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NOTICE OF SPECIAL MEETING
WEDNESDAY, NOVEMBER 14, 2018

IMPERIAL IRRIGATION DISTRICT	BOARD OF DIRECTORS
William R. Condit Auditorium 1285 Broadway El Centro, CA 92243	Division 1—Juanita Salas Division 2—Bruce Kuhn Division 3—James C. Hanks, *President* Division 4—Erik J. Ortega, *Vice President* Division 5—Norma Sierra Galindo
Kevin E. Kelley, *General Manager* Frank A. Oswalt, *General Counsel*	Gloria A. Rivera, *Secretary*

MEETING CALLED TO ORDER—5 p.m.

PUBLIC COMMENTS DURING SPECIAL BOARD MEETING (three minutes per speaker)
This is a public meeting and this is the time for public comment. Because this is a special meeting, you may address the board **only** on items appearing on the agenda for this meeting. If you wish to address the board, please come to the microphone and state your name for the record. Any action taken because of public comment shall be limited to direction to staff.

DROUGHT CONTINGENCY PLAN WORKSHOP

ADJOURNMENT

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November 14, 2018 **BOARD AGENDA MEMORANDUM** **Workshop**

SUBJECT	Drought Contingency Plan Workshop
DEPARTMENT	Executive
PRESENTER	Kevin Kelley, general manager Chuck DuMars, outside counsel Tina Shields, water manager Joanna Smith Hoff, deputy general counsel

Background

Persistent drought affecting the Colorado River watershed has led to a concerted effort by Section 5 contractors in the Upper and Lower basins to develop what has become known as a Drought Contingency Plan to arrest the declining elevation at both Lake Mead and Lake Powell.

If approved by all parties in the seven basin states, the DCP would become an overlay to the 2007 Interim Guidelines and extend through 2026. It would also activate Minute 323 binational water scarcity provisions that would result in additional water conservation volumes from Mexico to build elevation in Lake Mead.

Draft agreements among the parties were released to the public last month. For this workshop, the Imperial Irrigation District is releasing draft intrastate agreements that would, if adopted by IID, the Metropolitan Water District and other Colorado River water agencies in the state, establish parameters for California contributions, in the form of storage, under an expanded Intentionally Created Surplus program that would support the public policy aims of a Lower Basin DCP.

These two draft agreements between IID and MWD are attached and will be thoroughly reviewed with the public during the workshop. While they represent substantial agreement between the agencies, they are neither final nor exhaustive. Viewed as working drafts, the exchange of ideas and public input that will ensue from their release is regarded by IID as an essential component in these negotiations.

Also included here for public review and discussion is a letter received on November 6 from a group of agricultural water users opposing the district's participation in the Drought Contingency Plan based on the Superior Court ruling in the Michael Abatti v. IID litigation, which is currently before the Fourth District Court of Appeal in San Diego.

AGREEMENT BETWEEN THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA AND IMPERIAL IRRIGATION DISTRICT APPORTIONING CONTRIBUTIONS TO LAKE MEAD FOR DROUGHT CONTINGENCY PLAN IMPLEMENTATION

This AGREEMENT between The Metropolitan Water District of Southern California (MWD) and Imperial Irrigation District, a California irrigation district (IID), (individually, Party and collectively, Parties) is entered into as of this ____ day of _____, 2018 (Date).

RECITALS

A. On _____, 201_, the Parties, along with [certain entities in Arizona], [certain entities in California], the Colorado River Commission of Nevada, an agency of the State of Nevada (CRCN), and the Southern Nevada Water Authority, a political subdivision of the State of Nevada (SNWA), entered into the "Lower Basin Drought Contingency Plan Agreement" (LB DCP Agreement), which, to help Lake Mead avoid reaching critically low elevations, incentivizes the creation and storage in Lake Mead of Intentionally Created Surplus (ICS) and provides for Drought Contingency Plan (DCP) Contributions to be made if Lake Mead reaches certain critical elevations.

B. The LB DCP Agreement includes an Exhibit 1, the Lower Basin Drought Contingency Operations (LBOps), which is an operational document that will guide operation of Lake Mead through the Interim Period along with the Record of Decision for the "Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead," dated December 13, 2007 (2007 Interim Guidelines). For purposes of this Agreement, the LB DCP Agreement and the LBOps are collectively referred to as the "LB DCP." The LB DCP also provides that the projection of Lake Mead's January 1 elevation according to the August 24-month study conducted by the United States Bureau of Reclamation (Reclamation) will determine the amount of DCP Contributions for each of the Lower Basin States in the subsequent year, if any.

C. On December 13, 2007, the Parties, along with other California contractors, entered into the "California Agreement for the Creation and Delivery of Extraordinary Conservation Intentionally Created Surplus," as amended (California ICS Agreement), which established the terms and conditions for the creation, accumulation and delivery of Extraordinary Conservation Intentionally Created Surplus (EC ICS) by California contractors pursuant to the 2007 Interim Guidelines.

D. The 1931 California Seven-Party Agreement (Seven-Party Agreement) provides that Palo Verde Irrigation District (PVID), the Yuma Project, IID, and Coachella Valley Water District (CVWD) hold California's first three priorities to Colorado River water and are collectively entitled to the beneficial consumptive use as reasonably required of not to exceed 3,850,000 acre-feet per year. The fourth and fifth priorities totaling 1,212,000 acre feet per year are held by MWD. The sixth priority of 300,000 acre-feet per year is held by IID, CVWD, and PVID. The seventh priority of all remaining water available for use within California is reserved for agricultural use in the Colorado River Basin within California, which includes the lands within IID, CVWD and PVID. MWD and CVWD also have ~~[list the titles of the~~ surplus water delivery contracts~~]~~ with the Secretary of the Interior, entitled "Contract for Delivery of Surplus Flows

From the Colorado River", dated on or about September 9, 1987 and March 8, 1987, respectively.

E. Based on the net consumptive use volumes available to IID, MWD, PVID, and CVWD taking into account conserved water transfers authorized in the 2003 Colorado River Water Delivery Agreement, California's 4.4 million acre-foot apportionment is consumptively used by IID, MWD, PVID, and CVWD in the following approximate proportions: 60% by IID, 25% by MWD, 8% by PVID and 7% by CVWD. The apportionment of California's DCP Contributions by each Party are set out in the body of this Agreement below.

F. California's DCP Contributions will be met by IID, MWD, PVID, and CVWD as follows. Based on the Seven-Party Agreement and the percentage of projected use of Colorado River water under the Colorado River Water Delivery Agreement, PVID is responsible for 8% of California's DCP Contributions and CVWD is responsible for 7% of California's DCP Contributions as provided in separate agreements among MWD, PVID, and CVWD. IID and MWD are entering into this Agreement to set forth the responsibilities for the remaining portion of California's DCP Contributions.

G. The Parties desire to apportion California's DCP Contributions and establish the terms and conditions for implementation of the LB DCP between IID and MWD through this Agreement and through a concurrently-executed Amendment No. 2 to the California ICS Agreement.

H. IID is responsible for implementing the nation's largest agricultural water conservation and transfer program that provides approximately 500,000 acre-feet per year of conserved water to urban California water agencies, conserving in excess of 5 million acre-feet of water since the inception of the water conservation and transfer program, ensuring that California lives within its 4.4 million acre-foot annual ~~entitlement~~ normal apportionment to Colorado River water.

I. IID is reliant on the Colorado River as its sole water supply to serve its residents, industries and agricultural water users that feed the nation and ensure a safe and reliable domestic food supply year-round. IID recognizes the vital importance of sound water management policies and operational coordination to ensure a sustainable long-term Colorado River water supply for the basin and its water users. Despite its senior priority agricultural water right, IID agrees to assume responsibility for up to 250,000 acre-feet of California's DCP Contributions under the LB DCP to support the Colorado River through the duration of the 2007 Interim Guidelines.

J. MWD is responsible for providing a reliable water supply to its service area of approximately 19 million residents. To accomplish this, MWD has made over a billion dollars of investments in conservation and recycling programs that have saved over 5 million acre-feet of water. Since 2015, MWD has implemented the largest turf removal program in the country, investing $450 million in this type of conservation alone.

K. MWD recognizes that the historic 19 year drought in the Colorado River basin has resulted in declining Lake Mead reservoir elevations. MWD also recognizes MWD and IID's essential responsibility for remaining within California's 4.4 million acre-foot Colorado River

~~allocation~~ normal apportionment through funding and implementation of existing long-term conservation and transfer programs. As such, MWD agrees to assume a responsibility of ensuring that California's DCP Contributions will be fulfilled under the LB DCP that is greater than the proportion of MWD's right to use Colorado River Water in the Seven-Party Agreement.

NOW, THEREFORE, the Parties hereby agree as follows:

AGREEMENT

1. Definitions

   A. All capitalized terms not defined herein shall have the meaning set forth in the 2007 Interim Guidelines, the LB DCP and the California ICS Agreement.

2. Apportionment of IID's and MWD's California DCP Contributions

   A. In the first year when a California DCP Contribution is required, IID will contribute ~~120~~125,000 acre-feet of California's total DCP Contribution. In the second year when a California DCP Contribution is required, IID will contribute ~~130~~125,000 acre-feet of California's total DCP Contribution. These two contributions shall constitute IID's total DCP Contributions for the duration of the LB DCP for a maximum cumulative limit of 250,000 acre-feet (DCP Contribution Limit). In the event that IID has reached its DCP Contribution Limit, IID will have fully satisfied its portion of California's DCP Contributions and will have no further portion or obligation for California's DCP Contributions under the LB DCP. Subject to IID's DCP Contribution Limit and PVID's 8% and CVWD's 7% portions of the California DCP Contributions, MWD will be responsible for the remaining portion of California's DCP Contributions.

   B. In years when a California DCP Contribution is required and IID has not reached its DCP Contribution Limit, IID will have the choice to use any of the methods for contributions allowed under the definition of "DCP Contribution(s)," except for the "Creation of Non-ICS Water."

   C. MWD is not responsible for making IID's portion of any California DCP Contributions that may be required due to IID's borrowing of DCP ICS and IID is not responsible for making MWD's portion of any California DCP Contributions that may be required due to MWD's borrowing of DCP ICS, unless the Parties otherwise mutually agree in writing.

   D. Each Party shall have access to its own DCP ICS in a future year pursuant to the LB DCP.

3. IID's ICS Stored in MWD's System

   A. Within one year of the Effective Date of the LB DCP, IID's ICS stored in MWD's system, which is "Excess EC ICS" and "Additional Excess EC ICS" under the California ICS Agreement, as of the Date of this Agreement will be ~~exchanged~~

~~with an equal amount of MWD's EC ICS stored in Lake Mead and will then be~~ transferred ~~from MWD's EC ICS account in Lake Mead~~ to IID's EC ICS account in Lake Mead. IID shall be responsible for any additional losses that may be incurred, including evaporation losses. ~~The exchanged EC ICS transferred to IID's EC ICS account in Lake Mead shall be equal in the amount of losses applied to IID's ICS stored in MWD's system as of the Effective Date of the LB DCP to the maximum extent possible, such that IID will not be responsible for any additional losses associated with the exchanged EC ICS in Lake Mead beyond what would otherwise occur to existing EC ICS stored in Lake Mead under the LB DCP.~~

~~4. Amendment No. 2 to the California ICS Agreement~~

~~A. The Amendment No. 2 to the California ICS Agreement will establish terms and conditions, not otherwise provided herein, for implementation of the LB DCP among the California parties. This Agreement shall not become effective unless and until the Amendment No. 2 to the California ICS Agreement becomes effective.~~

~~5.~~4. Binational ICS under Minute No. 323

A. Notwithstanding the "2017 Agreement between the Metropolitan Water District of Southern California and Imperial Irrigation District Regarding the Opportunity to Participate Equally in Binational Intentionally Created Surplus" dated September 21, 2017, to the extent water in addition to the first 109,100 acre-feet of Binational ICS under Minute No. 323 becomes available, MWD will have the first right to provide funding for and receive such additional water. If MWD declines to fund and receive such additional water, IID may do so.

~~6.~~5. Responsibility for Liability and Litigation Costs

A. Each Party shall be severally but not jointly responsible for any liabilities, including impacts relating to the California Environmental Quality Act, California Endangered Species Act, National Environmental Policy Act, and federal Endangered Species Act, regarding each Party's own ICS creation and storage and each Party's responsibility for its portion of the California DCP Contributions as set forth in this Agreement and each Party shall bear its own litigation costs related to this Agreement.

[Signatures are on the following page.]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Date written above.

Approved as to form:

By:_____
Frank A. Oswalt, III
General Counsel

IMPERIAL IRRIGATION DISTRICT

By:_____
_____, Division _
President

Approved as to form:

By:_____
General Counsel

THE METROPOLITAN WATER DISTRICT OF SOUTHER CALIFORNIA

By:_____
General Manager

AMENDMENT NO. 2 TO THE CALIFORNIA AGREEMENT FOR THE CREATION AND DELIVERY OF EXTRAORDINARY CONSERVATION INTENTIONALLY CREATED SURPLUS

This AMENDMENT TO THE CALIFORNIA AGREEMENT FOR THE CREATION AND DELIVERY OF EXTRAORDINARY CONSERVATION INTENTIONALLY CREATED SURPLUS (Amendment) is entered into as of this ____ day of _____, 2018 by and among the PALO VERDE IRRIGATION DISTRICT (PVID), the IMPERIAL IRRIGATION DISTRICT (IID), THE COACHELLA VALLEY WATER DISTRICT (CVWD), THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA (MWD), and the CITY OF NEEDLES (NEEDLES), (collectively, the Parties).

RECITALS

A. On December 13, 2007, the Parties entered into the CALIFORNIA AGREEMENT FOR THE CREATION AND DELIVERY OF EXTRAORDINARY CONSERVATION INTENTIONALLY CREATED SURPLUS (Agreement). The Agreement established the terms and conditions for the creation, accumulation, and delivery of Extraordinary Conservation Intentionally Created Surplus (EC ICS) by California contractors pursuant to the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead. The Agreement also provided the terms and conditions for IID's creation, accumulation, and delivery of Excess EC ICS in MWD's system.

B. On October 20, 2015, the Parties entered into Amendment No. 1 to the Agreement, which established the terms and conditions for IID's creation, accumulation and delivery of Additional Excess EC ICS in MWD's system during 2015, 2016, and 2017.

C. On _____, 201_ [certain entities in Arizona], [certain entities in California], the Colorado River Commission of Nevada, an agency of the State of Nevada (CRCN), and the Southern Nevada Water Authority, a political subdivision of the State of Nevada (SNWA), entered into the "Lower Basin Drought Contingency Plan Agreement" (LB DCP Agreement), which, to help Lake Mead avoid reaching critically low elevations, incentivizes the creation and storage in Lake Mead of Intentionally Created Surplus (ICS) and provides for Drought Contingency Plan (DCP) Contributions to be made by each Lower Division State if Lake Mead reaches certain critical elevations.

D. The LB DCP Agreement includes an Exhibit 1, the Lower Basin Drought Contingency Operations (LBOps), which is an operational document that will guide operation of Lake Mead through the Interim Period along with the Record of Decision for the "Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead," dated December 13, 2007 (2007 Interim Guidelines). For purposes of this Amendment, the LB DCP Agreement and the LBOps are collectively referred to as the "LB DCP."

E. Under this Amendment the Parties desire to encourage conservation for purposes of supporting Lake Mead elevation and flexibility in meeting water supply needs and achieving California's DCP Contributions under the LB DCP.

F. This Amendment, together with the Drought Contingency Plan Implementation Agreement Between MWD and CVWD, the Drought Contingency Plan Implementation Agreement Between MWD and PVID, and the Agreement Between MWD and IID Apportioning Contributions to Lake Mead for Drought Contingency Plan Implementation (MWD-IID Agreement) shall constitute the California Intra-State DCP Agreements under the LB DCP~~, specifically including Sections II, III.D.1, and III.D.2 of the LBOps~~.

NOW, THEREFORE, the Parties hereby agree as follows:

AMENDMENT

1. This Amendment ~~shall be effective upon the first date written above and~~ shall remain in effect through the term of the Agreement, except that if the LB DCP terminates prior to the termination of the Agreement or becomes ineffective for any reason, then this Amendment shall terminate and the Agreement shall continue in full force and effect without being amended as set forth herein, unless the Parties agree otherwise~~; except that the Parties agree that the deletion of the 12,000 acre-feet annual limit on IID for the creation of EC ICS by seepage recovery projects in Section 1 of the Agreement shall survive early termination of this Amendment~~.

2. Definitions. All capitalized terms not defined herein shall have the meaning set forth in the 2007 Interim Guidelines, the LB DCP, the Agreement and the Amendment No. 1 to the Agreement.

3. Allocation of California's Annual Extraordinary Conservation ICS Creation Limit. Section 1 of the Agreement is amended to the following extent:

A. CVWD may create up to the amount of EC ICS in Lake Mead in any year necessary to meet its 7% portion of California's DCP Contribution for that year.

B. IID may create up to 50,000 acre-feet of EC ICS in Lake Mead in any year, except that in any year that a California DCP Contribution is required and IID is required to make a contribution subject to its DCP Contribution Limit, IID may, if it lacks sufficient EC ICS to make its DCP Contribution, create up to the incremental amount ~~250,000 acre-feet~~ of EC ICS in Lake Mead necessary to meet its portion of California's DCP Contribution. Additionally, IID may create any amount of ICS necessary to make a repayment of borrowed DCP ICS pursuant to the LB DCP. The 12,000 acre-feet annual limit on IID for the creation of EC ICS by seepage recovery projects shall be deleted.

C. MWD may create up to 400,000 acre-feet of EC ICS in Lake Mead less any amount of EC ICS created by CVWD and IID in that year~~; provided that IID may create any EC ICS in Lake Mead for which there is remaining California capacity not used by MWD or CVWD or pursuant to written consent by MWD~~.

4. Allocation of California's Total Extraordinary Conservation ICS Accumulation Limit. Section 3 of the Agreement is amended to the following extent:

A. The following provisions apply to both EC and DCP ICS as applicable as stated below.

B. CVWD may not accumulate EC ICS, as any EC ICS CVWD creates must be converted to DCP ICS in the same year. CVWD's DCP ICS capacity is equal to CVWD's portion of the total California DCP Contributions through 2026 that CVWD creates under section 1(A) of the DCP Implementation Agreement between CVWD and MWD.

C. IID may accumulate up to 350,000 acre-feet of EC and DCP ICS in Lake Mead~~; provided that IID may accumulate more than 350,000 acre-feet of EC and DCP ICS in Lake Mead pursuant to written consent by MWD~~.

D. MWD may accumulate ICS in Lake Mead up to 1.7 million acre-feet, as provided for in the LB DCP, less any amount of ICS accumulated by CVWD and IID.

5. Allocation of California's Annual Extraordinary Conservation ICS Delivery Limit. Section 4 of the Agreement is deleted in its entirety and replaced with the following:

A. The delivery of EC and DCP ICS shall be in accordance with the LB DCP, unless otherwise set forth below.

B. CVWD may call for the delivery of up to 10,000 acre-feet of DCP ICS.

C. Subject to the following paragraphs (i) and (ii), IID ~~shall have priority to~~may call for the delivery of up to 25% of California's EC and DCP ICS delivery capacity and may increase the call for the delivery by using any capacity MWD does not call for delivery.

i. In the event that IID takes delivery of any of the first 250,000 acre-feet of ICS accumulated in IID's ICS or DCP ICS Accounts, IID must return an equal amount to its ICS Account in the year following such delivery;

ii. For any ICS that IID accumulates in Lake Mead above a cumulative amount of 250,000 acre-feet, IID's ICS delivery is limited to years in which California is not required to make a DCP Contribution.

D. MWD may call for the delivery of the remaining California EC and DCP ICS delivery capacity.

~~6. Temporary Use of IID Accumulated Extraordinary Conservation ICS by MWD. Section 5 of the Agreement is deleted in its entirety and replaced with the following:~~

~~A. If California DCP Contributions are required in two or more consecutive years, MWD may temporarily use IID's ICS created and accumulated in Lake Mead above the cumulative amount of 250,000 acre-feet pursuant to Section 4.C.ii. MWD shall not, at any time, temporarily use IID's ICS at or below the cumulative amount of 250,000 acre-feet.~~

6. Return of Extraordinary Conservation ICS Created and Accumulated by IID in Lake Mead and Temporarily Used by MWD. Section 7 of the Agreement is ~~deleted in its entirety and replaced with the following~~amended to the following extent:

~~.~~A. If, pursuant to Section 5 of the Agreement, MWD temporarily uses ICS created and accumulated in Lake Mead by IID up to the cumulative amount of 250,000 acre-feet, then MWD shall return that volume of ICS up to 250,000 acre-feet to IID in the year following such temporary use.

~~A.~~B. If, pursuant to Section 5 of the Agreement, MWD temporarily uses ICS created and accumulated in Lake Mead by IID above the cumulative amount of 250,000 acre-feet ~~pursuant to Section 4.C.ii~~, then the provisions of Section 7 of the Agreement apply without modification by this Amendment~~MWD shall return that volume of ICS to IID in the year following such temporary use~~.

~~8.~~7. If the Secretary adjusts any scheduled deliveries to California Contractors pursuant to section III~~(~~.D~~)(~~.2~~)~~ . of the LBOps, the Contractor or Contractors that are responsible for the shortfall will take an adjustment to its deliveries in proportion to that Contractor's shortfall of the total California shortfall. Under no circumstances shall CVWD be required to make any portion of the California DCP Contribution in excess of what CVWD has agreed to make under the Drought Contingency Plan Implementation Agreement Between MWD and CVWD. Under no circumstances shall IID be required to make any portion of any California DCP Contribution in excess of IID's DCP Contribution Limit as set forth in the MWD-IID Agreement ~~and IID shall not be subject to an adjustment to its deliveries provided it has met its obligations for the two contributions comprising IID's DCP Contribution Limit as set forth in the MWD-IID Agreement~~.

~~9. IID Storage in MWD's System for 2018~~

~~A. If the LB DCP and the MWD-IID Agreement do not become effective in 2018, IID may create and deliver to MWD's system up to 75,000 acre-feet of Additional Excess EC ICS for the year of 2018 pursuant to the terms and conditions of the Amendment No. 1 to the Agreement.~~

~~10.~~8. Responsibility for Impacts and Litigation Costs

A. Except as provided in subsection B of this section, each Party shall be severally but not jointly responsible for any liabilities, including impacts relating to the California Environmental Quality Act, California Endangered Species Act, National Environmental Policy Act, and federal Endangered Species Act,

regarding each Party's own ICS creation and storage and each Party's responsibility for its portion of the California DCP Contributions as set forth in this Amendment and each Party shall bear its own litigation costs related to this Amendment.

B. Nothing in this section is intended to rescind, repeal, amend or modify any existing agreements, permits or authorizations to which CVWD, IID, MWD, Needles or PVID may be a party that define their respective responsibilities for performing and/or funding environmental mitigation or species conservation measures relating to the delivery or use of Colorado River water pursuant to contracts under the Boulder Canyon Project Act, or related contracts for the creation, delivery or use of conserved water, or to deprive any of them of any benefits, immunities, rights of indemnity or rights of contribution under such contracts, permits or authorizations.

~~11.~~9. Each Party hereby agrees not to divert any ICS that is to be delivered to or created by any other Party in accordance with this Amendment.

~~12.~~10. Notwithstanding Section 20 of the Agreement, MWD may allocate its own rights under this Amendment to create, accumulate, and take delivery of EC ICS, to entities in Arizona and Nevada only to the extent ~~expressly~~ provided in the LB DCP without approval of any other Party to this Amendment.

~~13.~~11. All provisions of the Agreement not modified by this Amendment remain in effect.

IN WITNESS WHEREOF, the Parties have executed this Amendment as of the day and year first written above.

Attest:

By:_____
General Manager

PALO VERDE IRRIGATION DISTRICT

By:_____
~~Chair~~President

Approved as to form:

By:_____
General Counsel

IMPERIAL IRRIGATION DISTRICT

By:_____
President

Approved as to form:

CITY OF NEEDLES

By:_____
City Attorney

By:_____
Mayor

Approved as to form:

COACHELLA VALLEY WATER DISTRICT

By:_____
Legal Counsel

By:_____
General Manager

Approved as to form:

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

By:_____
General Counsel

By:_____
General Manager

MusickPeeler

ATTORNEYS AT LAW

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LOS ANGELES
ORANGE COUNTY
SAN DIEGO
SAN FRANCISCO
SANTA BARBARA COUNTY
VENTURA COUNTY

FILE NO.: 01395.002

November 6, 2018

VIA EMAIL AND U.S. MAIL

Board of Directors
IMPERIAL IRRIGATION DISTRICT
1285 Broadway Avenue
El Centro, CA 92243

Re: *The Proposed Drought Contingency Plan and Related Documents and Agreements*

Dear Members of the Board of Directors:

We represent a group of owners and operators of irrigated farmland within IID, namely:

Douglas and Elena Westmoreland, Westmoreland Cattle Co., Inc.,
The Westmoreland Revocable Living Trust;
Ronnie Leimgruber;
James Abatti, Madjac Farms;
Brian Strahm, Artesia Farms Inc.;
Jack Vessey, Vessey & Company, Holtville;
Steve Scaroni, Scaroni Properties, Inc.;
Lawrence Cox, Lawrence Cox Ranches, The Lawrence W & Tina J Cox Trust;
Mike Abatti Farms, LLC, The Michael & Kerri Abatti Family Trust;
Ben Abatti Farms LLC, The Ben & Margaret Abatti Family Trust;
The Abatti Family Trust;
Paul Cameron, Paul Cameron Ranches, LLC;
Steve Dham, Steve Dham Ranches, LLC;
Ronald Leimgruber, Ronald C. Leimgruber Farms; and
Don Emmanuelli, Emmanuelli & Sons

We write this letter in an attempt to induce the Board to reject the proposed Drought Contingency Plan and related documents and agreements (the "DCP"), which include the proposed Lower Basin Drought Contingency Plan Agreement ("LB DCP Agreement"), "Companion Agreement," and any "Intra-State DCP Agreement," including any agreement

between IID and Metropolitan Water District of Southern California ("MWD") relating to the DCP (the "IID/MWD Agreement").

IID HAS FAILED TO PROVIDE NECESSARY INFORMATION REGARDING THE DCP

The DCP provides that California's annual contribution will be 200,000 acre feet when Lake Mead's elevation is 1,045 feet MSL and increases to 350,000 acre feet as the elevation declines to below 1,030 feet. We understand that IID's share of any such contribution would be set forth in the IID/MWD Agreement. At the August 28, 2018 IID Workshop, IID's general manager stated that IID had been negotiating with MWD since 2016 and that the IID/MWD Agreement was 95% completed. The general manager stated that landowners and others within the district would have a "couple-months time" to review the IID/MWD Agreement. He said that IID was committed to complete "transparency." Nevertheless, as of the date of this letter, the terms of the IID/MWD Agreement have not been disclosed.

If there is no agreement with MWD that caps IID's contributions, then under the DCP IID's share of the California contributions could be 60%, which could be from 120,000 to 210,000 acre feet per year for seven years. The water users within IID deserve to know the terms of the IID/MWD Agreement and to what extent the IID's water rights are impacted by the DCP.

IID's staff has stated that in their negotiations with MWD they hope to cap IID's DCP contribution obligation at 250,000 acre feet of water which is already currently stored by IID, about 50,000 acre feet of conserved water stored in Lake Mead, and about 200,000 acre feet stored in MWD system reservoirs. We understand that IID's cost for creating that 250,000 acre feet of stored water is as much as $71 million, assuming on-farm efficiency program payments were incurred to create the stored water. The value of that stored water, using the price of conserved water sold to San Diego at $650 per acre foot, is $162.5 million. Thus, IID is seeking to transfer water worth as much as $162.5 million without any compensation whatsoever.

A primary issue is whether IID will be able to recover the 250,000 acre feet it contemplates contributing pursuant to the DCP. Will IID be able sometime in the future to obtain the return of this $162.5 million asset? When? How much will be returned? Or, will that asset be lost forever and forfeited? IID has not provided answers. IID has failed to provide any hydrological studies for the Colorado River that reflect what the projected elevations of Lake Mead will be beginning in 2027, the end of the term of the DCP, and thereby fails to disclose what the real prospects are for recovering any of the water IID is committing to store at Lake Mead. Also, IID has not provided any information or analysis concerning the impact of the DCP's 10% one-time and 3% per year reductions of stored water. IID's September 20, 2016 presentation stated: "DCP proposals allow for recovery when Lake Mead reaches 1110' before 2036, which allows for less than 25 percent recovery." We are concerned that there is no or very

little likelihood that IID will ever get the water back because (a) elevations at Lake Mead will remain under 1,110 feet MSL, the elevation needed under the DCP for return of stored water, or (b) the contributions will be substantially or totally reduced by the time sufficient elevations are reached. So, without any credible assessment of the likelihood of return of the contributed water, it must be concluded that, under the DCP, IID will be forfeiting a minimum of 250,000 acre feet, an asset with a value that likely exceeds $162.5 million.

THE STATED JUSTIFICATION FOR IID'S ACCEPTANCE OF THE DCP IS INCOMPLETE AND FAULTY

IID agreed to cap its water right under the QSA, and agreed to conserve, and has conserved, hundreds of thousands of acre feet of water per year, all for the benefit of the other more junior Colorado River water users. Now, under the DCP, the IID Board is contemplating a further weakening of the senior water right that IID holds. The rationale for this voluntary compromise of IID's right, and the likely forfeiture of at least 250,000 acre feet of water, is that it will somehow forestall litigation. At IID's October 9, 2018 workshop, IID's counsel, Mr. Dumars, said that the threat of litigation was "never quite articulated out loud." However, he said the supposed issue was whether the federal government could "force IID to take a cut" and that it was his "position" that the federal government cannot force IID to "share shortages and reject its priority date." He said, however, that any litigation would be "at great expense" and would "last for many years." He said that, in his opinion, it would be better for IID to make a "one-time contribution" of 250,000 acre feet so that IID could have its priority date protected through 2026. However, it appears that there has been no real analysis and discussion of the legal issues that would be involved in this supposed litigation. What legal theories would the federal government assert? What authorities exist that suggest that IID's senior appropriative right is at risk, especially as against MWD, a junior right holder, and especially in light of the fact that under the QSA both MWD and the United States Bureau of Reclamation have committed not to challenge IID's right. So, apparently, the calculus is that it is appropriate to forfeit an asset with a value of at least $162 million in order to avoid not-yet-asserted claims that are meritless. This is a very steep price for which virtually no justification has been shown, and for which no real *quid pro quo* or compensation will be given. Without a further and more defined justification, the proposed idea is absurd.

IID'S ACCEPTANCE OF THE PROPOSED DCP WOULD VIOLATE CEQA

One of the stated purposes of IID entertaining the DCP is that it not exacerbate environmental and economic impacts to the Salton Sea. However, none of the DCP materials disclosed by IID discuss the Salton Sea at all. At a minimum, there will be 250,000 acre feet less water used within IID. If no cap on IID's contribution is obtained, then the environmental and economic impacts will be significantly greater. IID has not evaluated the DCP or any of its related agreements, including the IID/MWD Agreement, under CEQA. There is more than a fair

argument that the proposed project may have a significant effect on the environment, including impacts related to the Salton Sea, and it does not appear that the IID has prepared the requisite environmental impact report and submitted it for public comment in connection with its prospective approval of the DCP and related agreements.

In addition to the Salton Sea, IID has failed to consider the impacts on agricultural land within the district. Without a consistent supply of Colorado River water, the exclusive source of irrigation, the crops normally produced in the Valley will be adversely affected. More and more land will be fallowed, returning the soil to its native, arid condition.

How will the Valley's livestock, fish and wildlife fare if IID's water rights are reduced under the DCP and the Salton Sea is not mitigated? How will air quality be affected by the increased dust problem created by the shrinking Salton Sea and the fallowing of more and more land within the district?

IID has simply not considered any of these substantial environmental effects of the DCP. Compliance with CEQA is required under the law and IID's failure to even consider the environmental impacts on the district is a breach of the Board's fiduciary duties.

IID'S ACCEPTANCE OF THE PROPOSED DCP WOULD VIOLATE THE FARMERS' PROPERTY INTEREST IN COLORADO RIVER WATER RIGHTS

The irrigating landowners within IID own an equitable and beneficial interest in the water right IID holds in trust which is appurtenant to their lands and is a constitutionally protected property right. Under the proposed DCP, if accepted, a minimum of 250,000 acre feet, and much more if no cap is put in place, will be "contributed" with no showing that any of it will ever be able to be recovered, and for which no *quid pro quo* is given. Thus, the DCP as proposed would violate the farmers' property right, deprive the farmers of property without due process, and constitute a taking without compensation in violation of the federal and state constitutions.

IID'S ACCEPTANCE OF THE PROPOSED DCP WOULD VIOLATE THE JUDGMENT ENTERED IN *ABATTI V. IMPERIAL IRRIGATION DISTRICT*

The August 25, 2017 Declaratory Judgment entered in *Abatti v. Imperial Irrigation District*, Imperial County Sup. Ct. No. ECU07980, provides:

> "Effective as of August 15, 2017, Imperial Irrigation District is not empowered to enter into any new contracts committing to the provision of water to any non-domestic or non-agricultural user which guarantees the supply of water during times of shortage in a manner that is inconsistent with the Court's findings in its August 15, 2017 Statement of Decision in this action."

To the extent that IID has failed to show that there is a strong probability that its "contributions" under the DCP are able to be recovered, the DCP will constitute a "new contract committing the provision of water" in a manner inconsistent with the Court's decision, and thereby will be in violation of the Declaratory Judgment.

THE IID BOARD SHOULD POSTPONE ITS CONSIDERATION OF THE DCP AND RETAIN APPROPRIATE EXPERTS TO ADVISE IID

If the Board approves the DCP, we are concerned that IID will not be looking out for the interests of the Imperial Valley as a whole, its inhabitants, farmers, cattlemen, fish and wildlife, and the Salton Sea, and will have failed in its stewardship of the water rights held in trust. To date, IID has failed to bring to bear professional resources necessary to fully evaluate the complex hydrological and legal issues presented in connection with the DCP. The Board should step back and postpone its consideration of the DCP. It should retain experienced consultants with the requisite educational and professional experience, to understand the probability of recovery of any contributed water, and to obtain a second opinion regarding legal exposure, and thereby provide the advice that is required to better understand, evaluate and negotiate the DCP and its related agreements.

Respectfully submitted,

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