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via email, facsimile, and mail

Arthur G. Baggett, Jr., Chair and Hearing Officer
Dana Differding, Staff Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Re: IID-SDCWA Petition for Long Term Transfer;
Proposed Protest Dismissal Agreement

Dear Chair Baggett and Counsel Differding:

Protestant County of Imperial (Imperial) provides the following initial observations on the proposed protest dismissal agreement (PDA) discussed by the petitioners and others at the State Board pre-hearing conference of 23 January 2002, subsequently served on the Imperial County Counsel, and then forwarded to this writer for receipt on 28 January.

While the participants are awaiting the Board's issuance of an amended hearing notice, Imperial has been advised by staff to submit its comments on the proposed PDA as soon as practicable. This letter attempts to fulfill that advice as best as can be done on short notice, and in light of the substantial policy and legal implications of the two petitioners' and two protestants' (the Parties') request that the Board determine *ex ante* that its decision or order in this proceeding "will not be used by the Parties or others as precedent in any future matter or proceeding."

Imperial understands that in general this Board deems its decisions and orders to be "precedent decisions." As the Government Code provision on which the Parties rely states, decisions should be so designated "that contain a significant legal or policy determination of general application that is likely to recur." (Section 11425.60, subd. (b).) The petition before this Board seeks approval of a transfer of hundreds of thousands of acre-feet for a period of up to 75 years, with immense implications for the area of water origin, the

areas of water destination, the natural watercourse of the Colorado River, operations of the Colorado Aqueduct, and of greatest interest to Imperial, the economy and environment of this entire County that embraces the southeastern quadrant of California. The petition invokes some of the most challenging and vital issues of water resources law, issues that have tasked the participants and the courts for the better part of a century.

An objective assessment of this legal and factual context suggests that few if any proceedings before this Board, excepting perhaps those concerning Bay-Delta standards, could more fully satisfy the criteria for a precedent decision than the subject one on which the Board is about to embark. Literally millions of people, thousands of square miles of lands, and billions of dollars will be influenced by the Board's deliberations and rulings in this matter. The Board's decision must be a far-sighted one to govern the breadth and duration of the proposed transfer. Those who participate in these proceedings, as surrogates for present and future Californians, are entitled to a decision that governs this and all future similar proceedings, and one that can be enforced by any Californian or California agency with an interest in the matter during the term of the transfer.

Designating a decision as non-precedent implies that it only concerns the immediate parties to the proceeding, and those parties only in an *in personam* sense. In the context of this Board's jurisdiction, such a case might arise with a modest application that has no impact on non-party neighbors and that is attended by exceptional factors that would render the decision granted more in the nature of a variance than an entitlement to use. Clearly those characterizations cannot apply to the largest water transfer proposed in California history, one that is being observed closely both at home and throughout the Southwest and Nation.

A judicial analogy would be appropriate. The California Supreme Court has (albeit by sharply divided vote and invoking great controversy) authorized appellate parties in "private" disputes to direct the settlement of their appeals without considering the effects on outsiders or to judicial precedent. (*Neary v. Regents* (1992) 3 Cal.4th 273.) Even by its own terms, *Neary* (like Government Code section 11425.60) does not authorize non-precedent in matters of public importance. Thus, in a water resources case concerning definition of the public trust in accreted lands, the Supreme Court expressly refused the request of the State and private property owners to dismiss the matter on their own terms, holding that the important legal issues of statewide importance transcended the parties' desire to remove resolution of their dispute from the realm of binding precedent. (*State v. Superior Court (Lovelace)* (1995) 11 Cal.4th 50, 62.)

Similarly, in its final opinion in *County of Inyo v. City of Los Angeles* in 1993, following the authorization to implement settlement terms in (1984) 160 Cal.App.3d 1178, the Third District Court of Appeal refused to let the parties confine that settlement to their own prerogatives, holding that matters relating to the California Environmental Quality Act (CEQA) "are inherently freighted with the public interest," as excepted from *Neary* by *Neary*'s own terms.

In light of this judicial authority this Board would be hard pressed to conclude that the water resources and CEQA issues embraced in its reviews of the present petition are not matters of public importance that deserve the discipline and public advantage of being

decided by a decision of precedential value.

Having made these observations, Imperial does appreciate the conflicting legal interpretations that the Parties bring to the question of this Board's authority over waters withdrawn from the Colorado River. Imperial does not criticize the Parties for their statesman-like effort to set those differences aside in the interests of quantifying California's allocation of Colorado River supplies. Imperial suggests that the Parties may be able to reserve their differing views of this Board's jurisdiction, and secure their worthy ends, without the draconian remedy of this Board creating a decision of no precedential value.

It is one thing for the Parties to agree among themselves that none will use against the other in any future proceeding the fact of their participation in the present proceeding, to support or defeat California jurisdiction over transferred Colorado River water. That seems to be the Parties' intent in paragraphs 5 through 7 at page 6 of their proposed PDA, and that effort appears unobjectionable with the removal of the phrase "will have no precedential effect" from paragraph 6.

It is another for the Parties to ask this Board to become a party to their private "agreement to disagree" and force that "agreement" upon the remaining participants in this proceeding and indeed upon the entire world for the next 75 years, as anticipated in paragraph 3 and its recital "a." at page 4 proposed for this Board's adoption. Similarly, while it is commendable that in their 17 January covering letter "the Parties have agreed to set aside their differences for the purpose of this petition," they cannot transcend that consensus to claim that this Board's final order "will not be used by the Parties **or others as precedent** in any future matter or proceeding ...." (*Ibid*, p. 2 (emphasis added).)

Accordingly, the County of Imperial requests the Board to advise the Parties that they remain free to enter into their internal stipulation concerning their legal contentions; but to decline the endorsement and approval requested of the Board to bind others to their "agreement to disagree," and instead to grant the Board's final order the precedential value it deserves and demands. That is precisely the course followed by the Court of Appeal in *Inyo v. Los Angeles, supra*, 160 Cal. App.3d 1178.

Respectfully submitted,

Special Counsel to the County of Imperial

cc: Service list of 31 Jan 02 attached