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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

JOINT PETITION OF IMPERIAL IRRIGATION)
DISTRICT AND SAN DIEGO COUNTY WATER)
AUTHORITY FOR APPROVAL OF LONG-)
TERM TRANSFER OF CONSERVED WATER,)
ETC. UNDER PERMIT NO. 7643)
(APPLICATION NO. 7482))
_____)

**COUNTY OF IMPERIAL
PETITION FOR RECONSIDERATION**

The County of Imperial petitions for reconsideration of this Board's Order WRO 2002—
0013 as authorized by sections 768 and 769 of title 23, California Code of Regulations. The order
whose reconsideration is sought was dated 28 October 2002. This petition is grounded in the
County's argument that for reasons stated in our closing brief and comments to both the draft order
and revised draft order, discrete portions of the order remain legally erroneous. In two instances

1 the County argues that assertions in the proposed order remains unsupported by substantial
2 evidence.

3
4 Despite this petition the County expresses its admiration and appreciation to the Board and
5 staff for producing a final order that commendably addresses the difficult issues raised by the
6 proposed transfer, and that by and large disposes of those issues not merely adequately, but with a
7 refined attention to the interests of the County. The County's present petition is grounded in the
8 expectation that discrete and in most cases minor modifications to the Board's final order will
9 eliminate the legal shortcomings that are inevitable in a product of this length produced in short
10 order. To restate that premise, this petition is filed to give the Board and staff a final unhurried
11 opportunity to make its order the best possible, and enable the County of Imperial to respond
12 positively and constructively if a transfer approval emanates from the Imperial Irrigation District
13 (IID) vote next month.

14
15 The Imperial County Board of Supervisors has throughout the year steadfastly declined to
16 take a substantive position on proposed transfer elements, believing that the IID Board of Directors
17 must first exercise their judgment as governing board and trustee of the water resources and water
18 rights at issue. The Supervisors have attempted -- in this Board, in the Hertzberg negotiations,
19 and in direct transactions with IID -- to shape the final decisions of this Board, IID, the Bureau of
20 Reclamation, and other Colorado River interests, to ensure that the County would not interpose
21 objections to the final result.

22
23 Toward that end, the Board of Supervisors recently revisited their resolution of 8 October
24 2002, in light of the Hertzberg meetings, the final order of this Board on 28 October, and public
25 expressions by Imperial County residents. The result of this reassessment is embraced in the
26 Supervisors' resolution adopted 12 November 2002, the first attachment to this petition. In
27 understanding the points that Imperial County continues to advance in this proceeding, and in
28

1 formulating its response to those points, this Board is asked within its ability to satisfy as many as
2 possible of the concerns expressed in the Supervisors' resolution.

3
4 In particular, the County of Imperial continues to assert that under the approach taken by
5 this Board to attempt certain assured mitigation for 15 years, it is legally necessary for the Board to
6 require a supplemental assessment of the proposed transfer before the conclusion of that 15 years,
7 in order to define the conditions under which the transfer should proceed into year 16 and beyond.
8 No party to this proceeding, nor the Board itself, can assert credible knowledge of what
9 circumstances, both environmental and economic, will obtain at the end of the initial 15-year term.
10 As this Board has recognized, the beneficial and reasonable use of water cannot be inflexibly
11 determined in isolation of future changed conditions. (Final Order, p. 84; *Tulare Dist. v. Lindsay-*
12 *Strathmore Dist.* (1935) 3 Cal.2d 489, 567.) The only legal means of proceeding now (whether
13 under the requirements of the Constitution, Water Code, or CEQA) in light of the Board's "15 year
14 plan" is to ensure this reassessment prior to the end of that term.

15
16 The County also believes it legally necessary for this Board to ensure that the substantive
17 mandate of Water Code section 1810 is honored – that this transfer, which utilizes the Metropolitan
18 Water District (MWD) Colorado River Aqueduct to transport water to which the San Diego
19 County Water Authority (SDCWA) takes delivery at Parker Dam, not unreasonably effect the
20 environment or economy of Imperial County. Fortunately, the Legislature in its recent enactment
21 of Chapter 617, section 7, has amended Water Code section 1013, subdivision (b) to create a
22 mechanism that can assure section 1810 compliance. This Board has recognized the utility of
23 Chapter 617 to assist in meeting other legal requirements, and modifications to the final order will
24 ensure that the Legislature's design in Chapter 617 to implement section 1810 is fulfilled.

25
26 The County also believes that under both state and federal law, the Board is authorized and
27 required to determine that the use of Colorado River resources to sustain the Salton Sea and its
28 shoreline is as proposed reasonable and beneficial. That determination is needed to protect IID and

1 the County from loss or weakening of IID’s water rights, and to protect California from claims by
2 outsiders that waters of the Colorado would not be so beneficially used. As we interpret the Law
3 of the River, the supreme federal interest to be honored is that of maintaining the interstate and
4 international apportionment of the river accomplished by Congress and ratified by the Supreme
5 Court. So long as that interest is honored, California law can apply to *all* of California’s use of
6 water from the river. In particular, the requirement embraced within IID’s section 5 contract that
7 its water be used “beneficially” can be satisfied by this Board’s determination of beneficiality and
8 reasonableness under state law – unless the Secretary of Interior could show that a superseding
9 federal mandate arising from the Compact or Boulder Canyon Project Act limited this Board’s
10 ability to define beneficial use by reference to Water Code section section 1243 and *City of Los*
11 *Angeles v. Aitkin* (1935) 10 Cal.App.2d 460. (It would seem difficult for the Secretary to
12 determine that a superior federal interest conflicts with the two above-referenced California
13 authorities, when this Board would be invoking those authorities for the purpose of compliance
14 with the federal Endangered Species Act, which the Secretary herself is charged to enforce.)

15
16 Finally, we appreciate this Board’s acknowledgement through the Chair on 28 October
17 (R.T. 29:16-17) that its address of air quality mitigation measures and their feasibility is not
18 intended to supersede the authority of the Imperial County Air Pollution Control District
19 (ICAPCD) in its jurisdiction (and the parallel authority of the South Coast Air Quality
20 Management District (SCAQMD) in Riverside County). Translating this recital into the Board’s
21 final order will perpetuate that assurance. (In a related matter, slight modification of the discussion
22 of Imperial Valley’s air quality status will remove the erroneous inference that substantial evidence
23 supports a conclusion that the Valley *today* is deemed non-attainment, even if that condition may
24 have obtained in 1993.)

25
26 The County perceives from the Chair’s closing remarks on 28 October that the Board views
27 petitions for reconsideration as an opportunity to insert *errata* to the final order on a line-by-line
28 basis. (R.T. 34:7-11.) The County therefore submits as the second appendix to this petition

1 selected pages from the final order annotated with the *errata* that in the County's view must be
2 adopted to eliminate legal error, and conform the order to substantial evidence before the Board.
3 The County does not here address every claim it has brought to this proceeding (for example, the
4 claim that the Board would wrongfully act prior to IID is vitiated by this petition, which will
5 ensure that this Board's final action does not precede that by IID; and the faulty CEQA analysis
6 that this Board has inherited from the transfer EIR may well be vitiated by the actions of other
7 Colorado River interests and a mandatory supplemental reassessment by the end of 15 years). To
8 the extent necessary to avoid an argument that we have waived all issues presented to the Board,
9 the County incorporates by reference our prior briefing and comments on the two draft orders. In
10 this petition the County focuses on concrete suggestions we believe legally required to meet the
11 concerns that this Board is empowered to address in pragmatic response to the Supervisors' 12
12 November resolution.

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16 Dated: 27 November 2002

Respectfully submitted,

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Special Counsel to the County of Imperial

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2002 - 0013

In the Matter of

IMPERIAL IRRIGATION DISTRICT'S (IID) AND
SAN DIEGO COUNTY WATER AUTHORITY'S (SDCWA)
AMENDED JOINT PETITION FOR
APPROVAL OF A LONG-TERM TRANSFER OF CONSERVED WATER
FROM IID TO SDCWA
AND
TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, AND PURPOSE OF USE
UNDER

PERMIT 7643 ISSUED ON
APPLICATION 7482 OF
IMPERIAL IRRIGATION DISTRICT

SOURCE: COLORADO RIVER

COUNTY: IMPERIAL

MARKUP BY COUNTY OF IMPERIAL

ATTACHMENT 2

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7.5 Applicability of Water Code Section 1810

*7.3 Beneficial and Reasonable Use of Water to
Maintain Subton Sea Ecology and Stability.*

LIST OF ACRONYMS

µg/L	Micrograms per liter
afa	acre-feet per annum
BMPs	Best Management Practices
BO	Biological Opinion
CALFED	California/Federal Bay-Delta Program
CEQA	California Environmental Quality Act
CESA	California Endangered Species Act
CFBF	California Farm Bureau Federation
cfs	cubic feet per second
CRIT	Colorado River Indian Tribes
CRWQCB	California Regional Water Quality Control Board
CVWD	Coachella Valley Water District
DFG	California Department of Fish and Game
DHCS	Drain Habitat Conservation Strategy
DOI	U.S. Department of Interior
DOW	Defenders of Wildlife
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
ESA	federal Endangered Species Act
FEIR	Final Environmental Impact Report
HCP	Habitat Conservation Plan
ICAPCD	Imperial County Air Pollution Control District
IID	Imperial Irrigation District
MOU	Memorandum of Understanding
MWD	Metropolitan Water District of Southern California
NCCP	Natural Community Conservation Plan
NEPA	National Environmental Policy Act
PCL	Planning and Conservation League
PM 10	particulate matter, less than 10 microns in size
ppb	parts per billion
ppt	parts per thousand
PVID	Palo Verde Irrigation District
QSA	Quantification Settlement Agreement
R.T.	Reporter's Transcript
SANDAG	San Diego Association of Governments
SB	Senate Bill
SDCWA	San Diego County Water Authority
SIP	State Implementation Plan
SSA	Salton Sea Authority
SSHCS	Salton Sea Habitat Conservation Strategy
SWRCB	State Water Resources Control Board
TDS	Total Dissolved Solids
TMDL	Total Maximum Daily Load
USBR	U.S. Bureau of Reclamation
USEPA	U.S. Environmental Protection Agency
USFWS	U.S. Fish and Wildlife Service

SCA & WD

South Coast
Air Quality
Management
District

Water Code section 1810 requires that the transfer not produce unreasonable economic or environmental impacts in Imperial County. The Legislature's recent amendment of Water Code section 1013(b) provides a mechanism for this Board to engage and ensure compliance with section 1810.

Pursuant to Water Code section 1736, the SWRCB may approve a long-term transfer petition if the SWRCB finds that the transfer will not result in substantial injury to any legal user of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. In this order, the SWRCB finds that the transfer will not result in substantial injury to any legal user of water. We also find that the transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses, provided that certain mitigation measures are implemented. Accordingly, the transfer petition is approved, subject to specified conditions.

The potential for the proposed conservation and transfer project to affect fish and wildlife in and around the Salton Sea has generated the most concern in this proceeding. The Salton Sea is a saline lake that is almost entirely dependent on agricultural runoff, primarily from IID. The Salton Sea supports a productive fishery and numerous fish-eating birds, but this ecosystem is in jeopardy. Because the Salton Sea has no outlet, all the salt and nutrients that flow into the Sea continue to accumulate. Without a salinity control project, the Salton Sea will become too saline to support a viable fishery in the coming decades. The feasibility of restoring the Salton Sea is the subject of an ongoing study by the Secretary of Interior and the Salton Sea Authority.

The implementation of conservation measures within IID that reduce farm runoff or delivery system losses will reduce inflows to the Salton Sea, decreasing the time before the Salton Sea becomes too saline to support the fishery. Conserving water by fallowing agricultural land will also reduce inflows, but to a lesser extent.

In determining whether the impacts of the project to the Salton Sea would be unreasonable, the SWRCB must take into account all relevant factors, including the nature and extent of the impacts, the benefits of the proposed transfer, and the cost of mitigation measures. The proposed transfer is a critical part of California's commitment to reduce its use of water from the Colorado River. The State's water supply could be severely impacted if the transfer is not implemented and the Secretary of Interior limits California's diversions from the Colorado River. In addition, the only viable strategy for mitigating impacts to the Salton Sea that has been identified is providing replacement water to the Sea to compensate for reduced inflows. This mitigation strategy is likely to be costly and, unless an alternative source of water is found, will entail

fallowing land within IID. Land fallowing could have significant socio-economic impacts within Imperial County.

In view of the foregoing considerations, we conclude that salinity levels at the Salton Sea that would have existed in the absence of the transfer should be maintained for a period of 15 years. This requirement mitigates project impacts to the Salton Sea for a long enough period to provide time to study the feasibility of long-term restoration actions and begin implementation of any feasible restoration projects. At the same time, it avoids prejudging those restoration-planning efforts. This order avoids unduly burdening the transfer by limiting mitigation requirements to the incremental impacts of this transfer. It also recognizes that it would be unreasonable to have these mitigation requirements remain in effect if restoration planning either ultimately produces a plan that will restore the Salton Sea without requiring continued mitigation by the parties to the transfer or reveals that restoration is infeasible. In so doing, this order achieves a reasonable balance between the State's interest in protecting the fish and wildlife that depend on the Salton Sea and the State's interest in the implementation of this transfer to meet California's water supply needs.

It provides for supplemental assessment of the transfer prior to the conclusion of year 15.

the State's interest in protecting the environment and economy of Imperial County,

This matter is brought before the SWRCB as a voluntary change petition. Nothing in this order requires the petitioners to proceed with the transfer, or in the absence of the transfer to satisfy any of the conditions or mitigation measures described in this order.

1.1 IID's Water Right Permit

The SWRCB issued Water Right Permit No. 7643 to IID on January 6, 1950. Permit 7643 authorizes IID to divert a maximum of 10,000 cubic feet per second (cfs) from the Colorado River from January 1st to December 31st of each year for irrigation and domestic use on 992,548 acres of land. The permit limits IID's total annual diversion from the Colorado River under all its water rights and its federal contract to 3,850,000 acre-feet per annum (afa). As specified in the Seven-Party Water Agreement of August 18, 1931, which is described in detail in section 3.1, below, this is a collective right shared with other agricultural water users. IID also

and West Basin Municipal Water District, Municipal Water District of Orange County, the City of Los Angeles, the Colorado River Indian Tribes (CRIT), the County of Imperial, the Riverside County Farm Bureau, the California Farm Bureau Federation (CFBF), William DuBois, Larry Gilbert, and Cliff Hurley. *These 14 entities and individuals, together with petitioners IID and SDCWA, are deemed the parties to this proceeding.*

We consider the protestants who did not appear at the hearing to have abandoned their protests, and their protests are hereby dismissed. The unresolved protests of the following parties who did appear at the hearing are addressed by this order: CRIT, the County of Imperial, CFBF, William DuBois, and Larry Gilbert.

Those who appeared subject to conditional dismissal are allowed to dismiss on those conditions.

2.3 Water Rights Hearing

On December 11, 2001, IID and SDCWA filed a second amendment to their petition. The second amendment made changes to the petition consistent with a protest dismissal agreement reached between IID, SDCWA, CVWD, and MWD. The amendment reduced the amount of water proposed to be transferred to SDCWA to 200,000 afa, provided for acquisition of 100,000 afa of conserved water by CVWD or MWD and requested corresponding changes in the authorized place of use, point of diversion and purpose of use under Permit 7643. On December 20, 2001, the SWRCB issued a Notice of Public Hearing and Notice of Amendment to the Long-Term Transfer Petition. The notice specified that a water right hearing on the amended petition would commence on April 23, 2002. In the notice, the SWRCB waived the requirement that parties file protests regarding the amended petition and, instead, directed parties who objected to the proposed amendments to the petition to file by February 25, 2002, a notice of intent to appear at the water right hearing on the amended petition. The SWRCB also notified parties that it would hold a pre-hearing conference on January 23, 2002, to discuss the scope of the hearing, the status of protests to the petition and other procedural matters.

At the pre-hearing conference, parties to the hearing made several requests regarding the conduct of the hearing. Because the comment period on the draft Environmental Impact Report (EIR) prepared by IID, the lead agency under the California Environmental Quality Act (CEQA), and on the draft Environmental Impact Statement (EIS) prepared by the USBR, the lead agency under the National Environmental Protection Act (NEPA), would not close until April 25, 2002,

objects to the transfer based on the claim that the transfer will unreasonably affect fish, wildlife, or other instream beneficial uses, the party must present evidence supporting the claim.

The issues addressed during each phase of the hearing relate to the two principal findings the SWRCB must make in order to approve the transfer. These required findings are discussed in section 3.7 of this order.

2.3.2 Parties *Participating in the Hearing.*

The parties who appeared at the hearing were: IID, SDCWA, the CRIT, Imperial County, the California Farm Bureau Federation, William DuBois, Larry Gilbert, the Salton Sea Authority, the Planning and Conservation League, the Sierra Club California, the Defenders of Wildlife, the National Wildlife Federation, the National Audubon Society-California, and the California

Regional Water Quality Control Board Colorado River Basin Region (Regional Board). *Other parties who appeared to propose conditional dismissal of their protests were: CVWD and MWD.*

3.0 LEGAL BACKGROUND

3.1 Law of the River

The Law of the River consists of a variety of legal authorities concerning the use and distribution of Colorado River water, including treaties, interstate compacts, federal and state statutes, and case law.

A central component of the Law of the River is the 1922 Colorado River Compact. The 1922 Compact apportions the beneficial consumptive use of 7,500,000 afa of water from the Colorado River System to the Upper Basin States of Arizona, Colorado, New Mexico, Utah, and Wyoming, and the beneficial consumptive use of 7,500,000 afa to the Lower Basin States of Arizona, California, Nevada, New Mexico and Utah.³ (1922 Colorado River Compact, art. III, para. (a).) The 1922 Compact did not apportion water among the states within the Upper and Lower Basins.

³ Article III, paragraph (b) of the 1922 Compact apportions an additional 1,000,000 afa to the Lower Basin States.

In 1928, Congress enacted the Boulder Canyon Project Act (43 U.S.C.A. § 617 et seq.) (Project Act), which authorized construction of Hoover Dam and the All-American Canal. The purposes of the Project Act were to control floods, improve navigation, regulate the flow of the river, store and deliver water for beneficial uses, and generate electric power. (43 U.S.C.A. § 617.) Section 5 of the Project Act also authorized the Secretary of Interior to enter into contracts for the storage and delivery of Colorado River water. (43 U.S.C.A. § 617d.)

In *Arizona v. California*, the U.S. Supreme Court interpreted the Project Act to have effectuated the apportionment of the Lower Basin States' 7,500,000 afa share of water from the mainstream of the Colorado River among California, Arizona and Nevada as follows: 4,400,000 afa to California, 2,800,000 afa to Arizona, and 300,000 afa to Nevada. (*Arizona v. California* (1963) 373 U.S. 546, 564-565 [83 S.Ct. 1468, 1480].) The Court held that California was also entitled to half of any surplus. (*Ibid.*)

The Court held that the Project Act authorized the Secretary of Interior to carry out the apportionment among the Lower Basin States and to decide which users within each state would get water, through contracts made under section 5 of the Project Act. (*Arizona v. California, supra*, at pp. 579-580.) The Court stated that the Project Act established a comprehensive scheme for the distribution of Colorado River water pursuant to section 5 contracts. The Court stated further that this scheme left no room for inconsistent state law, but that States are free "to do things not inconsistent with the Project Act or with federal control of the river . . ." (*Id.* at pp. 587-588.)

The Court also emphasized that a significant limitation to the Project Act was the requirement that the Secretary of Interior satisfy "present perfected rights." (*Arizona v. California, supra*, at p. 584.) In a subsequent decree, the Court defined present perfected rights as those rights that had been perfected in accordance with state law as of June 25, 1929, the effective date of the Project Act. (*Arizona v. California* (1964) 376 U.S. 340, 341 [84 S.Ct. 755, 756].) *The*

Court then quantified ID's present perfected rights.
(Arizona v. California (1979) 439 U.S. 419, 429.)

3.7 State Law Applicable to Conserved Water Transfers

Water Code sections 1735 through 1737 govern the SWRCB's review of changes in permitted points of diversion, place of use or purpose of use for water transfers for periods in excess of one year. Under Water Code section 1736, the SWRCB may approve a long-term transfer petition if the SWRCB finds that the transfer will not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses.⁵

A number of other provisions may come into play when water is conserved for purposes of a transfer. Ordinarily, when an appropriative water right is not exercised for a proscribed amount of time, the right is subject to forfeiture for non-use. (See Wat. Code, § 1241.) To the extent that water is being used in accordance with a valid water transfer, however, this provision does not apply because the water is being used. A section recently added to the Water Code codifies this principle, specifying that a transferor's right to use the water transferred is protected from forfeiture due to non-use, provided that the transfer is implemented in accordance with applicable law. (Wat. Code, § 1745.07.)

Section 1011 protects from forfeiture the right to use water under an appropriative right to the extent that the right holder uses less water as a result of conservation efforts. The right to use water that is conserved may be transferred pursuant to other provisions of law governing transfers. (Wat Code, § 1011, subd. (b).) For purposes of section 1011, "water conservation" is defined as the use of less water to accomplish the same purpose or purposes of use. The term "water conservation" is also defined to include temporary "land fallowing" and "crop rotation," which in turn are defined to mean land practices "used in the course of normal and customary agricultural production to maintain or promote the productivity of agricultural land." (Wat. Code, § 1011, subd. (a).) Section 1011 protects the right holder from forfeiture, even if the water is not transferred. If the water right holder carries out a transfer, it is protected from forfeiture under Water Code section 1745.07, even if the measures employed to make water

⁵ Although Water Code section 1736 applies more broadly to water bodies that are not navigable and do not support a fishery, section 1736 effectively codifies the SWRCB's duty to consider public trust uses. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447, fn. 27 [189 Cal.Rptr. 346, 364, fn. 27, 658 P.2d 709, 728, fn. 27].) Accordingly, we need not reach the argument advanced by some parties to this proceeding that the public trust doctrine applies to the Salton Sea.

Furthermore, sections 100 and 275, in tandem with recently-amended Water Code section 1810 (b), enable 20. the SWRCB to address air quality impacts. The ICAPCD and SCAQMD have independent authority to address air quality impacts arising from the transfer.

Imperial County has requested the SWRCB to determine that Water Code section 1810 applies to and governs this transfer, because the water to which SDCWA takes delivery at Parker Dam is conveyed through available for transfer include measures, such as land retirement, that do not constitute "water conservation" as defined in section 1011. NWD's Colorado River Aqueduct.

IID has requested the SWRCB to find that Water Code sections 1011, 1012, and 1013 apply to and govern IID's conservation of water in support of the proposed transfer. Consistent with section 1011, section 1012 protects IID's rights from forfeiture to the extent that any conservation effort results in the reduction of water use within IID. Section 1013 provides that if IID, acting under contract with the United States or pursuant to State or federal requirements, reduces through conservation measures inflows to the Salton Sea, IID shall not be liable for any resulting effects to the Salton Sea or its bordering area.

Effective January 1, 2003, Senate Bill 482 (Stats. 2002, ch. 617) will amend section 1013 to extend the protection against forfeiture to a reduction in water use attributable to temporary or long-term land fallowing, regardless of whether it occurs in the course of normal and customary agricultural production, if the fallowing is undertaken in order to carry out or mitigate for a transfer under the QSA and IID ^{determines} consults with Imperial County ^{concerning the potential assessment of the} economic or environmental impacts of fallowing. (*Id.*, § 7.)

3.8 Endangered Species Act Requirements

The conservation and transfer project has the potential to "take" certain threatened and endangered species that are protected under the federal Endangered Species Act (16 U.S.C.A. §§ 1531-1544) (ESA) and the California Endangered Species Act (Fish & G. Code, §§ 2050-2116) (CESA).

Under the federal ESA, the Secretary of Interior may permit the taking of a threatened or endangered species if the Secretary finds, among other things, that the taking will be incidental to an otherwise lawful activity, the impacts of the taking will be minimized and mitigated to the extent practicable, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. (16 U.S.C.A. § 1539(a).) CESA contains similar provisions. The California Department of Fish and Game (DFG) may issue a permit that authorizes the incidental take of a species listed as threatened or endangered under CESA, provided, among

when a water right is changed. (SWRCB Order WR 2000-02, p. 19.) The rule precludes a change in the point of diversion, place of use, or purpose of use under circumstances where prior rights would bar issuance of a new permit for a project having the same impacts as the change. The Water Code requirement that there be no "injury" from changes or transfers is a term of art that does not necessarily protect every third party who is using water legally. In order to be protected under the no injury rule, a third party must be a water right holder, or have standing to raise issues concerning injury to a water right holder.⁷ (*Id.* at pp. 19-21; see Wat. Code, § 1703.6, subd (c) [authorizing the SWRCB to dismiss a protest based on injury to a legal user of water if the protestant fails to submit information necessary to determine if the protestant has a valid water right].)

The transfer will reduce flows in the lower Colorado River between Parker Dam, the point of diversion for the water proposed to be transferred to SDCWA and MWD, and Imperial Dam, IID's existing point of diversion. Reduced flows between Parker Dam and Imperial Dam have the potential to injure water right holders who divert water from that stretch of the river. The transfer will also reduce flows in the All-American Canal, which has the potential to injure third party water right holders who divert water from the canal (instead of diverting directly from the lower Colorado River) between Imperial Dam and IID's points of rediversion from the canal. (See IID 2, ex. B, pp. VII-1 - VII-9.)

The record establishes, however, that the transfer will not result in substantial injury to any third party water right holder. No third party submitted evidence to support an objection to the transfer based on injury to the right to use water for consumptive use purposes. In addition, the record indicates that, even with full implementation of the transfer, IID will continue to divert a substantial amount of water at Imperial Dam and to red divert the water from the All-American Canal. (IID 54, p. 15; IID 55, pp. [2-2]-[2-8]; R.T. pp. 669-676.) Accordingly, water right holders located upstream of IID necessarily will be able to satisfy their rights to divert water for consumptive use purposes.

⁷ For example, a water supply contractor who buys water from a water right holder would have standing if a change would deprive the water right holder of water to which it is entitled, without its consent, thereby reducing the contractor's receipt of water. (SWRCB Order WR 2002-02, p. 20.)

is allocated,

The only party who objected to the transfer based on injury to the right to use water for non-consumptive use purposes was the CRIT. CRIT presented evidence that the transfer will adversely affect CRIT's ability to generate hydroelectric power at the Headgate Rock Power Plant, a run-of-the-river hydroelectric facility located downstream from Parker Dam. Evidence presented by CRIT indicates that the transfer could reduce generation by approximately four or five percent. (CRIT 9, pp. 4-5; R.T. pp. 451-452.) The value of the lost power generation is approximately \$150,000 a year. (*Ibid.*)

[*Quaere: is this nonetheless a third-party socio-economic impact?*]

Although CRIT's ability to generate power may be affected, CRIT failed to claim or present any evidence substantiating a claim that CRIT holds a water right for purposes of generating hydroelectric power that would entitle CRIT to protection from injury under Water Code section 1736. The SWRCB afforded CRIT ample opportunity to substantiate a water right claim. The SWRCB's February 6, 2002, hearing notice specified that any party who objected to the transfer based on the allegation that the transfer would result in substantial injury to a legal user of water must present evidence that described the basis of the allegedly injured party's claim of water right. In addition, in a letter to CRIT dated May 14, 2002, SWRCB Chairman Baggett, the hearing officer in this proceeding, explained that CRIT would not be entitled to protection from injury to the extent that CRIT did not hold a water right. Chairman Baggett asked CRIT whether CRIT claimed to hold specific types of water rights and provided CRIT an opportunity to respond and submit evidence in support of any response.

In a May 21, 2002, response to the Chairman's May 14, 2002 letter, CRIT reiterated that CRIT is entitled to use the entire flow of the river to generate power by virtue of the fact that Congress authorized and funded the construction of Headgate Rock Dam for purposes of irrigation and power generation. CRIT also cited to evidence in the record that indicates that the USBR designed Headgate Rock Power Plant to utilize the entire, normal flow of the river, and Congress appropriated money to construct the power plant. CRIT has presented no evidence, however, that Congress granted CRIT a water right for purposes of power generation. The evidence cited by CRIT establishes merely that CRIT is entitled to generate electricity from all of the water that happens to be in the river. CRIT provided no evidence that Congress granted CRIT any right to

5.2.7 IID Should Be Required to Implement the SSHCS for Fifteen Years

The Salton Sea is a highly valuable resource for fish and wildlife and for recreation. Both Congress and the California Legislature have recognized the importance of addressing long-term restoration of the Sea. At the present time, however, no one knows whether restoration of the Sea will prove to be feasible. Moreover, providing replacement water to the Sea could be costly to petitioners and the residents of Imperial County. If the proposed transfer is not implemented because the cost of mitigation is too high, the consequences to the State's water supply and to the San Francisco Bay/Sacramento San Joaquin River Delta (Bay-Delta) could be severe. In view of these competing considerations, we conclude that IID should be required to maintain baseline salinity levels, as specified by the SSHCS, for 15 years. Fifteen years will allow the Secretary of Interior, Salton Sea Authority, Secretary of Resources, and the Governor of California sufficient time to study the feasibility of restoration of the Salton Sea and begin implementation of any identified feasible restoration measures.

Under Water Code section 1736, the SWRCB may approve the proposed transfer if the impacts to fish, wildlife, and other instream beneficial uses are not unreasonable. In considering whether the impacts would be unreasonable, the SWRCB must take into account not just the extent of the impacts, but all relevant factors, including the benefits of the proposed transfer and the cost of mitigation.

Also relevant in this case is the fact that, while maintaining baseline salinity levels will keep the habitat values of the Sea intact for some period of time, it will not solve the basic problem of increasing salinity in the long term. Without some sort of reclamation project to reduce salinity, the Salton Sea will become too saline to support the variety of fish and wildlife species that presently use the Salton Sea. Although witnesses for the Salton Sea Authority testified that restoration of the Sea with current inflows would be feasible, the evidence on the feasibility of restoration under different inflow scenarios was inconclusive. *It would be unreasonable to require the continued mitigation of the impact of the transfer on the Salton Sea if the decline of the Sea continues to the point where restoration is no longer feasible, or if it becomes clear that no implementation plan will ever be developed. At the point when it becomes unreasonable to require continued mitigation of impacts on the Salton Sea, because there is no longer any hope*

*In the absence of
adverse air quality
impacts,*

for saving the Sea, the public interest in avoiding inappropriate burdens on this important transfer outweighs any harm to instream beneficial uses of the Sea.

Mitigating the impacts to the Salton Sea could have socio-economic impacts in Imperial County. Implementation of the SSHCS will require a large volume of replacement water. Although the SSHCS does not specify the source of the replacement water, ^{two} ~~the only~~ possible source identified during this proceeding ^{were} ~~was~~ water conserved by fallowing land within IID. (R.T. pp. 3106-3108.)

In addition, it probably will not be practicable to provide replacement water by fallowing unless some amount of land is fallowed in order to generate water for transfer. (R.T. p. 3167.) Fallowing extensive acreage within IID could have significant socio-economic impacts in Imperial County, as discussed in section 6.4, below.

and
desalination
in San Diego
(R.T. pp.
416-417).

In addition, the possibility exists that if the cost of mitigation is too high, IID may not be willing to implement the transfer on a voluntary basis. If the transfer stalls, the QSA may not be executed by December 31, 2002, which would lead to suspension of the Interim Surplus Guidelines. A witness for MWD testified that if the Interim Surplus Guidelines are suspended and California is limited to its 4,400,000 afa apportionment, then under the terms of the Seven-Party Agreement, Southern California as a whole would face an immediate short-fall of approximately 800,000 afa, and MWD would face an immediate short-fall of 600,000 afa. (SDCWA 4, p. 5; R.T. pp. 149-150.) This could have significant economic consequences in Southern California and lead to increased pressure on the limited amount of water available from the Bay-Delta. (SDCWA 4, p. 5; SDCWA 5, pp. 5-6; R.T. pp. 116-117.) Increased demand for a significant amount of water for Southern California could also upset ongoing efforts to improve water management and restore the ecological health of the Bay-Delta through the CALFED planning process. (SDCWA 5, pp. 2-3, 6; R.T. p. 116.)

In considering the appropriate balance of the competing considerations outlined above, we are guided by the provisions of SB 482. As previously stated, SB 482 will authorize DFG to issue an incidental take permit in connection with implementation of the QSA, including the transfers authorized under the QSA, under specified conditions. (Stats. 2002, ch. 617, § 2.) In effect, SB 482 balances the same considerations at issue here. As discussed previously, SB 482 recognizes the value of restoring the Salton Sea.

cooperation with the Resources Agency, the Salton Sea Authority, and the Governor of California.¹¹

5.2.8 Implementation of the SSHCS Is Legally Feasible

SDCWA called into question the legal feasibility of the SSHCS, arguing that IID may not use water conserved by fallowing as a source of replacement water because the Law of the River does not allow the use of Colorado River water for purposes of preserving fish and wildlife habitat. For the reasons set forth below, we conclude that, consistent with the Law of the River, petitioners may use water conserved by fallowing as replacement water, and therefore implementation of the SSHCS is legally feasible.

As explained in section 3, above, the U.S. Supreme Court held in *Arizona v. California* that the Boulder Canyon Project Act (Project Act) established a comprehensive scheme for the distribution of Colorado River water which preempts inconsistent state law. (*Arizona v. California, supra*, 373 U.S. 546, 587-588.)

SDCWA argues that IID may not require delivery of Colorado River water for fish and wildlife purposes under section 5 of the Project Act, which authorizes the Secretary of Interior to contract for the storage and delivery of water for "irrigation and domestic uses, and generation of electrical energy . . .," but does not expressly provide for the delivery of water for fish and wildlife purposes. (43 U.S.C.A. § 617d.) Section 5 specifies further that no person shall be entitled to the use of water stored by the Secretary of Interior except by contract. (*Ibid.*)

SDCWA also cites to article III, paragraph (e) of the 1922 Compact. Article III, paragraph (e) prohibits Upper Division States from withholding and Lower Division States from requiring the delivery of water "which cannot reasonably be applied to domestic and agricultural uses."

¹¹ The Regional Board, the Planning and Conservation League, and Defenders of Wildlife call for protection of the water quality of the Salton Sea, consistent with the requirements of the federal antidegradation policy. (40 C.F.R. § 132.12.) With the mitigation requirements imposed by this order, the transfer will not have an adverse impact on the water quality of the Salton Sea, and the degradation will not occur for at least 15 years. It is uncertain what the future of the Sea will be after 15 years. Restoration efforts may continue to maintain the water quality of the Salton Sea, or it may be determined that maintaining the existing beneficial uses is impossible. As explained in section 5.1.5, it is appropriate to apply water quality standards as part of a more comprehensive review, and not just to this transfer in isolation. Because we are reserving continuing authority, we need not speculate at this time on how or under what circumstances the SWRCB should address degradation that may occur 15 years from now.

and requiring a supplemental environmental assessment of the transfer to be completed prior to the end of year 15

Similarly, the use of water to maintain the level of a saline lake to benefit surrounding property, prevent nuisance, and maintain attractive surroundings, is beneficial. (*City of Los Angeles v. Aitken* (1935))

Under California law, the use of water for the preservation and enhancement of fish and wildlife resources is recognized as a beneficial use. (Wat. Code, § 1243.) Water Code section 1707 authorizes any water right holder to petition the SWRCB for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation.

10 Cal. App.
2d 460, 474.)

We question whether the Law of the River can or should be interpreted to preclude the use of water for fish and wildlife purposes where that use is made in order to mitigate the adverse environmental impacts of conserving and transferring water for irrigation and domestic uses. We need not resolve the issue here, however, because the Law of the River ~~plainly~~ does not limit IID's ability to exercise its present perfected rights consistent with California law. Article VIII of the 1922 Compact states that present perfected rights to the use of Colorado River water are unimpaired by the Compact. Similarly, as the Supreme Court recognized in *Arizona v. California*, a significant limitation to the Project Act is the requirement that the Secretary of Interior satisfy present perfected rights. (*Arizona v. California, supra*, 373 U.S. 546, 584.) Section 6 of the Project Act provides that water stored under the Project Act is to be used first for river regulation, navigation, and flood control; second for irrigation and domestic uses and satisfaction of present perfected rights pursuant to article VIII of the Compact; and third for power generation. (43 U.S.C.A. § 617e.)

The Supreme Court has defined present perfected rights as rights that had been perfected in accordance with state law as of June 25, 1929, the effective date of the Project Act. (*Arizona v. California, supra*, 376 U.S. 340, 341.) IID holds a present perfected right to 2,600,000 afa, or the quantity of water necessary to irrigate 424,145 acres and satisfy related uses, whichever is less, with a priority date of 1901. (*Arizona v. California* (1979) 439 U.S. 419, 429 [99 S.Ct. 995, 1000].)

In *Bryant v. Yellen* (1980) 447 U.S. 352 [100 S.Ct. 2232], the U.S. Supreme Court affirmed that that the Project Act does not limit the ability of the holder of a present perfected right to exercise the right consistent with state law. Coincidentally, *Bryant v. Yellen* involved the question whether the use of water by IID under its present perfected rights was subject to the requirement

(absent a conflict with the Congressional apportionment of the river among the states,⁵¹ Indian Tribes, and international obligations)

of federal reclamation law, which was incorporated by the Project Act, that water be used on parcels no larger than 160 acres. The Supreme Court reiterated that a significant limitation to the Project Act was the requirement that the Secretary of Interior satisfy present perfected rights. (*Id.* at pp. 364, 370.) The Court explained that present perfected rights originated under state law and that, with respect to present perfected rights, the Project Act did not displace state law, which must be consulted in determining the content and characteristics of a presented perfected right. (*Id.* at pp. 370-371.) The Court held that IID had the right under state law to deliver water under its present perfected rights without regard to the acreage limitation. (*Id.* at pp. 371-374.)

Likewise, IID is entitled under California law to change the authorized purposes of use of its Colorado River present perfected rights to include the preservation of fish and wildlife habitat, even if the Compact or the Project Act ^{were interpreted to} otherwise limit the use of Colorado River water ^{for} irrigation, domestic use, and generation of hydroelectric power, ^{because that use would not} conflict with the Congressional design of river apportionments.

A related issue is whether IID would be required to obtain approval from the SWRCB before using water for fish and wildlife purposes. The use of water for fish and wildlife purposes as contemplated under the SSHCS also may entail a change in place of use, for which SWRCB approval may be required. Whether SWRCB approval of these changes would be required depends on whether IID proposes to exercise its rights under Permit 7643 or under its pre-1914 appropriative rights. If IID proposes to add fish and wildlife as an authorized purpose of use or expand the authorized place of use under Permit 7643, IID must file a change petition with the SWRCB. If, on the other hand, IID proposes to exercise its pre-1914 appropriative rights, IID may change the authorized purpose of use, place of use, or point of diversion without obtaining SWRCB approval, provided that others are not injured by the change. (Wat. Code, § 1706.)¹²

¹² In cases where dedicating water to an instream use involves simply bypassing the water, it would be advisable for a pre-1914 appropriative right holder to file a change petition under section 1707, even if doing so is not required. Going through the SWRCB's formal process would serve to place downstream water users on notice that the water has been dedicated to an instream use and is unavailable for diversion and would protect the right holder from claims of abandonment or forfeiture for nonuse. Under the facts of this case, however, these considerations do not appear to be an issue. If IID chooses to provide replacement water to the Salton Sea under its present perfected rights, it will continue to exercise a measure of control over the diversion and delivery of the water.

SEE PAGE 52 A.

Of course IID is restricted by its 1932 section 5 contract with the Secretary of Interior to "beneficial consumptive use" (art. 17, § 3) and to the Compact's article III "reasonably be applied to domestic and agricultural uses" standard (art. 29). Those provisions do not disable the SWRCB from determining that it is both reasonable and beneficial for IID to devote a portion of its agricultural-use allocation to the mitigation of IID-caused impacts on Salton Sea wildlife, water level, and ecological well-being. Indeed, the state-law savings clause in the Boulder Canyon Project Act (section 18) anticipates that except as preempted by the Congressional design for the river, state law should be consulted to determine beneficial use. The SWRCB does not anticipate that the Secretary would override the SWRCB determination of beneficial use of Colorado River to maintain Salton Sea wildlife, when the driving force of that use is to ensure compliance with the federal Endangered Species Act administered by the Secretary.

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(IMPERIAL COUNTY INSERT)

beneficial uses of the lower Colorado River will be reasonable.¹³ We will reserve continuing authority to consider whether any feasible mitigation measures should be implemented by IID in the event that the measures identified in the BO are not implemented by the USBR as expected. Even if any impacts to the lower Colorado River remain unmitigated, we find that the impacts will not be unreasonable in light of the benefits of the project, as described in section 5.2.7, above.

[The County's not annotating text does not waive our objection to this entire analysis.]

5.4 Potential Impacts to Fish and Wildlife in the San Diego Region

A number of parties submitted evidence regarding potential growth inducing impacts in the SDCWA service area. The parties alleged that the water received from IID will be more reliable than the water SDCWA currently receives under contract from MWD, and will therefore allow local planning agencies in the San Diego region to approve new construction, which will unreasonably affect fish, wildlife, and other instream beneficial uses in the region.¹⁴

To the extent that historic patterns indicate future trends, reduced water availability is unlikely to affect growth in urban areas. Water is one of many factors that may influence growth in a region but does not, by itself, cause the growth of a region. Economic, legal, and societal factors all play a role in growth, and water shortages have rarely done more than slow the progress of adequately financed development proposals.

In the San Diego region, the San Diego Association of Governments (SANDAG) is tasked with identifying future water supply needs through its Regional Growth Forecasts, and SDCWA is

¹³ It merits note that these mitigation measures were designed to mitigate the impacts of a 400,000 acre-foot transfer, and therefore should be more than adequate to mitigate the impacts of the proposed 300,000 acre-foot transfer.

¹⁴ SDCWA questions whether the requirement of Water Code section 1736 that there be no unreasonable impact on instream beneficial uses applies to instream beneficial uses in the proposed place of use to which water will be transferred. By its terms, section 1736 does not limit its application to impacts within the watershed of the existing point of diversion or place of use, and recognizing the intent of the Legislature that the SWRCB consider the water quality impacts of its water right decisions and orders, we do not construe section 1736 to incorporate such a limitation. (See generally Wat. Code, § 174.) While the SWRCB should consider potential water quality impacts, section 1736 does not necessarily require that any water quality impacts in the proposed place of use be avoided as a condition of approval of the transfer. Especially where any water quality impacts would result from the discharge of waste from land uses supported by the transfer, and the potential for and extent of any impacts is remote or speculative, it may be appropriate to rely on other regulatory programs to determine that any impacts will not be unreasonable.

Imperial County raises the growth-inducing issue not to assess impacts in San Diego, but instead⁵⁶ to force attention on the choice between that growth and Imperial County's well-being, and on alternatives available in San Diego to accommodate that growth.

must prepare an urban water management plan every five years that identifies existing and planned sources of water. (Wat. Code, §§ 10620, 10621, 10631.) This order directs SDCWA to report to the SWRCB biannually beginning within one year of the effective date of this approval, on the status of progress towards implementation of any desalination projects.

6.0 CEQA COMPLIANCE AND OTHER PUBLIC INTEREST ISSUES

In this section, we address Imperial County's motion to deny the transfer petition or adjourn this proceeding until IID approves the transfer project under CEQA. For the reasons set forth below, we disagree with Imperial County's argument that IID's project is not ripe for consideration.

[Rather than this analysis, a preferable resolution would determine the County's claim mooted.]
We also make findings as required by CEQA based on the Final EIR for IID's Water Conservation and Transfer Project (FEIR). IID certified the FEIR, as the lead agency under CEQA, on June 28, 2002.

Finally, we address other public interest issues, the potential socio-economic impacts and impacts to fish and wildlife associated with fallowing land.

6.1 The SWRCB's Role as a Responsible Agency under CEQA

For purposes of considering whether to approve IID's and SDCWA's transfer petition, the SWRCB is a responsible agency under CEQA. (See Pub. Resources Code, § 21069.) In deciding whether and how to approve a project, a responsible agency must consider the environmental effects of the project as disclosed in the environmental documentation prepared by the lead agency. (Cal. Code Regs, tit. 14, § 15096, subd. (f).) Except under limited circumstances when a responsible agency may assume lead agency status or prepare subsequent documentation, a responsible agency must presume that the conclusions reached by the lead agency in its environmental documentation regarding the environmental effects of the proposed project are adequate, or challenge the lead agency in court. (*Id.*, subds. (e) & (f).) A responsible agency is responsible for mitigating or avoiding only the environmental effects of the parts of the project it decides to approve. (*Id.*, subd. (g)(1); see Cal. Code Regs., tit. 23, § 3751, subd. (a); Decision 1632, pp. 90-91.)

6.3.2 Impacts that Will Be Reduced to Less Than Significant Levels with Mitigation

The following impacts will be reduced to less than significant levels if mitigated as outlined on the table: BR-1, BR-4, BR-5, BR-6, BR-7, and BR-8. These impacts all affect the lower Colorado River. The FEIR states that the USBR will mitigate these impacts. Implementation of the identified mitigation measures is within the USBR's responsibility and the USBR can and should implement them. To the extent that the USBR does not fully implement these mitigation measures, we will reserve continuing authority to require IID to implement them to the extent feasible.

The following impacts within IID's service area are also less than significant if mitigated: BR-11, BR-12, BR-24, BR-25, BR-26, and BR-27. We will require that IID implement the Drain Habitat Conservation Strategy, the Desert Pupfish Conservation Strategy, and the Razorback Sucker Conservation Strategy as mitigation for these impacts.

Finally, the following impacts to recreation, air quality and aesthetics are less than significant if mitigated: R-7, R-10, AQ-3, HCP2-AQ-6, and A-1. We will require that IID implement the mitigation measures identified in the FEIR and summarized on the table.

6.3.3 Impacts for Which Mitigation Is Unavailable or Infeasible

The FEIR identifies the following impacts as significant, unavoidable impacts for which no mitigation is available or feasible: AR-1, HCP-AR-2, R-8, and AQ-7. These impacts are discussed in detail in other parts of this order.

6.3.4 Impacts That May Be Avoided for 15 Years

This order requires IID to maintain for 15 years salinity levels in the Salton Sea that would have occurred in the absence of the project. We anticipate that water elevation levels will follow the trajectory shown on figure 3.3-1 of the FEIR and reproduced in section 5.2.4 of this order. Therefore, the following impacts may be avoided for the first 15 years of this project: BR-46, BR-51, R-8, and R-9. Because the SWRCB is reserving continuing authority to amend the conditions specified in this order after 15 years, we may consider other actions to mitigate these impacts in the future.

based on a required
supplemental environmental
assessment to be
completed before the end
of year 15,

non-agricultural use, (2) conflict with existing zoning for agricultural use, or a Williamson Act contract, and (3) other changes in the existing environment, which, due to their location or nature, could result in conversion of farmland to non-agricultural use. (See CEQA Guidelines, *supra*, appendix G.)

[The SWRCB can cure the following analysis by evaluating the project actually approved by IID]

If fallowing were used as a conservation measure, it could be rotational, permanent or a combination of the two. As identified in the FEIR, the worst-case impact of the proposed project would be the permanent fallowing of up to 75,000 acres of farmland in the IID service area. This represents up to about 15 percent of the total net acreage in agricultural production within the IID water service area. (Audubon 18, pp. 21-22.) The FEIR finds that permanent fallowing to this extent would result in a significant, unavoidable impact. The only mitigation measure proposed to avoid or minimize this impact is to prohibit the use of permanent fallowing under the proposed project. Permanent fallowing could increase the likelihood of land, especially land in close proximity to urban areas, being converted to a non-agricultural use. On the other hand, permanently fallowed farmland could be converted for system improvements such as canals, or other uses in support of on-farm irrigation system or water delivery system improvements. These changes would not result in an impact to agricultural resources as the land use would not be reclassified as non-agricultural, and thus the change would not affect the land's status under the Williamson Act.

It is likely that fallowing will occur on a temporary basis and may be combined with other conservation measures to further lessen the acreage that would be fallowed at any given time. Although impacts to agricultural resources are not likely to be as severe as the worst-case impact identified in the FEIR, we recognize that significant, unmitigable impacts may occur.

6.3.7 Impacts to Recreation

The Salton Sea currently supports a fishery, with 400,000 visitors using the Sea for sport fishing every year. Reduced inflows to the Salton Sea resulting from the proposed project will result in reduced water level elevations. This can impact recreational use of the Sea by making recreational facilities inaccessible to users. The FEIR indicates that these facilities can be moved so that they are located adjacent to the shoreline of the Sea during and after the elevation declines. These

regarding the air quality impacts of fallowing. This issue is quite complicated and the potential impacts cannot be determined with any certainty. On the one hand, particulate emissions, including PM10 emissions, could decrease because the fallowed land would be not be subject to disturbance due to plowing or other agricultural practices that disturb soil. On the other hand, fallowed lands may be subject to wind erosion, creating fugitive dust impacts unless actions are taken to reduce these effects. As discussed in the FEIR (IID 93, p. 3-54) it is not possible to qualitatively estimate dust/PM10 emissions associated with fallowing. The EIR concluded that there is a potential for significant unavoidable impacts associated with fallowing unless BMPs are implemented. These could include, but are not limited to, the following: implement conservation cropping sequences and wind erosion protection measures as outlined by the U.S. Department of Agriculture Natural Resources Conservation Service; apply soil stabilization chemicals to fallowed lands; re-apply drain water to allow protective vegetation to be established; or reuse irrigation return flows to irrigate windbreaks across blocks of land including many fields to reduce emissions from fallowed, farmed, and other lands within the block. If BMPs such as these are implemented, then emissions would be reduced to less than significant.

The IID service area is under the jurisdiction of the Imperial County Air Pollution Control District (ICAPCD). As a result of the area's ^{prior} designation as a federal moderate non-attainment area for PM10, the ICAPCD has published a State Implementation Plan (SIP) for PM10 in the Imperial Valley (ICAPCD 1993). (IID 93, pp. 3-53, 3-64.)¹⁸ The SIP will demonstrate ICAPCD's proposed control measures, methods, and schedule for attainment of the applicable ambient air quality standards, and the ICAPCD Rules and Regulations will be revised to implement the required control measures. By this order we will require that IID comply with all applicable requirements of the final updated SIP and implement the mitigation measures and BMPs for air quality impacts associated with fallowing as outlined in the FEIR. Implementation of these measures and BMPs should reduce the effect of the proposed project on air quality as a result of changes in agricultural practices to less than significant levels.

¹⁸ ~~Imperial County's witness testified that~~ ^{As present EPA ranks} the area is in attainment, but for emissions from Mexico. (R.T. p. 2103.)

6.3.8.2 Shoreline Exposure

Parties presented considerable testimony concerning the possibility that emissive sediments will be exposed as inflows to the Sea are reduced and the water level in the Sea declines. Once again, the testimony was inconclusive. With implementation of the SSHCS, we do not expect the project to cause air quality impacts during the first 15 years of this project. The water level and the total surface area of the Salton Sea would, however, decrease in the long term, unless a restoration program is developed that prevents that decrease. In light of the potential for shoreline exposure, resulting in potentially significant impacts, we will require that IID follow the monitoring and mitigation plan as outlined in the FEIR. (IID 93, p. 3-50 – 3-52.) This requires a phased approach to addressing the problem, including ongoing monitoring. The four-step plan is as follows: (1) restrict access to minimize disturbance of exposed shoreline, (2) conduct an ongoing research and monitoring program as the Sea recedes, (3) create or purchase offsetting emission reduction credits, and (4) direct emission reductions at the Sea. Step four could include implementing feasible dust mitigation measures or supplying water to re-wet emissive areas of the Sea.

The air quality impacts of exposed shoreline associated with the proposed project are difficult to predict using existing studies and technology. We accept the phased approach proposed in the Monitoring and Mitigation Plan (IID 93, pp. 3-50 – 3-52) for mitigation of potential shoreline exposure effects. The FEIR calls for incremental implementation of the plan as shoreline is exposed. In order to develop an adequate baseline, this order requires that step two of the plan, research and monitoring, be implemented within six months of the effective date of this approval. In addition, this order delegates to the Division Chief the authority to determine, in consultation with the ICAPCD, the South Coast Air Quality Management District and the California Air Resources Board, whether any mitigation measure identified as part of the four-step plan is feasible. With this mitigation measure, we believe that the impacts to air quality due to exposed shoreline will be less than significant. Nonetheless, the FEIR states that dust emissions from shoreline exposure is a potentially significant, unavoidable impact.

6.3.9 Statement of Overriding Considerations

This order imposes conditions of approval to mitigate the potential adverse effects of the conservation and transfer project. Nevertheless, for the following potential significant adverse

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together with the independent authority of
ICAPCD and SC AQMD,

environmental effects of the project as approved by this order, other parties are responsible for carrying out potential mitigation measures or overriding considerations outweigh the potential significant adverse effects:

- Potential impacts to habitat along the lower Colorado River. Mitigation measures are to be implemented by the USBR. If the USBR does not implement these mitigation measures, we will require IID to implement those measures that are within IID's authority to implement. To the extent that IID can not implement these measures and impacts occur, the SWRCB finds that the overriding considerations discussed below outweigh the impacts.
- Potential impacts to water quality, especially as a result of increased levels of selenium in agricultural drains and increased salinity at the Salton Sea. Mitigation measures are required by this order. To the extent that impacts occur, the SWRCB finds that the overriding considerations discussed below outweigh the impacts.
- Potential short-term impacts to agricultural resources in Imperial County are unavoidable and unmitigable, and the SWRCB finds that overriding considerations discussed below outweigh the impacts.
- Potential impacts to the Salton Sea fishery, piscivorous birds, and to recreation at the Sea after water level elevations decline and salinity increases. This order requires full mitigation for these impacts for 15 years. After the 15-year mitigation period required by this order, the SWRCB finds that the overriding considerations discussed below outweigh any impacts that may occur.

and
requires
supplemental
environmental
assessment
before the end
of 15 years

Potential impacts to air quality due to shoreline exposure at the Salton Sea. We expect that these impacts will be mitigated to less than significant levels by IID. Nonetheless, the FEIR finds that air quality impacts from shoreline exposure are potentially significant and unavoidable. To the extent that impacts are unmitigable and unavoidable, the SWRCB finds that the overriding considerations discussed below outweigh the impacts.

The benefits of this project to the public, the uncertainties regarding the feasibility of restoring the Sea, and the potential impacts to the State if the project is not approved are discussed at length in section 5.2 of this order. The SWRCB finds that the benefit of a reliable Colorado River water supply under the USBR's Interim Surplus Criteria are critically important to the people of the State. The California Water Plan identifies the Colorado River as a source of supply for Southern California. In the absence of the proposed transfer, the State may be required to immediately reduce its diversions from the Colorado River by approximately 800,000 acre-feet of water per year. The only infrastructure currently in place that could provide an alternative source of water is the State Water Project, which diverts water from the Sacramento-San Joaquin Delta Estuary. Increased diversion from the Bay-Delta could have negative impacts on fish and wildlife resources that rely on the Bay-Delta, and the resulting measures to protect threatened and endangered species under the CESA and the federal ESA could result in severe and unpredictable water shortages throughout the State. At the same time, there are many uncertainties regarding the feasibility of restoring the Salton Sea. Unless and until a feasible restoration plan can be developed, the Sea is ultimately imperiled. Therefore, to the extent that this order does not fully mitigate the adverse effects of this action, the environmental, economic, and social benefits of implementing the conservation and transfer project outweigh the potential adverse environmental effects that are not avoided or fully mitigated.

6.4 Socio-Economic Impacts Should Be Reduced or Mitigated to the Extent Feasible

To the extent that IID fallows land in order to conserve water to transfer, or to mitigate the environmental impacts of the transfer, the transfer may adversely affect the local economy within Imperial County.

The SWRCB has authority to consider whether the transfer would be in the public interest in view of the potential socio-economic impacts of fallowing. In evaluating proposed changes in a water right permit or license, including changes that will allow a transfer to take place, the SWRCB considers the same factors that it considers when evaluating a water right application, including

that mitigation can be deferred until the required supplemental assessment prior to the end of year 15. It would be inappropriate ⁷⁶ in light of that mitigation technique to determine now that

whether the changes will be in the public interest. (See Wat. Code, §§ 1253, 1255, 1256; *Johnson Rancho County Water Dist. v. State Water Rights Board* (1965) 235 Cal.App.2d 863, 874 [45 Cal.Rptr. 589]; Order WR 95-9, p. 29; Revised Decision 1641, pp. 117, 123-124, 129.)¹⁹

As summarized below, the record indicates that the economic impacts may not be as significant as estimated by IID. In addition, in determining whether the transfer would be in the public interest, the SWRCB also must consider the benefits of the transfer, which, as discussed above, is an integral part of California's Colorado River Water Use Plan. (See Wat. Code, § 1256 [in considering whether an appropriation would be in the public interest, the SWRCB must consider the California Water Plan; SDCWA 5, pp. 4-5 [Colorado River Water Use Plan is incorporated into the California Water Plan].)

The record also indicates, however, that it may be feasible to minimize potential economic impacts, and to mitigate those impacts that cannot be eliminated. We conclude that the transfer will be in the public interest, notwithstanding the potential socio-economic impacts associated with following, but that socio-economic impacts should be minimized and mitigated to the extent feasible. SB 482 (Stats. 2002, ch. 617), provides a process for evaluating and mitigating any economic impacts of the transfer. We will reserve continuing authority to consider whether any additional measures should be taken based on the analysis and recommendations developed as part of that process.

Based on the analysis of socio-economic impacts contained in the FEIR, IID estimated that if water is conserved exclusively through following, annual losses to the personal income of employees and

¹⁹ SDCWA contends that no legal basis exists for considering socio-economic impacts because Water Code section 1736 does not expressly provide for an evaluation whether a long-term change will be in the public interest. In contrast to the provisions of the Water Code governing short-term transfers, however, section 1736 does not require the SWRCB to approve a long-term transfer even if the requirements for protecting third-party water right holders and instream beneficial uses are satisfied. (Compare Wat. Code, § 1727, subd. (b) [the SWRCB "shall approve" a short-term transfer if specified conditions are met], with *id.* § 1736 [the SWRCB "may approve" a long-term transfer if specified conditions are met].) In purpose and effect, a long-term change is an amendment to a permit or license. Except in the case of short-term transfers, where expedited approval is required, the language of the Water Code does not require, and sound public policy does not support, a construction that precludes the SWRCB from considering the public interest as part of its review of a change petition when the SWRCB would be required to consider the public interest if the change had been proposed as part of the original application. [The SWRCB is also mindful that it is the official policy of the State to facilitate voluntary water transfers "where consistent with the public welfare of the place of export and the place of import." (Wat. Code, § 109, subd. (a); see also Wat. Code, § 174 [the SWRCB exercises the adjudicatory and regulatory functions of the State in the field of water resources].)

(Wat. Code, §§ 100, 275, 1310(b), 1810.)
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Due to the success of the test program, MWD and PVID are currently negotiating a 35-year temporary fallowing program. (R.T. pp. 2546-2549.) MWD and PVID are in the process of studying the potential, socio-economic impacts of the program. In order to mitigate socio-economic impacts, MWD proposes to establish a fund of approximately \$6,000,000 for community improvement projects, which would be administered by a committee comprised of representatives from MWD, PVID, and members of the Palo Verde Valley community. (SDCWA 50, pp. ES-3 - ES-4, 3-4; R.T. pp. 2563-2564.)

SB 482 requires the Resources Agency and the Technology, Trade and Commerce Agency to submit to the Legislature by June 30, 2003, a report prepared in consultation with IID and Imperial County, which evaluates: (1) the nature and extent of any economic impacts of land fallowing in Imperial County in connection with the QSA, (2) measures taken by IID to minimize economic impacts, (3) and the extent to which funds in excess of the funds received by IID for water transferred may be necessary to mitigate economic impacts. (Stats. 2002, ch. 617, § 9.) If additional funds are necessary, the report is to make recommendations regarding providing the

additional funds, and formulating a program to administer the funds. *(Ibid.) SB 482 also requires that prior to a land-fallowing conservation plan, Imperial County shall assess its impacts on the county's economy and environment. (Ibid, § 7)*

SB 482 provides a mechanism for addressing the potential socio-economic impacts of the transfer. We will reserve continuing authority pending the outcome of the ^{section 9} report described above, to consider whether any additional measures should be required in the public interest to minimize or mitigate for economic impacts.

and Imperial County's assessments under section 7 described above,

6.5 Potential Impacts of Fallowing on Fish and Wildlife that Rely on Agricultural Fields

Agricultural fields provide foraging and resting opportunities for a number of species of special status as well as common avian species. (IID 93, p. A3-166.) Most crops in IID are flood irrigated. This process provides standing water in agricultural fields that bird species can take advantage of. White faced ibis, cattle egrets and mountain plovers all frequent these fields, foraging on invertebrates, while geese will often forage directly on the crops being grown. (IID 55, p. 3.2-49.) Burrowing owls often use the embankments of irrigation and drainage ditches for their burrows, and forage for mammals in adjacent agricultural fields. (IID 93, p. A3-147.) Some species also find

refuge in small wetland areas formed by water that seeps from IID's delivery and drainage system canals. (IID 55, pp. 3.2-23 – 3.2-24.)

Agricultural acreage in IID approaches 500,000 acres in some years, and is expected to remain stable into the future under baseline conditions. Should a fallowing program generate the whole quantity of water necessary for transfer and mitigation, approximately 15 percent of the farmland in IID would be idled at any given time. This could affect the ability of some species to find adequate forage, depending on the crop types fallowed and the food preferences of those species.

Though agricultural field habitat will be lost when land is idled, it will be replaced when it is no longer necessary to fallow land to generate water. The Salton Sea and its surroundings provide rare and irreplaceable habitat, which requires a constant and relatively steady supply of inflow. The loss of 15 percent of one habitat type must be balanced, in this case, with the near total loss of a much larger and more rare habitat type. We find that the transfer is in the public interest, notwithstanding the potential loss of habitat that may occur if agricultural fields in IID are fallowed to provide water for transfer, or to mitigate the impacts of the transfer on the Salton Sea.

7.0 ADDITIONAL FINDINGS REQUESTED BY PETITIONERS AND OTHER PARTIES

In addition to approving the transfer petition, petitioners have requested the SWRCB to make additional findings of fact and conclusions of law. These requests are addressed below.

7.1 This Order Is Designated as Non-Precedential

Petitioners have requested that the SWRCB make this order and all findings of fact and conclusions of law non-precedential. We agree to this request.

Government Code section 11425.60, subdivision (b) provides that an agency "may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur." Whether to designate an order or decision as precedent is discretionary and is not subject to judicial review. (*Ibid.*)

The SWRCB's determination not to designate this order as precedential is a condition of the protest dismissal agreement between IID, SDCWA, MWD and CVWD. MWD and CVWD have taken the

as to jurisdiction, but precedential on the merits

position that the SWRCB's authority to take action on the transfer petition is preempted by the Law of the River. In view of the statewide importance of the transfer and California's Colorado River Water Use Plan, however, MWD and CVWD agreed not to object to the transfer or this proceeding, provided, among other things, that the SWRCB's order is not designated as precedential. (IID 23; R.T. pp. 72-77.)

Imperial County argues that the SWRCB's order in this proceeding should be designated as precedential because of the significance of this proceeding and the potential for this transfer to serve as a model for future transfers. We conclude, however, that the importance of supporting the efforts of petitioners, MWD, and CVWD to resolve their disagreements pertaining to the transfer petition, without prejudice to other parties, outweighs the value of designating this order as precedent.²⁰

7.2 Need to Reassess the Reasonableness of IID's Water Use Before 2024

Petitioners also request the SWRCB to find that the SWRCB's concerns, if any, with respect to IID's reasonable and beneficial water use are satisfied, and that the SWRCB does not anticipate the need to reassess the reasonable and beneficial use of water by IID before the year 2024, absent any substantial, material, adverse change in IID's irrigation practices or advances in economically feasible technology associated with irrigation efficiency. Petitioners request the SWRCB to find that the transfer and acquisitions are in furtherance of previous SWRCB decisions concerning the reasonableness of IID's water use, including Decision 1600 and Order WR 88-20. In support of its position that its water use is reasonable, IID presented evidence concerning its irrigation efficiency relative to other agricultural districts. (IID 2, pp. 4-11, ex. B.)

Article X, section 2 of the California Constitution and Water Code section 100 require "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented" (See also Wat. Code, § 275.) Through the requested finding, IID seeks assurance that the SWRCB

²⁰ The designation of this order as non-precedential will not affect the enforceability of this order as against the parties to this proceeding during the term of the transfer; only the SWRCB's authority to rely on the order in future proceedings will be affected. (See Gov. Code, § 11425.60, subd. (a); 25 Cal. Law Revision Com. Rep. (1995) p. 55, reprinted in West's Ann. Gov. Code (1992 ed.) foll. § 11425.60, p. 151.)

listed at sections

2.2 and 2.3.2 of this order

other

300,000 afa will be in furtherance of the SWRCB's directive to IID, contained in Decision 1600 and Order WR 88-20, to evaluate, secure funding for, and implement potential conservation measures. Because irrigation efficiency is not the only fact relevant to a determination of reasonableness, it would not be appropriate to find, as requested by IID, that the circumstances under which we anticipate it may be necessary to reassess IID's water use are limited to changes in IID's irrigation practices or technological advances in irrigation efficiency.

It bears emphasis that by making this finding we do not intend to bind the SWRCB in any future proceeding, particularly if circumstances change. To do so would be an abdication of the SWRCB's ongoing responsibility to prevent the unreasonable use of water. (See Wat. Code, § 275; see also *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567 [45 P.2d 972, 1007] ["What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."].)

7.3 Beneficial and Reasonable Use of Water to Maintain Salton Sea Ecology and Stability.
7.4 Applicability of Water Code Sections 1011, 1012, and 1013

Petitioners request the SWRCB to find that Water Code sections 1011, 1012, and 1013 apply to and govern the transfer and acquisitions, and that IID's water rights, including IID's priority of right, will be unaffected by the transfer and acquisitions. As explained in section 3, above, Water Code sections 1011 and 1012 protect IID's appropriative water rights from forfeiture to the extent that IID uses less water as a result of conservation efforts. [See page 84A.]

Regardless whether sections 1011, 1012, or 1013 apply in this case, IID's rights will be protected from forfeiture, diminution, or impairment to the extent that IID transfers water, provided that the transfer is implemented in accordance with applicable law. (Wat. Code, §§ 1745.07, 1014, 1017.) Moreover, effective January 1, 2003, SB 482 will amend Water Code section 1013 to protect IID's water rights from forfeiture to the extent that IID implements water efficiency conservation measures or fallows land in order to carry out or mitigate for a transfer under the QSA, and consults with Imperial County to secure its assessment of environmental and economic effects (Stats. 2002, ch. 617, § 7.)²²

²² Water Code section 1013 provides that if IID, acting under contract with the United States or pursuant to State or federal requirements, reduces through conservation measures inflows to the Salton Sea, IID shall not be liable for any resulting effects to the Salton Sea or its bordering area. The extent to which section 1013 protects IID from liability is not an issue in this case, and it would be inappropriate to offer an advisory opinion on this issue.

7.5 Applicability of 84 Water Code Section 1810.
[See pages 84 B-D]

7.3 Beneficial and Reasonable use of Water to Maintain Salton Sea Ecology and Stability.

Several parties request the SWRCB find that the use of IID's Colorado River allotment to maintain the ecology and stability of the Salton Sea is beneficial and reasonable. As explained in section 5.2.8 of this order, California law authorizes the beneficial use of water for the preservation and enhancement of fish and wildlife resources (Wat. Code, § 1243), and also authorizes as beneficial use the supply of water to a saline lake for maintenance of its shoreline to benefit surrounding property owners, prevent nuisance, and maintain attractive surroundings (*Aitkin v. City of Los Angeles*, 10 Cal.App.2d at p. 474). No paramount federal law precludes the SWRCB from making the requested finding of beneficial and reasonable use. Whereas the SWRCB in Decision 1600 determined in 1984 that it was not a beneficial use for excess water to flow into the Salton Sea at that time and produce flooding, conditions now obtaining require that the existing level of inflows to the Salton Sea be maintained to protect fish, wildlife, and overall ecology and scenery; and to prevent an air quality nuisance. Based on contemporary and anticipated conditions, changed from those in 1984, the SWRCB finds that the use of IID's Colorado River allotment as anticipated in this order constitutes reasonable and beneficial use. (See *Tulare Dist. v. Lindsay-Strathmore Dist.*, 3 Cal.2d at p. 567.)

7.5 Applicability of Water Code section 1810.

Imperial County requests that the SWRCB find that Water Code section 1810 applies to and governs the transfer. As now explained, section 1810 does apply to this transfer, and together with the recent amendments to Water Code section 1013, subdivision (b), (2002 Stats., ch. 617, § 7) enable this Board in concert with Imperial County to assure compliance with section 1810.

Subdivision (d) of section 1810 provides that when unused capacity of a water conveyance facility of one agency is made available to another agency for transport of that second agency's water, the use of the facility is to be made "without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred." In the present transfer, it is uncontested that the transfer will use MWD's Colorado River Aqueduct for transport of the water to San Diego, and that the water will be regarded from the moment of diversion at Parker Dam as the water of SDCWA. (SDCWA 14, ¶ 4.1, R.T. pp. 394, 425.) Section 1810's mandate that the transfer not unreasonably affect the Imperial County environment and economy thus applies to this transfer.

Section 1810 is silent, however, on the means of implementing that mandate. Legislative history of that provision presented by Imperial County establishes that subdivision (d) was added to eliminate the opposition, and secure the support, of Inyo County to this measure. Shortly after the measure was enacted, Los Angeles as owner of the Los Angeles Aqueduct originating in Inyo County agreed that it would not enter into

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(IMPERIAL COUNTY INSERT)

any water transfer agreement using the aqueduct unless that county represented that the transfer would "insure[] the protection of the county's environment and economy." (Inyo County Code, § 18.77.000, subd. (G).) Inyo County established a conditional use process to render those findings with respect to groundwater. (Inyo County Code, ch. 18.77.) This history suggests that the county of transfer origin is empowered to render findings of compliance with section 1810, but does not resolve the role of the SWRCB in section 1810 determinations.

The Legislature's recent amendment of subdivision (b) of Water Code section 1013 in SB 482 (ch. 617, § 7) provides additional guidance. SB 482 implements the requirements of section 1810 with respect to the present transfer by specifying that an IID land fallowing conservation program cannot proceed without securing Imperial County's assessment of the program's impact on the county's environment and economy. The Legislature relies on the county in the first instance to determine whether the transfer will unreasonably effect the overall economy or environment of Imperial County.

The SWRCB, however, in exercising its adjudicatory and regulatory authority over this transfer (Wat. Code, § 174) shares responsibility with Imperial County to ensure compliance with section 1810. The SWRCB cannot proceed in violation of section 1810. Moreover, under California's doctrine of concurrent jurisdiction with respect to water rights permits, Imperial County can seek to enforce section 1810 by address to the SWRCB as well as the courts, at least where a permit of the SWRCB is at issue. (*National Audubon Society v. Superior Court (DWP)* (1983) 33 Cal.3d 419, 449-451.)

We will ensure compliance with section 1810 by the following means. Paragraph 10 of the board's order (section 10.0) reserves continuing jurisdiction to modify this order based upon the assessments that Imperial County will produce as required by SB 482. In the event that Imperial County determines that this transfer is producing an unreasonable effect on the overall economy or environment of that county, the county and any other party can petition the SWRCB to modify its order to eliminate the unreasonable effect. By this process the SWRCB determines that this order will not produce unreasonable economic or environmental effects within Imperial County.

7.6
7.4

Reporting Requirements

Finally, petitioners request the SWRCB to make findings concerning IID's reporting obligations. Petitioners request that IID be allowed to verify the amount of conserved water transferred or acquired each year by (1) reporting that IID's diversions at Imperial Dam (less return flows) have been reduced below 3,100,000 acre-feet 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 (2) by reporting the amount of reductions in deliveries to participating farmers and the amount of water conserved by conservation projects implemented by IID itself. Petitioners request the SWRCB to determine that these annual reports satisfy the reporting requirements under Decision 1600 and Order WR 88-20. The only outstanding reporting requirement stems from Order WR 88-20, which required semi-annual reports on the conservation measures undertaken in satisfaction of Order WR 88-20.

The reporting requirement proposed by petitioners is adequate. IID may measure the amount of water transferred against the 3,100,000 acre-foot baseline because 3,100,000 acre-feet is less than the maximum amount of water that may be diverted under Permit 7643.²³ If adopted by the Secretary of Interior, the Inadvertent Overrun and Payback Policy would afford IID greater operational flexibility by allowing IID to payback inadvertent diversions in excess of IID's 3,100,000 acre-foot cap. (IID 53, pp. 2-4 - 2-8.)

The record indicates that the measuring device for IID's diversions at Imperial Dam has a significant margin of error relative to the volume of water diverted by IID. (See R.T. pp. 915-916.) IID will further verify, however, that it has reduced its diversions in an amount equal to the amount of water transferred by reporting the amount of reductions in deliveries to farmers and the amount of water saved by conservation projects implemented by IID.

²³ The full face-value of a permit or license does not necessarily define the amount of water that may be transferred under the permit or license. As discussed above in section 3.7, to the extent that a given water right has been unexercised, the right is subject to forfeiture for non-use (except to the extent that the right holder has transferred water or has conserved water under Water Code section 1011). To the extent that a right has been forfeited, it cannot serve as the basis for a transfer. In this case, however, the possibility of forfeiture does not appear to be an issue because 3,100,000 acre-feet is substantially less than the 3,850,000 acre-foot, maximum face-value of Permit 7643, and well within the historic range of IID's water use. (See IID 11.)

Permittee shall submit an annual report to the SWRCB on actions taken during each calendar year to comply with this condition. The report for each calendar year shall be submitted to the Chief of the Division of Water Rights by March 31 of the subsequent year.

In each report, if the air quality impacts of the project are not being mitigated to less than significant levels, permittee shall identify any air quality mitigation measure that it determined was infeasible. Notwithstanding such a determination by permittee, if the Chief of the Division of Water Rights determines, after consultation with the ICAPCD, the South Coast Air Quality Management District and the California Air Resources Board, that the mitigation measure is feasible and necessary to mitigate the air quality impacts of the project, then permittee shall implement the mitigation measure. *(This provision does not supersede the independent authority of ICAPCD or SCAQMD.)*

9. Permittee shall submit an annual report to the SWRCB on the efforts of the United States Bureau of Reclamation (USBR) to implement the mitigation measures outlined in the United States Fish and Wildlife Service's Biological Opinion for the Interim Surplus Criteria, Secretarial Implementation Agreements, and Conservation Measures on the lower Colorado River, Lake Mead to the Southerly International Boundary Arizona, California and Nevada (Jan. 12, 2001). The mitigation measures include the replacement of up to 744 acres of cottonwood – willow habitat, restoration of 44 acres of backwater habitat, and the re-introduction of some native fish species to the lower Colorado River. The report for each calendar year shall be submitted to the Chief of the Division of Water Rights by March 31 of the subsequent year.

The SWRCB reserves continuing authority to require the permittee to implement any of the mitigation measures described above that are not implemented by the USBR, provided that it is feasible for the permittee to implement the measures.

10. Permittee shall implement all the provisions of the Tamarisk Scrub Habitat Conservation Strategy, the Drain Habitat Conservation Strategy, the Desert Pupfish Conservation Strategy, and the Razorback Sucker Conservation Strategy, as described in the Final

measures that will save more than 25,000 afa. A copy of the study report shall be submitted to the Chief, Division of Water Rights and the Executive Officer of the Regional Board. Permittee shall work cooperatively with the Regional Board to implement any actions recommended by the report that are within the control of the permittee.

Permittee shall submit an annual report to the SWRCB on any actions taken pursuant to recommendations of the report during each calendar year. The report for each calendar year shall be submitted to the Chief of the Division of Water Rights by March 31 of the subsequent year.

13. To mitigate for the recreational and aesthetic impacts of a receding Salton Sea shoreline, permittee shall relocate or construct new recreational facilities as described in Mitigation Measures R-7 and R-10 on pages 3-6.19 through 3.6-21 in the Draft Environmental Impact Report and Habitat Conservation Plan (SCH # 1999091142) and on pages 4-7 through 4-10 in the Final Environmental Impact Report and Habitat Conservation Plan (SCH # 1999091142), as certified by permittee on June 28, 2002. Permittee also shall implement Mitigation A-1 as described on page 4-20 of the Final Environmental Impact Report and Habitat Conservation Plan (SCH # 1999091142), as certified by permittee on June 28, 2002.

Permittee shall submit an annual report to the SWRCB on actions taken during each calendar year to comply with this condition. The report for each calendar year shall be submitted to the Chief of the Division of Water Rights by March 31 of the subsequent year.

14. ^{INSERT - [See page 93A]} The SWRCB reserves continuing authority to consider whether any changes to this order may be appropriate in light of any new information that may become available if permittee revises, amends or supplements the Final Environmental Impact Report and Habitat Conservation Plan (SCH # 1999091142), as certified by permittee on June 28, 2002, before permittee approves the project under CEQA, or any substantial changes that the permittee may make to the project as part of its approval decision.

To evaluate transfer impacts during its first 15 years of operation, and assess the means (and attendant impact) of proceeding with the transfer beyond the 15-year term, the SWRCB requires the completion of a supplemental environmental assessment, in the form of a staged EIR that proceeds from the transfer EIR certified by IID in June 2002, prior to the completion of the 15-year term.

Permittee shall initiate the preparation of the supplemental environmental assessment no later than year 12 of the transfer's operation. The SWRCB reserves continuing authority to modify this order premised on that assessment and any subsequent decisions by IID and SDCWA relying on that assessment.

15. The SWRCB reserves continuing authority to consider whether any changes to this order to minimize or mitigate for socio-economic impacts may be appropriate in light of the evaluation and recommendations of the report to be prepared by the Resources Agency and the Technology, Trade and Commerce Agency in accordance with SB 482 (Stats. 2002, ch. 617, § 9), *and the assessments of economic and environmental effects prepared by Imperial County in accordance with SB 482 (Ibid, §7).*
16. This order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under California's fully protected species statutes, the California Endangered Species Act or the federal Endangered Species Act (ESA). Permittee shall obtain any necessary approvals under the Fish and Game Code and the federal ESA prior to carrying out the transfer. If a "take" of a species listed as fully protected, threatened or endangered under the Fish and Game Code or the federal ESA will result from the transfer, the permittee shall obtain an incidental take permit from the Department of Fish and Game or the U.S. Fish and Wildlife Service, as appropriate, prior to carrying out the transfer.
17. No work shall commence and no water shall be diverted, stored or used under this order until a copy of a stream or lake alteration agreement between the Department of Fish and Game and the permittee is filed with the Division of Water Rights. Compliance with the terms and conditions of the agreement is the responsibility of the permittee. If a stream or lake agreement is not necessary for this permitted project, the permittee shall provide the Division of Water Rights a copy of a waiver signed by the California Department of Fish and Game.

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