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June 4, 2002

**VIA FACSIMILE &
ELECTRONIC MAIL**

Mr. Arthur Baggett, Jr.
Hearing Officer, Chairman of State Water
Resources Control Board
State Water Resources Control Board
1001 "I" Street, 22nd Floor
Sacramento, CA 95814

Re: CRIT Response To SWRCB Questions

Dear Chairman Baggett:

We are in receipt of the Colorado River Indian Tribes' ("CRIT") May 21 response to the SWRCB's interrogatories as to the CRIT's water rights in respect to power generation. This letter serves as the response by Imperial Irrigation District ("IID").

Before we deal with the legal issues regarding CRIT's claim, the following is a summary of what the evidence and the recent CRIT response show, with factual citations:

- CRIT diverts water at Headgate Rock Dam for use on tribal lands. (Hearing Transcript, April 24, 2002, p.455, lines 9-12.) It makes such diversion under rights confirmed in the Arizona decrees by the Supreme Court;
- CRIT's diversion right will be unaffected by the proposed IID/San Diego water transfer. (Hearing Transcript, April 24, 2002, p.455, line 13 through p.456, line 7.);
- CRIT's power generation at Headgate Rock Dam does not emanate from the water that CRIT diverts as a matter of right, but rather from whatever water flows through the dam after CRIT diverts its water. (Hearing Transcript, April 24, 2002, p.452, lines 20-22; p.454, line 24 through p.455 line 4; and p.458, lines 8-17.);
- CRIT's power generation thus does not stem from its ordered water, but from whatever water may naturally flow by, as well as whatever water is ordered by downstream right holders. (Hearing Transcript, April 24, 2002,

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p.452, lines 20-22; *see also* Hearing Transcript, April 24, 2002, p.459, lines 9-17.) If, for whatever reason, a downstream user orders less (or no) water from the Bureau, then *ipso facto* there is less water flowing through Headgate Rock Dam. (*See generally* Hearing Transcript, April 24, 2002, p.457, lines 8-25.);

- CRIT has no right to order water for power generation from the Bureau at Parker Dam, but rather it is dependent, to put it colloquially, “on the kindness of strangers” to order water that will ultimately benefit CRIT incidentally. (Hearing Transcript, April 24, 2002, p.456, lines 8-16 and p.459, lines 9-17.);
- Even without the proposed transfer, the flow on the Colorado River fluctuates dramatically, in part because IID’s orders fluctuate significantly. (IID Exhibit 11.); and
- The amount of power supposedly to be lost at Headgate Rock Dam is about 6%, an insignificant amount according to the Bureau of Reclamation. *See* Hearing Transcript, April 24, 2002, p.460, lines 8-11; IID Exhibit 53; p.3.3-13.

Based upon the foregoing, all of which will be discussed in further detail in this letter, CRIT simply has no “water right” which will suffer any potential injury. Though IID does not dispute that CRIT is a legal user of water, the alleged “injury” to power generation is not related to its diversion water right; instead CRIT's alleged injury relates to an implied assertion by CRIT that it should be able to mandate that other downstream water users must order the same (or higher) volumes of water so that CRIT can incidentally benefit. CRIT is asserting a right to IID's water, not its own.

The rest of this letter explains in fuller detail why CRIT has no basis to claim a “legal injury” cognizable by the SWRCB under the Water Code.

1. CRIT's Diversion Right Is Unaffected By The Transfer

In this proceeding the IID does not dispute that CRIT has a right to divert water for proper use on its reservation. The scope of such right, however, by CRIT's own admission, does not include ordering water for power generation. Hearing Transcript, April 24, 2002, p. 456, lines 8-16. CRIT has not put on any evidence that its diversion right would be affected by the proposed transfer, nor has it put on any evidence that it has a right to do anything related to power other than generate power from whatever incidental water may flow by in the Colorado River.

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2. CRIT's Alleged Injury Is Not Related To Its Water Right

The alleged "injury" to CRIT is not related to CRIT's water right. As a matter of law, CRIT thus has no claim to make before the SWRCB. The SWRCB has found that the Water Code's "no injury to legal user" language does not include just "anyone," but only those whose water rights could be harmed by the transfer. Water Rights Order 98-01 (1998 Cal. ENV. LEXIS 1), and Water Rights Order 99-12 (1999 Cal. ENV. LEXIS 24). In the former, the SWRCB ruled that a user had no standing, because to be a "legal user of water" one had to have a water right being affected by a proposed transfer:

SDWA argues that it does not need a legal right to use the water in order to be injured within the meaning of Water Code sections 1707 and 1725 et seq., and that the common law cases do not apply. We do not agree. [FN2] The statutory no-injury rule codifies the common law no-injury rule. (See Water Code section 1706; Code Commission Notes to Water Code section 1700; Final Report, Governor's Commission to Review California Water Rights Law (1978) at 64-65.) Accordingly, the no-injury rules under Water Code sections 1702, 1706, 1707, 1725, and 1727 all should be interpreted consistently with the case law.

SWRCB Order WR 98-01 at p. 7.

We conclude, however, that the requirement that a transfer not injure any legal user of water does not extend protection to persons or interest[s] who have no legal right to use of the water.

Id. at fn.2. (Emphasis added.)

The above Merced River SWRCB ruling in WR 98-01 is instructive here. The South Delta Water Agency ("SDWA") asserted a right to have water released upstream at given times, and if it were not done, then it would supposedly be "injured." However, the SWRCB held that because SDWA had no right to the actual water in question, it could not make such a claim:

SDWA had no legal right to require the release of water from MID's reservoir at a time that would benefit SDWA. Considering that SDWA has no legal right to require MID to release stored water, it would not be reasonable for the SWRCB to require MID to prove that retaining the stored water until October would not, or did not, injure SDWA's members.

Id. at pp.10-11.

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This is directly analogous to the situation here. What CRIT is really requiring is that IID continue to order water at some (unspecified) set amount from the Bureau so that CRIT can incidentally benefit from the water flowing down to Imperial Dam. However, CRIT has put on no evidence, and indeed cannot, that IID has **any** duty to order **any** water from the Bureau, let alone specific quantities. Just as SDWA was attempting to do in the Merced River transfer decision cited above, CRIT is requiring that IID perform a service for it, without any duty or compensation.

Thus, there is no “substantial injury to a legal user of water” here under Water Code § 1736, because for there to be such an injury, CRIT’s diversion right must be affected, and it is not.

3. CRIT's Injury Is Not “Substantial”

Even if for some reason CRIT had a water right for power diversion (which it does not), there is no evidence of “substantial” injury here, as required by Water Code § 1735. CRIT’s own exhibits admit that the potential power loss is only about 6%. (CRIT Exhibit 5, p. 3.3-13.) Further, the Bureau of Reclamation’s Draft EIR/EIS for the Implementation Agreement states that such a power loss is minimal. *See* Hearing Transcript, April 24, 2002, p.460, lines 8-11; IID Exhibit 53, p.3.3-13.

As expressed in numerous exhibits and oral testimony, the flow of the Colorado River, and IID’s diversions, vary by hundreds of thousands of acre-feet yearly. CRIT has no expectation of anything other than that to the extent water passes by, it can generate power. With the current major fluctuations on the Colorado River, the transfer will have miniscule effect on CRIT, and thus there is no “substantial” injury to CRIT.

The SWRCB should not deny this transfer petition on the basis that CRIT’s “luck of the draw” power generation dam might lose some small percentage of power from water that CRIT has no right to. IID respectfully requests that the SWRCB deny the objection.

Very truly yours,

David L. Osias

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DLO:mhc
cc: All Counsel (See Attached Service List)
John P. Carter, Esq.
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