

LAW OFFICES OF
PATRICK J. MALONEY

2425 WEBB AVENUE, SUITE 100
ALAMEDA ISLAND, CALIFORNIA 94501-2922

PATRICK J. "MIKE" MALONEY
VIRSIK

(510) 521-4575

THOMAS S.

FAX (510) 521-4623
San Francisco (415) 512-0406
e-mail: PJMLAW@pacbell.net

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Ms. Victoria Whitney, Program Manager
Hearings and Special Projects Section
Division of Water Rights
SWRCB
PO Box 2000
Sacramento, CA 95812

Re: Transfer of water (IID and SDCWA petition to modify diversion and place of use), Permit 7643 on Application 7482

Dear Ms. Whitney:

This office represents interests that own or farm approximately 30,000 acres of land in the Imperial Valley in Imperial County. These lands have historic water rights that date from before the turn of the century, which rights have enabled that region to become a major national agricultural powerhouse. As generally recited in the various briefs on file in this proceeding, the landowners and farmers eventually formed mutual water companies which through various sales and transfers became what is today the Imperial Irrigation District (IID), a petitioner herein. Please note that the positions expressed in this letter are applicable to Imperial Valley lands other than our clients'; i.e., our clients' lands are a fair proxy for the balance of the (as yet) unrepresented lands and stand ready in terms of resources and expertise to represent the water rights holders of the Valley in safeguarding their rights under local, state, and federal law. Central Valley Water Agency v. United States, Ninth Circuit Court of Appeals, No. 01-16172 (September 26, 2002) (holding that individual farmer participants in the Central Valley Project have standing in a federal action).

Parameters of IID's Trust Responsibilities Over Water Rights

By IID's reckoning, it is the trustee of the water rights of the landowners of the Imperial Valley. IID and SDCWA Petition, page 14, n. 3; see also our letter of

September 27, 2002. Its trust responsibilities are well recognized and are relied upon by the Department of the Interior in delivering Colorado River water. Bryant v. Yellen (1980) 447 US 352 (present perfected rights of IID not superseded by Project Act). Notably, IID's trust responsibilities are to the landowners, rather than to the residents of any political subdivision or to water users.

As beneficiaries of the trust, the landowners have a legally enforceable right, appurtenant to their lands, to continued service by the District. . . . The District is obligated not only to continue delivery, but also to apportion water distributed for irrigation purposes ratably to each landowner in accordance with his share of the total assessments in the District.

Id., at n. 23. Just like providing water, conservation and payments for conserving must also be apportioned ratably. While we were hopeful that IID would respond to our Public Records Act request in the statutory time, that was not the case. A copy of IID's (tardy) response letter is enclosed herewith, however, informing us that all of the records that we requested will be made available by the end of the month. As our September 19, 2002 request stated, we are trying to work cooperatively with the IID to get to those records quickly and without undue burden on IID's part. Consequently, we cannot at this time be more specific regarding the nature of the water rights held in trust other than to rely on the few documents we have been able to analyze from other public sources.

The contours of the nature of IID's relationship to the landowners as a trustee can be discerned from the early rights recorded. That IID is to act as a trustee cannot be overemphasized. It is not, for example, akin to an "attorney in fact" that can wield power over the water rights at its pleasure or without notice or the acquiescence of the beneficiaries-landowners.

Special Status of IID's Water Rights

Notwithstanding IID's failure to cooperate, it is without controversy that the Imperial Valley enjoys a species of water rights to the Colorado River separate from and higher in priority than most of the other California parties. Arizona v. California, (1979) 439 US 419 (decree establishing quantities of present perfected rights of 2.6M acre-feet for IID, second in priority to PVID). Those present perfected rights are by sheer force of arithmetic based on pre-1914 rights (1901) over which the SWRCB has no jurisdiction, which the draft decision recognizes. Pages 51-54, n. 12. Consequently, while the 2.6 M acre-feet is part of the total 4.4M allocated to California by the "law of the river," the draft decision in no way

can be seen to affect the higher priority IID rights which IID as trustee for the landowners remains free to use, transfer, or do with as it otherwise pleases under the Supreme Court decrees.

Our preliminary research to date reflects that part or all of the perfected rights (all pre-1914) contemplated use in “San Diego County,” suggesting that IID may have the ability to offer to SDCWA (or others) higher priority water rights than those addressed in the draft decision. The Supreme Court decree quantifying the amount of those perfected rights (2.6M) places no geographic restriction on those rights – or other “gross” perfected rights – as it did with Indian Reservation rights and the sundry “miscellaneous” rights. The practical consideration is that should a substantial drought exist or California’s allotment be curtailed, IID will be able to rely on its own pre-1914 2.6M acre-feet even if it has no post-1914 rights from which conserved water may be made available to SDCWA. Our clients simply want to emphasize that the decision, as expressed on pages 51-54 and footnote 12, in no way authorizes (for it cannot) the transfer of any part of the higher priority water to SDCWA.

Transfer Method and Details Unknown and SWRCB Must Exercise Care in What it Approves or Sanctions

The decision also leaves unanswered many (if not all) of the details of the proposed transfer, notably its financial and other arrangements. Clearly, the SWRCB has not and should not be in a position to dictate to the IID or to SDCWA the terms of the transfer. Nevertheless, the SWRCB does recognize that it bears a certain amount of responsibility to make sure that especially IID acts consistent with its trust responsibility to the landowners for whom it holds the water rights in trust when it reserves continuing jurisdiction to address the inevitable socioeconomic issues. Part 6.4.

The approval of the transfer is, in essence, a decision to modify the terms of the trust under which the water rights are held due to changed circumstances. See e.g., Probate Code section 15409 (petition to change terms of trust when circumstances change). It appears there are two extremes that must be avoided when addressing the socioeconomic issues. The first danger is that IID will force landowners to fallow, essentially imposing an easement, lien, or equitable servitude on their land – a fallowing easement if you will – without compensation. The other danger is that IID will simply conduct an auction to allow a select (or perhaps just greedy) group to fallow all of its land to reap all of the benefits.

Neither extreme is acceptable and the socioeconomic results of each are to be avoided. If the IID forces fallowing (or creates a situation where fallowing is all but essential), landowners will not be able to make rationale choices to temper their conservation so as to minimize impacts. If the opposite occurs (an auction), then the benefit will be localized at the expense of the rest of the landowners and county. A trustee (which IID claims to be) must pursue the collective interest of the beneficiaries, and not pick and choose among competing interests.

In that vein, farmers in the Imperial Valley are interested in a water management solution by farmers, for farmers, and are developing means by which to make the underlying premise of the conservation of additional water a reality without impacting the socioeconomics of Imperial Valley. Again, in the terminology used by IID, the beneficiaries may no longer need to have a trustee look after their assets, or at least not as to the present assets that are being addressed in the petition. The Board should do all it can in its decision to allow such a management system to flourish rather than allow one to be imposed by IID over the objections of its “beneficiaries”. As the SWRCB knows, its staff is presently precluded from providing any support while a decision is still in the adjudicatory stage. The SWRCB should hold its decision open until all of the water conservation measures are finalized and accepted by the landowners, and then make that system a part of IID’s permit. Holding the decision open while instructing its staff to cooperate with the beneficiaries will allow a realistic opportunity to create a workable system recognizing all interests.

Continuing Jurisdiction Over Socioeconomic Impacts Problematic but Amenable to Creative Approaches

Our clients are concerned that the SWRCB’s continuing jurisdiction over the transfer to resolve socioeconomic impacts may run afoul of Constitutional limitations. They are concerned that their lands will be called upon to pay for impacts without due process, possibly violating the Constitutional limitations contained in Propositions 13 and 218. In the alternative, if their property is being taken away by a reduction of the water rights appurtenant to such land, then such taking must be fairly compensated. While the draft decision is purposely (perhaps appropriately) vague about such matters, it should include provisions that expressly recognize that any mitigation (environmental or socioeconomic) cannot take place without appropriate due process.

Nevertheless, our clients wishes to propose a consideration that the SWRCB (and the other parties) may wish to incorporate into its consideration of socioeconomic impacts. Because the transfer is long term (75 years) the socioeconomics need to

be addressed with a similar time frame. One source for such a long-term benefit is in the public education system of Imperial County. Another source is a community based foundation addressing the education, social, and economic needs of the region. Instead of a competition among individuals, communities, businesses, or charitable organizations (much less local governments and the danger of multiple layers of repetitive administration and bureaucracy squandering resources), my clients support the concept of the landowners making a significant gift of part of their water rights to a community based foundation which will use its resources to improve the outlook for all of the people of Imperial County. Thus, the 75 years of transfer will help support multiple generations of better-educated and responsible citizens of Imperial County. The effects of the transfer (no matter how severe or mild) can be offset by using a part of the resources created by the transfer to place people in a position to address those effects over the entire 75 years! A group of landowners is committed to this approach as a means of addressing the socioeconomic impacts of any transfer, and is forming an organization that may ultimately be able to relieve the SWRCB of any longer-term supervisory capacity over the socioeconomic impacts of the transfer.

Merits Aside, Notice Necessary as Matter of Due Process

Finally, while the IID has unequivocally held itself out as a trustee of the landowners, it has failed to provide any meaningful notice to those same beneficiaries and it appears that the SWRCB has also required none. A trustee has the responsibility of not only looking after the beneficiaries' collective best interest, but also to allow them meaningful notice of substantial events. This is without a doubt a substantial change in the terms of the trust relationship, but IID has never contacted the beneficiaries directly to seek their input or their approval. The SWRCB for its part, has rushed to a decision in record time due to political pressure to meet deadlines certain, rather than taking its usual care and attention to require the applicants and/or protestants to make a showing of what lands were affected, including listing those lands by APN's or other methods of identifying the actual parties that will be affected. IID could have noticed its beneficiaries (the lands to which the water rights are appurtenant) with minimal effort, as could the SWRCB. As part of its continuing jurisdiction over the socioeconomic impacts of the proposed transfer, the SWRCB should immediately order the IID to provide notice to the actual beneficiaries of the proposed transfer.

While our clients have substantial concerns as listed above, they are ready to work proactively to see the transfer go forward if the landowners and other interests in the Imperial Valley conclude that the full palette of benefits, advantages, risks, and

compromises are ultimately in the best interest of the water rights beneficiaries and citizens of Imperial County.

Sincerely,

Patrick J. Maloney

Encl. IID letter

c.

IID Board Member Allen

IID Board Member Horne

IID Board Member Kuhn

IID Board Member Maldonado

IID Board Member Mendoza

MWD
Ellison, Schneider & Harris
2015 H Street
Sacramento, CA 95814

CVWD
Redwine & Sherrill
1950 Market Street
Riverside, CA 92501

SDCWA
Daniel J. Hentschke
4677 Overland Avenue
San Diego, CA 92123

Salton Sea Authority
Tom Kirk
78-401 Highway 111, Suite F
La Quinta, CA 92253-2066

County of Imperial
County Counsel's Office
940 Main Street, Suite 205
El Centro, CA 92243

Counsel for IID
Horton, Knox, Carter & Foote
895 Broadway, Suite 101
El Centro, CA 92243

Ms. Lauren Grizzle
IVWUA
1036 Capra Way
Fallbrook, CA 92028

Robert Johnson, Regional Director
Lower Colorado Regional Office
PO Box 61470
Boulder City, NV 89006-1470

Hon. Bennett Raley
Assistant Secretary – Water

1849 C Street NW
Washington, DC 20240