

instead adds all of these other impacts together in its projected "baseline."⁵⁶ The Model's 12- and 75- year outputs are then improperly used as a starting-point comparison for deciding whether transferring an *additional* 130 KAFY to 300 KAFY out-of-basin might have significant impacts. Having ensured that the projected baseline already spells disaster for the Salton Sea, the Water Transfer DEIR improperly concludes that the transfers' acceleration of and "incremental" contributions to these other projects' impacts on Hydrology and Water Quality and on Biological Resources must be less than significant.

Having incorporated the adverse impacts of all other projects into its baseline for environmental analysis, the Water Transfer DEIR/DEIS' cumulative impacts analysis is unlawfully stunted and oversimplified: the improper inclusion of all other projects' impacts into the "baseline" leaves nothing to cumulatively analyze.

The Water Transfer DEIR/DEIS' "analysis" of cumulative impacts to Hydrology and Water Quality is a total of two paragraphs, and incredibly concludes that "[n]o significant cumulative impact would occur to hydrology and water quality of the Salton Sea with implementation of the Proposed Project and other related projects," despite the fact that the DEIR plainly states that the water level will fall some 22 feet (nearly 1/2 the current depth of the Sea) and result in salinity of up to 162,000 mg/L TDS (nearly four times the Sea's present salinity).⁵⁷

The Water Transfer DEIR/DEIS' Biological Resources cumulative impacts analysis claims that *all* cumulative impacts will be "avoid[ed] and/or mitigate[d]" by implementation of the proposed Project's HCP component, and that implementation of the proposed Project and its

⁵⁶ See discussion at note 11 *supra*.

⁵⁷ Water Transfer DEIR/DEIS at p. 5-33. See note 18. *supra*.

proposed HCP will only have beneficial impacts on affected species.⁵⁸ However, the proposed HCP explicitly states that it is *only* designed to offset the proposed Project's incremental impacts: "It is unreasonable and impractical for the water conservation and transfer programs to bear the burden of restoring the Salton Sea. [¶]The level of mitigation should be scaled to the impact attributable to the water conservation and transfer programs."⁵⁹ Because the Water Transfer DEIR refuses to recognize and assess all other projects' negative impacts – instead burying them in the projected "Baseline" – the Water Transfer DEIR/DEIS' cumulative impacts analysis fails to disclose the truth: cumulative impacts to the Sea's Biological Resources will, in fact, remain significant *despite* implementation of the proposed Projects' parsimonious HCP.

To put it in the kindest possible light, the Water Transfer DEIR/DEIS' analysis of cumulative impacts is factually erroneous and legally inadequate. The Water Transfer DEIR/DEIS cannot be certified until it actually "assess[es] the collective or combined effect of [water diversions from the Salton Sea]."⁶⁰

V. FINDINGS OF LESS THAN SIGNIFICANT IMPACTS UNSUPPORTED BY SUBSTANTIAL EVIDENCE

When preparing an EIR, "[t]he decision as to whether a project may have one or more significant effects shall be based solely on substantial evidence in the record of the lead agency."⁶¹ Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."⁶² Substantial evidence does not include "argument,

⁵⁸ Water Transfer DEIR/DEIS at p. 5-34.

⁵⁹ Water Transfer DEIR/DEIS, Appendix C, Draft Habitat Conservation Plan IID Water Conservation and Transfer Project at p. 3-25.

⁶⁰ *Kings County, supra*, 221 Cal.App.3d 692, 721.

⁶¹ CEQA Guidelines § 15064, subd. (f). See also Pub. Resources Code § 21082.2, subd. (a).

⁶² Pub. Resources Code § 21082.2, subd. (c); CEQA Guidelines § 15064, subd. (f)(5).

speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous”⁶³

As demonstrated by this memorandum, the Water Transfer DEIR/DEIS erroneously relies on a *future*, worst-case-scenario, model to inaccurately trivialize the impacts that the proposed project will have on the *existing* environmental setting of the Salton Sea. The evidence in the record is therefore “clearly inaccurate or erroneous” and is not a reasonable basis for the Water Transfer DEIR/DEIS’ repeated declarations that the proposed transfer will have less than significant impacts on the Hydrology and Water Quality and on the Biological Resources of the Salton Sea.

CONCLUSION

The Water Transfer DEIR/DEIS is fundamentally, legally flawed, and cannot be certified as written. The Salton Sea Accounting Model establishes a future, worst-case-scenario baseline to declare – in advance – an already dead Salton Sea.

But that is not the case. The Sea is admittedly in need of restoration if it is to support its incredible and unique biological diversity into the future. But it is hardly, at this moment in time, the lost cause that the Water Transfer DEIR/DEIS would make it out to be.

The Salton Sea Accounting Model appears to be a very useful tool for predicting the Sea’s response over time to a variety of changing environmental factors. The scientific ability of the Model to reasonably determine what might happen to the Salton Sea over the next 75 years is not at issue in this memorandum and legal analysis. What is at issue is whether the use of the projected “baseline” in the Model as the statutory “baseline” for CEQA analysis is legally correct. It is not.

⁶³ *Ibid.*

Memorandum to Tom Kirk
April 15, 2002
Page 17 of 17

Letter - R5
Page 49

In fact, the unlawful use of the Model's projected, future predictions as the baseline for environmental analysis taints every aspect of the Water Transfer DEIR/DEIS' analysis that it touches. The use of the projected, future baseline is inconsistent with CEQA's mandate that impacts be compared to the *existing* environmental setting; it has improperly "erased" the No Project alternative from the EIR; it has eliminated the ability to determine the true significance of the proposed Project's impacts on the Sea as it exists today; it has resulted in a legally deficient cumulative impacts analysis; it has resulted in inaccurate and erroneous evidence in the record upon which the EIR's findings of "less than significant impacts" are based.

While this memorandum has only addressed the problems that the Model creates for the Hydrology and Water Quality and Biological Resources sections of the EIR, there is no doubt that the same would apply for any other analysis in the EIR that relies, even if only indirectly, on the Model predicted, future baseline, including impacts to air quality, health and recreation.

R5-134



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COACHELLA VALLEY WATER DISTRICT

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Elston Grugaugh, Manager
Imperial Irrigation District
Resource Planning and Management Department
Post Office Box 937
Imperial, California 92251

Dear Mr. Grubaugh:

Subject: Imperial Irrigation District Water Conservation and Transfer EIR/EIS

The Coachella Valley Water District (CVWD) appreciates the opportunity to provide comments on this document.

The description of the proposed project indicates that the water transfers would occur in accordance with the terms of the IID/SDCWA Transfer Agreement and, as an alternative scenario if the proposed Quantification Settlement Agreement (QSA) is finalized and implemented, in accordance with the modified water transfers provided for under the terms of the QSA. In the absence of the QSA, no water transfer to San Diego County Water Authority (SDCWA) could occur. The alternative of the transferring 300,000 acre-feet per year (AFY) to SDCWA as part of the proposed project should therefore be deleted and all water transfers should be in accordance with the terms of the QSA for the following reasons:

The proposed alternative is not feasible and should be deleted from the analysis because its implementation would violate CVWD's prior right to use the water proposed to be transferred under this alternative.

In *Arizona v. California*, 373 U.S. 546, the U.S. Supreme Court ruled that the Boulder Canyon Project Act established a comprehensive scheme to apportion the mainstream waters of the Lower Colorado River Basin among the Lower Basin states and, through the Secretary of the Interior's (Secretary) contracting power under section 5 of the act, to allocate water apportioned to each state among users within the state and further ruled that the Secretary's contracting power displaced and preempted state law on that subject. (373 U.S. at 588: "Where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place.")

TRUE CONSERVATION
USE WATER WISELY

**Letter - R6. Coachella Valley Water District.
Signatory - Tom Levy.**

Response to Comment R6-1

IID does not agree that in the absence of the QSA, IID, and SDCWA must receive approval of CVWD and MWD before a transfer from IID to SDCWA could occur. This difference of opinion does not impact the environmental analysis. Any legal objections to such a transfer can be resolved by agreement or in the appropriate forum. As noted in the Draft EIR/EIS, IID and SDCWA have filed a petition seeking SWRCB approval of the water transfers, including a determination that the Project is in furtherance of SWRCB Decision 1600, SWRCB Order WR 8820, Article X, Section 2 of the California Constitution, and Sections 100 and 109 of the Water Code. Reclamation's agreement to implement the change in diversion required for a transfer to SDCWA, in a form similar to the IA anticipated for the QSA, would also be needed. Please refer to the Master Response on *Hydrology—Water Transfers to CVWD (QSA Implementation Scenario)* in Section 9 of this Final EIR/EIS.

R6-1

Section 5 of the Boulder Canyon Project Act authorized the Secretary to contract for delivery of water stored in Lake Mead, pursuant to general regulations issued by the Secretary, and expressly provided that "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract as herein made." This contract requirement was reinforced by two provisions of the Supreme Court Decree entered in *Arizona v. California*, 376 U.S. 340.

Article II(B)(5) enjoins the U.S. as follows:

Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to public and municipal corporations and other public agencies) in Arizona, California and Nevada, only pursuant to contracts therefore made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute.

Article III(C) enjoins users in Arizona, California and Nevada, including IID:

From diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective States; provided, however that no party named in this Article and not other user of water in said States shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use.

The regulations issued by the Secretary of the Interior for entering into water delivery contracts with users in California expressly incorporated the priority system of the Seven Party Agreement and under those regulations the Secretary incorporated the Seven Party Agreement Priority system into the several Section 5 water delivery contracts the Secretary signed with Palo Verde Irrigation District, IID, CVWD and The Metropolitan Water District of Southern California. The Seven Party Agreement priority system operates on a "cascading" basis where water unused in one priority becomes available to satisfy the next priority. Under the Seven Party Agreement and the 1934 Compromise Agreement, the pertinent provisions of which are incorporated in CVWD's 1934 water delivery contract with the U.S., CVWD is entitled to the use, as reasonably required for irrigation and potable purposes in the Coachella service area, of water available to priority 3a and priority 6a that is not otherwise put to reasonable beneficial use for irrigation and potable purposes in the Imperial service area. The delivery of 300,000 AFY of priority 3a water to SDCWA, as proposed in this alternative, would infringe upon CVWD's paramount right to that water and cannot occur unless CVWD consents.

As noted above, the Boulder Canyon Project Act has displaced state law on the subject of the allocation of mainstream water rights to users in California. Accordingly, neither general principles of California common law governing appropriative water rights, nor statutory California Water Code provisions governing transfers of appropriative water rights and transfers of conserved water can authorize the transfer proposed in this alternative in the face of the contracts the Secretary has made with IID and CVWD. IID's contract specifically describes the point of diversion, place of use and purpose of use of the water to be delivered to it, and those provisions do not permit the transfer of water to SDCWA. As noted in the enclosed memo by Interior Department Solicitor John Leshy, contract amendments would be required to effect the transfers of water for use by others outside the boundaries of IID.

However, without CVWD's consent, the Secretary cannot enter into a contract amendment that impairs CVWD's rights under its 1934 water delivery contract. The terms of the QSA identify the terms and conditions under which CVWD is willing to forebear its right to use, and to give its consent to the transfer of conserved water from IID to SDCWA, and those terms do not permit a transfer of 300,000 AFY of water to SDCWA as proposed in this alternative. Therefore, the alternative should be deleted from the EIS/EIR.

The QSA provides CVWD with 100,000 AFY of the 300,000 AFY of water conserved by IID. It also provides that MWD may acquire any occasional reduction in conserved water made available by CVWD or permanently waived by CVWD. In order to conform with CEQA and NEPA, the EIR/EIS assumes a worst case scenario in which CVWD would waive rights to the entire 100,000 AFY of conserved water associated with implementation of the QSA on a permanent basis. However the Coachella Valley Water Management Plan fully utilizes all water made available to CVWD under the QSA. CVWD sees no conditions under which any significant amount of water will be available for use by MWD. The worst case impacts included in the EIR/EIS are severely overstated in respect to Salton Sea impacts and Colorado River impacts as compared to the most likely transfer scenario in which CVWD uses the water allocated to it under the QSA. The EIR/EIS should give a true picture of the anticipated impacts associated with most likely transfer scenario in addition to the not so likely worst case scenario.

The document also looks at fallowing as a means of conserving water for transfer purposes and clearly indicates that fallowing is the environmentally preferred method of conserving water, not Alternative 1 as indicated in the draft EIR/EIS. Once again, the document fails to provide the reader with the effects of the likely transfer scenario in which CVWD uses all of the water allocated to it under the QSA. If transfer water is conserved by fallowing and 100,000 AFY is transferred to CVWD as contemplated under the QSA, impacts to the Salton Sea are once again reduced significantly. The final document should once again provide the reader with adequate information to fully analyze the likely effects of the transfer in addition to the worst case impacts.

The economic impact analysis is severely flawed. When fallowing is used to conserve water, the EIR/EIS assumes that all nonpermanent crops grown in the water service area will be reduced proportionately to their percentage of total cropped lands. This assumption takes no account of the reality that farmers would initially and in the future fallow crops with the lowest net return per acre. An example here is hay versus vegetables. The assumption, as stated, implicitly assumes that the net returns across all crops are equivalent which is certainly not the case. In some instances, marginal lands on a given farm that are barely productive will also come out of production. This assumption unequivocally produces an unrealistically high level of direct impact on the farmers, excessive transfer payments, indirect and induced impacts and total economic impacts. Ample discussion and explanation of this phenomenon was provided during the summer 2001. However, IID has chosen to ignore this input and continues to use flawed assumptions.

The authors of the EIR are correct in considering after-tax transfer revenue as far as the IMPLAN model is concerned since the latter does not deduct taxes. However, to assume a rate of 40.3 percent is excessive, given the average income of farmers and, more importantly, their ability to write-off additional income in many instances. Instead of a combined tax burden of 40.3 percent, it would not be surprising if farmers in Imperial County were able to cut that tax rate in half or more through proactive efforts. This will serve to increase the positive impacts.

Response to Comment R6-2

The impact estimates presented in the Draft EIR/EIS are based on generally accepted practices. The commenter indicates that the Draft EIR/EIS understates the economic stimulation that the Project will provide. The socioeconomic impact estimates presented in the Draft EIR/EIS are based on generally accepted practices in the Imperial Valley. Consistent with the methodology used throughout the impact analyses in the Draft EIR/EIS, a conservative approach to the selection of modeling assumptions was followed; thus, the modeling assumptions tend to understate potential beneficial effects and overstate potential adverse effects. Also, refer to the Master Response on *Socioeconomics—Crop Type Assumptions for Socioeconomic Analysis of Fallowing* in Section 9 of this Final EIR/EIS.

Response to Comment R6-3

Refer to response to Comment R6-2.

R6-1

R6-2

R6-3

Section 1.3.5, page 1-21, line 14. Reference to CVWD subordination should be changed to read as follows:

The 1934 Compromise Agreement between IID and CVWD provides that: "Imperial Irrigation District shall have the prior right for irrigation and potable purposes only, and exclusively for use in the Imperial Service Area [as defined], to all waters apportioned to said Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys as provided in the third and sixth priorities set out in the recommendation of the chief of the Division of Water Resources of the State of California, as contained in Article 17 of the Imperial Contract. Subject to said prior right of Imperial Irrigation District, Coachella Valley County Water District shall have the next right, for irrigation and potable purposes only, and exclusively for use in the Coachella Service Area [as defined] to all waters so apportioned to said Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys as provided in the third and sixth priorities. The use of water for generation of electricity shall be, in all respects, secondary and subservient to all requirements of said two districts for irrigation and potable purposes."

Table 1-1, page 1-26, fn 2. See comments regarding Section 1.3.5.

Section 1.4.3, page 1-28, lines 1-2. The statement that IID became the holder of 7 MAF of pre1914 state-based appropriative rights is incorrect. The U.S. Supreme Court's January 9, 1979, Supplemental Decree in *Arizona v. California* fixes IID's present perfected water right (which was based on the amount to which a water right had been perfected under state law as of June 25, 1929, the effective date of the Boulder Canyon Act) as being not more than: "(i) 2,600,000 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and satisfaction of related uses, whichever of (i) or (ii) is less with a priority date of 1901."

Section 1.4.3, page 1-28, line 21. See comments regarding Section 1.3.5.

Section 1.7.2.1, page 1-44. CVWD disputes that the State Water Resources Control Board has any jurisdiction over the water transfers or that California state law governing water transfers in general has any application to the transfer of Colorado River water. IID, SDCWA, MWD and CVWD have entered into a Protest Dismissal Agreement that resolves the protest of CVWD and MWD without waiving the legal positions of the protestants. A copy of the Protest Dismissal Agreement is enclosed.

Section 2.2.4.3, page 2-38. See above comments regarding inapplicability of California law to the transfer of Colorado River water.

Section 3.8.3.2, page 3.8-13. The reference to the 33,000-acre Fort Yuma Indian Reservation should be footnoted to note that the boundary of the reservation, hence its acreage, is currently in litigation before the Special Master in *Arizona v. California*, U.S. Supreme Court Case No. 8, Original.

Response to Comment R6-4

Comment noted. Pursuant to IID's position that State law applies to this transfer, IID and SDCWA have filed a petition seeking SWRCB approval of the water transfers, including a determination that the Project is in furtherance of SWRCB Decision 1600, SWRCB Order WR 8820, Article X, Section 2 of the California Constitution, and Sections 100 and 109 of the Water Code. Reclamation's agreement to implement the change in diversion required for a transfer to SDCWA, in a form similar to the IA anticipated for the QSA, would also be needed.

Response to Comment R6-5

The Draft EIR/EIS has been revised to reflect this issue. This change is indicated in this Final EIR/EIS in Section 3.8.3.2.

R6-4

R6-5

April 19, 2002

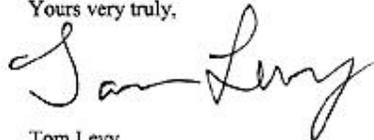
R6-6 [Section 5.1.1.1 indicates that a "decrease in groundwater inflows to the Salton Sea from canal seepage" occurs. The EIR/EIS for the Coachella Canal Lining project found no impact to flows to the Salton Sea as a result of lining the Coachella Canal. This reference should be deleted.

R6-7 [The Salton Sea modeling appears to overestimate future inflows to the Sea from the Republic of Mexico. In the future less excess water will flow to Mexico which will result in less return flow. In addition, completion of the Mexicali Wastewater System Improvements will provide additional water for irrigation use in Mexico further reducing flows to the Salton Sea. These future reductions in flow should be included in the modeling. Additionally, silt TMDLs will result in reduced inflows to the Sea. These reductions should also be accounted for.

R6-8 [We also understand that leaching water use in the Imperial Valley is expected to increase by three percent in the future as a result of increased salinity in the Colorado River. We believe that three percent additional leaching is not appropriate and that the actual additional leaching water required is less than three percent.

If you have any questions please call Steve Robbins, assistant general manager.

Yours very truly,



Tom Levy
General Manager-Chief Engineer

Enclosures/2/as

cc: Dennis Underwood (with enclosures)
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SR:j\robbins\apr\iideir2

Response to Comment R6-6

The Coachella Canal Lining Project EIS/EIR concludes that lining the canal is not expected to change inflow to the Salton Sea. However, it also states that, "It is possible that some ground water under the study area discharges directly into the bottom of the northeast side of the sea." One could therefore conclude that lining the Coachella Canal would not reduce inflow to the Sea or that it would cause a small reduction. The environmental analysis in this Transfer EIR/EIS was purposefully conservative, i.e., doubts were resolved in favor of understating potential beneficial effects and overstating potential adverse effects. The conclusion that inflows to the Salton Sea could be reduced as a result of lining the Coachella Canal is just one example of choosing the more conservative of two possible conclusions.

Response to Comment R6-7

Please refer to the following Master Responses in Section 9 of this Final EIR/EIS: *Hydrology—Development of the Baseline*, *Hydrology—TMDLs*, and *Other—Cumulative Impacts (Mexicali Wastewater System Improvements)*.

Response to Comment R6-8

During development of the IIDSS, an analysis was made of existing leaching practices at IID and of how these practices would change in response to an increase in Colorado River salinity. Based on this analysis and its application within the IIDSS, an average annual increase in water required for leaching was estimated to be approximately 3 percent.