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Protestant

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

JOINT PETITION OF IMPERIAL IRRIGATION)  
DISTRICT AND SAN DIEGO WATER)  
AUTHORITY FOR APPROVAL OF LONG-TERM)  
TRANSFER OF CONSERVED WATER, ETC.)  
UNDER PERMIT NO. 7643 (APPLICATION NO.)  
7482)

**BRIEF OF LARRY GILBERT**

1 **INTRODUCTION**

2 Protestant Larry Gilbert submits the following brief arguing that the transfer petition  
3 should be denied so long as the project remains in its presently proposed form. However, if  
4 certain specified conditions are met, the petition should be approved.  
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6 This brief first presents the reasons why the petition should be denied, then the  
7 conditions which need to be met for this protestant to argue for approval. Thereafter  
8 supporting evidence for each reason is given in more detail.  
9

10 **ARGUMENT**

11 Very important changes were made to the Project Draft EIR/EIS when it was  
12 certified as the Final EIR/EIS by the IID Board of Directors on June 28, 2002. Specifically  
13 Salton Sea HCP Approach 1 was eliminated, leaving only Approach 2. Approach 2  
14 specifies that inflows to Salton Sea will be essentially maintained. This eliminates the  
15 practicality of conserving any water for transfer by any means other than following IID  
16 farmland, and additionally requires fallowing to provide water to augment inflows to the  
17 Sea.  
18 Sea.  
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20 The only exception to this outcome would be for water to be obtained from outside  
21 the IID and transferred into IID so IID could have extra water with which to maintain  
22 inflows to the Sea. If this becomes a reality, then the transfer petition could be approved if  
23 the other described conditions are satisfied.  
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25 This outcome leaves the SWRCB with two options:

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1 I. DENY THE APPLICATION FOR TRANSFER AS THE FINAL EIR/EIS WILL  
2 REQUIRE IT TO BE IMPLEMENTED. The following reasons support this course of  
3 action:  
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- 5 1. No net new water will be provided for California.
- 6 2. It will not allow IID to become more efficient to comply with orders by this  
7 Board (D-1600 & 88-20).
- 8 3. It will not allow IID to become more efficient to comply with the  
9 requirements of the California Water Code.
- 10 4. It will not allow IID to become more efficient to comply with regulations of  
11 USBR and expectations of the Secretary of the Interior.
- 12 5. It will reduce habitat for bird species, including shore birds that forage in  
13 farm fields, by fallowing acreage that currently produces these crops and  
14 provides this habitat.
- 15 6. It transfers water away from an existing community/economy in an attempt to  
16 benefit a few fish-eating species for a short period of time.
- 17 7. It will provide only minimal, temporal benefit to few, if any, listed species  
18 which rely on a fish-filled water habitat.
- 19 8. It provides little, if any, benefit to non-listed fish-eating species that currently  
20 use the Salton Sea.
- 21 9. It violates the Agreement between IID and SDCWA, which prohibits  
22 fallowing for on-farm conservation.  
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6. Comply with regulations of the USBR and expectations of the Secretary of the Interior.
7. Fulfill the intent of the QSA.
8. Satisfy the conditions of the IA.
9. Comply with the provisions of the Transfer Agreement between IID and SDCWA.

B. That Salton Sea HCP Approach 2 (requiring that inflows to the Sea and the Salinity trajectory be maintained) not be implemented. This would be done because:

1. Only minimal, temporal benefit would accrue to very few listed species before the Sea reached the point where it will no longer support significant fish populations.
2. There was no evidence that non-listed species would be impacted in a way that would threaten the stability of the species.
3. The benefits of the transfer would far outweigh the few short-term negative environmental impacts of the Sea becoming hyper-saline.

C. That an alternate mitigation program be sought which would reduce impacts to fish-eating bird species while minimizing impacts to other species, including pupfish.

D. IID and its farmers, landowners and residents must be protected from claims for damages to people, property, or the environment resulting from good-faith fulfillment of its contractual obligations to conserve and transfer water pursuant to the agreement with SDCWA, the QSA, and related documents.

1 E. That Landowners' rights to receive water, and opportunity to conserve for transfer  
2 not be diminished because of their adherence to policies and regulations of IID and  
3 principles of the Water Code requiring efficient water use.  
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5 F. Landowners within IID who depend on their right to receive water must not be  
6 injured by having the price IID receives for transferred water decrease to a level  
7 below the cost of conserving the water by the methods specified in the Agreement.  
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9 **EVIDENCE SUPPORTING REASONS TO DENY THE PETITION**

10 I.1. **No net new water will be provided for California.** Following Imperial Valley  
11 farmland causes no increase in water use efficiency, nor does it in any way increase  
12 California's supply of usable water. It only takes water from where it is currently being  
13 used and changes the place and purpose of use.  
14

15 I.2. **It will not allow IID to become more efficient to comply with orders by this**  
16 **Board (D-1600 & 88-20).** If IID implements a fallowing program and maintains inflows  
17 to Salton Sea its district irrigation efficiency will decrease. (RT 2671-2673.) This is  
18 contrary to previous orders and decisions by this Board that IID increase its efficiency of  
19 water use.  
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21 I.3. **It will not allow IID to become more efficient to comply with the requirements**  
22 **of the California Water Code.** The California Water Code requires water rights holders  
23 to put their water "... to beneficial use to the fullest extent of which they are capable...".  
24 By becoming less efficient in its water use when transfer funds are available that could be  
25 used to improve efficiency, IID would be operating contrary to Water Code requirements of  
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1 reasonable. IID must be allowed to use the transfer funds to improve its efficiency and  
2 stay in compliance with Water Code requirements.

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4 **I.4. It will not allow IID to become more efficient to comply with regulations of**  
5 **USBR and expectations of the Secretary of the Interior.** The US Bureau of Reclamation  
6 regulations require that water it supplies to Colorado River contractors be used reasonably.  
7 By implementing this transfer in this way IID would be less able to meet the Bureau's  
8 standard and could be put in great jeopardy of having its water right reduced. The  
9 Implementation Agreement with the Secretary of the Interior provides benefits to IID on  
10 the condition that IID implement "major conservation activities". (Exh. IID #22-Exhibit  
11 D(Implementation Agreement) B.7.b).

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14 **I.5. It will reduce habitat for bird species, including shore bird species that forage**  
15 **in farm fields, by fallowing acreage that currently produces these crops and provides**  
16 **this habitat.** While nearly 400 bird species occur in the area, many use the canals,  
17 drainage channels and farm fields for habitat and a source of food. This number includes  
18 many of the shore birds (sea gulls, stilts, etc.), even waders (i.e. herons) and some which  
19 dive for food (ospreys). (RT 1884-1887.). Fallowing would decrease the acreage devoted  
20 to crops and thereby reduce the available habitat for these species.

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23 **I.6. It transfers water away from an existing community/economy in an attempt to**  
24 **benefit a few fish-eating species for a short period of time.** Water that would be  
25 conserved by fallowing and transferred away from IID is water that is contributing to the  
26 local economy and the community it supports. The people that depend on that economy  
27 would be harmed by providing a temporal benefit at best to a very few species of fish-  
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1 eating birds. This is not even co-existence; it is putting the welfare of birds ahead of  
2 people! This plan becomes a draconian measure against the residents of the Imperial  
3 Valley for a minimal temporal benefit to a few bird species.  
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5 **I.7. It will provide only minimal, temporal benefit to few, if any, listed species**  
6 **which rely on a fish-filled, water habitat.** Little evidence was presented that more than a  
7 very few listed species would be helped by HCP 2. Since the proposed HCP 2 only calls for  
8 the Salton Sea salinity to be kept lower for about 20 years (less if the fishery dwindles  
9 earlier), the maximum period of benefit is short. It must also be remembered that during  
10 that time the fishery can be expected to decline cyclically and therefore provide a  
11 dwindling benefit. (RT, David Christophel Cross-examination by Gilbert [July 8, during  
12 the morning session]). A more rapid decline in the suitability of the habitat would prove  
13 little more than an inconvenience to the species under consideration.  
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16 **I.8. It provides little, if any, benefit to non-listed fish-eating species that currently**  
17 **use the Salton Sea.** Almost no information was provided to show that non-listed fish-  
18 eating species would suffer impacts that would threaten the stability of the species. While  
19 testimony mentioned nearly 400 species of birds, it needs to be noted that this is the number  
20 that occurs in the area surrounding the Sea. (RT 1884-1886.). Also, not many of these are  
21 fish-eaters, and not all the fish-eaters get their food from the Sea. Many find their meals in  
22 the canals and drains which contain water year-round. (RT 1884-1887.).  
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25 **I.9. It violates the Agreement between IID and SDCWA which prohibits fallowing**  
26 **for on-farm conservation.** It is no secret that the Agreement between IID and SDCWA  
27 prohibits fallowing as a method of on-farm conservation. Implementing a program which  
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1 requires following would violate that agreement. The agreement was negotiated as a  
2 package. The need to mitigate socio-economic impacts in Imperial Valley was not  
3 contemplated. This key element of the agreement cannot be reversed without upsetting the  
4 balance of the entire agreement.  
5

6 **I.10. It is contrary to the purposes of the QSA (Quantification Settlement**

7 **Agreements).** The QSA were to allow IID to transfer water “around” junior rightholders  
8 on the River by satisfying claims that IID’s use was not reasonable and that some of the  
9 conserved water rightfully belonged to those junior rightholders. (RT 2678-2683.). IID  
10 gave up the opportunity to conserve and transfer “carve out” water to SDCWA at the same  
11 price that it would receive for the Primary Quantity to be conserved and transferred to the  
12 Authority. (RT 2682-2683.) (Exh. IID #7, Art 3, 3.1, 3.2, 3.2(a), 3.2(b), 3.2(d)). In return  
13 for transferring that water to CVWD & MWD for a much lower price, IID received  
14 assurances of unknown value that they would not challenge IID’s reasonableness of use.  
15 Exh. (IID #22-Exhibit A (CVWD/MWD Acquisition Agreement), Article 2, 2(a), 2(b),  
16 Article 5, 5.1, 5.2) (RT 2678-2682.).  
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20 Implementing the Agreement by following would cause IID’s district efficiency to decline.  
21 (RT 2670-2673.). If reducing IID’s efficiency were deemed reasonable, agreement by  
22 CVWD to not challenge IID’s efficiency would be worthless and IID would have no reason  
23 to transfer water to it at a reduced price. (RT 2685-2686.).  
24

25 **I.11. It is contrary to the intent of the IA (Implementation Agreement).** The

26 Implementation Agreement with the Secretary specifies that the Secretary would see no  
27 reason to assess IID’s reasonableness of use for the next 20 years IF IID implements major  
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1 conservation measures and does not have available significant new water use technology.  
2 Exh. IID #22-Exhibit D(Implementation Agreement) B.7.b.) (RT 2740-2742.). This  
3 presupposes that IID will implement major conservation activities that improve its  
4 efficiency—not fallowing, which would reduce its efficiency!  
5

6 **I.12. A fallowing program would reduce agricultural output and have a negative**  
7 **impact on the local economy and community.** Testimony showed that a long-term  
8 fallowing program would have major negative impacts on the local economy. (RT 966-  
9 971.). Testimony by both Dr. Smith and Mr. Spikard indicated that longer term fallowing  
10 programs would be expected to have major, long-lasting, and hard-to-successfully-mitigate  
11 impacts on the local economy. (RT 2265-2268.).  
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13 **I.13. It transfers water away from a poor community/economy to enhance a wealthy**  
14 **community/economy.** Testimony showed that Imperial County is a low-income, high-  
15 unemployment county and that San Diego County residents are much better off. It would  
16 be unjust and violate the principles of environmental justice to implement a fallowing  
17 program which impacts the economy of a low-income community so a high-income  
18 community can benefit.  
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21 **I.14. It would place a financial burden on farm operators as they compete for fewer**  
22 **remaining acres of cropland.** Testimony was presented that when farmable acres are  
23 withdrawn from availability farmers will compete for the remaining acres. This will result  
24 in decreased profitability for Imperial Valley farms.  
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2 **EVIDENCE SUPPORTING REASONS FOR CONDITIONS**  
3 **TO APPROVAL OF PETITION**

4 **II.A.1. Provide net new water for California’s use.** By conserving the water to be  
5 transferred by increasing IID’s water use efficiency, the project would increase the usable  
6 supply of water available to California. While it is common that agricultural inefficiencies  
7 produce water that may become available for reuse by others, that is not the case in the IID.  
8 Virtually all of IID’s return flows become mixed with highly saline groundwater or enter  
9 the Salton Sea and are unavailable for reuse. Therefore when distribution or irrigation  
10 losses are reduced, additional water is made available for municipal and agricultural  
11 purposes. Implementing a project which improves IID’s water use efficiency effectively  
12 creates new water to meet California’s increasing needs. This also lessens the pressure to  
13 find sources of water elsewhere in the state that can be transported to Southern California.

14 **II.A.2. Provide benefits to both the exporting and importing districts and their**  
15 **economies.** The importing district will receive the benefits of the additional water and an  
16 improved reliability of its supply, to accommodate the needs of its growing community and  
17 economy. The exporting district would be able maintain its agricultural output and add a  
18 conservation industry to benefit the local economy. Environmental mitigation expenditures  
19 in the local area would also benefit the local economies.

20 **II.A.3. Keep the Interim Surplus Guidelines in effect to provide additional benefits to**  
21 **California users.** This project would satisfy the next milestone for keeping the Interim  
22 Surplus Guidelines in effect. Those guidelines would make available to California,  
23 Colorado River water in excess of it’s 4.4 MAF entitlement during the next 14 years. This  
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1 water would allow coastal Southern California users to minimize water shortages that  
2 would put an extra strain on other California sources.

3 II.A.4. thru II.A.9. See explanations above.

4 II.B.1. and II.B.2. See explanations above.

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6 **II.B.3. The benefits of the transfer would far outweigh the few short-term negative**  
7 **environmental impacts of the Sea becoming hyper-saline.** The few unmitigated impacts  
8 to the environment that would result from the Salton Sea becoming hyper-saline more  
9 quickly than with approach 2, would be far outweighed by the benefits the transfer would  
10 provide to the whole state. In addition to those already enumerated, there would be  
11 environmental benefits to those other areas which would otherwise be looked to for  
12 alternate water supplies for Southern California. When considered together—the new  
13 water created, the availability of additional supplies of Colorado River water for the next 14  
14 years, the benefits to the many communities receiving water, and the ability to convey all  
15 the water without constructing new conveyance facilities, the benefits are overwhelming  
16 and extend to all parts of the state.

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20 **II. D. IID and its farmers, landowners and residents must be protected from claims**  
21 **for damages to people, property, or the environment resulting from good-faith**  
22 **fulfillment of its contractual obligations to conserve and transfer water pursuant to**  
23 **the agreement with SDCWA, the QSA, and related documents.** Proposals to mitigate  
24 the impacts of this transfer to the Salton Sea have ranged upwards to more than \$1 billion.  
25 The amount that claims for damages to persons or property might reach can only be  
26 imagined. Testimony has shown that revenue from the transfer may be adequate to cover  
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1 costs of conserving the water plus administration plus the amounts IID committed for  
2 environmental mitigation. Damage claims, however, could easily exceed the entire value  
3 of the farmland within the IID. (RT 547-548).

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5 **II.E. That Landowners' rights to receive water, and opportunity to conserve for**  
6 **transfer not be diminished because of their adherence to policies and regulations of**  
7 **IID and principles of the Water Code requiring efficient water use.** Landowners must  
8 not be penalized for good-faith adherence to policies and regulations of the IID or  
9 provisions of the Water Code requiring efficient water use. (W.C. Sec. 100). The IID has  
10 publicly presented a proposal that would penalize the most efficient users of water by  
11 granting rights to receive water to local landowners based on their historic use during a  
12 recent short period of time. (Exh. Gilbert #4, #5). There was also a proposal that would  
13 apportion the opportunity to conserve on the same basis. (Exh. Gilbert #4). This would  
14 reward those landowners whose water use has been least efficient and should not be  
15 permitted.  
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19 **II.F. Landowners within IID who depend on their right to receive water must not be**  
20 **injured by having the price IID receives for transferred water decrease to a level**  
21 **below the cost of conserving the water by the methods specified in the Agreement.**

22 The Agreement includes a Price Redetermination provision, known as Exhibit E of the  
23 Agreement, which provides for the price to be paid by SDCWA to be determined, at least  
24 in part, by prices paid for other water transfers. Evidence was presented that this could  
25 cause IID's price to be lowered to prices paid for water conserved by cheaper methods,  
26 such as storage and retrieval. (Exh. Gilbert #11). If this happened, IID's landowners  
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1 would be injured by the requirement to conserve by methods that cost more than the  
2 transfer revenues would support. This should not be allowed to be done.

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4 **SUMMARY**

5 The conservation and transfer of water similar to what is proposed here could  
6 provide many, far-reaching benefits to people in many parts California for many years.  
7 Unfortunately, this proposed transfer has several fatal flaws in its present form which cause  
8 it to be unsuitable for approval. If and when (and only when) those flaws can be corrected,  
9 the revised transfer should be approved for the benefit of both the exporting and receiving  
10 districts and the entire state of California.  
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14 Dated: 11 July 2002

Respectfully submitted,

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17 Larry Gilbert  
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