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10 STATE WATER RESOURCES CONTROL BOARD

11 STATE OF CALIFORNIA

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13 IMPERIAL IRRIGATION DISTRICT  
and SAN DIEGO COUNTY WATER  
14 AUTHORITY,

15 Petitioners.  
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**IMPERIAL IRRIGATION DISTRICT'S  
COMMENTS TO SWRCB DRAFT ORDER OF  
SEPTEMBER 26, 2002, REGARDING THE  
AMENDED JOINT PETITION BY IMPERIAL  
IRRIGATION DISTRICT AND SAN DIEGO  
COUNTY WATER AUTHORITY FOR  
APPROVAL OF A LONG-TERM TRANSFER  
OF CONSERVED WATER**

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1 IID COMMENTS TO SWRCB DRAFT ORDER

2  
3 The Imperial Irrigation District ("IID") submits the  
4 following comments on the September 26, 2002, Draft Order  
5 ("Draft") issued by the State Water Resources Control Board  
6 ("SWRCB"), as requested in the SWRCB's letter of September 26,  
7 2002.

8 **I. INTRODUCTION**

9 The IID greatly appreciates the significant amount of work  
10 the SWRCB and its staff have gone through to prepare the Draft.  
11 The large amount of documentation and testimony received required  
12 an exhaustive and detailed analysis by the SWRCB and its staff.  
13 As an overall comment on the Draft, subject to the comments  
14 below, IID believes that it constitutes a fair and reasonable  
15 result. However, certain matters should be clarified to avoid  
16 confusion and enable the transfer to move forward.

17 Many of the items that need clarification are minor, yet  
18 some are significant. This document is structured in the  
19 following manner: (a) in the first section we address what we  
20 consider to be the more significant issues that IID believes need  
21 to be clarified or changed in the Draft; and (b) in the second  
22 section we provide the SWRCB and its staff with the results of  
23 our review of the evidentiary and legal record and note where  
24 certain items cited in the Draft are in error, or need some  
25 modification.

1 IID is preparing a redlined copy of the Draft to reflect the  
2 recommended changes noted herein, which it will submit shortly  
3 and prior to the hearing.

4 **II. SIGNIFICANT ITEMS THAT NEED TO BE ADDRESSED**

5 The following matters are those that IID believes are of  
6 meaningful import in understanding the SWRCB's decision, and/or  
7 are necessary changes for the transfer to proceed. A number of  
8 the clarifications are necessary to meet the requirements of the  
9 agreements underlying the Petition (the Agreement For Transfer of  
10 Conserved Water between IID and SDCWA, the Quantification  
11 Settlement Agreement ("QSA"), and the Protest Dismissal Agreement  
12 ("PDA"); IID Exhibits 7, 22 and 23 respectively), and to ensure  
13 that no parties -- or third parties -- misread the SWRCB's  
14 decision.

15 **A. Nature Of The Proposed Order**

16 The SWRCB will issue its Order pursuant to a voluntary  
17 change petition brought by IID and SDCWA in connection with a  
18 proposed conserved-water transfer. As such, it would be very  
19 helpful to the reader, especially a non-party reader, for the  
20 Order to better clarify the context of the conditional approval.  
21 In other words, the SWRCB is not imposing obligations on IID and  
22 SDCWA regardless of whether there is a transfer. Rather, only if  
23 IID and SDCWA want to go forward with the transfer must certain  
24 conditions be satisfied. We suggest the following text would be  
25 helpful if added at the very end of the introductory section of  
26 the Draft on page 3 as a new paragraph:

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1 This matter is brought before the SWRCB as a  
2 voluntary change petition. Nothing in this  
3 Order shall require the petitioners to  
4 proceed with the transfer, or in the absence  
5 of the transfer to satisfy any of the  
6 conditions or mitigation activities described  
7 herein.

#### 8 B. Mitigation Costs

9 The SWRCB is aware that the responsibility for implementing  
10 and paying for environmental mitigation is governed by provisions  
11 of the IID/SDCWA Transfer Agreement and QSA, with certain maximum  
12 cost responsibilities specified and "backfill rights" (payment of  
13 costs higher than the set limits) held by certain of the parties.  
14 (See, e.g., IID Exh. 7, §§ 1.1(bk) and 8.1(b)(ii) and (iii).)  
15 In light of these provisions, it would be helpful if the order  
16 not lend itself to an interpretation that the SWRCB is directing  
17 who shall pay for the required mitigation. Because IID is a  
18 petitioner and the party whose permit will be changed, it may be  
19 appropriate that the condition to the change is generically  
20 couched in an "IID shall . . ." format. However, this could lead  
21 an uninformed reader to believe that the SWRCB is requiring that  
22 IID be the party which pays for the mitigation specified, an  
23 incorrect conclusion. IID therefore requests that the following  
24 addition be made at the end of current footnote 8 on page 27,  
25 which footnote regards the related subject of replacement water  
26 costs:

1 Similarly, any references herein to required  
2 mitigation measures are not intended to be  
3 read as requirements that petitioner IID  
4 provide the funding for the mitigation, or  
5 that IID must itself implement the  
6 mitigation. Mitigation may be paid for or  
7 implemented pursuant to the agreement of the  
8 parties to the IID/SDCWA Transfer Agreement  
9 and the QSA, or by others. The mitigation  
10 measures stated herein are conditions that  
11 must be funded and implemented if petitioners  
12 choose to proceed with their transfer,  
13 irrespective of who pays for or implements  
14 the mitigation.

15 C. Items Regarding The QSA/PDA Requirements

16 As the SWRCB is aware, the PDA required certain findings as  
17 conditions precedent to the parties' willingness to implement the  
18 transfer. IID is aware of the concerns that the SWRCB expressed  
19 early on as to such preconditions, and acknowledges that the  
20 SWRCB is under no obligation to make such findings. However,  
21 without such findings, the transfer may not go forward.

22 The below table lists the required findings, compares the  
23 findings in the current Draft, and identifies those that IID  
24 believes must be changed to allow the transfer to proceed:  
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| <p style="text-align: center;"><b><u>PDA Conditions-Precedent</u></b><br/><b><u>Findings</u></b></p>   | <p style="text-align: center;"><b><u>Was A Sufficient Finding Made?</u></b></p>   |
|--|---|
| <p>1. The decision, order and all findings of fact and conclusions of law, with the exception of any decision, order, finding of fact or conclusion of law made with respect to standing or the right to appear or object, shall have no precedential effect (as defined in the California Administrative Procedures Act) in any other proceeding brought before the SWRCB and, specifically but without limitation, shall not establish the applicability or nonapplicability of California law or federal law to any of the matters raised by the Petition or to any other Colorado River transfer or acquisition.</p> | <p>1. Yes. Page 82 of the Draft clearly states that the Order and all finding are non-precedential in separate later proceedings, but bind all the parties and are precedential in this proceeding.</p> |
| <p>2. There is no substantial injury to any legal user of water.</p>   | <p>2. Yes. Pages 23-25 of the Draft clearly state that the SWRCB has found there will be no substantial injury to any legal user of water.</p>  |
| <p>3. There is no unreasonable impact on fish, wildlife or other instream beneficial uses.</p>   | <p>3. Yes. The Draft clearly states that (with mitigation measures), there is no such unreasonable impact. See pages 1-2, and pp.25-59.</p>   |
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| <p style="text-align: center;"><u>PDA Conditions-Precedent</u><br/><br/><u>Findings</u></p>               | <p style="text-align: center;"><u>Was A Sufficient Finding Made?</u></p>  |
|---|---|
| <p>4. The SWRCB concerns, if any, with respect to IID's reasonable and beneficial use, are satisfied.</p> | <p>4. No, this finding was not sufficiently satisfied. The SWRCB has received reports every year that IID has complied with Decision 1600 and Order 88-20. The SWRCB has accepted such reports and the SWRCB has taken no further action to indicate any dissatisfaction with IID's use of water. No party since Order 88-20 has brought any evidence of IID unreasonable or nonbeneficial use before the SWRCB. At the hearing, as noted on page 83 of the Draft, extensive evidence regarding IID's reasonable use was submitted without dispute or any contrary evidence. Thus, it is appropriate (<b>and necessary</b>) for the SWRCB to state as a lead-in sentence to the second paragraph on page 84 as follows: "Based on the evidence in the record, the settlement with junior right holders, and the facts and circumstances of the petition, the SWRCB's concerns, if any, with respect to IID's reasonable and beneficial use are satisfied." Without such language, this necessary condition precedent remains unsatisfied.</p> |



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| <p style="text-align: center;"><u>PDA Conditions-Precedent</u><br/><br/><u>Findings</u></p>   | <p style="text-align: center;"><u>Was A Sufficient Finding Made?</u></p>   |
|---|--|
| <p>5. The SWRCB does not anticipate the need, absent any substantial material adverse change in IID's irrigation practices or advances in economically feasible technology associated with irrigation efficiency, to reassess the reasonable and beneficial use of water by the IID before the end of calendar year 2023.</p> | <p>5. Mainly, yes. The SWRCB addresses this on page 84 of the Draft. The SWRCB, however, adds an "and the flooding problem is resolved" requirement not contained in the requested finding. IID asks that the SWRCB modify the language on page 84 to remove the flooding text. The Draft requires replacement water to the Salton Sea as a mitigation requirement. Salton Sea elevation management is not an exact science. It would be an unfair result if replacement water were utilized, and then (because of weather or increased inflows from Mexico, for example) the flooding problem is not resolved. Such should not negate the reasonableness of IID's use, especially where the SWRCB requires inflows to the Salton Sea to be maintained. Thus, the addition of the flooding language creates an unacceptable risk to IID -- and one IID believes was unintended by the SWRCB.</p> |

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| <p style="text-align: center;"><u>PDA Conditions-Precedent</u></p> <p style="text-align: center;"><u>Findings</u></p>   | <p style="text-align: center;"><u>Was A Sufficient Finding Made?</u></p>  |
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| <p>6. Water Code sections 1011, 1012 and 1013 apply to and govern the transfer and acquisitions and IID's water rights are unaffected by the transfer and acquisitions.</p> | <p>6. Mostly. The required finding was made as to sections 1011 and 1012 on page 84. Section 1013 must have been inadvertently omitted and should be added to the sentence, as shown in the redline. The SWRCB goes on to provide that IID is further protected from forfeiture by section 1745.07 and newly-amended section 1013. To better identify the additional statutory forfeiture protection provisions available to the IID, reference should also be made to Water Code sections 1005, 1014 and 1017.</p> |
| <p>7. The conserved water transferred or acquired retains the same priority as if it were diverted and used by the IID.</p>   | <p>7. No. The Draft does not contain an express finding that IID's conserved and transferred water retains the same priority as if it were diverted and used by IID. Water Code sections 1011, 1012, 1014 and 1017 and the Draft protect IID's water right from being unimpaired. Thus, this finding is for the benefit of SDCWA and CVWD while they receive IID's transferred water. IID believes these parties are willing to waive this requirement, but the SWRCB should confirm this.</p>                      |
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| <p style="text-align: center;"><u>PDA Conditions-Precedent</u></p> <p style="text-align: center;"><u>Findings</u></p>  | <p style="text-align: center;"><u>Was A Sufficient Finding Made?</u></p>  |
|--|---|
| <p>8. The transfer and acquisitions are in furtherance of earlier SWRCB decisions and orders concerning the IID's reasonable and beneficial use of water, California Constitution article X, § 2, and sections 100 and 109 of the Water Code.</p>  | <p>8. Not clearly. Though the first paragraph of section 7.2 refers to this request, it is then not addressed. The SWRCB should make the requested finding, as noted in the redline.</p>  |
| <p>9. IID shall report annually on conservation of water pursuant to its Petition, and such annual reports shall satisfy reporting obligations of IID under Decision 1600 and Water Rights Order 88-20. The quantity of conserved water transferred or acquired will be verified by the IID reporting that (i) the IID's diversions at Imperial Dam (less return flows) have been reduced below 3.1 million AFY in an amount equal to the quantity of conserved water transferred or acquired, subject to variation permitted by the Inadvertent Overrun Program adopted by the DOI; and (ii) the IID has enforced its contracts with the participating farmers to produce conserved water and has identified the amount of reduced deliveries to participating farmers and has identified the amount of conserved water created by projects developed by the IID.</p> | <p>9. Yes. Though the SWRCB has not necessarily mirrored all the exact language in the condition, it states that, "The reporting requirement proposed by petitioners is adequate." (Draft, p. 85). IID reads the Draft as allowing exactly what IID has proposed.</p> |
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1 As one can see from the above table, in IID's view the Draft  
2 mostly satisfies the conditions precedent as to findings, and  
3 where it falls short, the simple changes recommended by IID will  
4 resolve the problems. Though the SWRCB is certainly under no  
5 obligation to modify the Draft, to the extent that it does not do  
6 so and any conditions remain unsatisfied, the IID/SDCWA Transfer  
7 Agreement and QSA are in jeopardy. IID is unaware of why any of  
8 the above conditions would not be in accord with the law, the PDA  
9 and with the evidence at the hearings, and thus requests that the  
10 Draft be modified as suggested. Based upon a complete reading of  
11 the Draft, IID believes the SWRCB intended that the conditions be  
12 satisfied, and thus these changes are really for clarification.  
13 In this context, we believe that it would be helpful for the  
14 SWRCB to add this sentence, perhaps where shown on the redline:  
15 "It is the intent of the SWRCB that this Order satisfy the  
16 conditions stated in the PDA."

#### 17 D. Selenium Issues

18 Ordering Paragraph No. 12 found at page 92 of the Draft  
19 requires IID, in consultation with California Department of Fish  
20 and Game and the RWQCB, to prepare a Plan to study practices  
21 within IID that result in the concentration of selenium  
22 discharged to the Salton Sea and its tributaries, including  
23 agricultural drains used by fish and wildlife; to complete a  
24 study pursuant to the Plan, prepare a report summarizing the  
25 results of the Study and recommend ways to reduce selenium  
26 discharges to levels that meet water quality objectives; and  
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1 thereafter to work with the RWQCB to implement any actions  
2 recommended by the report that are within the control of IID.

3 IID contends that this requirement, found nowhere in the  
4 EIR/EIS, is unduly onerous, and puts the transfer at risk because  
5 of excessive and unnecessary cost.

6 The Final EIR/EIS for the IID Water Conservation and  
7 Transfer Project explains at length the reasons why existing  
8 technologies for selenium removal do not provide a feasible  
9 solution to the problems posed by high selenium concentrations in  
10 tilewater within the IID Water Service Area. (See Section 3.1,  
11 Master Response on Selenium Mitigation.) The EIR/EIS concluded  
12 that habitat replacement is the only reasonable, feasible, and  
13 implementable mitigation measure for selenium impacts related to  
14 the IID Water Conservation and Transfer Project. The Draft  
15 recognizes that the creation of alternative habitat will  
16 compensate for any reduction in reproductive output of wildlife  
17 that inhabits the drains. (Draft, Section 5.1.5, page 32.)

18 As the Draft acknowledges, the IID water service area is not  
19 the source of the selenium. The source is agricultural drainage  
20 from areas served by the Colorado River upstream of IID and from  
21 naturally occurring seleniferous soils there. The Draft takes  
22 official notice that the Colorado Water Quality Commission  
23 amended its standards for the Gunnison and Lower Dolores River  
24 Basins to include new standards for selenium and took other  
25 actions that should result in a reduction of selenium levels in  
26 irrigation water imported into Imperial County. (Draft, Page 34).

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1 Such action addresses the source of the selenium. The Draft  
2 states:

3           The impact of increasing selenium in the  
4           drains is of significant concern. In view of  
5           the important state interest in the proposed  
6           transfer, however, it would not be reasonable  
7           to deny approval of the transfer simply  
8           because it is not feasible, as part of this  
9           order, to prevent the proposed transfer from  
10          contributing to further violations of the  
11          water quality objective for selenium.

12 (Draft, page 34).

13           All of this is fine. However, the Draft then goes on to  
14           state that comprehensive planning is needed to address selenium.  
15           Comprehensive planning logically should include all the sources  
16           of selenium and all the stakeholders, yet the Draft imposes the  
17           full burden of a study that must result in recommendations  
18           focused only upon IID, and must also be implemented "if within  
19           IID's control" regardless of what may be done elsewhere.

20           This is in stark contrast to the conclusion re salinity,  
21           though the origin of the problem is likewise outside of the IID  
22           water system. The Draft recognizes that salt accumulation in the  
23           Imperial Valley and in the Salton Sea is a direct result of  
24           rising salinity of Colorado River water, which affects all  
25           Colorado River stakeholders. It notes that salinity control must  
26           be addressed in a broader context than the current proceeding and  
27           concludes that, "the impacts of the transfer on fish and wildlife  
28           attributable to an incremental increase in the salinity of the  
29           drains will not be unreasonable."

30           IID therefore requests that the condition set forth in  
31           Ordering paragraph 12 be eliminated. The replacement habitat

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1 fully mitigates for the impact to biological resources. The  
2 impact to water quality related to the IID Water Conservation and  
3 Transfer Project is, just as with salinity, incremental at most  
4 and not unreasonable. The condition does not limit the study,  
5 recommendations and implementation to impacts caused by the  
6 Project, but is much broader and requires the study of all  
7 practices within IID, whether related to the Project or not,  
8 regardless of who engages in the practices. The only limitation  
9 is that IID implement recommendations that are within its  
10 control. This is unclear and will lead to endless controversy  
11 over what it means. This overbroad and vague condition does not  
12 allow the parties to quantify the potential costs of going  
13 forward with the project and could delay negotiations, because it  
14 was never included in the Final EIR/EIS HCP.

#### 15 E. Other Environmental Mitigation Requirements

16 The IID does not object to the other environmental  
17 mitigation conditions imposed by the SWRCB as conditions to the  
18 voluntary transfer. Other than as to the Salton Sea and  
19 selenium, the conditions adopt the Final EIR/EIS HCP provisions.  
20 The HCP remains a condition precedent to the commencement of the  
21 transfer. As to the Salton Sea, ongoing discussions with the  
22 environmental community and California Resource Agency  
23 representatives involve a replacement water mitigation approach  
24 that uses a volume approach, i.e., if the conservation and  
25 transfer activity reduced inflow by X acre-feet, then the  
26 mitigation would be to replace the reduction with mitigation  
27 water in the same amount. This would avoid salinity and  
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1 elevation measurements and limit mitigation to conservation and  
2 transfer-caused impacts. If this approach receives a consensus  
3 approval, IID will make a formal request to the SWRCB pursuant to  
4 its retained jurisdiction in paragraph 7 on page 90 of the Draft  
5 to modify the required Salton Sea mitigation condition.

6 F. The Decision Incorrectly Addresses The IID's Ability  
7 To Mitigate Conservation Activities

8 The Draft correctly rejects SDCWA's contention that the  
9 SSHCH is not legally feasible under the Law of the River (p. 51).  
10 IID's voluntary use of Colorado River water to mitigate  
11 environmental impacts associated with water conservation  
12 activities and transfers of conserved water is not prohibited by  
13 the Law of the River, is not limited to IID's use of present-  
14 perfected rights, and does not involve a change in purpose of use  
15 necessitating an amended petition for change under Water Code  
16 section 1707. Although the Draft correctly rejects the legal  
17 challenge, it does so with an incomplete explanation and too  
18 narrowly circumscribes the lawful use of Colorado River non-  
19 present-perfected rights.

20 The federal components of the Law of the River only displace  
21 state water law to the extent inconsistent with the Boulder  
22 Canyon Project Act ("Project Act"). The Draft correctly  
23 acknowledges this principle (p. 16, ll. 1-2). The Draft also  
24 correctly acknowledges the extensive state law aspects of IID's  
25 present-perfected rights. But, as to the question of whether the  
26 voluntary use of Colorado River water to mitigate conservation  
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1 and transfer impacts, the Draft fails to recognize that such use  
2 is **not** inconsistent with the Project Act.

3 1. State Law Permits Mitigation Use As A  
4 Conservation Activity Or An Allowed  
5 "Incidental" Use

6 Water Code section 1011 recognizes water conservation  
7 activities involving a reduction in irrigation use as the legal  
8 equivalent of reasonably and beneficially using water for  
9 irrigation purposes; "any **cessation** or **reduction** in the use of  
10 the appropriated water shall be deemed equivalent to a reasonable  
11 beneficial **use** of water." (Emphasis added.) Mitigation of  
12 environmental impacts resulting from conservation activities is  
13 merely a component of the conservation project itself, not a  
14 separate and direct use of water under the water right. Absent  
15 the conservation project, no mitigation use would occur. Thus,  
16 when IID lined canals pursuant to its 1988 agreement with MWD  
17 (IID Exh. 15), it mitigated any loss of habitat by replanting  
18 replacement habitat and irrigating that habitat. This was not  
19 the exercise of IID's water right for wildlife purposes, but  
20 merely the continued irrigation use associated with the  
21 conservation projects. Recently-amended Water Code section 1013  
22 makes this point even more clear with respect to conservation  
23 activities involving fallowing. New section 1013(b) provides  
24 that "'land fallowing conservation measures' means the generation  
25 of water to be made available for transfer or for environmental  
26 mitigation purposes by fallowing . . . ."

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1           Thus, the Draft should conclude that IID's voluntary use of  
2 Colorado River water to mitigate the impacts of a conservation  
3 activity is a use that is only part of the "conservation use"  
4 itself, or an incidental use in connection with the conservation  
5 activity.

6           Regardless of whether it is considered a conservation use,  
7 or an incidental use, an application for a change permit under  
8 Water Code section 1707 is unnecessary. Section 1707 is for the  
9 purpose of authorizing the water right holder to add the ability  
10 to directly use its water right for environmental purposes,  
11 regardless of and independent of, conservation activity to be  
12 implemented by the water right holder. Such change to IID's  
13 water right is not relevant to the joint petition before the  
14 SWRCB. The current change petition is only in connection with  
15 voluntary conservation activities, and no further change petition  
16 is needed for the mitigation component of the conservation  
17 activity or the incidental use in connection therewith.<sup>1</sup>

18                           2.   Conservation Use, Including Incidental  
19                                   Mitigation Use, Is Not Inconsistent With The  
20                                   Project Act

21           The Project Act expressly defers to state law to define the  
22 "use" of water. "Nothing herein shall be construed as  
23 interfering with such rights as the States had on December 21,  
24 1928, either to the water within their borders or to adopt such  
25 policies and enact such laws as they deem necessary with respect  
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27 <sup>1</sup> Re incidental use, see Rundale v. The Delaware and Rariton  
28 Canal Co. (1852) 55 U.S. 80, 93; Peacock v. Payne (1934) 1 Cal.  
2d 104, 109; and SWRCB Order WR95-9 (1995) WL4186673 at p. 21.

1 to the appropriation, control and use of waters within their  
2 borders, except as modified by the Colorado River Compact or  
3 other interstate agreement." 43 U.S.C. § 617g. A recent federal  
4 decision confirms a state's right to define the parameters of the  
5 permissible use of Colorado River water. The Arizona legislature  
6 defined artificial groundwater recharge as a legitimate use of  
7 water within the state of Arizona. Central Arizona Irr. and  
8 Drainage Dist. ("CAIDD") v. Lujan (D. Az. 1991) 764 F.Supp. 582,  
9 592. The federal court concluded that such recharge was within  
10 the "municipal and industrial" use authorized by the federal  
11 Central Arizona Project contract with the Secretary:

12       The allocation and preferences given to CAP water seems  
13       to be within the exclusive province of the Secretary of  
14       the Interior; once the preferences are already  
15       established, the possible uses of that water are  
16       governed by state law. Consequently, the Secretary of  
17       the Interior is authorized to allocate CAP water to M&I  
18       users. Then M&I users may use their water for any use  
19       authorized by Arizona law, including recharge.

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21 Id. at 591.

22       Thus, because California law defines the conservation of  
23 irrigation water as the continued use of water by the conserving  
24 water right holder pursuant to Water Code sections 1011, 1012 and  
25 1017 (when transferred), and the use of water to mitigate the  
26 conservation activity is either part and parcel of the  
27 conservation use or a mere incident thereto, there is no  
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1 relevance to the question whether the Law of the River would  
2 permit or preclude the direct use of Colorado River water for a  
3 Water Code section 1707 purpose. Conservation activities and  
4 incidental use as defined under state law are not inconsistent  
5 with the expressly-permissible irrigation use of all of IID's  
6 water right.

### 7 G. Other Material Issues

8 In addition to the issues listed above, the following  
9 matters also are important enough to merit review by the SWRCB:

#### 10 1. Salton Sea History

11 The Draft elucidates with some detail the ancient history of  
12 the Salton Sea, particularly on pages 6-7. In doing so, the  
13 SWRCB apparently relies on apocryphal stories submitted by PCL.  
14 However, IID believes that such reliance is inappropriate.  
15 First, such "evidence" is imprecise, suspect and uncertain as to  
16 location of the areas discussed. Second, the evidence submitted  
17 was insufficient to contradict the federal court's decision in  
18 United States v. Imperial Irrigation District (S.D. Cal. 1992)  
19 799 F.Supp. 1052, 1057, which states:

20 During the 400 years prior to 1905, the Sea was  
21 essentially dry except for occasional excessive  
run-off resulting from large storms.

22 Finally, IID believes it is inappropriate to even hint that the  
23 present Salton Sea -- caused solely by man-made accident and  
24 sustained by subsequent agricultural runoff -- may be related to  
25 any historical ponding in the general area known as the Salton  
26 trough. As the SWRCB is fully aware, certain environmental  
27 groups desire to transfigure the current accidental Sea into a  
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1 "Public Trust" resource, an issue which the SWRCB already ruled  
2 on earlier in the Order 88-20 proceedings and which it refused to  
3 revisit here. Thus, there is no need for the Draft to include  
4 verbage that may be taken out of context by those seeking to  
5 impose a public trust status on the Salton Sea.

6 IID suggests that the SWRCB delete the references to the  
7 Salton Sea history, or re-describe it as the "contention" of  
8 certain environmental groups, and then recite that the SWRCB  
9 makes no finding that the Salton Sea has always been a navigable  
10 body of water, or that it was so at the time of California's  
11 entry into statehood. IID has illustrated this suggested  
12 revision in its redline submission.

## 13 2. Dismissal Of Protestants

14 On page 10, the Draft states that the protestants who did  
15 not appear at the hearing have abandoned their protests and the  
16 protests are dismissed. IID believes that this is the wrong tool  
17 to use. This decision, though non-precedental, is nonetheless  
18 binding on the parties. The protestants who did not appear at  
19 the hearing submitted to the jurisdiction of the SWRCB and they  
20 should likewise be bound. The approach of the Draft could let  
21 these protestants assert that they were not parties and thus are  
22 not bound. IID believes that the SWRCB should instead overrule  
23 the protests on the grounds that: (a) these protestants put on  
24 no evidence in support of their protests; and (b) the protests  
25 were basically duplicative of those by others which were  
26 overruled. This would be analogous to a litigant who chooses to  
27 answer a complaint, and then not bother to show up for the trial.

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1 A court can properly enter judgment in such circumstance. Code  
2 of Civil Procedure § 594. Further, such action is appropriate in  
3 administrative proceedings. See, for example, the Division of  
4 Water Resources decisions in Decision 3561-D105 (1926 Cal. Env.  
5 Lexis 20); and Decision 8442 D388 (1936 Cal. Env. Lexis 13).  
6 Also, 23 California Code of Regulations 750, which deals with  
7 protest abandonment, is permissive re dismissal ("may be  
8 interpreted").

### 9 3. Fallowing Language

10 The SWRCB is well aware of the political controversy  
11 surrounding fallowing in IID. On the one hand, entities which  
12 are not being asked to fallow and who will not experience its  
13 impacts -- such as MWD, SDCWA, and CVWD -- are all for it, since  
14 it allays some concerns of the environmental advocates and  
15 reduces their economic obligations. On the other hand, fallowing  
16 means job losses and economic disruption for the Imperial Valley.

17 IID takes issue with the statement made by the SWRCB on  
18 page 77 of the Draft that, "As summarized below, the record  
19 indicates that the economic impacts may not be as significant as  
20 estimated by IID." (Emphasis added.) This phrase is repeated  
21 again on page 78, final paragraph. This conclusion is not  
22 supported by the evidentiary record. The only two economics  
23 experts who testified before the SWRCB were Dr. Rodney Smith and  
24 Mr. Spickard, both of whom testified that in fact the socio-  
25 economic impacts of fallowing would be significant. Dr. Smith  
26 testified that the range of impacts depended on the crops  
27 fallowed, but did not testify that the lower end of the range was  
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1 not significant. Further, Dr. Smith testified that the study on  
2 the two-year PVID test program resulted in a full mix of crops  
3 being fallowed. There was no competent evidence offered to rebut  
4 either of these two experts. While IID does not mind the SWRCB  
5 stating that there are measures that might be available to reduce  
6 job losses, as the Draft does on pages 77-80, IID objects to any  
7 statements which indicate that the record shows that such losses  
8 may not be significant. Since this is an area as to which the  
9 SWRCB is seeking further study (p.80), it is appropriate to not  
10 pre-judge the issue. More neutral language should be utilized,  
11 as suggested on the redline.

12 4. Extra 1,000,000 Acre-Feet From Compact

13 The footnote 3 citation on page 15 is surplusage and should  
14 be eliminated. There is no reason to potentially prejudice  
15 California's position by making the footnote 3 comment.

16 5. Effect Of Conservation And Seven-Party  
17 Agreement

18 There is no need for the SWRCB to state that "arguably"  
19 certain things might occur vis-à-vis CVWD or MWD use of IID  
20 conserved water as stated on the top of page 18. This topic area  
21 has been one of significant contest between the agencies, and  
22 there is no need for the SWRCB to opine on what "arguably" might  
23 occur when that situation is not at issue here. In the draft  
24 redline, we alter this language to show that this is an area of  
25 dispute between the agencies, but delete the language beyond that  
26 point.

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**III. OTHER ITEMS THAT NEED TO BE ADDRESSED**

The following are matters of less import than those stated above, but that the SWRCB should still review for possible correction. They are presented in table format for ease of reference, with page numbers in the Draft in the left column.

| Order pg. | Citation Source (Party)                            | Statement in Order Re:  | Inaccuracy (i.e., actual info in source cited)   |
|-----------|--|---|--|
| 4         | SWRCB 1d (IID Petition)                            | Basics of the transfer.                                       | Citation should be "SWRCB 1a - 1d" (to include original petition and amends, not just 2 <sup>nd</sup> amend)   |
| 4         | IID 1a   | Ramp-up schedule  | The Draft appears to misinterpret IID's ramp-up schedule. Reference should be made to the chart provided on page 21 of Jesse Silva's written testimony, which specifies the agreed ramp-up schedule, with data pulled from that chart. We have attempted to correct this in the redline. |
| 4         | SWRCB 1b, 1d (IID)<br><br>IID Closing Brief p13-16 | SWRCB findings.   | Citation should specify p.2 of SWRCB 1.  |
| 6         | PCL 2, p.6.  | "Major" filling of Salton Trough occurred AD 1600-1700        | PCL 2 says "there was at least a <i>partial</i> infilling" of Salton Trough at that time.  |
| 7         | PCL 7 p.48   | Small lagoons   | No corresponding statement found in PCL 7, p.48.   |
| 7         | PCL 3 p.10, 18-19                                  | In June of 1891 lake was 30 mi long, 10 mi wide and 6 ft deep | PCL pages only mention that in 1891 the Colorado River flowed into the Salton Sink and formed a lake "several miles in length" (p.19)  |



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| Order pg. | Citation Source (Party)  | Statement in Order Re:   | Inaccuracy (i.e., actual info in source cited)  |
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| 7         | RT 1491, 1499 (Krantz-PCL)   | Evaporation rate is 5.78 ft/yr.                                  | RT p.1491 says 5.78 ft/yr.<br>RT p.1499 says 5.70 ft/yr.  |
| 8         | IID 56, p.3.1-18 (IID Draft PEIR for OSA)                            | Storage capacity of USBR facilities is 60 MAF                    | No corresponding statement found in p.3.1-18.   |
| 10        | None   | Protest dismissal agreement reached between "IID, CVWD, and MWD" | Draft omits SDCWA.  |
| 18        | IID 22 (QSA)<br><br>SDCWA 15, 33-36 (Co. River Board Water Use Plan) | QSA water budgets  | Citation should be IID 22, p.9-11.<br><br>Draft appears to have inadvertently left out MWD. It says the QSA would cap IID and CVWD. It should also say that MWD's 4 <sup>th</sup> and 5 <sup>th</sup> priorities are capped at 550,000 and 662,000, respectively and MWD may acquire all or a portion of the 100 kafy that CVWD does not use. |
| 24        | CRIT 9 p.4-5<br><br>RT 451-52 (Gardner-CRIT)                         | Transfer could reduce CRIT power generation by 4 or 5 %.         | Order should also note that BOR states no mitigation is required. See RT 460(1)-(11).   |
| 26        | IID 93   | HCP  | Citation should be "IID 93, Attachment A"   |
| 27        | IID 55 p.3.2-128   | Drains   | Citation should be "IID 55, p.3.2-128"  |
| 28        | RT 675, 921 (Eckhardt-IID)   | Salinity rising  | Citation to RT p.675 should be 675-676.   |

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| 28        | IID 55<br>p.3.1-56            | Average TDS in IID drains is 2245 mg/l;<br><br>New and Alamo river water from Mexico is 3542 mg/l.                      | TDS figures in Draft don't match up with figures in table 3.1-4 on DEIR p.3.1-56. DEIR table shows:<br><br>New River at Salton Sea is 2,997;<br><br>Alamo River at Salton Sea is 2,458<br><br>New River at Mexico is 3,894; and<br><br>Alamo River at Mexico is 3,191. |
| 28        | RT 675, 922 (Eckhardt - IID)  | Flow to Sea averages 2727 mg of salt/liter and increasing   | Citation to RT p.675 should be RT p.676.   |
| 29        | CRWQCB 1 p.6                  | Selenium  | CRWQCB Exh. 1 does not have 6 pages.<br><br>Citation should refer generally to CRWQCB Exh. 3.  |
| 29        | 64 Fed Reg 58409 (1999)       | USEPA selenium criterion is 5 ug/L for freshwater and 7 ug/L for saltwater but EPA is revising the freshwater standard. | The material cited does say that EPA is revising its freshwater standard, but does not say what the standards currently are. Thus, the Order needs an additional citation explaining where it found the 5 and 7 ug/L figures.  |
| 30        | IID 93, pp. A-2 -- A-3        | Tail and tile water   | The pages cited are incorrect. Citation should be "IID 93 p.A2-3 to A2-4"  |
| 31        | Table 3.2-39 of the EIR (IID) | Salinity and vegetation.  | Citation should be IID 55, p.3.2-115, table 3.2-39.  |

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|-----------|---|---|---|
| 36        | PCL 17, p.1                             | Importance of Sea   | This citation seems inappropriate as PCL 17 is a critique of NAS and CORI reports on Mono Lake. Page 1 of that exhibit does not support the statements made in the Draft. |
| 36        | PCL 1, p.4                              | Birds at Sea  | Citation should be "PCL 1, p.2"   |
| 38        | RT 1282 (Brownlie-SSA)                  | Sea salinity is 45 ppt and rising 1 ppt every 4 years   | 1282 says salinity will rise 1 ppt every 4 years <i>if</i> inflow continues at an average of 1.34.  |
| 40        | DOW 2 p.3                               | Loss of fish for birds, loss of general bird habitat  | DOW 2, p.3 does not discuss the impacts on birds.   |
| 43        | Ibid, § 101(b)(A) [Sea Reclamation Act] | Sea evaluation  | Citation should be "§ 101(b)( <u>1</u> )(A)"  |
| 44        | SSA 1 p 4                               | Sea Reclamation Act requires Secretary to submit study to Congress and Secretary has not done so. | SSA 1, p.4 does not refer to the Secretary's obligation or failure to submit a study to Congress.   |
| 45        | IID 55 p.3.2-147                        | SSHCS and tilapia   | Citation should also refer to IID 93, p.A3-25   |
| 46        | Figure 3.3-6 of the EIR (IID)           | Salinity  | Should add citation reading "IID 93 p.A3-23, Figure 3.3-6"  |
| 46        | Figure 3.3-7 of the EIR (IID)           | Elevation   | Should add citation reading "IID 93 p.A3-24, Figure 3.3-7"  |

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| Order pg. | Citation Source (Party)                  | Statement in Order Re:                                      | Inaccuracy (i.e., actual info in source cited)   |
|-----------|--|---|--|
| 54        | IID 55 p.3.1-11                          | Variation of Co. River                                      | The cited section discusses stabilization along the River rather than variation (maybe refer to IID 55 p.3.2-14 instead) |
| 54        | IID 55 p.3.2-14                          | Normalization of River                                      | Refer also to IID 55 p.3.2-14.   |
| 58        | IID 93a p.6-1                            | Growth forecasts are based upon birth, death, etc.          | Citation should simply be "Ibid" as previous citation (SDCWA 39, p.5) does provide the relevant information.             |
| 72        | Audubon 18 p.21-22                       | Fallowing   | The pages cited do not discuss fallowing.  |
| 77 fn 18  | WC 1725(b), 1736                         | SWRCB transfer approval                                     | WC 1725 has no subdivision (b) and its content matter doesn't relate to when the SWRCB should approve a transfer.        |
| 78        | IID 65 p.9<br><br>IID 55 p.3.14-17 to 18 | 700 jobs created by non-fallowing.                          | IID 65 says between 700 and 900.<br><br>IID 55 (DEIR) says 710.  |
| 78        | RT 2554, 2615-1617 (SDCWA)               | Economic impacts less if e.g., alfalfa hay, fallowed        | Citation should be 2615- <u>2617</u> (not <u>1617</u> ).   |
| 79        | RT 1016, 1049 (Smith-IID)                | Reduce fallowing impacts by fallowing less productive soils | 1016 says soil type would be one factor farmer would consider in deciding whether to fallow.                             |

| Order pg. | Citation Source (Party)                 | Statement in Order Re:   | Inaccuracy (i.e., actual info in source cited)   |
|-----------|---|--|--|
| 79        | SDCWA 48 p.2                            | PVID water   | Draft says the MWD/PVID following program resulted in water savings of 186,000 <b>afa</b> . This is incorrect. SDCWA 48 says the program resulted in a savings of 186,000 acre feet over two years.  |
| 80        | PCL 31 p.i<br>RT 2622 (Underwood-SDCWA) | PVID 57 lost jobs  | Both the PCL and SDCWA sources said the PVID program caused the loss of 52 full-time and 7 part-time jobs.<br><br>The RT citation should be pages 2622-23  |
| 80        | Stats 2002 ch 617 § 9                   | Draft lists 3 elements which report is required to evaluate:<br><br>(1) nature and extent of economic impacts of following in Imperial related to the QSA;<br><br>(2) measures taken by IID to minimize impacts;<br><br>(3) extent to which funds in excess of funds received by IID for transfer may be necessary to mitigate economic impacts. | SB 482 § 9 lists 4 elements which report is required to evaluate:<br><br>(1) nature and extent of economic impacts of following in Imperial related to the QSA;<br><br>(2) measures taken by IID to minimize impacts;<br><br>(3) whether and to what extent fund provided to IID for the transfer under the QSA, together with any other funds made available for these purposes would mitigate economic impacts.<br><br>(4) the amount of any additional funds required to mitigate the economic impacts. |
| 81        | IID 55 p.3.2-49                         | Field habitat  | Page numbers incorrect. Should cite to p.3.2-50 to 51.   |

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| 81        | IID 55<br>p.3.2-34          | Drain habitat  | Page numbers incorrect.<br>Should cite to p.3.2-23 to 24.  |
| 84        | RT 3166<br>(Eckhardt-IID)   | Sea flooding might be resolved if Sea were to drop 3 feet  | 3166 says if Sea were dropped 3 feet the danger of flooding would depend on the size of the flood event and conditions; wave action regularly raises the Sea at the dikes by 3 feet. |
| 85        | SB 482 § 7                  | SB 482 will amend WC 1013 to protect IID's water rights from forfeiture  | Should cite specifically to § 7(d).  |
| 86        | RT 915-16<br>(Eckhardt-IID) | Measuring device for IID diversions has <u>significant</u> margin of error relative to volume of water diverted. | RT 915-16 says measuring device is rated within 3-5% accuracy range  |

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**IV. CONCLUSION**

IID looks forward to working with the SWRCB and the parties to finalize an Order by which the transfer and related transactions may move forward. IID appreciates the opportunity to comment.

Dated: October 12, 2002

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By: \_\_\_\_\_

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