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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
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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.

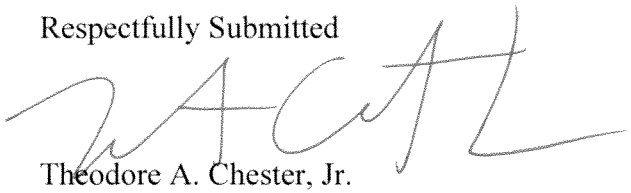
(c) The 2002 order concluded that an upstream change of point of diversion did not injure certain legal users. The petition discusses certain other aspects of the "no injury" rule. The questions here are whether the Imperial Valley irrigators are legal users and whether any changes or transfers cause 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



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