LARRY GILBERT  
945 East Worthington Road  
Imperial, CA  92251-9764  
TEL:  (769) 355-2278

Protestant

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

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

BRIEF OF LARRY GILBERT
INTRODUCTION

Protestant Larry Gilbert submits the following brief arguing that the transfer petition should be denied so long as the project remains in its presently proposed form. However, if certain specified conditions are met, the petition should be approved.

This brief first presents the reasons why the petition should be denied, then the conditions which need to be met for this protestant to argue for approval. Thereafter supporting evidence for each reason is given in more detail.

ARGUMENT

Very important changes were made to the Project Draft EIR/EIS when it was certified as the Final EIR/EIS by the IID Board of Directors on June 28, 2002. Specifically Salton Sea HCP Approach 1 was eliminated, leaving only Approach 2. Approach 2 specifies that inflows to Salton Sea will be essentially maintained. This eliminates the practicality of conserving any water for transfer by any means other than fallowing IID farmland, and additionally requires fallowing to provide water to augment inflows to the Sea.

The only exception to this outcome would be for water to be obtained from outside the IID and transferred into IID so IID could have extra water with which to maintain inflows to the Sea. If this becomes a reality, then the transfer petition could be approved if the other described conditions are satisfied.

This outcome leaves the SWRCB with two options:
I. DENY THE APPLICATION FOR TRANSFER AS THE FINAL EIR/EIS WILL REQUIRE IT TO BE IMPLEMENTED. The following reasons support this course of action:

1. No net new water will be provided for California.

2. It will not allow IID to become more efficient to comply with orders by this Board (D-1600 & 88-20).

3. It will not allow IID to become more efficient to comply with the requirements of the California Water Code.

4. It will not allow IID to become more efficient to comply with regulations of USBR and expectations of the Secretary of the Interior.

5. It will reduce habitat for bird species, including shore birds that forage in farm fields, by fallowing acreage that currently produces these crops and provides this habitat.

6. It transfers water away from an existing community/economy in an attempt to benefit a few fish-eating species for a short period of time.

7. It will provide only minimal, temporal benefit to few, if any, listed species which rely on a fish-filled water habitat.

8. It provides little, if any, benefit to non-listed fish-eating species that currently use the Salton Sea.

9. It violates the Agreement between IID and SDCWA, which prohibits fallowing for on-farm conservation.
10. It is contrary to the purposes of the QSA (Quantification Settlement Agreements).

11. It is contrary to the intent of the IA (Implementation Agreement).

12. A fallowing program would reduce agricultural output and have a negative impact on the local economy and community.

13. It transfers water away from a poor community/economy to enhance a wealthy community/economy.

14. It would place a financial burden on farm operators as they compete for fewer remaining acres of cropland.

or

II. APPROVE THE TRANSFER CONTINGENT ON SATISFYING THE FOLLOWING CONDITIONS:

A. That the water be conserved thru IID system efficiency improvements and on-farm conservation (efficiency improvements) since this would meet the following goals:

1. Provide net new water for California’s use.

2. Provide benefits to both the exporting and importing districts and their economies.

3. Keep the Interim Surplus Guidelines in effect to provide additional benefits to California users.

4. Comply with orders of the SWRCB (D-1600 & 88-20).

5. Comply with the California Water Code’s requirements for efficient water use.
6. Comply with regulations of the USBR and expectations of the Secretary of the Interior.

7. Fulfill the intent of the QSA.

8. Satisfy the conditions of the IA.

9. Comply with the provisions of the Transfer Agreement between IID and SDCWA.

B. That Salton Sea HCP Approach 2 (requiring that inflows to the Sea and the Salinity trajectory be maintained) not be implemented. This would be done because:

1. Only minimal, temporal benefit would accrue to very few listed species before the Sea reached the point where it will no longer support significant fish populations.

2. There was no evidence that non-listed species would be impacted in a way that would threaten the stability of the species.

3. The benefits of the transfer would far outweigh the few short-term negative environmental impacts of the Sea becoming hyper-saline.

C. That an alternate mitigation program be sought which would reduce impacts to fish-eating bird species while minimizing impacts to other species, including pupfish.

D. IID and its farmers, landowners and residents must be protected from claims for damages to people, property, or the environment resulting from good-faith fulfillment of its contractual obligations to conserve and transfer water pursuant to the agreement with SDCWA, the QSA, and related documents.
E. That Landowners’ rights to receive water, and opportunity to conserve for transfer not be diminished because of their adherence to policies and regulations of IID and principles of the Water Code requiring efficient water use.

F. Landowners within IID who depend on their right to receive water must not be injured by having the price IID receives for transferred water decrease to a level below the cost of conserving the water by the methods specified in the Agreement.

EVIDENCE SUPPORTING REASONS TO DENY THE PETITION

I.1. No net new water will be provided for California. Fallowing Imperial Valley farmland causes no increase in water use efficiency, nor does it in any way increase California’s supply of usable water. It only takes water from where it is currently being used and changes the place and purpose of use.

I.2. It will not allow IID to become more efficient to comply with orders by this Board (D-1600 & 88-20). If IID implements a fallowing program and maintains inflows to Salton Sea its district irrigation efficiency will decrease. (RT 2671-2673.) This is contrary to previous orders and decisions by this Board that IID increase its efficiency of water use.

I.3. It will not allow IID to become more efficient to comply with the requirements of the California Water Code. The California Water Code requires water rights holders to put their water “… to beneficial use to the fullest extent of which they are capable…”. By becoming less efficient in its water use when transfer funds are available that could be used to improve efficiency, IID would be operating contrary to Water Code requirements of
reasonableness. IID must be allowed to use the transfer funds to improve its efficiency and stay in compliance with Water Code requirements.

I.4. **It will not allow IID to become more efficient to comply with regulations of USBR and expectations of the Secretary of the Interior.** The US Bureau of Reclamation regulations require that water it supplies to Colorado River contractors be used reasonably. By implementing this transfer in this way IID would be less able to meet the Bureau’s standard and could be put in great jeopardy of having its water right reduced. The Implementation Agreement with the Secretary of the Interior provides benefits to IID on the condition that IID implement “major conservation activities”. (Exh. IID #22-Exhibit D(Implementation Agreement) B.7.b).

I.5. **It will reduce habitat for bird species, including shore bird species that forage in farm fields, by fallowing acreage that currently produces these crops and provides this habitat.** While nearly 400 bird species occur in the area, many use the canals, drainage channels and farm fields for habitat and a source of food. This number includes many of the shore birds (sea gulls, stilts, etc.), even waders (i.e. herons) and some which dive for food (ospreys). (RT 1884-1887.). Fallowing would decrease the acreage devoted to crops and thereby reduce the available habitat for these species.

I.6. **It transfers water away from an existing community/economy in an attempt to benefit a few fish-eating species for a short period of time.** Water that would be conserved by fallowing and transferred away from IID is water that is contributing to the local economy and the community it supports. The people that depend on that economy would be harmed by providing a temporal benefit at best to a very few species of fish-
eating birds. This is not even co-existence; it is putting the welfare of birds ahead of people! This plan becomes a draconian measure against the residents of the Imperial Valley for a minimal temporal benefit to a few bird species.

I.7. **It will provide only minimal, temporal benefit to few, if any, listed species which rely on a fish-filled, water habitat.** Little evidence was presented that more than a very few listed species would be helped by HCP 2. Since the proposed HCP 2 only calls for the Salton Sea salinity to be kept lower for about 20 years (less if the fishery dwindles earlier), the maximum period of benefit is short. It must also be remembered that during that time the fishery can be expected to decline cyclically and therefore provide a dwindling benefit. (RT, David Christophel Cross-examination by Gilbert [July 8, during the morning session].) A more rapid decline in the suitability of the habitat would prove little more than an inconvenience to the species under consideration.

I.8. **It provides little, if any, benefit to non-listed fish-eating species that currently use the Salton Sea.** Almost no information was provided to show that non-listed fish-eating species would suffer impacts that would threaten the stability of the species. While testimony mentioned nearly 400 species of birds, it needs to be noted that this is the number that occurs in the area surrounding the Sea. (RT 1884-1886.) Also, not many of these are fish-eaters, and not all the fish-eaters get their food from the Sea. Many find their meals in the canals and drains which contain water year-round. (RT 1884-1887.)

I.9. **It violates the Agreement between IID and SDCWA which prohibits fallowing for on-farm conservation.** It is no secret that the Agreement between IID and SDCWA prohibits fallowing as a method of on-farm conservation. Implementing a program which
requires fallowing would violate that agreement. The agreement was negotiated as a package. The need to mitigate socio-economic impacts in Imperial Valley was not contemplated. This key element of the agreement cannot be reversed without upsetting the balance of the entire agreement.

I.10. **It is contrary to the purposes of the QSA (Quantification Settlement Agreements).** The QSA were to allow IID to transfer water “around” junior rightholders on the River by satisfying claims that IID’s use was not reasonable and that some of the conserved water rightfully belonged to those junior rightholders. (RT 2678-2683.). IID gave up the opportunity to conserve and transfer “carve out” water to SDCWA at the same price that it would receive for the Primary Quantity to be conserved and transferred to the Authority. (RT 2682-2683.) (Exh. IID #7, Art 3, 3.1, 3.2, 3.2(a), 3.2(b), 3.2(d)). In return for transferring that water to CVWD & MWD for a much lower price, IID received assurances of unknown value that they would not challenge IID’s reasonableness of use. Exh. (IID #22-Exhibit A (CVWD/MWD Acquisition Agreement), Article 2, 2(a), 2(b), Article 5, 5.1, 5.2) (RT 2678-2682.).

Implementing the Agreement by fallowing would cause IID’s district efficiency to decline. (RT 2670-2673.). If reducing IID’s efficiency were deemed reasonable, agreement by CVWD to not challenge IID’s efficiency would be worthless and IID would have no reason to transfer water to it at a reduced price. (RT 2685-2686.).

I.11. **It is contrary to the intent of the IA (Implementation Agreement).** The Implementation Agreement with the Secretary specifies that the Secretary would see no reason to assess IID’s reasonableness of use for the next 20 years IF IID implements major
conservation measures and does not have available significant new water use technology.

Exh. IID #22-Exhibit D(Implementation Agreement) B.7.b.) (RT 2740-2742.). This presupposes that IID will implement major conservation activities that improve its efficiency—not fallowing, which would reduce its efficiency!

I.12. A fallowing program would reduce agricultural output and have a negative impact on the local economy and community. Testimony showed that a long-term fallowing program would have major negative impacts on the local economy. (RT 966-971.). Testimony by both Dr. Smith and Mr. Spikard indicated that longer term fallowing programs would be expected to have major, long-lasting, and hard-to-successfully-mitigate impacts on the local economy. (RT 2265-2268.).

I.13. It transfers water away from a poor community/economy to enhance a wealthy community/economy. Testimony showed that Imperial County is a low-income, high-unemployment county and that San Diego County residents are much better off. It would be unjust and violate the principles of environmental justice to implement a fallowing program which impacts the economy of a low-income community so a high-income community can benefit.

I.14. It would place a financial burden on farm operators as they compete for fewer remaining acres of cropland. Testimony was presented that when farmable acres are withdrawn from availability farmers will compete for the remaining acres. This will result in decreased profitability for Imperial Valley farms.
EVIDENCE SUPPORTING REASONS FOR CONDITIONS TO APPROVAL OF PETITION

II.A.1. Provide net new water for California’s use. By conserving the water to be transferred by increasing IID’s water use efficiency, the project would increase the usable supply of water available to California. While it is common that agricultural inefficiencies produce water that may become available for reuse by others, that is not the case in the IID. Virtually all of IID’s return flows become mixed with highly saline groundwater or enter the Salton Sea and are unavailable for reuse. Therefore when distribution or irrigation losses are reduced, additional water is made available for municipal and agricultural purposes. Implementing a project which improves IID’s water use efficiency effectively creates new water to meet California’s increasing needs. This also lessens the pressure to find sources of water elsewhere in the state that can be transported to Southern California.

II.A.2. Provide benefits to both the exporting and importing districts and their economies. The importing district will receive the benefits of the additional water and an improved reliability of its supply, to accommodate the needs of its growing community and economy. The exporting district would be able maintain its agricultural output and add a conservation industry to benefit the local economy. Environmental mitigation expenditures in the local area would also benefit the local economies.

II.A.3. Keep the Interim Surplus Guidelines in effect to provide additional benefits to California users. This project would satisfy the next milestone for keeping the Interim Surplus Guidelines in effect. Those guidelines would make available to California, Colorado River water in excess of it’s 4.4 MAF entitlement during the next 14 years. This
water would allow coastal Southern California users to minimize water shortages that
would put an extra strain on other California sources.


II.B.1. and II.B.2. See explanations above.

II.B.3. **The benefits of the transfer would far outweigh the few short-term negative environmental impacts of the Sea becoming hyper-saline.** The few unmitigated impacts to the environment that would result from the Salton Sea becoming hyper-saline more quickly than with approach 2, would be far outweighed by the benefits the transfer would provide to the whole state. In addition to those already enumerated, there would be environmental benefits to those other areas which would otherwise be looked to for alternate water supplies for Southern California. When considered together—the new water created, the availability of additional supplies of Colorado River water for the next 14 years, the benefits to the many communities receiving water, and the ability to convey all the water without constructing new conveyance facilities, the benefits are overwhelming and extend to all parts of the state.

II. D. **IID and its farmers, landowners and residents must be protected from claims for damages to people, property, or the environment resulting from good-faith fulfillment of its contractual obligations to conserve and transfer water pursuant to the agreement with SDCWA, the QSA, and related documents.** Proposals to mitigate the impacts of this transfer to the Salton Sea have ranged upwards to more than $1 billion. The amount that claims for damages to persons or property might reach can only be imagined. Testimony has shown that revenue from the transfer may be adequate to cover
costs of conserving the water plus administration plus the amounts IID committed for environmental mitigation. Damage claims, however, could easily exceed the entire value of the farmland within the IID. (RT 547-548).

II.E. That Landowners’ rights to receive water, and opportunity to conserve for transfer not be diminished because of their adherence to policies and regulations of IID and principles of the Water Code requiring efficient water use. Landowners must not be penalized for good-faith adherence to policies and regulations of the IID or provisions of the Water Code requiring efficient water use. (W.C. Sec. 100). The IID has publicly presented a proposal that would penalize the most efficient users of water by granting rights to receive water to local landowners based on their historic use during a recent short period of time. (Exh. Gilbert #4, #5). There was also a proposal that would apportion the opportunity to conserve on the same basis. (Exh. Gilbert #4). This would reward those landowners whose water use has been least efficient and should not be permitted.

II.F. Landowners within IID who depend on their right to receive water must not be injured by having the price IID receives for transferred water decrease to a level below the cost of conserving the water by the methods specified in the Agreement. The Agreement includes a Price Redetermination provision, known as Exhibit E of the Agreement, which provides for the price to be paid by SDCWA to be determined, at least in part, by prices paid for other water transfers. Evidence was presented that this could cause IID’s price to be lowered to prices paid for water conserved by cheaper methods, such as storage and retrieval. (Exh. Gilbert #11). If this happened, IID’s landowners
would be injured by the requirement to conserve by methods that cost more than the
transfer revenues would support. This should not be allowed to be done.

SUMMARY

The conservation and transfer of water similar to what is proposed here could
provide many, far-reaching benefits to people in many parts California for many years.
Unfortunately, this proposed transfer has several fatal flaws in its present form which cause
it to be unsuitable for approval. If and when (and only when) those flaws can be corrected,
the revised transfer should be approved for the benefit of both the exporting and receiving
districts and the entire state of California.

Dated: 11 July 2002

Respectfully submitted,

______________________________________
Larry Gilbert