## IV. SWRCB Jurisdiction

The SWRCB has jurisdiction over this Petition by virtue of California statutes and by virtue of its retained jurisdiction over the IID's conservation activities under both SWRCB Decision 1600 and Order WR 88-20.

This Petition is the direct result of the SWRCB's previous instructions to the IID to seek opportunities to conserve water and to finance such conservation with funds from urban water transferees, if possible. In SWRCB Decision 1600 and Order 88-20, the SWRCB specified measures the IID was to take to develop a meaningful water conservation plan, including implementing conservation opportunities which could be funded by urban water agencies such as the Authority. The SWRCB expressly retained jurisdiction over the IID to monitor compliance.

SWRCB Decision 1600 was adopted by the SWRCB on June 21, 1984[9]. At the conclusion of a six-day evidentiary hearing, the SWRCB found that, "the Imperial Irrigation District must take several actions to improve its water conservation program, as specified in this decision." Decision 1600, p. 2.

The SWRCB in Decision 1600 described why it should compel the IID to improve its water conservation efforts. Specifically, it noted that California is limited to 4.4 million acre-feet of water from the Colorado River when surplus is not available. Id. p. 12. Under such circumstances, the MWD would be limited to 550,000 AF, less than one-half of its historical diversions[10]. Id. at p. 12. Thus, "A transfer of conserved water could partially satisfy future Southern California needs." Id. at p. 56. In light of the potential benefits from the transfer of IID conserved water, and after reviewing applicable provisions of the California Constitution and Water Code, the SWRCB chose to exercise and retain its jurisdiction over IID conservation programs.

In fact, Water Code Section 1011 expressly authorizes the sale, lease, exchange or other transfer of water saved through conservation efforts. Under appropriate circumstances, the maximum beneficial use provision of Article X, Section 2 of the California Constitution may mandate the transfer of surplus water to water-short areas.

Id. at pp. 17-18.

The Board reserves jurisdiction in this matter for the purposes of reviewing the adequacy of the required plans and the district actions, to monitor the progress of the district in carrying out the various elements of the water conservation plan, and to take such other action as may be appropriate. The Board will continue to reserve jurisdiction until it determines that the requirements of Article X, Section 2 of the California Constitution are being met.

Id. at pp. 70-71.

In 1988, four years after SWRCB Decision 1600, the SWRCB conducted further hearings to review the status of the IID's water conservation program and plans. The SWRCB thereafter issued Order WR 88-20[11] . A central element of Order 88-20 is the prospect for a conserved water transfer by the IID. See pp. 11-13. Evidence was presented by the State Water Contractors showing that a transfer of water from the IID "could increase the supplies available to other State Water Project (SWP) water users . . . ." Id. at p. 12. The SWRCB found that California would benefit from a conserved water transfer by the IID:

The evidence presented clearly establishes that California water users have a need for substantial additional water supplies and that additional water conservation in IID presents a feasible means of meeting a portion of that demand. . . . The evidence presented at the Board hearing confirms that a transfer of this quantity of water [250,000 acre feet per year] would assist in meeting the identified future demands of California water users.

Id. at p. 14.

However, the SWRCB also found that one of the main problems for IID was funding conservation that would allow such transfers:

The inability of the district to provide or secure adequate funding for its proposed water conservation program, however, has delayed widespread implementation of specified measures.

Id. at p. 18.

One of the likely sources of funding for IID conservation measures identified by the SWRCB was urban areas in need of water, such as the Southern California region. Id. at p. 21. The SWRCB further recognized that the California Legislature had gone "on record" in "favor of promoting voluntary transfers of water or water rights as a means of meeting the State's growing water needs." Id. at p. 39. Specifically, the SWRCB noted that Water Code §§ 1011 and 1012 govern conservation and transfers of water from the IID:

In summary, the California Water Code not only authorizes the voluntary transfer of water made available through implementation of conservation measures, but it actively encourages such transfers and protects the underlying water right of the agency which conserves the water.

Id. at p. 39.

The SWRCB found that the "need for substantial additional water supplies in California and the prospects for substantial water conservation in the IID have been well established." Id. at p. 44. The SWRCB also found that "conservation of 367,900 acre-feet per annum … is a reasonable long-term goal which will assist in meeting future water demands." Id.

As a result of the above determinations, the IID was required to complete "an executed agreement with a separate entity willing to finance water conservation measures in Imperial Irrigation District," or take other measures which would achieve equally beneficial results. Id. at p. 45. The SWRCB retained "jurisdiction to review implementation of the initial plan and future water conservation measures." Id. at p. 44 (emphasis added).

Subsequent to Order 88-20, on March 28, 1989, in a letter titled, "Compliance with SWRCB Order WR 88-20," the SWRCB found the IID to be "in substantial compliance with... Order WR 88-20...."[12] Each year thereafter, the IID's semi-annual reports have been found by the SWRCB to be in compliance with reasonable operating practices for the IID under Article X, § 2, of the California Constitution. As recently as June 29, 1998, the SWRCB confirmed that IID's operations complied with the SWRCB's requirements.[13] The IID's compliance was premised in large part on its participation in the 1988 conserved water transfer agreement with the MWD for approximately 100,000 AFY.

The IID's Colorado River water rights are held as both California pre-1914 appropriative rights and as California permitted appropriative rights. [See Section III re IID Water Rights.] Though § 1706 could arguably allow the IID to change its point of diversion without SWRCB approval

(because of the IID's pre-1914 rights), the IID and the Authority jointly make this Petition under §§ 1700 et seq., 1735 et seq. and 1011-1012 based on the IID's permitted appropriative right under Permit 7643. The Petition is made without waiving the IID's pre-1914 appropriative rights (as was noted in Application 7482, and in Permit 7643 itself[14] ).

The Legislature identifies in §§ 174 et seq. the role of the SWRCB, and in § 179 grants the SWRCB broad powers and jurisdiction over water resource issues. The SWRCB's extensive authority is further detailed in Imperial Irrigation District v. State Water Resource Control SWRCB (1986) 186 Cal.App.3d 1160, 1162-1169. Additionally, the SWRCB's general authority over water matters as applied to this Petition is contained in the California Constitution, Article X, § 2; and in §§ 100, 382, 383, 387, 22228 and 22259.

This Petition is brought for approval of a long-term conserved water transfer involving a change in point of diversion and a transfer of conserved water by the IID for use by the Authority in the Authority's service area under IID Permit 7643.[15] Section 1701 allows such changes "only upon permission of the board." Sections 1702-1705 detail the procedures regarding a petition such as this one. Thus, §§ 1701-1705 are a clear legislative conferral of jurisdiction to the SWRCB to grant approval.

In addition, the Legislature has provided for SWRCB review of long-term transfers such as that proposed between the IID and the Authority in §§ 1735-1737. Section 1735 states:

The board may consider a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use. A long-term transfer shall be for any period in excess of one year.

The SWRCB has exercised the jurisdiction granted by § 1735 in the past. See, for example, WR Order 88-12 dated July 6, 1988 (Yuba County Water Agency, Petitioner), regarding a transfer of 185,000 AF of water.

Equally important, the Legislature granted the SWRCB authority to impose reporting requirements on transferors seeking to transfer conserved water pursuant to § 1011, and to require such transferors to comply with other laws regarding changes in point of diversion or place of use. The legislative mandate to the SWRCB to promote the transfer of conserved water while protecting the water rights of transferors, legal users of water, areas of origin and the environment, coupled with the SWRCB's extensive role in governing California's water rights, equates to SWRCB jurisdiction over the approval of this Petition on the terms requested.

Some opponents of the proposed conserved water transfer between the IID and the Authority have contended that SWRCB jurisdiction and California's interest in the transfer is preempted by the federal government's control of the Colorado River. This is not correct. California law governs the use and distribution of water received from federal Colorado River projects within California, unless California law is in direct conflict with federal law. This key principle has been stated numerous times and by various courts. For example:

- **U.S. Supreme Court:** California v. United States, 438 U.S. 645, 653 (1978). ("The history . . . is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." Also, at 675: "Congress intended to defer to the substance, as well as the form, of state water law."; and at 664: "The projects would be built on federal land. . . construction and operation . . . would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water.")

- **Ninth Circuit Court of Appeals:** U.S. v. SWRCB, 694 F.2d 1171, 1177 (9th Cir. 1982)

("[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purpose with an important federal interest served by the Congressional scheme."). U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1223 (9th Cir. 1989) ("State law governs the validity of transfers of water rights.")

o **California Supreme Court:** Environmental Defense Fund v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183, 192 ("California may impose any condition not inconsistent with Congressional directive . . . absent conflict with congressional directive, state law must be complied with in the 'control, appropriation, use, or distribution of water'.").

o **California Court of Appeals:** U.S. v. SWRCB (1986) 182 Cal.App.3d 82, 136 ("[T]he Board was fully authorized to impose the challenged water quality standards or conditions, a regulatory exercise which we determine to be consistent with congressional directives.").

Federal law concerning the Colorado River is not inconsistent with California law promoting the transfer of conserved water, and California law and the SWRCB's exercise of jurisdiction are therefore not preempted. The U.S. Supreme Court has declared that the power of the Secretary of the Interior to contract for Colorado River water deliveries is to be influenced by state law:

Section 18 plainly allows the states to do things not inconsistent with the Project Act or with federal control of the river. . . ."

Arizona v. California, 373 U.S. 546, 588 (1963).

[I]t bears emphasizing that the § 6 perfected right is a water right originating under state law. In Arizona v. California, we held that the Project Act vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition of § 18 of the Project Act not to interfere with state law. 373 US, at 586-588, 10 L Ed 2d 542, 83 S.Ct 1468. We nevertheless clearly recognized that § 6 of the Project Act, requiring satisfaction of present perfected rights, was an unavoidable limitation on the Secretary's power and that in providing for these rights the Secretary must take account of state law. In this respect, state law was not displaced by the Project Act but must be consulted . . . .

Bryant v. Yellen, 447 U.S. 352, 370-371 (1980).

On November 24, 1922, representatives of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming signed the Colorado River Compact ("Compact"), which divided the Colorado River Basin into an Upper and a Lower Basin and provided for an apportionment of part of the waters of the Colorado River system between these two Basins. Pursuant to Article III of the Compact, the Lower Basin States (Arizona, California and Nevada) received the exclusive beneficial consumptive use of 7.5 million AFY, "which [was to] include all water necessary for the supply of any rights which may now exist." In addition, the Lower Basin was given the right to increase its beneficial consumptive use by one million AFY.

The Compact made clear that it did not "interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water." Art. IV(c). In addition,

Article VIII provided that "present perfected" water rights were not affected:

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact.

Section 8 of the Reclamation Act of 1902 ("Reclamation Act") also ensures that state law governing water rights must be honored:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383.

"Reclamation law" is defined as the Reclamation Act of 1902 as well as "all Acts amendatory or supplementary thereto." 43 U.S.C. § 371(b). One such supplementary act is the Boulder Canyon Project Act ("Project Act") which specifically authorized the construction of Hoover Dam on the lower Colorado River, as well as the construction of the All-American Canal which connects Imperial Dam with the Imperial and Coachella Valleys.

The Project Act authorized the Secretary of the Interior to enter into storage and water delivery contracts "for irrigation and domestic uses, and generation of electrical energy" at rates which would allow the federal government to recover its construction, operation and maintenance expenses. 43 U.S.C. § 617d.[16]

Section 6 of the Project Act provided that the Hoover Dam and Reservoir should be used for the satisfaction of present perfected rights pursuant to Article VIII of the Compact. 43 U.S.C. 617e. Similarly, Section 18 of the Project Act provided that state law still had a major role to play:

Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement.

43 U.S.C. § 617q.

Section 4 of the Project Act provided that should less than all of the signatory states ratify the Compact, the Project Act could still become effective if California would unconditionally agree to restrict its share of the waters apportioned to the Lower Basin States to 4.4 million AF of water plus one-half of any unapportioned excess or surplus water. Though Arizona initially failed to ratify the Compact, California agreed to this restriction through the California Limitation Act of 1929, and the Compact and Project Act took effect.

In Arizona v. California, 373 U.S. 546, 580 (1963), the Supreme Court held that, through the contract powers which the Project Act gave the Secretary of the Interior, Congress intended to grant the Secretary the power "to carry out the allocation of the waters of the main Colorado River among the Lower Basin States," and that this power was properly exercised when the Secretary entered into water delivery contracts with right holders in the three Lower Basin

states. The Supreme Court subsequently entered its 1964 decree ordering the Secretary of the Interior to provide California with 4.4 million AF of water and, if there were any excess mainstream water available, to release half of that surplus for use in California. 376 U.S. 340 at 342.

Pursuant to the terms of the Project Act, this 4.4 million AF of mainstream water was to be used to satisfy "any rights which existed on December 21, 1928." Such "rights" included "present perfected rights" within the IID's pre-1914 state-law appropriative water rights. The original Supreme Court decree (Arizona v. California, 376 U.S. 340, 341 [1964]) gives the following definitions:

(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether of [sic] not the water has been applied to beneficial use;

(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act . . . .

A supplemental decree by the Supreme Court quantified the present perfected rights of a number of parties, including IID. Arizona v. California, 439 U.S. 419 (1979). That decree defined the IID's present perfected rights as the right to water:

in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

Id. at 429.

The Supreme Court observed that the Secretary had no ability to impair present perfected rights:

One of the most significant limitations in the Act is that the secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective.

Arizona v. California, 373 U.S. 546, 584 (1963) (emphasis added.)

The concept of the IID's "present perfected" rights is not a limit on the IID's Colorado River state law rights, but is rather a quantification of that portion of the IID's overall state appropriative rights that have priority benefits as a "present perfected" right. The IID has state water rights which encompass its "present perfected right," and all its state law rights are accorded deference by related federal Colorado River law unless expressly or implicitly inconsistent with federal law. California's conserved water transfer policy, including permitting changes in points of diversion and place of use, is not inconsistent with federal law and is thus not preempted. The SWRCB therefore, with jurisdiction over all permitted state appropriative rights, has jurisdiction over IID's proposed long-term transfer of conserved water to the Authority.

9 IID Appendix, Tab 6.
10 Indeed, the MWD's right could result in even less than 550,000 AFY because of certain other "rights and claims" as stated in the Decision. Id. at p. 12
11 IID Appendix, Tab 7.

12 IID Appendix, Tab 8.
13 IID Appendix, Tab 9.
14 IID Appendix, Tab 3.
15 See Section III.
16 Section1 of the Project Act provided that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial and Coachella Valleys...." 43 U.S.C. §617.