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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)

COUNTY OF IMPERIAL COMMENT ON DRAFT ORDER DATED SEPTEMBER 26, 2002

The County of Imperial submits the following written comment on the Board's draft order of 26 September 2002. The County expresses appreciation to the Board for its work to produce a comprehensive statement and proposed resolution of the issues under extreme time pressure, and for the Board's provision of opportunity to refine its draft order and thereby

minimize the issues that may form the subject of petitions for reconsideration. The County's comments are submitted to identify specific corrections and also to suggest approaches that will render its final order more acceptable to the County and to the entire State.

At the outset the County also expresses its appreciation for the Board's entertainment of issues that have historically received less attention from the Board than is now appropriate. Specifically, the order transcends a conventional response confined to other legal users of water or public trust values, to embrace environmental impact generally and the public interest in addressing and mitigating socio-economic impacts. Comparing the Board's draft decision with the initial notices in this proceeding, we discern a praiseworthy effort by the Board to assume responsibility for general environmental quality and for third-party socio-economic impacts. The County applauds the Board's progress in addressing these concerns which are at the core of our protest, and its suggestion that such impacts will shape protests in future proceedings. (See, e.g., Notice of Application to Appropriate Water By Permit, A. 31195, at p. 3 (Sep. 13, 2002) (allowing protest on "Adverse environmental impact" and "Not in the public interest").)

The Board's release of its draft order has also sharpened the issues for the County and facilitated the County's Board of Supervisors' evaluation of the transfer as proposed and possibly to be modified in light of recent negotiations sponsored by Speaker Emeritus Robert Hertzberg. The Supervisors have reduced their evaluation to a policy directive in their resolution adopted 8 October 2002, attached to this comment. The Supervisors' resolution informs the substance of the comment on the draft decision that now follows, just as the County trusts that in turn this comment will inform the Board's own developing understanding and adjudication of the petition.

Further Board Proceedings in Imperial County. The county requests that the Board conduct part—at least one day—of its reconsideration proceedings in Imperial County.

Ripeness/CEQA Responsible Agency Role. The doctrinal basis of the Board's response to the County's motion (Draft, pp. 60-64) does not overcome the functional need for the actual lead agency IID to formulate and fix first the project that this Board must then approve. Nonetheless, the Board's proposed response – to withhold effectiveness of its order until the lead agency approves a project and files its notice of determination (Draft, p. 64) – goes a long way toward addressing the difficulties presented. The County believes that by releasing its draft order, and even in approving that order subject to petitions for reconsideration, the Board has effectively followed the County's suggestion that the Board release a non-final advisory opinion at this time.

The "ripeness/responsible agency" issue can be satisfactorily and doctrinally resolved completely by the Board's modifying its proposed course of action (Draft, p. 64) in one respect. The Board should issue its order premised on the present draft and response to comments; then receive and deliberate upon petitions for reconsideration, preparing its ultimately final order for filing immediately following the approval if any by IID of a transfer decision. This course will then ensure that this Board has acted in full awareness of and subsequent to the IID action, and will not prejudice this Board's timely action in tandem with IID.

Precedence. The County appreciates the statesmanship of the parties to the protest dismissal agreement as reflected in their proposal to set aside their jurisdictional positions in order to facilitate this Board's action as necessitated by state law and the IID's prior proceedings before this Board. In that same spirit the County comments on the Board's proposal formally to designate this proceeding as "non-precedent." (Draft, p. 82.) The County accepts that formality, accompanied as it is by the Board's recognition that its final determination in this proceeding *will* provide guidance for future transfers (*Id.*, fn. 19), and that the order remains enforceable against

the parties to this proceeding (*Id*., fn. 20). The County asks that the final order clarify that the "parties" include not only those "who appeared at the hearing" and listed on page 14, but also those who in dismissing their protests consented to the substance of the Board's ruling while reserving their positions on the Board's jurisdiction.

Protest status of County of Imperial. The Board describes its protestants as "a number of Colorado River water right holders, environmental and public interest groups, and concerned individuals." (Draft, p. 9.) This categorization does not include the County as the general unit of local government in the area affected and in the area of water origin. (See Draft, p. 1 ("SOURCE: COLORADO RIVER COUNTY: IMPERIAL").) The Board is requested to revise the quoted text accordingly.

Chapter 617 (Senate Bill 482) Mandate. The Board at several points recognizes S.B. 482 as striking a balance among the competing interests in this proceeding. While S.B. 482 does not purport to embrace the full range of responsibilities devolving on this Board, the County supports the Board's effort to ensure that its order will harmonize with S.B. 482 when and if it becomes effective on 1 January 2003.

The Board's initial reference to S.B. 482 recognizes that one of the S.B. 482 mandates includes the duty of IID to consult with Imperial County to ascertain net environmental and economic effects prior to adoption of any plan that includes the form of non-customary fallowing that will be authorized by revised section 1013 of the Water Code. (Ch. 617, § 7.) (Draft order, p. 21.) The draft order fails, however, in its subsequent references to S.B. 482 (Draft order, pp. 49, 78, 80, 85) to include this duty of IID to consult with Imperial County in the formulation of its

mitigation plan for any fallowing that will rely on newly-revised section 1013. The Board's order should be amended accordingly at pages cited.

Moreover, to enforce the mandate of Water Code section 1810 [see next heading], the Board should require that IID secure the consent of Imperial County as a result of the S.B. 482-required consultation. While the practical effect of S.B. 482 alone should force IID to secure consent rather than proceed over the County's objection, this Board in enforcement of section 1810 can ensure that result.

Applicable State Law. The Board's listing of applicable state law (Draft, pp. 20-21) fails to recognize, as the County plead in its brief (pp. 17-19) that Water Code section 1810 applies to this transfer because it relies on IID's and SDCWA's use of MWD's Colorado River Aqueduct to "wheel" the transferred water. The County perceives, and appreciates, the Board's effort in its draft order to address the need to avoid unacceptable environmental or economic impact in the County of Imperial. The Board's order should be revised, however, to include the authority of, and duties imposed by, section 1810.

Air Quality Issues. As a factual matter, the Board's draft erroneously describes the IID service area under the jurisdiction of the Imperial County Air Pollution Control District (ICAPCD) as "moderate non-attainment." (Draft order, p. 74.) The uncontested evidence provided by the County establishes that the Imperial Valley is classified as in attainment but for emissions emanating from Mexico. (County EX. 2, ¶ 4; RT 2101, 2103.) This error should be corrected.

The County appreciates the Board's effort to address air quality impacts within the Imperial Valley, and its recognition that these impacts lie within its authority. (Draft order, pp. 73-75.) This recognition is both appropriate and necessary in light of the Board's expressed intention to rely not on the common law, but statutory, public trust doctrine. (Draft, p. 20, fn. 5.) As this Board recognized in D. 1651 at Mono Lake, air quality forms an important public trust value.

The Board's order cites reliance on ICAPCD control measures with respect to air quality impacts arising from fallowing, but does not extend that discussion to air quality impacts arising from an exposed Salton Sea shoreline. (Draft, pp. 73-75.) The County appreciates that in its proposed order the Board orders mitigation to include not only that identified in the final EIR, but also PM_{10} emission requirements that may be included in the ICAPCD's future enforcement of the State Implementation Plan. (Draft, pp. 90-91.) This welcome mandate, however, does not address cost.

The County therefore requests that the order be supplemented with this provision: IID or SDCWA shall fund ICAPCD monitoring and assessment of air quality impacts as the transfer proceeds, fund the development of air quality mitigation specifications, and fund the implementation of those mitigation measures adopted by the ICAPCD.

Duty of San Diego to Produce Desalinated Supplies. The Board states that at present, "the only possible source [of replacement water] identified during this proceeding was water conserved by fallowing land within IID." (Draft, p. 48.) The County believes the record proves this statement in error.

On cross-examination SDCWA's general manager stated that if the proposed transfer were not effectuated, her agency could produce up to 50,000 afa from desalinated sources within her

service area, and would so proceed. (RT 416-417.) In light of the circumstances more fully developed in the next headings – essentially that this transfer is being promoted to enable San Diego to continue its reliance on Colorado River water to which that area has not been entitled since the Supreme Court's 1963 decision and 1964 decree – San Diego must contribute not just dollars, but actual water, toward bringing California within her 4.4 mafa Colorado River apportionment. Such a contribution will also provide San Diego protection beyond the 15 years addressed in both S.B. 482 and the Board's proposed order, should the transfer be either terminated or significantly modified at the end of that 15-year term.

Accordingly, the Board should also condition the transfer's approval on SDCWA's development of a capacity to produce at least 50,000 acre-feet annually of desalinated water from its own facilities within the next 15 years.

This requirement will assist San Diego in securing appropriate federal subsidies to develop this desalinated source. Such subsidies are eminently warranted to facilitate the development of this technology on a sustainable basis, and to meet federal responsibilities toward the nationally significant resources in the Salton Sea, without the use of additional Colorado River supplies for that purpose.

Authority to Terminate the Transfer in 15 Years. The term of fifteen years has emerged as a common theme in matters relating to the Colorado River. That is term of the interim surplus guidelines at the end of which California is to conform to 4.4 mafa. That is the period of assurance or protection provided in S.B. 482. And now this Board has selected that period as the drop-dead time for the mitigation measures that it proposes to require. (Draft, pp. 47-51.)

Under the draft order, however, at the end of that 15-year period, maintenance of the Salton Sea's salinity (and hence level of unexposed shoreline) will no longer be required; IID will likely specify that any further transfer of water be generated on-farm or system-wide, essentially allowing the sea to decline; but IID will unless conditioned by this Board remain committed regardless of the then-existing circumstances to continue the transfer for an additional 15 to 30 years. Everyone is then off the hook except the welfare of the Salton Sea and the environment and economy of Imperial County.

If as now structured in several arenas "all bets are off" in fifteen years, when there no longer remains the federal incentive of surplus Colorado River water, then *all* commitments must be released. If the Imperial Valley is to accede to a 15-year experiment for the benefit of Southern California urban consumers, it must have the same option as the water agencies to withdraw from the obligations that otherwise are imposed for the 15-year period. If the experiment turns sour for IID or SDCWA to provide ongoing mitigation, they can walk away from those obligations in 2018. It is only fair that if the experiment turns sour for the County of Imperial and its environment and economy, the County also have authority to prevent further harm and also walk away from the transfer.

Accordingly, the mitigation measures and Board order should provide that if IID finds at the conclusion of the 15-year period that it cannot continue the transfer without adequate means to mitigate its impacts, IID have the authority to terminate its transfer obligations without penalty. The Board should also provide that if IID not elect to exercise that option, the County of Imperial may seek an order from this Board to terminate the transfer upon a finding that the transfer as then executed and as projected to continue imposes unreasonable effects on the economy or environment of Imperial County; and should the Board not grant that order, the County can seek its granting de novo from the superior court.

The Urban Baseline. The County fully comprehends the dilemma in which the Board finds itself as a result of the fallacious arguments in the IID/BuRec EIR/EIS, as well as the QSA EIR and IA EIS, that the proposed transfer will not induce growth in San Diego.[1] As responsible agency, this Board is obligated to accept the IID EIR unless it supplements it with new information, or else litigates its adequacy. The combination of this fallacious EIR analysis, and the limited time remaining in which to act, burdens the proposed transfer with a virtually incurable Achilles heel.

The County wishes it had a magic bullet to cure this infection, caused apparently by the unwillingness of San Diego to publicly acknowledge that this project is vital to its continued growth. The County of Imperial does not (in contrast to other parties who raise issues that are legitimately within their areas of concern) raise this point to condemn growth in San Diego, or to suggest that this Board should conform its order to actually prevent that growth. (Cf. Draft, pp. 58-59.) The County of Imperial in this proceeding is not asking that local land use control be surrendered to the State Water Resources Control Board. We do, however, ask for an honest acknowledgement about the motivation and reality of this proposed transfer, so that the important mitigations measure that we and others suggest – for example, that San Diego produce up to 50,000 afa of desalinated water from its own service area in the next fifteen years – are founded in an honest assessment of the benefit of the project to the San Diego interests.

Imperial County submits that it is not too late for San Diego to make this acknowledgement, not only for the legal sufficiency of this proceeding, but perhaps even more importantly to acknowledge to its rural counterparts that California faces a "4.4 crisis" not because

[1] The County is reluctant to argue this point anew. But within the context of error in this Board's order, as opposed to the EIR, how can the Board evaluate the Salton Sea based on a baseline that projects existing conditions coupled with no action in the future (Draft, pp. 41-46), while refusing to adopt that same analysis for urban supplies in San Diego (Draft, pp. 57-61)? The fact is that the San Diego baseline means approximately 200,000 afa less water than currently received, which *this project* will cause to be provided.

of Imperial Valley taking Colorado River water in excess of its apportionment, but instead because San Diego and the urban coastal plain have since 1963 premised their development on the availability of 800,000 afa of Colorado River water to which they were not entitled. If "paper water" can be defined as the expectation of a paper or legal entitlement that cannot be exercised by the appropriation of actual water, the present circumstance is "paper water inverted," the appropriation of actual water not backed by a paper or legal entitlement. The County does not believe that any party will object on CEQA grounds to the addition of such "material" to the final EIR before final action by both IID and this Board.

But even if the project proponents cannot bring themselves to correct this error, we urge this Board not to become party to it by the language presently appearing at pages 57 and 58 of the draft order. It may be true, as the Board asserts, that in the past in California "reduced water availability unlikely to affect growth in urban areas." (Draft, p. 57.) Nonetheless, the premise of just solving the problem by development followed by creation of the everlasting "supplemental supply" can no longer govern the future – at least until desalination can meet the needs of all California coastal urban centers. That premise was dispatched by of the Court of Appeal in *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.3d 892; it was dispatched by the Legislature in enacting S.B. 601 and S.B. 221 of the recently-adjourned session; and this Board need not and should not repeat the false mantras of past-century California.

The quoted language should be deleted, as should the suggestion that the growth will come anyway from the Sacramento-San Joaquin Delta. (Draft, p. 58.) The Board surely cannot deny the credibility of IID's witnesses DWR Deputy Director Steve Macaulay and Professor Bart Thompson that expanded exports from the Delta cannot be expected or relied upon. (RT 115-116, 364.)

The Board's assertion quoted above, moreover, misses the point. Imperial County's point (again, in contrast to that of other parties to this proceeding) is not that the transfer should be

denied to prevent future growth. Instead the County maintains that the Board recognize not that restricting water restricts growth, but the contrapositive: that providing a new or more reliable supply necessarily induces additional growth beyond the baseline condition.

The County requests that the analysis at pages 57-59 be redrawn to acknowledge that the proposed project can induce growth, and for that reason a sufficient nexus lies between that benefit and the mitigation measure of a requirement for the beneficiaries to produce their own source of desalinated water. From Imperial County's perspective, such a correction together with imposition of the requested measure would cure the CEQA and NEPA deficiencies on that score embedded in the environmental documentation to date.

Dated: 10 October 2002

Respectfully submitted,

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Attorney for County of Imperial