

**BRENDAN FLETCHER**  
**KARA GILLON**  
DEFENDERS OF WILDLIFE  
926 J Street, Suite 522  
Sacramento, CA 95816  
Phone: (916) 313-5810  
Fax: (916) 313-5812

Representatives of Participant:  
DEFENDERS OF WILDLIFE

**KAREN DOUGLAS**  
PLANNING AND CONSERVATION LEAGUE  
926 J Street, Suite 612  
Sacramento, CA 95816  
Phone: (916) 313-4512  
Fax: (916) 313-1784

Representative of Participant:  
PLANNING AND CONSERVATION LEAGUE

**STATE WATER RESOURCES CONTROL BOARD**

**STATE OF CALIFORNIA**

IMPERIAL IRRIGATION DISTRICT and )	IID/SDCWA WATER TRANSFER
SAN DIEGO COUNTY WATER )	HEARING
AUTHORITY; )	
)	CLOSING ARGUMENT/LEGAL BRIEF
Petitioners. )	OF DEFENDERS OF WILDLIFE AND
)	PLANNING AND CONSERVATION
)	LEAGUE
)	
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## I. INTRODUCTION

This brief addresses issues related to the environmental impacts of the proposed water transfer between the Imperial Irrigation District (IID), San Diego County Water Authority (SDCWA), Coachella Valley Water District (CVWD), and Metropolitan Water District (MWD). The petition requests approval for the transfer under two broad scenarios: 1) 130,000 to 300,000 acre feet per year to be transferred from IID to SDCWA, and 2) up to 200,000 acre feet per year to SDCWA and up to 100,000 acre feet per year to CVWD and/or MWD. (SWRCB Exh. 1b, p. 1; *see also* IID Exh. 55, p. 2-1.)

At the outset of this proceeding, the project was designed to generate the conserved water for transfer through implementation of water conservation measures within the service area of IID. The water conservation measures were to include on-farm irrigation system improvements, which would be implemented by landowners and tenants within IID's service area, water improvements by IID to its water delivery system, and subject to limitations within the IID/SDCWA Transfer Agreement, following measures to conserve water. (IID Exh. 55, p. 2-8.)

In Phase 2 of this proceeding, Defenders of Wildlife, Planning and Conservation League, and other parties put on abundant evidence demonstrating that the project as proposed would have adverse impacts across a wide range of resource areas in and around the Salton Sea, in Imperial and Coachella Valleys, along the Colorado River, and in the service area of San Diego County Water Authority. It was demonstrated that the dramatic reduction in agricultural runoff caused by the project would have adverse impacts on fish and wildlife at the Salton Sea, water quality in Imperial Valley drains and rivers, and air quality in Imperial and Coachella Valleys.

Since that time, IID has certified a final Environmental Impact Report in which the proposed mitigation measures, and apparently, the proposed project, have been substantially redefined. The original Habitat Conservation Plan (HCP) has been replaced with a plan to provide inflows to the Salton Sea sufficient to maintain the Sea's salinity at above 60 parts per thousand until the year 2030. An air quality mitigation plan has been developed. And most fundamentally, the method of conservation has apparently been changed from implementation of on-farm and system conservation measures to voluntary fallowing.

Although the changes to the project constitute an important step in the right direction by recognizing the irreplaceable resource values of the Salton Sea, they do not add up to a project that should receive this Board's approval. The Board cannot approve the petition on the current record for at least the following reasons:

1. The environmental documents presented for this Board's consideration do not adequately describe the project, making it impossible to determine that the project would not unreasonably affect fish, wildlife, and other instream uses.
2. The measures proposed to mitigate for impacts to fish, wildlife, and recreation do not assure that project-related reductions in Salton Sea inflows will be fully mitigated, and cannot serve as the basis for a determination that the project would not unreasonably affect fish, wildlife, and other instream uses.
3. The project will have severe adverse impacts on water quality for which no mitigation is proposed, making it impossible to determine that the project would not unreasonably affect fish, wildlife, and other instream uses.

4. There is no funding committed to the measures proposed to mitigate for impacts to air quality, and those measures fail to take account of potential project-related reductions in inflows prior to 2030; they cannot serve as the basis for a determination that the project would not unreasonably affect fish, wildlife, and other instream uses.

5. The petition is not ripe for approval because IID has not approved a project under the California Environmental Quality Act.

This brief also includes a discussion concluding that the Law of the River allows the use of water by IID for fish, wildlife, and other instream beneficial uses, and that the Interim Surplus Guidelines do not require execution of the Quantification Settlement Agreement by December 31, 2002.

We request that the Board take the following actions:

1. Deny the IID/SDCWA water transfer petition without prejudice until IID approves a project based on a supplemental or subsequent EIR/EIS that clearly describes the proposed project and fully addresses the long-term consequences of the proposed project on the Salton Sea's fish and wildlife resources, air and water quality, and growth-inducing impacts in San Diego.

2. Find that the project as originally proposed and mitigated as described in Habitat Conservation Plan Approach 1 would have unreasonable effects on fish, wildlife, and other instream uses.

3. Condition any future approval given to any transfer of water from IID to SDCWA, CVWD, and/or MWD to fully protect fish and wildlife resources, instream uses, water quality, and air quality.

## II. STATEMENT OF THE LAW

Section 1736 of the Water Code provides that the Board may approve a long-term transfer of water only if the transfer “would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses.” The petitioners have the initial burden of showing that there will be no unreasonable effect on fish, wildlife, or other instream beneficial uses. (State Water Resources Control Board, Revised Notice of Public Hearing and Amendment to Long-Term Transfer Petition of the Imperial Irrigation District and San Diego County Water Authority, February 5, 2002, p. 7.) “The establishment of procedures to avoid or mitigate adverse effects, the active involvement of the Department of Fish and Game and other fishery agencies, the recommendations of the fishery agencies, the ability of the transfer to provide a benefit to fish and wildlife while accomplishing its primary objective, and the commitments of the transferor and transferee all can be taken into account in making a determination whether the transfer will have an unreasonable effect on instream uses.” (SWRCB, WRO 94-4, p. 8.)

All uses of water in California are subject to the reasonableness doctrine set forth in Article X, section 2 of the California Constitution. The doctrine authorizes this Board to engage in a broad-ranging inquiry into the public costs and benefits of any given use or change in use of water, whether that change involves the purpose of use, method of use, method of diversion, or as is pertinent in this case, the method of conservation of water for transfer. This Board has exercised its Article X, section 2 authority to address not only water use issues affecting consumptive users of water, and fish and wildlife uses, but also air quality issues. In Decision 1631, this Board stated that “[i]t should be beyond dispute that, in a situation where diversion of

water can lead to violation of a public health based air quality standard, the protection of air quality should be considered in determining the conditions under which the water appropriation is allowed.” (SWCRB, Decision 1631, p.121.)

This Board has “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) National Audubon Society – California has submitted a brief extensively discussing the application of the public trust doctrine to the Salton Sea. Defenders of Wildlife and Planning and Conservation League adopt and incorporate by reference that discussion.

### III. DISCUSSION

#### **A. The Salton Sea is a resource of exceptional importance for fish, wildlife, and outdoor recreation.**

The Salton Sea is an environmental and recreational resource of the highest importance, one of the most productive areas for fish and wildlife in California. The Sea supports a diversity of invertebrate life, which in turn supports what may be one of the most productive fisheries in the world, sustaining up to 50 million fish. (Testimony of Dr. Timothy Krantz, Hearing Transcript, May 14, 2002, p. 1495, lines 4-11.) Several of these fish, including orangemouth corvina and tilapia, are important for recreational anglers; one of the fish species, the desert pupfish, is native to water bodies of the Salton Trough and is listed under the California and federal Endangered Species Acts. (IID Exh. 55, p. 3.2-61.)

The Salton Sea and the surrounding area are of international importance to migratory birds. (Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1865, line 15.)

Over 400 species have been counted in and around the Sea, two-thirds of all species in the United States. (PCL Exh. 1, p. 5.) On any given day there are hundreds of thousands of birds at the Sea; there are high day single counts of over 3 million. (Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1865, line 11.) The Salton Sea supports over 80 percent of American white pelicans, 90 percent of the North American population of eared grebes, 45 percent of the Yuma clapper rail, which is listed under both the federal and state Endangered Species Acts. (Testimony of Dr. Timothy Krantz, Hearing Transcript, May 14, 2002, p. 1496, lines 12-21.) It is the only inland nesting site for brown pelicans, also listed under both the state and federal acts. (*Ibid.*) Thirty to 50 percent of the *world's* population of mountain plovers, a species proposed for listing under the federal ESA, use adjacent agricultural areas. (*Id.* at lines 17-19.) Leg bands from birds banded at the Salton Sea have been recovered in Russia, Alaska, across Canada, up and down the Pacific Flyway, from as far away as Peru and Hawaii. (PCL Exh. 1, p. 2.) With over 90 percent of California's wetlands lost, the Salton Sea has become an irreplaceable link on the Pacific Flyway.

The Sea is a recreational resource for millions of people. It is estimated that as many as 2 million people visit the Sea itself every year. (IID Exh. 55, p. 3.14-24.) The Salton Sea Recreation Area, located along the northeastern shore of the Sea, has five campgrounds with approximately 1400 campsites, with boat launching and mooring facilities at each of the campgrounds. (IID Exh. 55, p. 3.6-7.) Over 200,000 visitors visit Salton Sea State Recreation Area annually. (*Id.* at p. 3.6-10.) The Sonny Bono Salton Sea National Wildlife Refuge attracts over 30,000 visitors per year. (*Id.* at 3.6-9.)

Among and in addition to these visitors are the estimated 400,000 anglers who visit the

Sea each year to fish for tilapia, sargo, corvina, and croaker. (*Id.* at 3.6-19.) The fishing at the Salton Sea has been described as some of the finest in California, with catch rates unequalled anywhere in the state. (Testimony of Bill Karr, Hearing Transcript, May 14, 2002, p. 1686, lines 2-6.) Not only are there large numbers of fish for recreational anglers, but they provide a unique sporting challenge, corvina especially – there is really no place in California other than the Salton Sea where anglers go expecting to catch numbers of fish over ten pounds. (Testimony of Tom Raftican, Hearing Transcript, May 14, 2002, p. 1691, lines 4-13.)

**B. The environmental documents presented for this Board’s consideration do not adequately describe the project, making it impossible to determine that the project would not unreasonably affect fish, wildlife, and other instream uses.**

On June 28, 2002, the IID Board of Directors certified the completion of the final EIR for the water transfer. The Final EIR presents a substantially revised HCP, including a new Salton Sea Habitat Conservation Strategy, and a wholly new air quality mitigation plan. In several respects the revised programs represent a substantial step forward: the new HCP recognizes the need to maintain inflows to the Salton Sea, although in its design it fails to provide full mitigation for inflow reductions. The new air quality mitigation plan recognizes the severity of the threat of dust emissions from shoreline exposure at the Sea, although there is no indication how this plan will be funded.

But these steps forward have come at a significant cost; the project is now so vaguely defined as to substantially defy meaningful analysis. In several places, the Final EIR states that implementation of the Salton Sea Habitat Conservation Strategy in concert with the on-farm and system-based conservation measures that constituted the original project “is not currently considered to be practicable.” (Final EIR, pp. 1-6, n.1, 3-38, n. \*\*.)

In testimony on July 8,



2002, Ms. Laura Harnish indicated that to be practicable, the transfer would need to consist of some amount of fallowing, possibly in combination with efficiency measures. (Testimony of Laura Harnish, citation to Hearing Transcript unavailable.) However, the air quality impact analysis indicates that by the end of the project term, in 2077, the project would expose a maximum of 16,000 acres of shoreline, apparently on the assumption that fallowing would be the exclusive measure employed to generate conserved water for the transfer for the entire term of the project. (Final EIR, p. 3-53; Testimony of Laura Harnish, July 8, 2002, citation to Hearing Transcript unavailable.)

Although it appears that the original project exclusively employing conservation measures has been superseded, there is no firm indication of what has taken its place: a project to conserve up to 300,000 acre feet via fallowing, a project that employs some undefined combination of efficiency conservation and fallowing to generate up to 300,000 acre feet for transfer, or a downsized project employing indeterminate conservation measures.

To add to the confusion, the IID's obligation to provide water to the Sea to mitigate for inflow reductions under the HCP is uncertain and dependent upon events wholly unrelated to the project. Rather than simply provide the Sea with one acre foot of water for every acre foot lost to the Sea because of the project, IID's mitigation obligations are tied to the baseline by a complex and uncertain formula, which is discussed in more detail in section II.C.2.c.

The net effect of the changes in the method of generating water for transfer and the uncertainty of IID's obligations under the HCP is that it is impossible to know what impact the project will have on inflows to the Salton Sea, the fish and wildlife that depend on the Sea, water quality in the drains, and the amount of land fallowed. CEQA does not allow for such

uncertainty. “An accurate, stable and finite project description is the *sine qua none* of an informative and legally sufficient EIR.” (*County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.) “Incessant shifts among different project descriptions” places an enormous burden on the public and vitiates the CEQA process “as a vehicle for intelligent public participation.” (*Id.* at 197-98.) In this case, petitioners have not merely shifted among different project descriptions, but have declined to commit to any project description at all. As a result, this Board lacks any basis for determining that the transfer would not have an unreasonable impact on fish, wildlife, and other instream uses.

**C. The measures proposed to mitigate for impacts to fish, wildlife, and recreation do not assure that project-related reductions in Salton Sea inflows will be fully replaced, and cannot serve as the basis for a determination that the project would not unreasonably affect fish, wildlife, and other instream uses.**

Any reduction in inflows to the Salton Sea will result in an increase in the Sea’s salinity and decreases in its surface area and elevation, threatening the fish, wildlife, and recreational uses of the Sea. None of the measures proposed to mitigate for these impacts assure that project-related reductions in inflow will be replaced on a one-to-one basis; accordingly, they cannot serve as the basis for a determination that the project would not unreasonably affect fish, wildlife, and other instream uses.

1. *Any reduction in inflows will have a substantial, adverse impact on fish and wildlife.*

Under the original project, IID was to conserve up to 300,000 acre feet of water for transfer, plus approximately 59,000 acre feet to comply with the Inadvertent Overrun and Payback Policy, via a combination of improvements to IID’s system and on-farm conservation measures. For each acre foot of water conserved under the project, inflow would be reduced by

one acre foot. (Testimony of Dr. John Eckhart, Hearing Transcript, April 30, 2002, p. 698, lines 8-11.) After full ramp-up, the proposed project would reduce annual inflows to the Salton Sea from the IID service area by approximately 359,000 acre feet annually.

Under this scenario, reduced inflows would result in the salinity of the Sea rising from its present concentration of 45 parts per thousand to over 60 parts per thousand (ppt) by the year 2012. (IID Exh. 55, p. 3.1-123.) Over the 75-year life of the project the reduction in inflow to the Sea is expected to result in a drop of the surface level of the Sea of roughly 22 feet, from a current elevation of -227.8 feet msl to -249.8 feet msl, as compared to an elevation of approximately -235 msl under the baseline. (IID Exh. 55, p. 3.1-120, Figure 3.1-31.) This would be expected to reduce the surface area of the Sea by 50,000 acres, exposing an equivalent amount of seabed.

It is not possible to determine the impacts of the revised project on salinity, elevation, and seabed exposure, because as discussed in detail below, the mitigation proposed in the final EIR is tied to, and depends on, the baseline projection of future inflows to the Salton Sea, rather than the amount of inflow reduction attributable to the revised project. However, if baseline inflows are greater than predicted under 95 percent confidence level of the project baseline, the transfer will increase the salinity of the Sea, accelerating the date at which it becomes to saline to support fish, and reduce its surface area and elevation.

Despite all the uncertainty, the evidence presented in Phase 2 of this proceeding clearly demonstrated that any reduction of inflow to the Salton Sea, and any increase in its salinity, will have severe, adverse impacts on fish and wildlife. When salinity in the Salton Sea reaches 60 parts per thousand, the tilapia fishery is predicted to collapse over a period of years. (Testimony

of Dr. Timothy Krantz, Hearing Transcript, May 14, 2002, p. 1503, lines 4-8.) Other fish in the Sea, including fish important for recreational anglers, would decline earlier. It is predicted that corvina, croaker, and sargo production may fail at 50 ppt, and croaker could not complete its life cycle at about 55 ppt. (IID Exh. 55, pp. 3.2-147-149.) Desert pupfish could hold on a bit longer than the other species, but would be expected to fail at 80 ppt. (IID Exh. 55, p. 3.2-147.)

When the fish disappear, the Sea will lose most of its fish-eating birds, including the endangered brown pelican. (Testimony of Dr. Nils Warnock, Hearing Transcript, May 15, 2002, p. 1868, lines 19-20.) With the failure of their prey base, they will be forced to find different foraging habitat, although remnant populations may hang on near the deltas of the New and Alamo Rivers if tilapia can sustain themselves in the estuaries. (*Id.* at p. 1868, lines 20-24.) However, the Sea will probably lose the large breeding populations of fish-eating birds, such as the thousands of double-crested cormorants that nest at Mullet Island, which constitute the largest breeding colony in California. (*Id.* at p. 1868, lines 24-25, p. 1869, line 1; IID Exh. 55, p. 3.2-155.)

Although the fishery's collapse and its consequences constitute the most dramatic impacts of the proposed project, the project's impacts on fish and wildlife are not limited to that collapse. Impacts from rising salinity will be felt as soon as inflows are reduced. Because salinity at the Sea is already high, the resident species of fish are already under stress. (Testimony of Dr. Stuart Hurlbert, Hearing Transcript, May 14, 2002, p. 1541, lines 13-14.) Any increase in salinity will stress these fish further, inhibiting their reproduction, making them more vulnerable to disease. (*Id.* at 1542, lines 21-25; Defenders Exh. 2, p.3.)

As the shoreline of the Sea recedes, there will be adverse biological impacts from the

changing configuration of the Sea. A land bridge will be exposed to Mullet Island, exposing the large breeding colonies of cormorants to predators. (Testimony of Nils Warnock, Hearing Transcript, May 15, 2002, p. 1870, lines 13 - 20; IID Exh. 55, p. 3.2-155.) These predators can destroy breeding colonies within a matter of days. (Testimony of Nils Warnock, Hearing Transcript, May 15, 2002, p. 1870, lines 17 - 20.) Also, as the shoreline recedes, in those areas where the slope increases, there will be a decrease the amount of shallow water for shorebirds to feed in. (*Id.* at p. 1870, lines 21-25, p. 1871, lines 1-8.)

Inflow reductions could also increase the incidence of avian disease outbreaks, both because of rising salinity in the Sea and changes in the Sea's surface area. Because of the degradation of wetlands throughout California and along the Pacific Flyway, the large numbers of migratory birds that move along the Flyway are forced into less and less habitat. (Testimony of Dr. Milton Friend, Hearing Transcript, May 29, 2002, p. 2420, lines 12 - 17.) This has created environmental conditions that facilitate the expression of avian disease, and disease transmission takes place more easily than when more habitat was available. (*Id.* at p. 2421, lines 1-7.) As the surface area of the Sea declines, and birds are forced to forage in more limited areas, or in more degraded habitat, increased concentrations of birds will increase the potential for infectious disease transmission. (*Id.* at p. 2425, lines 10 - 15.)

Finally, reductions in inflow will increase the potential for selenium contamination and the attendant consequences for reproduction and disease in birds. The proposed project could greatly increase the miles of drains that would be affected by selenium contamination. (IID Exh. 55, Table 3.2-40.) In addition, selenium "hotspots" could be exposed as the Sea recedes. Currently, although inflows to the Salton Sea are high in selenium, water in the Sea itself does

not exceed selenium standards. (Testimony of Philip Gruenberg, Hearing Transcript, May 14, 2002, p. 1219, lines 16-18.) However, there are elevated levels of selenium in the sediment of several areas of the Salton Sea, and those areas are currently devoid of oxygen in the warmer months. (*Id.* at p. 1237, lines 8-11.) If these areas are exposed as the Sea recedes, this could make the selenium more bioavailable to shorebirds and waterfowl; also, selenium that is in anaerobic conditions in deeper water could become oxygenated and thus more bioavailable. (Testimony of Dr. Doug. Barnum, Hearing Transcript, May 29, 2002, p. 2432, lines 3-13.)

2. *The HCP does not meet the requirements of the California and Federal Endangered Species Acts.*

Under the federal Endangered Species Act (ESA), the U.S. Fish and Wildlife Service (FWS) may not issue an incidental take permit (ITP) unless it makes all of the following findings: (a) the take will be incidental; (b) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking; (c) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; (d) any other measure the FWS has required as necessary or appropriate will be met; and (e) the FWS has received such other assurances as required to ensure that the plan will be implemented. (16 U.S.C. § 1539(a)(2)(B). )

Under the California Endangered Species Act (CESA), the Department of Fish and Game (DFG) may issue an incidental take permit as long as the following conditions are met: (a) the take is incidental; (b) the impacts of the authorized take shall be minimized and fully mitigated, and all required measures shall be capable of successful implementation; (c) the permit is consistent with any DFG regulations; (d) the applicant shall ensure adequate funding to

implement mitigation and monitoring; and (e) the issuance of the permit will not jeopardize the continued existence of the species.

IID developed a Habitat Conservation Plan (HCP) covering 96 fish, wildlife, and plant species with the potential to occur in the HCP area. (IID Exh. 55, Appendix C, pp. ES-2-3.) As part of this HCP, IID developed two approaches for addressing impacts fish-eating birds at the Salton Sea, including the listed brown pelican, caused by the loss of the Salton Sea fishery. Under the first approach, hereinafter called HCP 1, IID would construct and operate a fish hatchery to stock fish in the Salton Sea as prey for piscivorous birds until the fish could no longer tolerate the Sea's salinity. (*Id.* at ES-5.) At that point, IID would construct 5,000 acres of ponds and stock those ponds to produce fish for the remainder of the 75-year term of the project. (*Ibid.*) The ponds would be about 5 feet deep, in blocks approximately 160 and 640 acres in size, and would require approximately 30,000 acre feet of water per year. (*Id.* at 3-25.)

Habitat Conservation Plan Approach 2 (HCP 2) is built around mitigating for the transfer's impacts on inflows to the Salton Sea by conserving water and allowing it to flow to the Sea. (IID Exh. 55, Appendix C, p. 3-25.) The HCP states that this water could be generated through system improvements, on-farm conservation, fallowing, or any combination of these methods. (IID Exh. 55, Appendix C, p. 3-26.) If the water conservation were achieved through fallowing, approximately 75,000 acres would need to be fallowed to keep inflows to the Sea constant and generate water for the transfer, and an additional 9,800 acres would need to be fallowed to provide water necessary for the IOP. (*Ibid.*)

- a. The California Department of Fish and Game has determined that the HCP 1 does not meet the requirements of the California Endangered Species Act.

By letter dated May 29, 2002, the California Department of Fish and Game informed IID that after considerable analysis of HCP 1, it had concluded that the proposal would not fully mitigate the impact of the transfer, as required by the California Endangered Species Act.

(SDCWA Exh. 60.) The Department also stated its belief that IID could expect a joint letter from the Department of Fish and Game and the United States Fish and Wildlife Service indicating that the proposal may also be insufficient under the federal Endangered Species Act.

(*Ibid.*) Because HCP 1 does not fulfill the requirements of the California and federal Endangered Species Acts, it is inadequate to mitigate for the project's unreasonable impacts on fish-eating birds.

Even before the Department of Fish and Game made its finding, it was apparent that there were significant problems with HCP 1. In the first place, the replacement habitat for fish would be a small fraction of that provided by the Sea, approximately 2 percent. (Testimony of Dr. Stuart Hurlbert, Hearing Transcript, May 14, 2002, p. 1593, lines 11-16.) Because the ponds would be shallow, temperature fluctuations between summer and winter would be greater than in the Sea. (*Id.* at p. 1593, lines 23-25.) If tilapia were to be raised in the ponds, as planned, they would need to be heated, as tilapia cannot withstand cold temperatures. (*Id.* at p. 1594, lines 2-5.) The ponds could create problems with mosquito habitat. (*Id.* at p. 1591, lines 11-16; p. 1594, lines 12-14.) Finally, the ponds could concentrate contaminants from inflows, in particular selenium, in a small area, whereas the incoming selenium load is currently spread through the



entire volume of the Salton Sea. (Testimony of Dr. Doug Barnum, Hearing Transcript, May 29, 2002, p. 2438, lines 11-16.)

b. HCP 2 is incapable of successful implementation.

If HCP 2 were implemented as designed, and all inflow reductions to the Salton Sea attributable to the project were offset on a 1 to 1 basis with water flowing to the Sea, it would be possible to avoid the transfer's impacts on the biological resources of the Sea. However, there are legal, policy, and operational obstacles to implementation of HCP 2, which preclude a finding that HCP 2 will avoid impacts on the biological resources of the Salton Sea.

The IID/SDCWA Transfer Agreement provides that fallowing is not a permitted conservation method under IID's contracts with landowners to conserve water for the "primary" amount to be transferred, *i.e.* the first 130 to 200 thousand acre feet to SDCWA. (IID Exh. 55, p. 2-30.) The Agreement does not prohibit IID from fallowing land itself to conserve the primary amount, or fallowing by IID or landowners to create the discretionary amount, or fallowing to generate mitigation water. (*Ibid.*) However, the IID Board has adopted policies that discourage fallowing: IID Board Resolution 5-96 provides that "IID is not in favor of a fallowing program." (*Ibid.*)

Even if these legal and policy obstacles were eliminated, there are so few details regarding implementation of HCP 2 that it cannot be considered capable of successful implementation. There is no evidence in the record concerning how a fallowing program could be developed: no indication of what lands would be selected or eligible, no indication of who might participate in the plan and what incentives would be provided, no indication of whether fallowing would be temporary or permanent. There is no explanation of how water would

physically be routed to the Sea – whether it would flow through IID’s existing system in a manner roughly comparable to current patterns, or be routed directly to the Sea through alternative conveyance. Such a speculative program cannot meet either state or federal standards. (See Fish and Game Code § 2081; *Sierra Club v. Babbitt*, (S.D. Ala. 1998) 15 Fed.Supp.2d 1274, 1282 (HCP cannot rely on speculative future actions by others).

c. The Salton Sea Conservation Strategy of the revised HCP fails to provide assured replacement for inflow reductions caused by the project, and is incapable of successful implementation.

At first glance, the Salton Sea Conservation Strategy of the revised HCP appears to fully mitigate for inflow reductions to the Sea caused by the project: “The amount of mitigation water would be sufficient to offset the reduction in inflow to the Salton Sea caused by the Proposed Project and to maintain salinity in the Sea at or below 60 ppt until the year 2030.” (Final EIR, p. 3-37.) However, the devil is in the details, and those details reveal something less than a full commitment to provide one-to-one replacement for project-related inflow reductions. The formula for determining the amount of mitigation water provided is as follows:

The annual amount of mitigation water would be equal to the actual inflow reduction caused by the water conservation and transfer component of the Project plus or minus an amount of water necessary to maintain the target salinity trajectory. This trajectory would correspond to the salinity projection for the 95-percent confidence bound [reference omitted] until 2030. However, because of the continued threat of potential flooding of lands adjacent to the Salton Sea, IID would not be required to discharge mitigation water to the Sea if the discharge of that water would increase the surface elevation of the Salton Sea above the levels established by the projected elevation change associated with the Proposed Project [figure reference omitted]. That is, IID would not be required to discharge water to the Sea during years in which the elevation of the Sea was at or above the elevation projection for the Proposed Project . . . because of unforeseen increases in elevation (e.g., increased inflow from a major storm event). In addition, IID could discontinue to discharge water to the Salton Sea for mitigation prior to 2030

if a Salton Sea restoration project were implemented or if it could be demonstrated that tilapia were no longer successfully reproducing in the Sea.

(Final EIR, pp. 3-37-3-38.)

Due to time constraints, we have given the revised HCP only a preliminary review, but several elements of the above formula cause concern. First, IID's obligation to provide mitigation water to the Sea does not actually correspond to the amount of project-related inflow reduction. The initial calculation appears to consist merely of inflow reduction caused by the water conservation and transfer portion of the project; any inflow reductions due to water conserved for the Interim Operations and Payback policy, an amount potentially up to 59,000 acre feet per year, appear to be left unmitigated.

Second, the calculation does not stop at determining the inflow reduction caused by the water conservation and transfer component of the Project. Following that calculation, the amount is adjusted in order to maintain a salinity trajectory corresponding to the 95 percent confidence bound projected under the project baseline. If current inflows to the Sea are maintained, or if or if salinity otherwise increases at a rate slower than predicted under the baseline, for reasons that are not the result of IID's actions, IID will not be obligated to provide mitigation water in an amount equivalent to inflow reduction caused by the project. In addition, if the elevation of the Sea is at or above the elevation projected for the Proposed Project, IID will not be obligated to provide mitigation water, even if the higher elevation is the result of inaccuracies in the project baseline.

Finally, IID's obligation to provide mitigation water to the Sea ceases in 2030, irrespective of whether cutting of the supply will result in take of listed species or otherwise adversely affect fish and wildlife.

Put simply, IID is not required to fully mitigate for the inflow reductions caused by the project under the revised Salton Sea Conservation Strategy. This is impermissible under both federal and state Endangered Species Acts. (Fish and Game Code § 2081; 16 U.S.C. § 1539(a)(2)(B).) In addition, the revised Salton Sea Conservation Strategy is incapable of successful implementation for the reasons stated with respect to HCP 2.

d. The HCP fails to meet federal and state standards in other key respects.

Apart from the inadequacies of those parts of the HCP designed to address Salton Sea impacts, the HCP fails to meet federal and state standards in other key respects, including insufficient adaptive management and monitoring, adequate assurance that replacement habitat will be successful in offsetting the effects of increase selenium in drains, and perhaps most critically adequate funding. (See Audubon Exh.18, pp. 56-62.) The HCP identifies \$22.5 million in funds committed by permittees. (IID Exh. 55, Appendix C, p. 5-2.) However, the cost of the plan, while not specified, will far exceed \$22.5 million. The Department of Fish and Game's preliminary estimate for the mitigation planned for HCP 1 was over over \$100 million. (Testimony of Maureen Stapleton, Hearing Transcript, April 23, 2002, p. 413, lines 20-21, p. 414 lines 1-4.) There has been no cost estimate of HCP 2. Without a specified amount, the proposed HCP fails to fulfill the state and federal ESA requirements for adequate funding. (See *NWF v. Babbitt* (S.D. Ala. 1998) 15 Fed. Supp. 2d 1274, 1282; *National Wildlife Federation v. Babbitt* (E.D. Cal. 2000) 128 F.Supp. 1274, 1291.)

3. *Any inflow reductions could have an unreasonable effect on non-listed fish and wildlife species.*

Apart from the failure of the HCPs to meet the requirements of the federal and state Endangered Species Acts, the potential impacts of the transfer on non-listed species far outstrip in scale and severity impacts this Board has taken note of in other cases. For example, in Water Rights Order 95-9, in which petitioner had applied to divert treated wastewater from Deer Creek in Placer County, the Board required minimum flows sufficient to sustain riparian habitat approximately 5 to 8 miles below the wastewater treatment plant, even though that habitat would not have existed but for the discharge of treated wastewater. (WRO 95-9, pp. 35-37.) In Water Rights Order 99-012, a temporary-transfer case, the Board noted that *any* transfer of water that would result in a change in petitioner's consumptive use pattern and affect return flows to the Sacramento River could have an unreasonable impact on fish and wildlife. (WRO 99-012, p 21.) By contrast, this transfer could adversely affect millions of fish in California's largest inland water body, adversely affect tens of thousands of fish-eating birds apart from the listed brown pelican, and could affect hundreds of thousands of shorebirds through habitat alteration and contamination.

**D. The measures proposed to mitigate for impacts to sport fishing at the Salton Sea do not assure that project-related reductions in Salton Sea inflows will be fully mitigated, and cannot serve as the basis for a determination that the project would not unreasonably affect fish, wildlife, and other instream uses.**

Up to 400,000 anglers visit the Salton Sea each year. If inflows are not maintained on a one-to-one basis, the project will cause the fishery at the Sea to collapse earlier than it would in the project's absence, and as the fishery collapses, opportunities for sport fishing will disappear.

The Final EIR states that the mitigation proposed to address biological impacts at the Salton Sea will effectively avoid impacts to the sport fishery. (Final EIR, p. 3-45.) However, as described above, the Salton Sea Conservation Strategy of the revised HCP will not necessarily provide one-to-one replacement water for project-related inflow reductions; as a result, the sport fishery may disappear earlier than it would otherwise.

For a sport fishery that attracts 400,000 anglers per year, this is no small matter. Nor is it a small matter in economic terms. The DEIR/DEIS states that lost business output as a result of the loss of sport fishing opportunities could be as much as \$80 million per year using 1987 dollars. (IID Exh. 55, p. 3.14-24.)

The mitigation measures proposed to mitigate for impacts to sport fishing at the Salton Sea cannot serve as the basis for determining that the transfer would not unreasonably affect recreation at the Salton Sea.

**E. There are no proposed mitigation measures to mitigate for water quality impacts in the Imperial Valley Drains and New and Alamo Rivers, precluding a determination that there will be no unreasonable impacts on water quality.**

The Colorado River Basin Regional Water Quality Control Board has designated beneficial uses for the water bodies affected by the proposed transfer. (Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1209, lines 2-4.) For the Salton Sea, the Regional Board has designated the following uses as beneficial: warm water habitat, because the Sea supports a prolific fishery that supports fish-eating birds; wildlife habitat, because the Sea supports over 400 species of birds; water contact recreation, primarily because of fishing but also for swimming and water skiing; and preservation of rare, threatened, and endangered species, because the Sea provides important habitat for several listed species, including desert pupfish and

brown pelican. (*Id.* at p. 1209, lines 4-23.) For the New and Alamo Rivers and the agricultural drains in the Imperial Valley, the beneficial uses are warm water habitat; wildlife habitat; habitat for rare, threatened, and endangered species; and freshwater replenishment for the Salton Sea. (*Id.* at p. 1210, lines 13-25.)

As discussed above, under the original proposal reduced inflows to the Salton Sea would have increased the rate at which the Sea becomes more saline, impairing its beneficial uses. (Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1211, lines 5-22.) Reduced inflows under the original project would also have led to sharply reduced runoff from fields where conservation was practiced, thus causing reductions in runoff to agricultural drains and to the New and Alamo Rivers. (*Id.* at p. 1214, lines 11-18; IID Exh. 55, pp. 3.1-105-106.)

It is unclear exactly what effect the project as revised in the final EIR will have on selenium concentrations in the drains; presumably this will depend on the measures employed to generate water for transfer and whether mitigation water is routed to the Sea in a manner comparable to current drainage patterns. Accordingly, the discussion below assumes impacts are similar to those described in the draft EIR/EIS.

Reduced inflows would exacerbate already existing problems with selenium in the drains and the New and Alamo rivers. The water quality objective for selenium, set as a federal standard and adopted by the Regional Board, is 5 parts per billion (ppb). (Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1219, lines 1-8.) Currently, the concentration of selenium is approximately 1 ppb in the Salton Sea, approximately 4 ppb in the New River, and approximately 7 or 8 ppb in the Alamo River and Imperial Valley drains. (*Id.* at lines 16-22; *see also* Regional Water Quality Control Board Exh. 2, p. 3.) If the project is implemented as

originally proposed, selenium could reach almost 10 ppb in the Alamo River and over 8 ppb. In the New River. (Regional Water Quality Control Board Exh. 4, Tables 6 and 7.) Putting it differently, if inflows are reduced, New River water, which currently meets the selenium objective, could be in violation of that objective; and Alamo River and Imperial Valley drain water, which currently exceeds the selenium objective, could be even further out of compliance with the objective. (Testimony of Philip Gruenberg, Hearing Transcript, May 13, 2002, p. 1221, lines 2-7.)

Water quality at the Salton Sea is subject to the federal antidegradation policy enacted pursuant to the federal Clean Water Act. (40 CFR § 131.12.) That policy requires that “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained.” (40 CFR § 131.12(a)(1).) In addition, “[w]here high quality waters constitute an outstanding National resource, such as waters of National and State parks, that water quality shall be maintained and protected.” (40 CFR § 131.12(a)(3).) SWRCB Resolution No. 68-16 establishes requirements similar to the federal antidegradation policy. In all cases where the federal antidegradation policy is applicable, SWRCB Resolution No. 68-16 requires that, at a minimum federal policy must be satisfied. (SWRCB Order No. WQ 86-17 at pp. 17-18.)

In the Mono Lake decision, this Board applied the requirements of the federal antidegradation policy enacted pursuant to the Clean Water Act and the requirements of SWRCB Resolution No. 68-16 to determine that the City of Los Angeles must reduce its diversions from streams feeding Mono Lake. The federal and state antidegradation policies apply at the Salton Sea and in Imperial Valley drains as well.



Petitioners have proposed no mitigation for selenium impacts to the drains and the New and Alamo River, precluding a determination that the transfer will have no unreasonable impacts on water quality and fish, wildlife, and instream beneficial uses.

**F. There is no funding for implementation of the measures proposed to mitigate for air quality impacts at the Salton Sea, and those measures fail to take account of the potential for project-related reductions in inflow prior to 2030.**

By reducing inflows to the Salton Sea, the original transfer proposal would have caused the exposure of 50,000 acres or more of sediment as the shoreline receded. The Final EIR states that under the proposed project as revised and with implementation of the revised HCP, the transfer could cause the exposure of up to 16,000 acres of sediment after 2030. (Final EIR, p. 3-53.) If this sediment becomes airborne, it could cause air quality problems in the Imperial and Coachella Valleys similar in nature to those at Owens Lake.

The air pollution problems at Owens Lake are a result of the exposure of lakebed sediments following the diversion of water from the Owens River to supply the City of Los Angeles. (Defenders Exh. 17, p. 2.) Sixty square miles of lakebed were exposed, with 22,000 acres of emissive or potentially emissive lakebed among them. (Testimony of Theodore D. Schade, Hearing Transcript, May 14, 2002, p. 1737, line 25, p. 1738, line 1.) These emissive surfaces are the largest single source of air pollution in the United States. Dust emissions have been recorded that exceed federal standards by over 100 times. (Defenders Exh. 17, p. 3.)

The pollutant of concern at Owens Lake, as well as at the Salton Sea, is PM-10, which is particulate matter with a size of 10 microns or less. (Testimony of Theodore D. Schade, Hearing Transcript, May 14, 2002, p. 1728, lines 3-6.) Exposure to PM-10 levels above the federal standards can cause breathing difficulties and other health effects. (Defenders Exh. 17, p. 3.)

The federal standards for PM-10 are 150 micrograms per cubic meter as a 24-hour average and 50 micrograms as an annual arithmetic mean. (*Ibid.*) Currently, Imperial County is designated as a state nonattainment area and a federal moderate nonattainment area for PM-10, largely as a result of windblown dust. (IID Exh. 55, p. 3.7-13.)

There are enough similarities between Owens Lake and the Salton Sea to warrant serious concern. First and most obviously, the transfer will expose a vast amount of sediment, 16,000 acres or more. Some of the sediments exposed may be similar to those exposed at Owens Lake, and there is the clear potential for formation of unstable salt crusts. (Testimony of Theodore D. Schade, Hearing Transcript, May 14, 2002, p. 1733, lines 4-12; Defenders Exh. 17, pp. 6-7.) There are winds present in the Salton Sea area that exceed the threshold used to predict dust emissions at Owens Lake, and the transfer DEIR/DEIS most likely underpredicts wind speeds because of the omission of data from gauges near the Sea. (Defenders Exh. 17, pp. 6-17; Testimony of Dr. Sharon Libicki, Hearing Transcript, May 16, 2002, p. 2105, lines 17-25, p. 2106, lines 1-2.)

If emissions from exposed sediments are even a fraction of what they are at Mono Lake or Owens Lake, there would be serious implications for human health and regulatory compliance in the Imperial Valley. (Testimony of Dr. Sharon Libicki, Hearing Transcript, May 16, 2002, p. 2106, lines 20-25.) If exposed sediments at the Salton Sea were equally emissive as the emissive areas at Owens Lake, dust levels could be twice those of Owens Lake if 50,000 acres are exposed as under the original proposal. (Testimony of Theodord D. Schade, Hearing Transcript, May 15, 2002, p. 1740, lines 1-3.) If, because of differences in soil chemistry, temperatures, and other factors, Salton Sea sediments were only 10 percent or even 1 percent as emissive, there would

still be violations of the federal standard if 50,000 acres are exposed. (*Id.* at p. 1740, lines 4-8.) The potential for significant dust emissions remains with the project as presented in the Final EIR. (Final EIR, p. 3-53.) If there are violations of air quality standards, there could be stricter control measures imposed on every other dust emission source in Imperial County, from construction to agricultural activities. (Testimony of Dr. Sharon Libicki, Hearing Transcript, May 16, 2002, p. 2107, lines 4-8.)

The final EIR sets forth a four-part strategy for addressing potential dust emissions: 1) restrict access to exposed shoreline, 2) implement a research and monitoring program as the Sea recedes, 3) develop a long-term program for creating or purchasing offsetting PM10 emission reduction credits, 4) implement measures to reduce emissions at the Sea directly. (Final EIR, pp. 3-51 – 3-52.)

Time constraints prevent a full analysis of this plan in this brief, but preliminary review indicates two significant concerns. First, there is no estimate of potential cost of the four-part strategy, and no indications that funds have been committed to the strategy. Second, the strategy does not take account of potential sediment exposure due to inflow reduction before 2030. As discussed above in section II.C.2.c, the Salton Sea Conservation Strategy does not assure replacement for project-related inflow reductions on a one-to-one basis, creating the potential for sediment exposure prior to 2030.

**G. The petition is not ripe for approval because IID has not approved a project under the California Environmental Quality Act.**

On July 2, 2002, the County of Imperial submitted a brief arguing that the petition is not ripe for approval because IID has not approved a project and completed its duties under CEQA.

Defenders of Wildlife and Planning and Conservation League adopt and incorporate by reference Imperial County's preliminary brief and join in the County's request that the Board deny the petition without prejudice until IID approves a project.

**H. The Law of the River (including the Colorado River Compact, the Boulder Canyon Project Act, and case law interpreting the Compact and the Act), allows the use of water by IID for purposes of fish, wildlife, and other instream beneficial uses.**

The Secretary of the Interior, on behalf of the Federal government, serves as the "Watermaster" for the lower Colorado River, the only river system in the country that has been so federalized. The Bureau of Reclamation has been delegated the responsibility of operating and maintaining the extensive network of dams, reservoirs, water diversions, levees, canals, and other water control and delivery systems on the River. The Bureau's authority and discretion is guided by a body of treaties, Congressional enactments, compacts, and other agreements known as the "The Law of the River."

Significant components of the Law of the River include the Colorado River Compact of 1922; the Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq.*; the Water Treaty of 1944, and *Arizona v. California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964). More recent environmental laws, including the Endangered Species Act, the National Environmental Policy Act (NEPA), and the Clean Water Act must also be considered part of the Law of the River due to the substantial obligations they impose on the Bureau of Reclamation. (*See Arizona v. California*, 373 U.S. at 594 (recognizing that "Congress still has broad powers over this navigable international stream [and] can undoubtedly reduce or enlarge the Secretary's power if it wishes."))

The Colorado River Compact created the Upper Division (Wyoming, Colorado, New Mexico, and Utah) and the Lower Division (Arizona, Nevada and California) and allocated 7.5

million acre-feet (maf) of water each to the Lower and Upper Basins. (Compact, Arts. II(c)-(d), III(a). The lower basin “means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which water naturally drain into the Colorado River system below Lee Ferry” and all parts within those states but outside the basin which will be served by waters from the system. Art. II(g).) The Lower Basin has the right to increase its beneficial use by 1 maf per year. (Compact, Art. III(b).)

The Compact, later revised and approved by the Boulder Canyon Project Act (BCPA) and Supreme Court, set the measure and priority of use for Colorado River waters. The Compact states that the use of waters for navigation shall be subservient to power purposes, and both are subservient to domestic and agricultural purposes. (Art. IV.)

Six years later, the Boulder Canyon Project Act (BCPA) apportioned the 7.5 maf per year among the Lower Basin states: .3 maf per year to Nevada; 2.8 maf per year to Arizona; and 4.4 maf per year to California. (43 U.S.C. § 617c.) It also requires parties using water to have contracts with the Secretary whose terms are for permanent service, “under such general regulations as he [Secretary] may prescribe.” (43 U.S.C. 617d.)

Between 1930 and 1944, the Secretary entered into contracts for water delivery with five California agencies, the State of Nevada, and the State of Arizona for their full entitlements. The Secretary has contracts with water users in California amounting to 5.362 maf per year, almost 1 maf greater than its apportionment. (The California Seven-Party Agreement of 1931.)

Afterwards, the Supreme Court decided that Congress intended for the Secretary to carry out the above allocation of waters among the Lower Basin States and decide which users would get water. (373 U.S. at 579-584. The Court held that the Secretary made such apportionment with

water contracts because no entity can have delivery without a water contract. (*Ibid.*) The Colorado River Basin Project Act directed the Secretary to adopt “operating criteria” (long range operating criteria or “LROC”) for the long-range operation of Lake Mead, Lake Powell, and the Flaming Gorge, Aspinall, and Navajo reservoirs in order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Water Treaty of 1944. (43 U.S.C. § 1552.)

The LROC are reviewed every five years, but most of the issues raised are “more properly dealt with during development of the AOP [annual operating plan].” The AOP “shall reflect appropriate consideration of the uses of the reservoirs for all purposes, including flood control, river regulation, beneficial consumptive uses, power production, water quality control, recreation, enhancement of fish and wildlife, and other environmental factors.” (Operating Criteria, Article I(2).)

1. *Article III(e) of the Compact does not limit the purposes for which water may be used; it simply establishes the measure of how much water the Lower Division States are entitled to receive.*

At its core, Article III(e) of the Compact limits only water quantity. Article III(e) states in full: “The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses” (emphasis added). The Compact drafters were concerned with water needs rather than uses – the Upper Basin sought to preserve its water rights into the future. Legislative history illustrates the focus on apportionment based on needs of the two basins. (64 Cong. Rec. 2710 (1923) (letter from CRC Chair Herbert Hoover to Rep. Hayden).) Then Chair of the Colorado River Compact Commission Herbert Hoover stated “The apportionment was not

arbitrary. It was based on a careful consideration of respective *needs* of the two basins.” (*Id.* (Emphasis added).)

Article III(e) is then, most simply, a prohibition on waste. It assured the Lower Basin that the Upper Basin would not store water which the Lower Basin could beneficially use, and likewise that the Lower Basin could not request delivery of water that it could not beneficially use, thereby thwarting Upper Basin storage and eventual water use. Then Chair of the Colorado River Compact Commission asserted that Article III(e) “applies only to an unreasonable or arbitrary withholding or demand.” 64 Cong. Rec. 2712 (1923) (letter from CRC Chair Herbert Hoover to Rep. Hayden).<sup>1</sup>

Nor is the last clause – “which cannot reasonably be applied to domestic and agricultural uses” – a restriction on allowable uses. It merely indicates a preference for some uses. For example, neither navigation nor power are listed, but the compact recognizes both as uses in the Upper and Lower Basins, see Art. IV (a), (b). The compact merely established the relative importance of different uses of water.<sup>2</sup>

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<sup>1</sup> Another author has stated: “Although the Colorado River Compact does not specifically define “exclusive beneficial consumptive use,” it set forth some policies regarding use. First, Art. III(e) precluded *waste* by requiring the Upper Basin not to withhold water which the Upper Basin could not apply to domestic and agricultural uses from the Lower Basin. This requirement addressed Arizona’s fear that the upper Basin would deliberately withhold water, precluding even a minimum stream flow to the Lower Basin.” Gross, *The Galloway Project and the Colorado River Compacts: Will the Compacts Bar Transbasin Water Diversions?*, 25 Nat. Resources J. 935, 940 (1985)

<sup>2</sup> Notably, although Congress and the Supreme Court approved the States’ apportionments, they amended the Colorado River Compact, via the Boulder Canyon Project Act and Decree by reestablishing the priorities for Colorado River waters. Top priorities were controlling floods, improving navigation, and regulating the flow, the second priorities were water for irrigation and domestic purposes, and the lowest priority was power generation. Boulder Canyon Project Act, 43 U.S.C. § 617e; Decree, Art. II(A).

Finally, in sum, Article III does nothing more than allocate the amount of beneficial use among basins; nothing in the Compact defines or restricts beneficial use as defined by state law. As stated earlier, the Compact does not define beneficial consumptive use, and drafters intended that once the waters were apportioned among the basins, the state would then appropriate those waters in a non-wasteful manner. Again, the Chair addressed this issue, saying that the compact would not “preclude the complete control by each State of its own internal affairs.” (64 Cong. Rec. 2710, 2712 (1923) (letter from CRC Chair Herbert Hoover to Rep. Hayden).)

2. *The Act, which authorizes the Secretary of the Interior to enter into contracts for the storage and delivery of Colorado River water “for irrigation and domestic uses,” does not limit the purposes for which IID may use water under contract with the Secretary.*

The intent of this authorization was twofold: to ensure the reimbursement of the costs of the project and to ensure compliance with the Colorado River Compact. Currently, section 5 reads, in part, “Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to section (a) of section 617c of this title. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.” (43 U.S.C. § 617d.) Congress only added the contract power in response to the Secretary’s request that water users pay – “to meet the financial requirements of the act.” (S. Rep. No. 654, 69<sup>th</sup> Cong., 1<sup>st</sup> Sess. 26 (1926). *See Arizona v. California*, 373 U.S. at 615 (Douglas, J., dissenting).) The primary intent of section was to secure the repayment of project costs.

Once the contract power was incorporated into the bill, Congress amended section 8 of the BCPA to tie operation of the project and enjoyment of all of the project’s features to



compliance with the compact. *See* 43 U.S.C. § 617g (“The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein, authorized shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, . . . , and all permits, licenses, and contracts shall so provide”) (emphasis added).<sup>3</sup> It was not until this change that Congress also added the requirement that only contract holders would receive water, explicitly linking the requirements of section 5 and section 8.

Neither Congress nor the Secretary envisioned that section 5 would limit the uses of the water. They sought to achieve reimbursement and compact compliance via section 5. The Supreme Court also believed that section 5 was simply the mechanism by which the Secretary could oversee the project. “Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the section 5 contract power, to direct, manage, and coordinate their operation.” 373 U.S. at 589-90.

The function of the contract between the Secretary and the water user is to ensure that the Secretary is properly managing the works authorized by the BCPA, and specifically, in compliance with the compact. As can be seen from legislative history and clarifying language elsewhere in the Act, neither the Congress nor the Secretary of the Interior sought to regulate the uses of water obtained by BCPA section 5 contracts.

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<sup>3</sup> According to the Secretary, this amendment “provides for the distribution and use of all water for irrigation, power and otherwise, in accordance with the Colorado River compact.” (*See Arizona*, 373 U.S. at 615-16 (Douglas, J., dissenting) (emphasis added).)

3. *The Law of the River allows the holder of present perfected rights to change the place and purpose of use of water in accordance with state law, provided that the amount used does not exceed that which would be used in the absence of the change.*

Present perfected rights are further defined in the Decree. (*Arizona v. California*, 376 U.S. 340, 341 (1964).) The PPR protected by §6 of the BCPA is a water right originating under state law. The PPR protected by §6 is defined by the Decree, thus whether state PPR is a §6-protected PPR is a question of federal law. (*Bryant v Yellen*, 447 U.S. 352, 370-71 (1980).)

Neither the Compact nor the Act limits the purposes for which water may be used, therefore the Compact places no limits on present perfected rights. First, Article VIII of the Compact states: “Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact.” Thus, even if the compact did limit purposes, shown above not to be the case, the compact would not apply to PPRs.

Second, the Act, as shown above, does not limit the purposes for which IID may use water under contract with the Secretary, and thus no such limitations apply to the use of water that is delivered in satisfaction of present perfected rights within the meaning of article VIII of the Compact. Furthermore, section 6 of the BCPA requires the Secretary to deliver water in satisfaction of PPRs. (43 U.S.C. § 617e.) The Supreme Court has recognized that §6's requirement of satisfaction of PPRs is “one of the most significant limitations on the Secretary’s power to contract for the delivery of water,” *Bryant v. Yellen*, 447 U.S. at 364 (citing *Arizona*, 373 U.S. at 584), and an “unavoidable limitation on the Secretary’s power.” (*Id.* at 370.)

3. *The Law of the River allows the use of water for the protection of fish, wildlife, or other instream beneficial uses where such use is required under state law in order to mitigate the adverse impacts of delivering water for irrigation or domestic uses.*

a. The Law of the River allows such uses where required by federal law

In compliance with a variety of statutes, the Bureau of Reclamation has used Colorado River water to mitigate the adverse impacts of its actions, including water delivery. These statutes include the Endangered Species Act, Fish and Wildlife Coordination Act, and project authorizing acts.

For example, the Bureau of Reclamation has committed to the restoration and/or creation of 44 acres of backwaters along the Colorado River, which will require system water. These backwaters are partial mitigation for the promulgation and operation of the Interim Surplus Guidelines and their adverse impact on endangered species including the Yuma clapper rail and razorback sucker. (*See Biological Opinion for 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 7 (2001).*)

In another instance, also closely related to the QSA, the Bureau and Coachella Valley Water District have committed to the implementation of mitigation measures to sustain the ecological equivalency of fish and wildlife resources lost to the lining of the Coachella Canal. The Record of Decision dedicates up to 4,850 acre-feet/year from the conserved water to, among other uses, maintain flows in Salt Creek and support riparian and aquatic habitat for endangered species such as the desert pupfish and Yuma clapper rail. (*See Record of Decision, Coachella Canal Lining Project, Riverside and imperial Counties, California 12-14 (2002).*)

The potentially largest example of use of water in the lower basin for fish and wildlife purposes is the LCR MSCP. The purpose of the MSCP is to obtain ESA compliance for federal and non-federal entities in the lower basin for the next 50 years. Within the MSCP is a Water Acquisition subcommittee, and while they are still determining the methods and costs for obtaining water, clearly it is something required and contemplated by parties to the MSCP.

Water acquisition costs can be calculated in a number of ways. For example, water rights can be bought or leased by the acre along with agricultural lands, or when land does not come with associated water rights, water can be bought separately by the acre-foot. In addition, an annual use fee, or “indemnification fee,” of some pre-determined contractual amount could be paid for fallowing land. The majority of the land-fallowing programs along the lower Colorado River to date (MWD-PVID, and MWD-IID) have involved a fallowing or water conservation program which has created water for use in the municipal and industrial sectors outside of the LCR MSCP planning area. Consequently, the costs associated with these programs reflect the costs associated with the fallowing or water conservation program and the subsequent shift to the urban sector. These costs may not accurately reflect the costs associated with fallowing or conserving water in an agricultural district and then using the saved water for habitat conservation purposes in another portion of the same district or in the same general locale.

For the purpose of this cost estimate, it is assumed that water rights are bought along with private land that is acquired for habitat protection and restoration. Costs associated with the purchase of water rights together with property are included in the “Land Acquisition” cost estimate. It is assumed that half of the lands in public ownership have associated water rights, and that water rights would need to be purchased for restoration on the remaining half of public lands. It is assumed that water would need to be purchased for restoration and protection of habitat on leased lands.

(Lower Colorado River MSCP, Second Administrative Draft Conservation Plan 7-12 (2002).)

Lastly, in response to public comments on proposed Offstream Banking Regulations, the Bureau stated that water stored offstream one year could potentially be used to meet fish and wildlife purposes in a later year. (64 Fed. Reg. 58986, 58993 (Nov. 1, 1999).) The Bureau has contemplated, and has even committed, to the use of Colorado River water, whether conserved

water, banked water, or water actually in the river, for fish and wildlife purposes. In addition, the use of this water is used to mitigate construction activities, in the case of the Coachella canal, or to mitigate the release and delivery of water, as in the case of the Interim Surplus Guidelines.

b. The Law of the River allows such uses where required by state law

Two provisions of the Boulder Canyon Project Act provide for a state role in lower Colorado River management: sections 14 and 18. Section 18 reads:

nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of water within their borders.

“Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river. . . . What other things the States are free to do can be decided when the occasion arises.” (*See Arizona v. California*, 373 U.S. at 588.) Section 14 “shall be deemed a supplement to the reclamation law,” 43 U.S.C. § 617m, and, it follows, the federal-state balance effected by Congress in 1902, calling for the Secretary to proceed in accordance/conformity with “the laws of any state relating to the control, appropriation, use, or distribution of water for irrigation.” (43 U.S.C. §383.) The *Arizona* Court’s narrow reading of section 14 in conjunction with section 8 of the Reclamation Act, *see* 373 U.S. at 587, done so that the Court could square the section with its earlier dicta regarding the Secretary’s authority, has since been rejected by the Court itself.<sup>4</sup>

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<sup>4</sup> Section 8 reads: “Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate

In *California v. U.S.*, 438 U.S. 645 (1978), the Court outlines a broader role for the states and rejected the theory relied on by the *Arizona* court. (438 U.S. at 674-75.)<sup>5</sup> Citing the Reclamation Act as a prime example of “cooperative federalism, *id.* at 650, the *California* Court, expounded on the federal-state relation embodied in section 8, and set the standard for defining the federal-state balance within reclamation law: “[A state may impose conditions] not inconsistent with congressional provisions authorizing the project in question.” (*Id.* at 674.) When no inconsistency exists, the Secretary of the Interior must “comply with state law in the ‘control, appropriation, use, or distribution of water.’” (*Id.* at 675.)

In applying section 8, we must look to the “congressional provisions authorizing the project in question,” 438 U.S. at 674, and determine whether the state law is inconsistent with those provisions, as actually applied to the particular set of facts (not in the abstract). (*See U.S. v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 137, 227 Cal. Rptr. 161, 190-92 (1986) (citing *California*, 438 U.S. at 679); *U.S. v California*, 694 F.2d 1171, 1178-79 (9<sup>th</sup> Cir. 1982) (on remand).) Also, “the burden of proof lies with federal defendants to show that compliance

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stream or the waters thereof.” 43 U.S.C. §383.

<sup>5</sup> The *California* Court disavowed dicta in *Arizona v. California* that went beyond the facts of the case and that would prohibit the imposition of state law not inconsistent with federal law. Based on the facts in *Arizona* – conflicting interstate claims based on prior appropriation and equitable apportionment in a massive, multi-state project – there was no need for AZ to narrowly interpret §8 because direct conflict presented by interstate apportionment by prior appropriation was enough reason to ignore state law in favor of congressional apportionment. (438 U.S. at 674.) The BCPA had authorized the Secretary to apportion water among the Lower Basin states; conflicting claims based on the prior appropriation doctrine were directly inconsistent with the BCPA and thus state laws were not followed. *See also Bryant v. Yellen*, 447 U.S. 352, 370 n.21 (1980), which noted that the *Arizona* Court’s broad interpretation was “considerably narrowed” by *California* and that the “dispute among the Lower Basin States was at the heart of the controversy.” (*Id.* at 364.)

would violate a relevant congressional directive.” (*South Delta Water Agency v U.S.*, 767 F.2d 531, 539 (9<sup>th</sup> Cir. 1985); cf. *Jicarilla Apache Tribe v U.S.*, 657 F.2d 1126, 1136 (10<sup>th</sup> Cir. 1981) (court looks first to state laws, and only then to federal law to see if Congress intended a use “otherwise prohibited” under state law).)

*U.S. v. California*, 694 F.2d 1171 (9<sup>th</sup> Cir. 1982), *aff’g in part, rev’g in part and rem’g* 509 F. Supp. 867 (E.D.Cal 1981), on remand from 438 U.S. 645 (1978), veered from the Court’s “non inconsistent” with “congressional provisions authorizing the project in question” standard and instead said, “state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme.” (*Id.* at 1177. See *U.S. v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 136, 227 Cal. Rptr. 161, 190-92 (1986) (state conditions “not facially inconsistent with congressional directives”); *South Delta Water Agency v U.S.*, 767 F.2d 531, 539 (9<sup>th</sup> Cir. 1985) (no evidence of congressional conflict with state law).)

For example, in *NRDC v. Houston*, 146 F.3d 1118, 1132 (9<sup>th</sup> Cir. 1998), the court reversed the finding that the Bureau of Reclamation was not exempt from § 5937 of the California Fish and Game Code and that the CVPIA did not pre-empt exercise of the Code. The perceived conflict was the federal statute’s prohibition on the release of Friant dam water to implement the CVPIA versus the state law requirement that dam owners allow sufficient water to pass through or over dams to keep fish in good condition. Citing *California v. U.S.*, “cooperative federalism” requires compliance with state water laws unless they are directly inconsistent with

congressional directives regarding the project. (*Id.* at 1131.)<sup>6</sup> There was no clear directive in the CVPIA which preempts application of § 5937 if state law could be implemented consistent with Congress' plan to restore fisheries in a manner that is "reasonable, prudent and feasible." (CVPIA, PL 102-575, § 3406(c)(1).) On remand, the court ordered the district court to first determine whether state law applies and then determine whether it is preempted. The court should then determine whether actual application of § 5937 is inconsistent with the CVPIA.

In a more pertinent example, Colorado River water allocations in Arizona generated a conflict between Arizona and federal law. An Arizona statute allows for groundwater recharge, but only after all other uses are exhausted. CAP, on the other hand, gives M&I users priority over agriculture and allows M&I users to recharge. (*Central Arizona Irrigation and Drainage District v. Lujan*, 764 F.Supp. 582, 589-91 (D. Ariz. 1991).) The allocations and preferences given to CAP water are within Secretary of the Interior's discretion; once established, the possible uses are then governed by state law. (*Id.* at 591. *See also U.S. v. Alpine Land and Reservoir Co.*, 697 F.2d 851, 853 (9<sup>th</sup> Cir. 1983), *cert. denied sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irr. Dist.*, 464 U.S. 863 (1983); *Jicarilla Apache Tribe v U.S.*, 657 F.2d 1126, 1136 (10<sup>th</sup> Cir. 1981) (court looks first to state laws, and only then to federal law to see if Congress intended a use "otherwise prohibited" under state law).

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<sup>6</sup> The Ninth Circuit had previously concluded that "congressional directive" meant "preemptive federal statute." *Id.* (citing *United States v. California*, 694 F.2d 1171, 1176-77 (9<sup>th</sup> Cir. 1982).



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

Section 5.B of the Interim Surplus Guidelines (ISG) states that should the QSA and related documents not be executed by Dec. 31, 2002, “the interim surplus determinations under Sections 2(B)(1) and 2(B)(2) of these Guidelines will be suspended . . . for either the remainder of the period identified in Section 4(a) or until such time as California completes all required actions and complies with reductions in water use reflected in Section 5(C) of these Guidelines, whichever occurs first.” Thus, in the event the QSA is not signed, the first consequence will be the suspension of the more liberal surplus declarations allowed under the ISG – the Full Domestic and Partial Domestic Surpluses.

Next, according to Section 5.B, the 70R strategy will govern surplus determinations until (1) through Dec. 31, 2015 or (2) California completes all required actions and complies with mandated reductions in water use.

Whatever the term “all required actions” refers to, there is no evidence to show that it includes execution of the QSA, and considerable evidence to the contrary. The Final EIS for the Interim Surplus Criteria (ISC) makes little mention of the need for a signed QSA, or even of the existence of a QSA,<sup>7</sup> stressing instead in the Purpose and Need statement that the ISC were “intended to recognize California’s plan to reduce reliance on surplus deliveries, to assist California in moving toward its allocated share of Colorado River water, and to avoid hindering such efforts. Implementation of interim surplus criteria would take into account progress, or lack

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<sup>7</sup> In fact, a draft QSA was not made public until after the FEIS was issued.

thereof, in California's efforts to achieve these objectives." FEIS Colorado River Interim Surplus Criteria, at 1-4. The bureau adheres to these goals when it assumes in subsequent compliance documents that reduction in agricultural use is the sole determinant in reinstating sections 2(B)(1) and 2(B)(2).<sup>8</sup>

In each of the environmental compliance documents associated with the QSA, the Bureau of Reclamation has consistently assumed that in their baseline analyses that the QSA would not be in effect, but the Interim Surplus Guidelines would be.

"In the Interim Surplus guidelines Record of Decision (ISG ROD), benchmarks for reductions of agricultural use of Colorado River water in California were specified. Since these benchmarks are not met from QSA water transfers under the No Action scenario, it was assumed that the Metropolitan Water District (MWD) would reduce its use to meet the benchmarks and therefore, keep the ISG in effect." DEIS IA, IOPP, and Related Federal Actions, App. G: Implementation Agreement Technical Memorandum No. 1, at 2-5. See also App. C-5, containing the MWD schedules with and without benchmark reductions.

No Action Alternative – this scenario assumes that the ISG described in Chapter 1 would be implemented and that water would not be transferred under the IA. DEIS IA, IOPP, and Related Federal Actions, at 3.0-3. See also id. at 3.1-20; 3.1-23; 3.1-26.

The Interim Surplus Guidelines are presumed to be in effect for purposes of the assessment of the Proposed Project set forth in this Draft EIR/EIS. The Proposed Project will assist California in meeting the benchmarks for reduction of Colorado River water use included in the guidelines. DEIS, *Id.*, at 1-32.

Repeatedly, Bureau of Reclamation has placed its emphasis on the reduction of California's water use. Furthermore, this emphasis has led to the bureau's consistent assumption

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<sup>8</sup> A look at the Purpose and Need statement (from the bureau) for the IID water conservation and transfer agreement mirrors the federal commitment to assist California in reducing its water use (rather than the commitment to a signed QSA, regardless of its import), particularly since one of the alternatives is the implementation of a water conservation and transfer agreement without implementation of the QSA. DEIS, at 1-5; 1-42 (timely implementation of the proposed project will assist in meeting the benchmark deadlines and satisfying the ISG).

that implementation of the ISG and its surplus determinations will continue if California meets the required reductions in use. Assistant Secretary of Water and Science Bennett Raley said it most succinctly last December when he told Colorado River water users, “The interim surplus guidelines depend on attaining benchmarks - *i.e.*, specific reductions in use - of Colorado River water use in California.” (Written remarks of Bennett Raley, Colorado River Water Users Association, Las Vegas, NV (Dec. 13, 2001).)

#### **J. Incorporation by Reference**

Defenders of Wildlife and Planning and Conservation League adopt and incorporate by reference all policy statements, evidence, testimony, exhibits, briefs, and any other communications with the Water Board, whether written or oral, offered by party to this proceeding in opposition to approval of the IID/SDCWA Water Transfer Petition, as it is presently, formulated, to the extent that these communications are consistent with Defenders’ and PCL’s prior exhibits and testimony and the arguments presented in this brief.

#### **IV. CONCLUSION**

For the reasons set forth above, Defenders of Wildlife and Planning and Conservation League request that the Board take the following actions:

- 1. Deny the IID/SDCWA water transfer petition without prejudice until IID approves a project based on a supplemental or subsequent EIR/EIS that clearly describes the proposed project and fully addresses the long-term consequences of the proposed project on the Salton Sea’s fish and wildlife resources, air and water quality, and growth-inducing impacts in San Diego.*

As the County of Imperial has argued, the petition is not ripe for this Board’s consideration until IID adopts a project. In addition, the final EIR creates significant uncertainty as to what the proposed project now consists of, and adds significant new mitigation programs.

We believe the most efficient course at this point is for IID to circulate a supplemental or subsequent EIR/EIS for the project. Although we recognize that this approach will take time, we believe that the attempting to proceed on the current inadequate record will consume more time and resources in the long run.

2. *Find that the project as originally proposed and mitigated as described in Habitat Conservation Plan Approach 1 would have unreasonable effects on fish, wildlife, and other instream uses.*

Although the current record is not adequate to approve the project, the testimony and evidence submitted to the Board in this proceeding overwhelmingly show that the original project, as proposed in the draft EIR/EIS and mitigated through HCP 1, would unreasonably affect fish, wildlife, and other instream uses. We request that the Board so find.

3. *Condition any approval given to any transfer of water from IID to SDCWA, CVWD, and/or MWD to fully protect fish and wildlife resources, instream uses, water quality, and air quality.*

As just discussed, final action on the petition is premature at this point. However, this Board may be in a position to act on the petition at some not-too distant point. Accordingly, as we did in our opening statement, we request that the Board condition any transfer approval to include the following:

- A requirement that reduction in inflows caused by the transfer should be mitigated on a one-to-one basis with water provided to the Salton Sea, including a requirement that the method used to calculate both inflow reductions and replacement water be transparent, verifiable, and accessible to the public.
- A Habitat Conservation Plan that fully complies with the requirements of the California and federal Endangered Species Acts.

- A plan, developed with broad-based community participation, to invest an appropriate percentage of the transfer revenues into a community development fund, to mitigate for the socio-economic impacts in the Imperial Valley.
- A plan, developed with broad-based community participation, to address the growth-inducing impacts of the transfer within the service area of the San Diego County Water Authority.
- A plan to mitigate for water quality impacts in Imperial Valley drains.
- A plan to mitigate for air quality impacts caused by project-related activities.
- Petitioners' participation in a process, in conjunction with the federal and state governments and the Salton Sea Authority and in consultation with a broad range of stakeholders, to develop and implement an long-term restoration plan for the Salton Sea.

All plans should be fully funded and implementable prior to project approval. These conditions could be incorporated into a long-term transfer approval, or as we suggested in our opening statement, a shorter trial period if that would facilitate agreement on a plan. Either way, to emphasize one final time, additional environmental view will be necessary to fully define the project, including potential means of routing water to the Salton Sea; to remedy the deficiencies in the current environmental documents; and to ensure there are no unintended consequences.

Date: July 11, 2002

Respectfully submitted,

/s/

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BRENDAN FLETCHER  
KARA GILLON  
Representatives of  
DEFENDERS OF WILDLIFE

/s/

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KAREN DOUGLAS  
Representative of  
Planning and Conservation League