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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 REVISED OCTOBER 21, 2002

The County of Imperial submits the following written comment on the Board's revisions of 21 October 2002 to its draft order of 26 September 2002. The County comments on the changes made by the State Board staff in response to the interested parties' written and oral comments made at and prior to the workshop of 16 October 2002. We necessarily address the merit of the

parties' comments that caused changes to be made. While the County asks the Board and staff to respond to all of the suggestions in this comment prior to the Board's scheduled adoption on 21 October, we also recognize that the schedule that the Board has proposed to allow for petitions for reconsideration leaves little time for the Board to modify its currently-circulated draft. To the extent the Board does not grant relief on or shortly after 21 October, the County will raise these issues (as well as issues identified in our 10 October comments but not addressed by the Board in its present revisions) in a petition for rehearing.

1. Overview. "We are not to close our eyes as judges to what we must perceive as men." (*People v. Knapp*. (1920) 230 N.Y. 48, 63 (Cardozo, J.).) This Board as judges cannot ignore the DWR water wire of the past week, filled with several reports each day of the great distress that this proposed transfer brings to the people and institutions of the Imperial Valley. The misnamed "QSA Parties" have negotiated terms to be executed by non-QSA-party SDCWA but not to include the County of Imperial. These terms have raised great apprehension about the Valley's future economy and environment. To the extent that these QSA Parties for institutional reasons cannot on their own assure the Valley's future stability, the duty falls on this Board to impose conditions on the transfer that will provide that assurance. This Board must enable the County and others by 31 December to conclude that notwithstanding the fundamental flaws in the existing environmental documentation for which this Board will become literally and politically a "responsible agency," the transfer will not impose unreasonable economic or environmental affects on the Imperial Valley and the State.

2. The Fifteen Year Reconsideration. (Revised draft order, pp. 76-77.) The Board has revised its order to find now that impacts remaining after fifteen years are overridden by the

benefits of the transfer. The County perceives this revision to respond to IID's oral argument at the 16 October workshop that fifteen years of mitigation "is enough"; that by then we should "put the sea behind us."

Neither ecological reality nor human mortality support IID's argument. Perhaps in fifteen years the Salton Sea can be out of the minds and lives of those who from afar define the transfer terms. For those who live in the Imperial Valley, the proposed transfer will instead almost certainly bring the Salton Sea out of the background and into the forefront of their lives. This Board must look beyond the fifteen years in which the Secretarial promise of any available Colorado River surplus justifies the transfer up to that time.

Moreover, the Board must confront our present inability to measure the transfer's performance in those first fifteen years and to project what will lie beyond. To the extent that the transfer remains at best "an experiment, as all life is an experiment," (*Abrams v. United States* (1919) 250 U.S. 616, 630 (Holmes, J. dissenting)), any venture into the unknown must include measures to modify or terminate the experiment grounded in future empirical observation.[1]

We ask the Board to exhibit the humility for our collective inability to predict the future lacking from most of the proponents' arguments and assessments. IID after all has reserved to itself the right to terminate if the costs get too high.[2] That should not be a unilateral prerogative. This Board cannot justify a present override of future impacts when it has available the feasible

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[1] The inability to ascertain conditions beyond 15 years, which the Board essentially verifies (revised draft order, pp. 76-77), vitiates the Board's ability to declare an "override" at this time, because the Board has not first determined that feasible mitigation measures are not available to eliminate impacts then obtaining. (See Pub. Res. Code, § 21081, subd. (b) (agency must first determine infeasibility before proceeding to override).)

[2] IID at oral argument cited the need to address stranded costs. The County agrees that this legitimate issue must be addressed by the transfer proponents. It will need to be addressed whether IID alone, or this Board in collaboration with the other affected interests, has the ultimate power to modify or terminate the transfer in year 15.

alternative at the conclusion of year 15 of completing a *de novo* review (accompanied by a supplemental EIR) of the transfer's then-existing and projected impact based on natural and legal conditions then obtaining.

The Board's determination to conduct such a subsequent review, to commence in year 12 of the transfer, remains in the County's view singularly indispensable to acceptance of the transfer by 31 December of this year. The County asks the inclusion of such a condition to its order on 21 October.

3. Substantive Standards of Reasonableness Must Govern CEQA Override. (Revised draft order, pp. 76-77.) The Board essentially relies on a CEQA override to "balance" the benefits and detriments of the proposed project. As noted in heading 2 above, the County questions whether the procedural CEQA requirements for override have been met. Those requirements, however, must be satisfied in the context of the Board's substantive duty to prevent the unreasonable use of water, and the corollary duty to prevent unreasonable economic or environmental effects in the County of Imperial – whether flowing from the Constitution (art. X, § 2) or the Water Code (sections 100, 275, 1810).

The Constitution and implementing Water Code provisions impose a more rigorous duty of protection for public, sovereign values in Imperial County than one that merely states a "social" or "economic" preference for the more damaging course of action. (Cf. Pub. Res. Code, § 21081, subd. (a)(3).) When the Constitution and public trust (judicial or statutory) are implicated, both this Board and the reviewing courts are not bound by the lead agency, but must independently determine that protection of sovereign values such as air quality are maintained whenever possible. (*National Audubon Society v. Superior Court (Department of Water and Power)* (1983) 33 Cal.3d

419, 446 & fn. 27) (CEQA imposes similar, but not identical, duty as judicial or statutory public trust).)

4. Air Quality. (Revised draft order, pp. 74-75 & fn. 18, p. 92.) The County appreciates the Board's recognition in the revisions cited of the Imperial County Air Pollution Control District's (ICAPCD's) importance in assessing air quality impacts and installing mitigation measures. We remain concerned, however, that despite their good intention, these changes by the Board will be preempting the authority that reposes in the ICAPCD. Both the written text, and the oral explanation provided by staff at the 16 October workshop, anticipate that the Chief of the Division of Water Rights would consult with ICAPCD and the California Air Resources Control Board (CARB), but the definition of mitigation, including its feasibility, would be made by Board staff "in house."

The County also expresses concern that notwithstanding the personal testimony of the County's witness and ICAPCD's own outside expert Dr. Shari Libicki, the Board relegates her testimony to a footnote and continues to rely on uncorroborated and ahistoric assertions in the IID final EIR. We also believe that absent measures that to date have not been propounded by the petitioners in this proceeding, if the Salton Sea shoreline loses a stable elevation after fifteen years, adverse air quality impacts are virtually assured.

So vital are these air quality issues to both the County and the ICAPCD that the ICAPCD itself directly addresses the Board to request their correction. The County adopts the concurrently-submitted comment of the ICAPCD – trusting that the Board will recognize that the County has advanced identical positions in the present proceeding, most recently in its comments submitted on 10 October 2002, but not with the authority or detail now presented by ICAPCD. We restate our 10 October comment (page 6) as follows: Determination of air quality mitigation measures shall

be made by the ICAPCD; IID 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 ICAPCD.

5. Desalination. (Revised draft order, pp. 59-60.) The County appreciates the Board's responsiveness to our proposed mitigation measure that SDCWA be required to produce up to 50,000 afa of desalinated water by the end of the fifteen year period. To paraphrase IID's attorney in describing the Law of the River on 16 October, however, we believe the Board's response remains a bit timid. That observation becomes even more cogent in light of SDCWA's oral response at the 16 October workshop.

If the duty of reasonable use, and the duty to prevent unreasonable effects in the county of transfer origin mean anything, those duties require the importer of water to implement all alternative means of internally meeting new needs before imposing economic or environmental costs on areas of origin. (See *County of Inyo v. City of Los Angeles (III)* (1971) 71 Cal.App.3d 185, 203.) This premise forms the basis of the recent call of the Regional Council of Rural Counties for all importing water areas to strive for self-sufficiency before increasing their extractions from the counties and watersheds of origin. It is unfortunate that SDCWA does not recognize the relevance of our proposed desalination requirement to its requested leave to take water at great distress from the Imperial Valley.

Moreover, while we agree with SDCWA that the policy of this State encourages water transfers, that policy is combined with a policy of at least equal standing that no transfers produce unreasonable effects in the area from which the water is transferred. This Board must use its authority to implement both policies. Every acre-foot that San Diego can produce "in house" by conservation, re-use, or desalination, represents an acre-foot less that will be lost to the Salton Sea.

The 2000 SDCWA Urban Water Management Plan projects 25,000 afa of desalinated water by year 2020. (SDCWA EX. 7, p. 4-26.) SDCWA's general manager has updated this forecast with the agency's estimate that it could now produce 50,000 afa within that time frame. This Board should take the agency at its word and require progress reports that exhibit action toward meeting the 50,000 capability.

At the risk of repetition, this Board's order to that effect is important for two reasons: environmental quality and political acceptability. Los Angeles resisted the Court of Appeal's mandate for ten percent conservation in 1977; two decades later the city had increased its population by 30 percent while using less water than in 1977. The narrow issue today is whether San Diego can live up to its representation to produce 50,000 afa as now projected; the issue in 15 years will be why the city resisted that condition now.

6. Precedence. (Revised draft order, pp. 82-83.) At San Diego's insistence, the Board has removed former footnote 19 that addresses the guidance that this order can provide in future proceedings. The Board's revision, however, fails to honor the request of the County (joined in this instance by IID) that the Board make clear that its order does bind all the participants in this proceeding and the *res* of this transfer. Specifically, the Board should make clear that those who will dismiss protests after appearing, such as MWD and CVWD, are bound by the Board's order.

7. Law of the River. (Revised draft order, pp. 51-52.) Text was changed at page 52, but not in this writer's view sufficiently to meet the legitimate concerns raised on the merits by the Colorado River Board of California. The text at the end of the fourth line in the second full paragraph on page 52 could be amended to read, " … the Law of the River does not limit (absent a

conflict with the Congressionally-designed apportionment of the River among the States, Indian Tribes, and treaty obligations) IID's ability to exercise …." This writer adds the parenthetical phrase, and deletes the word "plainly," since the Law of the River is anything but plain.

Related to this issue, the County believes it appropriate in defense of the application of California law in this proceeding for the Board expressly to find that the provision of water to the Salton Sea for purposes of stabilizing and maintaining the shoreline to benefit property and recreational uses, prevent nuisance, and maintain attractive surroundings, is both reasonable and beneficial . (*City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460.)

8. Confirming Finality for CEQA Purposes. Apprehensions have been expressed to the County that the Board may be intending to file a notice of determination immediately upon adoption of an order on or about 28 October, without awaiting petitions for reconsideration and their resolution. Judicial authority requires the withholding of a notice of determination until all administrative appeals have been exhausted. (*San Francisans for Reasonable Growth v. City and County of San Francisco (I)* (1984) 151 Cal.App.3d 61, 70 fn.9.) If the Board or staff will confirm this premise at the 28 October hearing, apprehensions to the contrary can be alleviated.

Dated: 23 October 2002

Respectfully submitted,

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Attorney for County of Imperial