

LATE COMMENT

SMILAND CHESTER ALDEN LLP

140 SOUTH LAKE AVENUE
SUITE 274
PASADENA, CALIFORNIA 91101
TELEPHONE: (213) 891-1010
FACSIMILE: (213) 891-1414
www.smilandlaw.com



Theodore A. Chester, Jr.

Email: tchester@smilandlaw.com

April 2, 2015

State Water Resources Control Board
Felicia Marcus, Chairwoman
Jeanine Townsend, Clerk of the Board
commentletters@waterboards.ca.gov
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Permit 7643 (1950);
Water Rights Order 2002-0013;
IID Petition (11-18-14);
Board Notice (02-06-15);
Board Workshop (03-18-15)

Dear Chairwoman Marcus and Board Members:

We submit this post-workshop comment letter on behalf of irrigators owning and operating approximately 20,000 acres in Imperial Irrigation District in connection with the above proceedings.

1. The State appears to be bound by the 2003 QSA agreements and related statutes to restore the Salton Sea. In this connection, our clients find the behavior of the State (Senate, Assembly, Governor, Natural Resources Agency, Department of Water Resources, Department of Fish and Wildlife) to fall short of the minimum standard of acceptable government conduct.

(a) As revealed in IID's petition, the State has not carried out its Salton Sea restoration commitments for years. The Board's notice solicited comments about the issues to be addressed and the role of the Board. Our clients' written comments characterized the State's non-performance as inexcusable. Yet the State favored the Board, the parties, and the public with no written comments. This cosmic silence confirmed the State's past recalcitrance and foreshadowed future default.

(b) The State did present oral comments at the workshop. Its principal spokesman was Keal'ii Bright, deputy secretary of the Resources Agency. He did not address the State's contractual or statutory commitments. The restoration plan of 2007, he admitted, had been "unrealistic," "flawed," "not achievable," and "not feasible," and must be "replaced." Yet no significant action has been taken for eight years since that plan was published. The State offered a vague outline of a future three-part process but, our clients believe, it was incoherent and much too little, too late. The only excuse offered by the State was that it was free to choose among authorized infrastructure projects. This is not correct where one of the projects is required by contract or statute.

(c) The State's failure to submit written comments and its oral admissions confirm that other signatories to and beneficiaries of the QSA agreements have reasonable grounds for insecurity. Therefore, our clients believe, they should demand adequate assurances and, if such are not forthcoming, consider repudiating the contracts. No deal is better for all than a partly-performed or failed deal.

2. The recipients of the transferred water, including the Metropolitan Water District and the Coachella Valley Water District, submitted both written and oral comments to the Board. They have, in the memorable words of David Hayes, Deputy Secretary of the U.S. Department

of Interior, “pounced” upon that water for a dozen years, and want to continue doing so in the future. They oppose the relief requested in the petition, and are now content to leave the QSA agreements and related statutes requiring restoration unperformed by the State. The deal, if fully performed, is injurious to our clients, but not as much, they believe, as continued part performance. The uncertainty and chaos of the status quo should not now be imposed on the affected parties or the people of California.

3. The Board has received scores of written comments in response to its notice, and as many oral comments at the workshop. Virtually all commentators focused on the restoration aspects of the problem. Neither the MET nor CVWD addressed their own junior rights to river water. IID said little about the senior Imperial Valley rights in the petition, its written comments, or its oral comments. Farmers (Farm Bureau, Vegetable Growers, F.A.R.M.E.R.S.) also demurred on that aspect of the matter. This is regrettable, as these proceedings arise out of the 1950 permit and the 2002 order, which relate to water rights. Only our clients offered extensive comments on the water rights aspects of these proceedings. This gross imbalance in the commentary should be corrected to the extent possible. Policy cannot be allowed to trump law.

4. Our clients believe that the Board, in connection with any second workshop and mediation IID now proposes, should obtain legal opinions about the relevant legal issues, including those relating to the prior appropriation doctrine. Three are of particular import, but have heretofore been overlooked, neglected, or ignored.

(a) There is doubt whether post-1914 rights arose in the Thirties and Forties as a result of federal improvements. If construction was promptly commenced and diligently prosecuted to completion, any enhanced rights probably related back to 1901 and the Board lacks

authority. It should proceed only if and when it describes the existence and nature of any post-1914 rights.

(b) Another key aspect of the appropriation doctrine is the joint ownership rule. Where an operator diverts and conveys water for use by others, the former holds nominal title to the rights in trust, and the latter own the equitable and beneficial interests in the rights to use the water. It is the “first concern” of the Board in the exercise of its powers to recognize and protect the interests of those who have prior and paramount rights to such use. *Meridian, Ltd. v. San Francisco*, 15 Cal.2d 424, 450 (1939). It is no less a first concern today. The landowners’ interests in the water rights rest upon their beneficial use of the water for irrigation. As discussed in our clients’ written comments, the rights are usufructuary in nature, and they are part and parcel of the land irrigated. They are measured by reasonable use, which is commonly evidenced by local custom. Furthermore, water resources should be put to use to the fullest extent of which they are capable. Cal. Const., Art. X, § 2; Water Code § 100. The Board and the interested parties must analyze the joint ownership and related rules whether the existing conditions are changed or not.

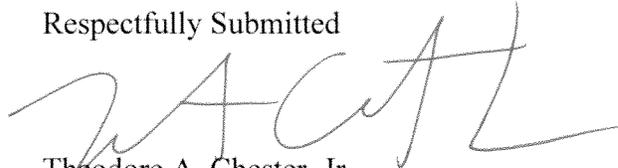
(c) The 2002 order concluded that an upstream change of point of diversion did not injure certain legal users. The petition discusses certain other aspects of the “no injury” rule. The questions here are whether the Imperial Valley irrigators are legal users and whether any changes or transfers cause them injury. This issue must be squarely confronted in any second workshop or mediation.

5. Our clients suggest that overlooking, neglecting, or ignoring the controlling law—the prior appropriation doctrine, including the diligent construction, joint ownership, and no injury rules—violates the constitution. An executive official must see that the law is faithfully

executed. Furthermore, property may not be deprived by an executive official without due process of law. The law is supreme here; policy and politics are lower order prerogatives.

6. Our clients' written comments noted that they would present the remarks of their expert, Craig W. Morgan, MBA, P.E., at the first workshop. But because their allotted time was truncated, Mr. Morgan was not able to speak. Accordingly, his views are attached hereto.

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'TACJ', with a long horizontal flourish extending to the right.

Theodore A. Chester, Jr.

COURTESY COPIES SERVICE LIST

Mr. Kevin E. Kelley
General Manager
Imperial Irrigation District
333 East Barioni Boulevard
Post Office Box 937
Imperial, CA 92251

Mr. Stephen W. Benson, President
IID Board of Directors
Imperial Irrigation District
333 East Barioni Boulevard
Post Office Box 937
Imperial, CA 92251

Ross G. Simmons, Esq.
Joanna Smith Hoff, Esq.
Imperial Irrigation District
333 East Barioni Boulevard
Post Office Box 937
Imperial, California 92251

Ronald L. Olson, Esq.
MUNGER TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Charles T. DuMars, Esq.
Law & Resource Planning Associates, P.C.
Albuquerque Plaza
201 Third Street NW, Suite 1750
Albuquerque, New Mexico 87102

David R.E. Aldjem, Esq.
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Hon. Jerry Brown
Governor of the State of California
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Hon. Kevin de Leon
President Pro Tem of the Senate
State of California
State Capitol, Room 205
Sacramento, CA 95814-4900

Hon. Toni G. Atkins
Speaker of the Assembly
State of California
Post Office Box 942849, Room 219
Sacramento, CA 94249-0078

Ralph Cordova, Jr.
Executive Officer
Imperial County of California
940 West Main Street, Suite 211
El Centro, CA 92243

Mr. Ryan E. Kelley
Chairman of the Board
Imperial Valley Board of Supervisors
940 Main Street
El Centro, CA 92243

Hon. John Hickenlooper
Governor of the State of Colorado
Office of the Governor
136 State Capitol Bldg
Denver, CO 80203

Christopher M. Brown, Esq
Senior Assistant Attorney General
Water and Natural Resources Division
Wyoming Attorney General's Office
123 Capitol Building
200 West 24th Street
Cheyenne, WY 82002

Hon. Doug Ducey
Governor of the State of Arizona
1700 West Washington Street
Phoenix, Arizona 85007

Hon. Susana Martinez
Governor of the State of New Mexico
Office of the Governor
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501

Hon. Gary R. Herbert
Governor of the State of Utah
350 North State Street, Suite 200
Post Office Box 142220
Salt Lake City, Utah 84114-2220

Hon. Brian Sandoval
Governor of the State of Nevada
State Capitol Building
101 N. Carson Street
Carson City, NV 89701

Hon. Michael L. Connor
Deputy Secretary of the Interior
U.S. Department of Interior
1849 C Street, N.W.
Washington, D.C. 20240

Hon. Estevan Lopez
Commissioner of U.S. Bureau of Reclamation
Bureau of Reclamation
1849 "C" Street NW
Washington D.C. 20240-0001

Hon. John Laird
Secretary of California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Hon. Charlton H. Bonham
Director of California Department of Fish & Wildlife
CDFW Headquarters
1416 9th Street, 12th Floor
Sacramento, CA 95814

Hon. Mark W. Cowin
Director of California Department of Water Resources
1416 9th Street, Room 1115-1
Sacramento, CA 95814

Mr. Jeffrey Kightlinger
General Manager
The Metropolitan Water District of Southern California
700 North Alameda Street
Post Office Box 54153
Los Angeles, CA 90012-2944

Mr. James Barret
General Manager
Coachella Valley Water District
Post Office Box 1058
Coachella, CA 92236

Ms. Maureen A. Stapleton
General Manager
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123

Mr. Roger Shintaku
General Manager, Salton Sea Authority
44-199 Monroe Street, Suite "C"
Indio, CA 92201



AVALEX INC.

Civil Engineering & Environmental Services

April 3, 2015

State Water Resources Control Board
Felicia Marcus, Chair
Jeanine Townsend, Clerk to the Board
commentletters@waterboards.ca.gov
1001 I Street, 24th Floor
Sacramento, California 95814

Re: March 18, 2015 SWRCB Workshop - Solicitation of Comments Regarding the Status of the Salton Sea and Revised Order WRO 2002-0013

There were a number of comments made during the March 18, 2015 SWRCB workshop regarding the Salton Sea and the QSA which deserve further attention.

- 1) **Cause of the Current Decline in Salton Sea Elevation** – As was noted by a few of the commenters, the elevation of the Salton Sea has dropped faster than that which was projected when the SWRCB considered WRO 2002-0013 in 2002. For example, the sea's baseline elevation in 2017 was projected to be -232 feet mean sea level (msl). It was assumed under the project's Salton Sea Habitat Conservation Strategy that this elevation would be maintained if not exceeded with the addition of replacement mitigation water. Elevations, however, have already declined below this point to -234 feet msl as of January 2015. One reason suggested was that inflows from Mexico have been lower than originally projected as well as drought conditions. I would include two additional factors that weren't considered in the original projections. First, the 3.1 million acre-feet (maf) cap imposed on IID under the QSA has itself reduced inflows. Prior to 2002 IID was using an average of 3.2 maf. Thus, IID was required to reduce its water use by 100,000 acre-feet just to meet the cap. Second, IID's attempts to ensure that they do not exceed the 3.1 maf cap have on average resulted in their underrunning the 3.1 maf cap by 80,000 acre-feet per year. No mitigation water is or has been provided for these reductions.
- 2) **Salton Sea Salinity Projections** – Corresponding to the accelerated drop in the sea's elevation, salinity levels have increased faster than projected. Projections contained within the 2002 IID Water Conservation and Transfer Project Draft Habitat Conservation Plan EIR/EIS for baseline salinity assumed a salinity value of approximately 54,455 ppm in 2014. The average salinity concentration in 2014 was 55,783 ppm. This salinity level would appear to violate Condition 5a of WRO 2012-0013 (page 86) which states “[a]t a minimum, permittee shall meet the mean modelled future baseline salinity trajectory.”
- 3) **Acreage of Exposed Playa** – Confusing if not conflicting information was presented as to the ultimate acreage of exposed playa created as the sea recedes. Representatives for the Resources Agency noted that 156 square miles (~100,000 acres) will ultimately be exposed as the sea recedes. IID cited estimates of 50,000 acres by the year 2030. The 2002 Final EIR/EIS for the water transfer project anticipated that the Salton Sea Habitat Conservation Strategy would result in a 2077 elevation of the Sea of -240 feet msl with

591 Tahoe Keys Blvd., Suite D6
Mailing Address:
Post Office Box 550218
South Lake Tahoe, CA 96155

Phone: (530) 543-3200
Fax: (530) 543-3201
Email: avalex@avalex.info

Felicia Marcus, Chair
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15,100 acres of exposed shoreline relative to the baseline. While the later estimate may represent exposures directly related to the QSA transfers, the fact remains that all playa lands exposed as the sea recedes pose a threat to the region's air quality and will need to be mitigated notwithstanding the cause.

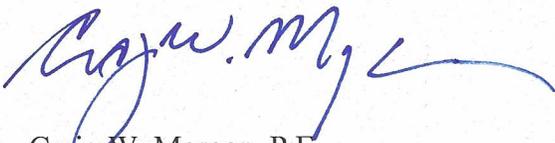
- 4) **Mitigation of Air Quality Impacts** – In a response to a question about whether air quality impacts are being mitigated, Dan Denham with the SDCWA noted that the air quality mitigation programs required under the QSA are presently being implemented. This may be true, but that does not mean that the impacts to air quality caused by the water transfers and other factors are being fully mitigated. This is especially true to the extent that more playa has presently been exposed than originally projected. Air quality mitigation programs in the future are unlikely to fully mitigate impacts given their costs and there currently are no comprehensive plans to mitigate the exposed playa as the sea recedes. One possible partial solution which should be considered is for IID to store their entitlement underruns in the Salton Sea to help maintain elevations.

Another issue which was not discussed during the workshop but which should be addressed in any discussions concerning the Salton Sea and the QSA is IID's lack of adequate water storage. Prior to the QSA, IID's rights to water were sufficient to ensure an adequate supply for all water users in the district each year and no storage was necessary. With the imposition of the 3.1 maf cap on its supply, the need to store water from within its allocation to balance yearly demands arises. This need was not fully understood when the water transfer project was proposed and the QSA signed. The lack of storage has created significant challenges for IID in the management of its water supply and unfortunately this has led the district to attempt imposing severe restrictions on the quantity of water available to its agricultural users. There are grave concerns within the Imperial Valley's farming community that potential future demands for water to mitigate air quality impacts created by the transfer will further reduce the available supply of water for irrigation purposes.

I appreciate your consideration of these comments.

Best regards,

AVALEX INC.



Craig W. Morgan, P.E.
Principal Engineer

Cc: Theodore A. Chester, Jr., Smiland Chester Alden LLP