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December 10, 2002

VIA FACSIMILE/E-MAIL/REGULAR MAIL

Mr. Andy Fecko
Environmental Scientist
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: IID/SDCWA Joint Petition

Dear Mr. Fecko:

Attached please find IID's Comments/Opposition regarding WRO 2002-013. Despite the vote last night, IID is continuing with its Petition process. A copy of this letter and the attached Comments/Opposition have been served on all parties. Thank you.

Very truly yours,

Mark J. Hattam

MJH:hmc
Enclosure
cc: All Parties, w/encl.
(See Service List.)

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11 STATE WATER RESOURCES CONTROL BOARD

12 STATE OF CALIFORNIA

13

14 IMPERIAL IRRIGATION DISTRICT
and SAN DIEGO COUNTY WATER
AUTHORITY,

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16 Petitioners.

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**IMPERIAL IRRIGATION DISTRICT
COMMENTS/OPPOSITION RE ALL
PETITIONS FOR RECONSIDERATION OF
SWRCB ORDER WRO 2002-013**

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1 IMPERIAL IRRIGATION DISTRICT COMMENTS/OPPOSITION REGARDING ALL
2 PETITIONS FOR RECONSIDERATION OF SWRCB ORDER WRO 2002-013
3

4 1. INTRODUCTION

5 Various entities who protested the joint petition by
6 Imperial Irrigation District ("IID") and the San Diego County
7 Water Authority ("SDCWA") have now filed Petitions for
8 Reconsideration in a continued attempt to seek multiple
9 rehearings of the same issues. Despite extensive evidentiary
10 hearings, public workshops, and submittals on the initial Draft
11 Decision, the same old arguments are now trotted out again, this
12 time under the guise of "new facts" or "errors of law." As the
13 SWRCB is well aware, though IID is not 100% in accord with the
14 text of the Board's ultimate Decision in Order WRO 2002-013, that
15 Decision nevertheless represents a reasoned and rational
16 balancing of important interests, and it protects the environment
17 as much as reasonable while still allowing a water transfer to
18 occur.

19 IID provides this brief as a comment upon the pending
20 Petitions for Reconsideration, and as opposition thereto. IID
21 addresses most of the major points raised in the Petitions for
22 Reconsideration, as opposed to providing separate briefing as to
23 each. As to any points not addressed, IID does not, of course,
24 acquiesce to the claims, but simply does not take the time to
25 again address them here since they have been dealt with
26 previously. IID also notes one area regarding mitigation water
27 raised by Imperial County in which a response should be included
28 in the order denying the reconsideration petitions.

1 **2. GENERAL OVERVIEW**

2 Before getting into the particulars of the Petitioners'
3 claims, it is important to keep a proper perspective on what is
4 occurring in this transfer petition process. IID and SDCWA have
5 come before the SWRCB as voluntary petitioners, attempting to
6 produce a water transfer that would help both agency service
7 areas and benefit the State. This transfer is especially timely,
8 because it comes to fruition at a point in time when California
9 is facing imminent threat of water reductions by virtue of junior
10 right holders' long overuse of Colorado River water.

11 To effectively produce the volumes of water needed for the
12 transfer, IID requires financial assistance to implement new
13 system and on-farm conservation measures. SDCWA is willing to
14 provide such assistance and to reap the benefit of the conserved
15 water. However, such conservation would, by its nature, reduce
16 runoff to the Salton Sea.

17 Before addressing the specific assertions of Petitioners
18 regarding the Salton Sea later in this brief, it is imperative
19 that all parties, the SWRCB, the State, and the federal
20 government be reminded that IID has no duty whatsoever to order
21 any set amount of water in any given year. IID's runoff to the
22 Salton Sea is an accidental (and incidental) benefit of
23 agriculture -- nothing more, and nothing less. There are no fish
24 nor fowl in the Salton Sea region which possess a "right" to
25 Colorado River water. Further, even IID itself does not hold its
26 water rights for itself -- it holds them in trust for its
27 landowners, as declared by the U.S. Supreme Court (Bryant v.
28 Yellin, 447 U.S. 352, 371 (1980)).

1 Water conservation is not something that this Board can or
2 should prohibit, whether in the agricultural or urban context.
3 Yet, despite the fact that IID believes it has an absolute right
4 to lower its water use by conservation methods, it has been
5 sensitive to the practical results of its runoff in keeping the
6 Salton Sea alive for a few extra years, and to the political
7 expediency of providing both federal and state governments extra
8 time to decide what to do (if anything) with the Salton Sea. IID
9 and co-petitioner SDCWA (as well as MWD and CVWD) have been
10 willing to address replacement water and fallowing issues, even
11 though they have significant disagreement on many such topics,
12 all to try and help this transfer occur. This Board has also
13 attempted to balance the competing interests in a manner that is
14 fair to all and best for California, which includes mitigation
15 water for the Sea.

16 Yet certain environmental groups and protestants demand
17 more: more time, more money, more studies, more water. This
18 transfer cannot be burdened with any more, or it will collapse of
19 its own weight. That, of course, is exactly what such groups
20 seek: to so overburden this transfer so that it cannot go
21 forward.¹ The SWRCB should not countenance such obstructionism,
22 and should deny all the Petitions for Reconsideration, except for
23 the one item noted below.

24 **3. ANALYSIS OF ASSERTED GROUNDS FOR RECONSIDERATION**

25 Numerous supposed bases for reconsideration are asserted by
26 the protestants, most of which deny the evidence from the

27 _____
28 ¹ Though the burdens placed on the transfer already have resulted
in the "no" vote by IID's Board, the IID Petition continues
forward since negotiations no doubt will continue.

1 hearings, and thus are without merit, with the exception of the
2 first point dealt with below regarding mitigation water.

3 A. The Use of Water To Mitigate Conservation
4 Activity Is A Permitted Use Incidental To
5 IID's Current Uses

6 Imperial County's Petition for Reconsideration states on
7 page 3:

8 The County also believes that under both
9 state and federal law, the Board is
10 authorized and required to determine that the
11 use of Colorado River resources to sustain
12 the Salton Sea and its shoreline is as
13 proposed reasonable and beneficial.

14 Imperial County Petition For Reconsideration, p.3.

15 Assuming that the County means that the use of water to
16 mitigate conservation activity as required by the Board is a
17 reasonable and beneficial use by IID under its existing
18 authorized use, *IID concurs 100% and asks that the SWRCB, in its*
19 *order denying the petitions for reconsideration, clearly state*
20 *that the use of water to mitigate conservation-activity impacts*
21 *on the Salton Sea as required by the Board is considered part of*
22 *IID's present authorized use; no change in use approval is*
23 *necessary; and such use is reasonable and beneficial. Why is*
24 *this so vital? Because the Bureau of Reclamation is now telling*
25 *IID that it cannot use its water as directed here; the Bureau*
26 *asserts that any use to mitigate Salton Sea impacts is non-*
27 *permissible. IID strongly disagrees with that position, and the*
28 *SWRCB should as well -- otherwise, this transfer and any others*

1 like it will never occur. The use of water to mitigate
2 conservation impacts is an incidental use to the permitted use.

3 The federal components of the Law of the River only displace
4 state water law to the extent inconsistent with the Boulder
5 Canyon Project Act ("Project Act"). The Order acknowledges this
6 principle, and also correctly acknowledges the extensive state
7 law aspects of IID's present-perfected rights. But, as to the
8 question of whether the use of Colorado River water to mitigate
9 conservation and transfer impacts is allowable, the Draft fails
10 to recognize that such use is **not** inconsistent with the Project
11 Act.

12 Water Code § 1011 recognizes water conservation activities
13 involving a reduction in irrigation use as the legal equivalent
14 of reasonably and beneficially using water for irrigation
15 purposes; "any **cessation** or **reduction** in the use of the
16 appropriated water shall be deemed equivalent to a reasonable
17 beneficial **use** of water." (Emphasis added.) Mitigation of
18 environmental impacts resulting from conservation activities is
19 merely a component of the conservation project itself, not a
20 separate and direct use of water under the water right. Absent
21 the conservation project, no mitigation use would occur. Thus,
22 when IID lined canals pursuant to its 1988 agreement with MWD
23 (IID Exh. 15), it mitigated any loss of habitat by replanting
24 replacement habitat and irrigating that habitat. This was not
25 the exercise of IID's water right for wildlife purposes, but
26 merely the continued irrigation use associated with the
27 conservation projects. Recently-amended Water Code section 1013
28 makes this point even more clear with respect to conservation

1 activities involving fallowing. New section 1013(b) provides
2 that, "'land fallowing conservation measures' means the
3 generation of water to be made available for transfer or for
4 environmental mitigation purposes by fallowing"

5 Thus, the order denying reconsideration petitions should
6 include language that IID's voluntary use of Colorado River water
7 to mitigate the impacts of voluntary conservation activity is a
8 use that is only part of the "conservation use" itself, or an
9 incidental use in connection with the conservation activity.²

10 The Project Act expressly defers to state law to define the
11 "use" of water: "Nothing herein shall be construed as
12 interfering with such rights as the States had on December 21,
13 1928, either to the water within their borders or to adopt such
14 policies and enact such laws as they deem necessary with respect
15 to the appropriation, control and use of waters within their
16 borders, except as modified by the Colorado River Compact or
17 other interstate agreement." 43 U.S.C. § 617g. Federal law
18 confirms a state's right to define the parameters of the
19 permissible use of Colorado River water. The Arizona legislature
20 defined artificial groundwater recharge as a legitimate use of
21 water within the state of Arizona. Central Arizona Irr. and
22 Drainage Dist. ("CAIDD") v. Lujan (D. Az. 1991) 764 F.Supp. 582,
23 592. The federal court concluded that such recharge was within
24 the "municipal and industrial" use authorized by the federal
25 Central Arizona Project contract with the Secretary:

26
27 ² Re incidental use, see Rundale v. The Delaware and Rariton
28 Canal Co. (1852) 55 U.S. 80, 93; Peacock v. Payne (1934)
1 Cal. 2d 104, 109; and SWRCB Order WR95-9 (1995) WL4186673 at
p. 21.

1 The allocation and preferences given to CAP
2 water seems to be within the exclusive
3 province of the Secretary of the Interior;
4 once the preferences are already established,
5 the possible uses of that water are governed
6 by state law. Consequently, the Secretary of
7 the Interior is authorized to allocate CAP
8 water to M&I users. Then M&I users may use
9 their water for any use authorized by Arizona
10 law, including recharge.

11 Id. at 591.

12 Thus, because California law defines the conservation of
13 irrigation water as the continued use of water by the conserving
14 water right holder pursuant to Water Code sections 1011, 1012 and
15 1017 (when transferred), and the use of water to mitigate the
16 conservation activity is either part and parcel of the
17 conservation use or a mere incident thereto, there is no
18 relevance to the question whether the Law of the River would
19 permit or preclude the direct use of Colorado River water for a
20 Water Code section 1707 purpose. Conservation activities and
21 incidental use as defined under state law are not inconsistent
22 with the expressly-permissible irrigation use of all of IID's
23 water right.

24 In summary, the County of Imperial's request for a
25 determination in the Order that use of mitigation water for the
26 Salton Sea is an IID permitted use that is reasonable and
27 beneficial is correct. IID suggests that the following language
28 be inserted where appropriate in the section on such mitigation
29 water:

30 If IID meets its obligation to supply
31 replacement water to the Salton Sea as

1 mitigation for conservation activity during
2 the 15-year period required herein by use of
3 its Colorado River entitlements which have
4 been permitted by this State, then such use
5 is deemed within the scope of its existing
6 permitted use and is incidental thereto, and
7 it is also deemed reasonable and beneficial.

8 Such language will clarify this issue, and will make clear
9 that under California law such mitigation does not put the water
10 rights of a transferring entity at risk.

11 **B. Protestants Falsely Assert That California**
12 **Faces No Imminent Water Shortage, And That**
13 **Findings Of Overriding Considerations Are**
14 **Thus Not Merited**

15 The combined environmental group brief (Audubon, Defenders
16 of Wildlife, Planning and Conservation League, Sierra Club, and
17 National Wildlife Federation; collectively the "Audubon Brief")
18 makes the argument (pp.12-15) that the SWRCB based its finding
19 that California is facing a water shortage (without the transfer)
20 on no substantial evidence, and that the Interim Surplus
21 Guidelines do not require QSA execution. This position is not
22 only nonsensical, it ignores reams of evidence presented to the
23 SWRCB on this issue.³ In this section, we summarize some of the

24 _____
25 ³ The "substantial evidence" standard is not one of conclusive
26 proof, but simply enough credible evidence that a reasoned
27 decision can be based thereon. See, for example, California
28 Administrative Code, Title 14, Section 15384(a), which states
the following: "Substantial evidence as used in these
guidelines means enough relevant information and reasonable
inferences from this information that a fair argument can be
made to support a conclusion, even though other conclusions
might also be reached." The SWRCB noted in Order No. WQ 92-14,

1 key evidence, showing that the Audubon Brief is completely in
2 error.

3 1. The Evidence Is Dispositive: California
4 Is Facing An Imminent Water Cutback

5 The SWRCB heard testimony by numerous witnesses regarding
6 the extensive benefits of this transfer, including the United
7 States facilitating a "soft landing" for California reductions
8 from 5.2 to 4.4 million AFY over 15 years by preserving the
9 availability of "Interim Surplus" water.

10 Absent the Transfer and QSA, and the ensuing Interim Surplus
11 Guidelines promulgated by the Bureau of Reclamation ("BOR"),
12 California must immediately limit its Colorado River water use to
13 4.4 million AFY. The evidence presented was overwhelming as to
14 the problems facing California in such event:

- 15 (a) Steve MaCaulay, Chief Deputy Director at DWR,
16 testified that the IID-SDCWA Transfer is a key
17 component of the California Water Plan.
18 Transcript, April 23, 2002, p. 112(22)-(24). He
19 also testified that if the QSA is not signed and
20 going forward by the end of this year, California
21 will be limited to 4.4 million AFY, "resulting in
22 a very significant drop of [water] in [sic] almost
23 overnight in the amount of water that California
24 can take from the river." Id. at p. 114(18)-(20).
25 Additionally, Mr. MaCaulay noted that such a
26

27 1992 Cal.Env. LEXIS 20, that: "substantial evidence does not
28 mean proof beyond a doubt or even a preponderance of evidence.
Substantial evidence is evidence upon which a reasoned decision
may be based." Id. at 6.

1 reduction would "immediately put more pressure on
2 the [San Francisco Bay] Delta, [requiring] more
3 deliveries from the State Water Project." Id. at
4 pp. 115(23)-116(1). Mr. MaCaulay also testified
5 that failure to implement the California Plan,
6 which includes the Transfer and Settlement, would
7 have catastrophic consequences for California and
8 for the CalFed process involving habitat
9 enhancement in the San Francisco Bay Delta.

10 Id. at p. 116(14)-(23);

11 (b) Dennis Underwood, an MWD Vice President, testified
12 in a similar vein, pointing out that the
13 implementation of the QSA was a key component of
14 the California Plan (Transcript, April 23, 2002,
15 p. 121(11)-(17), and that the Transfer and
16 Settlement are absolutely critical for California.
17 Id. at pp. 130(9)-131(6);

18 (c) Tom Levy, General Manager of CVWD, reiterated the
19 same points made by Mr. Underwood and
20 Mr. MaCaulay: the QSA is essential for California
21 (Transcript, April 23, 2002, p. 141(17)-(21) and
22 pp. 142(20)-143(1). He also noted that SWRCB
23 approval of the Transfer and Settlement was a
24 condition precedent to implementation of the QSA.
25 Id. at p. 143(10)-(18). Mr. Levy also pointed out
26 another reason the Transfer and Settlement were
27 vital for CVWD: CVWD has a serious groundwater
28 overdraft problem which is alleviated by the

1 Transfer and Settlement. Id. at pp. 140(23)-
2 141(10);

3 (d) Dr. Barton Thompson, a professor at Stanford
4 University and an expert on water resource
5 matters, testified that the Transfer and
6 Settlement were vital for California for three
7 reasons: (a) they help Southern California meet
8 its water needs and thus remove pressure on the
9 San Francisco Bay Delta; (b) they resolve numerous
10 longstanding divisive water disputes; and (c) they
11 are important models for further long-term water
12 transfers in California. Transcript, April 24,
13 2002, pp. 363(19)-366(24).

14 For the Audubon Brief to claim, in the face of such
15 testimony from numerous witnesses, that the SWRCB is indulging in
16 "speculation" without "substantial evidence" is completely
17 unfounded.

18 2. The Bureau Of Reclamation's Guidelines
19 Clearly State The Ramifications To
20 California If The QSA And Its
21 Constituent Transfer(s) Are Not In Place
22 By January 1, 2003

23 The Audubon Brief also asserts that the Interim Guidelines
24 ("Guidelines") promulgated by the BOR do not necessitate a
25 cutback for California, and that the QSA is not required under
26 those Guidelines. Nothing could be further from the truth, since
27 the BOR itself issued a clarification explaining that in fact its
28

1 Guidelines do in fact require implementation of the QSA by the
2 end of this year.

3 The BOR has answered allegations such as those raised by
4 Audubon regarding the Guidelines in the BOR's Notice ("Notice")
5 in the Federal Register of June 19, 2002. Federal
6 Register/Vol. 67, No. 118, June 19, 2002/Notices, pp. 41733-
7 41735.

8 In the Notice, the BOR makes the following points clear:

- 9 (a) Sections 5(B) and 5(C) of the Guidelines
10 "established independent conditions for
11 performance of certain actions by entities in
12 California" Id. at 41733 (emphasis
13 added);
- 14 (b) Section 5(B) addresses the QSA, and states the
15 requirement that it be signed by December 31,
16 2002. The Notice says that the "QSA is a critical
17 agreement among the California parties to reduce
18 California's reliance on surplus water from the
19 Colorado River." Id. at 41734. It then points
20 out that some commentators [such as Audubon here]
21 have asserted that failure to sign the QSA by the
22 deadline specified will not affect surplus
23 determinations for 2003 and/or that the Guidelines
24 would be terminated if the QSA were not signed by
25 the end of this year. However, the BOR make clear
26 in the Notice that such contentions are incorrect:
27 "Such suggestions are inconsistent with the plain
28 language of the Guidelines as adopted." Id. at

1 41734. In fact, the BOR states that the effect of
2 the QSA not being finalized by the end of this
3 year will in fact be the suspension of the "soft
4 landing" created by the special surplus water
5 currently being made available by the Interim
6 Surplus Guidelines, though the Guidelines as a
7 whole will not be. Id. at 41734; and

8 (c) Section 5(C) of the Guidelines is an independent
9 requirement that certain "Benchmark Quantities"
10 for California agricultural use must be reached in
11 specified three-year intervals. Id. at 41734.
12 Just as with Section 5(B), if this independent
13 condition is not met, the "soft landing" for
14 California is at risk: "As with the requirements
15 in section 5(B), section 5(C) also establishes the
16 implications for surplus determinations in the
17 event that the Benchmark quantity conditions for
18 performance are not met." Id. at 41734.

19 As stated in the Notice, the "soft landing" provisions in
20 Sections 2(B)(1) and 2(B)(2) of the Guidelines will be suspended
21 if either 5(B) (QSA signing) or 5(C) (Benchmark Quantities) are
22 not met. The BOR states that the QSA signing and the Benchmark
23 Quantities are each independent requirements, and thus a failure
24 of either negates the efficacy of Sections 2(B)(1) and 2(B)(2) of
25 the Guidelines.

26 The Audubon Brief's allegations of "no substantial evidence"
27 are thus incorrect.

28

1 3. Given The Above Facts, Findings Of
2 Overriding Consideration Are Proper

3 Because of the above-noted import of this transfer, the QSA,
4 and all the associated agreements, it is imperative that the
5 SWRCB's findings of overriding consideration be left undisturbed.
6 The water situation in California is in fact critical, and
7 abundant evidence was presented to the SWRCB of this fact.

8 C. The Protestants Incorrectly Assert That IID
9 And SDCWA Should Face This Entire Process
10 Again In Less Than 15 Years, That 15 years Is
11 Not Enough Time To "Save The Sea", And That
12 The Baseline Analysis Violates CEQA

13 Numerous parties ask this Board to either directly, or
14 indirectly, force IID and SDCWA to incur massive costs and effort
15 in getting this transfer program underway, only to be subject to
16 a "Let's look at it again in 13+ years and if we don't like it we
17 will then stop it" re-review. The main supposed bases for this
18 proposal are that perhaps the Salton Sea will still not yet be
19 "saved," and that the baseline used by the EIR is flawed.
20 However, the Audubon Brief itself states what every participant
21 in the hearing knows will happen to the Sea, absent massive
22 governmental intervention:

23 [S]alinity in the Sea will increase over time,
24 because the Sea is terminal.

25 Audubon Brief, p.6.

26 Simply put, IID will not go forward with the proposed
27 transfer if it is subject to huge exposure for stranded
28 conservation costs. For IID to do so would be irresponsible, and

1 neither the SWRCB, the State, nor the federal government should
 2 expect or demand such impropriety. If the SWRCB were to cater to
 3 the environmental lobby and require additional later CEQA review,
 4 with the option of nixing the entire transfer 13-15 years from
 5 now, IID would be unable to commit to the transfer. Though IID
 6 has bent to extraordinary political pressure and considered
 7 fallowing to a certain limited extent, it would also be
 8 implementing substantial conservation measures in that 15-year
 9 period, and the long-term revenue stream is necessary to pay the
 10 costs. The SWRCB is well aware, both from this proceeding and
 11 prior proceedings, that such conservation is expensive and
 12 requires substantial financial payments over the long term of the
 13 transfer. For IID to undertake such conservation spending only
 14 to have there be a risk that 15 years from now there will be
 15 further proceedings which could cancel the transfer would be an
 16 enormous gamble that IID and its ratepayers should not, and will
 17 not, take.

18 The approach taken by the SWRCB, in contrast, which gives
 19 the Sea 15 years of 100% replacement water, and after that makes
 20 overriding consideration determinations, is more than sufficient.
 21 The evidence in the record is quite substantial that the Sea is
 22 on the verge of collapse. Here is a table that lists just some
 23 of the evidence presented at the hearing:

<u>The EIR/EIS Model Prediction</u>	<u>What The Environmentalists Themselves Have Said</u>
1. "Available evidence indicates that Corvina reproduction could fail at any time, and, at a salinity level of 50 g/L, it will fail along	1. Fishery collapse under current trends is predicted between 2015 and 2035 . Salton Sea Authority Exhibit 18, p.6, "Current Salinity" slide from

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The EIR/EIS Model Prediction

with that of the croaker and sargo, leaving tilapia as the only sport-fish species. . . By 60 g/L, the salinity tolerance of tilapia reproduction will have been exceeded:" (Page 3.2-147 of IID Exh. 55 and incorporated in IID Final EIR/EIS at p. 1-1.) With no project, "the salinity of the Salton Sea would exceed the level at which **sargo**, gulf **croaker**, and **tilapia** could complete their life cycles . . . in **2008**, **2015**, and **2023**, **respectively**. Under the Proposed Project, the thresholds for sargo, gulf croaker, and tilapia would be exceeded **1**, **5**, and **11 years earlier** than under the Baseline (in 2007, 2010, and 2012, respectively)." (Page 3.2-149 of IID Exh. 55 and incorporated in IID Exh. 93 Final EIR/EIS at p. 1-1.)

What The Environmentalists Themselves Have Said

January 2002. See Transcript, May 14, 2002, p. 1623(13)-(22) (emphasis added).

"Proposed water transfers may reduce the time needed for implementing salinity controls from 15-30 years to 5-7 years." PCL Exh. 1, p. 22, from March 2002. (Emphasis added.)

"[A]t current rates of salt loading of 4 million tons of salts per year, the Salton Sea will be unsuitable for fish and other wildlife in 15 years." IID Exh. 72, p. 1, written by Dr. Timothy Krantz in 1999 (Transcript, May 14, 2002, p. 1640(14)-(22). (Emphasis added.)

1 The "status quo" of the Salton Sea is that of a sick and
2 dying habitat:

3 The Salton Sea, California's largest body of
4 water, is in trouble. . . . The Salton Sea
5 has become a fatal attraction as a result of
6 its polluted and saline water.

7 . . .

8 [D]ue to its deteriorating water quality, the
9 number of visitors to the Sea over the past
10 30 years has understandably declined.

11 . . .

12 [T]he Salton Sea may never be swimmable again
13 due to the reality that significant amounts
14 of wastewater continue to flow into it.

15 Defenders of Wildlife Salton Sea Position Statement, IID Exh. 79,
16 pp. 1 and 4.

17 By the foregoing evidentiary recitations, IID does not mean
18 to imply that nothing should be done about the Salton Sea. In
19 fact, IID is a member of the Salton Sea Authority, and it
20 supports outside intervention to preserve the Sea. However, if
21 the federal and/or state governments cannot make a decision in 15
22 years, then there is nothing to indicate that they would in 20
23 years, or 30 years, or 50 years. To ask IID and SDCWA to go
24 forward with a transfer, with large cost exposure, only to be
25 subject to the "plug being pulled" by new environmental review
26 and hearings is unrealistic. The SWRCB's 15-year "window of
27 opportunity" for the Sea is more than fair. In that time the
28 citizens of this State and this Nation must decide, via the
democratic process, if they want to fund the rescue of the Sea.
If they decide not to, it will not be because this Board has

1 provided too little time, but because the voters and their
2 elected representatives do not want to spend the money to do so.

3 Finally, in regards to the criticisms of the baseline for
4 the Salton Sea, they are unfounded. The Final EIR's sensitivity
5 studies show that even with varying assumptions, there is no
6 dramatic shift in the baseline.

7 Additionally, the argument that the baseline must be a
8 "snapshot" is simply in error. In a simple project, such as
9 construction of a commercial building, the Baseline normally
10 equals the existing conditions as of a fixed date (the date of
11 publication of the NOP) on a "snapshot" basis. However, the
12 proposed project at issue is complex, with built-in flexibility,
13 and will be implemented for up to 75 years. The actual physical
14 conditions at the Salton Sea that may be affected require a more
15 refined and complex approach to identify impacts over the 75-year
16 term. In particular, existing conditions at the Salton Sea
17 include identifiable trends which will affect Sea salinity and
18 elevation over the 75-year period. A projected Baseline allows
19 future changes caused by existing conditions to be distinguished
20 from project effects. This distinction is important because CEQA
21 does not require IID to mitigate effects which are not caused by
22 the project. Section 15125(a) of the Guidelines does not mandate
23 that a frozen snapshot of existing conditions be used. As noted
24 in an authoritative text on CEQA compliance:

25 Both the Guidelines and following Discussion
26 provide that physical conditions at the time
27 of the [NOP] normally constitute the baseline
28 for determining impacts, but a lead agency
may determine that another baseline is more
appropriate, either for overall evaluation of
a project's impacts or for evaluation of a
particular project impact. For example, if

1 it is known that a certain surrounding
2 environmental condition will either improve
3 or degrade by the time the project is
4 implemented, the lead agency may have a basis
5 for selecting a different baseline for
6 evaluating environmental impacts related to
7 that condition. If the lead agency does
8 elect a different baseline, the lead agency
9 should be careful to explain in the EIR why a
10 different baseline has been selected and to
11 summarize the evidence or determination
12 surrounding the selection of a different
13 baseline.⁴

8 The existing conditions of the Salton Sea reflect a
9 historical trend of increasing salinity that will continue into
10 the future, absent a major intervention aimed at restoration.
11 The trend evidences both declining water quality and habitat
12 values. This significant trend was recognized in the 2001 Draft
13 EIS/EIR for the Salton Sea Restoration Project (SS Restoration
14 Draft EIR/EIS, IID Exh. 69), which also utilized an earlier
15 version of the same Salton Sea Accounting Model used for the
16 Draft and Final EIR/EIS. As noted in that SS Restoration Draft
17 EIS/EIR (IID Exh. 69):

18 The Salton Sea ecosystem is under stress from
19 increasing salinity, nutrient loading, oxygen
20 depletion, and temperature fluctuations that
21 may be threatening the reproductive ability
22 of some biota, particularly sportfish
23 species, and also causing additional
24 ecosystem health problems. There are
25 indications that the deteriorating
26 environmental conditions may be contributing
27 to the prominence of avian disease at the
28 Sea. Without restoration, the ecosystem at
the Sea will continue to deteriorate.

25 Executive Summary, page ES-1.

26 _____
27 ⁴ Kostka, Stephen L. and Michael H. Zischke, 2002, California
28 Environmental Quality Act (CEQA), § 12.16, updated January
2002, p. 489. See also, Remy, Michael H. et al., Guide to the
California Environmental Quality Act (CEQA), 10th ed., 1999,
p. 165.

1 It is appropriate to reflect this trend in the Baseline
2 because it is an element of existing conditions, and it is also
3 appropriate to differentiate adverse changes in conditions at the
4 Sea resulting from the ongoing trend from changes caused by the
5 Transfer and Settlement. The Final EIR utilizes a reasonable
6 method of presenting the Baseline and identifying the project
7 impacts, and is the result of substantial time, effort and
8 expense. It is well within the discretion of the IID as the CEQA
9 Lead Agency to adopt this analytical method.

10 In Save Our Peninsula Committee v. Monterey County Board of
11 Supervisors (2001) 87 Cal.App.4th 99, the Court recognized a lead
12 agency's discretion to establish an appropriate baseline:

13 Because the chief purpose of the EIR is to
14 provide detailed information regarding the
15 significant environmental effects of the
16 proposed project on the "physical conditions
17 which exist within the area," it follows that
18 the existing conditions must be determined, to
19 the extent possible, in the EIR itself. . . .
20 [Citations] . . . On the other hand, the
21 agency has the discretion to resolve factual
22 issues and to make policy decisions. If the
23 determination of a baseline condition requires
24 choosing between conflicting expert opinions
25 or differing methodologies, it is the function
26 of the agency to make those choices based on
27 all of the evidence.

28 Id. at 120.

 The Court in Save Our Peninsula also rejected the theory
that the baseline must be rigidly determined as of a specific
date, the date when the NOP is filed:

 . . . [T]he date for establishing baseline
cannot be a rigid one. Environmental
conditions may vary from year to year and in
some cases it is necessary to consider
conditions over a range of time periods. In
some cases, conditions closer to the date the
project is approved are more relevant to a

1 determination whether the project's impacts
2 will be significant.

3 Id. at 125.

4 Citing County of Amador v. El Dorado County Water Agency
5 (1999), 76 Cal.App.4th 931, 955, and CEQA Guidelines
6 Section 15151, the Save Our Peninsula Court cautioned that an
7 adequate baseline description requires more than raw data; it
8 also requires sufficient information and analysis to enable the
9 decision-makers to make intelligent choices.⁵

10 In light of the inherent variability in the hydrological
11 conditions at the Salton Sea, which is verified by historical
12 records, using a "snapshot" Baseline which focuses on the
13 physical conditions on a specific date (or other limited point in
14 time) is not an accurate or reasonable method of reflecting
15 existing conditions. In addition, a "snapshot" approach does not
16 reflect predictable future changes caused by existing trends over
17 the project term. Following the direction allowed by applicable
18 law, the Final EIR provides a reasoned methodology and analysis
19 to allow the Lead Agencies to adopt the described Baseline and to
20 identify and assess project impacts in a meaningful way.

21 **D. The Continued Attempt To Claim That**
22 **Irrigation Runoff To The Salton Sea Creates A**
23 **"Public Trust" Resource Is In Error**

24 Various claims are again raised in the Petitions for
25 Reconsideration that the Salton Sea is a "public trust" and thus
26 the SWRCB should mandate continued inflows (and thus no water
27 conservation) by IID.

28 _____
⁵ Id. 124.

1 The SWRCB's Order does not make an "error of law" in stating
2 that § 1736 of the Water Code "effectively" codifies the concerns
3 that would be inherent in a public trust analysis. A fair
4 reading of the Order is not that § 1736 and the Public Trust
5 Doctrine are 100% co-extensive, as the Audubon Brief suggests is
6 being said, but that "effectively" the same concerns are inherent
7 in both the statute and the Public Trust Doctrine. This is
8 certainly correct, since just as with the statute's
9 "unreasonableness" standard, the Public Trust Doctrine itself
10 requires balancing of the public's interests in certain bodies of
11 water with the need for a supposed action that might affect it.
12 For example, the SWRCB may approve an appropriator's application
13 that will have some adverse impact on public trust interests
14 where the SWRCB has given due consideration to the impacts but
15 found that the public interest in approving the application
16 outweighs the expected injury. National Audubon Society v.
17 Superior Court (1983) 33 Cal.3d 419, 446. See also State of
18 California v. Riverside County Superior Court (2000)
19 78 Cal.App.4th 1019, 1031, n.18: "For example, the state's
20 interest in agriculture may require that water rights be awarded
21 with respect to a navigable waterway, even though the result will
22 be deleterious to such public trust uses in the waterway as
23 fishing, commerce, or even recreation; however, as the court
24 explains, the decision should be made after considering all
25 factors."

26 Further, as has been held by this very Board, the Public
27 Trust Doctrine does not mandate continued agricultural inflows to
28 the Salton Sea. In its Order WR 84-12 (1984 Cal.Env. LEXIS 31),

1 the SWRCB ruled that IID cannot be compelled by the Public Trust
2 Doctrine to drain irrigation water into the Salton Sea:

3 Upon its admission to the Union in 1850,
4 California acquired title as trustee to
5 navigable waterways and underlying
6 lands No such title or public trust
7 easement was acquired to the property
8 underlying the present Salton Sea since the
9 Sea was not created until 1905 [by accidental
10 diversion of the Colorado River]. Therefore,
11 regardless of the extent to which the public
12 trust doctrine may or may not apply to an
13 artificial body of water, it is apparent that
14 the doctrine does not justify continued
15 inundation of property to which no public
16 trust easement attaches.

17 Order WR 84-12, p. 12, fn.1.

18 This prior ruling of the SWRCB is in accord with the overall
19 law in California on the Public Trust Doctrine. See Colberg,
20 Inc. v. State of California (1967) 67 Cal.2d 408, 416; National
21 Audubon Society v. Superior Court of Alpine County (1983)
22 33 Cal.3d 419, 433.

23 Thus, if the SWRCB chooses to address the Public Trust
24 issue, as sought by the Audubon Brief (though it need not do so),
25 it should rule consistently with its earlier decision in this
26 very matter re IID's use: that the Public Trust Doctrine does
27 not require continued agricultural runoff.⁶

28 _____
⁶ Two points worth are also noting in the "public trust" context:
(1) certain environmentalists recently have been asserting
before State officials that the SWRCB has now "changed its
mind" regarding the Public Trust Doctrine and the Salton Sea.
To clarify that this Order does not somehow detract from the
above-quoted decision by the SWRCB, it may be helpful to add in
the Public Trust section that, "Nothing herein is intended to
negate prior SWRCB statements regarding the Public Trust
Doctrine and the Salton Sea."; (2) the Audubon Brief claims
that IID "continues to appropriate the Salton Sea's source
waters under the State's authority." This statement is false
on two counts. First, the Colorado River is no more the
"Salton Sea's source waters" than the arctic ice cap is the

1 **E. The Air Mitigation Issues Are Fully Resolved**

2 A number of complaints are raised by petitioners along the
3 lines of: (a) local agencies still have jurisdiction; (b) local
4 agencies need funding to monitor transfer effects; and (c) more
5 needs to be done re potential air pollution. Each argument is in
6 error.

7 First, there is nothing in the Board's Order which indicates
8 it has deprived any agency of jurisdiction. That is self-
9 evident. The Order need not recite each agency that it has not
10 deprived of jurisdiction. Rather, the Order properly states what
11 affirmative actions must occur to satisfy this Board for transfer
12 approval -- nothing more and nothing less.

13 Second, re funding, certain petitioners cite Health & Safety
14 Code § 42316 and ask this Board to order IID and/or SDCWA to fund
15 their agency. Imperial County Air Pollution Control District
16 Brief, pp.4-5. However, § 42316 is a legislative decision, via
17 statute, to allow certain measures to be imposed by the Great
18 Basin Air Pollution Control District on the City of Los Angeles.
19 It is not a funding measure for the Great Basin Air Pollution
20 Control District. Further, the statute is a proper exercise of
21 the Legislature's power. For this Board to order that IID and/or
22

23 _____
24 "source" of the Great Lakes. If one wants to deal in geologic
25 time, then many waters are interconnected and are the "source"
26 of other bodies of water. The far-fetched historic speculation
27 that the Audubon Brief and its authors ask this Board to embark
28 upon is extreme, and should not be accepted. Second, it is a
half-truth to say that IID appropriates water under the
"State's authority," as asserted. Though IID does in fact have
state permits, it also has federal water rights, and it really
appropriates water in trust for its landowners, as noted above.
Such water rights are held in trust for such particular persons
and lands, and not for the State generally.

1 SDCWA fund any or all of the work of other agencies who wish to
2 monitor this transfer would be inappropriate.

3 Finally, the Board has already made extensive allowance for
4 mitigation of any air pollution problems. No more is necessary.

5 **F. There Is No Application Of Water Code**

6 **§ 1810 Here**

7 Imperial County asserts in its brief that Water Code § 1810
8 mandates county of origin analysis. Though IID does believe that
9 the SWRCB should look at economic factors for other reasons (such
10 as whether the costs of conservation are too high in a reasonable
11 use context, and whether any fallowing requirement would harm the
12 County), § 1810 itself has no bearing here. That portion of the
13 Water Code deals with "wheeling" of water through pipes that have
14 certain unused capacities. Here, SDCWA and MWD have entered into
15 their own transfer agreement, which is not a § 1810 transaction.

16 **4. CONCLUSION**

17 In summary, except for the clarifying language regarding
18 mitigation water, the Petitions for Reconsideration should be
19 denied.

20

21 Dated: December 10, 2002

IMPERIAL IRRIGATION DISTRICT

22

23

By: _____

David L. Osias, Attorney

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25

26

27

28

Division of Water Rights
State Water Resources Control Board
PO Box 2000
Sacramento, CA 95812-2000
Attn: Andy Fecko

Re: "IID/SDCWA Petition"

CERTIFICATE OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 501 West Broadway, Ninth Floor, San Diego, California 92101-3577.

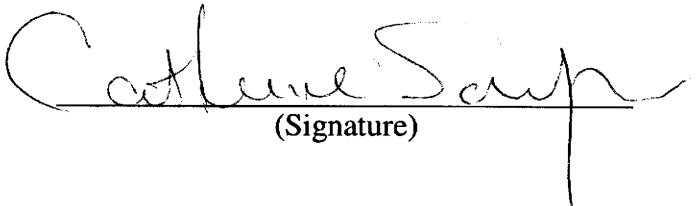
On December 10, 2002, I served the following:

**Imperial Irrigation District Comments/Opposition re All Petitions for
Reconsideration of SWRCB Order WRO 2002-013**

on the "List of Parties To Exchange Information" by electronic transmission (where e-mail address is indicated) or via overnight delivery.

Executed on December 10, 2002, at San Diego, California.

Catherine A. Schiaffo
(Type or print name)



(Signature)

**LIST OF PARTIES TO EXCHANGE INFORMATION
Imperial Irrigation District/San Diego County Water Authority
Water Transfer Hearing**

(Note: the parties whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the Hearing Notice.)

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