 88-20, the SWRCB expressly noted that the best method of moving forward
25 was through a voluntary agreement between IID and users interested in acquiring the conserved water
26 rather than a non-consensual physical solution. (WR Ord. 88-20, at 19.) As the SWRCB acknowledged
27 in WR 88-20, however, a substantial water conservation effort such as the one contemplated in the Petition
28 and by the QSA will require significant investments.

1 To date, IID and its conservation partners, have spent over \$600 million (in 1996 dollars) over the
2 last 50 years in improving conservation practices within IID. (IID Exh. 1, at 12; SDCWA Exh. 4, at 5.)
3 These efforts include lining canals with concrete, construction of reservoirs and interceptor canals, canal
4 seepage recovery pipelines, water order and administrative procedures, and improved irrigation
5 management measures. (IID Exh. 1, at 12; RT, at 185-187.) For example, in 1988, IID and MWD
6 entered into the 1988 IID/MWD Agreement in which IID committed to the conservation of 108,000 AFY
7 to be transferred to MWD. (IID Exh. 1, at 12; RT, at 179:20 - 180:2.) In return, MWD paid IID \$233
8 million for the conserved water. (IID Exh. 1, at 12.)

9 The State Legislature has contributed another \$235 million to successfully implement the California
10 Colorado River Plan. (Wat. Code § 12562 (a)(1) and (b)(1).) \$200 million was earmarked for the lining
11 of the AAC and \$35 million for conjunctive use.

12 **F. THE IMPERIAL VALLEY FARMERS AND ECONOMY WILL BENEFIT**
13 **THROUGH INCREASED REVENUES PROVIDED BY THE TRANSFER**

14 DWR's Chief Deputy Director Mccauley testified to some of the many benefits traditionally
15 associated with voluntary water transfers, among these that "[t]ransfers can provide an effective means of
16 moving water between users on a voluntary and compensated basis, as well as a means of providing
17 incentives for water users to implement management practices that will improve the effectiveness of local
18 water management." (SDCWA Exh. 5, at 4.)

19 Pursuant to the Transfer Agreement, IID will receive payments in excess of \$4.5 billion for the 75-
20 year period of the transfer. (RT, at 1031:18-25) These payments will allow IID to fund a water
21 conservation program, including the cost of on-farm and system improvements, environmental mitigation
22 costs, and other implementation costs. (IID Exh. 55, Vol. 1, ES-5.)

23 The transfer payments will also provide an economic stimulus to Imperial Valley's agricultural
24 economy and the surrounding community. (IID Exh. 55, Vol. 1, at ES-5; IID Exh. 1, at 15: 11-16.)
25 SDCWA's payments will provide capital for IID to conserve water and modernize and upgrade IID's
26 delivery system. (IID Exh. 1, at 15:13-14; RT, at 214:18-21.) The payments will also allow farmers to
27 improve their agricultural efficiency. (IID Exh. 1, at 15: 14-16.)

28 **G. IID'S WATER RIGHTS WILL NOT BE IMPAIRED THROUGH APPROVAL**
OF THE TRANSFER

1
2 The SWRCB’s approval of the Amended Petition, as requested and in accordance with the
3 Transfer Agreement and PDA, will ensure that IID’s senior water rights to Colorado River water are
4 protected against future claims of waste and unreasonable use and the uncertainty which is associated with
5 such vulnerability to litigation. (IID Exh. 55, Vol. 1, at ES-5; SDCWA Exh. 3, at 4.) Moreover, successful
6 implementation of the Conservation and Transfer Project will encourage other much-needed water transfers
7 around the state by demonstrating that it is possible to conserve and transfer water without risk to the
8 transferring party’s water rights. (RT, at 375:20-24.)

9 If IID’s conservation program should include only investments in temporary land fallowing, as
10 opposed to increased agricultural efficiency, it must still receive a comprehensive recognition of its herculean
11 efforts for the benefit of California and in accordance with Article X, Section 2. By voluntarily proceeding
12 to implement the physical solution of the Conservation and Transfer Program and the QSA, IID and the
13 transferors will have proposed a physical solution that has multiple, indeed overwhelming, benefits that
14 cannot be measured by percentages of irrigation efficiency. The SWRCB must acknowledge and find that
15 IID’s conservation efforts, temporary fallowing included, provide substantial benefits to California and the
16 failure to narrowly pursue improved agricultural efficiency at a cost to other values is reasonable and
17 beneficial within the meaning of Article X, Section 2.

18 **H. THE TRANSFER WILL PROVIDE MUCH NEEDED WATER SUPPLY**
19 **RELIABILITY FOR SAN DIEGO COUNTY AT A FAIR, STABLE AND COM-**
20 **PETITIVE PRICE**

21 SDCWA receives 100 percent of its imported water supply (nearly 90% of its total water supply)
22 from MWD. (SDCWA, Exh. 1, at 3.) As a result, water shortages affecting MWD’s supply will have a
23 direct impact on MWD member agencies, including its largest customer SDCWA. (RT, at 388:24 to
24 390:10.) The \$117 billion economy of the San Diego Region depends on a reliable water supply.
(SDCWA Exh. 1, at 9.)

25 The Conservation and Transfer Project will provide SDCWA with up to 200,000 AFY of an
26 independent, highly reliable imported water supply, thereby helping to reduce SDCWA’s reliance on
27 MWD and thus the risk of future shortages. (SDCWA Exh. 1, at 6 (describing the senior priority of IID’s
28 water rights), 9; SDCWA Exh.3, at 5; *see also* Ord. WR 88-20, at 5 (“As a member agency of MWD,

1 however, the San Diego County Water Authority would benefit by a water transfer arrangement which
2 increases the overall reliable water supply available to MWD.”); RT, at 391:2-10.) Further, “[t]he []
3 Transfer Agreement provides the San Diego region with an ‘insurance policy’ against the economic impacts
4 associated with drought and stabilizes the price of a significant portion of SDCWA’s supplies. As such,
5 it takes great strides toward achieving SDCWA’s water supply reliability goal.” (SDCWA Exh. 1, at 9;
6 IID Exh. 55, Vol. 1, at ES-6.)

7 **I THE CONSERVATION AND TRANSFER PROJECT WILL BENEFIT THE**
8 **ENTIRE MWD SERVICE AREA**

9 Because SDCWA is a MWD member agency, the acquisition of an independent and highly reliable
10 supply for SDCWA will help to keep MWD’s CRA full in the wake of reduced Colorado River water
11 deliveries to southern California and reduce SDCWA’s reliance on MWD. This benefit will in turn be
12 shared by other MWD member agencies by freeing up available Colorado River supplies for their use.
13 (SDCWA Exh. 1, at 9-10; RT, at 394:15-20.)

14 ///

15 **J. THE CONSERVATION AND TRANSFER PROJECT IS THE LINCHPIN OF**
16 **THE CALIFORNIA PLAN FOR THE COLORADO RIVER**

17 The Colorado Plan describes how California will reduce its use to its basic apportionment – 4.4
18 MAFY – while at the same time preserving a full CRA for MWD. (SDCWA Exh. 5, at 4.) The
19 Conservation and Transfer Program, which, as described herein, includes both the IID/SDCWA Transfer
20 and the additional acquisition of water by CVWD/MWD, is the linchpin of the California Plan and therefore
21 will greatly assist California in reducing its reliance on the Colorado River, as required by law. (SDCWA
22 Exh. 1, at 10; RT, at 397:7-24; RT, at 141:17-21; SDCWA Exh. 3, at 4; *see also* SDCWA Exh. 5, at
23 5.)

24 The SWRCB previously recognized the benefits that a conservation and transfer program like that
25 proposed by the Amended Petition could benefit all California water users.

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

1 (Ord. WR 88-20, at 7; *see also* Dec. 1600, at 24, 26.) SWRCB approval of the Amended Petition, and
2 thus the Conservation and Transfer Project, will enable California to work toward a long-term water
3 solution that avoids a drastic cutoff in Colorado River water. (SDCWA Exh.3, at 5; SDCWA Exh. 4, at
4 9.)

5 On the other hand, if the Amended Petition is not approved and thus the QSA is not executed prior
6 to December 31, 2002, thereby suspending the Guidelines, urban Southern California, i.e., MWD’s service
7 area, will suffer from an immediate loss of a significant portion of the Colorado River water supplies that
8 it has become reliant upon. MWD, on behalf of its 17 million customers, will be forced to rely more heavily
9 on alternative supplies, specifically, the SWP, thereby placing increased pressure on the already-fragile
10 Bay-Delta. (SDCWA Exh. 1, at 10; RT, at 397: 11-16; *see also* SDCWA Exh. 5, at 2-3; RT, at 394-
11 395; RT, at 115-116.) Yet due to heightened concerns relating to water quality and the health of the Bay-
12 Delta, additional diversions from the Bay-Delta are unlikely. (SDCWA Exh. 5, at 6.)¹⁷ Thus, approval
13 of the Amended Petition benefits all of California helping ensure that adequate imported water supplies
14 without placing a greater burden on the Bay-Delta.

15 **K. THE TRANSFER RESOLVES LONG-STANDING DISPUTES OVER**
16 **COLORADO RIVER WATER USE**

17 There is considerable debate over IID’s, and other Colorado River contract holders’, right to
18 transfer conserved Colorado River water to other parties, such as SDCWA, without the prior approval
19 of Colorado River water right holders MWD and CVWD. (SDCWA Exh. 3, at 4-5.) The Conservation
20 and Transfer Project, if approved, will facilitate an historical settlement (the QSA) achieved by the Four
21 Agencies and thus will help to resolve this and other long-standing disputes over Colorado River water
22 rights, while at the same time helping each of the Four Agencies reach its individual goal of an adequate and
23 reliable water supply for the next 75 years, despite California’s loss of as much as 800 KAFY of Colorado
24 River supplies. (SDCWA Exh. 3, at 4-5; IID Exh. 1, at 19; RT, 369: 4-9; RT 1483:24 to 1484:2.)

25 _____
26 ^{17/} “If MWD is unable to use such tools as water transfers and groundwater storage projects to keep
27 its Colorado River Aqueduct full, it will be very difficult to make up for this loss in supply (at least for the
28 foreseeable future) by diversion of additional amounts of water from the Delta. In fact, the CALFED Bay-
Delta Program implicitly has as a foundation for its water supply reliability program a core assumption that
the Colorado River Aqueduct will remain full. Any changes from that assumption could have serious
impacts on all aspects of the CALFED implementation.”

1 The Four Agencies have worked very hard and expended significant resources to reach consensus
2 on a myriad of complex and often divisive issues and to develop the water management programs necessary
3 to reduce California’s reliance on the Colorado River in accordance with the strategy set forth in the
4 California Plan. (SDCWA Exh. 3, at 5; SDCWA Exh. 4, at 2.) Each agency has compromised a great
5 deal along the way. (RT, at 2702:2-12.) This hard work has resulted in the Four Agencies’ support of
6 the Amended Petition, under the terms and conditions of the PDA.

7 **L. THE PROPOSED USE, TRANSFER TO SDCWA, IS HIGHLY EFFICIENT**

8 **1. SDCWA’s Existing and Proposed Uses Are Reasonable**

9 SDCWA was organized and created in 1944 under the County Water Authority Act (Stats. 1943,
10 c. 545) and is a California government agency. SDCWA is composed of 23 member public agencies. The
11 County Water Authority Act empowers SDCWA to acquire water and water rights, construct and operate
12 water delivery works, and exercise other functions associated with providing water within its service area.
13 SDCWA does not have the authority to approve either land use plans or building permits; such authority
14 is exercised by the County of San Diego and the incorporated cities within the SDCWA service area.
15 (SDCWA Exh. 1, at 2.)

16 SDCWA’s service area is 908,959 acres (1,420 square miles). It encompasses the western third
17 of San Diego County, but contains 96 percent of the County’s population. (SDCWA Exh. 9.)

18 SDCWA purchases imported water supplies from MWD and sells that water to its member
19 agencies who in turn deliver it to a wide variety of retail customers. Municipal and industrial use accounts
20 for about 80 to 85 percent of the region’s total water consumption. Agricultural use makes up the balance.
21 (SDCWA Exh. 2, at 3.) In fiscal year 2000-01, total water use (i.e., both imported and local supplies)
22 within SDCWA’s service area reached 695,000 AF. (SDCWA Exh. 2, at 4.)

23 Water conservation plays a central role in SDCWA’s water demand management strategy. Over
24 the past 11 years, SDCWA has consistently demonstrated a concerted effort to use water efficiently. As
25 a result, SDCWA has been highly successful in achieving real water savings, and thus offsetting demand.
26 Through the full implementation of best management practices (BMPs) and other conservation measures,¹⁸

27
28 ^{18/} A detailed description of the BMPs and other conservation measures implemented by SDCWA
and its member agencies is provided in SDCWA Exh. 2, at pages 4-8.

1 SDCWA and its member agencies have utilized all reasonable water conservation options available to
2 them, thereby maximizing their existing available water supplies. (SDCWA Exh. 2, at 4; RT, at 406-408.)

3 For example, SDCWA has consistently implemented all wholesaler BMPs and either meets or
4 exceeds all recognized California water wholesaler industry standards. “SDCWA is truly one of the
5 national leaders in the field of water conservation.” (SDCWA Exh. 2, at 5, 7 (describing awards granted);
6 *see also* SDCWA Exh. 7, Table 4-1 (illustrating compliance with BMPs); RT, at 408:3-7.) Additionally,
7 SDCWA has assisted, through funding and technical and operational assistance, its member agencies in
8 implementing retailer BMPs. (SDCWA Exh. 2, at 5.)

9 The efficiency of SDCWA’s water use is best demonstrated with hard numbers. In fiscal year
10 2000-01, SDCWA’s per capita water use was only 175 gallons per day – an eight percent reduction in
11 water usage over SDCWA’s use 11 years prior. In sum, water use conservation programs operated by
12 SDCWA and its member agencies have saved over 170,000 AF over the past 11 years. (SDCWA Exh.
13 2, at 6-7; RT, at 407:13-14.)

14 As described herein, SDCWA proposes to use water purchased from IID pursuant to the Transfer
15 Agreement and transported pursuant to the Exchange Agreement for the same purposes and in the same
16 or more efficient manner as the water it presently purchases from MWD. In fact, as a result of SDCWA’s
17 continued aggressive implementation of existing and new water conservation measures, SDCWA’s total
18 municipal and industrial demand is projected to achieve – or an estimated water savings of 93,200 AFY
19 by 2020. (SDCWA Exh. 2, at 8, 9 (table); RT, at 407:13-19.)

20 **2. SDCWA’s Need for Additional Water Supplies**

21 **a. 2020 Projections**

22 As of 2001, the population served by SDCWA was about 2.8 million people. (SDCWA Exh. 10.)
23 Demographic projections developed by SANDAG indicate that the region will experience an increase in
24 population to 3.7 million people by 2020. (SDCWA Exh. 2, at 9; *see generally* SDCWA Exh. 17, 18,
25 19.)

26 As required by the 1992 “Memorandum of Agreement between the San Diego County Water
27 Authority and the San Diego Association of Governments Establishing Implementation of the Regional
28 Growth Management Strategy’s Section on Water” (SDCWA Exh. 20), SDCWA has utilized SANDAG’s

1 growth projections to forecast the region’s expected water demands through 2020. (SDCWA Exh. 2, at
2 8; RT, at 1106-6-11.) SDCWA has projected that the region’s total water demand for 2020 will be 813
3 KAFY, or approximately 200 KAFY above today’s usage. (SDCWA Exh. 2, at 9 (table); RT, at 408:22
4 - 409:1.)

5 **b. Any Growth in SDCWA Will Be Supported by Local Supplies, Not**
6 **Conserved and Transferred Water**

7 In addition to SDCWA’s aggressive implementation of water conservation measures, its member
8 agencies propose to develop over 100,000 AF in new local supplies over the next 20 years, including
9 water recycling, groundwater development, and seawater desalination, much of which is drought-proof.
10 (*See generally* SDCWA Exh. 2, at 13-16 (detailing various new programs for the development of local
11 supplies.)) Development of these sources of supply will help to diversify SDCWA’s water supply portfolio
12 and create greater reliability and protection against the inevitable likelihood of another drought, such as that
13 which SDCWA experienced in the late 1980s and early 1990s.

14 Together, new local supplies will significantly offset SDCWA’s present reliance on imported water
15 supplies. In fact, despite the fact that SDCWA’s total water demand is projected to increase by over 120
16 KAFY by 2020, SDCWA proposes no increases in its imported water purchases at this time. (*See*
17 SDCWA Exh. 2, at 13 (projecting SDCWA’s imported water supplies for 2020 to be approximately 600
18 KAFY).)

19 **c. Imported Water Supply at Risk**

20 Despite SDCWA’s remarkable success in reducing its total water demand through water
21 conservation programs and developing new local water supplies to offset SDCWA’s reliance on imported
22 water supplies, imported water will continue to make up the greatest share of SDCWA’s water supply
23 portfolio. However MWD’s ability to continue to provide reliable imported supplies, particularly in dry
24 years, is constrained by uncertainties regarding the continued reliability and availability of Colorado River
25 and SWP supplies. (SDCWA Exh. 2, at 10.)

26 Although highly reliable in the past (SDCWA Exh. 1, at 3-6), MWD’s Colorado River supply,
27 which makes up the majority of SDCWA’s imported supply, is at risk. MWD has, since 1964, kept its
28 CRA full by accessing unused apportionments from Arizona and Nevada or declarations of surplus water

1 by the Secretary of the Interior. However, the water demands of Arizona and Nevada have increased to
2 at or near apportionment levels, thereby reducing the additional quantity available to MWD. (SDCWA
3 Exh. 2, at 9-10.) The Secretary of the Interior and the other lower Basin States have [demanded] that
4 California cut back its reliance on the Colorado River by as much as 800 KAFY (SDCWA Exh. 15, at
5 4), a large portion of which is presently delivered to SDCWA. (RT, at 396:19 to 397:2.)

6 MWD's SWP supply is also at risk. As evidenced by the last drought, this supply is not drought-
7 proof. (See SDCWA Exh. 1, at 5; SDCWA Exh. 2, at 10-12 (describing severe economic hardships felt
8 by San Diego County when MWD's SWP supply was drastically cut in the 1991); see also SDCWA Exh.
9 29.) Additionally, with the imposition of more stringent water quality standards adopted by the SWRCB
10 to protect the Bay-Delta, SDCWA has determined that under a 2020 demand scenario, existing SWP
11 facilities have a less than 25 percent chance of making full deliveries. (SDCWA Exh. 2, at 10.)

12 As a result of uncertainties regarding both the short and long-term reliability of MWD's imported
13 water supply, SDCWA has sought a more diversified mix of water supply resources to offset its heavy
14 reliance on MWD as its sole source of imported water supply. (SDCWA Exh. 2, at 12; RT, at 409:7-12 -
15 410:16-19.) Expert witnesses who testified on behalf of the SDCWA agree that the Conservation and
16 Transfer Project provides the diversification that SDCWA requires to ensure the continued reliability of its
17 imported water supplies.

- 18 • This 200,000 acre-feet imported supply is an essential element of
19 SDCWA's water supply balance for the future and without it SDCWA
20 could face shortages. . . . [T]he water supply made available by the []
21 Transfer Agreement is a beneficial water supply alternative for San Diego
22 County. It is at a volume that is achievable, practical and economically
23 affordable for the San Diego region and would significantly enhance the
24 reliability the [sic] SDCWA's water supply, while allowing SDCWA to
25 reduce its reliance on a single imported supply.

(SDCWA Exh. 2, at 13, 18; RT, at 410:20 - 411:2.)

- 24 • The 200,000 acre-feet we now anticipate being able to purchase from the
25 [] Transfer Agreement will replace a large portion of the supplies MWD
26 presently receives on the River and therefore will significantly reduce the
27 risk of future shortages.

(SDCWA Exh. 1, at 9; RT, at 389-391.)

27 **VII. THE PETITIONED CHANGES WILL NOT UNREASONABLY AFFECT FISH,
28 WILDLIFE, OR OTHER INSTREAM BENEFICIAL USES OF WATER**

1 Water Code section 1736 authorizes the SWRCB to approve a petition for long-term transfer of
2 water so long as the petitioned-for-changes will not “unreasonably affect fish, wildlife, or other instream
3 uses.” (Emphasis added; *see also* Wat. Code § 1702 (providing that a change may not operate to the
4 injury of any legal user of water); *In the Matter of Merced Irrigation District* (1998) WR Ord. 98-01
5 (construing “legal user” to include fish, wildlife and in-stream uses).) Thus, by the plain language of the
6 statute, only “unreasonable” impacts are prohibited – minor or insignificant impacts are not cause for
7 disapproval. (*In the Matter of Permit 16478* (2001) WR Ord. 2001-09, at 2.) Given the mitigation
8 measures identified in the HCP, impacts on fish, wildlife or other instream uses that do not rise to the level
9 of “significant and unavoidable,” as determined by the environmental review documentation prepared for
10 the proposed project – i.e., the EIR/EIS, are by definition neither significant or unreasonable.

11 The table that follows this part summarizes the conclusions made in the EIR/EIS. The table
12 illustrates that implementation of the Conservation and Transfer Project, depending on the method of
13 conservation employed (compare IID’s conservation program utilizing “all measures” of conservation vs.
14 “fallowing only”), would result in potentially significant and unavoidable impacts the following resource
15 areas:

16 In the event an “all measures” conservation program (like that identified in the EIR/EIS as the
17 “proposed project”) is implemented, potentially significant and unavoidable environmental impacts to fish,
18 wildlife or other instream uses would occur only in the *hydrology/water quality* resource area in the IID
19 service area. With respect to other potential environmental impacts, significant and unavoidable impacts
20 were identified in only the *agricultural* resource areas in the IID service area and in the *air quality*
21 resource area in the area of the Salton Sea.

22 In the event a “fallowing only” conservation program (like that identified in the EIR/EIS as
23 “Alternative Four”¹⁹) is implemented, no potentially significant and unavoidable environmental impacts to
24

25 ^{19/} Alternative 4, as described in the EIR/EIS, would involve the use of fallowing as the exclusive
26 means of conservation to generate up to 300,000 AFY for transfer. (IID Exh. 55, Vol. 1, at 2-57.) As,
27 explained in the EIR/EIS, Alternative 4 analysis fallowing as the exclusive means of conservation to identify
28 the effects of fallowing separately and to provide a comparison of with the other proposed conservation
methods allowed under the Conservation and Transfer Project. (IID Exh. 55, Vol. 1, at 2-57.) Fallowing
could be undertaken by multiple means: landowners could fallow land they own, lease, or purchase, or
fallowing could be undertaken on land that IID owns, leases, or purchases. (IID Exh. 55, Vol. 1, at 2-57.)
In order to generate up to 300,000 AFY of water for transfer, the EIR/EIS estimates that 50,000 acres

1 fish, wildlife and other instream uses would occur. With respect to other potential environmental impacts,
2 significant and unavoidable impacts were identified in only in the *agricultural resources* area in the IID
3 service area and in the *air quality* resource area in the area of the Salton Sea. However, as discussed in
4 detail below, substantial evidence indicates that if a temporary/rotational fallowing program is employed
5 as the method of conservation, both of these impacts could be minimized, potentially to less than significant
6 levels.

7 All other potentially significant impacts identified in the EIR/EIS would be fully mitigated with
8 implementation of the proposed mitigation measures and/or implementation of the HCP.

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would have to be followed.

SUMMARY OF IMPACTS ASSOCIATED WITH PROPOSED CONSERVATION AND TRANSFER PROJECT (FINAL EIR/EIS)

- Key:**
- (1) beneficial impact, no impact, or less than significant impact
 - (2) less than significant with implementation of proposed mitigation
 - (3) significant and unavoidable impact

“All Measures” is the conservation program described as the “Proposed Project”
 “Fallowing Only” is the conservation program described in “Alternative Four”

RESOURCE AREAS	IID SERVICE AREA AND AAC		SALTON SEA		LCR		SDCWA SERVICE AREA	
	All Measures	Fallowing Only	All Measures	Fallowing Only	All Measures	Fallowing Only	All Measures	Fallowing Only
Hydrology and Water Quality	3	1	1	1	1	1	1	1
Biological Resources	2	1	2	2	2	2	1	1
Geology and Soils	1	2	1	1	1	1	1	1
Land Use	1	1	1	1	1	1	1	1
Agricultural Resources	3	3	1	1	1	1	1	1
Recreation	1	1	2	2	1	1	1	1
Air Quality	2	2	3	3	1	1	1	1
Cultural Resources	2	2	2	2	1	1	1	1
Noise	2	2	1	1	1	1	1	1
Aesthetics	1	1	2	1	1	1	1	1
Public Services and Utilities	1	1	1	1	1	1	1	1
Transportation	1	1	1	1	1	1	1	1
Growth-Inducing Impacts	1	1	1	1	1	1	1	1
Indian Trust Assets	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Transboundary Impacts	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Socioeconomics	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Environmental Justice	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

HATCH AND PARENT
21 East Carrillo Street
Santa Barbara, CA 93101

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A. PETITIONERS HAVE DEMONSTRATED BY SUBSTANTIAL EVIDENCE THAT WITH THE IMPLEMENTATION OF PROPOSED MITIGATION, THE CONSERVATION AND TRANSFER PROJECT WILL HAVE NO SIGNIFICANT IMPACTS ON FISH, WILDLIFE AND OTHER INSTREAM USES IN THE LCR AND SDCWA SERVICE AREA REGIONS

As illustrated by the table above, the Conservation and Transfer Project, irrespective of the method of conservation utilized, will have no significant impacts on fish, wildlife and other instream uses with the implementation of the proposed mitigation measures in either the LCR or SDCWA service area regions.

1. Most Parties Either Support or Do Not Oppose the “Transfer” Aspects of the Conservation and Transfer Project: Their Concerns Relate to the Form of Conservation and the Impacts on the Salton Sea

First, it should be noted that with only two exceptions (discussed below), nearly all parties to the hearing indicated that they either supported the transfer aspects of the Amended Petition (i.e., those aspects of the Conservation and Transfer Project that could potentially give rise to environmental impacts in the LCR and/or SDCWA service area regions) and/or agreed that it was a necessary and critical element to achieving compliance with the California Plan. For example:

- Mr. Gilbert: The transfer has statewide importance and is considered critical to many, especially in Southern California. (RT, at 523:16-18; *see also* RT, at 534:20-24 [Walker]; RT, at 548:25 to 549:2 [Cox].)

* * *

- Mr. Rodegerdts: Would you consider yourself to be opposed to this transfer?
- Mr. Du Bois: No. I am not opposed to it. I think it could be beneficial for the whole Imperial County and for the Irrigation District. (RT, at 490, at 21-25.)

* * *

- Mr. Slater: Is it your testimony that you are not opposed to the transfer, correct?
- Mr. Gruenberg: That’s correct. (RT, at 1238:2-5.)

* * *

- Mr. Cohen: Let me start by saying that the Pacific Institute recognizes the need for the proposed water transfer. We also support the general objective of reducing California reliance on Colorado River water. . . . (RT, at 31:18-21.)

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- Mr. Fletcher: This opening statement was prepared in consultation with the Planning and Conservation League, National Audubon Society of California, National Wildlife Federation and Sierra Club of California. And those groups concur in the statement. . . . We request that the Board approve this transfer only upon condition that it causes no reduction in inflows to the Sea, at least in the short term. (RT, at 1472:10-14; RT, at 1481:10-13.)

* * *

- Mr. Slater: Is it your testimony then that if the conservation program employed would not expose the sediments, that your concerns would be predominantly addressed?
- Mr. Schade: Absolutely. (RT, at 1777:18-22; *see also* RT, at 1599:23 to 1600:24 [Krantz]; RT, at 1910:23 to 1911:8 [Taylor]; RT, at 1910:17-22 [Warnock].)

2. IID and the USBR’s Environmental Impact Analysis for the LCR and SDCWA Service Area Regions Concludes That the Conservation and Transfer Project Will Have No Significant Impacts in the LCR or SDCWA Service Area Regions

The EIR/EIS concludes and Mr. Larry Purcell testified that, with the implementation of mitigation measures, the Conservation and Transfer Project will have no significant impacts on any resource area required to be analyzed by CEQA in either the LCR or SDCWA Service Area regions. (*See* SDCWA Exh. 40, at 8 (table); RT, at 1092:25 to 1093:7.)

With respect to the LCR, Petitioners have agreed to implement a suite of conservation measures, including biological mitigation measures recommended by the USBR, thereby ensuring that any identified potentially significant impacts would be reduced to less than significant levels. (SDCWA Exh. 40, at 13; RT, at 2811:8-14.) Moreover, implementation of these conservation measures would also benefit a great number of species and their habitat in and along the LCR. (SDCWA Exh. 40, at 13.)

The EIR/EIS also concludes that the Conservation and Transfer Project will have no impacts of any kind in the San Diego service area region because the project will require no new pipelines, no new facilities, and no construction in San Diego County and will cause no additional water supplies to be delivered to San Diego County. (SDCWA Exh. 40, at 9; RT, at 1093:10-23.) The EIR/EIS also concludes that the Conservation and Transfer Project is not growth-inducing because it would not provide

1 additional water for the SDCWA area and would not increase the amount of water delivered to southern
2 California. (SDCWA Exh. 40, at 15; IID Exh. 55, Vol. 1, at 5-39, 5-40.)

3 No party has offered credible evidence that disputes or calls into question these conclusions.
4 However, because NWF argued that the Conservation and Transfer Project would adversely impact
5 sensitive species habitat in San Diego County²⁰ as a result of having induced growth in the region (NWF),
6 and the CRIT argued that the project would adversely impact cottonwood and willow habitat along the
7 LCR (CRIT), these arguments are addressed below.

8 **a. With the Implementation of Conservation Measures, Substantial**
9 **Evidence Demonstrates that the Conservation and Transfer Project**
10 **Will Have No Significant Impacts in the LCR Region**

11 The CRIT disputes the accuracy of the EIR/EIS's conclusion that the proposed change in point of
12 diversion (from Imperial Dam to Lake Havasu) would result in insignificant water surface elevation changes.
13 Mr. Land testified that reduced flows along the LCR would adversely impact riparian species, especially
14 those newly established in the Akahav Tribal Preserve. (RT, at 2309 - 2317.) However, Mr. Land
15 conceded that even under existing conditions flows at Parker Dam ²¹ vary by as much as 60 inches per day
16 (RT, at 2326) and yet despite these fluctuations, the restoration of cottonwood and willow habitat in the
17 Akahav Tribal Preserve has been successful (RT, at 2326). In other words, presently there is sufficient
18 inundation of riparian habitat along the LCR to support these species. The EIR/EIS concludes that no
19 change in water flows – daily highs and lows – would occur as a result of the Conservation and Transfer
20 Project, but that the duration of the river's daily highs would decrease slightly. (IID Exh. 55, Vol. 1, at 3.2-
21 105; RT, at 2328.) Mr. Land provided no evidence to dispute the EIR/EIS conclusion that this slight
22 decrease in the duration of the river's high flows would have no significant impact on riparian species. (RT,
23 at 2346; *see generally* RT, 2309 - 2350.)

24 Further, Mr. Land acknowledged that Petitioners' have agreed to monitor, and replace if
25 necessary, riparian habitat along the LCR occupied by the willow flycatcher. (RT, at 2328-2330.) In fact,

26 20/ Although NWF argued that the Conservation and Transfer Project would have significant
27 environmental effects throughout the area identified as the "hydrocommons" (apparently an area that
28 includes the Colorado River, southern California and northern Baja California), NWF appears to be most
concerned with the project's potential impacts in San Diego County.

21/ The Tribal Preserve is located in close proximity to Parker Dam. (RT, at 2325.)

1 despite the fact that the EIR/EIS concludes that only between 186 and 279 acres of cottonwood/willow
2 habitat could potentially be impacted by the project, Petitioners could be responsible for up to 1,116 acres
3 of cottonwood/willow habitat. (IID Exh. 55, Vol. 1, at 3.2-108; RT, at 2329 - 2330.) It appears that Mr.
4 Land's main concern is with the fact that the EIR/EIS does not specify the actual method by which
5 monitoring will be conducted. (RT, at 2347.) This testimony, however, does not mean that the underlying
6 analysis of the extent of potential impacts is itself flawed or inadequate.

7 **b. No Party Has Provided Credible Evidence That the**
8 **Conservation and Transfer Project Will Adversely Impact**
9 **Fish, Wildlife, and Other Instream Beneficial Uses in the**
10 **San Diego Region**

11 Perhaps in recognition that SWRCB decisions regarding growth inducement have deferred
12 mitigation for such impacts to the local land use agencies, NWF pursued another tack. Witnesses for the
13 NWF (Mr. Jones and Dr. Michel) testified, essentially, that the Conservation and Transfer Project will
14 provide a new and additional imported water supply to the San Diego region, which in turn will induce new
15 growth, which in turn will cause urban sprawl, which in turn will cause the loss of open space areas
16 inhabited by sensitive species, which in turn will adversely impact such species. This tenuous chain of logic
17 is based entirely on one assumption – that in “southern California, where water is an imported resource,
18 it is inherently true that in urbanizing areas, any increase in the availability or, or improvement in the reliability
19 of water, is growth-inducing” (NWF Exh. 3, at 1) -- even a one percent increase. (RT, at 2020.)
20 However, on cross-examination, Mr. Jones later conceded that this was not really a fair characterization.

- 21 • Mr. Slater: So it is not true that making water more reliable involves
22 growth, correct?
- 23 • Mr. Jones: It is different from circumstance to circumstance.
- 24 • Mr. Slater: So it is not inherent?
- 25 • Mr. Jones: Not with, say, for example, within the hypothetical you
26 provided for me.
- 27 • Mr. Slater: It is not inherent, correct?
- 28 • Mr. Jones: Not universally, absolutely.

(RT, at 2027:2-10.) NWF's argument regarding growth-inducement only goes downhill from here.

Irrespective of whether the Conservation and Transfer Project will induce growth in San Diego

1 County, and even assuming *arguendo* that Water Code section 1736's "fish, wildlife, or other instream
2 beneficial uses" includes fish and wildlife in the proposed place of use, San Diego County – which Petitioner
3 SDCWA contends it does not²² – no party has provided credible evidence that the Conservation and
4 Transfer Project will adversely impact fish, wildlife, and other instream beneficial uses in the San Diego
5 region. (*See generally* NWF Exh. 3 (discussing growth-inducement only); NWF Exh. 14 (alleging
6 assorted water quality and other impacts associated with urban sprawl, but without substantiating evidence);
7 RT, at 1860:3-9.)

8 **B. PETITIONERS HAVE DEMONSTRATED BY SUBSTANTIAL EVIDENCE**
9 **THAT WITH THE IMPLEMENTATION OF PROPOSED MITIGATION, THE**
10 **CONSERVATION AND TRANSFER PROJECT WILL HAVE NO**
11 **SIGNIFICANT IMPACTS ON FISH, WILDLIFE AND OTHER INSTREAM**
12 **USES IN THE IID SERVICE AREA, AAC AND SALTON SEA REGIONS**

13 **1. The Salton Sea Has No Traditional Standing Under Water Code Section**
14 **1702 or Section 1736**

15 22/ We have identified no SWRCB decision in which the SWRCB denied a petition for change made
16 pursuant to Water Code section 1700 *et seq.* based on unreasonable effects on fish, wildlife or other
17 beneficial uses in the area of the proposed use, as opposed to the area of existing use. For example, in *In*
18 *the Matter of Permit 20971* . . . (2001) WR Ord. 2001-20, 2-3, the SWRCB made clear that its analysis
19 was limited to the *existing* place of use only:

20 The proposed temporary urgency change involves the addition of 35 acres
21 of existing vineyard to the authorized place of use under Permit 20971.
22 The maximum amount of water to be supplied to the place of use is 7.5
23 acre-feet. The petitioner has stated that in anticipation of this action, the
24 petitioner has reduced the amount of water used within the existing,
25 permitted place of use. Thus, the proposed temporary urgency change
26 should not result in an increase in consumptive use under Permit 20971 or
27 a resultant increase in the amount of water diverted from Carneros Creek,
28 and therefore should not unreasonably affect fish, wildlife, or other
instream beneficial uses within Carneros Creek.

29 Additionally, the proposed place of use is an existing vineyard, which
30 would have been irrigated absent the failure of a groundwater well. The
31 water will be supplied to the proposed place of use via a temporary 4-
32 inch-diameter pipeline laid on the ground. Therefore, the delivery and
33 application of water to the proposed place of use should not unreasonably
34 affect fish, wildlife, or other instream beneficial uses within Carneros
35 Creek.

36 Further support of this conclusion arises from the fact that the SWRCB has construed the term
37 "legal user of water," to include fish, wildlife, and other instream uses. (*See In the Matter of License*
38 *11395* (1997) WR 98-01.) Given that "legal users of water" includes only those parties with rights at the
location of the existing use, it is impossible for a party (or fish and wildlife) to have present legal rights to
water at the location of the proposed use because, by definition, that use is not yet in existence.

1
2 As discussed herein, only “legal users” are entitled to protection from substantial injury in the
3 context of a petition for change. A “legal users” include only those persons having a legal right in the source
4 of the water supply sought to be transferred – i.e., the Colorado River. Unlike IID, CVWD and MWD,
5 among others, the Salton Sea does not have a right to divert water from the Colorado River. (BCPA §
6 5, codified at 43 U.S.C. 617d (“No person shall have or be entitled to have the use for any purpose of the
7 water stored as aforesaid except by contract made as herein stated”).) There is and can be no contract
8 for deliveries to the Salton Sea since uses are limited by federal law to “irrigation and domestic uses.” (*See*
9 *also* SSA Exh. 9, at § 101(b)(2)(C)(i) and 101(b)(3) (establishing feasibility study assumptions based on
10 reduction in inflows into the Salton Sea Basin of 800,000 AFY, and prohibiting options that rely on
11 additional water from the Colorado River); SSA Exh. 8, at § 8; Compact, Article III(e); BCPA, § 5.)

12 Additionally, while it is true that the statutory language “legal users” has been construed by the
13 SWRCB to include fish, wildlife, and instream uses (*In the Matter of License 11395, Merced Irr. Dist.*
14 (1998) WR Ord. 98-01)), the Salton Sea arguably is not a traditional “instream use” within the meaning
15 of Water Code section 1736.

16 The Salton Sea is a terminal lake with no surface water discharges. The Sea was formed by an
17 accident in 1905 when Colorado River flows breached an irrigation control structure and were diverted
18 into the Salton Basin for about 18 months. It is now fed almost exclusively by irrigation drainage flows from
19 the Imperial, Coachella and Mexicali Valleys, with smaller contributions from municipal effluent and
20 stormwater runoff. (SSA Exh. 6, at 1; SSA Exh. 11, at § 1.1.) Thus, the Salton Sea has had no natural
21 source of supply for nearly a century and there is no credible evidence of hydrologic connectivity between
22 the Colorado River and Salton Sea today. (RT, at 1492-1494 (describing possible connectivity prior to
23 1905) [Krantz].) It is by no means an “instream” resource as that term as previously been interpreted by
24 the SWRCB. (*In the Matter of Permit 20971 . . .* (2001) WR Ord. 2001-20, 2-3; *see also* footnote
25 __ herein.)

26 To the extent that the survival of beneficial uses in the Salton Sea are dependent upon the continued
27 ordering, importation and tailwater discharges from IID’s customers, they stand on tenuous factual and legal
28 grounds. History demonstrates that IID’s orders of Colorado River water vary from year to year. In some

1 years, diversions have actually been less than would be the case after the Conservation and Transfer
2 Project and the QSA were implemented.

3 Consumptive uses of tailwater or even return flows from foreign water would have no legal claim
4 to compel either the continued importation or the abandonment of the imported supply. Typically, an
5 appropriator that imports water may salvage and recapture the water without regard to the impact on
6 subsequent appropriators or riparian uses. (Bloss v. Rahilly (1940) 16 Cal2d 70, 74-76 (riparian rights
7 have no right to the foreign water); Stevens v. Oakdale Irr. Dist (1939) 13 Cal.2d 343, 348-353 [90 P.2d
8 58, 61-63]) If the SWRCB is to give recognition to the beneficial uses that make use of the tailwater return
9 flows, by requiring protection, it will be granting fish and wildlife a right generally superior to other
10 consumptive uses.

11 Nevertheless, Petitioners concede that the SWRCB has an independent obligation to consider the
12 effects of proposed water diversions fish and wildlife on public trust resources and to protect those
13 beneficial uses where feasible. (*In the Matter of City of Thousand Oaks* (1997) Dec. 1638, at 32.) But
14 this obligation extends only to public trust resources, as opposed to the Salton Sea itself. The SWRCB
15 has already addressed this issue in the specific context of considering IID's water rights and concluded that
16 a reduction of inflow, similar to that which would occur with implementation of the Conservation and
17 Transfer Project, to the Salton Sea would not violate the SWRCB's duty to protect the public trust.

18 A statement presented by the Salton Sea Fish and Wildlife Club at the
19 Board meeting on June 21, 1984 urged that an order resulting in reduction
20 of inflow to the Salton Sea would violate the Board's duty to protect the
21 public trust. The Board recognizes the beneficial effects of freshwater
22 inflow on Salton Sea salinity. The Board also recognizes, however, that in
23 the absence of an expensive salinity control project, the salinity will
24 inevitably increase unless ever greater amounts of freshwater are diverted
25 into the Salton Sea resulting in an ever larger body of water. The public
26 trust doctrine is based upon the State's ownership of navigable waterways
27 and underlying lands as trustee for the benefit of the people. Colberg Inc.
28 v. State of California (1967) 67 Cal.2d 408, 416; 62 Cal.Rptr. 401, 406.
Upon its admission to the Union in 1850, California acquired title as
trustee to navigable waterways and underlying lands. National Audubon
Society v. Los Angeles (1983) 33 Cal.3d 419, 435, 189 Cal.Rptr. 346,
355. 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. 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. Although we believe that maintaining
present levels of inflow is an improper way to postpone increases in the
salinity level, we are encouraged by the District's concern about the

1 fishery and by the discussion of physical solutions which could preserve
2 the fishery indefinitely.

3 (*In The Matter of Imperial Irrigation District* (1984) WR Ord. 84-12, at 4, n.1) (emphasis added).)

4 In context, adverse impacts to the Salton Sea, even if found to be significant, provide no legal basis
5 for denial of the Amended Petition. The Salton Sea is neither a “legal user” of water, and “instream use”
6 or a public trust resource deserving of protection under Water Code Section 1736. However, and most
7 importantly, as described more fully below, substantial evidence demonstrates that all significant impacts
8 to fish, wildlife or other instream uses at the Sea can be mitigated with the implementation of the proposed
9 HCP.

10 **2. The Baseline Established for the Salton Sea is Appropriate**

11 As required by CEQA, the EIR/EIS developed and employs a “Baseline” of environmental
12 conditions against which to evaluate potential impacts associated with the Conservation and Transfer
13 Project. (*See* 14 C.C.R. § 15125.) Once Baseline conditions are established, impacts can be evaluated
14 to determine whether they are significant by comparing Project impacts to the Baseline conditions.

15 The lead agencies sought to develop a reliable method to simulate the variability and trends that are
16 an intrinsic part of the existing hydrologic conditions, as well as to predict the effects of the conservation
17 program over the 75-year project term. (Final EIR/EIS, at 3-17.) To achieve these goals, the following
18 steps were taken in developing the Baseline. First, adjustments to the available historical record were made
19 to achieve accuracy and completeness. Second, the historical record was projected to reflect existing
20 trends carried into the future. This data were adjusted based on reasonable, anticipated future changes,
21 specifically:

- 22 • naturally-occurring increases in Colorado River salinity;
- 23 • yet-to-be-realized effects of projects implemented under the 1998
24 IID/MWD Agreement; and
- 25 • limitations on the quantity of Colorado River water diverted pursuant to
26 Priorities 1, 2, and 3 for normal-year hydrology in the Colorado River to
3.85 MAFY, the total entitlement held by Priorities 1, 2 and 3 under the
Seven-Party Agreement.

27 (IID Exh. 55, Vol. 1, at 3.0-14.)

1 By including a future projection of existing conditions in the Baseline, the EIR/EIS distinguishes
2 between effects that would be caused by the Conservation and Transfer Project and those that are
3 reasonably expected to occur from existing conditions and trends irrespective of whether the Conservation
4 and Transfer Project is approved and implemented. (IID Exh. 55, Vol. 1, at 3.0-14.) IID is not
5 responsible or required under CEQA to mitigate for impacts caused by other conditions, including a trend
6 of degrading conditions at the Salton Sea. (14 C.C.R. § 15092.)

7 In response to comments following publication of the Draft EIR/EIS, the lead agencies have
8 reexamined the assumptions on which the Baseline was developed and performed a sensitivity analysis to
9 determine whether changes in any of these key assumptions would significantly alter the impact analysis set
10 forth in the Draft EIR/EIS. They have concluded that the use of the projected Baseline and the assumptions
11 that were challenged are reasonable and appropriate, and the sensitivity analysis has confirmed that the use
12 of the Baseline has not resulted in an underestimation of project impacts. (Final EIR/EIS, at 1-12.) In fact,
13 the sensitivity analysis suggests that the Baseline assumptions used in the Draft EIR/EIS are well within the
14 range of accuracy and reasonableness. (Final EIR/EIS, at 3-26.)

15 As such, the Baseline utilized by the EIR/EIS is reasonable and appropriate and it is within the lead
16 agencies' discretion to adopt this analytical method. (Final EIR/EIS, at 3-21; Save Our Peninsula
17 Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 120 (recognizing a legal
18 agency's discretion to establish an appropriate baseline); Fat v. County of Sacramento (2002) 2097
19 Cal.App.4th 1270, 1277 [119 Cal.Rptr.2d 403].)

20 3. The Salton Sea is a Dying Resource

21 The current elevation of the Salton Sea is approximately -228 feet. (IID Exh. 55, Vol. 1, at 3.1-
22 69.) Under the Baseline, it is anticipated that as a result of reduction of inflow to the Sea, the Salton Sea
23 is expected to experience a seven-foot decline in elevation over a 75-year period. (Final EIR, at 3-25; IID
24 Exh. 55, Vol. 1, at 3.1-128.)

25 The Baseline sensitivity analysis performed for the EIR/EIS also indicates that, with 90 percent
26 certainty, salinity of the Salton Sea will increase to 60 ppt between 2018 and 2030 under the Baseline, with
27 a mean of 2023. (Final EIR/EIS, at 3-26; IID Exh. 55, Vol. 1, at 3.1-128.) The lead agencies have
28 determined that the best available information suggests that growth, survival and reproduction of tilapia,

1 which have a high salinity tolerance and are a staple food for fish-eating birds, would begin to decline at
2 about 60 ppt. (Final EIR/EIS, at 3-37;²³ IID Exh. 55, Vol. 1, at 3.2-73.)

3 Substantial additional evidence indicates that the Salton Sea is dying irrespective of whether the
4 Conservation and Transfer Project is implemented. Even those parties most interested in preserving and
5 even restoring the Salton Sea as habitat for birds recognize that the Sea, *without restoration*, will
6 inevitably become so toxic to fish species that their potential to reproduce and continue to exist in this
7 hyper-saline environment will be lost entirely. (RT, at 1282; RT, at 1211:7-8; RT, at 1244:1-3; RT, at
8 1268:9-17; RT, at 1273-1274; RT, at 1279:21-24; RT, at 1282:10-25; RT, at 1283-1284; RT, at
9 1304:18-21].) The SWRCB too has recognized the Salton Sea’s inevitable fate. (WR Ord. 84-12, at 4,
10 n. 17.) (“The Board also recognizes, however, that in the absence of an expensive salinity control project,
11 the salinity will inevitably increase unless ever greater amounts of freshwater are diverted into the Salton
12 Sea resulting in an ever larger body of water.”)

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27 23/ Although some uncertainty relating to the salinity threshold for tilapia exists, the 60 ppt threshold
28 is “based on the best professional judgment of scientists very familiar with this species in the Salton Sea and
no information could be found in the scientific literature to suggest a different threshold should be used.”
(Final EIR/EIS, at 3-37.)

1 **4. If IID Pursues A Fallowing Program, All Potentially Significant Impacts to**
2 **Fish, Wildlife, and Instream Impacts Associated with IID’s Conservation**
3 **Program Are Fully Mitigated by Implementation of the HCP**

4 As illustrated by the table above at page ____, if IID pursues a fallowing program for purposes of
5 conserving water for transfer and for mitigation, all potentially significant environmental impacts to fish,
6 wildlife or other instream uses associated with the Conservation and Transfer Project are made “less than
7 significant” with implementation of the HCP.

8 Implementation of the HCP would avoid project effects on salinity until 2035²⁴ and fully mitigate
9 for project impacts on fish-eating birds by providing water inflow to the Salton Sea to offset inflow
10 reductions caused by the Conservation and Transfer Project. This mitigation strategy would maintain
11 salinity increases and elevation decreases resulting from the Conservation and Transfer Project. In other
12 words, IID’s responsibility under the HCP is two-part: first, IID must maintain inflow levels sufficient to
13 offset the reduction associated with implementation of the project to 2030; and second IID must maintain
14 sufficient inflows to the Sea sufficient to maintain the salinity levels at below 60 ppt. (Final EIR/EIS, at 3-37
15 to 3-39.) The annual amount of mitigation water would be equal to the actual inflow reduction caused by
16 the water conservation and transfer component of the Conservation and Transfer Project plus or minus an
17 amount of water necessary to maintain the target salinity trajectory. (Final EIR/EIS, at 3-37.) Thus,
18 depending on circumstances not yet know, this may result in IID’s discharging more water than the quantity
19 of water conserved for transfer. (Testimony of Dr. Eckart, July 8, 2001 (RT citation not yet available).)

20 Under this approach, water for mitigation purposes could be provided from fallowing, from any
21 available water source, or a combination thereof. (Final EIR/EIS, at 1-5.) However, because water
22 sources other than fallowing have not yet been identified, the EIR/EIS evaluates the impacts associated with
23 the conservation of water for mitigation purposes by fallowing only. (Final EIR/EIS, at 1-6, n.1.)

24 No party presented credible evidence that the HCP, if implemented, would be insufficient to
25 mitigate impacts to the Salton Sea. In fact, almost all testimony regarding the HCP focused on the
26 adequacy of HCP1. (*See, e.g.,* RT, at 1351-1387.) However, as noted earlier, HCP1 is no longer

27
28 ^{24/} The HCP would provide mitigation water to the Sea until 2030, but because the elevation of the Sea
would be maintained above the Baseline projection up to 2030, the elevation would not fall below the
Baseline projection until the year 2035. (Final EIR/EIS, at 3-39.)

1 proposed as mitigation for impacts resulting from implementation of the Conservation and Transfer Project.
2 Additionally, many parties expressed support for the “HCP2 Approach” – now simply, the proposed HCP.
3 (RT, at 1305:5-7, RT 1390:9-16; RT 1601:17 - 1602:2.)

4 **a. Hydrology/Water Quality Impacts Would Occur Only If An**
5 **“All Measures” Program Were Employed, And Then Only**
6 **After 2030**

7 If the Conservation and Transfer Project were implemented using “all measures” of conservation,
8 potentially significant and unavoidable impacts in the hydrology and water quality resource area as a result
9 of increased selenium, Total Dissolved Solids, and Total Suspended Solids in IID’s surface discharges to
10 various drainage watercourses and groundwater, were identified. (Final EIR/EIS, at 4-5 to 4-6
11 (summarizing impacts associated with increased selenium concentrations).) However, with
12 implementation of the HCP, IID will conserve additional water to offset inflow reductions resulting from
13 water conservation and transfer and make this additional water available to the Sea as necessary to
14 maintain the salinity of the Sea below 60 ppt until 2030. During this period, selenium concentrations and
15 salinity in IID’s drains and in the rivers feeding the Sea could be equal or lower than under the Baseline,
16 depending on the source and source location of the mitigation water. Thus, the effects to biological
17 resources from changes in water quality and quantity in the drains and rivers as a result of implementation
18 of the Conservation and Transfer Project would be avoided during the first 30 years of project
19 implementation. (Final EIR/EIS, at 4-45.) The Final EIR/EIS has determined that no reasonable or
20 practical mitigation exists for these impacts. (Final EIR/EIS, at 3-8.)

21 On the other hand, the “fallowing only” conservation program would result in decreased concen-
22 trations of the same items to the same watercourses and groundwater, which is considered a beneficial
23 impact. (IID Exh. 55, Vol. 1, at 3.1-104-159.) Given that the Final EIR/EIS recognizes the
24 impracticability of utilizing an “all measures” conservation program in concert with the proposed HCP (Final
25 EIR/EIS, at 1-6, n.1), it is reasonable to conclude that the “all measures” conservation program, as
26 presently described, would not be employed in favor of a fallowing program and therefore all
27 hydrology/water quality impacts would become less than
28

1 **VIII. IMPACTS OF THE CONSERVATION AND TRANSFER PROJECT UNRELATED TO**
2 **LEGAL USERS OR BENEFICIAL USES**

3 **A. WITH IMPLEMENTATION OF THE HCP, SIGNIFICANT AND UNAVOID-**
4 **ABLE IMPACTS TO AIR QUALITY ARE AVOIDED ENTIRELY UNTIL**
5 **AFTER 2035**

6 As described herein, the HCP would maintain inflows to the Sea consistent with the Baseline
7 trajectory such that Sea levels would be maintained and the Conservation and Transfer Project would have
8 no impacts on air quality, at least until 2035 and potentially for the entire term of the project. Given a
9 great number of dissimilarities between the existing conditions at Owens and Mono Lakes and the Salton
10 Sea that tend to suggest that a reduction in water levels at the Sea would not have the kinds of air quality
11 effects that have occurred at Owens and Mono Lake. This, along with other factors and considerations
12 discussed in the EIR/EIS, Thus, the best-case evaluation of the Conservation and Transfer Project would
13 result in a “no impact” finding. However, given some lingering uncertainty regarding the actual air quality
14 impacts of Salton Sea exposed shoreline exposure as a result of a lack of sufficient records or research in
15 this regard, the EIR/EIS has assumed a “worst-case” scenario that some air quality problems potentially
16 may occur at some date after 2035. (Final EIR/EIS, at 3-47 to 3-50.)

17 **1. Implementation of a Four-Step Mitigation And Monitoring Program Would**
18 **Reduce Air Quality Impacts to Less Than Significant Levels**

19 To address potentially significant air quality impacts occurring at some date after 2035, the EIR/EIS
20 proposes a four-step mitigation plan that would be implemented to mitigate significant PM10 emissions and
21 incremental health effects (if any) from Salton Sea sediments exposed by the Conservation and Transfer
22 Project after such time as IID’s obligation to maintain flows to the Sea pursuant to the HCP has ceased.
23 This mitigation program would include: (1) restricting access to exposed shoreline; (2) implementation of
24 a research and monitoring program to evaluate changes occurring in the environmental setting as the Sea
25 recedes; (3) creation or purchase of offsetting emission reduction credits; and (4) direct emission reductions
26 at the Sea.

27 ///

28 In other words, the proposed four-step mitigation plan would, if necessary, mitigate for any
significant air quality impacts occurring after 2035 by use of dust control measures and, if feasible, re-

1 wetting of emissive areas exposed by the project. (Final EIR/EIS, at 3-53.) This proposed mitigation is
2 potentially sufficient to avoid or suppress PM10 emissions to less than significant levels. Nevertheless,
3 because some uncertainty remains regarding the success of the proposed mitigations, the EIR/EIS makes
4 the most conservative conclusion that the air quality impacts are potentially significant and cannot be
5 mitigated. (Final EIR/EIS, at 3-53.)

6 **2. Air Quality Impacts Could Be Minimized With Implementation of a**
7 **Temporary/Rotational Fallowing Program**

8 A temporary/rotational land management program would likely result in fewer impacts to air quality.
9 Mr. Underwood testified that it is estimated that the PVID Program – a temporary/rotational land
10 management program – will result in PM10 levels similar to or slightly decreased from current levels.
11 (SDCWA Exh. 48, at 2-3; SDCWA Exh. 50, at ES-7 to ES-8, 4-31 to 4-32; RT, at 2554, 2618; RT, at
12 2736, 1309, 1390.) Thus, in the event that a temporary/rotational fallowing program is employed for the
13 purpose of conserving water for transfer and/or mitigation, the air quality impacts identified in the Final
14 EIR/EIS may be reduced to less than significant levels, irrespective of the mitigation measures proposed.

15 This is because Alternative Four, which evaluates the environmental impacts that potentially would
16 be associated with implementation of a fallowing-only program, presents the “worst-case” analysis of any
17 fallowing program by assuming that water will be conserved by permanent fallowing only. (RT, at 2736,
18 1309-1310.)²⁵

19
20 Thus, in the event IID’s Board of Directors elects to approve the Conservation and Transfer
21 Project that utilizes temporary/rotational fallowing instead of permanent fallowing, the potential air quality
22
23

24 ^{25/} It should be noted that the environmental evaluation and analysis provided in the EI/EIS necessarily
25 encompasses and evaluates any and all impacts that would be associated with a temporary/rotational
26 fallowing program (RT, at 2736), as well as any other fallowing program. (IID Exh. 55, Vol. 1, at 3.5-16;
27 ES-12 (defining fallowing to include both short-term and long-term fallowing). In other words, because
28 a temporary/rotational fallowing program will have fewer impacts than a permanent fallowing program like
that described in Alternative Four, it is therefore is a subset of the latter. (RT, at 2736, IID Exh. 55, Vol.
1, at 2-57 (“The purpose of the analysis of Alternative 4 is to assess the potential environmental impacts
of fallowing rather than to predict the exact method of fallowing or by whom it would be done.”).)

1 impacts identified as potentially occurring after 2030 could be avoided, if not mitigated for through the BMP
2 mitigation program.

3 **B. SIGNIFICANT AND UNAVOIDABLE IMPACTS TO AGRICULTURAL**
4 **RESOURCES WOULD OCCUR ONLY IF A PERMANENT FALLOWING**
5 **PROGRAM WERE IMPLEMENTED**

6 The EIR/EIS for the Conservation and Transfer Project identifies the reclassification of prime
7 farmland as the primary impact that would be associated with a permanent fallowing program (as described
8 in Alternative Four). This impact would arise by the fact that the conversion of farmland to alternative uses
9 (i.e., fallow land) would result in the reclassification of prime farmland and farmland of statewide
10 importance.

11 However, because the EIR/EIS assesses the possible “worst-case” scenario relating to the impacts
12 of a conservation program that includes fallowing by assuming that 100 percent of the fallowing used to
13 generate conserved water would be performed as permanent fallowing (IID Exh. 55, Vol. 1, at 3.5-11),
14 the agricultural resource impacts identified would not result if a temporary/rotational fallowing were
15 implemented instead. The EIR/EIS concludes that because rotational fallowing is consistent with existing
16 land uses, this approach would not result in the conversion or reclassification of any farmland, therefore
17 such a program would not have a significant environmental effect on agricultural resources. (IID Exh. 55,
18 Vol. 1, at 3.5-16; *see also* SDCWA Exh. 50, at ES-6 to ES-7; RT, at 2569-62.) Thus, in the event the
19 IID Board of Directors approves a temporary/rotation fallowing program for purposes of conserving water
20 for transfer and/or mitigation, no impacts to agricultural resources will result.

21 **C. GROWTH-INDUCEMENT**

22 **1. The Statutory Provisions Governing this Change Petition, SWRCB**
23 **Decisions Applying Those Provisions, and CEQA Confirm that the Alleged**
24 **Growth-inducing Impacts Are Not Within the Jurisdiction of the SWRCB**
25 **and Thus Need Not be Considered by the SWRCB in Approving the**
26 **Amended Petition**

27 By their plain meaning, the Water Code provisions that authorize changes to a water right permit
28 or license upon permission of the SWRCB do not require the SWRCB to consider whether such changes
will induce growth, either in the county of origin or in the area of the proposed use. (*See* Wat. Code §
1702 (providing only that the petitioner shall establish, to the satisfaction of the board, and the board shall
find, that the change will not operate to the injury of any legal user of the water involved); Wat. Code §

1 1736 (SWRCB must consider harm to any lawful user of water and adverse impact to fish, wildlife, or
2 other instream beneficial uses.)

3 Alternatively, CEQA also does not provide for grounds for the SWRCB’s consideration of growth-
4 inducement. As described above, the SWRCB is a “responsible agency” under CEQA. (Pub. Res. Code
5 § 21069; 14 C.C.R. § 15381.) As such, it is responsible for mitigating only those impacts that are within
6 its jurisdiction, i.e., matters governed by the Water Code and specifically Water Code section 1700 *et seq.*
7 (14 C.C.R. § 15096; *In The Matter of City of Thousand Oaks* (1997) Dec. 1638.) The SWRCB itself
8 has confirmed this point on numerous occasions. For example, in *In the Matter of Cambria Community*
9 *Services District* (1977) Dec. 1477, the SWRCB stated:

10 The Final EIR indicates that the expansion of the water system to serve
11 new subdivisions in accordance with the Cambria General Plan would be
12 facilitated by the proposed diversion. Since the California Coastal
13 Commission has jurisdiction over the land use in most of the District’s
14 service area, the Coastal Commission has the authority and has adopted
15 appropriate conditions to mitigate any adverse impacts of growth
16 inducement caused by the approval of this permit.

17 (Dec. 1477, at 13 (emphasis added).) Similarly, in *In the Matter of Big Basin Water Company* (1978)
18 Dec. 1482, the SWRCB concluded:

19 The Final EIR discusses the impact of new development in considerable
20 detail and this discussion will not be repeated. . . . Although approval of
21 this application does not guarantee any specific development, since
22 additional environmental clearances, approvals, and permits would be
23 required by other public agencies, the denial of this application might
24 effectively prohibit the intended development for lack of an adequate
25 water supply. A denial by this Board based solely on the ground of
26 growth inducement is not warranted. The appropriate level of growth in
27 this area is principally a matter for local agencies to decide.

28 (Dec. 1482, at 10 (emphasis added).)

29 Lastly, in *In The Matter of Petition For Assignment of State Filed Application 5645* (1999)
30 Dec. 1635, the SWRCB concluded:

31 As lead agency, [El Dorado County Water Agency] relied upon El
32 Dorado County to adopt a program to mitigate the project’s growth-
33 inducing effects of the proposed project, including secondary effects on
34 vegetation and wildlife habitat. The Board finds that El Dorado County is
35 the primary agency responsible for: (1) land use planning, (2) approving
36 development consistent with the county’s general plan, and (3) mitigating
37 the effects of development resulting from approved development within the
38 county. Thus, the Board will not adopt conditions to address these
39 secondary environmental effects.

1 (Dec. 1635, at 50) (emphasis added).)

2 Just as in Decision 1635, the SWRCB is required to consider, and if necessary, require mitigation
3 for, the alleged direct effects of the proposed transfer on fish, wildlife and other instream uses. This analysis
4 does not include consideration of growth-inducement in the proposed new place of use. This issue is more
5 appropriately left to local planning agencies with permitting authority and thus jurisdiction over the
6 development that NWF argues will occur.

7 In sum, neither the Water Code, CEQA and its Guidelines, or prior SWRCB decisions require or
8 authorize the SWRCB to consider, much less mitigate for, any perceived growth-inducing impacts that
9 could be associated with the SWRCB's approval of the proposed transfer.

10 **2. Substantial Evidence Demonstrates That the Amended Petition, if**
11 **Approved, Will Not Induce Growth**

12 Irrespective of how the conservation element of the Project is implemented by IID, SDCWA's
13 efforts to transfer conserved water from IID to SDCWA, if successful, will not be growth inducing. As
14 a resource agency having no land use regulatory power of its own, SDCWA merely provides water
15 facilities and supplies necessary to meet demands first determined by other public agencies having
16 Constitutional and statutory authority to regulate the pace, location, quality and quantity of land
17 development. SDCWA is simply seeking to match its firm water supplies to regional water needs
18 determined according to population growth first established by others. (SDCWA Exh. 47, at 2.) While
19 the SWRCB is not required to address the subject of growth inducement, the fact remains that the
20 conservation and transfer project will not be growth inducing.

21 SDCWA's General Manager, Maureen Stapleton, and SDCWA's Water Resources Manager,
22 testified to the fact that SDCWA's imports approximately 600 KAFY from MWD to meet current
23 demand. Of this amount, only about 320 KAFY is a firm and reliable supply. (RT, at 2726:6-9.) In the
24 event MWD's supplies were cut by as much as 700 KAFY (the difference between MWD's current
25 Colorado River diversions of 1.25 MAFY and its entitlement of 500 KAFY),²⁶ as the Secretary of the

26 _____
27 ^{26/} While MWD has stated that it will meet all future water requirements of its member agencies
28 (MWD Admin. Code § 4202), reliability of the MWD supplies in the future is dependent on many factors,
including MWD's efforts to ensure that the CRA continues to be operated at full capacity through
implementation of various programs and actions contained in the California Plan.

1 Interior could very well demand come December 31, 2002, as much as 280 KAFY of SDCWA’s
2 imported water supply could be at risk. (SDCWA Exh. 47, at 2.) The Conservation and Transfer Project
3 would allow SDCWA to convert up to 200 KAFY of these potentially unreliable supplies into a supply that
4 equates to the reliability SDCWA enjoys today. (SDCWA Exh. 47, at 2.) In other words, Colorado
5 River water obtained from IID as part of the Conservation and Transfer Program would simply replace
6 Colorado River water supplies presently purchased from MWD but which may not be available in the
7 future.

8 Because the water to be purchased from IID is merely replacement water, no additions or changes
9 to SDCWA’s water delivery and storage system would be required. No construction whatsoever in the
10 San Diego region would be required. Under the Exchange Agreement, the water SDCWA purchases from
11 IID will be delivered to MWD at the CRA intake facility at Lake Havasu, and MWD will deliver that same
12 amount of water to SDCWA at its normal “point of delivery” to SDCWA facilities. (SDCWA Exh. 40,
13 at 17.) In other words, under the Conservation and Transfer Project, SDCWA would continue to receive
14 the same quantity of Colorado River water, at the same point of diversion, and through the same facilities
15 as it does presently. The only difference would be that the water delivered to SDCWA would be water
16 of a senior priority, and thus would help to ensure the continued future reliability of that water supply.
17 (SDCWA Exh. 40, at 17.)

18 MWD’s CRA is full today and the Conservation and Transfer Project will ensure that it remains
19 full for the future. NWF contested this characterization but its witnesses erroneously assumed that
20 SDCWA would be able to receive additional water from MWD, despite the fact that a goal of the project
21 is to ensure that the CRA would remain full. Their testimony was that SDCWA would simply buy more
22 water from MWD once it had secured the water made available under the Transfer Agreement. However,
23 they were not familiar with the status of the available capacity within the SDCWA’s conveyance and
24 treatment system (RT, at 2032:18-25, RT, at 2033:1-2) or that the Emergency Storage Project was limited
25 in how it was to be used and operated. (RT, at 2035:12-20)

- 26 • Mr. Slater: So you would be surprised to learn that the project must be
27 operated for storage purposes, emergency storage purposes?
- 28 • Mr. Jones: Yes, that would surprise me. (RT, lines 21-25.)

1 As testified by Ms. Stapleton, the true facts that SDCWA's conveyance and treatment capacity
2 is essentially full and that the Emergency Storage Project is limited to use for Emergency Storage purposes
3 and is not available to provide additional water supply needs.

4 NWF witnesses also expressed some suspicion that a larger conspiracy to import more water from
5 IID was afoot. However, they were unable to identify any specific reasons for this suspicion other than the
6 fact that SDCWA may not have diligently responded to questions from their witnesses.

- 7 • Mr. Slater: You have no reason to disbelieve the testimony of the general
8 manager .. That they have no present plan, no pipeline locations identified,
9 no project to pursue?
- 10 • Dr. Michel: I have reason to disbelieve, yes?
- 11 • Mr. Slater: What is that?
- 12 • Dr. Michel: Because the officials have been quiet both in the United
13 States and Mexico and not forthcoming on that.
- 14 • Mr. Slater: So it is their silence?
- 15 • Dr. Michel: Their silence, right.

15 (RT: 2006 lines 4-14.) Moreover, SDCWA has no additional capacity in existing treated water pipelines
16 to import additional supplies beyond those contemplated by the Conservation and Transfer Project.
17 Further, there is no proposal to add additional capacity at this time. (SDCWA Exh. 47, at 4.)

18 Contrary to the characterization of SDCWA offered by NWF (*see generally*, NWF Exh. 3; NWF
19 Exh. 14),²⁷ SDCWA is not responsible for developing general plans, instituting growth management
20 ordinances or issuing land use approvals under zoning and building ordinances. SDCWA has no land use
21 regulatory authority and makes no decisions about whether an individual development is permitted or will
22 proceed. (SDCWA Exh. 47, at 3.) Rather, SDCWA is responsible for providing, concurrent with need,
23 wholesale water facilities, which together with local supplies of its member agencies and demand reduction
24

25 ^{27/} In fact, NWF witnesses demonstrated a fundamental misunderstanding of many of the fundamental
26 elements of the Conservation and Transfer Project. For example, with respect to the quantity of water to
27 be transferred, both Mr. Jones and Ms. Michel testified that as much as 300 KAFY could be transferred
28 to SDCWA pursuant to the Conservation and Transfer Project. (RT, at 1966, 2006.) This is not correct – the quantity proposed to be transferred to SDCWA is no more than 200 KAFY. (*See Amended Petition*, at 8.) (*See also* RT, at 2006-2014 (evidencing witness' unfamiliarity with nearly all of the essential terms of the proposed Conservation and Transfer Project).)

1 (conservation) programs, are sufficient to provide for the population previously planned and anticipated by
2 SANDAG and its component agencies.

3 In 1989, the legislature charged SDCWA with providing water sufficient to meet the needs of its
4 member agencies serving the San Diego Region. In 1993, SDCWA entered into agreement with
5 SANDAG²⁸ to use SANDAG's most recent regional growth forecasts in determining water demands and
6 the amount, types and phasing of facilities needed to serve the forecast population. (SDCWA Exh. 20.)
7 The intent of the agreement is to assure consistency between the land use and development regulations and
8 policies of the county and cities on the one hand, and the water supply and facility planning by SDCWA
9 on the other. SDCWA takes its lead from SANDAG. Based on the regional growth projections
10 developed by SANDAG, SDCWA plans, sizes and phases its water facilities and supplies to meet,
11 concurrent with need, the water demands of the region.²⁹

12 NWF argues, based entirely on literature reviews (*see, e.g.*, RT, at 1983-1984, 2000), theoretical
13 discussion not specific to the matter at issue (*see, e.g.*, RT, at 2001) and mere speculation (*see, e.g.*, RT,
14 at 2005-2006), that a more reliable water supply necessarily results in adverse impacts to quality of life and
15 to fish and wildlife resources in San Diego County. (NWF Exh. 3; NWF Exh. 14; RT, at 2021 (stating
16 that a increase in reliability from 98 percent to 99 percent would be “incrementally more growth inducing”).)
17 However, just the opposite is true. Maintaining and preserving reliable imported water supplies is more
18 likely to result in improved environmental conditions and an improved overall quality of life within San Diego
19 County than if water supplies were less reliable. (SDCWA Exh. 47, at 5.) The Southern California
20 economy has grown up in dependence upon that water. If the Colorado River should suddenly become
21 unavailable as a result of a failure of the QSA, and thus the Conservation and Transfer Project and
22 Guidelines, there could be serious impacts on the environmental conditions within Southern California.

23
24 28/ Measure C, passed by the voters in 1998, requires the County of San Diego and each city in the
25 county to participate in formulating a regional growth management plan. SANDAG, a joint-powers agency
26 comprised of all the local government agencies that have land use regulatory power in San Diego County,
27 was designated as the regional growth management review board.

28 29/ The Director of Planning for SANDAG, Mr. Michael McLaughlin, an expert witness, testified to
the fact that the availability of water supplies is not a factor formulating growth projections for the region.
“In fact, the availability and/or reliability of water supplies for the San Diego region, despite the close
coordination between SANDAG and SDCWA, in no way influences the forecasts SANDAG produces.”
(SDCWA Exh. 39, at 5:16-20.)

1 For example, if MWD were unable to offset reductions in Colorado River water while it was
2 securing replacement water from other sources, there could be lesser quantities of imported water and
3 corresponding loss of irrigation run-off available in local surface streams that may be enjoyed by fish and
4 wildlife. (SDCWA Exh. 47, at 5.) Similarly, loss of agricultural lands could adversely impact habitat. The
5 San Diego region has one of the most productive agricultural industries in the state, but it needs water to
6 survive. Orchards do not easily adapt in drought conditions and a prolonged shortage caused serious
7 adverse impacts on San Diego’s agricultural economy. (SDCWA Exh. 47, at 5.)

8 In sum, the Conservation and Transfer Project would not induce growth in the SDCWA service
9 area because it would not provide additional water for the SDCWA service area and would not increase
10 the amount of water delivered to southern California. Further, the Project would not involve any additions
11 or changes to the SDCWA water delivery and storage system (since the conserved and transferred water
12 would be delivered through systems that are already in existence or approved) or any other construction
13 in the San Diego area. Rather, the Conservation and Transfer Project would maintain the reliability of the
14 Colorado River supply that SDCWA has experienced in the past by reallocating the existing water supply
15 to provide greater assurance against drought shortfalls. Overall, the Conservation and Transfer Project,
16 if approved, would assist in the reduction of the historic water supply diverted from the Colorado River to
17 southern California – a substantial benefit for all of California.

18 ///

19 ///

20 **D. NO CONSIDERATION SHOULD BE GIVEN TO SOCIOECONOMIC**
21 **IMPACTS**

22 Although the EIR/EIS includes an analysis of the Conservation and Transfer Project’s potential
23 impacts in the areas of Indian Trust Assets, Transboundary Impacts, Socioeconomics and Environmental
24 Justice, no significance finding is made with respect to any of these resource areas in any geographic area
25 because such a finding is not required by CEQA, only NEPA. (National Env. Policy Act Regulations, 40
26 C.F.R 1500, *et seq.*) Nevertheless, because considerable attention has been given to the Conservation
27 and Transfer Project’s potential for resulting in socioeconomic impacts, these concerns are addressed here.

28

1 As explained below, the SWRCB has no legal basis to consider, let alone mitigate for, socio-
2 economic effects that may occur as a result of its approval of the Amended Petition. Indeed, the absence
3 of such express authority when compared to language relating to a consideration of economic effects
4 elsewhere in the Water Code, unquestionably demonstrates that the Legislature did not intend for the
5 SWRCB to consider social economic effects within the context of Water Code section 1700 *et seq.*
6 Accordingly, and correctly, no prior SWRCB decision, nor any common law opinion interpreting or
7 applying the “no injury” rule, as set forth in Water Code section 1700 *et seq.*, provides a precedent for
8 conditioning the transfer on socioeconomic grounds.

9 **1. The Water Code Does Not Provide Authority for the SWRCB to Review**
10 **Socioeconomic Effects Associated with The Proposed Conservation and**
11 **Transfer Program**

12 This hearing concerns a petition for change filed pursuant to Water Code section 1736. Section
13 1736 allows the SWRCB to approve a long-term transfer “where the change would not result in a
14 substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other in-
15 stream beneficial uses.” Section 1736 does not provide for review of socioeconomic effects. Indeed, no
16 provision in all of Division 2, Part 2, Chapters 10 and 10.5 (sections 1700 *et seq.*), dealing with all forms
17 of change petitions, provides for the consideration of socioeconomic effects.

18 Only two sections in the Water Code require consideration of socioeconomic effects in the context
19 of a transfer of water, but neither are applicable here. First, Water Code section 1810 (the Wheeling
20 Statute), which requires conveyance facility owners to make surplus capacity available for others to use
21 so long as fair compensation is paid and various conditions are met, requires the conveyance facility owner
22 (not the SWRCB) to find that such use may not unreasonably affect the overall economy or the environment
23 of the area from which the water is being transferred. (Wat. Code § 1810(d).) In this case, no “wheeling”
24 will occur as the transportation of the water to be transferred will be effected as a result of the Exchange
25 Agreement entered into by SDCWA and MWD. (SDCWA Exh. 14.)

26 Secondly, Water Code section 380 *et seq.*, which allows local or regional public agencies to
27 transfer surplus or voluntarily forego water without regard to service area limitations, is also not applicable
28 to the pending Amended Petition. Petitioners have not sought a transfer under Water Code Section 380
and consequently the findings set forth in Section 386 do not apply. Moreover, this section expressly

1 acknowledges that this chapter does not prohibit or restrict the transfer of water by a local or regional water
2 user pursuant to *other* provisions of law. (Water Code § 382(b).)

3 The fact that other provisions of the Water Code do include reference to economic impacts of
4 some kind, and Water Code sections 1700 *et seq.* do not, requires an interpretation that the legislature
5 specifically intended not to include such a basis for review. The cannon of statutory construction “*expressio*
6 *unius est exclusio alterius*,” holds that the listing of a series of applications implies the exclusion of others
7 (see United Farm Workers v. Agricultural Lab. Rel. Bd. (1995) 41 Cal.App.4th 303, 316 [48 Cal.Rptr.2d
8 696]; In re Timothy E. (1979) 99 Cal.App.3d 349, 354.) The fact that the Legislature has included a
9 consideration of socioeconomics in two unrelated statutes indicates that it did not intend for the SWRCB
10 to be burdened with such a review here. Accordingly, it is not surprising that no SWRCB decision
11 conditioned transfers upon mitigation of socioeconomic impacts.

12 **2. The Reasonable Use Doctrine Does Not Provide a Basis for Review of**
13 **Third Party Socioeconomic Impacts**

14 The County of Imperial contends that Article X, Section 2 of the California Constitution (the
15 “Reasonable Use Doctrine”) provides a basis for the SWRCB’s consideration of third party impacts.
16 (Policy Statement of Hank Kuiper, Imperial County (April 22, 2002).) Perhaps it is also a basis to bring
17 about world peace. There is about the same amount of law on the two subjects.

18 The interpretation of Article X, Section 2 offered by the County would literally turn the requirement
19 that a water user engage in reasonable and beneficial use on its head. Instead of reasonable and beneficial
20 use being the measure of the rights of an existing user, the County proposes an introduction of amorphous,
21 undefined standard that would suggest the economic impacts of a use and transfer be considered.
22 SDCWA fails to see how such an approach would be in the best interests of the rural counties. Inviting
23 a comparison of relative economic value is similarly bad public policy and it is actually anathema to the
24 protection that the County of Imperial seeks to obtain. The temptation to consider the comparative values
25 that two users may make of the water has more often been associated with saber rattling by urban areas
26 supported by claims of a higher and better use.³⁰

27
28

30/A legal argument that is not advocated here.

1 California law does not demand that water be applied to optimal uses. It does not demand that
2 water be reallocated from existing uses for the benefit of higher uses, without compensation being paid the
3 senior user. And it does not require a transferee or transferor to be burdened with unquantified economic
4 liabilities as a condition of improving the coordinated and efficient administration of water rights and
5 complying with the mandates of Article X Section 2.

6 **3. Socioeconomic Impacts Are Not Required to be Considered Pursuant to**
7 **the SWRCB’s Role as a Responsible Agency Under CEQA**

8 CEQA does not require IID, the lead agency, or the SWRCB, as a responsible agency, to consider
9 the socioeconomic effects of the Conservation and Transfer Project. In fact, Public Resources Code
10 section 21100, which lays out the essential elements of an EIR, makes no mention of such impacts. As
11 such, California courts have ruled that an EIR need not address the socioeconomic effects of the project.
12 (Marin Mun. Water Dist. v. KG Land California Corp. (1991) 235 Cal.App.3d 1652, 1661 [1
13 Cal.Rptr.2d 767] (“Generally social and economic changes resulting from a project are not treated as
14 significant environmental effects, either primary or secondary, which require EIR analysis.”).)

15 The EIR/EIS for the Conservation and Transfer Program includes an analysis of the socioeconomic
16 impacts that could arise as a result of the proposed transfer because NEPA requires that USBR, a federal
17 agency, consider these impacts. (42 U.S.C. § 4332; *see also* 40 C.F.R. § 1508.8.) However, as
18 described above, the SWRCB is not required to do the same.

19 **4. The Model Transfer Act Is Not the Law**

20 In response to questions posed by the County of Imperial, Professor Barton Thompson testified
21 about the “Model Transfer Act” (RT, at 379:25 to 382:19) and indicated that if the proposed transfer
22 included fallowing as a means of conservation, the SWRCB would be required to consider whether the
23 transfer would result in unreasonable impacts on the local economy. (RT, at 380:6-15.)³¹ However, the

24 _____
25 31/ Professor Thompson testified:

26 If this transfer were to permit fallowing . . . one of the things that the Board
27 would have to look at would be its impact on the local economy. And if
28 the Board concluded that that was unreasonable in light of the facts
involving the transfer, looking at all the various costs and benefits of the
transfer, then that would be a transfer that this Board under California law
would not be permitted to approve.

1 proposed “Model Transfer Act,” is not the law and therefore provides no basis for the SWRCB’s review
2 or consideration of socioeconomic impacts. A more interesting question might have been what Professor
3 Thompson thought of that portion of the Model Act and its treatment of socioeconomic impacts. For a
4 preview of what that might have been, we can review his article published in 1998:

5 Whether the government shall take any actions to protect communities
6 from the adverse consequences of water exports (other than to reduce the
7 cost of economic transition as it does in the case of other market shifts)
8 remains questionable.

8 (Thomas & Mueller, “Reflections on the ‘Model Transfer Act’ by the Natural Heritage Institute” (1996)
9 *Hastings W.-N.W. J. Envtl. L. & Pol’y* §§ 91, 99.)

10 As for the concern over fallowing, other respected environmental scholars suggest discussing long-
11 term transfers based on land management are mis-focused:

12 Disallowing long-term transfers based on land fallowing that would cause
13 “substantial harm” to the local economy might be highly inhibitory of the
14 very type of transfers that public policy should be encouraging. It is clear
15 that the water should move out of agriculture to meet the needs of the
16 water that is being used least productively in that sector. Fully 20% of the
17 water used in agriculture produces less than 5% of its profits.

16 (Thompson, “Takings, Public Trust, Unhappy Truths, and Helpless Giants, A Review of Professor Joseph
17 Sax’s Defense of the Environment Through Academic Scholarship” (1998) 25 *Ecology L.Q.* 363, 382.)

18 **a. As a Matter of Public Policy, the SWRCB’s Public Interest Review
19 Should Not Include Socioeconomic Effects**

19 We recognize that the SWRCB has previously used a liberal standard to review petitions for
20 change for treated waste water to ensure that the public interest is satisfied. (*See e.g., In the Matter of*
21 *Treated Waste Water Change Petition WW-20 of El Dorado Irr. Dist.* (1995) WR 95-9, at 6.) As
22 such, in this matter, the SWRCB might feel compelled to consider such impacts as part of its broader effort
23 to promote the public interest. However, even in those instances where the SWRCB has entertained
24 arguments presented by parties without legal standing (i.e., non-legal users),³² the SWRCB has limited its
25 review to those issues supported by the governing statute. For example, in *In the Matter of Treated*
26 _____
27

28 ^{32/} The SWRCB routinely recognizes persons appearing at hearings who are not applicants, petitioners,
or protestants of record. (WR 95-9, at 6.)

1 *Waste Water Change Petition WW-20 of El Dorado Irr. Dist.*, a third party's (DFG) interest in the
2 proposed transfer was supported by express provisions within Section 1736 requiring protection of fish
3 and wildlife habitat, as well as the statutory requirement that DFG be notified of all change petitions (Water
4 Code § 1703). In contrast, there are no statutory provisions to support similar complaints based on
5 socioeconomic effects and we know of no instance in which the SWRCB has considered socioeconomic
6 impacts in the context of a Petition for Change, even under the guise of its broader public interest review
7 authority.

8 **5. Consideration of Socioeconomic Impacts Must be Made in Context**

9 Assuming, *arguendo*, that the SWRCB does find that its public interest duties require that the
10 socioeconomic impacts are relevant to its public interest review, the present factual context and policy
11 implications should be considered. The Transfer Agreement *presumes* that a minimum of 130,000 AF of
12 water be made available through efficiency improvements for which there are *no* adverse socioeconomic
13 impacts. If fallowing is to be pursued by IID as a part of its conservation efforts, it is likely to be in
14 response to allegations that irrigation efficiency efforts may cause adverse impacts on the Salton Sea.

15 The transferors are paying for the water conserved by IID. If IID does not incur the costs of
16 installing improvements to increase irrigation efficiency (RT, at 2520, 2529) and pursues fallowing instead,
17 the cost of generating the conserved water will be reduced. Excess revenues can be redistributed by IID
18 to mitigate any socioeconomic impacts. (RT, at 2555-2556.) SDCWA supports these efforts. (RT, at
19 2542.)

20 To condition the petition on a specific distribution of proceeds would only serve to interject the
21 SWRCB into a political question best left to IID to resolve. Its Board is popularly elected and responsible
22 to a large number of constituents — not just farmers.

23 The EIR/EIS estimates that the aggregate impact of worst case fallowing would be a loss of 2,460
24 jobs and a reduction of \$166 million in total business output. (IID Exh. 55, Vol. 1, Table 3.14-11, at 3.14-
25 23.) Again, however, the EIR/EIS analysis is based on the worst-case scenario – a permanent fallowing-
26 only conservation program. (RT, at 902:15-22.)

27 Dr. Smith, who based his analysis on data provided in the EIR/EIS (RT, at 1002:7-10), failed to
28 distinguish between permanent and temporary fallowing when he concluded that a fallowing program would

1 have substantial economic impacts in the Imperial Valley. (RT, at 1013:10-19.) Additionally, Dr. Smith’s
2 analysis omits consideration of soil types and availability of water (RT, at 1013:25 - 1014), profit-
3 maximizing factors such as electing to grow one crop over another (RT, at 1015:2-4), changing crop mixes
4 (RT, at 1017:14-25), the productivity of the land (RT, at 1016:20-23), and off-setting benefits from a
5 farmer’s reinvestment of cash-payments for fallowing into the local economy (RT, at 1023:11-15) and a
6 healthy recreational economy at the Salton Sea (RT, at 1025:20 to 1027:18), all of which Dr. Smith agreed
7 would be important factors in preparing a meaningful economic analysis.

8 Mr. Spickard’s analysis consisted of nothing more than an analysis of the Draft EIR/EIS’s worst-
9 case analysis based on a permanent fallowing program (RT, at 2186:20-25) and therefore failed to take
10 into account an array of factors (landowner v. farmer (RT, at 2187:1-4) that would be important in
11 evaluating the economic impacts associated with a specific fallowing program.

12 Lastly, the CFBF introduced two reports published by the California Institute for Rural Studies,
13 Inc. (CFBF Exh. 2 & 3.) Both are wholly distinguishable and provide no basis for reasonably or accurately
14 evaluating the potential impacts that a planned fallowing program would have on the local economy in
15 Imperial County. (RT, at 478:21 to 480:1.) Both studies considered the economic impacts of a single
16 drought event in the Central Valley and Mendota area, not in Imperial County. No evidence was presented
17 with which to evaluate the similarities or differences between these communities. Further, both examined
18 the effects of a drought on highly unreliable water supplies susceptible to interruption (RT, at 484:8-25) and
19 therefore have no application to IID which holds high priority rights to the Colorado River.

20 In sum, none of the concerns expressed in these proceedings about the potential for significant
21 socioeconomic impacts if a fallowing program is employed were based on an analysis of a specific and
22 defined fallowing program for IID. (RT, at 2179:5-25.)

23 On the other hand, substantial evidence based on a real program implemented by MWD indicates
24 that any socioeconomic impacts associated with a land management conservation program can be reduced
25 to acceptable levels. (RT, at 2696, 2606, 2541.) One example of fallowing program that employed some
26 of these factors is in the two year test program undertaken by MWD and PVID. (SDCWA Exh. 48, at 3)
27 The test involved the fallowing of 20,215 acres of farmland and saved approximately 186,000 acre-feet
28 of Colorado River water over two years. (SDCWA Exh. 48 at 3.) The study entitled “1994 Regional

1 Economic Impacts of the Palo Verde Test Land Fallowing Program” reviewed and analyzed the economic
2 issues surrounding the PVID test program. (SDCWA Exh. 48 at 3; PCL Exh. 31; RT 1021:7-21.)

3 Several key conclusions were:

- 4 • The program was not found to have affected overall regional economic performance to any
5 significant degree.
- 6 • The program was not found to have caused non-farm-related businesses in the region to
7 reduce employment or lose revenue.
- 8 • Negative economic impacts of the program concentrated on a few farm related business
9 providing services or suppliers to the region’s farmers.
- 10 • The program was found to be only one of several causes for reduced regional demand for
11 farm-related labor, services and manufactured inputs.
- 12 • Approximately 93% of program payments in excess of fallowing and maintenance costs
13 were spent locally on farm-related improvements.
- 14 • There was no measurable change in taxable sales, property taxes or construction activity
15 in the region.

16 (See also RT, at 2546.)

17 MWD and PVID were so pleased with the results of the PVID test program that they are now
18 pursuing a pursuing a long-term arrangement. (SDCWA Exh. 48, at p. 3; RT, at 2547:15-25; see also
19 SDCWA Exh. 50.) Under that program and one that could be pursued by IID in the instant case, non-
20 irrigated lands would be rotated once every year up to once every five years, at the participating farmer’s
21 option. Low value crops such as hay and grain would be targeted and land management measures to
22 control weed growth and wind erosion could be employed. (SDCWA Exh. 48, at 2-3.)

23 Mr. Underwood and Mr. Levy testified that a land management program similar to that which is
24 proposed by MWD and PVID (see SDCWA Exh. 50) could substantially reduce and even eliminate the
25 socioeconomic impacts of any fallowing conservation program.

26 Many witnesses testified that the following factors, if incorporated in a water conservation program,
27 would be important features in a program designed to reduce any resulting socioeconomic impacts:

- 28 • temporary fallowing (see also RT, at 1048:4-7 [Smith]; RT, at 1053:16-
18 [Smith]; RT, at 1078:4-23 [Smith]; RT, at 2167:20 to 2168:2
[Spickard]; RT, at 2541:24 to 2542:14 [Stapleton]);
- targeting specific crops (see also RT, at 1049:6-8 [Smith]; RT, at 1054:1-
7 [Smith]; RT, at 1060:24 to 1061:3 [Smith]; RT, at 2132:19 to 2133:1
[Spickard]; RT, at 2164:5-21 [Spickard]; RT, at 2541:24 to 2542:14
[Stapleton]);

- 1 • rotating specific properties in and out of the program over a defined
2 number of years (*see also* RT, at 1048:8 to 1049:5 [Smith]; RT, at
3 2132:19 to 2133:1 [Spickard]; RT, at 2164:5-21 [Spickard]; RT, at
4 2167:20 to 2168:2 [Spickard]; RT, at 2541:24 to 2542:14 [Stapleton]);
5 • maximizing payments to farmers as opposed to landowners (*see also* RT,
6 at 708:2-21 [Eckhart]; RT, at 1050:18-25 [Smith]; RT, at 2187:5-10
[Spickard]; RT, at 2541:24 to 2542:14 [Stapleton]); and
7 • targeting specific soils (*see also* RT, at 1049:18-25 [Smith]; RT, at
8 2541:24 to 2542:14 [Stapleton]).

9 (SDCWA Exh. 48, at 2-4; SDCWA Exh. 49, at 2-3.)

10 Mr. Levy concurred with Mr. Underwood’s diagnosis of how socioeconomic impacts could be
11 minimized. (SDCWA Exh. 49, at 3; *see also* SDCWA Exh. 52, Alan P. Kleinman, “Economic Impacts
12 of Fallowing Irrigated Land in the IID,” Aug. 2001.) Mr. Levy testified that impacts could be reduced
13 below those identified in the EIR/EIS by targeting specific low value crops, rotating lands in an out of the
14 program and structuring payments to that they are equitably apportioned between farmers and landowners.
15 (RT, at 2554:16 to 2556:21)

16 In addition, Mr. Underwood took issue with the point that alfalfa and corn were a low value part
17 of a standard *crop rotation* generally pursued by farmers. He pointed out, that contrary to testimony from
18 Dr. Smith, that farmers did not typically rotate through low value crops.

- 19 • Ms. Douglas: Now we have heard testimony, though, that Farmers tend
20 to have a crop rotation over their land so they might farm seven crops and
21 alfalfa might be part of the rotation, and somehow this would make it more
22 difficult to target lower value crops.

23 Is that – did you find that to be the case in the Palo Verde case?

- 24 • Mr. Underwood: No. They would go through a – to my knowledge, they
25 do not go through the same type of cycle. They do not alternative crops.
26 Keeping in mind that the predominant crop is alfalfa and Sudan Grass,
27 wheat, cotton; and out of those wheat, Sudan Grass and alfalfa the more
28 like candidate for crop rotation.
- Ms. Douglas: [D]id you say alfalfa and Sudan grass are the most likely
candidates for fallowing?
- Mr. Underwood: Yes, because of the low value. From the beneficial part,
is that they are less labor intense, so you have less social economic
impacts.”

(RT, at 2616:9 to 2617:2.)

1 A land management program also offers benefits. First, it may reduce the environmental impacts
2 associated with the conservation of water necessary for the Conservation and Transfer Program. (RT, at
3 2549:19-22.)

4 Second, a land management program is also inherently reliable and may be perceived as a way to
5 reduce the farmer’s financial risk of participation in the conservation program and ensure guaranteed
6 income during periods of poor economic conditions. (IID Exh. 55, Vol. 1, at 2-31 to 2-32.)

7 Third, a fallowing program would likely avoid the controversy associated with having to choose
8 an historical baseline from which to determine the conservation potential of each farm. (RT, at 528-535;
9 RT, at 544:15-24).

10 Fourth, a fallowing program would address concerns expressed by farmers that a conservation
11 program similar to that originally posed by IID would involve substantial initial capital expenditures prior
12 to payment for the water conserved. (RT, at 2552:13 to 2553:1; IID Exh. 55, Vol. 1, at 2-31.)

13 Fifth, a land management program, if properly managed, can provide additional leaching benefits
14 for the land and other soil preservation benefits. (RT, at 547:10-18; RT, at 901:3-10; IID Exh. 55, Vol.
15 1, at 2-31.)

16 Sixth, a temporary fallowing program may be easier to manage than other conservation programs
17 – farmers can be certain how many acres of land will be required to be taken out of production and how
18 much water can be conserved as a result.

19 Seventh, a temporary fallowing program that is voluntary would provide farmers with an additional
20 market option. (RT, at 1017:14-25.)

21 Lastly, given that a non-fallowing conservation program will be difficult to enforce, a fallowing
22 program would eliminate this concern. (*See* RT, at 552:19 to 553:14.)

23 **IX. SWRCB APPROVAL IS SUPPORTED BY THE FACT THAT THE OVERWHELMING**
24 **BENEFITS OF THE CONSERVATION AND TRANSFER PROJECT FAR**
25 **OUTWEIGH ANY ENVIRONMENTAL IMPACTS**

26 Neither the “no injury” language of Water Code sections 1702 or 1736 nor the public trust doctrine
27 require the SWRCB to deny the Amended Petition on the basis that there may be some injury to instream
28 uses or protected public trust values. In fact, assuming *arguendo* that the Salton Sea does constitute a

1 public trust resource despite SWRCB precedent to the contrary, the SWRCB may approve the Amended
2 Petition even if it finds such approval will actually harm fish and wildlife at the Salton Sea.

3 No person can acquire a vested right to appropriate water in a manner
4 harmful to interests protected by the public trust. But if the public interest
5 in the diversion outweighs the harm to public trust values, water may be
6 appropriated despite harm to public trust values.

7 (*In the Matter of the Diversions and Use of Water from Big Bear Creek* (1995) WR Ord. 95-4;
8 National Audubon Society v. Superior Court (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].) Rather, the
9 SWRCB is responsible for balancing the various interests that may be impacted by the proposed transfer
10 of water. Thus, the important interests promoted by the transfer may outweigh any identified potential injury
11 to in-stream uses.

12 Any environmental impacts associated with the transfer of water from Imperial Valley to San Diego
13 County must be balanced against the strong legislative policy favoring, and even facilitating, transfers of
14 water. (*In the Matter of City of Thousand Oaks* (1997) Dec. 1638, at 21.³³)

23 33/ [T]he SWRCB believes it is desirable to provide a minimum instream flow of 6.0 cfs at the
24 City's point of diversion. However, there are strong public policy considerations
25 encouraging the use of reclaimed waste water. . . . In this instance, the SWRCB concludes
26 that the appropriate balancing of competing interests results in allowing the City to divert
27 its treated waste water at the rate of discharge from the [treatment plant] less 2.0 cfs to
28 account for channel losses, less 2.0 cfs which the City proposes to dedicate to instream
uses. The City's proposed diversion of additional waste water from other sources should
be allowed only when a total of 6.0 for instream uses is bypassed at the City's point of
diversion.

(*In the Matter of City of Thousand Oaks* (1997) Dec. 1638, at 21.)

1 **X. THE DETERMINATION OF ISSUES RELATING TO THE APPLICATION OF**
2 **FEDERAL LAW IS THE SUBJECT OF THE PDA AND THUS UNNECESSARY TO**
3 **AND OUTSIDE THE SCOPE OF THESE PROCEEDINGS**

4 In a good faith effort to avoid litigation between MWD, CVWD, IID and SDCWA over
5 inconsistent interpretations of the primacy of federal and state law, the PDA expressly reserved the parties'
6 disputes and requested a non-precedential decision from the SWRCB regarding the issue. In addition, the
7 interests of the State of California and its long-term ability to improve its bargaining position with other
8 Colorado River Basin States require a common, united front among California stakeholders.

9 Because the California entities will consent to the implementation of the California Plan as enabled
10 by the QSA, the Authority respectfully requests that the SWRCB avoid issuing an opinion construing the
11 Law of the River on a dispute not presently before the SWRCB. In the instant case, the parties ask the
12 SWRCB to assume that deliveries to California of Colorado River water will be made by the Secretary
13 of the Interior in accordance with the Implementation Agreement and the QSA, which the Secretary has
14 incorporated into her own scheme. (*See* Guidelines, § 5(B), 66 Fed. Reg. 7772, 7782 (Jan. 25, 2001).)

15 The Implementation Agreement provides:

16 The Secretary agrees to deliver Colorado River water in a manner set
17 forth in this Agreement during the Quantification Period. The Secretary
18 shall begin to deliver water in the manner set forth in this Agreement when
19 the Quantification period begins and shall cease delivering water in the
20 manner provided in this Agreement when the Quantification Period ends.

21 (IID Exh. 21, at 2.)

22 As the proposed water transfer now under consideration by the SWRCB will be carried out under
23 the Implementation Agreement, whether the activities covered by this Petition could be carried out under
24 federal or state law in a manner other than as provided in that Agreement is presently not a case or
25 controversy before this SWRCB. Having reserved the issues regarding what might be accomplished
26 without consent under the PDA and the Implementation Agreement, the Authority's responses to the
27 questions set forth by the SWRCB on June 14, 2002 are intended to be only advisory in nature.

28 ///

29 **A. ARTICLE III, PARAGRAPH (e) OF THE COMPACT, WHICH PROVIDES**
30 **THAT LOWER DIVISION STATES, INCLUDING CALIFORNIA, MAY NOT**
31 **“REQUIRE THE DELIVERY OF WATER WHICH CANNOT REASONABLY**
32 **BE APPLIED TO DOMESTIC AND AGRICULTURAL USES,” LIMITS THE**

1 **PURPOSES FOR WHICH WATER MAY BE USED WITHIN THE LOWER**
2 **DIVISION STATES, INCLUDING PRESENT PERFECTED RIGHTS**

3 Article III, paragraph (e), of the Compact limits the ability of the Lower Division States, including
4 California, to require the Upper Division States to deliver water, if the water sought could not be
5 reasonably applied to domestic and agricultural uses. It establishes a rule similar to that developed in
6 California water law under the 1928 constitutional amendment, now Article X, Section 2, that a lower
7 riparian may not compel an upper riparian or appropriator to send water down the stream, if the lower
8 riparian does not have a current need for that water. (*See, e.g., Meridian v. San Francisco* (1939) 13
9 Cal.2d 424, 447; *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 374-75.) Article III, paragraph (e), does not
10 limit the purposes for which water may be used within the Lower Division States per se, if the water has
11 been delivered without compulsion of the Upper Division States, but it does mean that the Lower Division
12 States may not force the Upper Division States to deliver water if the planned purpose for that water is
13 outside the Compact’s definition of domestic and irrigation uses. During a period in which the Upper
14 Division States require their full allocation of 7.5 million af of Colorado River water under the Compact and
15 could reasonably apply a greater amount of water for domestic or irrigation uses, the limitation in Article
16 III, paragraph (e), practically blocks the Lower Division States from using water for other than domestic
17 or irrigation uses themselves.

18 The Compact defines “domestic use” to include the use of water for “household, stock, municipal,
19 mining, milling, industrial, and other like purposes.” (Compact, Article II(h).) Direct use of water to benefit
20 fish and wildlife was not included in the definition and is a different type of use than those included in the
21 definitional list. The uses listed constituted traditional uses of water in society for artificial, industrial, or
22 human civilization purposes. Use of water for fish and wildlife is a natural or “uncivilized” purpose. While
23 the latter use is appropriate in some circumstances and under some laws (*See, e.g., Water Code* § 1243),
24 it is a different type of use than those included in the Compact definition of “domestic use” and cannot fairly
25 be included in that definition.

26 Since the Compact limits the ability of the Lower Division States to require the delivery of water
27 for other than domestic or irrigation purposes, a Lower Division State, such as California, could not require
28 the delivery of water in order to benefit fish and wildlife, even if that is accepted as a reasonable and

1 beneficial use under state law. The Lower Division States have agreed by compact to limit their uses to
2 a subset of all beneficial uses: domestic and irrigation uses only.

3 Article III, paragraph (a) allocates to the Upper Division and Lower Division States 7.5 million af
4 each and declares that such amounts “shall include all water necessary for the supply of any rights which
5 may now exist.” It is clear from that language that the allocation provisions of Article III were intended to
6 apply to all rights in existence at that time. There was no exception made for paragraph (e), other than the
7 general statement in Article VIII that “[p]resent perfected rights to the beneficial use of waters of the
8 Colorado River System are unimpaired by this compact.” That provision is best read as reflecting a general
9 reassurance to rights-holders rather than creating an exception to Article III, paragraph (e). Given the
10 status of development of the doctrine of beneficial uses as of 1922, when fish and wildlife uses were not
11 yet deemed to constitute beneficial uses in any of the Colorado River states (the exclusion of fish and
12 wildlife as an allowable use of water would not have impaired any present perfected rights). (*See* Cal.
13 Water Code § 1243 (added by Stats. 1959, c. 2048, p. 4742, §1); Ariz. Rev. Stat. § 45-151(A) (fish and
14 wildlife added to beneficial uses by Ariz. Sess. Laws 1941, Ch. 84, §1); State v. Morros (1988) 104 Nev.
15 709 [766 P.2d 263] (holding that United States could appropriate water for fish and wildlife purposes,
16 despite lack of statutory provision explicitly granting such right); State ex rel. State Game Commission v.
17 Red River Valley Co. (1947) 51 N.M. 207 [182 P.2d 421] (recognizing fishing as a beneficial use); Utah
18 Code Ann. § 73-3-3(11)(a) (ability of Division of Wildlife Resources or Division of Parks and Recreation
19 to file applications for instream flows, but not private individuals, added by 1987 Utah Laws ch. 161, §
20 289); Wyo. Stat. Ann. §§ 41-3-1001 to 1014 (added Wyo. Sess. Laws 1986, ch. 76).)

21 Thus, Article VIII would merely have been a statement of legal fact with regard to Article III,
22 paragraph (e), rather than a real protection of water rights dedicated to beneficial uses other than domestic
23 and irrigation. For the foregoing reasons, the limitations of Article III, paragraph (e), should be interpreted
24 to apply to present perfected rights.

25 **B. THE ACT, WHICH AUTHORIZES THE SECRETARY OF THE INTERIOR TO**
26 **ENTER INTO CONTRACTS FOR THE STORAGE AND DELIVERY OF**
27 **COLORADORIVER WATER “FOR IRRIGATION AND DOMESTIC USES,”**
28 **LIMITS THE PURPOSES FOR WHICH IID MAY USE WATER UNDER**
CONTRACT WITH THE SECRETARY, INCLUDING PRESENT PERFECTED
RIGHTS

1 The Boulder Canyon Project Act limits the purposes for which IID may use water under its 1932
2 contract with the Secretary. That limitation applies to the use of water delivered in satisfaction of IID's
3 present perfected rights within the meaning of Article VIII of the Compact.

4 Section 5 of the Act authorizes the Secretary of the Interior to contract for the delivery of water
5 "for irrigation and domestic uses." (*See* 43 U.S.C. § 617d.) In addition, Section 5 provides that "[n]o
6 person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by
7 contract made as herein stated." (*See id.*) Section 12 of the Act defines "domestic" as it was defined in
8 the Colorado River Compact, Article II(h). (*See* 43 U.S.C. § 617k.) As discussed above, the Compact
9 definition of "domestic uses" does not include uses for the direct benefit of fish and wildlife.

10 Based on the language in Section 5, the Secretary of the Interior entered into a contract for the
11 delivery of Colorado River water to IID on December 1, 1932. (*See* IID Exh. 28.) It is that contract
12 under which IID receives its rights to Colorado River water. The contract reflects the Compact and
13 Section 5 limitations on delivery of water when it sets forth the following provision: "This contract is for
14 permanent water services but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir
15 shall be used, first, for river regulation, improvement of navigation, and flood control; second, *for irrigation*
16 *and domestic uses* and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River
17 compact; and, third, for power." (*See* IID Exh. 28, Article 17 (emphasis added).)

18 While the reclamation laws in general have been interpreted to defer to state law doctrines of
19 beneficial use (*See United States v. Alpine Land and Reservoir Co.* (9th Cir., 1983) 697 F.2d 851, 854),
20 the Supreme Court has held that uses of Colorado River water are limited to irrigation and domestic uses
21 as defined by the Compact and adopted by Congress in the Act. Article II(A)(2) of the Supreme Court
22 Decree enjoined officers of the United States (including the Secretary) from releasing water other than for
23 "irrigation and domestic uses" (*Arizona v. California* (1964) 376 U.S., at 341), and Article II(B)(5)
24 enjoined any person from diversions of water other than as delivered by the Secretary. (*See id.*, 376 U.S.,
25 at 343. *See also* Article I(I), 376 U.S., at 341 (defining "domestic use" consistently with the Compact
26 definition).) Together, these provisions of the Decree show that the specific Law of the Colorado River
27 preempts state law doctrines of beneficial use, despite a rule to the contrary in general reclamation law.

28 **C. THE LAW OF THE RIVER ALLOWS THE HOLDER OF PRESENT PERFECTED RIGHTS TO CHANGE THE PLACE AND PURPOSE OF USE OF**

1 **WATER IN ACCORDANCE WITH STATE LAW, AS LONG AS THE**
2 **CHANGED PURPOSE IS AN “IRRIGATION OR DOMESTIC USE”**

3 Federal reclamation laws preempt state water laws generally only if the state laws are inconsistent.
4 (See California v. United States (1978) 438 U.S. 645; Reclamation Act of 1902, § 8, codified at 43
5 U.S.C. §§ 372, 383. Regarding federal preemption generally, see Pacific Gas & Electric Co. v. State
6 Energy Resources Conservation & Development Comm. (1983) 461 U.S. 190; Gibbons v. Ogden (1824)
7 22 U.S. 1, 209.) State laws which are not inconsistent may be given full effect.

8 The same rules apply under the Law of the Colorado River. (See Arizona v. California (1963) 373
9 U.S. 546, 588.) The Supreme Court in the Arizona v. California opinion analyzed this question based on
10 provisions of the Boulder Canyon Project Act. In deciding the role of state law on the Colorado River,
11 the Court clearly stated that “Section 18 [of the Act] plainly allows the States to do things not inconsistent
12 with the Project Act or with federal control of the river.” (See *id.*; Boulder Canyon Project Act, § 18,
13 codified at 43 U.S.C. § 617q. See also Boulder Canyon Project Act, § 14, codified at 43 U.S.C. § 617m
14 (“This subchapter shall be deemed a supplement to the reclamation law,” which includes the Reclamation
15 Act of 1902, § 8, interpreted by United States v. California, as discussed above).) The Supreme Court
16 provided two examples of functions that state law could perform in managing Colorado River waters:
17 regulation of the use of tributary water, and protection of present perfected rights. The Court went on to
18 hold that in the dispute pending before it, whether the apportionment of water among the Lower Basin
19 States was controlled by federal law or state prior appropriation laws, federal law controlled: “Congress
20 in passing the Project Act intended to and did create its own comprehensive scheme for the apportionment
21 among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the
22 Colorado River.” (See Arizona v. California (1963) 373 U.S., at 564-65.)

23 The rationale behind the preemption of inconsistent state laws by the Boulder Canyon Project Act
24 was explained well when the Court noted that “[w]here the Government, as here, has exercised this power
25 [to regulate navigable waters] and undertaken a comprehensive project for the improvement of a great river
26 and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws.”
27 (Arizona v. California (1963) 373 U.S., at 587.) The “no room” language must, of course, be read
28 alongside the Court’s later statement quoted above that there is a role for state law on the river. (See *id.*,

1 373 U.S., at 588.) The test for federal preemption of a particular state law doctrine or process is whether
2 that state law would interfere with or frustrate the accomplishment of the federal law scheme, here the
3 apportionment of Colorado River waters among the Lower Basin States.

4 The Supreme Court’s opinion in Arizona v. California left certain ambiguity as to the applicability
5 of state law to intrastate allocations and use of Colorado River Water. (*Id.*) The ambiguity stems from the
6 opinion’s discussion regarding the United States Secretary of Interior’s broad power to contract with
7 individual users under the Boulder Canyon Project Act (“Project Act”). (*Id.*, at 580, *interpreting* 43
8 U.S.C. §§ 617(a)-617(c).) There is no dispute as to the Secretary’s authority to apportion the Colorado
9 River amongst the states. However, commentators disagree over whether federal law preempts state law
10 with regard to intrastate allocations and use. It is the position of SDCWA that the better reasoning suggests
11 that state law applies to intrastate use of Colorado River water to the extent that the state law is “not
12 inconsistent” with the BCPA. (*See* 43 U.S.C. § 617(q); California v. United States (1978) 438 U.S. 645,
13 674-75; *see also* Kaplan, “Federal-State Conflicts Over the Colorado River,” 6 UCLA J. Env’t. L & Pol’y
14 233, 238-45 (1987).)

15 Those that contend federal law entirely preempts state law with regard to the use of Colorado River
16 water cite to dicta within Arizona v. California in which the court opined that “the Secretary in choosing
17 between users within each State and in settling the terms of his contract is not bound by those sections [of
18 the BCPA and the Reclamation Act of 1902] to follow state law. . . .” (Abbott, “California Colorado
19 Issues,” 19 Pac. L. J. 1391, 1405 (1988), *citing* Arizona v. California (1963) 373 U.S., at 585-87.) This
20 language, however, is non-binding dictum because the conflict in Arizona v. California concerned an
21 interstate allocation of water between California and Arizona. The issue did not require the court to rule
22 on the issue of allocations between users within each state. (California v. United States (1978) 438 U.S.,
23 at 673; Bryant v. Yellen (1980) 447 U.S. 352; *see also* Kaplan, “Federal-State Conflicts Over the
24 Colorado River,” 6 UCLA J. Env’t. L & Pol’y 233, 238-45 (1987).)

25 More importantly, the United States Supreme Court’s later case of California v. United States (a
26 case that did involve intrastate use of water) disavowed the court’s dictum in Arizona v. California and held
27 that Section 8 of the Reclamation Act of 1902 allows the application of state law to the operation of federal
28 reclamation projects where the application of state law is “not inconsistent” with federal laws. (California

1 v. United States (1978) 438 U.S., at 674 (discussing Section 8).³⁴ Arizona v. California's dictum was
2 severely limited by the court's holding in California v. United States. (*Id.*; *see also* Bryant v. Yellen (1980)
3 447 U.S. 352, 369.) The majority of publications agree that California v. United States distinguished
4 Arizona v. California based on the unistate/multistate differences in the projects at hand. (*See* Kaplan,
5 *supra*; Kelley, "Staging a Comeback – Section 8 of the Reclamation Act," 18 *U.C. Davis L. Rev.* 97, 120
6 n. 113 (1984); Note, "Allocation of Water From Federal Reclamation Projects: Can the States Decide,"
7 4 *Ecology L.Q.* 343, 367-68 (1974).) Accordingly, the better argument holds that state law governs
8 intrastate allocations of Colorado River water so long as they are not inconsistent with federal law.

9 As discussed above, federal law does preempt state law with regard to the use of Colorado River
10 water for fish and wildlife purposes. The Compact and the Act expressly prohibit the use of water for other
11 than "domestic and irrigation uses" even if other beneficial uses are recognized by state law. (*See* BCPA,
12 §§5 and 12; Compact, Article II(h).) State approval of a change in purpose of use for the direct benefit
13 of fish and wildlife would be inconsistent with those provisions of federal law. The portion of the question
14 posed by the SWRCB regarding such a change in purpose of use is easily answered.

15 Application of the preemption rules established in Arizona v. California to SWRCB approval of
16 a change in place of use results in the opposite conclusion. Unlike the limitation to irrigation and domestic
17 uses contained in Section 5, the Act does not contain federal law limitations on the place of use. Section
18 5 allows delivery of water "at such points on the river and on said [All-American] canal as may be agreed
19 upon" (BCPA, § 5, codified at 43 U.S.C. § 617d), and Section 18 states that "[n]othing herein shall be
20 construed as interfering with such rights as the States had on December 21, 1928, either to the waters
21 within their borders or to adopt such policies and enact such laws as they deem necessary with respect to
22 the appropriation, control, and use of waters withing their borders." (BCPA, §18, codified at 43 U.S.C.
23 § 617q.)

26 ^{34/} Section 8 of the Reclamation Act, 32 Stat. 390, codified at 43 U.S.C. §§ 372, 383, provides:
27 "[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with
28 the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used
in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the
provisions of this Act, shall proceed in conformity with such laws."

1 Because of the fact-specific inquiry used to determine federal preemption, it is necessary to analyze
2 the consistency of the state law action at issue here: approval of the IID Petition to transfer conserved water
3 to SDCWA for irrigation and domestic uses within California. Examination of the transfer shows that not
4 only is that state law action not inconsistent with the federal apportionment scheme, it is directly in support
5 of and necessary for accomplishment of that scheme.

6 Presently, California uses up to 5.2 MAFY of water from the Colorado River, under contracts with
7 the Secretary. (SDCWA Exh. 15, at 16.) This is in excess of California's 4.4 MAFY apportionment
8 under the Act by as much as 800,000 AFY (RT, at 114:16-23, 149:16-25, 150:1-3), and has been
9 supplied by use of the surplus above the needs of the other Lower Basin States. (SDCWA Exh. 4, at 4-5.)
10 Arizona and Nevada will soon require their full apportionments under the Act (SDCWA Exh. 1, at 6), and
11 California must find a way to reduce its use to 4.4 MAFY in non-surplus years. The method of reduction
12 is contained in the California Plan, and water transfers are a critical component of that plan. (*See, e.g.*,
13 SDCWA Exh. 15, at 17, 24-25, 32-37.) The IID/SDCWA conserved water transfer is the largest transfer
14 contemplated by the Plan. (SDCWA Exh. 15, at 34-35; SDCWA Exh. 1, at 34-35; RT, at 112:22-24,
15 113:9-20.)

16 The Secretary has not only acknowledged that the proposed conserved water transfer from IID
17 to SDCWA is consistent with federal law, she has determined the transfer to be necessary for the
18 accomplishment of the federal law apportionment scheme, as discussed herein. Approval of the
19 IID/SDCWA water transfer under state law is fully consistent with the federal purpose in managing
20 allocation of the Colorado River; therefore the operation state law in this case is not preempted by the
21 federal Law of the River.

22 It is recognized by SDCWA that MWD and CVWD do not agree with the position of SDCWA
23 presented herein regarding the application of state law to a change in place of use.

24 **D. THE LAW OF THE RIVER DOES NOT ALLOW THE DIRECT DELIVERY OF**
25 **WATER TO IID SOLELY FOR FISH AND WILDLIFE PURPOSES, EVEN IF**
26 **SUCH USE IS REQUIRED UNDER STATE LAW IN ORDER TO MITIGATE**
27 **THE ADVERSE IMPACTS OF DELIVERING WATER FOR IRRIGATION OR**
28 **DOMESTIC USE EXCEPT UNDER EXTREMELY NARROW**
 CIRCUMSTANCES

1. To the Extent Water Is Provided for Irrigation and Provides an Incidental
 Benefit to Fish and Wildlife or Mitigates Unreasonable Impacts, it Is
 Permissible

1 It is clear that, if adverse impacts to fish and wildlife are to be mitigated according to state law, it
2 must be done in a manner that is not *inconsistent* with the federal Law of the River. There are several
3 bases to conclude that this may be safely done for the IID water conservation water transfer proposal
4 before the SWRCB, without running afoul of the law.

5 The United States Supreme Court has defined “irrigation” as the actual watering of the soil.”
6 (Farmers Reservoir & Irrigation Co. (1948) 337 U.S. 755, 763.) “Irrigated land” is “land supplied with
7 water artificially.” (*See Beck, Waters and Water Rights* (1994) Vol. 6 at 921.) The SWRCB has defined
8 “irrigation use” to include “any application of water to the production of irrigated crops.” (Cal. Code Regs.,
9 Title 23, §661 (2002).) “Irrigation” use therefore encompasses the general application of water to land
10 as well as its application for crop production.

11 Given that the permissible purposes under the Law of the River are irrigation and domestic uses,
12 a delivery of Colorado River that served a *mixed purpose* would not be prohibited as inconsistent with
13 State Law. Conditioning the conservation program to maintain water elevation levels at the Salton Sea to
14 a level that would have existed “but for” the transfer and that does not involve a direct delivery for either
15 a new or different purpose is also permissible. In other words, the fact that the Secretary may not deliver
16 water exclusively for fish and wildlife purposes, is not a barrier to a successful implementation of the
17 conservation program contemplated by the Petition or the mitigation of adverse impacts on fish and wildlife.

18
19
20 There is no prohibition on the delivery of water for a *combined* purpose, which includes “irrigation”
21 and in the process may provide other ancillary purposes consistent with federal law. This conclusion is self-
22 evident from the fact that fish and wildlife have, albeit fortuitously, made a beneficial use of the Colorado
23 River water imported by IID and discharged by its customers, for decades. (*See generally Oklahoma v.*
24 *New Mexico* (1993) 510 U.S. 126 (construing the Canadian River Compact and accounting for mixed use
25 separately from incidental uses).)

26 A similar problem was presented by a request for the delivery of water for recreational purposes
27 as an incidental use in New Mexico. In *Jicarilla Apache Tribe v. United States*, the 10th Circuit Court of
28 Appeals found that under the statutes governing the San Juan-Chama Project, water could not be released
by the Bureau of Reclamation for solely recreational use, as it was not one of the primary purposes of the

1 project. (*See Jicarilla Apache Tribe v. United States* (1981 10th Cir.) 657 F.2d 1126, 1139.) Whether
2 recreational use was a municipal use of water under state law was held to be irrelevant, because recreation
3 use was viewed by Congress as unique from the municipal use and it was federal law of the project which
4 controlled. (*See id.*, 657 F.2d at 1141.) Allocation for recreational purposes, when incidental to municipal
5 purposes were held to be allowable, but large scale allocations of water to strictly recreation uses were not
6 included under the term “municipal” as defined by Congress and therefore were not permissible uses of
7 project water. (*See id.*)

8 The beneficial use that fish and wildlife may fortuitously make of the imported water that is diverted
9 by IID and subsequently discharged to the Salton Sea under present conditions is and would not be
10 considered a direct use of water by IID. The fact that the water may provide an added benefit of mitigating
11 impacts on fish and wildlife does not alter the fact that water also provides a benefit to agriculture or that
12 its purpose is strictly “irrigation” within the definition of the term.

13 For example, IID may deliver water for irrigation in the context of implementing a land management
14 component of its conservation program. The applied water would serve a beneficial purpose in wetting
15 the ground for leaching of the soil and could also be used in pre-irrigation and in dust suppression. The
16 applied water could then be collected and discharged to the Salton Sea. (RT __)

17 Using water on agricultural land has beneficial effects on the soil that improve the productivity of
18 land and contribute beneficially to the production of crops in the future, even when there is not a crop that
19 will be grown within the immediately ensuing growing season. (RT, at 2689.) To the extent that such water
20 reaches the Salton Sea, after it is used for irrigation purposes, and incidentally thereby mitigates any
21 unreasonable impacts on fish and wildlife, it would be consistent with federal Law of the River. It would
22 also be consistent with the practical experience of most irrigation projects in the west where return flows
23 are enjoyed by instream uses downstream from the point of discharge.

24 **2. A Change in Use May be Conditioned Under State Law so as to Protect an**
25 **Existing Condition in a Manner Not Inconsistent With Federal Law**

26 There is also ample authority for the proposition that the SWRCB’s authority to protect fish, wildlife
27 and water quality extends to it the power to properly condition the conservation program so as to require
28 continued agricultural return flow to the Salton Sea without violating State or federal law. (*See United*

1 States v. SWRCB (1986) 182 Cal.App.3d 82, 131; *In the Matter of Treated Waste Water Change*
2 *Petition WW-20, El Dorado Irrigation Dist.* (1995) WR 95-9 (requiring continued release of imported
3 water for the benefit of instream beneficial uses under Water Code Section 1243). *Accord In the Matter*
4 *of Water Right Application 29408 and Waste Water Change Petition, WW-6, City of Thousand Oaks*
5 (1997) D-1638.)

6 Federal courts have consistently held that either direct uses of water *relatively small* in amount
7 compared to the total amount of water used directly for the primary purpose, or indirect uses of runoff or
8 drainage, qualify as uses which are merely incidental to the primary purpose. The incidental use, small in
9 degree, does not convert the existing purpose or add a new one. No special authorization under federal
10 law is required for incidental uses.

11 **a. Incidental Uses Are Simultaneous Uses, or Separate Uses**
12 **Relatively Small in Amount Compared to Water Used for the**
13 **Primary Use**

14 Under federal reclamation and state water laws, water uses may be appropriately characterized
15 as incidental to a primary water use in two circumstances. First, water use is incidental when made
16 simultaneous with the primary use. In the United States Supreme Court case of Oklahoma v. New Mexico,
17 the Court examined the Canadian River Compact, which entitled New Mexico to a certain amount of
18 conservation storage on the Canadian River against downstream Oklahoma. The Court decree declared
19 that water stored for flood protection, power generation, or sediment control purposes is not chargeable
20 to conservation storage, even if incidental usage is made of the water while stored for beneficial uses usually
21 served by conservation storage. (*See Oklahoma v. New Mexico* (1993) 510 U.S. 126 [114 S.Ct. 628,
22 630].) Thus, simultaneous uses of water are attributed to the primary purpose of the water use under
23 federal law and qualify as proper incidental uses. Such simultaneous uses of water do not need a separate
24 water duty or right. (*See United States v. Alpine Land & Reservoir Co.* (1983 9th Cir.) 697 F.2d 851,
25 859-60 (holding that no award of water duty for incidental fishing and recreation uses was necessary or
26 appropriate); *see also United States v. Fallbrook Public Utility District* (1952 S.D.Cal.) 108 F. Supp. 72,
27 79 (holding that, according to California law, even though seasonal storage is not a proper riparian usage
28 of water, some temporary storage is permissible, if it is “incidental” to other beneficial and proper riparian
uses, such as irrigation, domestic uses, and power generation).)

1 Thus, use of water by IID for maintenance of the Salton Sea *status quo* would clearly be “incidental” if the
2 water were simultaneously serving the purpose of irrigation.

3 The second circumstance in which water use is incidental occurs when a relatively small amount
4 of water is applied to a separate use, but one which supports the primary use. For example, the Seventh
5 Circuit, interpreting Indiana law in Prohosky v. Prudential Insurance Co. (1985) 767 F.2d 387, declared
6 that the spraying of non-planted areas by a central pivot irrigation system was “incidental to the appropriate
7 and beneficial use of agricultural irrigation.” (Id., 767 F.2d at 394.) The irrigation system at issue sprayed
8 at most two percent of the groundwater extracted by the defendant onto non-planted areas such as
9 roadways, uncultivated fields, and ditches, while 98 percent of the water was sprayed onto planted areas.
10 (Id.) Thus, the concept of incidental usage of water was applied to circumstances where the water
11 molecules constituting the incidental use did not physically reach the irrigated crops, but were applied
12 directly to other areas. Incidental use was not limited to a runoff or drainage simultaneous use
13 circumstance. It should be emphasized that this type of incidental use is limited to very small amounts of
14 water.

15 **3. State Law Allows the Relatively Small Incidental Use of Water by IID,
16 Even Outside its Service Territory**

17 **a. Implied Authority to Use Water Outside Service Area**

18 According to California law, a water agency may distribute water outside of its service area as a
19 necessary aspect of acquiring water rights, when a portion of the rights thus acquired have previously been
20 dedicated to a public use in that outside area. For example, in the case of Fellows v. City of Los Angeles
21 the court upheld the actions of the city in acquiring and operating water works outside the city limits,
22 because those works had surplus water rights attached which could be used for the benefit of city residents.
23 (See Fellows (1907) 151 Cal. 52, 63-64, cited approvingly in City of Los Angeles v. City of San Fernando
24 (1975) 14 Cal.3d 199, 255 n.45) The rationale behind the decision was that the city had implied authority
25 to serve water outside the city limits in order to accomplish its primary purpose of serving water to its own
26 citizens. (See id.) The same concept has been applied to another city (City of South Pasadena v.
27 Pasadena Land and Water Co. (1908) 152 Cal. 579, 590-91), a municipal water district (Central Basin
28 Municipal Water Dist. v. Fossette (1965) 235 Cal.App.2d 689, 701), and, relevant to these proceedings,

1 an irrigation district (Hewitt v. San Jacinto Irr. Dist. (1899) 124 Cal. 186, 192). (*See also* Cal.Jur.3d
2 *Waters*, §1091, *Serving Area Outside City*, §1098, *Contracts for Supply of Water* (2002).)

3 If one of the conditions imposed by the SWRCB on the IID/SDCWA transfer is maintenance of
4 the status quo of runoff to the Salton Sea, then such maintenance by IID would not constitute use outside
5 of the IID permitted place of use. IID would have the implied authority to allow a subsequent beneficial
6 use water at the Salton Sea outside of the permitted place of use, because such use would be necessary
7 to accomplish its primary permitted uses of water: irrigation and domestic uses.

8
9
10 **b. IID Need Not Petition the SWRCB to Change Its Permitted
11 Purpose of Use to Include Fish and Wildlife**

12 As a result of operation of the state and federal Endangered Species Acts, an HCP was prepared
13 for the Conservation and Transfer Project. The HCP requires that a certain amount of water from Imperial
14 Valley be allowed to runoff to the Salton Sea, as it has done for a number of years, to mitigate for the fact
15 that IID's conservation of water will result in reduced tailwater runoff to the Salton Sea. (IID Exh. 55.)

16 In accordance with its duties as a Responsible Agency for the Conservation and Transfer Project,
17 the SWRCB provided comments to the BOR and IID on the Draft EIR/EIS. (*See* Letter from SWRCB
18 to BOR and IID (April 26, 2002).) Essentially, after noting that the Conservation and Transfer Project
19 would include implementation of a HCP and that the proposed HCP would require the maintenance of
20 flows to the Salton Sea to offset the decrease in agricultural runoff that would result from the Conservation
21 and Transfer Project, the SWRCB commented that "IID must file a petition with the SWRCB to add fish
22 and wildlife as an authorized purpose of use to IID's water right permits." (Letter from SWRCB to BOR
23 and IID, at 2 (April 26, 2002).) As described in detail below, no further amendment to the IID Permit is
24 required.

25 The SWRCB has the authority to impose conditions on water rights permits as part of the change
26 petition process in order to protect existing rights of legal users of return flow or drainage discharges. (*See*
27 *In the Matter of Water Right Application 29408 and Waste Water Change Petition WW-6, City of*
28 *Thousand Oaks* (1997) D-1638, 1997 WL 615503 at *39; *In the Matter of Fishery Protection and*
Water Right Issues of Lagunitas Creek (1995) WR 95-17, 1995 WL 694381 at *6, 55; *In the Matter*

1 of Treated Waste Water Change Petition WW-20 of El Dorado Irrigation Dist. (1995) WR 95-9,
2 1995 WL 418673 at *22.) That authority derives from Article X, §2 of the California Constitution, Water
3 Code §§100, 275, 1243, and 1253, and the public trust doctrine. (*In the Matter of Fishery Resources*
4 *and Water Right Issues of the Lower Yuba River, Yuba County Water Agency* (2001) D-1644.) But
5 there is no need or requirement that IID modify the purposes of its existing permits under state law.

6 Numerous decisions have imposed conditions to protect beneficial instream uses and otherwise
7 mitigate environmental harm *without* requiring a change in the purpose of use. In fact, almost every
8 application to appropriate or a petition for change in purpose of use, point of diversion, or place of use, is
9 approved only upon the imposition of certain conditions, often for the purpose of mitigating for potential
10 environmental impacts. (*In the Matter of Charles and Anna Kluge* (1997) WR 1637, 1997 WL 615501
11 at *11 (petitioner's change in place of use approved subject to allowing a Water Conservation District to
12 use storage rights); *In the Matter of Application 25366 George B. and Ruth V. Heibel* (1980) D-1562,
13 1980 WL 30104 at *3 (approval of petition to change the place of use subject to reasonable and beneficial
14 use and minimum flow requirements); *In the Matter of United States Bureau of Reclamation* (1970) D-
15 1356, 1970 WL 9488 at *5-9 (change in purpose of use granted subject to beneficial use, maximum
16 diversion and seasonal diversion conditions).)

17 In other words, the SWRCB is authorized to condition its approval of a change to a water right
18 permit upon the implementation of certain environmental mitigation measures designed to reduce or avoid
19 potentially significant impacts on environmental resources.

20 The circumstances of the present proceedings are not unique. The Amended Petition requests
21 changes in point of diversion, purpose of use and place of use to allow for the transfer of water from IID
22 to SDCWA. The requested changes would result in the amendment of IID Permit 7643 to add municipal
23 use (by SDCWA) as an authorized purpose of use. The Amended Petition does not request the addition
24 of environmental use as an authorized purpose of use.

1 Presently, water is applied to lands within IID’s service area for agricultural purposes. As a result
2 of that use, part of the conserved water, however, would otherwise have eventually made its way to the
3 Salton Sea.³⁵

4 The HCP is designed to mitigate for IID’s change in conservation practices so that the status quo
5 – and the existing quantity of return flows into the Salton Sea – are maintained in connection with any
6 change.

7 While it is true that implementation of the HCP may result in the replacement of agricultural tailwater
8 that otherwise would have flown to the Salton Sea but for the conservation program, the fact that water
9 will ultimately flow to the Salton Sea does not describe the use of the water and therefore it is not
10 appropriate that IID’s permit be amended to describe this non-use, incidental result. Rather, under the
11 HCP water will be used for current agricultural purposes and any runoff to the Salton Sea will be merely
12 an incidental, secondary, and derivative use.

13 **c. Petitioners Have Not Invoked Water Code §1707 and Its**
14 **Provisions Do Not Apply in the Present Case**

15 The SWRCB’s April 26, 2002 letter suggests that the HCP “would maintain flows to the Salton
16 Sea by dedicating water conserved either through on-farm conservation efforts or land fallowing to offset
17 the decrease in agricultural runoff that would result from the proposed project.” (Emphasis added.)
18 However, no such dedication is contemplated.

19 Section 1707, which governs changes for purposes of preserving or enhancing wetlands habitat,
20 fish and wildlife resources, or recreation in, or on, the water, was enacted to allow water rights holders to
21

22
23

35/ In the Matter of the Alleged Waste and Unreasonable Use of Water by the Imperial Irrigation
24 *Dist.* (1984) D-1600:

25 Although there may be means for increasing the efficiency of water use by a particular
26 water user, the availability of excess water for other beneficial purposes may serve to
27 mitigate what might otherwise be an unreasonable situations. [35] For example, if virtually
28 all of an irrigators tailwater reenters the stream where it is available for downstream use,
and if the diversion has no adverse effects on instream uses, then it may not be
unreasonable to allow large quantities of tailwater...A third possibility, as discussed in
Section 12.0 below, is the availability of irrigation return flow for the enhancement of fish
and wildlife resources which is recognized as a beneficial use of water under Water Code
Section 1243.

1 dedicate water for beneficial instream purposes without the risk of losing those same rights through
2 abandonment or prescription. (*See* Water Code §1707.)

3 Once the water is diverted, IID has a right to sell the water and to recover the water before it is
4 abandoned. This process is commonly called “conservation” or historically “salvage.”

5 The right to engage in salvage is a power of most general and special act districts. (Baldwin Park
6 County Water District v. County of Los Angeles (1962) 208 Cal.App.2d 87, 90.) The Imperial Irrigation
7 District has this power. (*See* Water Code §22078; Girth v. Thompson (1970) 11 Cal.App.3d 325.)

8 The power of salvage includes the power, “without intervention of any other agency to acquire a
9 supply of water, distribute it to its consumers, pick it up when it appears as waste water after use, treat it,
10 and then put it back into a water delivery system for re-use, repeating the process as many times as is
11 feasible. (Anderson v. Board of Supervisors of Santa Cruz County (1965) 235 Cal.App.2d 436, 441.)

12 If the appropriator elects not to salvage the water, it is abandoned for use by others, subject to its
13 priority right to recapture the flow in the future. So long as IID elects not to reclaim the supply, it may
14 appropriated and used by others. (*See* Crane v. Stevinson (1936) 5 Cal.2d 387; Stevens v. Oakdale
15 Irrigation Dist. (1939) 13 Cal.2d 343 (right to recapture, but once the water is abandoned, it may be
16 subjected to appropriation for use by another).) Accordingly, while fish and wildlife may presently make
17 a subsequent beneficial use the water discharged by IID, as a subsequent use of foreign water imported
18 and released after agricultural use into a terminal artificial reservoir, it is on tenuous legal footing.

19 An appropriation of water for instream uses is not available in California. (California Trout v. State
20 Water Resources Control Board (1979) 90 Cal.App.3d 816 (review denied).)

21 Water Code Section 1707 was added to allow an appropriator to dedicate water to instream beneficial
22 uses despite the fact that an appropriation requires a diversion of water and to maintain control over the
23 water against downstream claimants that the water has been abandoned.

24 In the case of IID’s change petition, there are no downstream water right holders on the Salton
25 Sea. Accordingly, given the status of the water supply as foreign and the fact there are no downstream
26 claimants, dedication pursuant to Water Code § 1707 would be superfluous.

1 **XII. FAILURE TO SIGN THE QSA BY DECEMBER 31, 2002 WILL RESULT IN**
2 **DRASTIC WATER SHORTAGES FOR CALIFORNIA**

3 From the time the United States Supreme Court entered its decree in Arizona v. California (1964)
4 376 U.S. 564, until recently, the other lower basin states of Nevada and Arizona did not require their full
5 basic apportionments of water from the Colorado River. (SDCWA Exh. 1, at 6.) Accordingly, the
6 Secretary routinely made surplus water deliveries to California to meet its water supply demands, up to a
7 maximum of 5.2 MAFY (SDCWA Exh. 4, at 4-5.) With explosive population growth in Nevada and
8 Arizona in recent years, and the construction of the Central Arizona Project, those states now need their
9 full apportionments of Colorado River water to meet water supply demands within their boundaries.
10 (SDCWA Exh. 1, at 6.) Therefore, California cannot continue to rely on receiving surplus water deliveries
11 on an every-year basis in the future, but will be limited to standard surplus determination provisions.

12 In order to provide a “soft landing” for California in its necessary reductions in Colorado River
13 water use, the other states and the Secretary have agreed to a 15-year interim period before California will
14 be held to its basic apportionment of 4.4 million acre-feet per annum. (SDCWA Exh. 4, at 7; RT, at
15 129:1-5.) Between February 24, 2001 and December 31, 2015, the Secretary has made and will make
16 surplus determinations based on the Guidelines, 66 Fed. Reg. at 7772 (January 25, 2001). Those IS
17 Guidelines make available to California up to approximately 600,000 acre-feet per annum of surplus water
18 in addition to California’s basic apportionment of 4.4 million acre-feet per annum. (RT, at 149:16-25,
19 150:1-3.)

20 In order for the other lower basin states and the Secretary to allow California 15 years to reduce
21 its water diversions to its basic apportionment, those parties insisted that California develop a legally binding
22 plan to accomplish such reduction. (RT, at 2707:12-25, 2708:1-2.) In accordance with that insistence,
23 the Colorado River Board of California, in consultation with the California Department of Water Resources,
24 MWD, CVWD, IID, PVID, SDCWA, City of Los Angeles and others, has developed California’s
25 Colorado River Water Use Plan (SDCWA Exh. 4, at 4), otherwise known as the 4.4 Plan. The 4.4 Plan
26 includes several key components, including voluntary water transfers, water storage and conjunctive use
27 programs, and canal lining projects. (SDCWA Exh. 4, at 4-5; RT, at 112:4-7.) The water transfers
28 component is critical to the success of the 4.4 Plan and California’s ultimate compliance with its

1 apportionment of water rights in the Colorado River (SDCWA Exh. 1, at 8; RT, at 399:9-13), and the
2 water transfer from IID to SDCWA is the largest by volume included in the Plan. (SDCWA Exh. 1, at 9;
3 RT, at 112:22-24, 113:9-20.) The other lower basin states and the Secretary will not accept any substitute
4 for successful implementation of the 4.4 Plan. (SDCWA Exh. 1, at 10; SDCWA Exh. 4, at 5.)

5 In order to provide assurances to the other states and the Secretary that California will in fact
6 reduce its water use in conformity with the 4.4 Plan, the Guidelines contain two conditions on continued
7 application of the generous interim surplus determinations, which are contained in Sections 2(B)(1) and
8 2(B)(2) of the Guidelines. (RT, at 129:5-22.) Those conditions are: (1) that the California water users
9 execute the QSA by December 31, 2002, to show their willingness to be legally bound to internal water
10 allocations that collectively equal 4.4 million acre-feet per annum (66 Fed. Reg. at 7782; RT, at 129:15-22,
11 155:8-19; SDCWA Exh. 4, at 7); and (2) that California agricultural water usage be reduced to certain
12 benchmark quantities at three-year intervals during the interim period, beginning in 2003. (66 Fed. Reg.
13 at 7782; *see* RT, at 130:9-12; SDCWA Exh. 4, at 7.) Those are independent conditions that must both
14 be satisfied in order for the Secretary to apply the relatively generous surplus determinations set forth in
15 Sections 2(B)(1) and 2(B)(2) of the Guidelines. (*See* Guidelines, Notice Regarding Implementation of
16 Guidelines, 67 Fed. Reg. 41733, 41733-34 (June 19, 2002); RT, at 2707:5-10.)

17 **A. WILL THE INTERIM SURPLUS GUIDELINES (66 FED. REG. 7772) REMAIN**
18 **IN EFFECT IF IID, METROPOLITAN WATER DISTRICT OF SOUTHERN**
19 **CALIFORNIA, AND COACHELLA VALLEY WATER DISTRICT DO NOT**
20 **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?

21 The relatively generous surplus determinations contained in Guidelines, Sections 2(B)(1) and
22 2(B)(2), will be suspended if the QSA has not been executed by December 31, 2002, irrespective of
23 whether California reduces its water use to meet the benchmark quantities set forth in the Guidelines. The
24 execution of the QSA in Guidelines Section 5(B) and the attainment of agricultural usage benchmarks in
25 Section 5(C) are independent conditions for the continued applicability of Sections 2(B)(1) and 2(B)(2).
26 The Assistant Secretary of the Interior confirmed this in his Guidelines, Notice Regarding Implementation
27 of Guidelines, 67 Fed. Reg. 41733, 41734 (June 19, 2002).

28 **B. THE GUIDELINES PROVIDE THAT IF THE QSA IS NOT EXECUTED BY**
DECEMBER 31, 2002, THE INTERIM SURPLUS GUIDELINES WILL BE

1 **SUSPENDED “UNTIL SUCH TIME AS CALIFORNIA COMPLETES ALL**
2 **REQUIRED ACTIONS AND COMPLIES WITH REDUCTIONS IN WATER**
3 **USE REFLECTED IN SECTION 5(C) OF THESE GUIDELINES ...” IS**
4 **EXECUTION OF THE QSA A “REQUIRED ACTION” WITHIN THE**
5 **MEANING OF THIS SECTION, OR DOES THE PHRASE “ALL REQUIRED**
6 **ACTIONS” REFER TO THOSE ACTIONS NECESSARY TO MEET THE**
7 **BENCHMARK QUANTITIES?**

8 In the event the QSA is not executed by December 31, 2002, the Guidelines provides a procedure
9 whereby the Section 2(B)(1) and 2(B)(2) surplus determinations may be reinstated.

10 The exact nature of the requirements for reinstatement of those Sections is not clear, but the required
11 actions would likely be at least as stringent as the provisions of the QSA, and would possibly be more
12 stringent. Such required actions would be extremely difficult for California to meet, if not impossible, if the
13 QSA were not to be executed, because the QSA is a core component of California’s Colorado River
14 Water Use Plan for reducing California’s non-surplus diversions to 4.4 MAF.

15 Execution of the QSA is a “required action” within the meaning of Section 5(B) of the Guidelines.
16 The phrase “all required actions” is not limited to those actions necessary to meet the benchmark quantities
17 contained in Section 5(C).

18 Guidelines Section 5(B) declares that the surplus determinations contained in Sections 2(B)(1) and
19 2(B)(2) of the Guidelines will be suspended if the QSA and its related agreements have not been executed
20 by December 31, 2002. (66 Fed. Reg. at 7772, 7782 (Jan. 25, 2001).) Suggestions to the contrary were
21 forcefully rejected by Assistant Secretary of the Interior Bennett W. Raley in a subsequent Federal Register
22 Notice clarifying the Guidelines. (Notice, 67 Fed. Reg. at 41733 (June 19, 2002).) That Notice reported
23 that “[s]ome informal commentators have suggested that failure to execute the QSA would have no
24 consequence for surplus determinations for 2003 under the Guidelines,” and then declared that “[s]uch
25 suggestions are inconsistent with the plain language of the Guidelines as adopted.” (67 Fed. Reg., at
26 41734.) There can be no doubt that if the QSA has not been executed by December 31, 2002, on January
27 1, 2003, the Secretary will publish the 2003 Annual Operating Plan for the Colorado River System
28 Reservoirs (AOP) based on a suspension of Sections 2(B)(1) and 2(B)(2). (67 Fed. Reg. at 41734; 43
 U.S.C. § 1552(b) (2002) (setting January 1 as the transmittal date for the AOP).)

 Sections 2(B)(1) and 2(B)(2) of the Guidelines set forth how the Secretary will determine the
surplus available to MWD in years when the Lake Mead water level elevation is above 1,125 feet and

1 below the amount which would initiate a surplus under the “70R Strategy” set forth in Section 2(B)(3).
2 (E66 Fed. Reg. at 7780-81.) Suspension of those provisions would result in no surplus being made
3 available to MWD unless Lake Mead levels exceeded the storage requirements for the 70R Strategy, and
4 would likely cause a significant reduction in the amount of Colorado River water available for diversion by
5 MWD during the period of suspension. Such a reduction in water available for diversion by MWD would
6 constitute an immediate water crisis and be detrimental to the interests of California water users statewide.

7 Under Section 5(B), the surplus determinations under Sections 2(B)(1) and 2(B)(2) may be
8 reinstated after suspension, presumably sometime after December 31, 2002, if “California completes all
9 required actions and complies with reductions in water use reflected in Section 5(C) of the[] Guidelines.”
10 (66 Fed. Reg., at 7782.) The Board has asked the parties to brief whether “execution of the QSA [is] a
11 ‘required action’ within the meaning of [Section 5(B)], or [whether] the phrase ‘all required actions’ refer[s]
12 to those actions necessary to meet the benchmark quantities.” (Letter from Chairman Baggett, SWRCB,
13 to Hearing Parties, at 3 (June 14, 2002).)

14 Ultimately, the determination of what are the “required actions” for reinstatement of Sections
15 2(B)(1) and 2(B)(2) lies within the discretion of the Secretary of the Interior and is difficult to predict by
16 the parties at this time. In his recently published notice regarding some aspects of the Guidelines, Assistant
17 Secretary Raley explicitly declined to provide any clarification on this point, by stating that “[n]othing in this
18 notice is intended to address or limit the appropriate circumstances for reinstatement of Sections 2(B)(1)
19 and 2(B)(2) as the bases for annual surplus determinations.” (67 Fed. Reg. at 41734.) It is important to
20 note that this statement was made after the current Question 2(a) was posed to the parties by the Board
21 on June 14, 2002. It appears from the Assistant Secretary’s refusal to clarify the reinstatement
22 requirements that the Secretary is not promising what the exact nature of the “required actions” will be, and
23 that those requirements may change based on circumstances prevailing at the time the Secretary is called
24 upon to determine reinstatement.

25 Petitioner SDCWA anticipates at this time, however, that execution of the QSA would be
26 necessary for California to meet any future requirements for reinstating the surplus determinations in
27 Sections 2(B)(1) and 2(B)(2).
28

1 In order to understand the “required actions” language contained in Section 5(B), it is necessary
2 to consider the context and purpose of the Guidelines. California must reduce its use of Colorado River
3 water from its maximum use of 5.2 MAF to 4.4 MAF in order to comply with its legal apportionment.
4 Recognizing that California cannot immediately reduce its water use so substantially, the other lower basin
5 states and the Secretary of the Interior have agreed to allow California to reduce its diversions over a
6 several year period, reaching the ultimate 4.4 MAF goal by 2016. The Secretary has agreed to make its
7 surplus determinations between now and 2016 on a basis other than California’s ultimate apportionment
8 as long as California is making progress toward achieving its goal. As explained by the Assistant Secretary:

9 The relationship between efforts to reduce California’s reliance on surplus
10 deliveries and the adoption of specific criteria to guide surplus
11 determinations was established in the initial Federal Register notice
12 announcing the potential development of surplus guidelines: “Reclamation
13 recognizes that efforts are currently underway to reduce California’s
14 reliance on surplus deliveries. Reclamation will take account of progress
15 in that effort, or lack thereof, in the decision-making process regarding
16 specific surplus criteria.

17 (67 Fed. Reg., at 41733 (*quoting* Intent to Solicit Comments on the Development of Surplus Criteria for
18 Management of the Colorado River and to Initiate National Environmental Policy Act (NEPA) Process,
19 64 Fed. Reg., at 27008, 27009 (May 18, 1999).) The Section 5(B) condition of Sections 2(B)(1) and
20 2(B)(2) surplus determinations on execution of the QSA is one method set forth by the Secretary to
21 objectively measure California’s progress.

22 Execution of the QSA is a significant step toward reducing California’s excessive diversions from
23 the Colorado River. It is, however, only one component of California’s Colorado River Water Use Plan,
24 which is the comprehensive planning document outlining all of California’s numerous identified methods for
25 reducing its diversions. Rather than requiring that all of the Plan components must be immediately
26 implemented, the Secretary in the Guidelines allowed California to show its progress toward reducing
27 diversions through two conditions: execution of the QSA, in Section 5(B), and limiting agricultural usage
28 to certain benchmark quantities, in Section 5(C).

Given that context, Section 5(B) is most reasonably interpreted to require of California for
reinstatement, at an absolute minimum, to continue to comply “with reduction in water used reflected in
Section 5(C) of the [] Guidelines.” Beyond such compliance, which was already an independent condition
by the terms of Section 5(C) itself, California must “complete[] all required actions.” The function of

1 Section 5 within the Guidelines is to determine California’s progress in taking action under the Plan to
2 reduce its over-use of Colorado River water. The Section 5(B) “required actions” are thus best
3 understood as execution of the QSA, without which the Plan cannot be implemented. Actions that are
4 “required ” would be those actions so critical that the Plan could not be effective without them.

5 The QSA is clearly a critical component of the Plan, as shown by the following statements within
6 the Plan itself:

- 7 • The new Quantification Settlement Agreement, other interagency
8 agreements and associated implementation agreements with the Secretary
9 of the Interior, together with the Secretary’s administration of water rights
10 and use, constitute the principal binding and enforceable provisions of The
11 Plan. (SDWCA Exh. 15, at 6);
- 12 • That the QSA is a “significant advancement in the development” of the
13 Plan (SDCWA Exh. 15, at 30);
- 14 • That the QSA and the Plan are interdependent (SDCWA Exh. 15, at 30,
15 32);
- 16 • That the QSA is one of the “principal binding and enforceable provisions
17 of The Plan” (SDCWA Exh. 15, at 109-110).

18 The IID/SDCWA water transfer itself is a core component of the QSA. The record supports this
19 in a number of statements regarding water transfers in general and the IID/SDCWA transfer in particular,
20 including:

- 21 • There are initial linchpin components of California’s Colorado River
22 Water Use Plan that in their absence would make it difficult to achieve the
23 goals of The Plan or California’s orderly transition to its basic River water
24 apportionment without potential major water supply and economic
25 disruptions. These linchpin Plan components are: ...core cooperative
26 water conservation/transfers from agricultural use to urban use [and]
27 further quantification of the third priority of the Seven-Party Agreement....
28 Of these linchpins, the cooperative water conservation/transfers of
between 0.4 to 0.5 million af per year of water from agricultural use to
urban use and the further quantification of the water rights, which helps
facilitate these transfers, provide the greatest long-term contributions
volume wise for California to meet its Colorado River water needs from
within its basic apportionment (SDCWA Exh. 15, at 24-25);
- That water transfers like that proposed by IID/SDCWA possess “a
critical linchpin role in California’s ability to meet its Colorado River water
needs from within its basic apportionment” (SDCWA Exh. 15, at 32);
- That water transfers are a central component of the Plan (SDCWA Exh.
15, at 32-37;

- 1 • That the IID/SDCWA water transfer is among the “core cooperative
2 voluntary water conservation/transfers” incorporated into the Plan
(SDCWA Exh. 15, at 34);
- 3 • That the IID/SDCWA water transfer is the largest anticipated transfer by
4 quantity (SDCWA Exh. 15, at 34, 35);
- 5 • That voluntary water transfers generally “will continue to play an important
6 foundation role for California to meet its Colorado River water needs
7 within its apportionment,” (SDCWA Exh. 15, at 37);
- 8 • In the expert witness statement of Dennis B. Underwood, he stated that
9 “[t]he 1998 IID/SDCWA Water Conservation and Transfer Agreement
10 will be a vital component of California Plan strategy for meeting the
Interim Surplus Guidelines,” (SDCWA Exh. 4, at 3; *see also* RT, at
11 130:22 - 131:6);
- 12 • Mr. Underwood further asserted that the IID/SDCWA transfer is a “QSA
13 core component,” (SDCWA Exh. 4, at 5).

14 The QSA and the IID/SDCWA water transfer are interdependent. The QSA facilitates voluntary
15 water transfers by settling the quantification of Colorado River water available to each California user. As
16 described in the Plan, the “Quantification Settlement Agreement and its associated Secretarial
17 Implementation Agreement provisions on the third and sixth priority use provide the mechanisms needed
18 to help facilitate the voluntary shift” of water from agricultural use to urban use, of which the IID/SDCWA
19 transfer is the most significant. (SDCWA Exh. 15, at 33, 25-26, 28.)

20 As noted above, the Assistant Secretary has not specified exactly what might constitute the
21 reinstatement requirements in the future if the QSA is not executed (Notice, 67 Fed. Reg., at 41734) but
22 California should expect that, given the circumstances – California’s failure to perform the original condition,
23 which the other lower basin states would argue was a generous concession – those requirements will be
24 at least as stringent as the terms of the QSA.

25 The foregoing interpretation of Section 5(B) is supported by the language of the Guidelines as well
26 as its context and intent. There are several rules of interpretation which lead to that conclusion.
27 Preliminarily, one should note that, in examining this question, federal rules regarding interpretation of
28 regulations apply, because the Guidelines is an instance of federal law. (73 Am.Jur.2d *Statutes*, §64
(2002) (*citing Lytle v. Southern Ry-Carolina Division* (1933) 171 S.E. 42 (1933).) The California rules
are, however, generally identical and are useful when the federal law is silent. Additionally, the same rules
of construction and interpretation that apply to statutes are applied to administrative rules and regulations.

1 (2 Am.Jur.2d *Administrative Law*, § 239 (2002) (*citing* M. Kraus & Bros., Inc. v. United States (1946)
2 327 U.S. 614 [66 S.Ct. 705]; California Drive-In Restaurant Asso. v. Clark (1943) 22 Cal.2d 287 [140
3 P.2d 657]; Auchmoody v. 911 Emergency Services (1989) 214 Cal.App.3d 1510 [263 Cal.Rptr. 278].)

4 First, the qualifying words “reflected in section 5(C) of these Guidelines” should be applied only
5 to the words “reductions in water use” and not “all required actions.” It is a general rule that qualifying or
6 modifying words or phrases should be considered to refer to the word, phrase, or clause with which they
7 are grammatically connected. (*See* 73 Am.Jur.2d *Statutes*, § 137 (2002) (*citing* McClurg v. Kingsland
8 (1842) 42 U.S. 202 [11 L.Ed. 102].) In addition, qualifying words and phrases are ordinarily confined
9 to the words immediately preceding. (73 Am.Jur.2d *Statutes*, § 138 (2002) (*citing* People v. Costa (6th
10 App. Dist. 1991) 1 Cal.App.4th 1201 [2 Cal.Rptr.2d 720].)

11 In Section 5(B), the words immediately preceding the phrase “reflected in section 5(C) of these
12 Guidelines” are “reductions in water use.” There are separate phrases for “completes all required actions”
13 and “complies with reductions in water use,” with separate verbs and objects, and the qualifying words
14 “reflected in section 5(C) of these Guidelines” follow the second phrase. Thus, according to general rules
15 of interpretation, the qualifying words should only be applied to the immediately preceding word “reductions
16 in water use.” The result is that one must look for the “required actions” elsewhere than merely in Section
17 5(C), and at actions broader than those required to meet the benchmark quantities of Section 5(C).

18 Second, Section 5(B) should be interpreted as requiring some “required actions” in addition to the
19 benchmark quantities in Section 5(C) because the contrary interpretation would render Section 5(B)
20 meaningless. It is a general rule that a regulation should be interpreted to give effect, if possible, to all
21 provisions of the regulation. (*See, e.g.,* Cammarano v. United States (1950) 358 U.S. 498 [79 S.Ct.
22 524].)

23 Section 5(B) provides that the surplus determinations contained in Sections 2(B)(1) and 2(B)(2)
24 will be suspended if the QSA has not been executed by December 31, 2002. (66 Fed. Reg., at 7782; 67
25 Fed. Reg., at 41734.) It allows those surplus determinations to be reinstated, however, if “California
26 completes all required actions and complies with reductions in water use reflected in section 5(C) of these
27 Guidelines.” (66 Fed. Reg., at 7782.) If the “required actions” were interpreted as nothing more than the
28 actions necessary to achieve the “reductions in water use reflected in section 5(C),” then Section 5(B)

1 would be made meaningless. Since California must comply with Section 5(C) in any case, Section 5(B)
2 and the execution of the QSA would be a false condition with no consequences: if the QSA were executed,
3 California would need to comply with Section 5(C); if the QSA were not executed, California would still
4 only need to comply with Section 5(C). Thus, the correct interpretation of Section 5(B) includes some
5 “required actions” other than mere compliance with the reductions in water use reflected in Section 5(C).

6 Ultimately, in the interpretation of statutes or regulations, the intent behind the statute or regulation
7 is the controlling factor. Accordingly, the primary rule of construction of statutes is to ascertain and declare
8 the intention of the legislature or official. (73 Am.Jur.2d *Statutes*, § 61 (2002) (citing Atlantic Mutual
9 Insurance Co. v. C.I.R. (1998) 523 U.S. 382 [118 S.Ct. 1413]; Calatayud v. State of California (1998)
10 18 Cal.4th 1057 [77 Cal.Rptr.2d 202]).) As described above, this interpretation fits the overall context
11 and intent of the Guidelines.

12 **C. IF THE PROPOSED TRANSFER IS NOT IMPLEMENTED BEGINNING IN**
13 **2003, WILL CALIFORNIA NONETHELESS MEET THE 2003 BENCHMARK**
14 **QUANTITY FOR AGRICULTURAL USAGE OF 3.74 MILLION ACRE-FEET**
15 **SET FORTH IN THE GUIDELINES, AND, IF SO, HOW?**

16 It is possible that California could meet the required benchmark quantities in 2003, apart from the
17 Conservation and Transfer Project. (RT, at 159:23-25, 160:1-4.) But, it is doubtful whether California
18 would be able to meet the next required benchmark quantities in 2006. (RT, at 160:5-11.)

19 Contrary to the unsupported assertion in the August 27, 2001 letter by Mr. Gastelum to DWR, that
20 California will meet the benchmark quantities without the IID/SDCWA transfer (County of Imperial, Exh.
21 5, at 2), Mr. Underwood of MWD testified in these proceedings that MWD’s position now is that the
22 alternatives to the transfer are unacceptable. (RT, at 2705:17 to 2797:19; *see also* SDCWA Exh. 61
23 (retreating in substance from the August 27, 2001 letter). The opinion in the August 27, 2001, letter has
24 been repudiated and should not be relied upon in these proceedings.

25 Nevertheless, even if California was able to meet these initial benchmarks in some other way, as
26 discussed above, Sections 2(B)(1) and 2(B)(2) of the Guidelines will be suspended on December 31,
27 2002, if the QSA is not executed by that date, and California will not receive the tremendous benefit of
28 those sections. (RT, at 2704:5-8, 2707:5-10.) Thus, whether California can meet the 2003 benchmark
quantity does not alone determine the ultimate availability of surplus water; that determination depends also
on execution of the QSA.

1 **D. IF THE PROPOSED TRANSFER CANNOT BE MITIGATED SATISFAC-**
2 **TORILY, IS AN ALTERNATIVE SOLUTION AVAILABLE?**

3 No. As stated during the Board hearings by representatives of two of the parties to the QSA, Mr.
4 Underwood of MWD, and Mr. Levy of CVWD, as well as by Ms. Stapleton of the SDCWA which
5 actively participated in the formulation of the QSA, it would be practically impossible for the parties to
6 modify the QSA in any significant way that still would maintain the agreement of the parties. Each of the
7 parties feels that it has given up as much as it can for the QSA as written. (RT, at 158:23-25, 159:1-7,
8 397:19-24, 2702:25, 2703:1-13, 2710:16-19.)

9 **E. IF THE PROPOSED TRANSFER IS NOT IMPLEMENTED, IS THERE ANY**
10 **OTHER ACTION THAT THE SWRCB CAN AND SHOULD TAKE IN ORDER**
11 **TO ENSURE THAT CALIFORNIA REDUCES ITS USE OF COLORADO**
12 **RIVER WATER IN ACCORDANCE WITH THE GUIDELINES?**

13 There is nothing that would be sufficient to satisfy the Guidelines; execution of the QSA and
14 approval of the IID/SDCWA transfer are necessary.

15 **XII. THE SWRCB'S APPROVAL OF THE CONSERVATION AND TRANSFER PROJECT**
16 **IS OF EXTREME IMPORTANCE AND URGENCY**

17 The SWRCB's approval of the Conservation and Transfer Project is of extreme importance and
18 urgency for the entire state of California. Without it, the proposed QSA fails.

- 19 • Mr. Slater: Mr. Levy, based upon your decades of experience in water
20 management and your position as the general manager of Coachella, your
21 direct participation in the development of the key terms and your
22 knowledge of the specific facts and circumstances in this case, is it critical
23 that the State Board approve the San Diego/IID transfer in order to
24 implement the QSA?
- 25 • Mr. Levy: Yes. It is a condition precedent to the execution of the QSA.

26 (RT, at 143; *see also* RT, at 143:14-18, 396:19-25, 397:1-2.)

27 It is imperative that the California Plan components that will enable the
28 state to meet the requirements of the Interim Surplus Guidelines succeed.
The Interim Surplus Guidelines are vital to a controlled reduction in
California's use of the Colorado River. For this reason, there is great
urgency in reaching a resolution on these matters that are before the
[SWRCB].

(SDCWA Exh. 4, at 9; *see also* RT, at 130:17-18, 399:7-13.)

The QSA is a key component to the success of the California Plan (RT, at 121:11-17, 130:24-25,
131:1, 141:17-21), and without it 800,000 AF of California's water supply will be in jeopardy. The loss

1 of 700,000 AF of urban water supply, which constitutes approximately one-third of the MWD water
2 supply and enough water to serve 5 million people (RT, at 150:6-16, 396:19-25, 397:1-2), would
3 constitute an immediate water crisis, with unacceptable statewide economic and environmental adverse
4 impacts.

5 If no new agreements were executed and no surplus water were available,
6 Southern California would face a total reduction of Colorado River water
7 supply of about 800 KAFY. The statewide economic and environmental
8 consequences of this shortfall would simply not be acceptable. There is
9 no substitute for success in implementing a plan for reducing California's
10 dependency on Colorado River water that is acceptable to the Secretary
11 of the Interior and the other Colorado River Basin states.

12 (SDCWA Exh. 4, at 5; RT, at 115:23-25, 116:14-23.)

13 As such, Petitioner SDCWA urges the SWRCB to approve the Amended Petition with all
14 due speed.

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XIII. CONCLUSION

For the foregoing reasons, Petition San Diego County Water Authority requests the SWRCB's approval of the Amended Petition. SWRCB approval will clear the way for implementation of the Transfer Agreement, the QSA and thus the California Plan.

DATED: July 11, 2002

Respectfully submitted,

By [original signed]
SCOTT S. SLATER
STEPHANIE OSLER HASTINGS
Attorneys for Petitioner, San Diego
County Water Authority

ATTACHMENT A

**Proposed Findings Supported by the Evidence
and Related Conclusions of Law**
(without citations)

1. The proposed Conservation and Transfer Project will not result in substantial injury to any legal user of water.
 - a. No protestant offered credible evidence of a valid vested legal right to water, a legally recognizable injury, or the time at which water right holder began the authorized water use began.
 - b. Subject to the conditions set forth in the PDA, MWD and CVWD withdrew their protests and now consent to the SWRCB's approval of the proposed Conservation and Transfer Project.
2. Approval of the Amended Petition will provide substantial benefits to the State of California.
 - a. The Conservation and Transfer Project is an essential component of the California Plan and is a necessary prerequisite to the successful implementation of the QSA and related agreements.
 - b. The Conservation and Transfer Project and the QSA assures the maintenance of a full Colorado River Aqueduct for the benefit of California and the avoidance of an annual loss of 800,000 acre-feet of water in accordance with the California Plan.
 - c. MWD holds substantial rights to the State Water Project and the successful implementation of the California Plan will decrease the likelihood of MWD requesting additional State Water Project water to replace the lost Colorado River supply and increasing pressure on other users and the San Francisco-San Joaquin Bay-Delta.
3. Approval of the Amended Petition will promote the State's paramount interests in maximizing the reasonable and beneficial use of Colorado River water in accordance with Article X, Section 2, of the California Constitution by ensuring that California puts all of the available Colorado River water to beneficial use.
 - a. The Transfer Agreement and the QSA will ensure that California continues to use its basic allocation of Colorado River water and the surplus deliveries.

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- b. The surplus deliveries will allow the municipal use of the surplus water by MWD and its member agencies.
 - c. SDCWA will apply the transferred water to municipal, industrial and agricultural uses in accordance with Article X, Section 5, of the California Constitution.
4. A more efficient use of Colorado River water in accordance with Article X, Section 2 will result from each of the following measures that will be undertaken pursuant to the QSA:
- a. Substantial conservation efforts undertaken by IID and funded by the Authority, CVWD and MWD will generate 300,000 acre-feet of conserved water annually at a cost well in excess of a billion dollars to the transferees.
 - b. The coordinated water use and water rights administration provided by the QSA and related agreement so that presently unquantified agricultural rights will be quantified, competing claims to Colorado River water will be settled, and clear guidelines governing the delivery of water among Colorado River interests will be established, thereby providing greater certainty and enhanced water rights and water supply reliability for IID, the Authority, MWD and CVWD.
 - c. The QSA constitutes a consensual “physical solution” reducing waste, promoting the efficient use of water and benefitting the agencies receiving conserved water while not causing substantial injury or material expense to IID
 - (1) IID has high priority (Priority Three) water rights to Colorado River water.
 - (2) MWD and CVWD are junior priority users that would benefit by the Transfer Agreement and the QSA.
 - (3) SDCWA is a transferee that would not enjoy a direct benefit of Colorado River water in the absence of the physical solution made possible by the QSA.
 - (4) The junior right holders and the transferees agree to fund the conservation efforts to make water available to SDCWA and CVWD so that the senior right holder does not incur substantial expense or material injury in implementing the Transfer Agreement and the QSA.

- 1 5. The transfer and acquisitions are in furtherance of earlier SWRCB Decision 1600 and WR
2 88-20 concerning the IID’s reasonable and beneficial use of water, the California
3 Constitution, Article X, Section 2 and sections 100 and 109 of the Water Code.
- 4 a. WR 88-20 raised the possibility of both a voluntary conservation and transfer program
5 pursuant to Water Code Section 1011, as well as an imposed physical solution.
- 6 6. Given the more efficient use of Colorado River water under the actions described in paragraph 4,
7 the SWRCB concerns with respect to IID’s reasonable and beneficial use are satisfied and the
8 SWRCB does not anticipate the need, absent any substantial material adverse change in IID’s
9 irrigation practices or advances in economically feasible technology associated with irrigation
10 efficiency, to reassess the reasonable and beneficial use of water by the IID before the end of
11 calendar year 2023.
- 12 a. The cost of investing in conservation measures, including land management and
13 maintenance activities, that meet the requirements of Water Code Section 1011, are
14 substantial.
- 15 b. The transferees will spend billions of dollars to fund the conservation measures and related
16 programs to be implemented and administered by IID and its farmers.
- 17 c. In the context of the QSA, a land management and maintenance program that includes
18 temporary fallowing and makes water available to the transferees is a substantial investment
19 in conservation.
- 20 (1) In the context of the QSA, an investment in a land management and maintenance
21 program that improves efficiency, certainty and reliability of all Colorado River use
22 outweighs the need to improve only agricultural on-farm efficiency.
- 23 (2) In the context of the QSA, a land management and maintenance program that
24 includes temporary/rotational fallowing in a manner that avoids unreasonable
25 adverse impacts on fish and wildlife in the Salton Sea outweighs the need to
26 improve only agricultural on-farm efficiency where the SWRCB can confirm that
27 temporary land fallowing by IID qualifies as conservation within the meaning of
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Water Code Section 1011(a) and further finds that the land management program is integral to a more regional efficient use of Colorado River water.

d. SDCWA has engaged in substantial water conservation efforts, used water efficiently and has plans in place to continue these conservation efforts as well as the efficient use of the water transferred to it by IID.

7. 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. As such, the conserved water transferred or acquired retains the same priority as if it were diverted and used by the IID. IID's conservation program complies with Water Code Section 1011 so long as:

a. Without regard to the specific method of conservation chosen by IID, all of IID's conservation measures will result in reduced deliveries of Colorado River water.

(i) IID will cap its diversions from the Colorado River at 3.1 million acre-feet under the QSA;

(ii) The Secretarial Implementation Agreement requires the Secretary of Interior to reduce its delivery of water to IID by an amount equal to the water being made available to SDCWA and CVWD as provided therein;

b. IID has proposed conservation measures that may include improved agricultural efficiency, system improvements and land fallowing. All water savings resulting from the measures proposed, other than permanent fallowing, qualify for protection under Water Code Section 1011(a).

(i) A land management program in which specific parcels of land are temporarily fallowed on a rotational basis for periods less than five consecutive years is considered temporary fallowing.

(ii) Land is routinely fallowed by farmers in accordance with customary farming practices. There are agricultural land benefits associated with temporary fallowing.

(iii) Fallowed land may still be properly irrigated to leach the soil, pre-irrigate and limit air quality impacts.

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(iv) IID has discretion to adopt a land management program that includes temporary fallowing in a manner that minimizes socioeconomic impacts.

c. IID files an initial report with the SWRCB describing the conservation program and the measures taken to address socioeconomic impacts within six months from approval of the project and thereafter an annual report with the SWRCB describing the specific characteristic and components of the conservation program, and verifying that in accordance with the QSA and the Secretarial Implementation Agreement: (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 Department of Interior; 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 IID.

8. The annual reports provided under paragraph 7c shall satisfy the reporting obligations of IID under Decision 1600 and Water Rights Order 88-20.

9. The Amended Petition will not unreasonably affect fish, wildlife, or other instream beneficial uses of water.

a. Approval of the Amended Petition and the Implementation of the QSA and the California Plan will provide substantial benefits to all of California, to the Petitioners and to MWD and CVWD as provided in paragraphs 2,3 and 4 above. Any affect on fish, wildlife or other instream beneficial uses must be considered in that context.

b. The Salton Sea is an artificial body of water that is dependent upon orders of imported water from IID and its customers. Colorado River water is foreign to the Imperial Valley and the Salton Sea.

c. The survival of fish and wildlife that rely upon the Salton Sea are dependent upon the continued importation of foreign water by IID and the continued use and release of that

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water by IID’s customers. However, neither IID nor its customers are required to continue their importation and release of such foreign water.

d. Elevations of the Salton Sea are declining and salinity levels are increasing without regard to whether the Conservation and Transfer Project is implemented.

e. Unreasonable affects on fish and wildlife in the Salton Sea can be reasonably avoided by the inclusion of a condition that any conservation program adopted by IID not accelerate the expected general decline of Salton Sea elevations beyond those that would have occurred “but for” the Conservation and Transfer Project.

- (i) The EIR/EIS evaluates the baseline condition for inflows into the Salton Sea.
- (ii) Implementation of the HCP would mitigate for the loss of inflows to the Salton Sea as necessary to ensure that the impacts on Salton Sea elevations and salinity levels are no greater than those identified in the “no-project” condition set forth in the EIR/EIS.

f. Approval and implementation of the HCP will fully protect against adverse affects on fish and wildlife by maintaining SaltonSea inflows, and thus salinity, at a level that is equivalent to those in the “no-project” condition set forth in the EIR/EIS.

10. This 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 precedential 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 non-applicability of California law or federal law to any of the matters raised by the Petition or to any other Colorado River transfer or acquisition.

ATTACHMENT B

**Proposed Findings Supported by the Evidence
and Related Conclusions of Law**

(with citations)

- 1 1. The proposed Conservation and Transfer Project will not result in substantial injury to any legal
2 user of water.
- 3 a. No protestant offered credible evidence of a valid vested legal right to water, a legally
4 recognizable injury, or the time at which water right holder began the authorized water use
5 began. (RT, at 444-462.)
- 6 b. Subject to the conditions set forth in the PDA, MWD and CVWD withdrew their protests
7 and now consent to the SWRCB's approval of the proposed Conservation and Transfer
8 Project. (SDCWA Exh. 3, at 1-2; SDCWA Exh. 4, at 3.)
- 9 2. Approval of the Amended Petition will provide substantial benefits to the State of California.
- 10 a. The Conservation and Transfer Project is an essential component of the California Plan
11 and is a necessary prerequisite to the successful implementation of the QSA and related
12 agreements. (SDCWA Exh. 4, at 3; SDCWA Exh. 3, at 3-5; SDCWA Exh. 1, at 8-10.)
- 13 b. The Conservation and Transfer Project and the QSA assures the maintenance of a full
14 Colorado River Aqueduct for the benefit of California and the avoidance of an annual loss
15 of 800,000 acre-feet of water in accordance with the California Plan. (SDCWA Exh. 4,
16 at 4; SDCWA Exh. 3, at 4-5; SDCWA Exh. 1, at 8-10.)
- 17 c. MWD holds substantial rights to the State Water Project and the successful
18 implementation of the California Plan will decrease the likelihood of MWD requesting
19 additional State Water Project water to replace the lost Colorado River supply and
20 increasing pressure on other users and the San Francisco-San Joaquin Bay-Delta.
21 (SDCWA Exh. 5, at 5; SDCWA Exh. 1, at 5.)
- 22 3. Approval of the Amended Petition will promote the State's paramount interests in maximizing the
23 reasonable and beneficial use of Colorado River water in accordance with Article X, Section 2,
24 of the California Constitution by ensuring that California puts all of the available Colorado River
25 water to beneficial use.
- 26 a. The Transfer Agreement and the QSA will ensure that California continues to use its basic
27 allocation of Colorado River water and the surplus deliveries. (SDCWA Exh. 4, at 4;
28 SDCWA Exh. 3, at 3-4; SDCWA Exh. 1, at 8-9.)

- 1 b. The surplus deliveries will allow the municipal use of the surplus water by MWD and its
2 member agencies. (SDCWA Exh. 1, at 12; SDCWA Exh. 40, at 4.)
- 3 c. SDCWA will apply the transferred water to municipal, industrial and agricultural uses in
4 accordance with Article X, Section 5, of the California Constitution. (SDCWA Exh. 1, at
5 4; SDCWA, Exh. 2, at 3.)
- 6 4. A more efficient use of Colorado River water in accordance with Article X, Section 2 will result
7 from each of the following measures that will be undertaken pursuant to the QSA:
- 8 a. Substantial conservation efforts undertaken by IID and funded by the Authority, CVWD
9 and MWD will generate 300,000 acre-feet of conserved water annually at a cost well in
10 excess of a billion dollars to the transferees. (SDCWA Exh. 1, at 7; SDCWA Exh. 3, at
11 5.)
- 12 b. The coordinated water use and water rights administration provided by the QSA and
13 related agreement so that presently unquantified agricultural rights will be quantified,
14 competing claims to Colorado River water will be settled, and clear guidelines governing
15 the delivery of water among Colorado River interests will be established, thereby providing
16 greater certainty and enhanced water rights and water supply reliability for IID, the
17 Authority, MWD and CVWD. (SDCWA Exh. 1, at 6-11; SDCWA Exh. 4, at 5-7.)
- 18 c. The QSA constitutes a consensual “physical solution” reducing waste, promoting the
19 efficient use of water and benefitting the agencies receiving conserved water while not
20 causing substantial injury or material expense to IID
- 21 (1) IID has high priority (Priority Three) water rights to Colorado River water. (IID
22 Exh. 26, at 2.)
- 23 (2) MWD and CVWD are junior priority users that would benefit by the Transfer
24 Agreement and the QSA. (IID Exh. 26, at 2.)
- 25 (3) SDCWA is a transferee that would not enjoy a direct benefit of Colorado River
26 water in the absence of the physical solution made possible by the QSA.
27 (SDCWA Exh. 1, at 4-5; SDCWA Exh. 4, at 7.)
- 28

- 1 (4) The junior right holders and the transferees agree to fund the conservation efforts
2 to make water available to SDCWA and CVWD so that the senior right holder
3 does not incur substantial expense or material injury in implementing the Transfer
4 Agreement and the QSA. (SDCWA Exh. 1, at 7; SDCWA Exh. 3, at 5.)
- 5 5. The transfer and acquisitions are in furtherance of earlier SWRCB Decision 1600 and WR
6 88-20 concerning the IID’s reasonable and beneficial use of water, the California
7 Constitution, Article X, Section 2 and sections 100 and 109 of the Water Code.
- 8 a. WR 88-20 raised the possibility of both a voluntary conservation and transfer program
9 pursuant to Water Code Section 1011, as well as an imposed physical solution. (SWRCB
10 Exh. 2b, at 38-40.)
- 11 6. Given the more efficient use of Colorado River water under the actions described in paragraph 4,
12 the SWRCB concerns with respect to IID’s reasonable and beneficial use are satisfied and the
13 SWRCB does not anticipate the need, absent any substantial material adverse change in IID’s
14 irrigation practices or advances in economically feasible technology associated with irrigation
15 efficiency, to reassess the reasonable and beneficial use of water by the IID before the end of
16 calendar year 2023.
- 17 a. The cost of investing in conservation measures, including land management and
18 maintenance activities, that meet the requirements of Water Code Section 1011, are
19 substantial. (SDCWA Exh. 4, at 5-6; SDCWA Exh. 48, at 2.)
- 20 b. The transferees will spend billions of dollars to fund the conservation measures and related
21 programs to be implemented and administered by IID and its farmers. (SDCWA Exh. 1,
22 at 7; SDCWA Exh. 3, at 5.)
- 23 c. In the context of the QSA, a land management and maintenance program that includes
24 temporary fallowing and makes water available to the transferees is a substantial investment
25 in conservation. (SDCWA Exh. 4; IID Exh. 1; RT, at 1051-1057; *see also* Water Code
26 § 1011(a).)
- 27 (1) In the context of the QSA, an investment in a land management and maintenance
28 program that improves efficiency, certainty and reliability of all Colorado River use

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outweighs the need to improve only agricultural on-farm efficiency. (*See In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 355-57 [158 Cal. Rptr. 350]; *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 547 [45 P.2d 972]; *Allen v. California Water & Telephone Co.* (1946) 29 Cal.2d 466, 488 [176 P.2d 8]; *Pasadena v. Alhambra*, (1949) 33 Cal.2d 908, 925-926 [207 P.2d 17]; *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74 [219 Cal.Rptr. 740]; *People ex rel. State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3d 743, 751 [126 Cal.Rptr. 851]; *In the Matter of Fishery Resources and Water Right Issues of the Lower Yuba River* (2001) Dec. 1644, at 34; see also RT, at 116:17-23, 183 -185, 820:23 - 821:14, 3549, 2556.)

(2) In the context of the QSA, a land management and maintenance program that includes temporary/rotational fallowing in a manner that avoids unreasonable adverse impacts on fish and wildlife in the Salton Sea outweighs the need to improve only agricultural on-farm efficiency where the SWRCB can confirm that temporary land fallowing by IID qualifies as conservation within the meaning of Water Code Section 1011(a) and further finds that the land management program is integral to a more regional efficient use of Colorado River water. (Final EIR/EIS, at 1-6, n.1; SDCWA Exh. 47, at 9; RT, 2549-50, 2556, 2610-2611.)

d. SDCWA has engaged in substantial water conservation efforts, used water efficiently and has plans in place to continue these conservation efforts as well as the efficient use of the water transferred to it by IID. (SDCWA Exh. 2, at 4-9; SDCWA Exh. 7, Table 4-1; RT, at 406-8.)

7. 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. As such, the conserved water transferred or acquired retains the same priority as if it were diverted and used by the IID. IID's conservation program complies with Water Code Section 1011 so long as:

- 1 a. Without regard to the specific method of conservation chosen by IID, all of IID's
2 conservation measures will result in reduced deliveries of Colorado River water.
- 3 (i) IID will cap its diversions from the Colorado River at 3.1 million acre-feet under
4 the QSA; (IID Exh. 7, at 46.)
- 5 (ii) The Secretarial Implementation Agreement requires the Secretary of Interior to
6 reduce its delivery of water to IID by an amount equal to the water being made
7 available to SDCWA and CVWD as provided therein; (IID Exh. 22, at 4.)
- 8 b. IID has proposed conservation measures that may include improved agricultural efficiency,
9 system improvements and land fallowing. All water savings resulting from the measures
10 proposed, other than permanent fallowing, qualify for protection under Water Code
11 Section 1011(a).
- 12 (i) A land management program in which specific parcels of land are temporarily
13 fallowed on a rotational basis for periods less than five consecutive years is
14 considered temporary fallowing. (RT, at 2549.)
- 15 (ii) Land is routinely fallowed by farmers in accordance with customary farming
16 practices. There are agricultural land benefits associated with temporary fallowing.
17 (RT, at 1050: 4-14; RT, at 1006: 14-22.)
- 18 (iii) Fallowed land may still be properly irrigated to leach the soil, pre-irrigate and limit
19 air quality impacts. (SDCWA Exh. 48, at 1-3; RT, at 1006:14-22.)
- 20 (iv) IID has discretion to adopt a land management program that includes temporary
21 fallowing in a manner that minimizes socioeconomic impacts. (RT, at 2524.)
- 22 c. IID files an initial report with the SWRCB describing the conservation program and the
23 measures taken to address socioeconomic impacts within six months from approval of the
24 project and thereafter an annual report with the SWRCB describing the specific
25 characteristic and components of the conservation program, and verifying that in
26 accordance with the QSA and the Secretarial Implementation Agreement: (i) the IID's
27 diversions at Imperial Dam (less return flows) have been reduced below 3.1 million afy in
28 an amount equal to the quantity of conserved water transferred or acquired, subject to

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variation permitted by the Inadvertent Overrun Program adopted by the Department of Interior; 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 IID. (Wat. Code § 1011.)

- 8. The annual reports provided under paragraph 7c shall satisfy the reporting obligations of IID under Decision 1600 and Water Rights Order 88-20.
- 9. The Amended Petition will not unreasonably affect fish, wildlife, or other instream beneficial uses of water.
 - a. Approval of the Amended Petition and the Implementation of the QSA and the California Plan will provide substantial benefits to all of California, to the Petitioners and to MWD and CVWD as provided in paragraphs 2,3 and 4 above. Any affect on fish, wildlife or other instream beneficial uses must be considered in that context. (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346]; *In the Matter of City of Thousand Oaks* (1997) Dec. 1638, at 21; *In the Matter of the Diversions and Use of Water from Big Bear Creek* (1995) WR Ord. 95-4;
 - b. The Salton Sea is an artificial body of water that is dependent upon orders of imported water from IID and its customers. Colorado River water is foreign to the Imperial Valley and the Salton Sea. (*In The Matter of Imperial Irrigation District* (1984) WR Ord. 84-121, p. 4.)
 - c. The survival of fish and wildlife that rely upon the Salton Sea are dependent upon the continued importation of foreign water by IID and the continued use and release of that water by IID’s customers. However, neither IID nor its customers are required to continue their importation and release of such foreign water. (Stevens v. Oakdale Irr. Dist. (1939) 13 Cal.2d 343, 348-53; City of Los Angeles v. City of San Fernando (1975) 14 Cal.3d 199, 259-61; Haun v. De Vaurs (1950) 97 Cal.App.2d 841, 844.)

- 1 d. Elevations of the Salton Sea are declining and salinity levels are increasing without regard
2 to whether the Conservation and Transfer Project is implemented. (Final EIR, at 3-25 to
3 3-26; IID Exh. 55, Vol. 1, at 3.1 to 3-128.)
- 4 e. Unreasonable affects on fish and wildlife in the Salton Sea can be reasonably avoided by
5 the inclusion of a condition that any conservation program adopted by IID not accelerate
6 the expected general decline of Salton Sea elevations beyond those that would have
7 occurred “but for” the Conservation and Transfer Project.
- 8 (i) The EIR/EIS evaluates the baseline condition for inflows into the Salton Sea.
9 (Final EIR, at 3-25; IID Exh. 55, Vol. 1, at 3.1-128.)
- 10 (ii) Implementation of the HCP would mitigate for the loss of inflows to the Salton Sea
11 as necessary to ensure that the impacts on Salton Sea elevations and salinity levels
12 are no greater than those identified in the “no-project” condition set forth in the
13 EIR/EIS. (Final EIR/EIS 3-36 to 3-39.)
- 14 f. Approval and implementation of the HCP will fully protect against adverse affects on fish
15 and wildlife by maintaining Salton Sea inflows, and thus salinity, at a level that is equivalent
16 to those in the “no-project” condition set forth in the EIR/EIS. (Final EIR/EIS 3-36 to 3-
17 39.)
- 18 10. This Order and all findings of fact and conclusions of law, with the exception of any decision, order,
19 finding of fact or conclusion of law made with respect to standing or the right to appear or object,
20 shall have no precedential effect (as defined in the California Administrative Procedures Act) in any
21 other proceeding brought before the SWRCB and, specifically but without limitation, shall not
22 establish the applicability or non-applicability of California law or federal law to any of the matters
23 raised by the Petition or to any other Colorado River transfer or acquisition.
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