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NATIONAL AUDUBON SOCIETY - CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT and SAN DIEGO COUNTY WATER AUTHORITY; Petitioners.	IID/SDCWA WATER TRANSFER HEARING, PHASE 2 CLOSING ARGUMENT / LEGAL BRIEF OF NATIONAL AUDUBON SOCIETY – CALIFORNIA

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I. INTRODUCTION

By the law of nature these things are common to mankind –
the air, running water, the sea and consequently the shores of the sea.[1]

In 1983, the California Supreme Court ruled that the State Water Resources Control Board could not sacrifice Mono Lake's unique biological and aesthetic values to quench Los Angeles' thirst for imported water.[2] In *National Audubon Society v. Superior Court*, the Supreme Court held 1) that California's Public Trust Doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands," and 2) that the "state 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."[3]

Nearly twenty years later, the San Diego County Water Authority ("SDCWA") seeks to pacify its own thirst for imported water by asking the Board to condemn the Salton Sea's precious biological and aesthetic resources. And, twenty years later, National Audubon again steps forward to defend the Sea's unique public trust values for present and future generations.

II. STATEMENT OF FACTS

In fall of 1905, flood waters of the lower Colorado River breached the headgate of a canal delivering irrigation water to California's Imperial Valley.[4] From 1905 until 1907 the entire flow of the Colorado River continued to fill the Salton Basin, resulting in a lake forty-five (45) miles in length, seventeen (17) miles in width, and eighty-three (83) feet deep.[5]

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[1] Justinian, Institutes, § 2.1.1.

[2] *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419

[3] *National Audubon*, *supra*, 33 Cal.3d 419, 441, 446.

[4] Audubon/PCL Exhibit 6: Imperial Irrigation District, Historic Salton Sea and Imperial Irrigation District (5th printing, 1966), at p. 1. All exhibits cited in this Brief are referred to by their exhibit number in SWRCB's Phase 1 and Phase 2 hearings on the proposed water transfer.

[5] Audubon/PCL Exhibit 3: William Phipps Blake, The Salton Sea: A Study of the Geography, the Geology, and the Ecology of a Desert Basin (1914), at p. 5.

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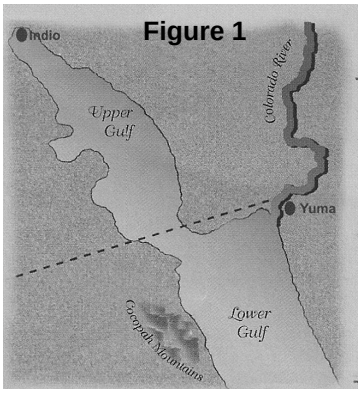
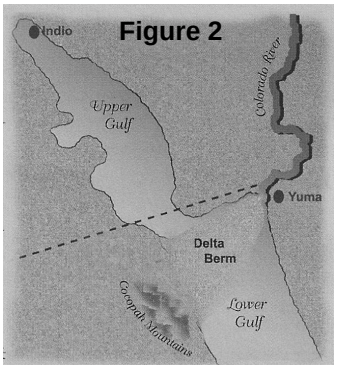
The myth, perpetuated throughout this hearing, is that the 1905 incident was a unique "mistake" and that the Salton Sea would never have existed but for human intervention.[6] The truth is exactly the opposite: the Salton Sea is simply the latest in a series of lakes created by the natural meanderings of the Colorado River. These lakes, such as the ancient Lake Cahuilla, are a natural part of the Colorado River's hydrology and have naturally existed in various forms for thousands of years. In fact, it is *only* human intervention that, at this brief moment in geologic time, prevents the Colorado River from reclaiming its bed in the Salton basin from time to time.

A. THE GEOLOGY OF THE SALTON BASIN

Geologically, the Salton basin is the northwestern continuation of the Gulf of California rift.[7] Millions of years ago, the gulf extended northward to what is now Indio, California, with the Colorado River entering the delta near the present-day location of Yuma, Arizona, as shown in Figure 1.[8] During the mid-Pleistocene era, sediments from the Colorado Plateau exiting the Colorado River at present-day Yuma were deposited into the Colorado Delta, forming an east-west fan of deposits that eventually extended across the gulf, forming a natural sediment barrier dividing the upper and lower Gulfs, as shown in Figure 2.[9]





Over time, this natural process of sediment deposition would periodically alter the course of the Colorado River – at times flowing to the lower Gulf in the south, and then shifting course to fill the

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[6] IID Exhibit 55: Imperial Irrigation District Water Conservation and Transfer Project Draft Habitat Conservation Plan, Draft Environmental Impact Report/Environmental Impact Statement, January 2002, at p. 3.2-62 (stating that the "Salton Sea was created in the early 1900s).

[7] Audubon/PCL Exhibit 8: Buckles & Krantz, "Reconstruction of Prehistoric Shorelines for Cultural Restraints Using GIS" (Salton Sea Database Program, University of Redlands), at p. 1.

[8] Salton Sea Authority Exhibit 16: Newsletters, at p. 12.

[9] Audubon/PCL Exhibit 8, *supra*, at p. 2; Salton Sea Authority Exhibit 16, *supra*, at p. 12.

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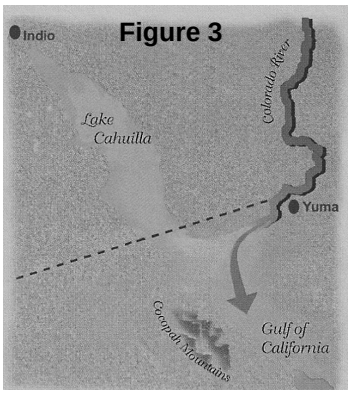
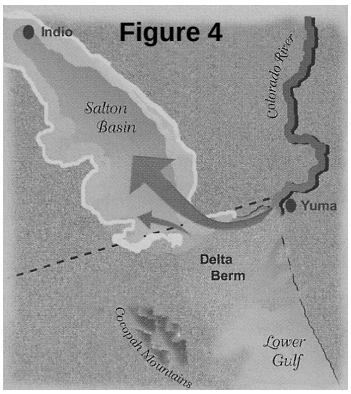
Salton basin to the north, as shown in Figures 3 and 4.[10] "Prior to dam construction on the Colorado River, the slower flow of the river meanderings resulted in the deposition of a great deal of sediment in the lower channels of the delta. This encouraged local flooding, which dropped even more sediments on the fan. This gradual accumulation of silts raised the overall height of the delta and lowered stream channel margins above the average grade of the main river channel to the north, resulting in an impoundment and flooding of the Salton trough."[11]





Between 695 A.D. and 1580 A.D. at least three and possibly four major lakes filled the Salton basin.[12] "At its climax, Lake Cahuilla encompassed over 5,700km^2 and reached depths of 95m."[13] At this level, Lake Cahuilla would have reached the lip of the delta berm – approximately 40 feet above sea level – and then would spill south to the lower delta at an outlet point near Cerro Prieto and then into the present channel of the Hardy River.[14]

In fact, once the Colorado was diverted toward the north in any given year, the tendency would be for the Salton basin to entirely fill before the river would shift back to the south.[15] From the point where the River's natural, potential routes over the sediment berm diverge to the

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[10] Audubon/PCL Exhibit 8, *supra*, at p. 2; Salton Sea Authority Exhibit 16, *supra*, at p. 12.

[11] Audubon/PCL Exhibit 2: Archaeological Investigations at a Proto-Historic Fish Camp on the Receding Shoreline of Ancient Lake Cahuilla, Imperial County, CA – Jerry Schaefer, Ph.D. (ASM Affiliates, June 2000), at p. 6.

[12] Audubon/PCL Exhibit 8, *supra*, at p. 2.

[13] Audubon/PCL Exhibit 8, *supra*, at p. 2.

[14] Audubon/PCL Exhibit 9: Laylander, "The Last Days of Lake Cahuilla" (Pacific Coast Archaeological Society Quarterly. Volume 33, Numbers 1 & 2, Winter and Spring, 1997), at p. 49.

[15] Audubon/PCL Exhibit 9, *supra*, at p. 54.

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north and south, the gradient south toward the Gulf of California averages only 1.7 feet/mile, while the gradient north toward the Salton basin averages 4.6 feet/mile.[16] Once diverted to the north, "[i]t seems likely that the river would have entrenched itself in to the soft lacustrine sediments and maintained its northward flow. This apparently would have occurred after the river's accidental diversion to create the Salton Sea in 1905, had engineering efforts on an epic scale not been expended to prevent it."[17]

The best available geologic evidence demonstrates that the filling of the Salton basin in 1905, while perhaps aided by colossal human error, was just one more example of the River's natural tendency to shift its outflows from south to north over the natural sediment berm dividing the upper Gulf and lower Gulf. "[I]t is probable that even if the Colorado and the general drainage conditions through the Alamo and its associated channels had not been interfered with in any way by the operations of the irrigation engineers, another diversion of the river water towards the west was about due from . . . natural causes . . . and would in any case have ensued within a few years."[18]

B. HISTORIC INUNDATION OF THE SALTON BASIN

IID's historic records document that the Salton basin was repeatedly filled with water at around the time of California's statehood.[19] Both before and "[d]uring the summer of 1890 the water from the Colorado River filled many of the small channels and lagoons toward the southwest, and in 1891 flowed into the Salton Sink and formed a lake several miles in length."[20] In June of 1891, the Salton Sea was observed to be thirty miles long, ten miles wide and

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[16] Audubon/PCL Exhibit 9, *supra*, at p. 54.

[17] Audubon/PCL Exhibit 9, *supra*, at p. 54.

[18] Audubon/PCL Exhibit 3, *supra*, at p. 20.

[19] Audubon/PCL Exhibit 6, *supra*, at p. 10 (stating that "there was some water in [the] Salton Sea in the 1850's and early eighties, and in 1891").

[20] Audubon/PCL Exhibit 3, *supra*, at p. 19.

approximately six feet deep.[21] The hydrological connection between the Salton Sea and the Colorado River at that time was clearly navigable in fact: "William Conovers, followed by one or two others, succeeded in making the journey by boat from the Colorado [River] to the [Salton Sea] . . . ."[22]

The replenishment of the Salton Sea during the 1890s was hardly unique. H.T. Cory documented settler accounts that the Colorado River flowed into the Salton Sea in 1840, 1842, 1852, 1859, 1862 and 1867.[23] In 1848, a salt lake three-quarters of a mile long and one-half mile wide and about one foot in depth was observed in the Salton trough.[24] A separate report documents the march of Lieutenant W.H. Emory to the shore of an earlier version of the Salton Sea, also in 1848.[25] And, historical maps reviewed by Godfrey Sykes in a 1915 study of the Salton Sea suggest that former fillings of the Salton trough were "known to travelers at some time between 1706 and 1760."[26]

Accounts of ongoing replenishment of the Salton Sea throughout the 1800s are consistent with recent scientific studies of the geologic history of the Salton basin. Relic landforms in the Salton trough suggest that, over geologic time, massive lakes extending to over ninety meters in depth existed in the Salton trough.[27] Up until the 1980s, the formation of lakes in the Salton trough was thought to have ended by the time of the first Spanish expeditions up the Colorado

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[21] Audubon/PCL Exhibit 3, *supra*, at p. 10.

[22] Audubon/PCL Exhibit 3, *supra*, at p. 19.

[23] Audubon/PCL Exhibit 3, *supra*, at p. 19. See also Audubon/PCL Exhibit 9, *supra*, at pp. 50 (stating that "Partial diversions happened several times during the nineteenth century . . . ."), 61 (documenting ephemeral lakes in the basin in 1828, 1840, 1849, 1852, 1862, 1867 and 1891).

[24] Audubon/PCL Exhibit 3, *supra*, at p. 19.

[25] Audubon/PCL Exhibit 3, *supra*, at p. 16; Audubon/PCL Exhibit 4: The Imperial Valley and The Salton Sink – H. T. Cory; "Part I. Sketch of the Region at the Head of the Gulf of California – A Review and History," Ch. III "Lake Cahuilla" – William P. Blake, pp. 17-21; "Part II. Some Scientific Facts of General Interest About the Salton Sea," Ch. II "Geographical Features of the Cahuilla Basin" – Godfrey Sykes, pp. 42-48, at p. 48.

[26] Audubon/PCL Exhibit 4, *supra*, at p. 48.

[27] Audubon/PCL Exhibit 8, *supra*, at p. 2.

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River in the middle 1500s.[28] "These would not have been possible if the river was still flowing into Lake Cahuilla."[29] Today, however, the best available science conclusively proves that infilling of the Lake continued to occur, even after the Spaniards laid claim to America in 1492. "Over 30 radiocarbon dates from a dozen sites have conclusively demonstrated that there was at least a partial infilling [of the Salton Sea] as recently as A.D. 1600-1700, between Spanish visits to the river."[30]

In short, given today's extensive scientific knowledge of the basin's geomorphology, it is beyond dispute that 1) the Salton trough is a part of the bed of the Colorado River and an integral part of the River's natural hydrology, and 2) the trough is a natural sink for the River's unimpaired, natural flows. Conclusive scientific evidence and documented contemporaneous reports from numerous sources prove that the Colorado River's cycle of claiming and reclaiming its natural bed in the Salton trough has been cyclically repeated throughout ancient times and modern recorded history.

C. HISTORIC PUBLIC TRUST USES OF THE SALTON BASIN

Early versions of the Salton Sea were unquestionably used for traditional Public Trust Doctrine purposes. "Lake Cahuilla nourished a special set of plant and animal resources which were, for the most part, not otherwise available to aboriginal peoples in the Colorado Desert. These include waterfowl, freshwater fish, freshwater mollusks, and plants adapted to freshwater marsh conditions."[31]

"One of the most unique adaptations of the Patayan II and III phases [A.D. 1000 to 1500, and A.D. 1500 to historic period] on the western side of Lake Cahuilla was the use of stone fish

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[28] Audubon/PCL Exhibit 2, *supra*, at p. 6.

[29] Audubon/PCL Exhibit 2, *supra*, at p. 6.

[30] Audubon/PCL Exhibit 2, *supra*, at p. 6 (citations omitted). See also Audubon/PCL Exhibit 9, *supra*, at p. 68 (noting that a 1994 scientific study reported a series of radiocarbon dates that "indicate the presence of a full stand of the Lake around the middle of the seventeenth century").

[31] Audubon/PCL Exhibit 9, *supra*, at p. 85.

traps . . . ."[32] A 1980 study observed about 650 V-shaped stone weirs in fifteen rows separated by differences in elevation of about 1.5 meters and matching observed annual evaporation rates in the Salton Sea today.[33] These observations corroborate oral traditions of the Cauhuilla Indians recalling tribal fishing and hunting at Lake Cahuilla.[34] Ruins of houses in the area of the stone fish traps contain bones of razorback suckers and bonytails – Colorado River species that are presently on the federal endangered species list.[35] "Fish bone dominated the faunal assemblages at the Dunaway Road Fish Camp (IMP-5204) and the Salton Sea Test Base sites."[36]

In June of 2000, IID published a study of an archaeological pit house and midden site found near Salton City, California. The pit house structure and midden were radiocarbon dated to approximately A.D. 1700.[37] The IID-commissioned study concluded that the size and uniformity of fish bones found at the pit house site were consistent with historic Native American weir fishing techniques.[38] "Abundant fish bone and macrobotanical remains indicate a specialized subsistence base of fish from the receding lake and salt-resistant plants that thrived on the newly exposed lake bed."[39]

Beyond fishing, remains of waterfowl and freshwater mollusks at the Elmore site further indicate the traditional public trust uses of Lake Cahuilla. "*Anodonta* sp. (freshwater clam) was a

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[32] Audubon/PCL Exhibit 2, *supra*, at p. 10.

[33] Audubon/PCL Exhibit 5: Archaeological Investigations at CA-RIV-1179, CA-RIV-2823, and CA-RIV-2827, La Quinta, Riverside County, California, "Chapter 1. The Natural and Cultural Environment," Philip J. Wilke (Coyote Press Archives of California Prehistory, No. 20 1988), at p. 8; see also Audubon/PCL Exhibit 9, *supra*, at p. 88.

[34] Audubon/PCL Exhibit 5, *supra*, at p. 9.

[35] Audubon/PCL Exhibit 5, *supra*, at p. 8; see also Audubon/PCL Exhibit 9, *supra*, at pp. 39-40, 87-88.

[36] Audubon/PCL Exhibit 2, *supra*, at p. 10.

[37] Audubon/PCL Exhibit 2, *supra*, at p. 1.

[38] Audubon/PCL Exhibit 2, *supra*, at pp. 48-49.

[39] Audubon/PCL Exhibit 2, *supra*, at p. 1.

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prehistorically exploited resource at some +40-foot Lake Cahuilla shoreline sites."[40] Indigenous tribes also hunted waterfowl at Lake Cahuilla.[41] "Waterfowl bone makes up more than 95 percent of the bone at the Elmore site (IMP-6427)."[42]

D. HUMAN DIVERSION OF NATURAL FLOWS TO THE SALTON BASIN

In 1914, Godfrey Sykes noted that the annual spring floods of the Colorado River, if left unchecked, threatened agricultural interests in the Imperial Valley. As already noted, it is probable that the Colorado River would have naturally continued to periodically flood the Salton Sink even in the absence of the infamous canal breach of 1905.[43] Sykes understood that agriculture in the Imperial Valley would exist under the perpetual threat of catastrophic flooding due to periodic shifts in the Colorado River's course "unless adequate measures [were] taken for controlling and storing the flood-waters of the early summer upon the upper Colorado [River]."[44]

In 1928 Congress stepped forward to "fix" the Colorado River's tendency to flow into the Salton basin. "Passage by Congress in December 1928 of the Boulder Canyon Project Act made possible the construction of Hoover Dam, Imperial Dam and the All-American Canal system. One of the primary reasons for construction of Hoover Dam was the need for controlling the floods and silt content of the Colorado River to prevent eventual inundation of Imperial Valley."[45]

In other words, Congress' 1928 approval of the Boulder Canyon Project Act and the construction of Hoover Dam robbed the Salton basin – a natural part of the bed and streamcourse of the Colorado River before, during, and after the time of California's statehood – of any chance for future replenishment due to the River's natural tendency to periodically shift from the delta in

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[40] Audubon/PCL Exhibit 9, *supra*, at p. 37 (citation omitted).

[41] Audubon/PCL Exhibit 9, *supra*, at p. 40.

[42] Audubon/PCL Exhibit 2, *supra*, at p. 10.

[43] See discussion at note 18, *supra*; Audubon/PCL Exhibit 3, *supra*, at p. 20.

[44] Audubon/PCL Exhibit 3, *supra*, at p. 20.

[45] Audubon/PCL Exhibit 6, *supra*, at p. 3.

the south to Lake Cahuilla in the north. As explained by IID's own historical account: "Had man not prevented the River from continuing westerly, there is no question but that its course would have continued into and through Imperial Valley, as it had done many time over ages in the past, and Lake Cahuilla would have been recreated."[46]

E. MODERN PUBLIC TRUST VALUES OF THE SALTON BASIN

Since the most recent natural infilling of the Salton Basin in 1906, the Salton Sea has continuously persisted – and has supported a variety of modern public trust uses. As reported by IID in 1965, "Because of weather and location, the [Salton Sea] is increasingly popular with residents of nearby coastal regions for all forms of water sports, camping and fishing."[47]

1. Boating

The Salton Sea, since its latest filling in 1905, has been a popular boating and water sport destination. At one time, the sea hosted three yacht clubs.[48] It was also the site for the "Salton Sea 500" – a 500-mile marathon boat race that attracted boating enthusiasts from all over the United States.[49] "The Salton Sea offers unlimited boating opportunities. There are boat launch facilities all around the lake and kayak trails at the State Recreation Area."[50]

2. Fishing

Since 1905, the Salton Sea has provided significant fishing opportunities to the public. "During the past few million years, [the] Salton Sink has been flooded with fresh water, salt water and water much more saline than the ocean . . . but there have always been fish."[51]

When the canal breach of 1905 began replenishing the Sea, freshwater fish poured with the Colorado River's waters into the basin.[52] In 1929, the federally endangered razorback sucker

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[46] Audubon/PCL Exhibit 6, *supra*, at p. 19.

[47] Audubon/PCL Exhibit 6, *supra*, at p. 28.

[48] Audubon/PCL Exhibit 6, *supra*, at p. 29.

[49] Audubon/PCL Exhibit 6, *supra*, at p. 29.

[50] Salton Sea Authority Exhibit 13: Fact Sheets, at p. 18.

[51] Defenders of Wildlife Exhibit 9: Written Testimony of Bill Karr, at p. 1; Defenders of Wildlife Exhibit 10: Fishing Salton Sea, at p. 1.

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and the striped mullet still inhabited the Sea.[53] The mullet provided both sport and commercial fishing opportunities. "Mullet Island was the base for one of the commercial mullet canneries, and the foundations of the cannery can be seen to this day."[54] In fact, a 2002 scientific study conducted, in part, by the U.S. Fish & Wildlife Service, recently concluded that "[c]ontrary to the current public paradigm, the Salton Sea supports a large fish community and could support a commercial fishery."[55]

There are presently four fish species in the Salton Sea of interest to anglers, and all four are excellent eating: corvina, Gulf croaker, sargo and tilapia.[56] According to expert fishermen and statistics provided by the California Department of Fish and Game, the Salton Sea provides some of the best sport fishing in California.[57] "In 1971, CDFG recorded recreational fish catches at the Salton Sea at 1.88 fish per angler hour, one of the highest catch rates in the state."[58]

Although the Sea's increasing salinity and other water quality problems have led to massive fish die-offs, the Sea's fish populations and opportunities for recreational fishing remain exceptional. Estimates by CDFG place the number of fish in the *billions*.[59] "The total number of

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[52] Defenders of Wildlife Exhibit 9, *supra*, at p.2.

[53] Defenders of Wildlife Exhibit 9, *supra*, at p. 2.

[54] Defenders of Wildlife Exhibit 9, *supra*, at p. 2.

[55] Defenders of Wildlife Exhibit 13: Final Report, Fish Biology and Fisheries Ecology of the Salton Sea, at p. 2; see also Salton Sea Authority Exhibit 16, *supra*, at p. 24 (noting that the Salton Sea Authority is presently investigating commercial uses of Salton Sea fisheries including "composting, fertilizers, fish meal and pet food").

[56] Defenders of Wildlife Exhibit 9, *supra*, at p. 3; Defenders of Wildlife Exhibit 10, *supra*, at pp.9-11.

[57] Defenders of Wildlife Exhibit 9, *supra*, at p. 3; Defenders of Wildlife Exhibit 11, "Secrets of the Salton Sea," *Western Outdoors*, Feb. 2001, at p. 49.

[58] Defenders of Wildlife Exhibit 9, *supra*, at p. 3.

[59] Defenders of Wildlife Exhibit 9, *supra*, at p. 4; Defenders of Wildlife Exhibit 11, *supra*, at p. 52.

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tilapia are staggering, especially when you consider fish kills on the order of 8 million fish, after which it's hard to tell the difference in population levels."[60]

3. Migratory Waterfowl and Other Birds

Of course the ongoing public trust uses most at issue to Audubon in this proceeding center on the unique biological values associated with the Salton Sea's importance to migratory waterfowl and other birds. In 1930, the Salton Sea National Wildlife Refuge was established at the south end of the Sea.[61] The refuge has reported over 384 species, more than any other wildlife refuge in the west, and over two million birds per year rely on the Sea's habitats.[62]

Avian species on the federal endangered species list that presently rely on the Sea's resources include the brown pelican and Yuma clapper rail.[63] Species listed under the California Endangered Species Act that reside at the Sea include the black rail and the greater sandhill crane.[64] The brown pelican, Yuma clapper rail, black rail, and greater sandhill crane have also each been designated a "fully protected" species by the California Legislature.[65] Numerous other avian species of special concern to both the U.S. Fish & Wildlife Service and the California

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[60] Defenders of Wildlife Exhibit 9, *supra*, at pp. 4-5, quoting CDFG biologist Terry Foreman; Defenders of Wildlife Exhibit 11, *supra*, at p. 52 (same).

[61] Audubon/PCL Exhibit 7: Salt Dreams: Land & Water in Low-Down California, excerpted "Chapter 4 Memories of Seas," pp. 48-59, "Chapter 5 Loomings," pp. 63-70, "Chapter 10 The Delta Hung Out to Dry," pp. 135-136, and Notes to Chapters 4, 5, & 10 – William deBuys and Joan Myers, at p. 136; see also Audubon Exhibit 10: Nils Warnock, Testimony: Birds of the Salton Sea: Past, Present, and Future (Written testimony served electronically in PDF format, accompanying PowerPoint presentation served on all Parties in hard copy), at p. 2 (noting that 407 species of birds have been recorded at the Salton Sea).

[62] Audubon/PCL Exhibit 7, supra, at p. 136; Audubon Exhibit 13: Shuford, Warnock, *et al*., Avifauna of the Salton Sea: Abundance, Distribution, and Annual Phenology (April 2000), at p. 2 (noting 402 species of native birds reported); Audubon Exhibit 17: Testimony – Daniel Taylor, Executive Director, National Audubon Society - California, at p. 1 (same).

[63] Audubon Exhibit 13, *supra*, at Table 3-1.

[64] Audubon Exhibit 13, *supra*, at Table 3-1.

[65] Fish & G. Code, § 3511.

Department of Fish and Game also rely on the existence of functional wetland and upland habitats at the Sea.[66]

The amazing display of avian affinity for the Sea is hardly a mere incident of a mistaken canal breach in 1905.[67] "These birds only duplicated the movements of their ancestors, which by the hundreds of thousands had colonized the habitats created with every recurrence of Lake Cahuilla. If the immediate cause for creation of the Salton Sea was human blunder, the birds did not care, and if the sea's habitats have persisted since then, thanks solely to irrigation runoff, the birds care still less."[68]

The following statistics only begin to summarize the Salton Sea's importance to various bird species:

- 90% or more of North America's population of eared grebes use the Sea in some years.[69]
- 40% of North America's endangered Yuma clapper rails breed around the Sea.[70]
- Up to 50% of the world's population of Mountain Plovers winter in the Imperial Valley in some years.[71]
- Up to 30% of North America's white pelicans use the Sea.[72]

The importance of the Sea to these, and other, bird species has only increased as other wetland habitats have been lost on a massive scale. California alone has lost 91% of its wetland habitats in the past 200 years.[73] As these habitat losses pile up, the importance of the Sea as one of the few remaining places that presently supports these species is increasingly magnified.[74]

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[66] Audubon Exhibit 13, *supra*, at Table 3-1.

[67] Audubon Exhibit 10, *supra*, at p. 1; Audubon Exhibit 17, *supra*, at p. 3.

[68] Audubon/PCL Exhibit 7, *supra*, at p. 135-136.

[69] See Audubon Exhibit 10, *supra*, at p. 2.

[70] See Audubon Exhibit 10, *supra*, at p. 2.

[71] See Audubon Exhibit 10, *supra*, at p. 2.

[72] See Audubon Exhibit 10, *supra*, at p. 2.

While it is true that the Sea, in recent years, has become the site of periodic avian die-offs due, in part, to its slowly deteriorating water quality, it still remains Southern California's most significant inland stopover along the Pacific flyway.[75] These unfortunate die-off events demonstrate that the Sea's avian habitats are in need of protection and restoration. Federal and state governments and agencies have responded by passing legislation and commissioning significant studies aimed at developing methods for restoring the Sea's fundamental biological values including 1) the creation of the Salton Sea Authority in 1993, a joint powers authority formed by the Coachella Valley Water District, Imperial Irrigation District and Riverside and Imperial Counties; 2) passage of the 1998 Salton Sea Reclamation Act; and, 3) the ongoing preparation of a Salton Sea Restoration Project EIR/EIS.[76] Any activity that would instead intensify or otherwise accelerate the buildup of salts and other toxins in the Sea – acknowledged effects of the proposed transfer at issue in this proceeding – would be contrary to these efforts, and would only ensure that the Salton Sea rapidly follows the historic avian habitats of Tulare Lake and Owens Lake into oblivion.[77] "To lose the Salton Sea . . . means losing one of the most important interior sites in North America for waterbirds."[78]

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[73] Audubon Exhibit 10, *supra*, at p. 4.

[74] Audubon Exhibit 10, *supra*, at p. 5.

[75] See Audubon Exhibit 12: Warnock, Salton Sea Studies – Assessing the birds of an inland sea (PRBO, Winter 1998-99), at p. 6; Audubon Exhibit 15: Shuford, Warnock, *et al*., The Salton Sea as critical habitat to migratory and resident waterbirds, at pp. 8-10; Audubon Exhibit 16: Shuford, Warnock, *et al*., Patterns of Shorebird Use of the Salton Sea and Adjacent Imperial Valley, California, at pp. 2, 11.

[76] See Audubon Exhibit 13, *supra*, at p. 2; Audubon Exhibit 14: Warnock, *et al*., Distribution Patterns of Waterbirds at the Salton Sea, California, in 1999, at p. 3; Audubon Exhibit 15, *supra*, at p. 1; Salton Sea Authority Exhibit 13, *supra*, at pp. 1-2.

[77] Audubon Exhibit 10, *supra*, at pp. 4-5.

[78] Audubon Exhibit 10, *supra*, at p. 5.

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III. STATEMENT OF LAW

In 1983 the California Supreme Court decided *National Audubon Society v. Superior Court of Alpine County*, and confirmed the well-established rule that, under California's Public Trust Doctrine, the state "owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people."[79] "It is . . . well settled in the United States generally and in California that the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams."[80] The Public Trust Doctrine is not a mere declaration of the state's right to use public property for public purposes: "it is an affirmation of the *duty* of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[81]

Traditional uses protected by the Public Trust Doctrine include navigation, commerce, fishing, hunting, swimming, wading, standing, bathing and general recreation purposes.[82] California has expanded these traditional uses to include "the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."[83]

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[79] *National Audubon Society, supra,* 33 Cal.3d at p. 434 (citations and internal quotations omitted). In this brief, the term Public Trust Doctrine is used in the capitalized form to distinguish the ancient common law doctrine – which protects in place navigable waterways and the lands beneath them – from traditional concepts of public trust resources typically created or acknowledged through constitutional or statutory provisions, such as public rights regarding water, air, and wildlife. In other words – as further explained below – the Public Trust Doctrine can be fundamentally distinguished from "traditional" public trust resources in one critically important way: the Doctrine protects *places for particular public uses* rather than *things*.

[80] *National Audubon, supra*, 33 Cal.3d at p. 435 (citations omitted).

[81] *National Audubon, supra*, 33 Cal.3d at p. 441 (emphasis added).

[82] *National Audubon, supra*, 33 Cal.3d at p. 434 citing *Marks v. Whitney* (1971) 6 Cal.3d 251, 259.

[83] *Marks v. Whitney, supra*, 6 Cal.3d at p. 259-260, cited in *National Audubon, supra,* 33 Cal.3d at p. 434-435.

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In its 1983 *National Audubon* decision, the California Supreme Court specifically addressed the fundamental tensions that exist between the State's duties to preserve and protect Public Trust Doctrine lands for their recognized public uses and the State's constitutional and statutory water rights regime, which establishes a "first in time, first in right" priority for water appropriations, subject to the overriding constitutional requirement that "the waters of the State be put to beneficial use to the fullest extent of which they are capable . . . ."[84] In resolving the inherent conflicts between California's constitutional and statutory water rights system and the State's Public Trust Doctrine trustee responsibilities, the *National Audubon* Court established the following principles to guide its decision:

> a. The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the [Public Trust Doctrine].
>
> b. As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values. . . . .
>
> c. The state 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. . . . As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the [Public Trust Doctrine].[85]

The Water Board's Public Trust Doctrine duties under the *National Audubon* decision are separately reinforced by the specific statutes which govern the allowable impacts to general public trust resources in authorizing any long term water transfer: "The board . . . may approve .

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[84] Cal. Const., art. X, § 2; *National Audubon*, *supra*, 33 Cal.3d at p. 445.

[85] *National Audubon*, *supra*, 33 Cal.3d at p. 445-446.

. . a petition for a long-term transfer where the change . . . would not unreasonably affect fish, wildlife, or other instream beneficial uses."[86]

IV. DISCUSSION

In this hearing, the State Water Resources Control Board has been asked to approve the long-term transfer of 200,000 acre feet of Colorado River water per year from Imperial Irrigation District (IID) to the San Diego County Water Authority (SDCWA). As the following discussion demonstrates, the Board cannot approve the proposed transfer for at least the following reasons:

1) The Salton Sea is a navigable waterway that is, and always has been, a natural sink for the Colorado River's outflows and is a part of the Colorado River's natural bed. The Sea is therefore protected by the Public Trust Doctrine. The California Supreme Court's 1983 *National Audubon* decision might allow IID to transfer some portion of its allocation of Colorado River water out-of-basin for SDCWA's use, but any such transfer must protect the Sea's Public Trust Doctrine uses. At this time, however, the Board and project proponents have consistently denied that the Salton Sea is protected by the Public Trust Doctrine, and therefore have not adequately considered the proposed transfer's impacts on the Sea's Public Trust Doctrine uses. The Board cannot approve the transfer at least until it acknowledges that the Sea is, as a matter of law, protected by the Public Trust Doctrine, and performs the balancing of considerations mandated by the *National Audubon* decision.

2) Even if the Water Board finds that the Salton Sea is not protected by the Public Trust Doctrine, the Board must still make a finding, under its own statutes, that the proposed water transfer to SDCWA "would not unreasonably affect fish, wildlife, or other instream beneficial uses" before it can allow the proposed transfer to proceed.[87] In comments to IID and the Bureau of Reclamation, National Audubon Society – California and numerous other environmental organizations, state and federal governmental units, Native American tribes and private individuals have identified a vast array of fundamental, irreconcilable legal and factual errors in the environmental documents prepared for this project.[88] Because these documents are fundamentally flawed and otherwise rely on wildlife mitigation measures that have been expressly rejected by California's Department of Fish and Game, the Water Board lacks any credible evidence upon which it might reasonably base a determination that impacts to fish, wildlife or other instream beneficial uses will not be unreasonable. The Board cannot approve the proposed transfer until credible and legally adequate evidence is presented upon which the Board might make a rational determination of the transfer's impacts to these resources.

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[86] Water Code, § 1736.

[87] Water Code, § 1736.

[88] See, e.g., Audubon Exhibit 18: Comments on Draft EIR/EIS for IID/SDCWA Transfer.

A. THE SALTON SEA IS PROTECTED BY CALIFORNIA'S PUBLIC TRUST DOCTRINE

1. The Salton Sea Satisfies Traditional Standards for Designation as a Public Trust Doctrine Resource

The Salton Sea, as a natural part of the bed of the Colorado River which held navigable waters before, after, and at times contemporaneous with California's statehood, qualifies under traditional standards as a Public Trust Doctrine resource. Under the traditional formulation of the Public Trust Doctrine, the states each acquired trusteeship over lands underlying navigable waterways upon their admission to the Union.[89] The traditional basis of the Public Trust Doctrine is founded in the "equal footing" doctrine, whereby each new state, upon its admission to the Union, assumes sovereign trusteeship over the beds of navigable waters within their borders, so as to be assured of "equal footing" with the original states.[90] "The State of California acquired title as trustee to such lands and waterways upon its admission to the union; from the earliest days its judicial decisions have recognized and enforced the trust obligation."[91]

At present, the Salton Sea is a navigable waterway.[92] In addition, the best available historical evidence demonstrates that before, after and at times contemporaneous with California's statehood, significant stands of Colorado River water capable of supporting traditional navigational purposes – including commercial fisheries – have repeatedly occupied the River's natural bed in the Salton basin.[93] Significant stands of water occupied the Basin as late at the 1700's.[94] And, in 1848 and 1852 – two years before and two years after California's

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[89] *National Audubon, supra*, 33 Cal.3d at p. 434 (citations omitted).

[90] *Pollards Lessee v. Hagan* (1845) 44 U.S. 212.

[91] *National Audubon, supra*, 33 Cal.3d at p. 434 (citations omitted).

[92] See Part II.E.1 *supra* (describing recent use of Salton sea for boating purposes).

[93] See discussion at Parts II.B & II.E.2, *supra* (describing historic, natural inundations of the Salton basin clearly sufficient to support traditional navigational uses, and describing the past and present potential of the Salton Sea as a commercial fishery).

[94] See Part II.B, *supra*.

admission to the Union – natural standing water, measuring up to at least three-quarters of a mile wide and one mile long, occupied the Salton basin.[95]

2. The Salton Sea Satisfies California's Standards for Designation as a Public Trust Doctrine Resource.

In addition to meeting the traditional "equal footing" standard for Public Trust Doctrine status, the Salton Sea enjoys Public Trust Doctrine status as an incident of Mexican law, and Mexico's cession of California to the United States under the 1848 Treaty of Guadalupe Hidalgo. California's Supreme Court has expressly recognized that Public Trust Doctrine status may be handed down through annexation of lands to the United States from other governments that adhere to the common law principles of the Public Trust Doctrine.[96] In *City of Los Angeles v. Venice Peninsula Properties*, California's Supreme Court determined that certain lands within the state may be impressed with Public Trust Doctrine status, independent of the traditional "equal footing" rationale, if the lands were subject to common law Public Trust Doctrine status prior to annexation by the United States.[97]

In *Venice Peninsula*, the City of Los Angeles brought a quiet title action to establish its right, under the Public Trust Doctrine, to construct sea walls and make other public improvements in the Ballona Lagoon – an arm of the Pacific Ocean in the Marina Del Ray area

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[95] See Part II.B, *supra*. The fact that the Salton basin is a longstanding, natural part of the bed of the Colorado River and its unaltered hydrology also clearly distinguish the facts of this proceeding from cases holding that California's Public Trust Doctrine does not extend to cover artificial, non-navigable impoundments of water in the absence of some impact on navigable waters. See, e.g., *Golden Feather Community Association v. Thermalito Irrigation District* (1989) 209 Cal.App.3d 1276. *Golden Feather* is further distinguishable in that the plaintiffs in that case conceded that the reservoir in question, Concow Reservoir in Butte County, was a non-navigable waterway. The evidence adduced at this hearing clearly indicates that the waters occupying the Salton basin before, after and at the time of statehood have been navigable in fact. The fact that the Colorado Rivers waters are presently delivered to the Sea via agricultural delivery and drainage canals does not sever the Sea from its historic and present status as "navigable waters." See, e.g., *Headwaters v. Talent Irrigation Dist.* (9th Cir. 2001) 243 F.3d 526, 533 (holding that canals that connect navigable waters qualify as tributaries of navigable waters); *National Audubon*, *supra*, 33 Cal.3d at p. 437 (confirming that the Public Trust Doctrine protects navigable waters from harm caused by diversions of nonnavigable tributaries).

[96] *National Audubon*, *supra*, 33 Cal.3d at p. 434, n. 15; *City of Los Angeles v. Venice Peninsula Properties* (1982) 31 Cal.3d 288, 297, overruled on other grounds sub nom *Summa Corp. v. California ex rel. State Lands Comm'n* (1984) 466 U.S. 198.

[97] *Venice Peninsula*, *supra*, 31 Cal.3d at p. 298.

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of Los Angeles.[98] Fee title to the lagoon had been "acquired by private persons from the Mexican Government prior to the time when California was ceded to the United States under the Treaty of Guadalupe Hidalgo, and was later patented to the owners by the federal government in accordance with the requirements of the treaty."[99]

In 1851, consistent with the terms of the Treaty – which required the federal government to honor previously granted private property rights in the ceded lands – the federal government passed "An Act to ascertain and settle the private Land Claims in the State of California."[100] In 1852, the Mexican owners of Ballona Lagoon petitioned for a federal patent to the Lagoon under the 1851 Act.[101] The owners' petition was granted, and later "affirmed by the United States District Court in 1855." Throughout these proceedings, California made no claim to the Lagoon, in either a proprietary or trustee capacity.

At trial, the present fee owners of Ballona Lagoon insisted that the state's failure to bring any claim during the 1852 federal land patent proceedings extinguished any present public trust right that the City of Los Angeles might claim over the Lagoon. The Los Angeles County Superior Court, however, held that the lagoon was protected by the Public Trust Doctrine, and that, therefore, "the state or its successors have the right to construct the improvements in the lagoon."[102] On review, the California Supreme Court affirmed.

In reaching its decision, the California Supreme Court first noted that Mexican law, at the time of cession and dating back to the 13th century – well before Spain laid claim to America in 1492 – recognized the common law Public Trust Doctrine, and prohibited the state's alienation of such lands.[103] The California Supreme Court then determined that, under prior case law

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[98] *Venice Peninsula, supra*, 31 Cal.3d at p. 292.

[99] *Venice Peninsula, supra*, 31 Cal.3d at p. 292.

[100] *Venice Peninsula, supra*, 31 Cal.3d at p. 294, citing 9 U.S. Stat. 631.

[101] *Venice Peninsula, supra*, 31 Cal.3d at p. 294.

[102] *Venice Peninsula, supra*, 31 Cal.3d at p. 293.

[103] *Venice Peninsula, supra*, 31 Cal.3d at p. 296.

interpreting the 1851 Act with regard to cession of mineral rights, the United States federal government succeeded to Mexico's trusteeship over tidelands upon annexation of California: "upon annexation of California, the federal government succeeded to the ownership of the public's rights in the tidelands contained in ranchos which had been conveyed by Mexico."[104] Finally, the California Supreme Court held that since tidelands are not held by the government in its proprietary capacity, but rather as trustee for the benefit of the public, such lands may not be alienated at will, and therefore the private owners' patent under the 1851 Act was subject to a continuing Public Trust Doctrine easement, handed down from Mexico to the United States, and then to California upon statehood.[105]

On review, the United States Supreme Court reversed the California Supreme Court's decision, but only on a very narrow basis.[106] The United State Supreme Court held that the public trust status of Ballona Lagoon had been extinguished, but *only* because the state of California in 1852 failed to present any claim when the Mexican owners sought to confirm their patent under the 1851 Act.[107] In reaching this narrow holding, the United States Supreme Court expressly acknowledged that, in the absence of the 1852 patent to the Mexican owners under the express authority of the Treaty of Guadalupe Hidalgo and the 1851 Act, the result would have necessarily been affirmation of the City of Los Angeles' claim to public trusteeship over Ballona Lagoon:

> The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. (*Pollard's Lessee v. Hagan* (1845) 3 How. 212, 11 L.Ed. 565.) Thus, an ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State. (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 15-16.) But the Court in *Borax* recognized that a different result would follow if the private lands had been patented under the 1851 Act. (*Id.* at 19.) Patents confirmed under the authority of the 1851 Act were issued "pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although

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[104] *Venice Peninsula, supra*, 31 Cal.3d at p. 298, citing *Moore v. Smaw*, (1861) 17 Cal. 199.

[105] *Venice Peninsula, supra*, 31 Cal.3d at p. 300.

[106] See *Summa Corp., supra*, 466 U.S. at p. 209.

[107] See *Summa Corp., supra*, 466 U.S. at p. 201.

tideland, had not passed to the State." (*Id*. at 21. See also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, (1977) 429 U.S. 363, 375; *Knight v. United States Land Assn.*, (1891) 142 U.S. 161.)[108]

Equally important, the United States Supreme Court expressly declined to rule on the California Supreme Court's decision that the Ballona Lagoon's Public Trust Doctrine status had descended from Mexican law through cession to the United States and then to California upon statehood.[109] In short, the California Supreme Court's determination that California succeeded to Mexico's trust duties over Public Trust Doctrine lands in existence prior to cession to the United States remains in force and effect to this day.

The evidence presented in this hearing conclusively demonstrates that the Salton Sea clearly qualified for Public Trust status under Mexican law prior to the cession of California to the United States.[110] According to the best scientific evidence available, radiocarbon dates clearly establish 1) that significant stands of water occupied the Salton basin when Spain – which recognized the Public Trust Doctrine at the time – laid claim to America in 1492, and 2) that the Colorado River continued to periodically reclaim its bed in the basin at least through the 1700s.[111] This evidence also shows that the indigenous tribes of the area relied on these stands of water for wading, fishing, and hunting – all traditional public trust uses.[112] Pre-statehood fillings also occurred in 1840 and 1842.[113]

In 1848 – the same year that Mexico ceded California to the United States under the Treaty of Guadalupe Hidalgo – a significant lake was documented in the basin.[114] The fact that navigable waters existed in the Basin at the time that the United States took possession of

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[108] *Summa Corp.*, *supra*, 466 U.S. at p. 205.

[109] See *Summa Corp.*, *supra*, 466 U.S. at p. 201, fn. 1.

[110] See Part II.B, *supra*.

[111] See Part II.B, *supra*.

[112] See Part II.C, *supra*.

[113] See discussion at note 23, *supra*.

[114] See discussion at notes 24 & 25, *supra*.

California from Mexico in 1848 further indicates that the United States could *only* hold the basin in trust for California upon its eventual admission to the Union.[115] Unlike the unique facts in *Venice Peninsula*, no evidence has been produced at this hearing indicating that IID, or any other private entity, acquired title to the Salton basin pursuant to a patent under the 1851 Act. As a result, the State – through Mexico's cession of California to the United States in the Treaty of Guadalupe Hidalgo – has assumed Mexico's pre-existing Public Trust Doctrine duties toward the Salton Sea, regardless of whether it can be conclusively proven navigable waters existed in the basin at the precise moment of California's grant of statehood by the federal government.

3. The Salton Sea is Protected by the Public Trust Doctrine to Its Present-Day High Water Mark Regardless of Uncertainty About Its Historic Levels

Given the uncertain status of the exact level of the Salton Sea at any given moment in time – whether it be Spain's claim to California in 1492, cession of California to the United States in 1848, or the admission of California to the Union in 1850 – attempting to set the precise geographic elevation at which the Sea's Public Trust Doctrine status begins, based upon historical data, would be extremely difficult, if not impossible. Potential claims could range from a maximum elevation of forty (40) feet above sea level – the basin's maximum fill height before spilling into the lower gulf – to a grudging puddle at the center of the basin, based on occasional sightings of ephemeral water in the basin before 1905.[116] Given the settled land use regimes that have developed around the modern history of agriculture and development in the Imperial Valley since 1905, for Audubon to now claim that the entire Salton basin to 40 feet a.s.l. must be dedicated to Public Trust Doctrine uses would strain credibility almost as much as IID's factually unsupportable assertion that the Salton Sea was "created" in 1905 and has no public

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[115] See *Summa Corp., supra,* 466 U.S. at p. 205. See also *Utah Division of State Lands v. United States* (1987) 482 U.S. 193 (holding that the federal government can prevent a state from assuming trusteeship over Public Trust Doctrine lands only if it makes an express statement of its intent to defeat the state's sovereign trusteeship with regard to particular lands at the time statehood is granted); *Montana v. United States* (1981) 450 U.S. 544, 553 (holding that there is a presumption against retention of title to the bed of navigable waters by the U.S., and that "the beds of navigable waters remain in trust for *future* States and pass to the new States when they assume sovereignty." [emphasis added]).

[116] See Part II.B, *supra*.

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trust rights at all. Fortunately, California's Supreme Court, in a pair of 1981 cases, has helped answer this question in a very practical manner, holding that where demarcation of historical Public Trust Doctrine status is uncertain due to natural and artificially induced fluctuations of water levels, but the present level of the water body has been stable for a long period, the present high-water mark is the proper level at which the Public Trust Doctrine attaches.[117]

In the first of these two cases, *California v. Superior Court* (*Lyon*), the California Supreme Court considered how fluctuations of the water levels in a natural lake impacted the demarcation of the state's trusteeship under the Public Trust Doctrine. In *Lyon*, a landowner bordering Clear Lake claimed ownership to the Lake's natural, low water mark, while the State insisted that the high water mark established the boundaries of the state's trusteeship.[118] Following a trial court ruling in favor of the landowner, the Supreme Court reversed, holding that although the owner could claim fee ownership of the land to the low water mark pursuant to Civil Code section 830, such ownership remained subservient to the state's overriding trusteeship to the Lake's natural high water mark.[119] In reaching its holding, the court made it clear that the trust attached to the *bed* of Clear Lake to the high water mark, regardless of whether water was actually present, to preserve the public's rights including recreational uses and preserving the land in its natural state.[120]

In the second case, *California v. Superior Court* (*Fogerty*), the California Supreme Court considered the effect on the state's public trusteeship of a dam constructed at the mouth of the Truckee River, which artificially raised the level of Lake Tahoe several feet. In *Fogerty*, landowners bordering Lake Tahoe claimed private ownership of the near-shore bed of the lake

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[117] See *California v. Superior Court* (*Lyon*) (1981) 29 Cal.3d 210; *California v. Superior Court* (*Fogerty*) (1981) 29 Cal.3d 240.

[118] See *Lyon*, *supra*, 29 Cal.3d at 217-218.

[119] See *Lyon*, *supra*, 29 Cal.3d at 228, citing *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387.

[120] See *Lyon*, *supra*, 29 Cal. 3d at 229-231 (stating "we hold that the same incidents of the trust applicable to tidelands also apply to nontidal navigable waters and that the public's interest is not confined to the water, but extends also to the bed of the water.").

where they had built piers or docks.[121] As in *Lyon*, the Supreme Court again reversed a trial court decision in favor of the landowners, holding that the present-day high water mark established the extent of the state's trusteeship over the bed of Lake Tahoe, despite the clear evidence that the Lake's level had been artificially elevated by construction of a dam in 1870 at the Lake's outflow into the lower Truckee River.[122] In reaching its decision, the court cited 1) the "monumental evidentiary problem[s]" inherent in trying to precisely delineate Lake Tahoe's pre-1870 level, and 2) the 100-year history of the Lake existing at its present level.[123]

Establishing the present elevation of the Salton Sea as the level at which the state's Public Trust Doctrine duties begin is consistent with both the *Lyon* and *Fogerty* decisions. In *Lyon*, the Court was concerned with protecting the historic bed of a Public Trust Doctrine resource – whether it was presently covered by water or not – in order to protect the underlying purposes that are served by the trust. In the present case, the Salton Sea, even at its present elevation, is beginning to show signs that it is reaching the limits of its ability to support its public trust purposes.[124] Nevertheless, in the absence of the proposed transfer, the Salton Sea will remain a significant and increasingly important resource for public trust uses for at least the next several decades – especially in light of the continuing loss of other significant inland waterways along the Pacific Flyway.[125] And, as with *Fogerty*, designating the Sea's present level as the extent of the state's trusteeship 1) would avoid the evidentiary problems implicated in delineating the Salton Sea's precise level at the time of statehood (or Spain's claim to California, or Mexico's

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[121] *Fogerty*, *supra*, 29 Cal.3d at p. 243.

[122] *Fogerty*, *supra*, 29 Cal.3d at p. 247-248.

[123] *Fogerty*, *supra*, 29 Cal.3d at p. 248-249.

[124] See discussion at notes 59 and 75, *supra*.

[125] See Part II.E.3, *supra*. And, absent the proposed transfer, the quality and biological "life expectancy" of the Sea will likely be significantly extended through other governmental efforts that are presently underway to restore the Sea. See, e.g., discussion at note 76, *supra* (outlining federal and state laws and programs undertaken to restore the Salton Sea).

cession of California to the United States, for that matter), and 2) would be entirely consistent with the Sea's consistent historic water levels for the past 100 years.[126]

4. IID's Right Under State Law to Appropriate Colorado River Water is Subject to the State's Public Trust Duties Toward the Salton Sea, Regardless of The Law of the River

On June 14, 2002, the Water Board issued a memorandum requesting briefing on the question of whether the Law of the River (including the 1922 Colorado River Compact, the Boulder Canyon Project Act of 1928, and supporting case law) allows the use of water by IID for purposes of fish, wildlife and other instream beneficial uses.[127] The simple answer is yes.

As already shown above, the bed of the Salton Sea is a natural and navigable part of the bed of the Colorado River's waters protected by the Public Trust Doctrine for public trust uses as recognized and developed by the California and United States Supreme Courts.[128] And, as previously discussed, the United States Supreme Court has repeatedly affirmed that the Public Trust Doctrine, as an incident of state sovereignty, cannot be repealed by federal action unless express reservations are made at the time of statehood.[129] Because the above-referenced federal laws and interstate compacts took place after California's grant of statehood – a grant in which the federal Government expressly reserved no rights to California's Public Trust Doctrine lands, other than its prior guarantee to Mexico under the Treaty of Guadalupe Hidalgo that it would honor Mexican owners' prior ownership rights – these federal laws and interstate compacts are powerless, regardless of their express or implied terms, to impair the uses of Colorado River water for the Salton Sea's traditional Public Trust Doctrine uses, including fish, wildlife and other beneficial instream uses.

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[126] IID Exhibit 77, Salton Sea Elevation (chart starting at –180') and IID Exhibit 78, Salton Sea Elevation (chart starting at –224') (both demonstrating that Salton Sea's elevation has been essentially stable since approximately 1980).

[127] See Letter from Arthur G. Bagget, Jr., Hearing Officer, SWRCB, to Enclosed List of Parties (June 14, 2002) at p. 2.

[128] See Parts IV.A.1 & IV.A.2, *supra*.

[129] See discussions at notes 108 and 115, *supra*.

5. Past Statements that the Salton Sea is Not a Public Trust Doctrine Resource Have Mischaracterized the Sea's History and Geomorphology

The Salton Sea has been improperly characterized, by both IID and the Water Board, in this and prior proceedings, as nothing more than an agricultural sump, mistakenly created through human intervention in 1905, with no Public Trust Doctrine status.[130] IID and the Board's past statements, however, are arbitrary and unsupported by the overwhelming scientific and historic evidence to the contrary: the natural hydrology of the lower Colorado River – not human intervention – created the Salton Sea both in prehistoric times and at the time of California's statehood.[131] It would make as much sense for IID or the Water Board to claim that humans created the Colorado River itself. The natural geomorphological processes that repeatedly replenished the Sea before 1905 were poised to do so again when the Colorado River breached a poorly designed canal headgate to reclaim its natural stream course to the Salton trough.[132]

In fact, the very purpose of the Boulder Canyon Act of 1928 was to *prevent* the River's *natural* tendency to flow into the Salton Basin.[133] In this regard, the Salton and the Mono Lake basins have striking similarities – implicating the Water Board's trust duty to ensure that appropriative rights are exercised in a manner consistent with the Public Trust Doctrine. In 1940, the California's Division of Water Rights, the predecessor to the Water Board, granted Los Angeles appropriative rights to almost the entire flow of Mono Lake's tributaries.[134] In 1970, Los Angeles attempted to exercise those rights by taking virtually all the flow from four of five

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[130] See, e.g., IID Exhibit 31: SWRCB Order 84-12, at fn. 1 (stating that the Salton Sea is not a Public Trust Doctrine resource "since the Sea was not created until 1905"); IID Exhibit 55, *supra*, at pp. 2-50 (stating that the Salton Sea "is an agricultural drainage repository that has no legal entitlement to Colorado River water") and 3.2-62; IID Exhibit 56: Draft Program Environmental Impact Report for Implementation of the Colorado River Quantification Settlement Agreement, State Clearinghouse No. 200061034, Jan. 2002, at p. 3.2-38 (same).

[131] See Part II.B, *supra*.

[132] See discussion at note 46, *supra*.

[133] See Parts II.B & II.D, *supra*.

[134] See *National Audubon, supra*, 33 Cal.3d at p. 424.

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streams feeding Mono Lake.[135] On these facts, in the *National Audubon* decision, the California Supreme Court held that Los Angeles could appropriate water from Mono Lake's source streams under its appropriative rights, but only to the extent of avoiding unreasonable impacts to Mono Lake's Public Trust Doctrine purposes:

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.[136]

The present case is no different. In 1928, physical "improvements" to the Colorado River – including Hoover Dam – were undertaken that fundamentally altered the hydrology of the lower Colorado River, with one of the express purposes being to cut off the Salton Sea from its historic source of replenishing flows.[137] Now the major California benefactor of those "improvements" – IID and Imperial Valley irrigators – seek to put the Salton Sea's source waters to purely consumptive, out-of-basin, urban uses and to ignore the resulting impacts to the Sea's Public Trust Doctrine purposes.

There is no question that the Water Board has plenary authority to review and make adjustments to IID's appropriation of Colorado River water – that is the fundamental nature of this very proceeding. Now, in weighing IID's current water rights and deciding whether and how much of IID's appropriative right may be transferred to San Diego for the next seventy-five years, the Water Board is bound by its Public Trust Doctrine duties, as expressed in the *National Audubon* case, to ensure that the transfer is consistent with the Salton Sea's current needs.[138] So long as IID continues to appropriate the Salton Sea's source waters under the State's authority, that appropriation is fully subject to the Water Board's paramount duty to ensure that the State's Public Trust Doctrine resources, in the form of the Salton Sea, are adequately protected.

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[135] See *National Audubon, supra,* 33 Cal.3d at p. 424.

[136] *National Audubon, supra,* 33 Cal.3d at p. 447.

[137] See Part II.D, *supra*.

[138] *National Audubon, supra,* 33 Cal.3d at p. 447.

B. THE BOARD LACKS CREDIBLE EVIDENCE UPON WHICH TO MAKE A REASONED FINDING THAT THE PROPOSED TRANSFER WILL NOT HAVE UNREASONABLE IMPACTS ON FISH, WILDLIFE OR OTHER BENEFICIAL INSTREAM USES

Beyond the Public Trust Doctrine status of the Salton Sea, the Water Board may only approve the proposed water transfer if it finds that the proposed project "would not unreasonably affect fish, wildlife, or other instream beneficial uses."[139] As the following discussion demonstrates, the Water Board cannot make this required finding because the evidence that has been submitted regarding the proposed project's impacts to wildlife, and mitigation measures to avoid or reduce those impacts, is fundamentally flawed. Until the Water Transfer EIR/EIS and proposed HCP are updated to at least address the deficiencies identified below, the Water Board has no credible evidence upon which it can make a reasoned determination that the proposed transfer of 200,000 acre feet per year to SDCWA will not have unreasonable impacts on fish, wildlife or other instream beneficial uses.

1. Failure to use the Existing Environmental Setting as the Baseline For Analysis of the Proposed Transfer's Potentially Significant Impacts Precludes a Finding that Impacts to Fish, Wildlife and Beneficial Instream Uses Will Not Be Unreasonable

CEQA requires a lead agency to prepare an EIR for any project that it proposes to carry out or approve that may have a significant effect on the environment.[140] CEQA requires inclusion of a detailed statement in the EIR setting forth "[a]ll significant effects on the environment of the proposed project."[141] CEQA defines the "environment" of a project to be "the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance."[142] The CEQA Guidelines require an EIR to include "a description of the physical environmental conditions in the vicinity of the project, *as they exist at the time the notice of*

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[139] Water Code, § 1736.

[140] Pub. Resources Code, § 21100, subd. (a).

[141] Pub. Resources Code, § 2110, subd. (b)(1).

[142] Pub. Resources Code, § 21060.5.

preparation is published."[143] The CEQA Guidelines further explain that "[t]his environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."[144]

The Water Transfer EIR/EIS' methodology is in fundamental conflict with CEQA.[145] The Water Transfer EIR/EIS fails to use the *existing* environmental setting as the statutorily mandated baseline for environmental review.[146] Instead, the Water Transfer EIR/EIS analyzes the impacts of the proposed project and its alternatives relative to the conditions that might (or might not) occur in 75 years, as predicted by the Salton Sea Accounting Model.[147] The environmental analysis in the Water Transfer EIR/EIS is inadequate as a matter of law because it does not disclose "the impacts of the project on *the environment*, defined as the *existing* physical conditions in the affected area."[148]

Beyond these fundamental legal deficiencies, the Water Transfer EIR/EIS' methodology makes it factually impossible for the Water Board to rationally evaluate the significance of the proposed project's impacts on fish, wildlife and other instream beneficial uses. The Water Board

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[143] The Guidelines for the Implementation of the California Environmental Quality Act, Cal. Code Regs., tit. 14, § 15125, subd. (a) ("CEQA Guidelines") (emphasis added); see *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 126 (holding that the better approach is to determine baseline conditions as of the time environmental review is begun); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955 ("[a]n EIR must focus on impacts to the existing environment, not hypothetical situations"); *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354 (holding that CEQA is concerned with "the impacts of the project on the environment, defined as the existing physical conditions in the affected area").

[144] CEQA Guidelines, § 15125, subd. (a).

[145] Audubon Exhibit 18, *supra*, at pp. 3-6.

[146] Audubon Exhibit 18, *supra*, at pp. 3-6.

[147] IID Exhibit 55, *supra*, at pp. 3.1-98 to 3.1-101 (confirming that the Salton Sea Accounting Model was used to predict hydrological responses, and briefly explaining what models were run), pp. 3.2-100 to 3.2-102 (confirming that the same models used for analyzing hydrologic response provide the basis for predicting impacts to biological resources), and Appendix F (describing the methodology and assumptions used in constructing and running the Salton Sea Accounting Model).

[148] *Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354 (emphasis added).

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cannot make any reasoned determination regarding the proposed project's impacts on these resources as they exist today because the Water Transfer EIR/EIS simply does not analyze or disclose such impacts, or feasible mitigation measure or alternatives to reduce or avoid those impacts. Instead, the Water Transfer EIR/EIS illegally relies on a *future*, worst-case-scenario model to presume that the proposed project will have little or no impacts on a pretend, future Salton Sea that is devoid of fish or wildlife.[149]

Put bluntly, the "evidence" in the record regarding the project's environmental impacts is wishful speculation wrapped in the shroud of a computer model to give the appearance of scientific validity. IID's fatalistic predictions that may never come to be are not a reasonable (or lawful) basis for the Water Transfer EIR/EIS' repeated declarations that the proposed transfer will have less than significant impacts on the *existing* Hydrology and Water Quality or on the Biological Resources of the Salton Sea.[150] In turn, it would likewise be arbitrary for the Water Board to rely on such "evidence" in making any determination about whether the water transfer would unreasonably impact fish, wildlife and other beneficial instream uses at the Salton Sea.

2. Failure to Adequately Analyze and to Develop and Adopt Feasible Mitigation Measures or Alternatives to Reduce or Avoid the Proposed Transfer's Potentially Significant Impacts Precludes a Finding that Impacts to Fish, Wildlife and Beneficial Instream Uses Will Not Be Unreasonable

CEQA requires public agencies to adopt all feasible mitigation measures or alternatives that will reduce or avoid a project's significant impacts before approving or carrying out a project that may have significant impacts on the environment.[151] The Water Transfer EIR/EIS fails to adequately evaluate many potentially-significant impacts to presently existing biological resources, including significant impacts to fish and migratory and resident bird species that

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[149] See, e.g., Salton Sea Authority Exhibit 19: Comments on DEIR/DEIS, at pp. 2-18 (memo from Law Office of J. William Yeates to Tom Kirk, dated April 11, 2002, re: IID Water Transfer HCP DEIR/DEIS – Legal Analysis / Comment (re: Baseline)).

[150] See, e.g., Salton Sea Authority Exhibit 19, *supra*, at pp. 2-18.

[151] Pub. Resources Code, § 21081, subd. (a)(1); CEQA Guidelines, § 15091, subd. (a)(1).

depend upon the Sea.[152] As the following discussion will show, the Water Transfer EIR/EIS' analysis of impacts to various biological resources, including fish and birds, is fatally flawed, leaving the Board with no credible evidence from which it might rationally characterize the proposed project's impacts to fish, wildlife and instream beneficial uses as "reasonable" or "unreasonable."

i. Inadequate Analysis of Impacts to Fish and Related Beneficial Instream Uses

The Water Transfer EIR/EIS dismisses the accelerated loss of the fishery at the Salton Sea, stating that: "Because all fish species are introduced, non-native species, the impacts are less than significant."[153] This assertion completely ignores the tremendous biological, recreational and commercial resources offered by the Salton Sea's presently existing, staggering fish populations – whether native or not.[154] It also ignores CEQA's mandate to reduce or avoid significant impacts to the *existing* environment. Despite the Water Transfer EIR/EIS' implied assertion to the contrary, CEQA's protections are not limited to native species. Because the Water Transfer EIR/EIS fails to acknowledge, at all, the clearly significant impacts that the water transfer will have on the Sea's existing fisheries, it fails to adequately evaluate feasible mitigation measures or alternatives to reduce or avoid these impacts. The Water Board, therefore, lacks adequate evidence upon which to determine that the proposed project's impacts on fish and other beneficial instream uses, such as sport fishing and commercial fisheries, will not be unreasonable. If, through *proper* environmental analysis, feasible mitigation or avoidance measures are developed and adopted, the incremental impacts caused by the Board's approval of the transfer without such measures in place would clearly be entirely unnecessary, and therefore unreasonable.

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[152] Audubon Exhibit 18, *supra*, at pp.19-25.

[153] Audubon Exhibit 18, *supra*, at p. 16, citing IID Exhibit 55, *supra*, at p. 3.2-150.

[154] See Audubon Exhibit 18, *supra*, at p. 16; see also discussion at Part II.E.2, *supra*.

In addition to its fundamental failure to acknowledge that entirely wiping out the Salton Sea's presently existing fisheries might be a "potentially significant impact" to fish, the Water Transfer EIR/EIS contains conflicting and inconsistent information about impacts that must be clarified before any finding can be made by the Board as to whether impacts to fish are not unreasonable. For example, the Water Transfer EIR/EIS inconsistently addresses the salinity tolerance of tilapia, at one point suggesting that tilapia can be expected to survive in the Salton Sea until its salinity reaches 120 g/L, while later suggesting that the loss of the tilapia fishery will occur at or near 60 g/L, and that the loss of all fish could occur at about 80 g/L.[155] And, even if these conflicting numbers can be reconciled, the use of such "bright-line" salinity thresholds as stark determinants of species' viability ignores the absence of empirical evidence of any such "rigid" salinity thresholds. In fact, the best available evidence to the Water Board suggests that population abundance or productivity would be expected to change continuously in response to increases in salinity, with more rapid shifts in salinity – such as those induced by the proposed by the project – having more significant impacts than gradual shifts that might allow for some degree of acclimation and adaptation.[156]

As another example, the Water Transfer EIR/EIS also fails to adequately account for the proposed project's potential to exacerbate documented temperature fluctuations at the Sea.[157] Tilapia are sensitive to water temperatures below 55° F and are subject to large-scale die-offs in the cold winter months.[158] High summer temperatures can exacerbate algal blooms that reduce the availability of oxygen in the Sea. Wind-generated mixing of anoxic bottom waters can also

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[155] Audubon Exhibit 18, *supra*, at p. 17, comparing IID Exhibit 55, *supra*, at p. 2-5, with p. 3.2-147.

[156] Audubon Exhibit 18, *supra*, at p. 17, citing Hurlbert, S. H., *Salinity thresholds, lake size, and history: a critique of the NAS and CORI reports on Mono Lake* (1991) Bulletin of the Southern California Academy of Science 90: 41-57.

[157] Audubon Exhibit 18, *supra*, at p. 18.

[158] Audubon Exhibit 18, *supra*, at p. 18.

increase mortality rates.[159] In fact, such temperature-driven mortality potentially could exceed losses due to the rise in salinity.[160]

Until the factual inconsistencies and gaps in analysis contained in the Water Transfer EIR/EIS regarding impacts to fish and related instream beneficial uses, as exemplified above, are analyzed and all feasible mitigation measures or alternatives are incorporated into the project, the Water Board cannot rationally make a determination that impacts to fish and instream beneficial uses are not unreasonable.

ii. Inadequate Analysis of Impacts to Birds and Related Beneficial Instream Uses

While the Water Transfer EIR/EIS' analysis of impacts to birds is marginally better than its fisheries analysis – at least acknowledging, in some instances, that the transfer may have some impacts to birds – there are still significant gaps in its analysis that impair the Water Board's ability to make reasoned findings regarding whether such impacts are "reasonable" or "unreasonable." Examples of shortcomings in the EIR/EIS that must be addressed before the Board makes any such determination include, but are not limited to, the following points:

Shorebird counts at the Salton Sea exceed 78,000 individuals in fall, 68,000 in spring, and 27,000 in winter, with large numbers of black-necked stilts, American avocets, western sandpipers, and dowitcher species reported.[161] These shorebirds are concentrated primarily on unvegetated beaches and alkali flats along the Sea's south shoreline.[162] The Water Transfer EIR/EIS reports that such unvegetated areas constitute 25% of the adjacent wetlands at the Salton

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[159] Audubon Exhibit 18, *supra*, at p. 18.

[160] Audubon Exhibit 18, *supra*, at p. 18.

[161] Audubon Exhibit 18, *supra*, at p. 19, citing Shuford, W. D. et al., *Patterns of shorebird use of the Salton Sea and adjacent Imperial Valley, California* in Studies in Avian Biology (2002) (forthcoming).

[162] Audubon Exhibit 18, *supra*, at p. 19, citing Shuford, W. D., et al., *Patterns of shorebird use of the Salton Sea and adjacent Imperial Valley, California* in Studies in Avian Biology (2002) (forthcoming).

Sea, yet fails to quantify the loss of such habitat due to the projected decline in the Sea's elevation, or assess how the loss of such habitat might impact shorebirds.[163]

The Salton Sea provides valuable habitat for a significant percentage of the North American population of white pelicans, as well as other special status fish-eating birds.[164] As already noted, the proposed project would greatly accelerate the loss of the Salton Sea's fishery, destroying important habitat and resulting in illegal take of these birds.[165] The Water Transfer EIR/EIS fails to adequately evaluate this potential loss of habitat in light of the cumulative effects of the elimination of more than 90% of California's historic wetlands.[166]

The Water Transfer EIR/EIS assumes that water conservation actions taken in the agricultural fields will not significantly impact species because agricultural habitat is abundant, despite the fact that the proposed project could reduce the amount of available agricultural habitat by approximately 15%.[167] The Water Transfer EIR/EIS fails to adequately evaluate or mitigate the loss of avian nesting habitat and food supply, and it also fails to justify its finding that this substantial reduction in available habitat is "less than significant."

As with its deficient analysis of impacts to fish, the above examples demonstrate that there are many gaps and logical inconsistencies in the Water Transfer EIR/EIS' analysis of impacts to birds that must be addressed before the Water Board has credible evidence upon which it can rationally determine the reasonableness of the proposed project's impacts on birds.

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[163] Audubon Exhibit 18, *supra*, at p. 19, citing IID Exhibit 55, *supra*, at Append. C, p. 2-43.

[164] Audubon Exhibit 18, *supra*, at p. 19.

[165] Audubon Exhibit 18, *supra*, at p. 19.

[166] Audubon Exhibit 18, *supra*, at p. 19.

[167] Audubon Exhibit 18, *supra*, at pp. 21-22.

3. Failure to Adequately Analyze and to Develop and Adopt Feasible Mitigation Measures or Alternatives to Reduce or Avoid the Proposed Transfer's Potentially Significant Out-of-Basin Impacts to Fish, Wildlife and Instream Beneficial Uses Precludes a Finding that Impacts to Such Resources Will Not Be Unreasonable

In determining whether a project may have a significant impact on the environment, CEQA requires a lead agency to consider reasonably foreseeable indirect impacts.[168] A project's potential for inducing growth is a specific environmental consideration that must be addressed and analyzed in an EIR pursuant to California state law (CEQA) and in an EIS pursuant to federal law (NEPA).[169]

Although the Water Transfer EIR/EIS includes the SDCWA service area within the region of the proposed project's influence, it incorrectly finds no growth-inducing impacts, claiming that the project would only provide SDCWA the same amount of water it currently receives.[170] This statement sorely mischaracterizes the nature of the water right to be exercised by SDCWA under the transfer, and therefore the project's resultant implications for growth in the San Diego area: the transfer provides *senior* rights to a new and expanded supply of 200,000 and potentially 300,000 acre-feet of water independent of the Metropolitan Water District, and to which San Diego County would not otherwise have *guaranteed* access.[171] To the extent that the water transfer will provide 75 years of guaranteed senior water rights – where comparable,

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[168] Audubon Exhibit 18, *supra*, at p. 40, citing CEQA Guidelines § 15064, subd. (d)(3).

[169] Pub. Resources Code, § 21100; CEQA Guidelines §§ 15126, subd. (d) and 15126.2, subd. (d); 40 C.F.R. §§ 1500.2(f), 1502.14(f), 1502.16(a), (b) and (h), 1508.8(b), and 1508.20 (2001). See, e.g., *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144 (negative declaration for a golf course rejected by court where substantial evidence supported a fair argument that the project would induce residential growth, even though area was not currently designated for residential development); *City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325 (construction of sewer lines and road on undeveloped property required preparation of an EIR even though no specific development proposal for site had been submitted because "[c]onstruction of the road way and utilities cannot be considered in isolation from the development it presages."). See also Audubon Exhibit 18, *supra*, at pp. 36-56 (discussing EIR/EIS' failure to adequately evaluate growth-inducing impacts of proposed project).

[170] Audubon Exhibit 18, *supra*, at p. 37, comparing IID Exhibit 55, *supra*, at § 1.0, p. 1-14 with § 3.0, p. 3.0-2 and Table 3-1, pp. 3.0-5 to 3.0-7.

[171] Audubon Exhibit 18, *supra*, at pp. 36-56.

contemporary water deliveries are presently *contingent* upon excess availability from MWD's junior appropriation – the proposed water transfer will provide SDCWA with hard water rights that do not presently exist for new development, and will therefore have clear growth-inducing impacts within the SDCWA service area.[172]

The EIR/EIS' claim is also fundamentally inconsistent with SDCWA's express stated purpose for seeking access to, and willingness to pay a premium for, IID's senior rights in the Colorado River's waters: "SDCWA seeks to acquire an independent, reliable alternate long-term water supply . . . to accommodate . . . *projected* demand for municipal, domestic, and agricultural water uses."[173] One must query *why* would San Diego be willing to pay IID a premium for water that it – supposedly – already has? The answer: having *assurances* of future delivery - which San Diego does not presently have in its contingent agreements with MWD - is critical for projected growth to go forward in the San Diego area, even if the amount of water supplied to the region in normal years remains consistent with present deliveries under SDCWA's present, contingent agreement with MWD.

Streams, riparian corridors, and other waterways are among the habitats that will likely be affected by the water transfer's growth inducing impacts in SDCWA's service area. Sprawl development is the leading cause of species imperilment in California.[174] The principal causes of species endangerment are the direct removal of habitat and fragmentation of remaining habitat areas into smaller and more isolated areas.[175] Losses of habitat result in decreases in total

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[172] Audubon Exhibit 18, *supra*, at p. 37.

[173] Audubon Exhibit 18, *supra*, at pp. 38-39, citing 64 Fed.Reg. 52103 (Sept. 27, 1999) (emphasis added); see also San Diego County Water Authority, *Water Transfer Update* (Issue #11, July 1997) <http://www.sdcwa.org/news/wtu-070097.phtml> [as of July 3, 2002] ("A water transfer agreement with [IID] will give the San Diego region a reliable new water supply, which is essential to our economy and quality of life").

[174] Audubon Exhibit 18, *supra*, at p. 54, citing *Paving Paradise: Sprawl's Impact on Wildlife and Wild Places in California*, National Wildlife Federation, February 2001 (Outranking all other factors, sprawl imperils 188 of the 286 California species listed as threatened or endangered under the federal Endangered Species Act).

[175] Audubon Exhibit 18, *supra*, at p. 51, citing Noss, R. F. et al., The Science of Conservation Planning: Habitat Conservation under the Endangered Species Act (1997); Flather, C. H. et al., *Threatened and endangered species geography: characteristics of hot spots in the coterminous*

population size of species, leaving the remaining individuals at a greater risk of local extinction due to stochastic events (e.g., fire, weather patterns, disease outbreaks) and adverse genetic effects from inbreeding.[176] Aside from the direct removal of natural habitats, development produces a variety of indirect impacts to remaining habitats, including the fragmentation of existing habitat areas into smaller patches, adversely impacting the remaining natural open spaces.[177] Other indirect impacts include increases in lights and noise, exotic plant and animal species invasions, increased mortality from road kill, changes in fire cycles, disturbance of vegetation by foot and vehicle traffic, changes in hydrology and storm water runoff quality.[178] The long-term adverse effects of the majority of these indirect impacts are not fully understood but it is clear that they can severely degrade the quality of habitats – including streams, riparian corridors, and other waterways – that are not directly impacted by development.[179]

To date, no qualitative or quantitative evidence has been presented to the Water Board to describe the potentially significant impacts that the proposed water transfer may have on fish, wildlife and instream beneficial uses in the SDCWA service area.[180] Nor has there been any

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United States (1998) BioScience 48: 365-376; Stein, B.A. et al., eds., Precious heritage: the status of biodiversity in the United States (2000); Czech, B. et al., *Economic associations among causes of species endangerment in the United States* (2000) BioScience 46.

[176] Audubon Exhibit 18, *supra*, at p. 51.

[177] Audubon Exhibit 18, *supra*, at p. 51, citing Lovejoy et al., *Edge and other effects of isolation on Amazon forest fragments* in Conservation biology: the science of scarcity and diversity (Soulé, M. E. edit., 1986) pp. 257-285; Sunderland et al., *Changes in wildlife communities near edges* (1988) Conservation Biology 2:33-339.

[178] Audubon Exhibit 18, *supra*, at pp. 51-52.

[179] Audubon Exhibit 18, *supra*, at p. 52.

[180] Audubon and other environmental groups have, however, submitted evidence that the San Diego area is a biodiversity "hotspot" for imperiled species. (Audubon Exhibit 18, *supra*, at p. 37, fn. 124 ["The Nature Conservancy and the Association for Biodiversity Information have designated much of the SDCWA service area as one of the six greatest hotspots for imperiled species in the U.S., supporting at least 138 endemic species and 158 imperiled species. Habitat loss and fragmentation, due to residential and urban development, are principal causes of species endangerment. The National Wildlife Federation's *Paving Paradise: Sprawl's Impact on Wildlife and Wild Places in California* (Feb. 2001) found that urban sprawl is the leading cause of species endangerment in California. The proposed water transfer would enable the continued urbanization of the SDCWA service area and the destruction of a large proportion of the remaining native habitat in the area"].)

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analysis of feasible mitigation measures or alternatives to reduce or avoid such out-of-basin impacts to fish, wildlife and instream beneficial uses. The Water Transfer EIR/EIS blithely states – in the face of SDCWA's declaration that the project's express purpose is to supply water for "projected" (not "existing") demand in its service area – that no out-of-basin growth inducing impacts exist. The proposed HCP for the project is silent with regard to mitigating or avoiding growth inducing impacts to out-of-basin, special-status fish and wildlife and related beneficial instream uses. The Water Board cannot approve the project, because it simply has no evidence upon which it can rationally determine whether potential impacts to fish, wildlife and other instream beneficial uses in the SDCWA service area are "reasonable" or "unreasonable."

4. Failure to Meet the Requirements for Issuance of Incidental Take Permits under the State and Federal Endangered Species Acts Precludes a Finding that Impacts to Special-Status Fish, Wildlife and Related Beneficial Instream Uses Will Not Be Unreasonable

In addition to the legal and factual errors and shortcomings of the environmental analysis in the Water Transfer EIR/EIS, the proposed HCP for the project fails to adequately meet legal standards for the issuance of state or federal incidental take permits for the project. Because a legally valid HCP has yet to be proposed for the project, the Water Board again lacks any credible evidence upon which it might make a reasoned finding that the project will not have unreasonable impacts on special-status fish and wildlife and related instream beneficial uses that support such special-status species.

i. The Habitat Mitigation Strategies Called For in the Draft HCP Fail to Meet the Requirements for Issuance of an Incidental Take Permit under State Law, and Have Otherwise Been Deemed Inadequate by the California Department of Fish and Game

Under the California Endangered Species Act ("CESA"), state agencies must consider reasonable and prudent alternatives before approving projects which, as proposed, "would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species."[181] CESA authorizes the Department of Fish and Game ("CDFG") to issue an incidental

[181] Fish and G. Code, § 2053.

take permit for state-listed species 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 CDFG 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.[182]

In order to meet these standards, the Water Transfer EIR/EIS proposes an HCP as the core mitigation strategy for potentially significant impacts of the proposed water transfer to state listed species. The draft HCP proposes two approaches.[183] The first, entitled "Hatchery and Habitat Replacement," involves breeding hatchery fish and stocking them in 5,000 acres of fish ponds when the Salton Sea becomes too saline to support reproduction of its resident fish populations.[184] The second approach, discussed more briefly than the first, focuses on fallowing to offset changes in inflow to the Sea.[185]

The proposed HCP for the water transfer fails to meet the statutory requirements for issuance of an incidental take permit under state law. In particular, CDFG has expressly stated that it will not approve the HCP's primary, fish-pond mitigation strategy (Approach 1).[186]

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[182] Fish and G. Code, § 2081.

[183] IID Exhibit 55, *supra*, at Append. C, pp. 3-24 to 3-26. Although the Final EIR/EIS states that Approach 1 has been removed from consideration (p. 3-35), discussion of it remains relevant until the proposed project is approved without Approach 1's inclusion. The Final EIR/EIS' Salton Sea Habitat Conservation Strategy sets forth an expanded version of Approach 2 dependent on fallowing (Master Response 3.5), yet fails to address the fact that fallowing is currently illegal as well as counter to IID's contract with SDCWA.

[184] IID Exhibit 55, *supra*, at Append. C, pp. 3-24 to 3-25.

[185] IID Exhibit 55, *supra*, at Append. C, pp. 3-25 to 3-26. (although four other mitigation approaches were initially considered, all were rejected for reasons of excessive cost or insufficient detail).

[186] Audubon Exhibit 18, *supra*, at p. 57; SDCWA Exhibit 60: Memo from California Department of Fish and Game, dated 5/29/02. The Final EIR/EIS notes that FWS also disapproved the fish-pond mitigation strategy (Approach 1). (Final EIR/EIS at p. 3-35.) The HCP was revised in the Final EIR/EIS to eliminate Approach 1.

While acknowledging CDFG's rejection of Approach 1 in its rebuttal testimony before the board, SDCWA has now asserted that implementation of Approach 2 (fallowing) could satisfy CDFG's concerns as to the HCP's legal adequacy.[187] Under the current formulation of California's Water Code, however, *permanent* fallowing does not qualify as a recognized "water conservation effort," thus opening IID's conserved water to challenges of forfeiture to the next most senior appropriator, thereby making it unavailable for transfer or mitigation.[188] And, while *temporary* fallowing is an authorized "water conservation effort" under the statute, an HCP relying only on temporary measures clearly cannot meet section 2081's requirements of "fully mitigat[ing]" impacts to wildlife or being "capable of successful implementation."

Additionally, and perhaps more importantly, the 1998 "Agreement for Transfer of Conserved Water" between IID and SDCWA explicitly forbids fallowing, stating that "fallowing will not be a permitted Water Conservation effort under [IID's] contracts with its Contracting Landowners."[189] In other words, Approach 2 relies on a mitigation method which the lead agency, IID, cannot implement because it is forbidden by the transfer agreement's express terms from entering water delivery contracts that call for fallowing.

Finally, even if California law and the agreement between IID and SDCWA were amended to allow long-term fallowing to offset impacts to beneficial instream wildlife uses, the impacts of implementing fallowing to special-status fish and wildlife species and related beneficial instream uses are not adequately analyzed in the Water Transfer EIR/EIS for all of the

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[187] SDCWA Exhibit 47: Outline of Supplemental Expert Testimony of Maureen Stapleton (for Rebuttal Case), at p. 9.

[188] Water Code, § 1011, subd. (a).

[189] IID Exhibit 7: Agreement for Transfer of Conserved Water by and between Imperial Irrigation District and San Diego County Water Authority dated April 29, 1998, at p. 58. ("Contracting Landowners defined at p. 5 as "A landowner that has contracted with the IID to undertake Water Conservation efforts and reduce its use of Colorado River water;" "Water Conservation" defined at p. 13 "As defined in § 1011(a) of the California Water Code, as in effect on the Execution Date").

reasons already stated in this Brief.[190] Since the proposed HCP relies on the deficient Water Transfer EIR/EIS to identify the potentially significant impacts to special-status fish and wildlife species that must be "fully mitigated" prior to the issuance of a state incidental take permit, CDFG lacks credible evidence upon which it can make a rational determination of whether the project's impact have, in fact, been "fully mitigated" by the proposed HCP. For the same reason, the Water Board cannot rationally find that the project's impacts to special-status fish and wildlife, and supporting beneficial instream uses would not be unreasonable.

In summary, IID has proposed two approaches for "fully mitigat[ing]" the transfers impacts on California's special-status fish and wildlife species.[191] CDFG has flatly vetoed Approach 1. Approach 2 is not capable of successful implementation because its mitigation strategy – fallowing – is presently foreclosed by the Water Code and by the express terms of IID and SDCWA's Water Transfer Agreement.[192] Having been presented with an HCP for the water transfer that contains no viable option for complying with the Fish and Game Code's mandate that impacts to special-status species be "fully mitigated," the Water Board has no credible evidence upon which to make a reasoned determination that impacts to special status fish, wildlife and related beneficial instream uses will not be unreasonable.[193]

ii. The Habitat Mitigation Strategies Called for in the Draft HCP Fail to Meet the Requirements for Issuance of an Incidental Take Permit under Federal Law

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

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[190] See Parts IV.B.1, IV.B.2 and IV.B.3, *supra*. See also Audubon Exhibit 18, *supra*, at pp. 56-62.

[191] IID Exhibit 55, *supra*, at Append. C, pp. 3-24 to 3-26.

[192] SDCWA Exhibit 60: Memo from California Department of Fish and Game, dated 5/29/02; Water Code § 1011, subd. (a); IID Exhibit 7, *supra*, at p. 58.

[193] Fish and G. Code, § 2081, subd. (b)(2).

reduce the likelihood of the survival and recovery of the species in the wild; (d) any other measures FWS has required as necessary or appropriate will be met; and (e) FWS has received such other assurances as required to ensure that the plan will be implemented."[194] In approving an HCP, FWS must also engage in internal consultation under Section 7 of the ESA to ensure that its action of approving the HCP will avoid adverse modification or destruction of critical habitat and avoid jeopardy to listed plants.[195] In conducting this evaluation, FWS must also consider the cumulative impacts of the issue of the ITP on listed species.[196]

In making its "no jeopardy" determinations under ESA sections 10 and 7, FWS must issue a biological opinion ("BO"), a document stating FWS' opinion as to whether the proposed project "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."[197] The outcome of the BO determines whether FWS will issue a Section 10 permit.[198] In performing its analysis FWS must use the best available scientific and commercial information.[199] "[T]he law establishes that FWS cannot comply with the strict ESA mandate that the HCP 'minimize and mitigate' the effects of the projects to the 'maximum extent practicable' simply by relying on speculative future actions by others."[200] The FWS Habitat Conservation Planning Handbook ("HCP Handbook") states that the project applicant should include in an HCP all actions that (1) are likely to result in incidental

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[194] 16 U.S.C. § 1539(a)(2)(B); *National Wildlife Federation v. Babbitt*, (E.D. Cal. 2000) 128 F.Supp.2d 1274.

[195] 16 U.S.C. § 1536(a)(2).

[196] 40 C.F.R. § 1508.27(b)(7) (2001).

[197] 50 C.F.R. § 402.02 (2001).

[198] 50 C.F.R. § 402.14(h) (2001).

[199] 16 U.S.C. § 1536(a)(2).

[200] Audubon Exhibit 18, *supra*, at p. 59, citing *Sierra Club v. Babbitt* (S.D. Ala. 1998) 15 F.Supp.2d 1274, 1282; see also *National Wildlife Federation v. Babbitt* (E.D. Cal. 2000) 128 F.Supp.2d 1274 (discusses strict requirements for establishing that a project fulfills mitigation requirements under ESA).

take; (2) are reasonably certain to occur over the life of the permit; and (3) over which the applicant has some form of control.[201]

For all of the same reasons that an incidental take permit cannot be issued under state law – including, but not limited to, the rejection of Approach 1 as a viable mitigation strategy, and the lack of authority to ensure implementation of Approach 2 – the findings necessary to issue a federal ITP simply cannot be made based on the information presently available to FWS in the Water Transfer EIR/EIS and HCP.[202] In addition, the Water Transfer EIR/EIS contains several misstatements regarding the level of coverage afforded by the 2001 BO.[203] This BO covers the Interim Surplus Guidelines and the change in point of diversion of up to 400,000 acre feet per year of the Colorado River's waters.[204] Contrary to several statements in the EIR/EIS, mitigation for impacts to biological resources and cumulative impacts identified within the BO is not as extensive as claimed.[205] For example, the BO does not provide ESA compliance for the aggregate Lower Colorado River ("LCR") impacts of the proposed project.[206] The application of the BO is likewise extended to supposedly mitigate cumulative impacts on the LCR from *all related projects*.[207] There is no study of the cumulative impacts to biological resources on the LCR, however, rendering it impossible to justify the assertion that the BO will mitigate those impacts.[208]

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[201] Audubon Exhibit 18, *supra*, at p. 57, citing U.S. Fish and Wildlife Service Habitat Conservation Planning Handbook (1996) at 3-12.

[202] See Part IV.B.1, *supra*.

[203] Audubon Exhibit 18, *supra*, at p. 27.

[204] Audubon Exhibit 18, *supra*, at p. 27.

[205] Audubon Exhibit 18, *supra*, at p. 27.

[206] Audubon Exhibit 18, *supra*, at p. 27, citing IID Exhibit 55, *supra*, at p. 5-21.

[207] Audubon Exhibit 18, *supra*, at p. 28, citing IID Exhibit 55, *supra*, at p. 5-34.

[208] *See* Audubon Exhibit 18, *supra* at p. 28.

5. Take of Salton Sea Species Designated as "Fully Protected" is Categorically Prohibited by Law, Precluding a Finding that the Transfer's Impacts to Such Species are Not Unreasonable

California's "fish and wildlife resources are held in trust for the people of the state by and through [CDFG]."[209] Under state law "it is unlawful to take any bird, mammal, fish, reptile, or amphibian except as provided in [the Fish and Game Code] or regulations made pursuant thereto."[210] The Fish and Game Code designates several species of birds as "fully protected" and explains that "[f]ully protected birds or parts thereof may not be taken or possessed at any time and *no provision of this code or any other law* shall be construed to authorize the issuance of permits or licenses to take any fully protected bird and no such permits or licenses heretofore issued shall have any force or effect for any such purpose."[211] Similar sections exist prohibiting the take of fully protected mammals, fish, and amphibians.[212]

Nine out of the thirteen (69%) bird species listed in the Fish and Game Code as "fully protected" (brown pelican, greater sandhill crane, Yuma clapper rail, California black rail, golden eagle, white-tailed kite, American peregrine falcon, southern bald eagle, and California least tern) are illegally enumerated as species covered by the proposed HCP.[213] At least four of these species (brown pelican, greater sandhill crane, Yuma clapper rail, and California black rail) are documented to actually exist at the Salton Sea.[214] As a result of their fully protected status these species simply cannot be subjects of "take" under a § 2081 permit or under *any* other state law.[215] Both the EIR/EIS and the proposed HCP include sections expressly acknowledging the prohibitions of California's fully protected species statutes, but then inexplicably go on to

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[209] Fish and G. Code, § 711.7, subd. (a).

[210] Fish and G. Code, § 2000.

[211] Fish and G. Code, § 3511 (emphasis added).

[212] Fish and G. Code, §§ 4700, 5050, and 5515.

[213] Fish and G. Code, § 3511; IID Exhibit 55, *supra*, at Appendix C, Table 1.5-1, pp. 1-10 to 1-12.

[214] Audubon Exhibit 13, *supra*, at Table 3-1.

[215] Fish and G. Code, § 3511, subd. (b), (c) and (m); Audubon Exhibit 13, *supra*, at Table 3-1.

include these fully protected species in tables of species to be "taken" in the course of the proposed project.[216]

In short the Water Transfer EIR/EIS and HCP expressly propose to violate state law by illegally "permitting" the take of species that have been designated as "fully protected." The Water Board cannot rationally find that impacts to fully protected wildlife and related beneficial instream uses are not unreasonable, where take of such species is categorically prohibited, despite the issuance of a permit under Fish and Game Code section 2081 or any other law.

C. INFORMATION CONTAINED IN THE FINAL EIR/EIS DOES NOT ALLOW THE BOARD TO FIND THAT IMPACTS TO FISH, WILDLIFE AND BENEFICIAL INSTREAM USES WILL NOT BE UNREASONABLE

Upon an initial review of the Final EIR/EIS for the water transfer project and cross-examination of IID's expert witnesses at the Water Board's July 8, 2002 hearing, it is apparent that the fundamental problems previously identified in Parts B.1, B.2 and B.3 of this Brief regarding the Water Transfer DEIR/DEIS have not been adequately addressed. In addition, substantial revisions to the project, in the form of new mitigation measures and a re-written HCP, require recirculation to the public for review and comment before the project can be approved. As explained below, these issues indicate that the Board still lacks credible evidence upon which it can rationally determine whether the project's impacts to fish, wildlife and beneficial instream uses will be unreasonable.

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[216] IID Exhibit 55, *supra*, at pp. 3.2-13, 3.2-20 to 3.2-21, 3.2-53 to 3.2-58, Appendix C, pp. 1-10 to 1-12, and p. 1-59 (EIR/EIS Table 3.2-14 at p. 3.2-57 notes species' fully protected status in a column with notations of special concern status instead of in the state and federal status columns, then adds a footnote explaining that "Federal and state status have legal consequence. CDFG:SC (California Department of Fish and Game, Species of Concern) is assigned for information only." By excluding fully protected status from the "State Status" column, this table and its footnote fail to acknowledge that fully protected status does indeed "have legal consequence").

1. The Final EIR/EIS Fails to Remedy the Water Transfer DEIR/DEIS' Improper Baseline

Upon a cursory review of the Final EIR/EIS, it appears that IID has attempted to justify its improper conflation of the baseline with the No Project Alternative by invoking CEQA and NEPA's general provisions that environmental analysis need not identify or mitigate impacts that are unrelated to the proposed project.[217] Unfortunately, the law cited in the Final EIR/EIS and principals espoused by IID do not allow the adoption of a future baseline, especially where the only purpose is to minimize the appearance of the project's actual impacts by concocting a projected condition of total environmental degradation. If such tactics were allowable, every project proponent would demand the right to forecast non-project impacts into the future to avoid responsibility for their project's contribution to environmental degradation: residential developers would project future conditions of general traffic gridlock, water shortages and overflowing sewers without their project to find their project has no significant impacts to traffic, water supplies or drainage; industrial developers would project future conditions of generally polluted skies and impaired waterways without their project to find their project has no significant impacts to air or water quality.

IID, in the Water Transfer EIR/EIS, would have the Board entertain such a ruse as well: "In the case of the Salton Sea analysis set forth in the Draft EIR/EIS, the projected Baseline is substantially the same as the No Project Alternative for purposes of impact analysis."[218] The CEQA Guidelines, however, make clear that unless the existing physical environment at the project site will remain *unchanged* under the No Project Alternative, a baseline representing the current project site environment must be used, so that the required No Project Alternative analysis, representing the future project site environment without the project, has meaning.[219] To

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[217] Final EIR/EIS at p. 3-17.

[218] Final EIR/EIS at p. 3-27.

[219] See, e.g., CEQA Guidelines, § 15126.6, subd. (e)(1) (requiring the inclusion of a No Project Alternative and an analysis of its impacts as compared to the existing setting, and expressly stating that "[t]he no project alternative analysis is not the baseline . . . unless it is identical to the existing environmental setting analysis which does establish that baseline").

allow IID's use of a 75-year future "baseline" impermissibly writes the requirement of a No Project Alternative *analysis* out of both CEQA and NEPA, because there can be no "analysis" of environmental impacts where the baseline and the No Project Alternative are one and the same.

The actual holding of the case law cited by IID in support of its attempt to trivialize the Water Transfer's impacts to the *existing* environment is inapposite to IID's use of a 75 year, worst-case, future baseline.[220] Despite the language that is selectively quoted in the Final EIR/EIS, the *Save Our Peninsula* court actually concluded that the *existing* environmental condition at the time that environmental review commenced was proper basis for environmental review to determine the proposed project's impacts on the existing environment, and not conditions three-and-one-half years later at the time of project approval.[221] IID, ignoring *Save Our Peninsula*'s rejection of a mere three-and-one-half year future baseline projection, has now gone to the extreme of projecting its "baseline" by *seventy-five* years, erasing all distinction between the baseline and the No Project Alternative.

Because IID's use of a 75-year, projected "baseline" has evaded disclosure of the water transfer's potentially significant impacts on the *existing*, thriving fish and wildlife communities at the Salton Sea, the Water Board has no credible evidence upon which it can make a rational determination of whether impacts to existing fish, wildlife and other instream beneficial uses will be unreasonable.

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[220] See *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99 (rejecting County's use of formulas in an EIR for establishing a baseline for water use, because such formulas were subject to manipulation to reduce the appearance of the project's actual impacts and did not otherwise accurately describe the existing environment).

[221] Final EIR/EIS at p. 3-21; *Save Our Peninsula, supra,* 87 Cal.App.4th at p. 127.

2. The Final EIR/EIS Fails to Identify a Water Source for Its New Habitat Conservation Plan

The Final EIR/EIS includes a revised HCP portion of the project to address CDFG's and FWS' rejection of Approach 1.[222] However, no feasible water source is identified in the new HCP for use in implementing the Salton Sea Habitat Conservation Strategy: "Mitigation water sources to offset Project-related inflow reductions *could* be acquired by IID by fallowing in the Imperial Valley or by using any other legally permissible water provided to IID for this purpose by other parties to the Quantification Settlement Agreement, by state or federal agencies, or by any other third parties willing to contribute to the mitigation effort, or any combination of the foregoing."[223] The one water source identified in the revised HCP, fallowing, is infeasible because it is presently foreclosed by the lead agency's own water transfer agreement with SDCWA and by California state water law.[224]

In *Stanislaus Natural Heritage Project v. County of Stanislaus*, the County of Stanislaus certified a programmatic EIR and approved a phased, 5,000-unit residential development project, but the EIR failed to disclose the source of the water to serve the project.[225] Following a trial court ruling in favor of the County's approval of the project, California's appellate court reversed, holding that a lead agency's approval of a Final EIR without identification of a water source for the project "defeated a fundamental purpose of CEQA: to 'inform the public and responsible officials of the environmental consequences of their decisions before they are made.'"[226] In reaching this decision, the *Stanislaus* court reasoned that the failure to disclose and examine the impacts of the potential water sources for the project crippled the process of

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[222] See Part IV.B.4.i, *supra*; Final EIR/EIS at p. 3-35.

[223] Final EIR/EIS at pp. 3-38 to 3-39 (emphasis added).

[224] See discussion at notes 188 and 189, *supra*.

[225] *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182.

[226] *Stanislaus Natural Heritage Project*, *supra*, 48 Cal.App.4th at p. 195, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123.

intelligent decision-making necessary to analyze the environmental consequences of the proposed project.[227]

For the same reasons cited by the *Stanislaus* court, IID's "failure to disclose and examine the impacts of the potential water source for the project" precludes the Water Board from finding that the newly proposed HCP will not result in unreasonable impacts on fish, wildlife and related beneficial instream uses.

3. IID Has Not Determined the Feasibility of the HCP Proposed by the Final EIR/EIS Making It Uncertain What Project the Water Board is Being Asked to Approve

Beyond the failure to identify a reliable source of water for its new HCP, IID as the lead agency has yet to make any feasibility findings because it has not approved any project.[228] With regard to making a determination on feasibility of the HCP for the project, however, IID is faced with an intractable dilemma: the "old" HCP cannot be found to be feasible, because it has been rejected by CDFG and FWS.[229] The "new" HCP cannot be found to be feasible because it is precluded by IID's agreement with SDCWA and by state law. Due to this dilemma, it is fundamentally uncertain what "project" is before the Board. Is it a water transfer with an HCP that has been rejected by CDFG? Or is it a water transfer with an HCP that is prohibited by contract and the state's law?

Until IID actually defines and approves a project, and makes the requisite findings of feasibility under CEQA, the Water Board lacks the necessary evidence to make a rational determination of whether the project's impacts to fish, wildlife and related beneficial instream uses will be unreasonable.[230]

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[227] *Stanislaus Natural Heritage Project, supra,* 48 Cal.App.4th at pp. 196-197, quoting *Santiago County Water Dist. V. County of Orange* (1981) 118 Cal.App.3d 818, 831.

[228] Pub. Resources Code, § 21081; CEQA Guidelines, § 15091.

[229] See Part IV.B.4.i, *supra*; Final EIR/EIS at p. 3-35.

[230] On this point, see also Part IV.D, *infra*, incorporating by reference Imperial County's preliminary brief regarding the ripeness of the IID/SDCWA petition.

4. The New Air Quality and HCP Elements of the Final EIR/EIS Must Be Recirculated for Public Review and Comment

Finally, the Water Board should not approve the proposed transfer, because significant new information has been added to the Water Transfer EIR/EIS without adequate, subsequent public review. According to *Laurel Heights Improvement Assn. v. Regents of University of California* (*Laurel Heights II*), if a lead agency adds "'significant new information' to the EIR subsequent to the close of the public comment period but *prior* to certification of the final EIR, CEQA requires that the lead agency provide a new public comment period."[231]

IID's Final EIR/EIS contains an entirely new Air Quality mitigation measure and a fundamentally revised HCP.[232] HCP Approach 1 has been dropped from consideration, and the new plan contained in the Final EIR/EIS involves using water to mitigate for the proposed project only until 2030, instead of over the life of the project.[233] At the minimum, IID, before certifying its Final EIR/EIS, should have recirculated these new measures, to allow the public – and the Water Board – the opportunity for meaningful review and comment. The interested public has been precluded a meaningful opportunity to review and comment on these substantial changes. Appropriate public review might reveal additional mitigation measures or alternatives to reduce or avoid the significant impacts raised by these substantial changes. Therefore, the Water Board cannot reasonably determine that the water transfer will not have unreasonable impacts on fish, wildlife or related beneficial instream uses.

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[231] *Laurel Heights Improvement Assn., supra*, 6 Cal.4th at pp. 1124-1125 (emphasis in original).

[232] See Final EIR/EIS at p. 3-53 (stating that the "attainment status of the Basin in 2035 cannot be ascertained; however, the Clean Air Act requires a plan for attainment well in advance of that date"). It is also interesting to note that, with regard to establishing a "baseline" for environmental analysis, the Final EIR/EIS is straightforward and even optimistic with regard to the future air quality at the Salton Sea based on existing federal law, but is not so with regard to hydrology, assuming the worst-case scenario will occur and ignoring the existence of the Clean Water Act and federal statutes mandating the investigation of restoration options for the Salton Sea. (See, e.g., discussion at note 76, *supra*.)

[233] Final EIR/EIS at pp. 3-35 to 3-39.

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D. THE IID/SDCWA WATER TRANSFER PETITION WILL NOT RIPEN FOR DECISION UNTIL IID ACTUALLY DEFINES AND APPROVES A PROJECT FOR THIS BOARD'S CONSIDERATION

On July 3, 2002, Imperial County submitted to the Water Board and served on the Parties a preliminary brief concerning the ripeness of the IID/SDCWA Water Transfer Petition. National Audubon Society – California herby adopts and incorporates by reference Imperial County's preliminary brief, and joins in requesting that the Board deny the Petition without prejudice at least until and unless IID complies with CEQA by approving a defined project for this Board's consideration.

E. INCORPORATION BY REFERENCE

National Audubon Society – California hereby adopts and incorporates by reference all policy statements, evidence, testimony, exhibits, briefs and any other communications with the Water Board, whether written or oral, offered by any identified Party to this proceeding or by any other person in opposition to approval of the IID/SDCWA Water Transfer Petition, as it is presently formulated, to the extent that these communications are not fundamentally inconsistent with Audubon's prior exhibits and testimony, and the arguments presented in this brief.

V. CONCLUSION

The Water Board cannot approve IID's proposal to transfer 200,000 acre feet per year of water to SDCWA as presently presented. The proposed transfer fails to adequately account for the Public Trust Doctrine status of the Salton Sea, and therefore to reasonably consider the impacts to public trust resources at and around the Sea. In addition, the evidence submitted to the Water Board regarding the proposed transfer's potentially significant and adverse impacts on fish, wildlife and other beneficial instream uses is fundamentally flawed. Therefore, this Board has no credible evidence to support a determination that impacts to such resources will not be unreasonable. Finally, this Board cannot properly approve the proposed transfer until IID, the CEQA lead agency for the project, actually approves a defined project for the Board's consideration.

For the foregoing reasons, National Audubon Society respectfully requests that the Water Board deny the IID/SDCWA Water Transfer petition as presently formulated unless and until 1)

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IID prepares a supplemental or subsequent EIR/EIS that properly takes into account ongoing state and federal efforts to protect and restore the Salton Sea, and that adequately addresses the long-term consequences of the proposed project on the Salton Sea's Public Trust Doctrine values and fish and wildlife resources, and 2) legislative action is taken that would allow and ensure the use of reliable mitigation measures, such as long-term fallowing, to assure adequate inflows to at least maintain – if not improve – environmental conditions at the Salton Sea.

DATE: July 11, 2002

Respectfully submitted,

LAW OFFICE OF J. WILLIAM YEATES

[original signed]

J. WILLIAM YEATES
KEITH G. WAGNER
Attorney for Participant:
NATIONAL AUDUBON SOCIETY – CALIFORNIA

CERTIFICATE OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is 8002 California Avenue, Fair Oaks, CA 95628.

On July 11, 2002, I served the following documents on all parties listed on the attached service list by method indicated.

- **CLOSING ARGUMENT / LEGAL BRIEF OF NATIONAL AUDUBON SOCIETY –CALIFORNIA**

Executed on July 11, 2002, at Fair Oaks, California.

Anna C. Hartford	[original signed]
Type or print name	Signature

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