



MEMO

TO: Phil Rosentrater
FROM: Lisa Moore
RE: Salton Sea Workshop — Federal Legislative Background and Recommendations
DATE: November 16, 2019

This memo first provides background on existing federal law and non-binding directives related to the Salton Sea in order to contextualize four federal legislative recommendations which follow. On the federal level, SSA has made key progress in rebutting the argument that Salton Sea management is purely a state or local obligation by securing: (1) strong congressional support for federal funding commitments and federal engagement; (2) permitting directives; (3) federally-funded and competitively secured USDA pilot projects; (4) expanded federal authorizations to secure EPA financing for Sea projects; and (5) the authorization of sizable federal USDA funding which may be tapped administratively for the Salton Sea.

Unfortunately, these non-mandatory but clear directives and authorizations from Congress and other commitments from Interior have not yet been sufficient to spur federal engagement commensurate with the scale of the challenge and federal landownership responsibility.

They do, however, provide a firm foundation upon which to base stronger mandatory federal obligations — especially given the momentum from SSA's recent legislative successes, the funding opportunities those successes present, and the cohesion among our congressional delegation that these new federal tools and funding be mobilized to benefit the Sea.

Accordingly, the attached recommendations at page seven for your consideration could form the basis of federal legislation to create: (1) a mandatory federal Salton Sea acreage management obligation; (2) a mandatory federal funding obligation, principally through the creation of a Salton Sea Initiative at USDA; (3) a mandatory federal obligation to abide federal environmental laws and mitigate Salton Sea impacts resulting from Colorado River storage reservoir operations (rather than placing that burden on state and local entities); and (4) a mandatory federal obligation for the Corps of Engineers to expedite permitting for Salton Sea Management Plan (SSMP) work and related projects.

Congressmen Ruiz and Vargas have secured a commitment from the House Committee on Natural Resources to convene a Salton Sea hearing, which is likely to take place early in 2020. The Congressmen sent a joint letter (attached) to the Committee outlining issues to be addressed in the hearing. They are also interested in introducing federal legislation concerning the Salton Sea, and to have the hearing framed around that legislation. They seek SSA's input and specific legislative recommendations. Congress may consider a Water Resources Development Act (WRDA) in 2020, which could be a vehicle for Sea-related legislation.

I. Existing Federal Law and Directives related to the Salton Sea

a. Federal Study Mandates

Much of the federal law related specifically to the Salton Sea involves study mandates, directing Interior to study and recommend measures to control salinity, elevation, ecological concerns and foster economic/recreational development. Each of these pieces of legislation authorized minimal appropriations to conduct studies.

For example, in 1992, the Reclamation Projects Authorization and Adjustment Act (PL 102-575) established that the restoration the Salton Sea was in the national interest, and directed the Secretary of Interior to develop recommendations to advance restoration. Later, in 1998, the Salton Sea Reclamation Act (PL 372-105) directed Interior to conduct a feasibility study to address the salinity, elevation, and ecological challenges at the Salton Sea, and to enhance the potential for recreational uses and economic development.

In 2004, Congress directed in PL 108-361 Interior to coordinate with the State of California to complete the feasibility study and select a preferred alternative for Salton Sea restoration, which resulted in the 2007 BOR Restoration of the Salton Sea document, but no selection of a preferred alternative.

b. Memorandum of Understanding (MOU) Directives

Efforts to spur Interior action beyond planning at the Salton Sea have been embodied thus far in MOU agreements. Such agreements are non-binding. While at times they do result in action, Sea-related MOUs have failed to spur significant federal engagement at the Sea.

For example, in 2014, Interior signed a MOU with SSA pledging greater cooperation and collaboration on Salton Sea projects. In 2016, California Natural Resources Agency and Interior signed an MOU with more specific pledges, including Interior commitments to: (1) provide \$30 million in new funding for the Sea; (2) follow federal environmental laws at the Sea; (3) develop a cross-agency federal funding plan for the Sea; and (4) develop a multi-year funding partnership with USDA for the Sea. These commitments were included based upon SSA input. In connection with the negotiation of this agreement, philanthropic organizations also pledged \$10 million to support Salton Sea restoration.

In view of the change of administration in 2017, SSA met with the new administration to urge progress on Interior's MOU commitments. As none were forthcoming, Senator Feinstein included report language in her FY18 Energy and Water Appropriations bill directing Interior to act. Given that Senator Feinstein is the lead appropriator for the Bureau of Reclamation (BOR), this direction would typically spur action from BOR. Notwithstanding this direction, meaningful progress on these commitments has not been forthcoming.

c. Corps Permitting Directives

The Corps of Engineers has responsibility to permit discharges into waters of the United States, which is the basis for its federal regulatory engagement at the Salton Sea. The assertion of this authority rests upon jurisdictional determinations about whether a particular area meets that definition (*i.e.*, waters of the U.S.). At the Sea, the Corps in conjunction with the State of California has fully permitted the Species Conservation Habitat project. We have engaged with SSA to advocate that the Corps simplify permitting processes at the Sea, for example, through issuing a Nationwide Permit for the remainder of SSMP and expediting jurisdictional determinations in order to ensure that no Corps permitting is required for air quality mitigation projects on dry playa (on the argument that such areas are not jurisdictional — no longer waters of the U.S.).

Senator Feinstein is the senior Democrat on the Senate Energy and Water Appropriations Subcommittee, and accordingly writes the bill which provides funding to the Corps. At SSA and IID's request this year, we secured Senator Feinstein's engagement with the Corps to urge them to advance these two priorities, and the Senator included report language in her bill to urge the Corps to expedite this work. In the process of undertaking this work, the Corps responded that the state had not filed the necessary paperwork to allow the Corps to take these actions. A Nationwide Permit, for example, requires that the state make an application to that effect. Based upon our recent discussions with the state, they indicate that they are working to advance these issues with the Corps.

In our last SSA meeting in October, Supervisor Kelley indicated that Imperial County had repeatedly asked the Corps to meet to discuss permitting issues involving the Salton Sea. In view of the importance of this issue and its link to ensuring timely project advancement, SSA could request that Senator Feinstein's staff convene a meeting among SSA agencies and the Corps, moderated by her staff, to evaluate the effectiveness of Corps engagement at the Sea, and identify any policy modifications which would expedite this permitting work.

d. Federal Funding and Financing Authorizations

As measures to address Salton Sea challenges were studied and ultimately came into greater focus in the SSMP and State Water Board Order, SSA has led efforts to identify and secure federal funding to finance these measures in partnership with the state. SSA's efforts have focused on the Corps, Interior and EPA. In 2013, Cultivating began working with SSA as a partner to expand these efforts, particularly at USDA and at EPA.

The federal government has a history of advancing major environmental restoration efforts in conjunction with states for ecological areas of national importance (*e.g.*, Florida Everglades, Great Lakes). In the case of the Salton Sea, Congress has established that it is of national interest. The federal government also has direct landownership liability related to its management of its own lands. Interior Department agencies own roughly 40 percent of the Salton Sea and surrounding area.

The federal government must comply with environmental laws as a Sea landowner, and major federal actions related to Colorado River Basin storage reservoir operations are subject to federal

evaluation, alternative analyses (*i.e.*, identifying the least harmful alternative from among possible federal actions to an environmental resource like the Sea), and mitigation requirements. This is among just one of the legal obligations which would have been nullified by the initial Drought Contingency Plan (DCP) federal legislation, which was successfully modified by SSA and IID in Congress this spring to protect the Salton Sea.

Maintaining these federal legal obligations is critical to making the argument that the federal government should contribute funding to Salton Sea management. Part of the reason Interior actively sought the DCP legislation was to remove its own Sea evaluation and mitigation obligations. Had that legislation passed as proposed, the burden to address Sea impacts from Colorado River reservoir operations would fall exclusively to the state and local parties.

i. Army Corps of Engineers (Corps)

The Corps undertakes significant water resource development projects around the nation, including ecosystem restoration projects. The process for securing Corps funding is one the most protracted in government, however, and requires securing 2 separate congressional authorizations (laws) for a project (study, construction) and 2 separate appropriations (laws) for each of those activities. The Corps currently has a \$98 billion backlog of projects that have been authorized by Congress, studied, and recommended for construction. The Corps annual construction budget is roughly \$2.2 billion.

Senator Boxer served as the senior Democrat on the Senate Committee on Environment and Public Works, which is the Senate committee charged with writing the Water Resources Development Act (WRDA) legislation which provides the required Corps project authorizations.

In 2007, SSA supported and Senator Boxer secured a \$30 million authorization in WRDA to permit the Secretary of the Army to partner on Salton Sea pilot projects. In the 2016 WRDA legislation, SSA asked Senator Boxer to secure a modification to this authorization designed to facilitate its use and to provide SSA with the ability to partner with the Corps directly. While Senator Boxer made several attempts to secure funding to conduct the required planning (step 1) to mobilize Corps construction funding for the Sea, those attempts were blocked by the administration's Office of Management of Budget.

ii. Department of Agriculture (USDA)

In view of the complexity of securing Corps funding and the overall Corps construction funding deficit, the SSA embarked on a strategy in 2013 of developing USDA pilot projects building toward securing legislation in the 2018 Farm Bill to make robust USDA funding available for the Sea. USDA conservation funding is \$6 billion annually and mandatory. That is, the Farm Bill is a 5-year law that provides congressional authorization and appropriations in that single legislative vehicle. So, not only is USDA conservation funding 3 times larger on an annual basis relative to the Corps construction budget and is not burdened with a large backlog, but it is also locked in once every five years.

Once funding is dedicated to particular purpose in a Farm Bill, further congressional action is not required. Comparatively, what it takes 4 laws to accomplish to access Corps assistance at the Sea, it takes 1 law to accomplish at USDA. USDA also has much less cumbersome processes for allocating funding administratively. Farm Bills, however, do not earmark funding for particular projects. The law generally authorizes activities, and USDA administratively targets that funding to particular natural resource concerns affecting agriculture according to those general authorizations.

In particular, funding is mobilized from USDA administratively through a variety of avenues. First, USDA directs funding from its different programs on a competitive basis. We secured the initial Salton Sea pilot funding through these competitive means. Second, USDA has a long history of expanding pilots established through these competitive programs through non-competitive expansions called initiatives. USDA has some 67 federal administratively-created targeted conservation initiatives in the country (Everglades, Mississippi River, Great Lakes, Bay-Delta, Gulf of Mexico, to name a few). Each USDA state office also has the discretion to create its own state-level initiatives, targeting funding to important state concerns.

In order to engage USDA as a funding partner at the Sea, several steps were necessary, the most complex of which have been successfully accomplished. First, USDA rarely if ever makes significant funding commitments to a regional concern absent a project concept competing for funding on a pilot scale. Accordingly, from 2013-2017, we developed two pilot projects for the Sea with USDA in order to build support for a USDA role locally, in Congress and at USDA.

Second, we were aware that several key policy changes needed to be made to USDA's legal authorities in order to make it possible for USDA to invest in the area of immediate concern — the playa. At the time, USDA program funding was limited to expenditure on private agricultural lands. Beginning in 2016, we worked with Senators Feinstein and Senator Reid to reinstate a USDA program that could be used on public land (the playa) and went on to secure our first pilot under that program working with the state, which would allow it to be used to cost-share on the Species Conservation Habitat project and more broadly at the Sea.

Building on this legislative success, we developed a 8-state western conservation 2018 Farm Bill policy and funding strategy that successfully increased overall USDA Farm Bill conservation funding by \$2.6 billion (over five years) and secured the authority to use 4 different USDA programs to address Salton Sea conservation at scale and on the playa. This was the first funding increase for these programs since 2002, and the first ever authority for USDA to direct funding to environmental restoration on public lands. Several of these tools explicitly do not require competition, and may be accessed through negotiated agreements with USDA through a process initiated by a state or subdivision thereof. We also secured congressional direction to use these new authorities to address significant water conservation challenges tied to regional water resources.

These funding and policy provisions supported by SSA were so consequential that they were hotly debated in the Farm Bill conference for months, and were the very last provisions agreed to in the overall bill in December 2018. Senator Feinstein and several other Western Senators directly engaged at the member level in multiple ways over months to secure them.

Note that it is critically important that the state work to implement the Watershed Act pilot we helped it secure in 2017 to use Watershed Act funding at the Sea. This requires the state to expend funding we secured for a Watershed Plan, which would ensure that the Salton Sea is eligible for Watershed Act construction funding. We recently secured the state an extension from USDA for using this funding, which remains unspent. The Watershed Act is a half a billion dollar per year USDA program that we are responsible for reestablishing with SSA's support, and one of the most easily accessed and utilized of the USDA funding tools for the Sea. The state's support is also critical for accessing additional USDA funding tools we secured in the 2018 Farm Bill.

iii. Environmental Protection Agency

The Water Infrastructure Finance and Innovation Act (WIFIA) was established in 2014 and provides low interest federal loans with flexible terms (deferred repayment, long repayment period, fixed low interest rate) for water and wastewater infrastructure projects, and may be accessed by eligible borrowers including local, state, and tribal governments. Borrowers must provide 51% of total project costs, and WIFIA provides the remaining 49%. In the 2016 WRDA, Senator Boxer included an amendment we requested to provide that eligible projects include drought and environmental restoration activities. This modification was sought to make the Salton Sea eligible for WIFIA financing. At the same time, SSA advocated that WIFIA receive congressional appropriations, which it did for the first time in 2016.

Building upon that work, the State of California worked with Cultivating and SSA to submit an application in order to help finance the Sea water infrastructure backbone. We focused on this project because it fit the WIFIA criteria at the time and had the requisite planning and design elements. The state pledged the \$80 million in then-existing Salton Sea State funding, to be matched by WIFIA financing. This was the first year of the WIFIA program and we were not sure what to expect from it. We secured support for the project application from the congressional delegation, met with EPA's WIFIA program staff, and developed the state and local support for the project.

While we did not secure financing for the project, our post-application briefing from EPA revealed that the project we proposed scored the highest among all WIFIA projects that year for meeting WIFIA criteria. We did not receive financing because EPA wanted to see a more secure form of WIFIA loan repayment. The typical WIFIA loan would be backed by water user fees, for example, providing adequate assurances that the loan would be repaid. In the case of our project, we relied upon the credit and promise of the State of California to repay the loan. In our pre-application meetings with EPA staff, they advised us that this would be adequate, but this proved wrong. The current effort to create enhanced infrastructure finance districts could help overcome this difficulty in a subsequent effort to secure WIFIA financing related to the Sea by providing a payback mechanism. EPA staff have been encouraging regarding a reapplication.

II. Prospective Federal Legislative Recommendations

After considerable effort on both the state and federal levels, there is a State of California Salton Sea plan, State order and schedule for acreage restoration, and State funding. On the federal level, SSA has made key progress in rebutting the argument that Salton Sea management is purely a state or local obligation by securing strong congressional support for federal funding commitments, federal permitting directives, expanded federal authorizations to secure financing for Sea projects, and most recently the authorization of sizable federal funding for the Sea from USDA. Below are four legislative options for your consideration designed to mobilize this work to ensure meaningful federal engagement in Salton Sea management activities.

- (1) **Mandatory federal Salton Sea acreage management obligation.** Create a mandatory obligation for Interior to restore Salton Sea exposed acres. State Water Board Order 2017-0134 provides for state-level acreage management requirements and schedule. In federal legislation, dovetail a mandatory federal obligation and schedule for *additional* Sea acreage management. This is a nuanced version of IID's DCP request, supported by SSA, to provide funding match for state Sea investments.
- (2) **Mandatory federal funding obligation.** Require USDA to create a Salton Sea Initiative with dedicated funding to facilitate Interior's compliance with the acreage mandates in (1), and authorize other federal agencies to provide such assistance. Several USDA programs are geared toward restoration on an acreage basis, and USDA has a long history of targeting its funding in this manner to solve critical environmental concerns, particularly where (as here) there has been initial pilot-level engagement. Senator Feinstein's 2018 Farm Bill legislation ensures that both ample authority and funding exists for USDA to back an Interior Salton Sea acreage management obligation.
- (3) **Mandatory federal obligation to mitigate Salton Sea impacts resulting from Colorado River storage reservoir operations.** Affirm the federal legal duty to comply with federal environmental laws and mitigate the impact of Colorado River Basin storage reservoir operations on the Salton Sea. During consideration of DCP, it was our experience that some parties aimed to describe the agreement as a state agreement rather than federal agreement. Characterizing agreements concerning federal reservoir storage operations as state agreement appeared designed to avoid these federal environmental law requirements. Similarly, the DCP legislation as proposed by Interior would have voided these federal environmental mandates, and placed the burden of addressing Salton Sea impacts resulting from federal Colorado River Basin reservoir operations on state and local parties.
- (4) **Mandatory federal obligation for the Corps of Engineers to expedite permitting for Salton Sea Management Plan (SSMP) and related projects.** The Corps of Engineers has tools such as Nationwide Permit 27 which allow for the Corps to provide an overall permit for SSMP. Establish a timeline for permitting and Corps jurisdictional decisions for all Salton Sea management matters.