STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of IMPERIAL IRRIGATION DISTRICT'S (IID) AND SAN DIEGO COUNTY WATER AUTHORITY'S (SDCWA) AMENDED JOINT PETITION FOR APPROVAL OF A LONG-TERM TRANSFER OF CONSERVED WATER FROM IID TO SDCWA AND TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, AND PURPOSE OF USE Under Permit 7643 on Application 7482 of Imperial Irrigation District (counsel listed on next page)	**PETITION OF IMPERIAL IRRIGATION DISTRICT FOR MODIFICATION OF REVISED WATER RIGHTS ORDER 2002-0013**

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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

PETITION FOR MODIFICATION OF REVISED WATER RIGHTS ORDER 2002-0013

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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

PETITION FOR MODIFICATION OF REVISED WATER RIGHTS ORDER 2002-0013

I. INTRODUCTION AND EXECUTIVE SUMMARY

Imperial Irrigation District ("IID") hereby petitions the State Water Resources Control Board ("SWRCB" or the "Board") to modify its Revised Order WRO 2002-0013 (the "2002 Order")[1] in a manner that, as described more fully below, will hold the State of California to its obligation to restore the Salton Sea. The State of California faces a looming environmental and public-health crisis at the Sea that, unless checked, will cause significant damage to the residents and the economy of the Imperial and Coachella valleys and will threaten one of the State's most important environmental resources.

This threat is exacerbated by the current drought, which is one of the most severe and prolonged in California's recent history. The drought not only has placed significant strain on California's water supply for agricultural, urban, and industrial uses, but also poses a major threat to public health and to the environment, including fish and wildlife. It is incumbent upon all water users in the State to work collaboratively to find solutions that ensure that California's limited water supplies are used efficiently, while at the same time protecting the environmental resources upon which all Californians depend. This petition reflects IID's attempt to start that collaborative process by pressing forward to ensure restoration of the Salton Sea in the manner mandated by California law.

IID is the appropriate party to start this process. It is a holder of senior water rights on the Colorado River and has historically stepped up to avert crises on the river. It played a preeminent

[1] The 2002 Order is reproduced at App. 1-96 and is also available at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2002/wro2002-13revised.pdf.

role in shaping the Colorado River Compact, and all legislation, agreements, and Supreme Court cases that make up the Law of the River.

Under the Law of the River, California is entitled to use 4.4 million acre-feet per year (afy) of Colorado River water, and IID holds senior water rights to a substantial percentage of that entitlement. For decades, the availability of surplus and unused water on the Colorado River allowed California to use more than its 4.4 million afy entitlement. However, beginning in the late 1990s, due primarily to increased use by other lower Colorado River basin states of their own apportionments, the federal government pressed California to limit itself to 4.4 million afy. That effort posed a serious threat of reductions in deliveries to California users with water rights junior to IID's—most notably, the Metropolitan Water District of Southern California ("MWD"). In 2003, to help avert this threat, IID entered into the Quantification Settlement Agreement ("QSA"), an interconnected series of agreements among IID, the State of California, other California water agencies, and the federal government and Indian tribes.[2]

The centerpiece of the QSA was a proposal that IID conserve water and arrange for the long-term transfer of that conserved water from IID to three other major Southern California water users: the San Diego County Water Authority ("SDCWA"), Coachella Valley Water District ("CVWD"), and MWD. Through the QSA, IID, recognizing the needs of the entire state to continued water supply, agreed to extensive conservation, including fallowing of farmland. Through these actions, IID made water available for other users, particularly in urban coastal Southern California. IID agreed to the QSA transfers in large part because they were widely

[2] The terms "Quantification Settlement Agreement" and "QSA" are used herein to refer to the entire collection of agreements signed in October 2003. To avoid confusion, the October 10, 2003 agreement between the Imperial Irrigation District, the Metropolitan Water District, and the Coachella Valley Water District—which is itself labeled the Quantification Settlement Agreement—will be referred to herein as the "three-party QSA."

considered to be an essential mechanism for allowing California to meet its statewide demand while at the same time keeping within its 4.4 million afy entitlement. The Imperial Valley has faithfully fulfilled its obligations under the QSA, despite the significant sacrifices and challenges IID and its water users have faced in doing so. Many of those sacrifices and challenges have come in the form of economic impacts to the communities within the Imperial Valley, a region suffering from one of the highest unemployment rates in the nation.

In the years since the QSA was signed, and especially in this time of drought, the QSA has only taken on added importance. As an example of extraordinary water conservation, the QSA protects California's entitlement and has become a bulwark of water security and stability in California and along the Colorado River.

But the QSA is not, and never has been, a risk-free endeavor. All who participated in the development of the QSA recognized that the transfers carried the potential for significant adverse environmental and public-health consequences at the Salton Sea and in the Imperial and Coachella valleys.

The Salton Sea is one of California's most important environmental resources. It serves as a critical buffer against windblown dust emissions in the Imperial and Coachella valleys, a region that already suffers from some of the worst air quality in California and the nation. It is also arguably the single most significant habitat for migratory birds in the United States, and among the hundreds of species who reside at the Sea are numerous species listed as endangered or threatened under federal and state law. There was no question in the minds of the parties who orchestrated this water transfer—the largest in U.S. history—that without a commitment to ensure that the Salton Sea would be restored and the other effects mitigated, implementation of the QSA transfers would destroy these essential environmental values. Basic principles of

hydrology made clear that absent restoration of the Sea, reduced agricultural return flows would cause the shoreline to recede and expose playa around the Sea, producing dust emissions that would severely exacerbate the already poor air quality in the Imperial and Coachella valleys. Reduced agricultural return flows would also lead to a spike in the salinity of the Sea, dooming the fishery and, in turn, much of the bird population at the Sea.

The potential for devastating environmental, public-health, and economic impacts was so widely acknowledged, and raised such deep concerns, that the QSA negotiations nearly fell apart as a result. The State of California was desperate to avoid that outcome, believing (with good reason) that chaos would likely result, as users would suffer mandatory cutbacks in their allotment of Colorado River water, prompting them to seek increased imports from elsewhere in the State—particularly the Sacramento–San Joaquin River Delta. In order to get the QSA back on track and alleviate fears about its environmental, public-health, and economic impacts, the Legislature unequivocally committed the State by statute to restoring the Sea, and the State and the QSA parties agreed jointly to bear the costs of mitigation. Only after the State and the QSA parties committed to these measures was the QSA signed, and the QSA agreements were expressly premised on the implementation of mitigation and restoration measures. Absent those measures, the QSA would not have been signed. Both mitigation and restoration of the Salton Sea were, and always have been, indispensable components of the QSA.

The SWRCB correctly recognized as much in its 2002 Order. Under California law, the Board has the authority and duty to ensure that a long-term transfer, such as the one contained in the QSA, will not "result in substantial injury to any legal user of water [or] unreasonably affect fish, wildlife, or other instream beneficial uses." (Water Code § 1736.) That authority and duty entail the power to place conditions on long-term transfers as necessary. To fulfill its statutory

mandate, the Board in its 2002 Order conditioned its approval of the QSA transfer on the implementation of a number of mitigation measures set forth in the Environmental Impact Reports (the "EIRs") prepared by the parties to the QSA transfer.[3] These measures were designed to preserve the State's ability to fulfill its commitment to restoring the Sea, and to ensure that the environment at the Salton Sea and the residents of the Imperial and Coachella valleys would not bear the brunt of the State's effort to reduce its usage of Colorado River water—no matter how necessary and important that effort might be.

The 2002 Order required IID to deliver mitigation water to the Salton Sea for a period of 15 years, until the end of 2017. The choice of that timeframe was a deliberate one: the QSA parties and the Board determined that 15 years would be an adequate period of time to allow the State to study the feasibility of restoration and to identify and begin implementation of a restoration plan. The Board repeatedly and expressly emphasized that it retained "continuing authority" to review developments during this 15-year period and issue additional orders as necessary to protect the public interest. (*See, e.g.*, App. 50, 51 & fn. 12, 70, 91, 95.)

The decision by this Board as to whether the transfers were in the public interest, and therefore should be allowed, necessarily involved balancing the State's interest in meeting its water supply needs against the potential extraordinary negative environmental, public-health and economic consequences of the transfers on the Imperial Valley and the State as a whole. The State's commitment to implement a Salton Sea restoration plan to offset those negative consequences of the transfers was the item that tipped the scales in favor of issuance of the 2002

[3] The parties prepared two EIRs: a program-level EIR (prepared jointly by CVWD, IID, MWD, and SDCWA) and a project-level EIR for the water transfers (prepared jointly by IID and the federal Bureau of Reclamation). This latter EIR doubled as an Environmental Impact Statement (EIS) to fulfill Reclamation's obligations under the National Environmental Policy Act (NEPA).

Order. That commitment by the State was what permitted the Board to find that the QSA water transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses. The Board understood that, to preserve the feasibility of restoration, salinity levels would not be allowed to increase to the point at which they would preclude restoration. And the Board understood and expected that by 2017, a plan for restoration would be in place. The year 2017 is fast approaching and yet no restoration plan has been forthcoming.

The time has come for the Board to exercise its continuing authority and add a condition to the 2002 Order that requires the State to fulfill its unequivocal statutory commitment to restoring the Salton Sea. This is a matter of the highest possible importance and urgency. The Salton Sea and the Imperial and Coachella valleys already have begun to suffer significant environmental and public-health impacts as a result of the State's failure to abide by its promise to restore the Sea—impacts that will accelerate dramatically once deliveries of mitigation water end in 2017. Absent restoration, over the next 30 years, air pollution in the form of windblown dust emissions will have a catastrophic impact on public health in the region, adding up to a cost of tens of billions of dollars. Ecological impacts, particularly in the form of the death of fish and protected bird species, are likely to be nearly as significant. The recreational, aesthetic, and cultural values of the Sea will also deteriorate sharply. Precisely for those reasons, the QSA was *expressly premised* on the State's commitment to restore the Sea—yet, more than a decade after the agreements were signed, restoration has not occurred. This delay threatens irreparable harm to the Sea and jeopardizes the validity of the other parties' commitments under the QSA.

IID remains committed to the QSA as an essential component of statewide water policy in California and along the Colorado River, and does not seek to undo the many years of painstaking negotiations that were required to arrive at the delicate compromise the QSA parties

struck. But the QSA must be implemented *in its entirety*—and that includes the restoration of the Salton Sea. The residents of the Imperial and Coachella valleys simply cannot be made to shoulder the disproportionate burden—in the form of environmental degradation, severe air pollution, and a wide variety of accompanying economic challenges—of California's effort to live within its entitlement of Colorado River water. The State has received the benefit of the QSA. It now must live up to its legal commitment to restore the Sea as part of the compromise that brought it that benefit.

For that reason and those set forth in this petition, the SWRCB, in exercising its continuing authority to oversee the QSA transfer under Water Code § 1736, should require the State to fulfill its commitment to restore the Salton Sea as a condition of the QSA transfers. The obligation to restore the Sea unquestionably has been assumed by the State alone as part of the *quid pro quo* for the transfers. But the plan for restoration and state funding should be developed through a collaborative and cooperative process among all affected parties. The expertise of State, federal, Native American and local interests should be solicited in the formulation of the restoration plan. There is not time for years of deliberation and discussion. IID is proposing a plan of action now. And IID is prepared to be a leader and an active and engaged partner in the collaborative process.

IID proposes a multi-step process to accomplish this result. As an initial step, the Board should convene a status conference or workshop among all of the QSA parties, as well as other key stakeholders, and order the parties to meet and confer in a good-faith dialogue, with the objective of developing a consensus-based restoration plan and a realistic, viable mechanism for funding it. The results of this dialogue, along with legal and evidentiary submissions from the

parties (and public comment) regarding restoration of the Sea, would be presented to the Board in a final status conference or workshop, and then in a public adjudicatory hearing.

Because of the urgent need to have a fully funded restoration plan implemented immediately—and certainly by the time deliveries of mitigation water end in 2017—the Board should set an expedited timeframe for the process of no more than six months for the dialogue and subsequent status conference or workshop, with the public hearing to occur no more than nine months from the date of filing of this petition. In order to initiate and establish a timeline and procedures for these steps, the Board should hold the initial status conference or workshop within the next month.

This process will allow the Board to identify a restoration and funding plan that will best achieve the key objective of preventing the significant environmental and public-health consequences that the Salton Sea region would face absent restoration. IID's respectful view is that the Board, after full review of the factual and legal issues, should find that the public interest and the necessity of avoiding overwhelming environmental, public-health, and economic impacts at the Salton Sea and in the Imperial and Coachella valleys require modification of the 2002 Order to add the condition that the State comply with its commitment to implement and fund a Salton Sea restoration plan.

II. FACTUAL AND LEGAL BACKGROUND

The factual and legal background regarding IID's water rights and the Salton Sea goes back more than a century and has been thoroughly catalogued elsewhere, including in the Board's 2002 Order (*see* App. 7-25) and in the opinion of the California Court of Appeal rejecting certain challenges to the QSA (*In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 772-90 ["*In re QSA Cases*"]). This section briefly summarizes the key background points necessary to place this petition in context.

A. The Salton Sea Is a Critical Environmental Resource and the Imperial and Coachella Valleys Face a Dire Public-Health Threat If No Restoration Plan is Implemented and Funded

The Salton Sea, California's largest lake, occupies approximately 370 square miles of low-lying areas in Imperial and Riverside counties in southeastern California. For centuries prior to the westward settlement of California, the region had been home to a large freshwater lake known as Lake Cahuilla, which grew and shrank in size in a cyclical manner, in tandem with precipitation and runoff patterns. The Sea in its current incarnation was formed in 1905, when during a flood year the waters of the Lower Colorado River broke a levee and were diverted from their natural channel (flowing south to the Gulf of California) into an irrigation canal leading into the Imperial Valley. The river was restored to its natural course in 1907, but the Sea remained, and has been sustained ever since, primarily by agricultural return flows from the Imperial and Coachella valleys.

During that time, the Salton Sea has become one of California's most critical environmental resources. It serves as an indispensable buffer against windblown dust emissions in the Imperial and Coachella valleys, two regions that already suffer from some of the worst air pollution in California and the nation. Were the surface area of the Sea to be further reduced, newly exposed playa would emit an additional tens of thousands of tons of dust per year into the air, including potentially toxic compounds of arsenic, cadmium, chromium, lead, and selenium. (*See* Pacific Institute, *Hazard's Toll: The Costs of Inaction at the Salton Sea* (Sept. 2014), at pp. 13, 18 ("Pacific Institute Report").[4]) This would likely result in a significantly increased incidence of heart disease, heart attacks, lung cancer, asthma, and premature death in the

[4] Available at http://pacinst.org/publication/hazards-toll/.

Imperial and Coachella valleys, resulting in billions of dollars in public-health costs. (*Id.* at pp. 12, 17-19.)

The ecological significance of the Salton Sea is due in large part to its unparalleled array of bird species. The Sea is perhaps the single most important avian habitat in the United States, and among the most important in the world. The Sea's "combination of avian biodiversity and importance as breeding habitat is unsurpassed by any limited geographic area within the continuous 48 states and Latin America." (U.S. Bureau of Reclamation, *Restoration of the Salton Sea: Summary Report* (Sept. 2007) ("Bureau of Reclamation Report"), at pp. 1-8.[5]) More than 400 species of birds have been observed at the Sea, including a significant number listed as endangered, threatened, or as species of concern under the federal Endangered Species Act and the California Endangered Species Act. (Salton Sea Authority, *Salton Sea Authority Plan for Multi-Purpose Project* (July 2006) ("Salton Sea Authority Plan"), at p. 2;[6] App. 28.) Approximately 70 percent of all California's bird species have been sighted at the Sea—and a substantial portion of those species use it as their main breeding ground. (Bureau of Reclamation Report, *supra*, at pp. 1-5 through 1-8.) The Sea's avian habitat supports a thriving tourism industry in the region, including both bird-watching and fowl-hunting. (*Ibid.*)

The Sea also ranks among the most important locations on a number of international bird migratory routes. It is a major stop on the 5,000-mile-long Pacific Flyway, one of the main north-south avenues for migratory bird travel in the Americas. (Salton Sea Authority Plan, *supra*, at p. 2.) The U.S. Geological Survey's Bird Banding Laboratory has found that birds observed at the Salton Sea travel from as far away as Russia, Alaska, the Canadian Arctic,

[5] Available at http://www.usbr.gov/lc/region/saltnsea/FinalSummaryRpt.pdf.

[6] Available at http://saltonsea.ca.gov/pdfs/ssa-plan-board-review-copy-7-20-06.pdf.

Hawaii, Latin America, and the Maritime Provinces of eastern Canada. (Bureau of Reclamation Report, *supra,* at pp. 1-5.)

The Sea's bird habitat has taken on added importance in light of the degradation of wetlands elsewhere in California and the region; indeed, more than 90 percent of California's original wetlands have been lost due to development. (U.S. Fish & Wildlife Service, *Sonny Bono Salton Sea National Wildlife Refuge Complex: Endangered and Threatened Species*.[7]) In addition, the Colorado River Delta—which had long served as a principal bird habitat in the region—has been degraded significantly as a result of diversions in both the United States and Mexico, further heightening many species' reliance on the Salton Sea habitat.

The Sea's ecological value is not limited to protecting air quality and providing avian habitat. The Sea also supports an important fishery, which bolsters the local tourism economy by providing a food source for dozens of piscivorous bird species at the Sea. The Sea is also a popular tourist destination for a variety of other groups in Southern California and beyond, including photographers, kayakers, campers, hikers, backpackers. Finally, the Sea is an important Indian cultural resource, particularly for the Torres-Martinez Band of Cahuilla Indians.

The QSA transfers threaten these environmental values. Because agricultural return flows from the Imperial and Coachella valleys are the only significant source of inflow for the Sea, any proposal or plan that would result in less water being used in the Imperial and Coachella valleys—such as the QSA transfers—would, absent restoration or mitigation measures, result in a receding shoreline at the Sea, higher levels of salinity, and higher levels of air pollution in the region. As is discussed in greater detail below, the QSA parties and this Board recognized this serious threat, and designed a mitigation and restoration scheme that would preserve the Salton

[7] Available at http://www.fws.gov/saltonsea/endangered%20species.html.

Sea's environment even as the transfers would reduce water consumption in the Imperial Valley. But deliveries of mitigation water to the Sea (designed to offset the reduction in agricultural return flows resulting from the QSA transfers) are scheduled to end in 2017, and no restoration plan has been funded or implemented. Without restoration, the fishery at the Sea will die, which in turn will reduce and possibly eliminate the use of the Sea by piscivorous birds. Dust emissions from exposed playa will increase dramatically, with devastating effects for the region's air quality and significantly increased incidence of heart disease, asthma, lung cancer, and premature deaths in the Imperial and Coachella valleys. It is virtually impossible to overstate the threat to the Sea and to surrounding communities if no restoration plan is funded and implemented.

B. The QSA Was Designed to Reduce California's Use of Colorado River Water While Protecting the Environment at the Salton Sea and the Public Health of the Imperial and Coachella Valleys

The QSA was carefully crafted to avoid precisely the types of environmental and public-health impacts described above. In particular, because of widespread concerns about the impacts of the QSA transfers, the QSA parties and the State agreed to the transfers contingent upon the State making good on its commitment to restore the Salton Sea. Yet, more than a decade after the QSA was signed, restoration of the Salton Sea remains an unfulfilled promise.

1. QSA Background

Farmers and municipalities in the Imperial Valley have been diverting and beneficially using Colorado River water since before the turn of the 20th century. As a result of this long history of water use, IID holds some of the most senior water rights on the Colorado River. These are reflected in Water Right Permit No. 7643 (Jan. 1950), which confirms IID's right to divert and beneficially use up to 3.85 million afy of Colorado River water. It is neither a coincidence nor a historical accident that IID holds these water rights: the citizens of the Imperial

Valley acquired the rights by dint of their labor, and their early appropriation and beneficial use of Colorado River water ensured that California would receive in perpetuity a substantial portion of the river's annual flow. Indeed, based on its early diversion and beneficial use of water, IID would have been entitled to claim rights to more than 7 million afy of Colorado River water. As part of the 1931 Seven-Party Agreement among California users, IID voluntarily agreed to limit itself to 3.85 million afy, in the interests of statewide and regional cooperation in water policy.

For many decades, California diverted and beneficially used more than the 4.4 million afy of Colorado River water to which it is entitled under federal law. This was possible primarily because the other basin states were slower to develop than California and were not yet using their full share of Colorado River water. Hydrological conditions of the Colorado River also provided surplus water on the river. As a result of this unused and surplus water, California users, including agricultural users and urban water districts in Southern California with water rights junior to IID's, were allowed to divert and use more water than they were legally guaranteed under the Boulder Canyon Project Act, the California Limitation Act, and the Seven-Party Agreement.

Beginning in the late 1990s, as more basin states began using their full share of Colorado River water and due to severe drought in the Colorado River basin, the federal government began to press California to limit itself to its 4.4 million afy entitlement. Eventually, Reclamation threatened to take legal action if California did not voluntarily reduce its usage of water. This prospect of curtailment posed the greatest threat to more junior users of Colorado River water. The possibility that water agencies within California might lose part of their supplies of Colorado River water, in turn, posed a significant threat to water users (and to the environment) in

Northern California and the San Joaquin Valley, due to the likelihood that the agencies would seek to compensate for any lost water by increasing imports from the State Water Project.

To help reduce California's usage of Colorado River water, in 1998 IID entered into an agreement for a long-term transfer of 300,000 afy to SDCWA. MWD and CVWD challenged that plan, both in the courts and before the Board, claiming that it would impair their own water rights, in violation of both state and federal law. Around the same time, as other Colorado River basin states began using their full share of Colorado River water, the federal government placed increased pressure on California to reduce its use of water to its 4.4 million afy entitlement. In order to reach an agreement that would benefit all water users in Southern California (and ease demands on State Water Project imports from Northern California), IID, MWD, SDCWA, CVWD and other agencies began negotiations on what ultimately would become the QSA. They formulated a plan, which eventually would become the centerpiece of the QSA, for IID to transfer up to 200,000 afy of conserved water to SDCWA and up to a total of 103,000 afy of conserved water to CVWD (and at times, potentially to MWD), over a period of at least 35 and up to 75 years. These amounts are in addition to the approximately 105,000 afy IID transfers to MWD pursuant to a 35-year agreement entered into in 1988.

2. The QSA Mitigation and Restoration Scheme and the 2002 Order

IID and its partner agencies conducted an extensive environmental review process, culminating in the preparation and certification of the EIRs. The EIRs revealed that the proposed QSA transfers were expected to have numerous significant impacts on the environment at the Salton Sea and in the Imperial and Coachella valleys, including with respect to salinity, air quality, water quality, soils, aesthetics, and cultural and recreational resources. (*See, e.g.*, App. 239-243.) IID and its partner agencies designed a multifaceted mitigation plan, which entailed, for a period of 15 years, deliveries of mitigation water to the Salton Sea in order to offset the

reductions in agricultural return flows that would otherwise have occurred as a result of the transfers. This mitigation plan, the QSA parties reasoned, would preserve baseline environmental conditions at the Salton Sea for a period long enough to allow a plan for the restoration of the Sea—the only viable long-term strategy for protecting the environment at the Sea compatible with reduced water consumption in the Imperial Valley—to be identified, funded, and implemented.

Under California law, the Board's approval was required for the proposed transfer to go forward. Section 1736 of the Water Code grants the Board the authority and duty to ensure that no long-term transfer of water will "result in substantial injury to any legal user of water" or "unreasonably affect fish, wildlife, or other instream beneficial uses." IID and SDCWA jointly petitioned the Board for approval of the proposed transfer.

After a 15-day evidentiary hearing and extensive public participation and comment, the Board issued a draft decision in September 2002 and its final order, the 2002 Order, on December 20, 2002. In the 2002 Order, the Board conditionally approved the proposed transfer. It recognized that the proposed transfer had "the potential to adversely affect fish and wildlife at the Salton Sea" as a result of reduced agricultural return flows (App. 41), and also expressed its "particular concern" about "[t]he impacts to air quality of the proposed transfer" that would result from increased dust emissions (App. 73).

In order to avoid and mitigate these effects, the 2002 Order expressly conditioned the proposed transfers on the implementation of a variety of mitigation measures, including many of the measures identified in the EIRs. It ordered the parties, for a period of 15 years, to implement the Salton Sea Habitat Conservation Strategy—a plan that was outlined in the EIRs and that provided for mitigation water to be delivered to the Sea during the same 15-year period in order

to maintain baseline salinity levels, water elevation, and surface area during that time. (App. 47-48.) This measure, the Board reasoned, would "mitigate[ ] project impacts to the Salton Sea for a long enough period to provide time to study the feasibility of long-term restoration actions" without "prejudging those restoration-planning efforts." (App. 7.) Restoration was thus an integral and essential component of the overall QSA scheme.

In its 2002 Order, the Board went to great lengths to emphasize the importance of considering both the interests of the State as a whole and the specific, localized concerns of communities in the Imperial and Coachella valleys and around the Salton Sea. It concluded that the approach it had selected—conditionally approving the transfer but requiring a robust mitigation scheme—achieved "a reasonable balance between the State's interest in protecting the fish and wildlife that depend on the Salton Sea, the State's interest in protecting the economy of Imperial County, and the State's interest in the implementation of this transfer to meet California's water supply needs." (App. 7.) Significantly, the Board expressly recognized that its duty to consider the interests of the environment in the Imperial and Coachella valleys and at the Salton Sea was an ongoing one. For that reason, the Board "reserve[d] continuing authority to consider whether it would be appropriate to add, delete, or modify the mitigation measures required" by the 2002 Order, in light of future developments, including a study on Salton Sea restoration. (App. 51, 70, 91, 95.)

The Board's 2002 Order merely *allowed* the parties to enter into a transfer agreement; it did not *require* it. (App. 7.) And the parties proved unable to reach a final agreement during 2002 and early 2003. As discussed in greater detail below (*see infra* Section III.B.2), this failure resulted in principal part from widespread concerns that the proposed transfer would have significant, unmitigated adverse impacts on the environment at the Salton Sea and in the Imperial

and Coachella valleys—concerns that could be fully addressed only if the parties could be certain that Salton Sea restoration would accompany the proposed QSA. (*See* D. Kasler & S. Leavenworth, Salton Sea Impact Threatens to Sink Crucial Water Deal, *Sacramento Bee*, Apr. 28, 2002.) Throughout much of 2003, the QSA parties were at an impasse due to these environmental concerns.

In response to this lack of progress, the federal government took actions designed to force California to reduce its use of Colorado River water to 4.4 million afy. In July 2002, Reclamation initiated proceedings under 43 C.F.R. Part 417, which it interpreted (incorrectly, in IID's view) to give it the authority to make determinations about which users should receive Colorado River water. Under this purported authority, Reclamation directed the reduction of IID's water allocation for 2003 by approximately 250,000 acre-feet. Although IID's water allocation ultimately was not reduced because IID sued in federal court and obtained an injunction to halt this reduction, the federal government continued to exert significant pressure on California to limit itself to its 4.4 million afy entitlement. (*See In re QSA Cases*, *supra*, 201 Cal.App.4th at p. 788.)

3. The QSA Legislation

Around this time, the Legislature, recognizing the threat to California water users and to the environment if no plan were adopted to reduce California's use of Colorado River water, began taking a more active role. In September 2002, it enacted Senate Bill 482, which was designed to facilitate implementation of the QSA by authorizing the California Department of Fish and Game to issue permits for the take of certain endangered and threatened species resulting from impacts attributable to the QSA transfers. But the QSA remained stalled, in large part because of concerns about the likely environmental consequences of the transfers. (D. Kasler & S. Leavenworth, Salton Sea Impact Threatens to Sink Crucial Water Deal, *Sacramento*

Bee, Apr. 28, 2002 ["As badly as state regulators want the Imperial water transfer, they fear it could accelerate the decline of the Salton Sea, creating monstrous dust storms and killing scores of birds and fish in California's largest lake."].)

Alarmed by this lack of progress, the Legislature took on additional commitments pertaining to Salton Sea restoration and mitigation in order to encourage the QSA parties to reach an accord. In a package of three bills (SB 277, SB 317, and SB 654—collectively, the "QSA legislation"), the Legislature agreed to assume the costs of Salton Sea restoration and QSA mitigation, with the exception of the first $133 million (in 2003 dollars) in QSA mitigation costs, which were to be borne by IID, CVWD, and SDCWA. In particular, in SB 277, the Salton Sea Restoration Act, the Legislature declared it to be "the intent of the Legislature that the State of California undertake the restoration of the Salton Sea ecosystem and the permanent protection of the wildlife dependent on that ecosystem." (Fish & Game Code § 2931, subd. (a)).[8] The sponsors of the bill explained that it entailed "a commitment on the part of the state to restore the Salton Sea," and that SB 277 "states that it is the responsibility of the State of California to restore the Salton Sea." (App. 99.)

[8] SB 277 also provided that the restoration would be carried out in accordance with a "preferred alternative developed as a result of the restoration study" to be undertaken by the Resources Agency. (SB 277, Ch. 611, 2003–2004 Reg. Sess.; *see* Fish & Game Code §§ 2930-2933.).

SB 317 required IID to provide a total of 1.6 million acre-feet of conserved water to the Salton Sea for mitigation purposes and for sale to fund restoration. It also required the Resources Agency to carry out the Salton Sea restoration study referenced in SB 277, and permitted the Department of Fish and Game to issue certain take permits for impacts of QSA-related activities. (SB 317, Ch. 612, 2003–2004 Reg. Sess.; *see* Fish & Game Code § 2081.7; Water Code § 1013.)

SB 654 authorized the Department of Fish and Game to enter into an agreement with CVWD, IID, and SDCWA to assume the cost of QSA-related environmental mitigation in excess of $133 million. (SB 654, Ch. 613, 2003–2004 Reg. Sess.; *see* Water Code § 12562.)

The QSA legislation, and in particular the State's commitment to the restoration of the Salton Sea, led IID and the other agencies negotiating the agreements to modify, in certain important respects, the package of mitigation measures that had been proposed to accompany the QSA water transfers. In addenda to the EIRs adopted in October 2003, the QSA parties took note of the enactment of the QSA legislation, which the EIRs described as being designed to "facilitate implementation of the QSA, as well as restoration of the Salton Sea." (App. 296.) The changes set forth in the addenda "were designed to reflect the terms of the new state legislation … and to accommodate state goals with respect to restoration of the Salton Sea." (App. 271.)

These changes included, among others, a reduction in the time period specified during which mitigation water would be delivered to the Salton Sea. The final EIRs had envisioned the delivery of mitigation water until 2030, but the QSA parties determined that, in light of the State's commitment to restore the Sea, deliveries of mitigation water would be necessary only until 2017. Indeed, 2017 was considered an *outer limit* of the extent to which these deliveries would be necessary, because the parties understood that a restoration plan would be in place before then. The parties "anticipated that, at some point during the first 15 years of the QSA term," deliveries of mitigation water would become unnecessary, in light of "the approved Salton Sea restoration plan." (App. 276.) That prediction, and the changes the QSA parties made to the mitigation plan in reliance on the QSA legislation, were reasonable and appropriate in 2003, but the State's unanticipated failure to restore the Sea means that, absent action from this Board, there will be no restoration plan in place when deliveries of mitigation water end in 2017.

4. The QSA Agreements

The QSA legislation, designed specifically to provide assurances to the QSA parties and the public that their concerns regarding the environmental effects of the QSA would be

addressed, had precisely that effect. In deciding to enter into the QSA, the parties directly and detrimentally relied upon the commitments made by the State through the QSA legislation. On October 10, 2003, IID, MWD, CVWD, SDCWA, state and federal agencies, as well as other water agencies, municipalities, and Indian tribes, signed the related agreements that together comprise the QSA. In so doing, they expressly agreed that the QSA was "premised on," among other things, the "continuation of the QSA Legislation [*i.e.*, SB 277, SB 317, and SB 654] in full force and effect without material modification." (App. 331, 334.) IID, SDCWA, CVWD, and the State also entered into the QSA Joint Powers Authority Creation and Funding Agreement ("Joint Powers Agreement" or "JPA Agreement"), which effectuated the plan the Legislature had authorized in SB 654. IID, SDCWA, and CVWD agreed to pay the first $133 million of Salton Sea mitigation costs, "with the balance to be borne by the State." (App. 341.) As the Court of Appeal has recognized, "the agreement … unconditionally obligate[s] the state to pay the excess mitigation costs beyond those for which [IID], Coachella, and San Diego are responsible." (*In re QSA Cases*, *supra*, 201 Cal.App.4th at p. 775.)

C. Since the QSA Was Signed, a Variety of Restoration Plans Have Been Studied and Proposed, But the State Has Not Fulfilled Its Obligation to Restore the Salton Sea

In its 2002 Order, the SWRCB recognized that it would be premature to explicitly condition the QSA transfers on the restoration of the Salton Sea, because it was not yet known whether restoration of the Sea was even feasible. (Appendix ["App."] 7.) In addition, the Legislature had not yet enacted SB 277, in which it committed the State to restoring the Sea and ordered the Resources Agency to study restoration and identify a preferred alternative. Over the past decade, several government agencies and nongovernmental organizations have put forth a variety of restoration plans. These proposals vary in their specifics and any such plan would need to be modified and updated before being implemented, but the plans confirm that

restoration is feasible at a realistic cost and necessary to protecting both the environment of the Salton Sea and the public health and economies of the nearby communities in the Imperial and Coachella valleys. Yet the State has not met its obligation to restore the Sea.

The Salton Sea Authority, an intergovernmental agency whose board of directors represents Imperial and Riverside counties, IID, CVWD, and the Torres-Martinez Desert Cahuilla Indians, released a restoration plan in July 2006. The cost estimate for the Salton Sea Authority's plan was $2.2 billion, of which the Authority projected "[a] significant portion … can be locally financed" through the development of renewable energy resources in the region and other sources of revenue. (Salton Sea Authority Plan, *supra*, at p. ES-12.) IID, along with Imperial County and the Imperial County Air Pollution Control District, endorsed the Salton Sea Authority plan in an October 2013 Memorandum of Understanding as a framework for restoration of the Sea, while recognizing that the plan would need to be "updated, revised, or superseded by a new restoration plan consistent with inflow estimates and projected revenue … that may result in a smaller but still sustainable Salton Sea." (Memorandum of Understanding (Oct. 24, 2013), at p. 3.[9])

As required by the QSA legislation, the Resources Agency published in May 2007 its Salton Sea Ecosystem Restoration Program Preferred Alternative Report and Funding Plan ("Preferred Alternative Report").[10] This report considered nine separate alternatives for Salton Sea restoration and identified a preferred alternative. *Id.* at pp. ES-2 through ES-9; *see also* California Legislative Analyst's Office, Restoring the Salton Sea, at p. 21 (Jan. 24, 2008) ("LAO

[9] Available at http://www.iid.com/Modules/ShowDocument.aspx?documentid=8308.

[10] Available at http://www.water.ca.gov/saltonsea/docs/Funding_Plan.pdf.

Report").[11] The preferred alternative was projected to cost $8.9 billion, with major construction expected to begin in 2014. (*Ibid.*)

In September 2007, the Bureau of Reclamation issued its own report analyzing prospects for Salton Sea restoration, acting pursuant to a federal statute—the Water Supply Reliability and Environmental Improvement Act of 2004 (118 Stat. 1681, Pub. L. No. 108-361)—which required Reclamation to complete a new feasibility study on Salton Sea restoration. Reclamation's report evaluated a number of the same options that had been considered by the Salton Sea Authority and the Resources Agency. Although Reclamation declined to recommend the adoption of any particular alternative, it estimated that the no-project alternative—*i.e.*, the status quo without any restoration efforts—would entail at least $1.4 billion in mitigation costs and would have substantial negative air-quality impacts. (Bureau of Reclamation Report, *supra*, at p. xvi.) Given that reality, Reclamation suggested that consideration be given to an option involving construction of "shallow saline habitat complexes," which "could minimize both risk and costs, while providing historic wildlife habitat replacement and partial mitigation of air quality impacts associated with reduced future inflows at the Salton Sea." (*Id.* at p. xvii.)

Despite these extensive studies, little restoration work actually has taken place at the Salton Sea. Proposition 84, passed by the voters in 2006, provided $47 million for restoration of the Salton Sea. (LAO Report, *supra*, at pp. 29-30.) In 2013, the Legislature approved an additional $30 million in its annual budget for an additional restoration study. (*See, e.g.*, California Budget OKs $30M for Salton Sea Study, *Desert Sun (Palm Springs)*, June 27, 2013.) The water bond approved by California voters on the November 2014 ballot includes up to $475 million to fund state obligations relating to environmental restoration projects, some portion of

[11] Available at http://www.lao.ca.gov/2008/rsrc/salton_sea/salton_sea_01-24-08.pdf.

which may be available for Salton Sea restoration. (*See, e.g.*, K. Daly, Water Bond that Could Benefit Salton Sea Restoration Will Be on the November Ballot, *Imperial Valley Press*, Aug. 15, 2014.) These sums, along with the $30 million contributed by IID, SDCWA, and CVWD to the Salton Sea Restoration Fund as required by SB 654, are not insubstantial, but they fall well short of what the State's obligations require. (*See, e.g.*, California State Auditor, Salton Sea Restoration Fund Report (Nov. 2013) ("State Auditor Report"),[12] at p. 3 [noting that, as of June 2013, the amount of money available for Salton Sea restoration through 2047 "totals roughly $81.8 million, or $2.2 billion less than the cost to construct the least costly restoration alternative included in the Preferred Alternative Report"].)

In 2013, the Legislature renewed its commitment to Salton Sea restoration by enacting AB 71, signed into law by Governor Brown on September 28, 2013. AB 71 reaffirmed that it remains "the intent of the Legislature," among other things, to, "[p]ermanently protect fish and wildlife that are dependent on the Salton Sea ecosystem," "[r]estore the long-term stable aquatic and shoreline habitat for fish and wildlife that depend on the Salton Sea," and "[m]inimize noxious odors and other water and air quality problems." (AB 71, Ch. 402, 2013-2014 Reg. Sess., § 1; *see* Fish & Game Code § 2940.)[13] AB 71 also provides that the Secretary of Resources "shall lead the Salton Sea restoration efforts," which "shall include," among other things, habitat demonstration projects and research into water quality, air quality, and biological restoration. (AB 71, Ch. 402, 2013-2014 Reg. Sess., § 2; *see* Fish & Game Code § 2942.) AB 71 requires the Secretary of Resources to "consult[ ]" and "coordinat[e]" with the Salton Sea

[12] Available at http://www.bsa.ca.gov/pdfs/reports/2013-101.pdf.

[13] AB 148, signed into law by Governor Brown on July 16, 2014, made a minor alteration to part of this language, so that the Legislature's present intent is to "protect and provide long-term conservation" of fish and wildlife at the Salton Sea, rather than to "[p]ermanently protect fish and wildlife" at the Sea. (AB 148, Ch. 124, 2013-2014 Reg. Sess.)

Authority in undertaking these efforts. (AB 71, Ch. 402, 2013-2014 Reg. Sess., § 1; *see* Fish & Game Code §§ 2942, 2943.) The Legislature's inclusion of funding in the 2014 water bond to help meet the State's QSA-related restoration obligations is further evidence of the Legislature's recognition of its obligations to the Sea and to the Imperial and Coachella valleys.

In November 2013, the State Auditor issued a report concluding that the State faces significant, open-ended mitigation liabilities—and that the Imperial and Coachella valleys face a potential environmental and public-health crisis—if progress on restoration is not made soon. (*See* State Auditor Report, *supra*, at pp. 1-5.) The State Auditor noted that the Resources Agency had estimated in its May 2007 Preferred Alternative Report that the State's liability for Salton Sea environmental mitigation costs would be approximately $800 million (in 2006 dollars) in upfront construction costs and $50 million in annual operations and maintenance costs. (*Id.* at p. 2.) The State Auditor went on to conclude that "the actual costs … are likely to be significantly greater when adjusted for inflation" and emphasized that the $800-million-plus-$50-million-annual-cost figure "does not reflect all of the mitigation costs the State may incur in satisfying its financial obligations under the QSA." (*Ibid.*) The State Auditor also recognized that "by performing restoration activities now that are also designed to reduce the need to undertake mitigation activities in the future, the State could potentially decrease its future mitigation costs." (*Id.* at pp. 2, 23.) The State Auditor noted that these mitigation costs will ramp up quickly once the $133 million mitigation funding provided by IID, SDCWA, and CVWD is used up—a milestone that currently is on track to occur around the year 2025. (*Id.* at pp. 2, 23.)

Most recently, a report authored by the Pacific Institute highlighted the significant costs that failure to restore the Salton Sea will exact on the environment at the Sea and in the Imperial

and Coachella valleys. The report forecast that, if no restoration plan is implemented when deliveries of mitigation water come to an end in 2017, in a span of 15 years the salinity of the Sea will triple, the volume of the Sea will decrease by more than 60 percent, and 100 square miles of dust-generating playa will be exposed to the wind, exacerbating the already severe air quality problems in the region. (Pacific Institute Report, *supra*, at p. iv.) The report estimated that the public-health costs associated with failure to restore the Sea would be at least $3 billion through 2047 and could reach $37 billion, in addition to tens of billions of dollars in ecological damage at the Sea, reduced property values, and diminished agricultural productivity. (*Id.* at pp. v-vi.)

D. IID and Farmers in the Imperial Valley Have Fulfilled All of Their Obligations Under the QSA, at Significant Cost and Difficulty

Even as the State has failed to fulfill its commitment to restore the Sea, IID, along with farmers in the Imperial Valley and their partner QSA water agencies, have fulfilled all of their QSA-related obligations, despite the significant costs and challenges they have faced in doing so. Since the execution of the QSA in 2003, IID has conserved, transferred, and/or reduced its use, to the benefit of other California water agencies, in excess of 2.7 million acre-feet. As the Salton Sea mitigation water requirement winds down during the next critical three-year period, IID is scheduled to conserve and transfer nearly 800,000 acre-feet more to its QSA partners while delivering another 390,000 acre-feet of water to the Sea for mitigation purposes. Under the QSA, IID is scheduled to provide 12.3 million acre-feet of conserved water for transfer through 2047 (the balance of the initial 45-year term).

1. Performance by IID and Farmers in the Imperial Valley

IID and farmers in the Imperial Valley have fully and faithfully lived up to all of their obligations under the QSA. IID has delivered water to SDCWA, CVWD, and MWD in

accordance with the schedule of deliveries set forth in the agreements. It has done so even though that commitment has required fallowing over 200,000 acres of farmland in the Imperial Valley since execution of the QSA, with thousands more acres of farmland that will be fallowed during the next critical three-year period until the delivery of mitigation water to the Salton Sea ceases. This significant amount of fallowing reduces overall economic activity and job opportunities available in the region, which already suffers from some of the highest unemployment rates in the nation. "El Centro, the largest city in the Imperial Valley and a stronghold of lettuce growers… has nearly the highest unemployment rate in the country" at "a jobless rate of 21.1%, second only to the 26.5% rate in Yuma, Ariz.," which is only minutes away from El Centro. (El Centro's 21.1% Unemployment Rate Second Highest in U.S., *L.A. Times*, July 1, 2014.) Fallowing land in the Imperial Valley has far-reaching economic impacts to many, including the agricultural workers and service providers of this industry.

IID and farmers in the Imperial Valley have implemented extensive water conservation measures, in order to ensure that Colorado River water is used in the most efficient, cost-effective manner possible. IID has also been a committed partner of the Bureau of Reclamation and other Colorado River basin states in working toward cooperative, basin-wide solutions to the problems the River faces in an era of increasing supply challenges.

2. QSA Mitigation Efforts and Facilitation of Restoration

Along with SDCWA and CVWD, IID has funded all mitigation measures required by the QSA, under the auspices of the Joint Powers Authority. To date, the Joint Powers Authority has "primarily used the three water agencies' mitigation funds to pay for delivery of mitigation water into the sea" (which, as discussed above, is scheduled to end in 2017), as well as a handful of other projects, including the four-step air-quality monitoring and mitigation scheme outlined in the EIRs and research into other ways to reduce fugitive dust emissions from exposed playa at

the Sea. (State Auditor Report, *supra*, at p. 10.) The Joint Powers Authority also has used the mitigation funding provided by IID, CVWD, and SDCWA to study the impacts on wildlife of high salinity levels and increased concentrations of selenium in the Sea and its tributaries. The State Auditor reported that IID and its partner agencies are on track to complete their mitigation funding obligations within approximately 10 years, at which point mitigation funding will become the sole and exclusive obligation of the State. (State Auditor Report, *supra* at p. 1.)

The Joint Powers Authority operates on an annual budgeting cycle, so it has not yet approved or funded mitigation plans for the years after deliveries of mitigation water end. Yet it is clear that the mitigation costs that will become necessary absent restoration will be substantial. The Resources Agency has estimated that mitigation will cost $800 million in 2006 dollars (equivalent to nearly $950 million in 2014 dollars), and possibly more. (State Auditor Report, *supra*, at p. 17.) That figure, moreover, actually understates the severity of the mitigation challenges facing the Sea if no restoration plan is implemented. The bulk of the money would be spent to prevent and mitigate fugitive dust emissions from exposed playa, but there is no guarantee that those efforts will succeed, and the $800 million figure does *not* include any significant funding for salinity control or saline habitat—both of which are essential to the ecological health of the Sea. IID will continue to bear mitigation costs as required by the JPA Agreement, but its obligation, along with those of CVWD and SDCWA, are capped at $133 million (in 2003 dollars), with all mitigation costs beyond that amount to be borne by the State alone.

In addition to funding Salton Sea mitigation through the Joint Powers Authority, IID has gone above and beyond its legal obligations to lay the groundwork for the State to fulfill its commitment to restore the Sea. In 2013, IID in partnership with Imperial County launched the

Salton Sea Restoration and Renewable Energy Initiative ("Initiative") to jumpstart stalled restoration work at the Sea. The Initiative seeks to develop renewable energy resources at the Sea and to play a constructive role, as envisioned by AB 71, in working with the State to identify beneficial restoration projects at the Sea that can be implemented and funded. While IID believes the Initiative can help build momentum toward restoration of the Sea, the fact remains that the obligation to restore the Sea belongs to the State alone, and it has not yet fulfilled that obligation.

3. QSA Litigation

IID has also been a staunch defender of the QSA in the courts. For more than a decade, it has expended significant financial resources defending the QSA against a wide variety of legal challenges. In 2003, shortly after the QSA was executed, IID filed an action in California Superior Court seeking to validate the agreements pursuant to Code of Civil Procedure § 22762 and Water Code § 860. That action was ultimately consolidated with lawsuits challenging the environmental impacts of the QSA transfers under CEQA, brought by Imperial County and the Imperial County Air Pollution Control District (among others). After seven years of litigation, the Superior Court invalidated the QSA on the ground that the JPA Agreement violated constitutional prohibitions barring the State from incurring debts and prohibiting the courts from ordering the Legislature to make appropriations. In 2011, the California Court of Appeal reversed and remanded the case. (*See In re QSA Cases, supra*, 201 Cal.App.4th 758.) On remand, in June of 2013, the trial court issued an order validating the QSA. Several parties appealed that ruling, and the appeals remain pending before the Court of Appeal. (*See In re Quantification Settlement Agreement Cases*, No. C074592, Cal. Ct. App. (3d Dist.).)

Throughout the QSA litigation, IID has consistently argued—and still maintains—that, notwithstanding the potential environmental effects of the QSA, the legal challenges to the

transfers lack merit under California law. But, IID has emphasized, that is true *only because* the QSA included, as indispensable elements, robust mitigation measures and an unequivocal commitment by the State to restore the Sea. The QSA litigation, in short, provides additional support for the conclusion that if the QSA is to continue—as IID believes it should—it must continue *in its entirety*, including through the fulfillment of the State's commitment to restore the Salton Sea.

III. THE BOARD SHOULD EXERCISE ITS "CONTINUING AUTHORITY" TO MODIFY ITS 2002 ORDER AND REQUIRE THE STATE TO FULFILL ITS STATUTORY OBLIGATION TO RESTORE THE SALTON SEA AS A CONDITION OF THE QSA TRANSFERS.

In its 2002 Order, the Board repeatedly emphasized that it retains the authority to revisit the impacts of the QSA transfers in light of future developments. In particular, the Board made clear that it would reassess the impacts of the QSA transfers after the 15-year period during which mitigation water would be delivered to the Salton Sea. That period of time, the Board concluded, would be sufficient to determine whether a feasible Salton Sea restoration plan could be devised and implemented.

Given the State's failure to make any significant progress on fulfilling its restoration obligations, it is time for the Board to revisit the 2002 Order. Over the past 15 years, multiple studies have demonstrated that restoration of the Salton Sea is both feasible and essential to maintaining the environment and public health at the Salton Sea and in the Imperial and Coachella valleys. In light of those studies, as well as the State's unequivocal statutory commitment to restore the Sea as part of the QSA, the Board should take steps to ensure that the State follows through on its commitment. The Board should initiate a collaborative, cooperative process that would bring together all of the QSA parties and Salton Sea Authority member agencies to agree upon a restoration plan that can realistically be presented to the Board,

implemented, and funded in time to prevent the environmental and public-health crisis that the Sea otherwise faces. IID stands ready to be an active and engaged partner in that process. Whatever the outcome, there can be no doubt but that the State *must* restore the Sea as a condition of the QSA transfers.

The QSA was crafted to solve a statewide problem—namely, California's urban reliance on excess on the Colorado River to meet its water supply needs. Absent the QSA transfers, water users junior to IID would have faced significant reductions and shortages, and immense strain would have been placed on environmental resources elsewhere in the State—particularly in the Sacramento-San Joaquin River Delta. The QSA has been largely successful in averting these threats, and the State and the water agencies receiving conserved water have reaped the benefits of the transfers. But just as the QSA has statewide benefits, so too must its costs—the threat of significant, irreversible environmental and public-health impacts at the Salton Sea and in the Imperial and Coachella valleys—be borne by the State as a whole, as the QSA envisioned.

A. The Board Has Both the Authority and the Duty to Impose New or Modified Conditions on the QSA Transfers to Protect the Environment

The Legislature has vested the Board with "plenary power and duties of management and oversight of valuable water resources." (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 148; *see also Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1485 [the Board possesses "full authority to exercise the adjudicatory and regulatory functions of the state in the field of water resources" (internal quotation marks and citation omitted)]; Water Code §§ 174, 179.) This includes the "broad authority to control and condition water use," which "includes protection of the environment." (*Light*, *supra*, 226 Cal.App.4th at p. 1485.) The Board also possesses all "'powers … that may be necessary or

convenient for the exercise of its duties authorized by law.'" (*Id.* at p. 1482 [quoting Water Code § 186, subd. (a)].)

Sections 1701 and 1736 of the Water Code set forth the Board's authority and duty as they relate to the approval of petitions for changes in a water rights permit. Section 1701 provides that an "applicant, permittee, or licensee" (such as IID in this instance) "may change the point of diversion, place of use, or purpose of use" from that specified in a water rights permit, and that such change "may be made only upon permission of the Board." The QSA transfers fall under this provision because they entail all three of those triggering types of changes: During the period of up to 75 years in which the QSA transfers are in effect,[14] water transferred by IID to SDCWA or MWD (1) will be diverted at Parker Dam instead of Imperial Dam; (2) will be used in urban Southern California rather than the Imperial Valley; and (3) will be used for a variety of purposes (including residential and industrial use) rather than for primarily agricultural purposes.

Section 1736 sets forth the standards the Board must apply in deciding whether to approve or reject a petition for a long-term transfer, defined in Section 1735 as any transfer involving a "change of point of diversion, place of use, or purpose of use … for any period in excess of one year." Section 1736 provides that the Board may approve such a petition only "where the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses." (*See also United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 103 [Board generally must

[14] Under Water Code § 1737, "[f]ollowing expiration of the long-term transfer period, all rights shall automatically revert to the original holders of the right without any action by the board." (*See also* Water Code § 1011, subd. (c) ["Notwithstanding any other provision of law, upon the completion of the term of a water transfer agreement, or the right to the use of that water, that is available as a result of water conservation efforts … the right to the use of the water shall revert to the transferor as if the water transfer had not been undertaken."].)

"consider the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources and needed to remain in the source for the protection of beneficial uses" (internal quotation marks and citation omitted)].)

Section 1736, like the other sections of the Water Code delineating the Board's power, grants the Board not merely a one-time power, but rather the "continuing authority," as well as the statutory duty, to oversee water use and to ensure compliance with the law. (*United States v. State Water Resources Control Bd., supra*, 182 Cal.App.3d at p. 129; *see also id.* at p. 152 [Board possesses the "power and duty to reopen … permits to protect fish and wildlife wherever feasible" (internal quotation marks omitted)]; *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.* (1980) 26 Cal.3d 183, 190 [Board retained jurisdiction over water permits to adapt to future changes in conditions]; *cf. Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 447 [public trust doctrine "imposes" on the Board "a duty of continuing supervision over the taking and use of … appropriated water" in California]; App. 23 & fn. 5 [2002 Order, noting that Section 1736 "effectively codifies the SWRCB's duty to consider public trust uses" when adjudicating change petitions (citing *National Audubon Society*)].)

Consistent with these principles, the Board in its 2002 Order repeatedly and expressly "reserve[d] continuing authority to consider whether it would be appropriate to add, delete, or modify the mitigation measures required by this order to protect the Salton Sea" in light of later developments. (App. 51; *see also, e.g.*, App. 50, fn. 11; 51, fn. 12; 57; 64; 68; 78; 81; 91; 95.) In addition, the Board specifically identified 15 years—the period during which deliveries of mitigation water to the Sea would continue—as the timeframe after which it would be appropriate to revisit the 2002 Order. (*See* App. 70 ["Because the SWRCB is reserving continuing authority to amend the conditions specified in this order after 15 years, we may

consider other actions to mitigate" the impacts of the QSA transfer "in the future."]; App. 51, fn. 12 ["Because we are reserving continuing authority, we need not speculate at this time on how or under what circumstances the SWRCB should address degradation that may occur 15 years from now."].) Indeed, the case law is clear that the Board possesses the "power and duty to reopen … permits to protect fish and wildlife 'wherever feasible,' even *without* a reservation of jurisdiction." (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 152 [quoting *Nat'l Audubon Soc'y*, 33 Cal.3d at p. 446-47].)

In light of these authorities, it is clear that the Board has the authority under the Water Code to revisit its 2002 Order and add or modify conditions on the QSA transfers. It is also clear that the Board has a statutory duty to ensure that the QSA transfers do not have an unreasonable adverse effect on the environment at the Salton Sea and in the Imperial and Coachella valleys. Revisiting the 2002 Order is particularly necessary and appropriate before the end of the 15-year period in 2017, during which the mitigation measures contained in the 2002 Order are in effect. IID is filing this petition now, in 2014, in order to ensure that a restoration plan is identified and implemented before deliveries of mitigation water conclude at the end of 2017. It will not be sufficient to try to respond retroactively to environmental and public-health impacts at the Sea and in the Imperial and Coachella valleys after they have already taken place.

B. The Board Should Require the State to Fulfill Its Statutory Commitment to Restore the Salton Sea as a Condition of the QSA Transfers

Section 1736, as discussed above, requires the Board to determine whether a proposed long-term transfer would "unreasonably affect fish, wildlife, or other instream beneficial uses." That formulation calls for an inquiry into the reasonableness of mitigation or restoration measures accompanying a proposed long-term transfer such as the QSA. And "the test of reasonableness is dependent upon the totality of the facts and circumstances involved in the

context of each case." (*Betchart v. Dep't of Fish & Game* (1984) 158 Cal.App.3d 1104, 1108 [internal quotation marks and citation omitted]; *see also Ford & Vlahos v. ITT Commercial Fin. Corp.* (1994) 8 Cal.4th 1220, 1235 [reasonableness inquiry "is intensively factual and the answer depends upon all of the circumstances" (internal quotation marks omitted)].)

In the 2002 Order, the Board determined that the "impacts to fish and wildlife that rely on the Salton Sea are reasonable given the importance of the transfer to the State," but *only* "so long as" the mitigation measures set forth in the EIRs and ordered by the Board were implemented. (App. 29.) As discussed above, *see supra* Section II.B.3, those mitigation measures were crafted against the background presumption that the State would fulfill its obligation to restore the Sea. For that reason, the principal mitigation measure the parties contemplated—continued water deliveries to the Salton Sea—is set to expire in 2017. In other words, the mitigation measure in the 2002 Order without which this Board would not have approved the QSA transfers will cease to be operative in just three years. At the same time, little progress has been made on restoration, which, like mitigation, always has been an indispensable part of the overall structure of the QSA. In light of that reality, as well as the multiple studies that have concluded that restoration of the Salton Sea is both feasible and necessary to avert an environmental and public-health crisis, the Board should require the State to fulfill its unequivocal commitment to restore the Sea as a condition of the QSA transfers.

1. The State Has Made an Unequivocal Statutory Commitment to Restore the Salton Sea

The State has made an unequivocal statutory commitment to undertake the restoration of the Salton Sea. Section 2931 of the Fish & Game Code, added by SB 277 as part of the QSA legislation in 2003, provides that "[i]t is the intent of the Legislature that the State of California undertake the restoration of the Salton Sea ecosystem and the permanent protection of the

wildlife dependent on that ecosystem." (Fish & Game Code § 2931, subd. (a).) The statute further mandates that "[t]his restoration shall be based on the preferred alternative developed as a result of the restoration study" undertaken by the Resources Agency. (*Id.*, subd. (b).) These statements setting forth the State's responsibilities with regard to the Sea could hardly be clearer.

As California courts repeatedly have emphasized, the "fundamental rule of statutory construction" in California is that "a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 438-39 [internal quotation marks omitted].) This intent is the "controlling issue" in cases of statutory interpretation. (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 831.) And the key task of ascertaining the intent of the Legislature is easy where, as here, the statute contains an "express declaration of the intent of the Legislature." (*In re Johnson* (1980) 107 Cal.App.3d 780, 786 [internal quotation marks omitted].)

In enacting SB 277, the Legislature unequivocally made "the restoration of the Salton Sea ecosystem and the permanent protection of the wildlife dependent on that ecosystem" the governing law of the State. (Fish & Game Code § 2931, subd. (a).) The Legislature reaffirmed that mandate just last year in enacting AB 71, which states that "[i]n restoring the Salton Sea, it is the intent of the Legislature," among other things, "to protect fish and wildlife that are dependent on the Salton Sea ecosystem," "[r]estore the long-term stable aquatic and shoreline habitat for fish and wildlife that depend on the Salton Sea," "[m]itigate air quality from restoration projects," and "[p]rotect water quality," and "[m]inimize noxious odors and other water and air quality problems." (Fish & Game Code § 2940.) That statutory language not only reaffirms the State's policy of restoring the Salton Sea, but sets multiple concrete criteria delineating what the restoration is designed to accomplish.

Other aspects of the QSA legislation, enacted in 2003, confirm that the Legislature (as it expressly stated) committed the State to undertake the restoration of the Salton Sea. The QSA legislation requires, among other things, that IID, in particular, along with other agencies, make substantial monetary contributions to the cause of Salton Sea restoration—an obligation that would make no sense except as part of a comprehensive plan to restore the Salton Sea. SB 654 required IID, CVWD, and SDCWA to contribute $30 million to the Salton Sea Restoration Fund directly. IID and the other water agencies have fulfilled their obligations under the QSA and the QSA legislation, but the State has not held up its end of the bargain.

2. The Factual Context and Legislative History Surrounding the QSA Legislation Confirm that Its Primary Purpose Was to Ensure that Salton Sea Restoration Would Take Place in Exchange for the Substantial Benefits the QSA Transfers Provided to the State as a Whole

The statutory text alone suffices to make clear the Legislature's intent to commit to restore the Salton Sea. But if there were any doubt on that point, the factual context and legislative history surrounding the QSA legislation confirm the point beyond all doubt. (*See, e.g.*, *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 628 ["Where, as here, no single textually determined construction presents itself, we are well advised … to consult other interpretive aids, including legislative history and the context of the enactment."].)

It is not a coincidence that the Legislature committed in the QSA legislation to undertake the restoration of the Salton Sea. That commitment was, in fact, the *sine qua non* without which agreement on the QSA could not have been reached. The QSA legislation was proposed and enacted after negotiations had ground to a halt, primarily because of concerns that the proposed transfers would doom the Salton Sea and create and exacerbate a panoply of environmental problems at the Sea and in the Imperial and Coachella valleys. (*See, e.g.*, G. Martin, Peace at Last in Key Water Battle, *S.F. Chronicle*, Sept. 30, 2003, at p. A1 [stating that "[i]t became

apparent over the past year that no deal could be struck unless the ecological integrity of the Salton Sea was assured"]; M. Cohen, Salton Sea Must Be Addressed in Water Deal, *San Diego Union-Tribune*, Feb. 20, 2003 ["In part because neither the state nor the federal government put forward a viable solution for the sea, the water transfer collapsed."].) The title of an April 2002 article in the *Sacramento Bee* summed up the situation as concisely as possible: "Salton Sea Impact Threatens to Sink Crucial Water Deal." (D. Kasler & S. Leavenworth, Salton Sea Impact Threatens to Sink Crucial Water Deal, *Sacramento Bee*, Apr. 28, 2002 ["As badly as state regulators want the Imperial water transfer, they fear it could accelerate the decline of the Salton Sea, creating monstrous dust storms and killing scores of birds and fish in California's largest lake."].) It became clear, in other words, that legislators would not permit the State as a whole to shunt its water problems off on the Imperial and Coachella valleys and the Salton Sea, reaping the benefits of reduced water consumption in that region without helping to pay for the accompanying environmental challenges.

At this point, the Legislature faced a choice. It could allow the proposed QSA to fall apart—a course of action that would have doomed California's ability to voluntarily reduce its consumption of Colorado River water, which in turn likely would have prompted the federal government to unilaterally reduce water deliveries to California water agencies. That, in turn, posed a threat of monumental proportions to the entire State, as those agencies would seek to compensate for their losses of Colorado River water by attempting to increase their water imports from elsewhere in California. The Legislature's only other option was to step in and act, in effect, as guarantor for the QSA—to provide assurances to parties, and to the communities in the Imperial and Coachella valleys and around the Salton Sea in particular, that it would bear the

lion's share of the environmental costs that would inevitably accompany the QSA transfers. The Legislature chose this second option.

Given this background, it is no surprise that in debates leading up to the enactment of the QSA legislation, legislators repeatedly announced, in unusually clear and explicit terms, that their central goal was to get the transfer negotiations back on track by firmly committing the State to restoration, thereby alleviating the environmental concerns about the effects of transfers on the Salton Sea and the Imperial and Coachella valleys that had derailed progress on the QSA. The sponsors of the QSA legislation explained that it was "necessary to implement the QSA," a goal the sponsors described as "key to the implementation of the California Colorado River Water Use Plan, the framework for reducing the state's annual use of Colorado River water to its entitlement of 4.4 million acre-feet." (App. 138.) The sponsors noted that "the deadline of December 31, 2002 … for execution of the QSA was not met," and that a primary cause of the impasse was that "the proposed transfer of water … has raised concerns about the decrease of inflow to the Salton Sea" and accompanying environmental challenges. (*Ibid.*) This was a major source of concern for the Legislature, because it was "important for California to honor its commitment to reduce Colorado River water use," and to achieve this goal the Legislature considered it a "necessity" that the QSA "be executed by a date certain" and that it entail "a water transfer from Imperial Irrigation District to San Diego." (App. 177.)

The sponsors of the QSA legislation went on to explain—repeatedly and in no uncertain terms—that in order to address the environmental concerns that had derailed the QSA, the State had agreed to restore the Sea:

> The QSA *commits the state to restoration* of the environmentally sensitive Salton Sea and provides full mitigation for its water supply programs. … One of the features of the final version of the QSA is a *commitment on the part of the state to restore the Salton Sea.* Earlier versions merely committed to maintaining the

> present rate of deterioration of the Salton Sea for the next fifteen years. [¶] *This bill states that it is the responsibility of the State of California to restore the Salton Sea.* (App. 98-99 [emphasis added].)

This was not stray or unconsidered language. Virtually identical language, stating that the QSA and the legislation "commit[ted]" the State to Salton Sea restoration, that restoration was a "responsibility of the state," and that the State would restore the Sea even though "it will be very expensive," appeared multiple times throughout the legislative history of all three bills that together composed the QSA legislation. (App. 97-98, 103-104, 109, 114, 118, 120-121, 138-139, 143-144, 150, 191.) To emphasize: "[e]arlier versions" of the QSA had failed to win agreement because they committed to preserve the Sea only "for the next fifteen years," so the State, in view of the urgency of brokering an agreement, stepped in to guarantee the long-term health and stability of the Sea and the Imperial and Coachella valleys. (App. 99.) It is rare to find legislative history with such a degree of specificity and clarity regarding the aims and objectives of resulting legislation.

The Legislative Analyst reached the same conclusion in analyzing the context and purpose of the QSA legislation. "During the negotiations surrounding the QSA, a critical issue was the financial responsibility for any negative environmental impacts on the Sea from the water transfer. In order to facilitate the signing of the QSA, the state (as a signing party to the QSA and in statute) agreed to assume most of the financial responsibility for the restoration of the Sea." (LAO Report, *supra*, at p. 8.) Thus, on the very first page of its report and again repeatedly throughout the report, the Legislative Analyst recognized that "[t]he State of California has legal and contractual obligations to restore the [Salton] Sea." (*Id.* at p. 1; *see also id.* at pp. 3 ["Due to a series of statutes and contractual agreements regarding the use of Colorado River water in Southern California, the state has an obligation to restore the Sea."]; 7 ["[T]he state's obligation to restore the Sea, and its related financial obligation to pay for most of the

restoration, has its basis in both contractual agreements and statute."]; 35 ["The state has a statutory and contractual obligation to restore the Sea."].) The Legislative Analyst's report—which, like legislative history and statutory context, is a proper source of "extrinsic aid to help determine legislative intent" (*Shippen v. Dep't of Motor Vehicles* (1984) 161 Cal.App.3d 1119, 1126; *accord Day v. City of Fontana* (2001) 25 Cal.4th 268, 273)—confirms that the State has the obligation to restore the Sea.

It was not just legislators and the Legislative Analyst who recognized that the Legislature agreed to undertake the restoration of the Salton Sea in order to offset the anticipated environmental effects of the QSA transfers, and in so doing push the QSA parties toward the finish line in negotiating a deal. Virtually every informed observer writing about the legislative negotiations reached the same conclusion. A plethora of news reports throughout the fall of 2003 described the acceptance of the long-term reduction in agricultural return flows to the Salton Sea resulting from the QSA transfers as a "concession" that had been made as "a trade-off for Salton Sea restoration." (M. Gardner, Davis Signs Bill to Clear Environmental Hurdles on Water Deal, *San Diego Union-Tribune*, Sept. 30, 2003; *see also, e.g.*, G. Martin, Vote Ends Long-Running Water Wars, *S.F. Chronicle*, Oct. 4, 2003 [noting that the QSA "provides for restoration of the Salton Sea"]; Colorado River Deal Could End Water Wars, *San Jose Mercury News*, Sept. 12, 2003 [noting that the agreement "sets up a restoration plan for the environmentally threatened Salton Sea"].) Indeed, in summarizing the purpose and effect of the QSA legislation in one sentence, the *Los Angeles Times* described it as: "creat[ing] a way to *pay for restoration of the Salton Sea … to offset the environmental harm of transferring water* from

the Imperial Valley to San Diego." (Bills Signed Into Law by Gov. Davis, *L.A. Times*, Oct. 13, 2003 [emphases added].[15])

The key principle underlying the QSA compromise was that, just as the entire State would reap the benefits of the QSA—by allowing California to live within its share of Colorado River water without placing a dramatic strain on water resources and the environment in the rest of the State—so should the entire State, and not just the people in the Imperial and Coachella valleys and around the Salton Sea, bear the substantial burdens the QSA water transfers would entail.

Unfortunately, in the years since the QSA, the fundamental bargain that permitted it to come into existence has not been kept. Although the State has benefited immensely from the QSA transfers, and IID and other agencies have borne the costs (so far) of mitigating the effects of those transfers in order to give the State the time and opportunity to implement a restoration plan, the State has failed to act.

3. The Parties Expressly Premised the QSA Transfer Agreements on the State's Fulfilling Its Statutory Commitment to Restoration

At the time the QSA was signed, IID and the other QSA parties recognized the indispensable role played by the State's commitment to restoration (as well as the rest of the QSA Legislation) in bringing the parties back to the negotiating table. For that reason, the parties included language in the QSA making clear that the agreement was expressly contingent

[15] IID acknowledges that its prior legal counsel made statements in certain court filings that are in tension with these authorities. (*See* Imperial Irrigation District Phase 1A Response Trial Brief at p. 23, *QSA Coordinated Civil Cases* (Cal. Super Ct., JCCP No. 4353, Oct. 29, 2009) ["The QSA-JPA Agreement does not contain any contractual promise by the State, or any other party, to restore the Salton Sea."].) Counsel responsible for these statements no longer represents IID and such statements were not adopted by courts, lacked relevant citations, contradict the multiple authorities cited above, and do not reflect the position of IID.

upon the State's restoring the Salton Sea. The QSA parties, and IID in particular, in entering into the QSA and crafting the mitigation measures that would accompany the transfers, also detrimentally relied on the State's commitment.

The three-party QSA provides that "[t]his Agreement and the Related Agreements"—*i.e.*, the other QSA agreements—"are premised on, among other things, the special considerations set forth in Section 6.2." (App. 331.) These special considerations include "[t]he continuation of the QSA Legislation in full force and effect and without material modification." (App. 334.) The term "QSA Legislation" is defined elsewhere in the agreement as encompassing the three bills enacted by the Legislature and signed into law in the fall of 2003: SB 277, SB 317, and SB 654. (App. 314.) SB 277, in turn, announces the Legislature's intent that the State of California undertake the restoration of the Salton Sea.

In other words, the QSA is "premised" on the Legislature's commitment to undertake the restoration of the Salton Sea "continu[ing] … in full force and effect and without material modification." (App. 331, 334.) That conclusion accords not only with the negotiating history outlined above, but also with common sense: it is obvious that the intent of the QSA parties was to premise their agreement on the QSA legislation *actually being enforced*. That commitment was the centerpiece of the QSA legislation, without which the QSA never would have come into being. In light of that clear intent, there can be no question but that the State's commitment to restore the Salton Sea is a core premise on which the entire QSA rests. The QSA parties' intent thus confirms the plain text of the QSA, establishing that the QSA was premised on the State restoring the Sea. (*See, e.g.*, *Hartnell Community College Dist. v. Superior Court* (2004) 124 Cal.App.4th 1443, 1451 [if a contract term "is ambiguous, its interpretation depends on the parties' intent"].)

The three-party QSA specifically defines the consequences in the event that any of the premises set forth in Section 6.2 are not satisfied: it provides, in a section labeled "Failure of Consideration," that "a material failure of any special considerations set forth in Section 6.2"—which include the continuation "in full force and effect" of the QSA legislation—"shall constitute an irreparable injury to each Party and shall also constitute irreparable harm to the public interest." (App. 334.) As a result of this provision, a failure of any one of the premises in Section 6.2 has the effect of discharging the contracting parties from their obligations under the contract. "Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for the performance by the other party." (*Rutherford Holdings, LLC. v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 230 [internal quotation marks and citation omitted].) Moreover, a "failure of consideration is a ground for either rescinding or terminating a contract." (*Scheel v. Harr* (1938) 27 Cal.App.2d 345, 352; *accord* Civil Code § 1689(4); 1 Witkin, Summary of Cal. Law [10th ed. 2005] *Contracts* § 814; Restatement [Second] Contracts § 274.) The State's failure to undertake the restoration of the Salton Sea, therefore, seriously jeopardizes the continuing force of the QSA parties' obligations under the agreements.

The QSA parties had good reason to make restoration a prerequisite of the QSA. As discussed above (*see supra* Section II.B.3), the parties relied on the State's representations regarding restoration in creating and amending the mitigation plan accompanying the QSA transfers. In the end, the mitigation plan, and the Board's 2002 Order, required 15 years of deliveries of mitigation water—less than had been initially proposed, and less than would have been required in the absence of the State's commitment to restoration. This "detrimental reliance on the [State's] promise" to restore the Sea provides yet a further, independent basis for the

Board to conclude that restoration must accompany the QSA transfers. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.)

The Board, of course, is not a court, and is not in a position to hear a contract dispute.[16] What it does have the authority to do, under Water Code § 1736, is to impose reasonable conditions on long-term transfers. In light of the plain text of the QSA legislation, the factual background against which the state undertook its restoration commitment, the QSA parties' express and detrimental reliance upon that commitment, and the demonstrated public-health and environmental impacts that will result if the transfers go forward with that commitment being unsatisfied, the Board should exercise its authority under § 1736 to require the State to fulfill its statutory obligation to restore the Salton Sea as a condition of the QSA transfers.

4. Restoration of the Salton Sea Is Feasible and Necessary to Prevent Severe Public-Health and Environmental Consequences

In its 2002 Order, the Board recognized the crucial role of Salton Sea restoration. But it also recognized that, at that time, it was too early to impose restoration as a condition of the QSA transfers—indeed, the QSA legislation had not yet even been enacted. The Board noted that "[t]he feasibility of restoring the Salton Sea is the subject of an ongoing study by the Secretary of the Interior and the Salton Sea Authority," and that implementation of a 15-year mitigation plan would "provide time to study the feasibility of long-term restoration actions and begin implementation of any feasible restoration projects." (App. 6-7.) Part of that has happened: a

[16] By filing this petition, IID does not waive, and in fact hereby expressly reserves, all of its rights to seek any contractual or other relief to which it may be entitled at law or in equity. IID has filed this petition because it believes that the Board, as the entity possessing plenary authority to regulate water use and water transfers in California, is well situated to resolve the legal and factual questions regarding restoration of the Sea, particularly in light of

. its reservation of continuing authority over the QSA transfers in the 2002 Order. It is IID's hope that cooperative dialogue and proceedings before the Board can obviate any possible litigation regarding restoration of the Sea.

number of studies have revealed that restoration is feasible and achievable at a realistic cost. These studies also have revealed that the Sea and the Imperial and Coachella valleys face an environmental crisis if restoration does not occur, and that restoration will eliminate or reduce the need for substantial mitigation expenditures. But implementation has not progressed. Under these circumstances, requiring the State to fulfill its commitment to restore the Sea as a condition of the QSA transfers is the only reasonable approach.

Numerous analyses of restoration have now been conducted, by both governmental and nongovernmental entities. These analyses uniformly have concluded that restoration of the Sea can be achieved, primarily by reducing the size of the Sea; creating special habitat zones to support fish, birds, and other organisms; and establishing a salt deposit area and a water barrier around exposed playa to minimize adverse air-quality impacts. The Salton Sea Authority has released a detailed plan for Salton Sea restoration that includes all of these elements, as well as water treatment facilities and a Colorado River water storage area, and would cost an estimated $2.2 billion to carry out, a large portion of which may come from local funding sources such as the development of renewable energy resources. (Salton Sea Authority Plan, *supra*, at pp. ES-6 through ES-12.) The Resources Agency has identified eight separate alternatives with construction costs ranging from $2.3 billion to $5.9 billion. (LAO Report, *supra*, at pp. 17-19.) Reclamation's report arrived at similar conclusions and its estimates were in that same range. (Reclamation Report, *supra*, at p. xxi.)

These analyses also establish that the *failure* to undertake restoration will result in significant environmental impacts to the Salton Sea that cannot be fully mitigated. Absent restoration, the Resources Agency determined, there will be a "decline and ultimate loss of open water fish populations," which in turn will "reduce and possibly eliminate use of the Salton Sea

by fish-eating birds," including those listed as endangered, threatened, or as species of concern under federal and state law. (Preferred Alternative Report, *supra,* at p. 4.) The Salton Sea Authority reached the same conclusion: "If no remedial actions are taken, the Sea will become so saline within 15 years … that the sport fishery and the fish that serve as a food source for the birds will be effectively eliminated." (Salton Sea Authority Report, *supra,* at p. ES-2.)

Of greater immediate concern to the residents of the Imperial and Coachella valleys is the stark reality that, absent restoration, dust emissions from exposed Salton Sea playa will increase dramatically from less than 1,000 tons of dust per year to anywhere between 4,000 and 38,000 tons of dust per year. (Pacific Institute Report, *supra,* at p. 18; *accord* State Auditor Report, *supra,* at p. 18 ["State and federal experts agree that the high winds around the sea are likely to pick up significant amounts of fine dust from the dry seabed, increasing the amount of particulate matter in the air and further reducing the air quality in an already degraded basin."].) It is almost impossible to overstate the threat these new dust emissions would pose to the Salton Sea region. Already, the Salton Sea air basin does not meet state or federal particulate matter pollution (PM-10) standards, and fugitive dust emissions account for almost 70 percent of PM-10 emissions in the region. (Pacific Institute Report, *supra*, at pp. 13-14.) The projected new dust emissions would have a significant adverse impact on the health of tens of thousands of residents in the Imperial and Coachella valleys, given the well-documented scientific evidence demonstrating a close causal link between increased particulate emissions and increased mortality rates, as well as increased incidence of cardiac disease, heart attacks, lung cancer, and asthma. (*Id.* at p. 12.)

The consequences of a failure to restore the Salton Sea do not relate solely to the environment and public health—they are financial in nature as well. Between the significant costs associated with increased mortality rates and health expenditures, a loss of valuable

ecological resources at the Sea, reduced property values, decreased agricultural productivity, and other costs, failure to restore the Sea will carry a total price tag of at least $13 billion and up to $70 billion, dwarfing the costs of restoration. (Pacific Institute Report, *supra*, at pp. v-vi.)

These costs can be partially, though not entirely, covered by any mitigation expenditures arising from the transfers, but mitigation itself—the cost of which the State is "unconditionally obligate[d] … to pay" (*In re QSA Cases, supra*, 201 Cal.App.4th at p. 775)[17]—will be very high, potentially on the same order of magnitude as the cost of restoration. Reclamation estimated that the cost of mitigating the air-quality impacts *alone* of the QSA transfers would be at least $1.4 billion. (Restoration Report, *supra*, at p. xvi.) The State Auditor likewise recognized that although "the future costs of mitigation are uncertain," the Department of Fish and Wildlife had estimated the cost of mitigation at approximately $800 million (in 2006 dollars), and that even this estimate "was based on conditions that were known at the time it was developed and does not reflect all of the mitigation costs the State may incur in satisfying its financial obligations under the QSA." (State Auditor Report, *supra*, at p. 17.) These are just upfront costs—for mitigation, no less than for restoration, "all of the alternatives under consideration would require significant annual operational costs." (LAO Report, *supra*, at p. 20.) And as expensive as this mitigation effort will be, there is no guarantee it will be successful. Its prospects for success are certainly weaker than the prospects of restoration would be, and even a partial failure of mitigation would leave the Salton Sea region facing billions of dollars in environmental and public-health costs, as described above.

[17] The State repeatedly has recognized this obligation, most recently in a brief in the ongoing litigation before the Court of Appeal. (*See In re Quantification Settlement Agreement Cases*, No. C074592, Respondents' Brief of the State of California by and Through the Department of Water Resources and the Department of Fish and Wildlife (April 16, 2014), at p. 9 ["[T]he state owes the obligation and cannot argue lack of appropriation as a defense."].)

This is not to say that restoration will be inexpensive. No doubt, it will be a costly endeavor. But the same will also be true of mitigation if no restoration plan is implemented—and the State has already agreed to bear that expense. There is no cost-free option. The choice is between, on the one hand, the State paying upward of a billion dollars to *mitigate*, though not fully avoid, the negative environmental and public-health impacts and costs of the QSA transfers, and, on the other hand, the State paying somewhat more (though precisely how much more remains to be seen) to restore the Sea and protect the public health and ecological value of the Sea, as was promised when the QSA was signed. The expense of restoration, moreover, would be borne by the State as a whole—in reflection of the State's interest in reducing Colorado River water use through the QSA transfers—while the costs of an unsuccessful or incomplete mitigation effort would be borne entirely by the Salton Sea region and the Imperial and Coachella valleys. That is the precise outcome the QSA was carefully structured to avoid.

IV. REQUESTED RELIEF

IID recognizes the difficulties and challenges involved in restoring the Sea. It also recognizes that, although the obligation to restore the Sea belongs to the State alone, the process for identifying and implementing a restoration plan should be a collaborative and cooperative one, with input from key affected parties. To that end, IID believes the first step in achieving restoration is to bring together the State and all such affected parties for an open and collaborative dialogue. The SWRCB should order the QSA parties and Salton Sea Authority member agencies to meet and confer in good faith in an effort to achieve consensus around a realistic, feasible restoration plan and mechanism for funding it. The SWRCB unquestionably possesses the authority to order the parties to enter into such a dialogue, because doing so would be both "necessary [and] convenient for the exercise of [the Board's] duties authorized by law." (Water Code § 186.) If possible, this process should be chaired or overseen by a member of the

SWRCB, in order to provide guidance and leadership to the parties. IID stands ready to work as an active, engaged partner, and will do its utmost to ensure that this collaborative process achieves its goal.

The process must not be open-ended: the crisis the Salton Sea faces is imminent, and dialogue on its own will not solve the problem. Thus, the Board should set a hard-and-fast, short-term time limit of no more than six months for the collaborative dialogue. This dialogue should, at a minimum, focus on how the State will meet its obligation to fund a restoration plan and explain how the plan will avoid the most significant environmental and public-health threats the Sea and the Imperial and Coachella valleys face. As discussed above, a variety of detailed restoration plans, along with price estimates, have been put forth by a number of different government agencies and nongovernmental organizations. Although IID does not at this time advocate any particular restoration plan, the broad contours of restoration (as detailed in the numerous restoration plans released to date), and the goals that restoration must achieve, are clear.

In order to ensure that restoration of the Sea begins before it is too late, the Board should notice and schedule the public hearing now, and also should establish procedures and set a timeline for the other steps in the process. Setting the dates now will provide the parties with both certainty and an appropriate sense of dispatch to guide their dialogue.

IID suggests the following sequence, which will allow the process to move forward in an expeditious manner with full input from affected parties:

First, the Board should hold an initial status conference or workshop within the next month—*i.e.*, before the end of 2014. At this initial status conference or workshop, the Board should order the parties to commence the dialogue discussed above, and provide any guidance

the Board finds appropriate for the conduct of that dialogue—including, at a minimum, a timeline and procedures for the steps to follow.

Second, at the initial status conference or workshop, the Board should notice and schedule a second status conference or workshop for approximately six months from the date of filing of this petition, so that the parties may inform the Board of the results of their dialogue.

Third, again at the initial status conference or workshop, the Board also should notice and schedule a public adjudicatory hearing—to be held approximately nine months from the date of filing of this petition—at which the parties would present their legal and factual submissions to the Board, informed by the results of their dialogue, and interested members of the public also would have an opportunity to comment. At the public hearing, the parties would have the opportunity to present evidence and to call and cross-examine witnesses, and the Board could weigh that evidence, along with the parties' submissions and public comment regarding the QSA and restoration of the Salton Sea.

Finally, following these other processes and resolution of the plan for restoration, the Board should issue an order modifying its 2002 Order to add State implementation and funding of that restoration plan as a condition of transfers under the QSA.

In carrying out this process, the steps that led to the 2002 Order can serve as a model: following public notice and an opportunity for public comment, the Board held a 15-day public hearing focusing on approximately a dozen different issues relating to the proposed QSA. (App. 13-17.) A similar structure would be appropriate here, although with a narrower scope, and would allow for the Board to take action that is prompt, deliberative, and well-informed. For the reasons set forth above, IID believes restoration of the Sea is, and always has been, an indispensable component of the QSA, and IID would stand ready at that point to make its full

legal and factual case before the Board. IID will demonstrate that the public interest and the necessity of avoiding overwhelming environmental, public-health, and economic impacts at the Salton Sea and in the Imperial and Coachella valleys require the State to comply with its commitment to implement and fund a Salton Sea restoration plan. Accordingly, IID respectfully requests that the SWRCB modify the conditions on the QSA transfers contained in the 2002 Order to add the condition that the State implement and fund Salton Sea restoration as provided herein.

V. CONCLUSION

IID respectfully urges that this petition be approved and that the Board implement the relief outlined above.

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DATED: November 18, 2014

Respectfully submitted,

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