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January 30, 2006

Secretary Michael Chrisman  
Resources Agency  
c/o Department of Water Resources  
Colorado River and Salton Sea Office  
1416 9th Street  
Sacramento, CA 95814

Re: COMMENTS ON THE PENDING  
CEQA PROCESS ON THE SALTON SEA

Dear Secretary Chrisman,

A consortium of interests led by the Imperial Group makes these comments forward. The Imperial Group is comprised of landowners, ranchers and farmers, whose membership owns approximately 25% of the farmland in the Imperial Irrigation District (IID) service area and around the Salton Sea. The consortium includes the Dutra Group and Bean Stuyvesant. The companies are experts in water barrier construction and environmental restoration projects.

The Consortium believes that a comprehensive and integrated solution of the coupled issues of efficient water delivery management, protection of water rights, Salton Sea restoration, and cross-border water issues is necessary to protect the long-term interests of the Imperial Valley and the State of California.

The Consortium has employed additional experts to aid in the development of its Salton Sea Restoration Project alternative. These experts include but are not limited to the following:

Dean James Kelley, retired Dean of the College of Science and Engineering at San Francisco State University and former President of the California Academy of Sciences. Dr. Kelley has done extensive research on the SFBay and Mexican Deltas. Dr. Kelley's specific area of responsibility on this project has been to review and comment on environmental issues and to determine the potential application of Dutch reclamation technology to California's problems. To this end he has reviewed Dutch projects of a similar nature in Holland and reviewed the Engineering Department of Delft University

with whom, Bean Stuyvesant worked in developing the Consortium's proposed Restoration Plan

Professor David Hornbeck. Dr. Hornbeck is California's foremost Historical Geographer and has reviewed the historical data relating to the Mexicali and Imperial Valleys and the creation of the modern Salton Sea and prepared projections on the future growth of Imperial County. He has also examined Restoration Projects in Holland and their potential application to California Geography.

Ali Shahroody of the Engineering Firm of Stetson Engineers. Mr. Shahroody has actively participated on behalf of Consortium in meetings of the various study groups of the Resources Agency created for this project. He has work actively with DWR, BOR, BIA and DOI on water issues for the last 40 years.

Professor Peter Reinelt. Dr. Reinelt is an Agricultural and Resource Economist who examined all engineering assumptions and models prepared by the various water agencies and their consultants on water use in Imperial and Coachella Valleys. He was engaged in similar work in the Salinas Valley of Monterey County and his work demonstrated the SVGISM model developed by two international engineering firms to define and determine the causes of Salt Water Intrusion in the Salinas Valley was incorrect in part because of the data on which the engineering firms were relying. His work in Monterey in part led to a complete rethinking of the appropriate approach to use in dealing with the Salt Water Intrusion problem in the Salinas Valley. Dr. Reinelt recently published an article on some of the work he did in Monterey on Salt Water Intrusion: [Seawater intrusion policy analysis with a numerical spatially heterogeneous dynamic optimization model](#), Water Resources Research, May 2005.

Moffat and Nichol, [www.moffatnichol.com](http://www.moffatnichol.com), is a worldwide Engineering Firm experienced in coastal and water resource development. The firm has been employed by the Consortium to examine the feasibility of the plans prepared by Bean Stuyvesant and to analyze the cost of the various plans.

Goldman Sachs, [www.goldmansachs.com](http://www.goldmansachs.com), is an investment bank employed for the purposes of analyzing various financing options for the Consortium.

Tramutola and Company, [www.tramutola.com](http://www.tramutola.com), is a political consultant specializing in local political elections. In this project he has been employed to investigate the feasibility of a Prop 218 election, citizen's initiative in Riverside and Imperial counties and provide a demographic study of voting patterns in Riverside and Imperial counties.

The Consortium has and continues to make the expertise of the above-described academics, engineering firms, investment bankers and consultants available to Resources Agency if it will be helpful in improving the final EIR for the Legislature and answering any questions about the proposal of the Consortium.

The Consortium has made its views about the Salton Sea Restoration known in various fora, including an April 15, 2004 letter to Charles Keene of the Department of Water Resources, to which you may refer (including its voluminous exhibits). That letter can be found at [http://www.imperialgroup.info/docs\\_salton.php](http://www.imperialgroup.info/docs_salton.php). Representatives of the Consortium have met privately with your staff and presented comments at a meeting of your Advisory Committee on November 30, 2004. The Consortium has also participated in your various Technical Workgroup Meetings of the Resources Agency in connection with this project. The Consortium found your staff and consultants helpful and courteous. The Consortium is submitting its views in writing about the multitude of factors that must be considered when choosing a restoration plan per the special legislation, e.g., evaluation of Salton Sea Alternatives and any proposed funding plan therefore as required by Fish and Game Code Section 2081.7(e)(2)(D) which provides as follows: “The selection of a preferred alternative consistent with Section 2931, including a proposed funding plan to implement the preferred alternative.”

## **LEGAL RIGHTS**

As a prerequisite to any rational discussion of Salton Sea restoration, one must understand the legal constraints of what can and cannot be done. In that vein, it is important to note that while the Quantification Settlement Agreement (QSA), its implementing legislation, and State Water Resources Control Board Order 2002-13 (SWRCB Order, <http://www.waterrights.ca.gov/hearings/ARCHIVED%20PROJECTS/Archived%20IID%20Long-Term%20Transfer.htm>) purported to approve or modify the preexisting legal constraints; restoration has not been given carte blanc for two reasons. First, the QSA has not been legally validated, i.e., it is a tentative agreement as a matter of law. The Imperial Irrigation District (IID) commenced a validation action shortly after signing the QSA, thereby providing notice to the world that until a Court gives final approval, the QSA is simply a paper agreement. That lawsuit is still pending. (QSA Litigation) The SWRCB Order is also challenged in that litigation. ([http://www.saccourt.com/CoordCases/qsacases/qs\\_main.asp](http://www.saccourt.com/CoordCases/qsacases/qs_main.asp))

Just as importantly, even assuming that the QSA and SWRCB Order 2002-13 are valid and binding, there still exist substantial legal restraints on restoration activity based on the rights of the landowners that have not and could not be changed by the QSA and SWRCB Order 2002-13.

The water rights, which of necessity provide the water that may or may not ultimately flow to the Sea for restoration, are appurtenant to the land. These rights are the landowners – not the IID’s nor the State of California’s. IID recognized as much and the United States Supreme Court agreed in its Bryant v. Yellen decision. Bryant v. Yellen (1980) 447 US 352, n. 23, [http://www.imperialgroup.info/docs\\_salton.php](http://www.imperialgroup.info/docs_salton.php) and Section 17 therein. As the holders and/or exercisers of those rights, the landowners are entitled as a matter of public policy to conserve water which they then can use – for Salton Sea restoration or otherwise. Water Code § 1011. The landowners are in the process, in reliance on the laws untouched by the QSA and SWRCB Order 2002-13, filing Statements of Water Diversion and Use in order to further protect and quantify their

rights. Water Code §§ 5100 et seq. In fact, SWRCB 2002-13 expressly held that section 1011 was applicable to the transfer.

The SWRCB Order did not provide a carte blanc for the transfer and subsequent Salton Sea restoration. When IID asked the Court to find that the Order precluded a challenge by the landowners, the Court disagreed. Ruling # 10 in 11/5/04 Order, “Court believes the record of the SWRCB proceeding is too incomplete to sustain a demurrer.” (<http://www.saccourt.com/courtrooms/trulings/qsacasesview.asp>) Moreover, the SWRCB Order on its face explicitly states that it does not address any of the pre-1914 rights the landowners developed. SWRCB Order 2002-13 at n 13. Since 2.6 of the quantified 3.1 MAF subject to the QSA are pre-1914 rights (known as the present Perfected Rights or PPR in the Arizona v. California lawsuits, 439 US 419) the SWRCB Order has limited application, if any, to what can and cannot be done with the landowner’s water as it relates to Salton Sea restoration.

In connection with the Salton Sea itself there are crucial issues involving the State of California. The first is the land ownership under the Salton Sea. The land under the sea is not owned by the State of California except for certain limited acreage. See the attached Map prepared by Dr. Hornbeck describing the landownership under the Sea. (Exhibit A) Secondly the water flowing into the Sea is not public water of the State of California such as a natural stream. The landowners through their development of agriculture and communities and the conveyance system from the Colorado River created the Salton Sea. The Consortium is not sure the “Public Trust” doctrine applies to the Salton Sea.

The Consortium is not suggesting that the State of California could not take over the land under the Salton Sea and guarantees a water supply for the Salton Sea but if the State were to follow such a course there would be significant Federal and condemnation issues and various parties would expect recompense. There are also fundamental legal and political issues as to whether or not the Secretary of Interior would allow Colorado River water to flow into the Salton Sea if there were other uses for the water. The Federal Government in the 417 Process seem to assert the position that California did not have any “Public Trust” right in the Salton Sea. The 417 Process refers to the administrative process started by BOR as a result of litigation commenced by IID in 2003 against BOR. (417 Process).

It should be noted that because of the nature of the water flowing into the Salton Sea, the State itself will have to go through the Application to Appropriate Water Process of the State Water Resources Control Board.

Finally, it is worth noting that the Torres Martinez Indian Tribe has no lawful stake in the Sea independent of the CVWD. The Tribes appeared through the United States in the Arizona v. California case and were not granted independent rights to flows in that proceeding. The tribes also had the opportunity to content the Part 417 Process initiated by the Bureau of Reclamation against IID in 2003. Likewise the Part 417 Process recommendations likewise did not note any independent right of the Tribe. The Tribe’s

stake is through the entitlement that can lawfully be claimed by CVWD. The Consortium is unaware of any evidence or decision to the contrary or right that CVWD or the County of Imperial has to flows from Imperial County into the Salton Sea.

The Consortium recognizes these are complex legal issues, but the Consortium submits that they have to be discussed in detail in the EIR when it is submitted to the Legislature.

### **BASELINE**

The Salton Sea did not exist in modern times until the Colorado River was breached in the early 20<sup>th</sup> century. Any discussion of the baseline must start with the conditions before the creation of what became the IID distribution system and what happened after the levee in Mexico was breached. Title Insurance and Trust Co. v. California Development Company (1915) 171 Cal. 173; Salton Sea Cases (1909) 172 F.792; 172 F. 820. The EIR process should carefully review the records underlying these cases because the records give an excellent presentation of the conditions, which existed in the Salton Sink before the levee break in Mexico. There should be a thorough discussion of the impact of changing agricultural practices and better water management on the flows into the Salton Sea. SWRCB Decision 1600.

[http://www.waterrights.ca.gov/hearings/d1600\\_d1649.html](http://www.waterrights.ca.gov/hearings/d1600_d1649.html). Its size has varied in modern times. [http://www.imperialgroup.info/salton\\_maps.php](http://www.imperialgroup.info/salton_maps.php). See Exhibit B prepared by Professor Hornbeck. The flows into the Sea Salton and its size have depended on the nature of cropping patterns and development in the Imperial and Mexicali Valleys and the management of the water resources by IID and Mexico. What are appropriate cropping patterns, development and management of the flows from the Colorado River have changed dramatically over the last 100 years and will continue to change over the next 100 years. To give you some idea of the potential variance in water use, attached are exhibits submitted by the State of California in connection with California v. Arizona in the 1950ties. EXHIBITS C 1,2,3,4, 5 and 6.

Because of the unique nature of the formation and continued management of the Salton Sea and the unique nature of the Secretary's charge under the enabling statute, it is inappropriate to rely on existing conditions when determining the baseline for this project. The appropriate baseline for this should be the condition existing before any man made diversions from the Colorado River into the Imperial Valley.

### **INVESTMENTS**

Landowners have invested approximately \$1.3B in today's dollars in the water management system that created the Salton Sea. The Salton Sea exists only because of the investment by the landowners. See the record and transcripts in Arizona v. California. Research has not been completed on the total landowner investment, however, because of positions taken by IID in the QSA Litigation. The landowners have created a valuable resource because of this investment that which can be used for their economic benefit. The scope of this investment and the potential fruits of the investment have to be carefully analyzed and discussed in the EIR process. This investigation should start with the record in California v. Arizona, the earlier Salton Sea cases discussed

above, and the record made by MWD and CVWD in the 417 Process as to potential landowner and IID water management improvements.

### **ENVIRONMENTAL CONCERNS**

You are directed to the comments by Dr. Kelley to your Advisory Committee on November 30, 2004 on the ecological framework and environmental issues as they relate both to California and Mexico.

<http://www.salttonsea.water.ca.gov/calendar/ac/11.30.2004/>.

### **ECONOMIC DEVELOPMENT**

You are directed to the comments by Dr. Hornbeck to your Advisory Committee on November 30, 2004 on urban growth.

<http://www.salttonsea.water.ca.gov/calendar/ac/11.30.2004/>. Potentially the conversion of the agricultural land in the Imperial Valley to residential use may lead to an increase in the water usage in the Imperial Valley. This is based on the historical water use of water in the Coachella Valley, e.g., golf courses and developments with various water amenities. Essentially the land in Imperial Valley could become more valuable for residential use with a higher use of water. See for instance the General Plan EIR of the City of Coachella on water use for golf courses. The General Plan contemplates a water usage of 7.5 acre-feet per acre for Golf Courses, which is higher than the current water use for irrigated agriculture in the Imperial Valley.

### **SELLING ELECTRICAL ASSETS**

The Consortium believes that a substantial portion of any Salton Sea restoration can be funded by the sale of the Coachella Valley electrical system owned by IID on behalf of the landowners. The Consortium explained its rationale and that there was no legal impediment to do so in its letter of February 9, 2005 to you.

[http://www.imperialgroup.info/docs\\_correspondence.php](http://www.imperialgroup.info/docs_correspondence.php). As that letter explained, an irrigation district's primary duty is to its water beneficiaries, so a sale of a part of IID's electrical assets in order to address Salton Sea Restoration issues is consistent with its duties. Nev-Cal Electric Securities v. IID (1936) 85 F.2d 886, cert denied. The potential sale of electrical system assets of IID to finance the Restoration of the Salton Sea is one of the issues being analyzed by the Consortium's experts.

### **IID INEFFICIENCY**

The changing irrigation practices of the landowners will increase water available for other uses by the landowners. The EIR process should carefully examine evidence that MWD and CVWD presented on these issues in the 417 Process and analyze the impact of the MWD and CVWD conclusions on water flows into the Salton Sea. While many of the identified water conservation methods are not cost effective under current institutional constraints and economic incentives, over the course of the 75-year planning horizon for the restoration plan, they are more likely than not to become cost effective under evolving water institutions and economic incentives. Therefore, current inflow assumptions may vastly overstate the amount of water likely to flow into the Salton Sea at the end of the planning horizon, absent guarantee of the flows.

The BOR recommended that IID improve its delivery system. The Consortium agrees. An improved delivery and water management system is necessary so that the several hundred thousand acre-feet currently being lost to system inefficiency can be available for other landowner uses. The landowners recently explained their views on BOR's recommendations on system improvements in a letter to Concur, Inc. (an IID consultant) dated December 22, 2005. A copy is attached for your convenience and marked Exhibit D.

Second, as time goes on, the Secretary of the Interior may find the Colorado River in a state of drought and will require greater efficiency by River users, as most recently explained by Secretary Gale Norton. This potentially could reduce the water available to the Salton Sea. <http://www.waterchat.com/>. The Secretary's Plans for Drought on the Colorado River should be discussed in detail in the EIR process.

### **CANAL LINING and SEWER FLOW into Calexico**

Part of the QSA included lining the All American Canal (technically, constructing a parallel lined one) and transferring the 67 KAF saved to certain others. Various cross-border entities filed suit to stop that part of the QSA, which lawsuit is presently pending. Consejo de Descarollo Economico de Mexicali v. USA (2005) No. 2:05:cv-05-0870 PMP, Dist. Nev. The Consortium assumes that the Canal will not be lined because of the environmental destruction it will cause. The increment of water expected from lining will have to come from somewhere – which may further reduce the flows available to the Salton Sea. The State should also do everything within its power to immediately stop the sewage flow from Mexico into the City of Calexico and should not consider the Mexican flow part of the flows into the Salton Sea.

### **FINANCING**

Goldman Sachs is examining financing alternatives for the project on behalf of Consortium. The Consortium is more than willing to make Goldman Sachs expertise available to the Resources Agency and have it report on the financing alternatives it has examined.

### **DATA STATUS**

The Consortium continues to express concern about the paucity of data on which this EIR process is relying. It is essential that the State not rely on data produced by model runs or reports by third parties. The State must rely on the primary source data and then develop its own models with full public participation in their development. The primary sources would include but not be limited to original pumping data and water use data of the two water districts surrounding the Salton Sea. In order for the EIR process to have any validity at all the public must be able to review the primary source data and its use models developed in an open process.

The Consortium further believes that it is impossible to develop and analyze alternatives until more testing is done on the Salton Sea. Since project cost will be a key consideration of whether any proposed project is ultimately implemented along with attainment of environmental/habitat goals, Engineering safety, and regional and statewide

public acceptance the Consortium believes that additional testing is required to publicly document the much lower cost construction method employed by the Consortium restoration plan, as well as to determine the scope of the selenium problem and how to deal with it. This information will make the EIR process more helpful for the Legislature. The types of testing which Consortium needs to be done is set forth in Exhibit E. Much of this recommended testing would be helpful in evaluating the other alternatives.

### **CONSORTIUM PLAN**

The Consortium representatives have attended most of the Technical Workgroup Meetings in connection with the Salton Sea Restoration Process. Based on a review of the issues raised in these meetings the Consortium has revised the plan presented to the Advisory Committee on November 30, 2004 and developed a revised plan and cost estimates to meet objections raised by the various parties at Advisory Committee meetings. The revised plan and cost estimates have been reviewed in detail by the Consortium Consulting Engineers, Moffatt and Nichol and Stetson Engineers and a conservative cost estimate has been prepared. Moffatt and Nichol is prepared to present the revised plan of the Consortium and a cost estimate in any forum you would like. The conservative cost estimate is considerable lower than the estimated capital cost estimates presented in the Salton Sea Update for various alternatives presented by the Resources Agency in January 2006. The revised plan is based on a flow of 600,000 acre feet per year into the Salton Sea attached hereto and marked Exhibit F.

### **CONCLUSION**

The Consortium submits that the Resources Agency to date has done a good job in meeting the requirements of the Legislature but it would hope that the Resources Agency would carefully consider the issues raised in this letter so the that the EIR ultimately submitted to the Legislature will be full and complete.

For the Consortium

Patrick J. Maloney

Members of Salton Sea Advisory Committee