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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

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

BRIEF OF THE COUNTY OF IMPERIAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Regulations

Other Authorities

SUMMARY

The IID/SDCWA petition must be denied without prejudice, or the proceeding adjourned to await the approval, if any, of a transfer project by the petitioners. At present there is not a fixed proposal before the Board to evaluate. When the petitions are ripe for decision, that decision should have the value of precedent except as to jurisdictional issues that some of the parties may reserve. Were the petitioners to proceed with the proposed project and proposed EIR, that proposal could not lawfully be approved. A project relying exclusively on on-farm conservation, however commendably motivated, nonetheless produces unreasonable environmental and economic effects in the County of Imperial. If petitioners on the other hand proceed with an alternative project that includes fallowing beyond normal and customary farming practices, it cannot succeed under existing state law. To secure consensus and lawful approval at the earliest time, the Board should encourage structured mediation through the office of the Governor. This result should not require suspension of the Colorado River interim surplus guidelenes.

I. BECAUSE LEAD AGENCY IID HAS NOT APPROVED A PROJECT OR COMPLETED ITS COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, ITS PETITION AND THAT OF SDCWA IS NOT RIPE FOR THIS BOARD'S DECISION.

In its just-published final EIR/EIS, state lead agency IID states,

> Certification of the EIR/EIS by the IID Board is scheduled to take place in June 2002. Project approval is not expected to be considered by the IID Board until the 4th quarter of 2002 after completion of the State Water Resources Control Board (SWRCB) approval process for the water transfers (see Section 1.7.2.1 of the Draft EIR/EIS) ….

(Final EIR/EIS, p. 1-2.)

Section 1.7.2.1 of the draft EIR/EIS, referenced in the above quotation, does not specify or even suggest that State Board approval would precede project approval by the lead agency IID. (IID EX 55, pp. I-44 to I-45.)

In fact the IID Board of Directors on 28 June 2002 did certify the completion of its final EIR/EIS, but expressly also recited that "the Board, at this time, does not intend to make a decision on the Proposed Project assessed in the Transfer EIR/EIS." (IID Resolution 8-0002 (June 28, 2002).(copy of certification-related documents lodged concurrently with this brief).

Neither the letter of the California Environmental Quality Act (CEQA) nor the functional needs of this Board sanctions the efforts of petitioners to secure this Board's approval of a project that has not been defined and approved by its lead agency IID (and contracting partner SDCWA).

A lead agency's duty is to exercise principal responsibility for the project, and become the first agency to approve the project. (Pub. Res. Code, § 21067; 14 Cal. Code Regs., §§ 15050, 15051.; see *Citizens Task Force on SOHIO v. Board of Harbor Commissioners* (1979) 23 Cal.3d 812); *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892.) As the unquestioned lead agency in the water transfer, IID is of course obligated as it seems to recognize to certify the completion of the final EIR/EIS. IID is required to do more as lead agency, however, before its CEQA duties are complete. IID must actually *employ* the EIR it has certified either to disapprove the proposed project; or to render a project approval, adopt findings related to that approval, and then file a notice of determination. (14 Cal. Code Regs., §§ 15091, 15092, 15093, 15094.)

Only when these lead agency actions are completed does it become the authority and duty of a responsible agency (such as the State Board) to employ the final EIR/EIS in its own decision-making process. (14 Cal. Code Regs., § 15096.) Several practical factors compel this result.

First, the lead agency's "work" on the final EIR/EIS is not done until the agency actually makes its approval decision. That is because in the time between certification and final approval action, the lead agency has both the opportunity and authority to add "any other information" to the final, beyond comments received and response to those comments. (14 Cal. Code Regs., § 15132(e).) Especially in the instant proceeding, where substantial arguments have been advanced for lead agency IID to adopt a different project than that initially proposed in 1998, and to perform additional environmental assessment of that suggested new project, the lead agency must remain free before its final decision to augment the environmental documentation on which it bases its actual, final decision. A responsible agency such as this Board cannot act on mere "certification," because the Board has no assurance that it has before it the actual final EIR/EIS that will be employed by the lead agency.

Second, if a responsible agency were to act on a certified final EIR/EIS before the lead agency's approval, that responsible agency would effectively assume the role of lead agency for purposes of judicial review. That is because the responsible agency, using the certified final EIR/EIS as the basis of its decision, would be required to file the first notice of determination based on that certified final. (14 Cal. Code Regs., § 15096, subd. (i).) That notice of determination, in turn, would trigger the 30-day statute of limitations for challenges to the validity of the EIR or other CEQA compliance. (Pub. Res. Code, § 21167(c).) Thus, if this Board were to render a decision based on IID's certified final EIR/EIS, this Board as the first agency to *use* the EIR/EIS would become in effect the lead agency,[1] nominating itself as the principal defendant in any CEQA judicial challenge, and obligated to defend the adequacy of the EIR/EIS.

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[1] The CEQA Guidelines recognize circumstances in which the lead agency designation shifts to a responsible agency. (14 Cal. Code Regs, § 15092.) The circumstance that IID proposes in its final EIR/EIS and approval resolution are not included in the Guideline, probably because no one anticipated such an otherwise-unlawful process. If IID and this Board were to so proceed, however, by analogy to Guideline section 15092 the courts would deem this Board the new lead agency .

Finally, and most functionally, a responsible agency such as the Board cannot prematurely rely on nothing more than a certified EIR/EIS, because the project subject to this Board's review has not been fixed. This Board cannot render the findings requested of it by the petitioners, or required of it by the Water Code and other provisions of law, until the petitioners fix their project that this Board is to act on.

The Board Chair was on to this problem in the very first day of testimony:

CHAIRMAN BAGGETT: I guess I'm a little perplexed. I guess after the last two witnesses it appears we don't know how much water, when it is going or who is going to give it, what water there really is to transfer at this point in time.

So I guess my question is: Why are we even here talking about transferring water when there seems to be so many details missing?

(RT 245-246.)

But the problem is much worse and more fundamental than "details." A substantial probability lies that by the time the IID directors vote, "the" transfer or "a" transfer may not be approved at all. An equally substantial probability lies that by the time the IID directors vote on a transfer, it will be in a vastly different form than the EIR's "proposed project" defined in the draft EIR/EIS (IID EX 55, p. 2-2) by the 29 April 1998 transfer agreement.[2] At worst case, if the Board proceeds to decision on this record, it will have invested institutionally and in its resources to no avail, making a decision to "approve" a transfer that never secures approval from its contracting principals. At best, the Board would render an advisory opinion that may or may not conform to the transfer subsequently framed by the contracting principals.

[2] Not only could the final project be vastly different, it would also be premised on subsequent environmental assessment, which Ms. Harnish expected would be completed before IID board approval and filing of its notice of determination. (RT 2999.)

In retrospect, the County now wishes it had been even more forceful in questioning IID's and SDCWA's "March of Folly." Right after the Board Chair's observation cited above, IID's general manager anticipated that "by April 30th we hope to get the Board certified EIR. We will then have 30 days after that to wait for anybody's complaint." (RT 251.) The misconception here of course is that mere certification, rather than actual decision and notice of determination, would ripen a CEQA claim and trigger the statute of limitations.[3]

San Diego also telegraphed its misconceptions in the closing days of the hearings.

> MS. STAPLETON: … we really anticipated that we would be going through the environmental, necessary environmental and review process, getting to certification as well as through the State Water Board process, prior to specifics being added to the program.

(RT 2524.) Unfortunately, San Diego like IID wants the cart before the horse -- in contrast, for example, to Metropolitan Water District (MWD), and Palo Verde Irrigation District (PVID), who apparently recognize that they must frame their program and perform the environmental assessment on that program before approving a transfer arrangement. (See SDCWA EX 50 (MWD-PVID Draft EIR).)

San Diego's misplaced reliance on premature certification and State Board action becomes evident in Ms. Stapleton's recognition that in contrast to the proposed project, the parties may find promising a "fallowing or land management program … creating different impacts … (RT 2723), analysis of which "hasn't been done to date in the present Draft Environmental Impact Report." (RT 2724.)

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[3] Earlier Mr. Silva expressed the need for a final EIR "so the Board can get an idea how to structure that agreement, not the agreement, but the plan to conserve the water. So we are not quite ready to make that decision yet." (RT 185.) Fair and right enough. But until his board is ready to make that decision, this Board cannot be.

To confront the misconceptions of IID and SDCWA and overcome them as efficiently as possible, the County asked both the U.S. Bureau of Reclamation (Imperial County Board of Supervisors letter of June 5, 2002 (concurrently lodged)) and IID Board of Directors (Imperial County Board of Supervisors letter of June 26, 2002 (concurrently lodged)) to withhold certification and instead recirculate a revised draft EIR/EIS that cured asserted deficiencies in the existing draft and included the newly-suggested "fallowing or land management program."

For the moment IID declined the County's request, certifying the EIR/EIS. (IID Resolution 8-2002, *supra*.) Reclamation has not acted on its final EIS; it apparently is still considering the County's request. On 8 July IID offered into evidence the Reclamation's *Administrative* Final EIS on the Implementation Agreement (final IA EIS), which implies that the bureau has not adopted a final IA EIS, which necessarily must precede Reclamation and IID adoption of a final water transfer EIR/EIS.[4]

But whatever the compliance by IID of its own legal requirements, neither it nor SDCWA can ask this Board to act prematurely on approval of a project that has neither been defined nor approved by the CEQA lead agency.

For this reason, the County requests the Board to deny the petitions without prejudice, or adjourn the proceedings after the hearings and briefings now calendared for completion on 16 July, until and unless IID and co-petitioner San Diego County Water Authority (SDCWA) render final approval of their proposed transfer project pursuant to the California Environmental Quality Act.

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[4]IID recognized before this Board that certification of its EIR/EIS had to await the Reclamation's completion of its final IA EIS (RT 724, 730), and represented that Reclamation's "equivalent of a certification" had to precede IID certification (RT 3000). The IID certification resolution reads, however, "... the Board has considered the environmental assessment included in the Final Secretarial Implementation Agreement EIS, in a form represented to the Board by Reclamation as the final version of the Implementation Agreement EIS." (IID Resolution 8-2002, *supra*.) IID did not recite that it had reviewed and considered an actual, approved final IA EIS.

II. THE BOARD'S ULTIMATE DECISION SHOULD NOT BE PRECEDENTIAL AMONG THE PARTIES WITH RESPECT TO BOARD JURISDICTION, BUT SUBSTANTIVELY SHOULD HAVE PRECEDENTIAL VALUE.

The four water districts by their proposed protest dismissal agreement (IID EX 23) and the Colorado River Indian Tribes by oral statement (RT 445) have requested that the Board's decision in this proceeding be treated as not precedent. As explained by Metropolitan's general counsel in his opening statement, "The fundamental purpose of the Protest Dismissal Agreement is that we waive our jurisdictional issues." (RT 73.)

The County appreciates the conflicting legal interpretations that the parties bring to the question of this Board's authority over waters withdrawn from the Colorado River. The County does not criticize the districts and CRIT for their statesman-like effort to set those differences aside in the interests of quantifying California's allocation of Colorado River supplies. The County suggests that these 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.

An objective assessment of the 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 present one. (Gov. Code, § 11425.60, subd. (b).) 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.

Indeed, IID's own legal expert, Professor Barton Thompson, advanced the transfer "as a model for future water transfers in the state of California." (RT 366.) Professor Thompson further explained:

> All stakeholders in the water field will look to see how this Board addresses the San Diego/IID transfer, in looking to see whether or not they are interested themselves in engaging in transfers and how they should approach future transfers.

(RT 375.)

The answer is for the districts, CRIT, and Board to confine themselves to a reservation of rights and precedent devoted to jurisdiction, but not substance. The districts have so confined their reservation with the Secretary of Interior in the proposed Implementation Agreement (IID EX 53, vol. II, appendix A, ¶ 11, at pp. 9-10), and among themselves in their Quantification Settlement Agreement (QSA) (IID EX 22A, ¶ 4.1, at p. 14). The proposed protest dismissal agreement can be modified slightly in its paragraphs 5 through 7 on page 6 to reserve jurisdictional positions, without designating the substance of the proceeding of no precedent, as paragraph 3 and its recital "a" on page 4 purport to accomplish. (Accord, *County of Inyo v. City of Los Angeles (VI)* (1984) 160 Cal.App.3d 1178 (court allows parties to stipulate to their contract terms, without court itself adopting all contract provisions).)

Thus, it remains appropriate that Board Member Katz had "a problem" with the request for designation of this proceeding as non-precedent. (Prehearing (Jan. 23, 2002) RT 10-13.) Precedent assures

> … [not] reworking a problem once solved; … the values of routine as a curb on arbitrariness; the social values of predictability; the power of whatever exists to produce expectations and the power of expectations to become normative. The force of precedent in the law is heightened by an additional factor: that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances.

(K. Llewellyn, *Case Law* (1930) 3 ENCYL. OF SOCIAL SCIENCES 249.) In sum, precedent is required on the merits, not only to protect the present efforts of the Board and its participants, but also to serve the successors of this Board and its future constituents.[5]

III. LEGAL MANDATES GUIDE THE BOARD'S REVIEW OF THE PROPOSED WATER TRANSFER.

A. IID's Reasonably-Exercised Water Rights Must Be Protected.

1. IID's Rights Derive from Federal and State Law.

IID has since 1901 diverted water from the Colorado River to produce one of the Nation's most important agricultural resources. These overwhelming portion of these rights, perfected under state law before the effective date of the Boulder Canyon Project Act (45 Stat.1057, Dec. 28,

[5] Criticism of this Board's "precedent" policy has been stated: "In effect, under the guise of section 11425.60 [of the Government Code] the SWRCB has made important policy and legal decisions with very little scrutiny from the water community and water users as a whole." (A. Schneider, *The Legal Classification of Groundwater*, CAL. WATER LAW & POLICY CONF. (April 8, 2002) p. D1-5.) The present proceeding, however, hardly can be characterized as an obscure one not subject to intense scrutiny and participation by the community, including virtually daily attendance by the Board's distinguished critic herself.

1928), have been adjudicated, decreed, and quantified by the United States Supreme Court. (*Arizona v. California* (1963) 373 U.S. 546; *Arizona v. California* (1964) 376 U.S. 340, 342-343 (decreed); *Arizona v. California* (1979) 439 U.S. 419, 429 (quantified).) The Supreme Court ultimately fixed Imperial's "present perfected rights," decreed to run from the Compact's effective date of 25 June 1929 (376 U.S. at 341) with a priority date of 1901 and in a quantity not to exceed the lesser of 2,600,000 acre-feet annually or consumptive use required to irrigate approximately 424,000 acres. (439 U.S. at p. 429.)[6]

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[6] The Board has raised questions whether the Law of the River allows "the use of water by IID for purposes of fish, wildlife, and other instream beneficial uses," and in particular whether such use is allowed when "required under state law to mitigate the adverse impacts of delivering water for irrigation or domestic uses." (SWRCB letter of 14 June 2002.)

The County cannot be deemed to share the experience or intense interests in these questions that have been developed over the years by IID, MWD, and others. We are in awe of the elegant opinions prepared on the role of state law in the use of Colorado River water, by such luminaries as Dean Charles Myers (law clerk to Special Master Simon Rifkind) and retired Solicitors Milton Nathanson and Edward Weinberg.

In this respect as others in this proceeding, however, the County advances an answer from its relatively disinterested and nonproprietary position as one not under contract for Colorado River water from the Secretary of Interior.

To the question, does federal or state law control the use of Colorado River water from presently perfected rights, the answer is clearly "both." Even though the Boulder Canyon Project Act recognizes the right of the states to regulate waters according to state doctrine established prior to 1928, that reservation is subject to the conditions of the Compact. (43 U.S.C. § 617q.) Indeed, the very recognition of prior perfected rights arises from that supreme federal mandate. And the 1963 opinion in *Arizona v. California* itself, eloquently describing the federal investment necessary to enable IID as well as newer users to enjoy the Colorado as they do today, justifies the Court's conclusion that supreme federal law can authorize both the following of, and [presumably absent independent constitutional limitations] the overriding of, conflicting state law. (373 U.S. at pp. 588-590; see IID Contract (Dec. 1, 1932), HOOVER DAM DOCUMENTS (1948) (H.R. DOC. 717, 80TH CONG., 2ND SESS.), App. 1106 (IID agrees to comply with Compact to secure construction of All-American Canal).)

From the *Arizona* opinions and the Court's subsequent opinions in *California v. United States* (1978) 438 U.S. 645 and *Bryant v. Yellen* (1980) 447 U.S. 352, together with corollary cases such as *Nevada v. United States* (1983) 463 U.S. 110 and *United States v. New Mexico* (1978) 438 U.S. 696, the County surmises that the Court's law today is as follows: State law can govern the use of Colorado River water within a state, except to the extent that law conflicts with a clear Congressional directive (such as the Boulder Canyon Project Act as enforced by the Court) or

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other federal directive (such as the Compact.) Federal law is supreme over state-defined and state-regulated rights, to the extent that the state directives would conflict with the federal purpose; provided, that as a matter of grace federal law exempts state-defined rights as they were defined in December 1928 from nonessential federal policies.

The Board's questions essentially ask if California can authorize post-1929 regulation on Colorado River water, whether derived from prior perfected rights, or not. The short answer seems to be "yes," so long as the California regulation does not interfere with the federal scheme enforced in the *Arizona* opinions. That federal scheme, in turn, is essentially an interstate one: meeting national treaty obligations to Mexico and the Indian Tribes, allocating the river between the Upper and Lower Basin States, and apportioning the Lower Basin allocation among California, Nevada, and Arizona. In essence, so long as California is living within her 4.4 mafa apportionment or such shortage provisions that the Secretary may impose (see 373 U.S. at pp. 592-594) and not producing an adverse transboundary impact, neither the federal government nor the sister states can complain that California is upsetting the federal administration of the Colorado. On this premise rests this Board's authority to issue Decision 1600 and Order 88-20. (See *Imperial Irr. Dist. v. State Water Resources Control Board (II)* (1990) 225 Cal.App.3d 548, 561, cert. denied (1991) 502 U.S. 857.)

At first glance that answer may seem more obviously correct with respect to prior perfected rights than with respect to rights grounded solely in post-1928 contracts with the Secretary of Interior. A closer look at the mandates, however, shows that the affirmative answer applies to both types of rights. Even prior perfected rights must yield to the supreme (and Supreme) Court decree; for example, under no circumstances can California's total use absent declared surplus exceed 4.4 mafa. On the other hand, there is no reason, consistent with *California v. United States*, that this Board could not regulate post-1928-established Colorado River use, so long as the state honors those provisions of federal law that define California's rights vis-à-vis the Nation or other states. Thus under article X, section 2 of the Constitution, sections 100, 275, 1011, 1736, and 1810 of the Water Code, or the public trust doctrine, this Board can direct IID's (or MWD'S) use of its Colorado River water as necessary to maintain and maximize the district's reasonable domestic and agricultural use.

The junior California interests on the river have responded, however, that there is a federal interest in their receiving the shares to which they are entitled by contracts with the Secretary. But while the California contracts include the Seven Party Agreement of 1931 (e.g., IID Contract, *supra*, art. 17), that agreement (IID EX 26) serves solely the California interest in prioritizing the 4.4 mafa. The interest of MWD, for example, lies in securing the remainder of California's basic 4.4 mafa after the agricultural districts receive the first 3.85 mafa. If California regulation causes that initial 3.85 mafa to serve more users than the holders of those entitlements, by allowing those holders to make that water available to others, the junior rights-holders cannot complain that they are being deprived of what would otherwise be available under the priorities defined by a California agreement. Perhaps the junior holders' recognition that they have been arguing in the past in effect for a windfall based upon conservation efforts by the seniors, explains their commendable willingness to put those claims aside in the greater interest of maximizing California's use of the river.

The same reasoning should apply to state-authorized use of Colorado River water to serve wildlife or other environmental needs; the Board would merely condition IID's rights to maintain

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2. IID's Present Water Use is both Beneficial and Reasonable.

IID's substantial and essentially uncontested evidence of its existing water use provides sufficient basis for this Board to conclude that its present practices, implementing WR Order 88-20 and maintaining a relatively constant and historical level of inflow to the Salton Sea, are both reasonable and beneficial.

In California, "what is a reasonable use of water depends upon the circumstances of each case, … an inquiry [which] cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance." (*Joslin v. Marin Mun. Water. Dist.* (1967) 67 Cal.2d 132, 140.) In contrast to the facts of the *Joslin* case, where the plaintiff's use of water was deemed to serve "no public policy" (*Id*. at pp. 140-141), IID has established that its existing use of water, complying with Board Order 88-20 and maintaining an annual billion-dollar agricultural economy, is reasonable.

Nor can it be argued that IID's use has become unreasonable because the District has identified the potential to conserve an additional 200,000 afa through on-farm and system

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agriculture on making some of its water available to mitigate environmental harm. The County agrees with IID that use of water for agricultural irrigation includes the use of water necessary to mitigate agricultural-use-related impacts. (IID BU REC EIR/EIS, p. S-3 (response to this Board's comment).)

But this Board's power over Colorado River water in respect of reasonable or public trust uses is not absolute. The Secretary retains her own power to determine reasonable use by her contracting parties (e.g., IID Contract, *supra*, arts. 17, 29 (requiring compliance with Compact's art. III, ¶ (e)'s "reasonably be applied" standard), a necessary power to ensure that a rogue state does not sanction waste. Just as the petitioners in this case are seeking both this Board's and the Secretary's determination that their presently-proposed action is reasonable, so should the Secretary's concurrence be sought with respect to any conditions this Board may suggest or require to render an IID BU REC transfer environmentally and economically acceptable. Given the strong testimony as to the national importance of a healthy Salton Sea (RT 1495-1496, 1553, 1865, 1893), the Board should anticipate Secretarial concurrence in such conditions.

improvements. As IID's evidence and that of others have shown, the reduction of inflow to the Salton Sea will produce negative impacts there, on features ranging from air quality to water quality to endangered and other wildlife species. California law has long recognized that water used to maintain the level of a saline lake is beneficial to the extent it protects against nuisance, maintains property values, and secures "the existence of the lake in its natural condition, with all its attractive surroundings." (*City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460, 474.(Mono Lake).)

Given the overwhelming evidence presented to the Board on the impact of substantial further reductions in Salton Sea inflow, this Board must not consider itself bound by its 1984 determination that the level of freshwater inflow to the Salton Sea was then deemed nonbeneficial. (Board EX 2, D. 1600, at p. 66.) *Aitken* establishes that use of water to maintain a saline lake level can be beneficial. In light of the "statewide considerations of transcendent importance" demanding a healthy Salton Sea environment,[7] *Joslin* commands that reasonable use be determined by the circumstances of today, not 1984.

3. IID's Rights Cannot Be Involuntarily Redistributed to Other Consumers.

Both the United States and California Supreme Courts have made clear that valid and productively-used water rights cannot be transferred to other users on a "social utility" theory. Those who suggest that the federal government can "take away" IID's senior adjudicated rights if IID does not meet distributional aspirations forget the United States Supreme Court's advice when

[7] "Mr. Chairman, I want to emphasize that this Administration will not approve an action that jeopardizes the Sea's already fragile ecosystem. Rather, we are committed to working closely with transfer proponents to ensure that the transfer can go forward in a manner that does not adversely impact the Sea and the surrounding communities." (Statement of DWR Director Thomas M. Hannigan before the House Resources Comm., Water and Power Subcomm. (June 14, 2002) p. 4.; see also RT 1555 (statewide importance of the Salton Sea).)

the Bureau of Reclamation sought to reallocate involuntarily the Truckee-Carson Irrigation District's adjudicated rights:

> The government is completely mistaken if it believes the water rights confirmed by the Orr Ditch Decree in 1944 for use in irrigation Newlands project were like so many bushels of wheat to be bartered, sold or shifted about as the government saw fit.

(*Nevada v. United States*, 463 U.S. at p. 126.)

The California Supreme Court recently issued an identical reminder. In *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, the Court rejected an argument that footnote 61 of *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 265-266 authorized the courts to ignore proprietary priorities in favor of an "equitable apportionment" based on contemporary use patterns. (23 Cal.4th at pp. 1246-1248.) "Case law simply does not support applying an equitable apportionment to water use claims unless all claimants have correlative rights …" (*Id*. at p. 1248.) Of course, "courts should have some discretion … to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin." (*Id*. at p. 1249 fn. 13.) But, while

> a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution's general purpose cannot simply ignore the priority rights of the parties asserting them. [citation] … [A] court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine.

(*Mojave*, 23 Cal.4th at p. 1250.)

More than a common law violation is lurking. An involuntary reassignment of IID's water to urban consumers raises the risk of unconstitutional taking, because the government would not be acting to preserve sovereign values such as navigation, air quality, or fish and wildlife, but instead redistributing the water to competing consumers. (See *United States v. Gerlach Live Stock Co.*

(1950) 339 U.S. 725 (Reclamation ordered to pay compensation upon finding that the government's purpose at Friant Dam was redistribution, not navigation).)[8]

Back of the doctrine protecting IID's senior rights lies the reality of industry, risk-taking, and sacrifice by the Imperial Valley pioneers who without federal assistance first employed the Colorado to transform the Nation's most inhospitable desert into the Nation's prime year-round agricultural resource. (See generally O. TOUT, THE FIRST THIRTY YEARS IN IMPERIAL VALLEY, CALIFORNIA (1931).) Commendably the other parties to this proceeding respect this history and the equities arising from it. Those outside this proceeding seeking to reallocate IID's water rights and agricultural economy -- either to the coastal plain or the Salton Sea -- must like the participants here first honor the investments and expectations of the Imperial Valley.

B. Water Conserved by Non-Normal and Non-Customary Fallowing Practices Cannot be Recognized for Transfer from IID.

Water Code section 1011 provides that to be recognized as a source of conserved water for transfer, reduced usage from temporary "land fallowing" and "crop rotation" will be authorized for "land practices, involving the nonuse of water, used in the course of normal and customary agricultural production to maintain or promote the productivity of agricultural land." (Water Code, § 1011, subd. (a).)

The petitioners recognize that section 1011's limitations must be honored to authorize the present transfer. SDCWA's general manager testified that the transfer agreement was formulated with its "no fallowing" provision to comply with section 1011. (RT 433.) The QSA parties also

[8] *Joslin* allowed a redistribution from one water user to another without payment of compensation, but only because the California Court found that "the amassing of mere sand and gravel which for aught that appears subserves *no* public policy." (67 Cal.2d at p. 140-141.) The same cannot be said, of course, in respect of irrigated agriculture in the Imperial Valley.

recognize that existing law does not allow for conservation from permanent fallowing, attempting by their "75-year temporary fallowing" definition (IID EX 22A, ¶ 1.1(56), at p. 8) to respect this law. (RT 151-153.)

Mr. Levy testified that fallowing land for five continuous years would not form a customary or usual agricultural practice in either the Imperial or Palo Verde Irrigation Districts. (RT 2711.) Mr. Underwood agreed, and based on the PVID-MWD draft EIR (SDCWA EX 50, p. 4-12) concluded that fallowing a parcel for more than two years out of a five year period would not promote the productivity of that agricultural land. (RT 2699-2701.) That two-year criterion and other customary practices must therefore be honored to comply with section 1011.[9] The QSA final EIR (co-authored by IID, SDCWA. MWD, and CVWD) recognizes that for "non-temporary (i.e, permanent) fallowing" to be emplyed, "legislation would be needed to address the conflict with Water Code Section 1011." (QSA PFEIR, p. l-3.)

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[9] As further evidence of section 1011's efficacy, the Legislature has in the present session been considering an amendment to Water Code section 1013, to authorize conservation credit resulting from permanent as well as temporary fallowing. In its present form, S.B. 482 adds a subdivision (b) to section 1013:

1013. (b) For the purposes of this section, and during the term of the Quantification Settlement Agreement as defined in subdivision (m) of Section 1 of the act amending this section during the 2001-2002 Regular Session, "land fallowing conservation measures" means the generation of water to be made available for transfer or for environmental mitigation purposes by fallowing land or removing land from agricultural production regardless of whether the fallowing or removal from agricultural production is temporary or long term, and regardless of whether it occurs in the course of normal and customary agricultural production, if both of the following apply:

(1) The measure is part of a land fallowing conservation plan that includes mitigation provisions adopted by the Board of Directors of the Imperial Irrigation District.

(2) Before the Imperial Irrigation District adopts a land fallowing conservation plan, the district shall consult with the Board of Supervisors of the County of Imperial and obtain the board's assessment of whether the proposed land fallowing conservation plan includes adequate measures to avoid or mitigate unreasonable economic or environmental impacts in the County of Imperial.

(S.B. 482, 2001-2002 Reg. Sess., as amended July 03, 2002, § 23.)

C. The Transfer Cannot Be Approved if It Produces Unreasonable Environmental or Economic Effects in the County of Imperial.

Article X, section 2 of the California Constitution, section 100 of the Water Code, and section 275 of the Water Code all authorize the Board to prevent the unreasonable use of water in California. While other provisions of the Water Code expressly protect "legal users of water" or the statutorily-defined public trust values of fish and wildlife (e.g., Water Code, § 1736), article X has long been recognized to embrace protection of environmental values as well as economic ones, and to grant standing to non-proprietary water interests to enforce its reasonable-use mandate. (*Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist. (I)* (1977) 20 Cal.3d 327, rev'd on other grounds (1978) 439 U.S. 811; *(II)* (1980) 26 Cal.3d 183.) Without doubt, and unambiguously law of this case, the Court of Appeal has vindicated this Board's power under the Constitution, and sections 100 and 275, to adjudicate the reasonableness of IID's water use. (*Imperial Irr. Dist. v. State Water Resources Control Board (II)*, *supra*; *(I)* (1986) 186 Cal.App.3d 1160.)

Even without reference to more specific authority than the Constitution and Water Code sections 100 and 275, this Board is empowered to disapprove a transfer that would produce unreasonable effects of either an economic or environmental nature in the County of Imperial. That power is expressly confirmed, however, in Water Code section 1810, to which the proposed IID-SDCWA transfer is amenable.

Water Code section 1810 authorizes and requires the owner of a water conveyance facility to make unused capacity available to a bona fide transferor of water. Subdivision (d) of the statute provides:

> (d) This use of a water conveyance facility is to be made without injuring any legal user of water and without unreasonably affecting fish, wildlife, or other instream beneficial uses and without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred.

Legislative history shows that this provision was added at the express request of the County of Inyo to remove that county's opposition to A.B. 2476 (Katz) of the 1985-1986 session.[10] Inyo was concerned that even as it was making peace with Los Angeles over that city's groundwater pumping program, outsiders would purchase private ranch land in the Owens Valley and demand that Los Angeles convey groundwater extracted from those ranches to San Diego.[11]

Water Code section 1810 applies to the present transfer, because SDCWA as transferor is making use of MWD's conveyance facility, the Colorado Aqueduct. That San Diego's use of the aqueduct is a "wheeling" mechanism derives from the MWD-SDCWA Exchange Agreement (SDCWA EX 14), which provides that "the Exchange Water shall be characterized for the purpose of all of Metropolitan's ordinances, plans, [etc.] in the same manner as the Local Water of other Metropolitan member agencies." (SDCWA EX 14, ¶ 4.1, at p. 15.) In her testimony SDCWA's general manager verified on direct examination that the exchange agreement was a "transportation agreement." (RT 394.) On cross-examination Ms. Stapleton affirmed that IID water "was not blended into the supplies that Metropolitan then divided up among its member agencies" (RT 425.) Then:

MR. ROSSMANN: Am I correct in characterizing this essentially as a wheeling agreement?

MS. STAPLETON: Yes, it is a transportation agreement.

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[10] See Inyo County Board of Supervisors Res. 86-46 (June 24, 1986) (opposition); A.B. 2476, as amended July 10, 1986 (includes existing § 1810, subd. (d)); Inyo County Board of Supervisors letter to Assembly Member Katz (Aug. 5, 1986) (support).

[11] After the bill was enacted, Los Angeles agreed that it would not enter into any water transfer agreement unless the county informed the city that an agreement with the seller had been reached "that insures the protection of the county's environment and economy." (Inyo County Code, §18.77.000, subd. G.) The county established a conditional use process to render those determinations in respect of groundwater extraction. (Inyo County Code, ch. 18.77.)

(RT 425.) Ms. Stapleton then affirmed that the exchange agreement "was not used to avoid the findings required by Water Code Section 1810." (RT 425.)

The transfer thus requires a determination that it will not unreasonably affect the economy or environment of Imperial County. As to the question of who must make this finding, the first answer is that the County through its Board of Supervisors is clearly most interested and qualified to make the finding, and it must do so.[12] This Board, however, must also render the finding in order to be assured that it is approving a transfer consistently with Water Code requirements. (See *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 858-860 (findings according to statutory criteria required of approving agency, to ensure that those criteria are applied).)

In summary, the constitutional mandate of reasonable use is implemented by sections 100, 275, and 1810 working in concert to prohibit unreasonable economic or environmental effects in the County of Imperial. As summed up by IID's water law expert, Professor Thompson:

> If this transfer were to permit fallowing, which, again, is something which currently this transfer does not permit, but on that hypothetical, one of the things this Board would have to look at would be its impact on the local economy. And if the Board concluded that that was unreasonable in light of the facts involving the transfer, looking at all the various costs and benefits of the transfer, then that would be a transfer that this Board under California law would not be permitted to approve.

(RT 380.)

D. The Environmental Documentation Will Not Support a Project Approval.

[12] That this practice was established by Los Angeles and Inyo County, who were intimately involved in the drafting of Water Code section 1810, reflects the intent of that measure. Notably, in its present version of S.B. 482, the current session of the Legislature is also calling for the County of Imperial to assess the economic and environmental effect of long-term fallowing before that fallowing can be authorized as a valid conservation measure. See p. 16, fn. 9, *supra*.

As the County has been suggesting in its cross-examination during the Board hearings, the draft and final EIR/EIS on the water transfer fail to meet the requirements of CEQA. These failures are not academic; they disable the public from a fair understanding of a project proposal and alternatives to that proposal capable of meeting project objectives with far less impact; they disable the lead agency from approving a project; and they disable this Board from using the EIR/EIS in its own decision-making.

The County appreciates and largely joins in the complete catalogue of EIR/EIS deficiencies detailed by the environmental participants in Audubon exhibit 18. The County here will highlight the most serious of these deficiencies, the ones that truly prejudice public participation and accountable decision-making.

1. Lack of a Rotational Fallowing Alternative.

In this proceeding many alligators have filled the bathtub in Justice Kaus' celebrated description of the impact of judicial elections on the Court's work, begging to be ignored. Perhaps the biggest of these alligators is the widely-circulated proposal that IID adopt a form of rotational (as opposed to permanent) fallowing to enable simultaneous transfer of substantial resources to San Diego while also contributing to the maintenance of the Salton Sea. (E.g, IID EX 84 (letter of Senator Feinstein).) It would be an extreme understatement to describe this proposal as an alternative to the proposed project, that excludes fallowing altogether, capable of meeting most project objectives with substantially less impact than either the Salton Sea destabilization (the project initially proposed in the draft EIR/EIS) or the EIR-considered-alternative of permanent fallowing.

The draft and final EIR/EIS have treated this dilemma in two different ways. The draft did not consider such a proposal at all; the project proponents themselves candidly acknowledged that rotational fallowing was not discussed at all in the draft EIR. (RT 2692 (Ms. Stapleton: "fallowing

should be analyzed as one of the alternatives"), 2723-2724 (rotational fallowing not evaluated in EIR).) Neither was "ET fallowing," described by Mr. Underwood as a promising measure to mitigate impacts on the sea and generate water for the transfer at the same time, but "fundamentally different than the approach that is contemplated in the draft EIR/EIS," assessed. (RT 2735 (responding to Mr. Fecko of the Board staff).)

The EIR proponents could have cured this circumstance by including a rotational and ET fallowing alternative in the final EIS/EIS, but did not do so.[13] Perhaps they were driven by fear of such an addition as (rightly) giving rise to the claim that this significant new information would decree recirculation of the draft. Instead, the final EIR/EIS declares that to address impacts arising from increased salinity of the Salton Sea, the habitat conservation plan (HCP) to be adopted must provide additional water to the sea to compensate for conserved water transferred to San Diego. In her testimony in phase II (RT 2942-2946) and again earlier this week (hearing of 8 July 2002) Ms. Harnish asserted that this additional water *could* come from fallowing, and the EIR had assumed for purposes of analysis that permanent fallowing *could* form the source of replenishment water, but the HCP did not *require* that fallowing be the source. Thus, presumably, the EIR authors avoided having to add a rotational fallowing alternative; instead the formulation of the HCP's watering element masked the source of the water. (RT 2946 ("They [sources of HCP-2 water] may not be identified in the final.").)

This alligator cannot be ignored. The EIR authors identify the HCP as *the* most important mitigation measure in their EIR. (RT 2946.) Black-letter CEQA law requires, however, that the

[13] The final EIR/EIS cannot even agree on the appropriate definition of rotational, or non-permanent, fallowing. The transfer EIR/EIS considers that to be fallowing of land up to four continuous years. (IID-BU REC EIR/EIS, at pp. 6-3, L-13(5).) The incorporated IA EIS, however, by relating to the statewide standards of farmland significance, considers the appropriate term no longer than three years. (IA FINAL EIS, at p. 3.6-8.) Imperial Valley farmers themselves consider two years a maximum period for appropriate rotational fallowing. (RT 547), as does MWD's MV Underwood (RT 2699-2701).

EIR do more than identify mitigation measures; it must establish their feasibility of achievement. Los Angeles' effort similar to that here formed the principal ground for rejection of its second Owens Valley groundwater pumping EIR. (*County of Inyo v. City of Los Angeles* (*IV*) (1981) 124 Cal.App.3d 1.) More recently, major projects have been judicially set aside because their EIRs purported to rely on quantities of water to meet project objectives, but failed to identify the actual sources of that water. (E.g., *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182; *Save Our Peninsula Comm. v. Monterey County* (2000) 87 Cal.App.4th 99.)[14] In the present case, neither the Board nor its participants can rely on the present EIR/EIS to establish the feasibility of the HCP mitigation.[15]

2. Inappropriate "No Project" Assessment of Urban Water Supply.

Turning from the failure to assess rotational fallowing, the EIR's other principal fundamental flaw in the eyes of the County lies in its assessment of the "no project" alternative for San Diego's future water supply. This flaw has two implications. It masks the growth inducing impact of the project in San Diego, and avoids a comparison of means to accommodate that region's future needs. But even more fundamentally, the EIR's treatment of "no project" for coastal plain water supply strongly implies that there is no need for the IID-SDCWA transfer project at all.

As with our colleagues at the Salton Sea, the County's problem here begins with the "baseline" issue. But if the flaw in the Salton Sea analysis [challenge to which the County defers to the Salton Sea and environmental parties] lies in failing to fulfill the CEQA duty of comparing

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[14] Irony at best attends the final EIR/EIS' reliance on *Save Our Peninsula* for the lead agency's discretion to establish an appropriate baseline. (IID-BU REC FINAL EIR/EIS, at p. 3-21.) There the court *rejected* the EIR because the lead agency created its baseline on "paper groundwater rights" rather than actual historic pumping levels.

[15] Indeed Ms. Harnish seemed to agree, believing that additional environmental review would needed prior to IID's approval of an agreement if HCP sources were to be other than from permanent fallowing. (RT 2999.) She reiterated that point in her 8 July testimony.

the project impacts to both existing as well as reasonably expected "no project" conditions (14 Cal. Code Regs., § 15126.6, subd. (e) (2); see RT 3004 (not done at Salton Sea)), the flaw in the urban-future-water-supply analysis is failing to assess project impacts by comparison to a "no project" future.

The draft EIR/EIS takes the position that the transfer will not induce growth in San Diego because it is designed to replace water that is presently available to San Diego. In this respect, the EIR authors are comparing project conditions to existing conditions; the incorporated QSA PEIR bluntly states, "The QSA PEIR used existing water supplies at the time the NOP was published in 2000 as the baseline." (QSA FINAL PEIR, at p. L-4.)[16]

The alligator, if you will, instead recognizes the reality that without the project, with the Secretary of Interior enforcing California's 4.4 mafa allocation in normal years, MWD and its customer agencies are losing up to 700,000 afa. (RT 149.) San Diego will consequently lose approximately 200,000 afa (RT 415); of its present reliance on MWD for approximately 600,000 afa, San Diego will in the "no project" scenario be confined to 320,000 afa of reliable MWD entitlement. (RT 2521, 2726.)

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[16] Commendably, the IA Administrative FEIS disagrees, asserting that "additional new agency-specific projects responding to non-implementation of the IA and QSA and reduced water supply and reliability are speculative and, therefore, are not part of the No-Action Alternative." (IA AFEIS - June 2002, at p. 2-29.)

The problem then becomes that the transfer final EIR/EIS also incorporates the IA (administrative) FEIS, but perhaps the authors intended this tactic to give themselves the choice of baseline-of-convenience. Lest IID now rely too heavily on the IA AFEIS, that document also suggests that the State Water Project could form a substitute source for diminished Colorado supplies. (*Id*.) IID's principal witnesses on the statewide significance of its proposed transfer, Deputy DWR Director Macaulay and Professor of Law Thompson, both agreed that there is no prospect of securing additional Southern California supplies from the State Water Project. (RT 144, 364.)

The EIR/EIS analysis of this issue thus resembles that of the EIR found faulty in *Planning and Conservation League v. Department of Water Resources*, supra, 83 Cal.App.4th 892. There the EIR authors (the same firm that prepared the QSA EIR) declined to analyze the State Water Project operations that would result if the preproject contracts' provision for entitlement reduction in time of permanent shortage (article 18(b)) were enforced. The Court of Appeal rejected that analysis and required a proper EIR to include a comparison not only to the existing contract conditions, but also to reasonably foreseeable conditions such as article 18(b) enforcement, since the project was motivated principally to *avoid* such enforcement. (83 Cal.App.4th at p. 911-916, relying on CEQA guideline section 15126.6 subd. (e) (2).)

Here the EIR must compare conditions in San Diego with the project, to those with the reasonably foreseeable consequence of *Arizona v. California* decree enforcement, whose impacts the transfer project is expressly designed to avoid. This perspective allows the Board and its participants to recognize -- as indeed the IID-SDCWA petition that governs this Board's proceeding expressly alleges -- that the transfer is designed to accommodate new growth in the San Diego region. (State Board EX 1(d); RT 420-421 (Ms. Stapleton reading from joint petition).) The County seeks this analysis not to judge the merit of that region's growth, which is principally for San Diegans to decide; but to force a comparison of other means for accommodating that growth, and selection of a mix of measures that would achieve that project purpose with minimal impact on the Imperial Valley economy and environment.

The final EIR/EIS instead asserts that the project does nothing more than maintain historic deliveries. (IID BU-REC FINAL EIR/EIS, at p. 3-97.) The QSA final PEIR, whose growth-inducing response is incorporated into the transfer final (*Id*. at p. 3-94) makes essentially the same assertion. (QSA FINAL PEIR, at pp. S-15, L-4.) This analysis fails to compare project and "no project" conditions. Moreover, by failing to recognize that what matters is not the same level of resulting water availability in the Colorado River Aqueduct, but instead the *changed condition* of

agricultural water now being devoted to urban use, the final EIR/EIS simply ignores the reality of project purpose.

Because the correct analysis has not been done, this Board cannot discern the need for the project. Without this need, neither the lead agency nor responsible agencies can render findings that project considerations justifiably override the environmental harm in Imperial County. Now can this Board conclude that IID's prepared water use is constitutionally reasonable, since that determination requires comparison of competing demands for the water. (*IID II, supra*, 225 Cal App. 4th at pp. 570-571; see *Joslin, supra,* 67 Cal. 2d at pp. 140-141.)

Thus, the final EIR's response to the County's (and DFG's and NWF's) growth-inducing-impacts comments transcends failure to address and correct the flawed analysis. If anything, the final makes the situation worse, by suggesting that the loss of MWD Colorado River supplies does not matter, because MWD will likely make up the deficiency by other means. While recognizing a "loss" [quotation marks the EIR's] of approximately 600,000 afa of Colorado River water, the incorporated QSA final PEIR

goes on to state under the no-project scenario, MWD and SDCWA would evaluate other water management actions …. **These actions are found to be sufficient to meet projected water demands**.

(QSA FINAL PEIR, at p. L-4 (boldface added).)[17] While that "make up" cannot like Secretarial entitlement enforcement be considered a reasonably foreseeable outcome -- because it requires future uncertain *discretionary* decisions-- the QSA PEIR's assertion that the "action" of

[17] Dr. Eckhart acknowledged that the draft EIR/EIS was in fact prepared on the assumption that water lost to MWD by entitlement enforcement "would be made up" (RT 869), although the "baseline" did not include countermeasures other agencies might take to substitute for Colorado River reductions (RT 933). On 8 July he testified that between the draft and the final there was no change to the baseline. SDCWA's Mr. Purcell, however, claimed that the "baseline" included a full Colorado River aqueduct. (RT 1111.)

"evaluation" will likely make up for loss of the transfer project raises the question of whether the combined intractable impacts of this transfer project on Imperial Valley agriculture and the Salton Sea should be imposed. We are left to ask, based on the EIR's analysis, is this transfer really needed?

E. The Board is Unable to Render Legally Required Findings.

The Board's hearing order for this proceeding establishes that the petitioners bear the burden for showing that the legally required findings can be made. (Revised Notice of Public Hearing and Amendment to Long-Term Transfer Petition. (Feb. 6, 2002) p. 7.) For all the reasons stated in the previous paragraphs in this section, the Board is unable to make the legally required findings. The deficiency is not just in the lack of a preponderance of evidence. Instead, the findings are precluded as a matter of law based on uncontroverted evidence. The findings also cannot be made because of the lack of a finally-approved and consistently-described feasible project on which to render them. Given the testimony presented by Imperial County (County EX 1, 2, 3, 3A, RT 2085-2303) establishing the economic and environmental harms flowing from the proposed 1998 water transfer agreement, the petition must be denied.

IV. THE COUNTY OF IMPERIAL RECOMMENDS SPECIFIC ACTIONS TO THE STATE BOARD.

A. Deny the joint petition without prejudice based on lack of ripeness.

For reasons stated in part I of this brief, the County recommends that the Board deny the petitions without prejudice, to meet two needs: (1) to establish that the Board has actually acted on the petitions, and (2) to comply with the provisions of CEQA, and their practical implications, which require that the lead agency fix its project before responsible agencies are required to evaluate and approve that project themselves.

Provided that no party objects with appropriate foundation, or that the petitioners consent as an alternative to dismissal without prejudice, the Board could adjourn the present proceeding until completion of the steps outlined in the remaining paragraphs. That process would ensure that the notices, record, and the like of the present proceeding carry over to the Board's remaining proceedings. Were the Board to follow this procedure, it would not in the County's view vitiate the need for the petitioners to revise their petition based upon a new proposed and approved project, and revise their environmental documentation accordingly.

B. Advise the petitioners to prepare and circulate a revised draft EIR/EIS to include presently-available alternatives and assessments that were not part of the initial draft and final EIR/EIS.

As set forth in part III of this brief, the present environmental documentation, like its underlying project, fails to comply with legal mandates. Most obviously, the final EIS/EIR certified by IID fails to include assessment of a "rotational fallowing" alternative that appropriately defined and mitigated might form an important component of a transfer and California's efforts to attain the 4.4. mafa limitation. Equally obviously, the final EIS/EIR fails to consider alternatives to a transfer to SDCWA of less than 130,000 afa, which combined with other measures in the San Diego service area might still meet that region's foreseeable future needs while sustaining both Imperial Valley irrigated agriculture and the Salton Sea.

A revised draft EIS/EIR to embrace these two elements will cure the legal deficiency and enable IID as lead agency to define and approve an acceptable transfer project. Preparation and circulation of this new draft should not be unilaterally or bilaterally undertaken, however. Release of a draft EIS/EIR should be concurrent with the definition of a consensus project that results from structured mediation as specified in paragraph D below.

C. Advise the petitioners of substantive constraints that will likely apply to a redefined transfer project.

The County has been critical of IID's proposed process of securing this Board's decision before it identifies and approves its own project. The County would like to acknowledge here, however, one redeeming virtue of IID's otherwise faulty approach: it has avoided the need for litigation on the part of any interested party.

If the "method" to IID's "madness" was to secure an advisory opinion from the Board, the County will not object to that outcome with the same intensity as if an advisory judicial opinion were sought. The principal factors counselling against advisory opinions in the judicial arena -- institutional investment to address a controversy that may not materialize, and inability to enforce a mandate -- would counsel this Board to move with caution as well. Nonetheless, advisory or preliminary opinions in the field of water administration have frequently produced benign results.[18] The County senses that in respect of the proposed transfer, the petitioners could build some political courage with supportive guidance. Without committing itself to a course of action, the

[18] For example, the Court of Appeal's March 1977 preliminary memorandum, indicating that Los Angeles' efforts to modify the injunction in *County of Inyo v. City of Los Angeles* were "not likely to achieve success" without water conservation, led to the first mandatory conservation ordinance in that city's history. (R. Nadeau, *A City that Water Built*, Los Angeles Times, (June 26, 1977) part VII, p. 1.) More than twenty years later the city was using less water than in 1977, while serving a population increase of 32 per cent. (*Water Conservation Efforts Paying Off in S. California*, Los Angeles Times (June 14, 1999), p. A1.)

Board could facilitate a resolution by rendering "advice" that seems obvious to most observers: that absent a change in the Water Code, permanent fallowing cannot be voluntarily made part of the project; that basing San Diego's acquisition of 130,000 afa and more solely on Imperial Valley on-farm conservation will not pass muster under the constitutional and statutory reasonable use standards; that regardless of their doctrinal source, the public trust values at the Salton Sea deserve protection; and that to assure these results IID and SDCWA must define and assess the transfer program that will work for both regions.

D. Advise all parties to enter structured discussions to produce a California consensus.

The parties to the proposed transfer deserve credit for formulating a transfer that would meet their individual institutional needs. The California water districts under contract to the Secretary of Interior deserve credit for their diplomatic efforts to conclude the unfinished business remaining from their 1931 Seven Party Agreement.

These efforts did not, however, account for the environmental interests and effects at the Salton Sea, and the environmental and economic effects that would burden all Imperial Valley residents, the County of Imperial as the general government responsible for social services. This Board has performed a service of statewide and Colorado-basin-wide significance by bringing these "nonnproprietary" interests into the dialogue, and building a record of effects that transcend those of the two parties to the transfer.

All parties now emerge better informed, and better qualified to state and resolve their concerns collaboratively. That collaboration must be given a chance. If IID and SDCWA could succeed in achieving their consensus, and the QSA parties their consensus, these parties together with the County, the farmers, and the environmental interests can succeed in achieving a fully-informed and statewide consensus.

This approach seems less like an option and more like a necessity. Exclusive reliance on formal administrative or adjudicatory proceedings seems destined to lead only to dead ends -- at least for the foreseeable future, which still represents more time than California has been given.

Recognizing that this Board may not be able to conduct or oversee the mediation of a case before it, the appropriate authority to convene and conduct a mediation would seem to be the Governor himself. This Board can initiate that outcome.

E. Memorialize this Board's and the parties' progress for the benefit of the Secretary of Interior and sister Colorado basin states.

The bad news of course is that neither this Board nor its petitioners are likely capable of producing a lawful permanent solution to the "4.4" problem by 31 December 2002.

The good news is that this Board's proceeding has now armed all California participants with awareness and knowledge of the competing needs to be met, and has created a framework that should lead to resolution with but one more round of (now universal) negotiation and environmental review.

The good news also is that California will meet the year 2003 benchmark called for in section 5 of the Secretary's interim surplus guidelines (66 Fed. Reg. 7772, 7782 (Jan. 25, 2001), whether or not the QSA is signed. That is because California need only to reduce its benchmark agricultural use to 3.74 maf in that year, a 110,000 af savings that should be attainable without the IID-SDCWA transfer. (RT 159-160 (Mr. Underwood).)

As expressed by the MWD chief executive officer, these functional guidelines, and not signatures on a QSA, qualify California to benefit from the interim surplus guidelines rather than default to the "70R Strategy." (County EX 5.) Meeting the benchmarks, or obtaining signatures,

"*whichever occurs first*," qualify California for reinstatement of the guidelines, absent an effective QSA on 31 December. (Guideline § 5, ¶ B, 66 Fed. Reg. at p. 7782 (emphasis added).)

True, the cited guideline section and paragraph require California to complete "all required actions." But as DWR Director Macaulay testified, "Reading the paragraph in its entirety, I don't see anything that requires the parties to sign the QSA." (RT 147.) Exactly right: the Secretary states an "expectation" that the parties will sign a QSA, not a requirement. As MWD's vice president Dennis Underwood explained, his CEO in authoring County exhibit 5

did some clarification as to the other alternatives that may be available if, in fact, there is difficulty or if there is a problem with executing. We could have a suit. We could have the State Board process take longer.

(RT 2706.) One of the anticipated difficulties could be environmental review; the other assuring that "the burden of reclaiming the Sea was not going to be on the transfers." (RT 2708.) Thus in order to do "everything possible" to facilitate QSA signing by 31 December, MWD CEO Gastelum urged the passage of needed legislation as one component of that "everything possible." (SDCWA EX 61.)

That legislation, S.B. 482 as referenced at page 16, footnote 9, supra, has not yet been enacted and its fate is unknown. It lacks an urgency clause, and thus even if enacted would not be effective until 1 January 2003.

Moreover, the failure of the environmental documentation to include a description of the type of fallowing that would enable IID to mitigate impacts on the Salton Sea presents another obstacle of the sort anticipated by Mr. Underwood to explain why QSA execution by 31 December 2002 may not be possible. Perhaps an extraordinary effort of negotiation and supplemental EIS/EIR preparation could produce a consensus-ready QSA and transfer agreement by 31 December, but the more likely outcome will be substantial progress toward that goal, which

coupled with California meeting the 110,000 af reduction in agricultural use before this year, will justify maintenance of the interim surplus guidelines.

The net result will not mean loss of the interim surplus guidelines, despite a cult of crisis that has been built up in this proceeding and elsewhere in California. By 31 December of this year, California still has her 4.4 plan, and will by then have met her year 2003 benchmark. As Mr. Underwood explained,

> The Secretary of Interior said he was not going to approve *any transfers* unless there was quantification. He was not going to provide surplus water unless there was *a California plan*.

(RT 155 (emphasis added).) Notably, the Secretary did *not* say (in the interim surplus guidelines, or apparently to Mr. Underwood) that he was not going to provide surplus water unless there was a *quantification*. Thus, a QSA is necessary for functional reasons only to approve a transfer, because without it a transferring district has no benchmark from which to transfer. (*Id*.) The only reason a QSA would be absolutely necessary by 31 December is that a transfer was deemed absolutely necessary by that date. But again, to reiterate MWD's CEO, achieving the benchmark provides the means of showing that "a California plan" is taking effect.[19] The progress of this Board's proceeding in moving California toward full implementation of that plan justifies the Secretary's continued reliance on the interim surplus guidelines.

[19] Reclamation's interim surplus EIS does not anticipate that the transfer would be completed by 31 December; rather, "[t]he initial transfer target date is 2002, or whenever the conditions necessary for the agreement to be finalized are satisfied or waived, *whichever is later*." (COLORADO RIVER INTERIM SURPLUS CRITERIA FINAL EIS (Dec. 2002), at p. 1-23.) The preferred and adopted project derived from the "Basin States Alternative," Attachment I in volume II of that EIS. There California's required progress is measured strictly by reduced Colorado River water use, with no reference whatsoever to QSA execution.

Dated: 11 July 2002

Respectfully submitted,

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