

February 23, 1999

**To:** Board of Directors (Executive Committee--Information)

**From:** General Manager \_\_\_\_\_

**Submitted by:** General Counsel \_\_\_\_\_

**Subject:** IID/SDCWA Joint Petition for Approval of IID/SDCWA Water Transfer

**RECOMMENDATION(S)**

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For information only.

**EXECUTIVE SUMMARY**

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At the February Board meeting a report was requested as to the nature and requirements of the State Water Resources Control Board (SWRCB) proceedings regarding approval of the Imperial Irrigation District/San Diego County Water Authority Long-Term Transfer Agreement. In particular, questions were raised with regard to the issue of whether the SWRCB proceeding would potentially culminate in the expansion of the IID service area.

As discussed in the following detailed report, the Joint Petition for Approval of the Long-Term Transfer filed by IID and SDCWA requests, among other matters, that the IID place of use be expanded to include the service area of the San Diego County Water Authority. Additionally, the Petition requests the SWRCB to make other changes, including the authorized diversion point and to expand the type of use IID is authorized to serve.

Under the SWRCB process, parties currently have until April 1, 1999 to file protests or comments on this Petition. As previously discussed with your Board at the November 1998 meeting, MWD will file documents to enable it to preserve its right to fully participate in the SWRCB process. Such a filing by MWD is consistent with the terms of the Exchange Agreement between MWD and SDCWA, which specifically recognized that in so far as the Transfer Agreement was consistent with and implemented in accordance with state and federal law and the California Plan MWD would not oppose approval or implementation of the Agreement. Metropolitan believes that the IID/SDCWA Agreement could be implemented consistent with federal law and state law, to the extent applicable.

## **DETAILED REPORT**

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### **I. SWRCB NOTICE AND PROCESS**

On April 29, 1998, the Imperial Irrigation District (“IID”) entered into an agreement with the San Diego County Water Authority (“SDCWA”). IID agreed to “transfer” to SDCWA certain quantities of conserved water for a period of years. IID filed a petition (“Change Petition”) with the State Water Resources Control Board (“SWRCB”) on July 22, 1998 to change its place of use and place of diversion under SWRCB-issued Permit 7643 (Application number 7482). An amended petition was filed on October 9, 1998 to change IID’s authorized water use to include municipal use, in addition to the irrigation and domestic uses authorized under Permit 7643.

On October 15, 1998, the SWRCB issued its “Notice of Petition For Change In Point Of Diversion, Place Of Use, and Purpose Of Use, Involving The Long Term Transfer Of Up To 200,000 acre-feet Of Water To Areas Within The San Diego County Water Authority Service Area, Under Imperial Irrigation District Permit 7643 (Application 7482).” (“Notice of Petition” or “Notice”). The SWRCB Notice indicates the SWRCB is seeking information to assist in its evaluation of the proposed transfer and comments, recommendations or protests. The SWRCB originally required any comments or protests to be filed by December 15th. The SWRCB has since extended the protest deadline until April 1, 1999. Supplemental comments or protests will be accepted regarding environmental impacts up to ninety days after the draft environmental impact report/statement is issued.

In order for MWD to preserve its right to participate at the time of the SWRCB hearing on the IID/SDCWA long-term transfer and Change Petition, it is necessary to submit a protest based on any of the following grounds: interference with a prior water right, the transfer is not within the SWRCB’s jurisdiction, the transfer would not best serve the public interest or uses, the transfer would be contrary to law, or the transfer would have an adverse environmental impact. The SWRCB’s regulations also direct that a statement of facts supporting the protest allegation be included. If the protest is based upon injury to a prior right, then allegations of specific injury must be included as well as the protestant’s claim of right to the use of the water, when the use began, type of use and point of diversion. MWD has numerous matters which it must raise regarding the Change Petition and related transfer between IID and SDCWA in order to address, for example, the areas in which the petition and transfer, as proposed to the SWRCB, would not be consistent with federal law. Under the SWRCB’s regulations, these must be presented in a protest context.

### **II. IID IS SEEKING SIGNIFICANT PLACE OF USE EXPANSION**

#### **A. THE IID/SDCWA PETITION TO THE SWRCB WOULD EXPAND IID’S PLACE OF USE AND TYPE OF USE AND ADD A POINT OF DIVERSION, ALL TO SERVE PRIORITY 3 WATER TO SDCWA**

Until the proposed IID/SDCWA transfer, no conservation, salvage or exchange arrangement regarding Colorado River water has involved the SWRCB and no Change Petition has ever before been filed with the SWRCB. The IID and SDCWA petition to the SWRCB would do three things related to Permit 7643 held by IID:

1. Expand the place of use of water by IID to include the service area of SDCWA
2. Add a point of diversion at Lake Havasu for conveyance through the Colorado River Aqueduct.
3. Add municipal use as an authorized purpose of use.

The SWRCB issued notice of the Change Petition confirming that, if the petition is approved, the SWRCB would add the SDCWA service area to IID's authorized place of use, add Lake Havasu as an authorized point of diversion, and add municipal use as an authorized purpose of use under IID's one consumptive use permit number 7643.<sup>1</sup>

The SWRCB notice also anticipates that the IID conserved water would be conveyed to the SDCWA service area and does not anticipate the exchange agreement between MWD and SDCWA. The SWRCB notice states:

“Diversion at Lake Havasu is necessary to enable the Metropolitan Water District of Southern California (MWD) to transport the water through the Colorado River Aqueduct for delivery to the SDCWA service area, which includes the City of San Diego and other local water districts.” (SWRCB Notice at 2.)

The change in type of use to specifically include “municipal” is particularly interesting since IID has argued in the past that its rights to use water for “potable and irrigation’s purposes” (per the Section 5 contract) and for “irrigation and domestic uses” (per the SWRCB permit) intrinsically included municipal use. The petition, therefore, indicates that IID has backed off of its position of asserting that it already has the right to serve water for municipal purposes.

#### B. ADVERSE EFFECT ON MWD

Place of use is a key aspect of a water right. An expansion of place of use is generally viewed as a threat by other right holders. Place of use is one of the limitations, together with the reasonable use requirement and maximum diversion quantity that “junior” right holders rely upon to keep “seniors” from expanding their use. Thus, MWD would be adversely affected by place of use expansions, since more water would then be used by “senior” right holders, with the result that less water would be available to Metropolitan. To the extent that the water to be served to SDCWA is conserved water, as in the IID #1 deal, and the conserved water would be taken by MWD under its priorities, MWD is affected because that water displaces water MWD might otherwise have been able to divert. If IID were to somehow prevail in its argument that the water it conserves for SDCWA would stay priority 3 water, then that places the SDCWA use

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<sup>1</sup> IID makes a legalistic argument in its petition that, because Water Codes Section 1011 specifies that conservation is reasonable and beneficial use itself, the “use” is still within IID because that is where the conservation effort would be occurring. IID asserts that:

“Thus, the Petition is brought (in the alternative) as a change of place of use petition to the extent that though legal use is still in the IID under section 1011, the practical result is new water is being “used” in the Authority’s service area.” (IID Petition at 34.) In its Notice on the change petitions, however, the SWRCB ignores this contention that implies that there is no actual change in place of use because of Section 1011.

ahead of MWD priorities<sup>2</sup> and would disrupt the “trickle down” process by pulling SDCWA’s use ahead of MWD priorities. Furthermore, the extent of the effect would possibly not be limited to the 200 kaf transfer, since IID’s place of use expansion would not necessarily be restricted to the SDCWA transfer.

### III. SWRCB JURISDICTIONAL ISSUES

#### A. NO ONE HAS EVER BEFORE TRIED TO INVOLVE THE SWRCB IN ANY COLORADO RIVER CONSERVATION AGREEMENT.

Unlike the proposed transfer to SDCWA, the IID #1 Agreement painstakingly avoided characterizing the activities to be undertaken as a “transfer under state law.” Instead, IID agreed to conserve water which it would otherwise divert under its third priority; in years when MWD would not otherwise receive all of its fourth and fifth priority and surplus contract water, MWD could divert the IID #1 107 kaf under MWD priorities. Coachella Valley Water District (CVWD) asserted its contractual right to the water IID conserved, and MWD and IID reached agreement with CVWD ( and PVID) that recognized CVWD’s right to a portion of the IID #1 water under certain circumstances. Basically, IID #1 was structured as a transaction among Colorado River entitlement holders pursuant to the federal Law of the River. No Change Petition was filed with the SWRCB, since IID was not “transferring” water, but was simply not diverting the water it was conserving and MWD would divert the water under its rights and contracts.

For the SDCWA transfer, IID has requested the SWRCB to determine that state law applies. In so doing, IID is attempting to avoid the priority of right raised by CVWD with regard to the IID #1 Agreement. IID has specified to the SWRCB that two preliminary legal questions should be addressed immediately: (1) do Water Code Sections 1011,1012 and 1013 apply, govern and permit the transfer, and (2) does the conserved water retain the same priority as if it were diverted and used by IID. IID also advised the SWRCB that if the SWRCB rules against IID on these two issues, then the Transfer Agreement becomes a nullity. These two issues are questions of federal law, which arguably should be decided in federal court. MWD’s protest should assert that the SWRCB does not have jurisdiction to determine Colorado River matters other than with respect to the waste and unreasonable use issue. Such a position would be consistent with MWD’s long-standing views of the application of federal law to the Colorado River.

#### B. THE LAW OF THE RIVER DIRECTS THE PRIORITY OF THE USE OF COLORADO RIVER WATER AND CANNOT BE IGNORED OR INTERPRETED BY THE SWRCB.

The Section 5 contracts, the Seven Party Agreement, the Boulder Canyon Project Act, and the 1934 Agreement between IID and CVWD are all impacted by IID’s Change Petition. The SWRCB does not have authority to interpret or modify any of these agreements nor the BCPA.

The Notice recognizes that the federal government, pursuant to the BCPA, controls the contracts for Colorado River water. IID has a contract with the Secretary of the Interior for its use of Colorado River water. The Notice also recognizes the 1934 agreement between IID and CVWD, which addresses use of Colorado River water as between IID and CVWD. The Notice

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<sup>2</sup> It is also not clear that MWD’s section 5 contract encompasses MWD’s diversion of priority 3 water for IID or SDCWA.

contemplates IID and CVWD may negotiate a compromise or amendment to their 1934 agreement. However, if this does not occur, the SWRCB does not have jurisdiction to amend its terms.

The IID Change Petition also references the Seven-Party Agreement. This also supports the argument that the SWRCB and IID are aware of federal law controls. The Notice specifically recognizes the Seven-Party Agreement controls the priority of right to the Colorado River water. By granting IID's Change Petition, the SWRCB arguably would interfere with the priority system this agreement dictates. MWD's protest must challenge interference with the Law of the River and the priority system.

C. IID IS REQUESTING THAT THE SWRCB DETERMINE IT HAS NOT WASTED WATER AND ENSURE ITS PRACTICES RESULT IN SIGNIFICANT WATER CONSERVATION.

An implication of the Notice and the Change Petition is that the SWRCB will be involved in an examination of IID's current irrigation practices. IID is requesting that the SWRCB analyze its current practices and conclude it has put its water to reasonable and beneficial use. Implicit in making such a finding is that the SWRCB would have determined whether IID has wasted water and whether continued increased use of water has been reasonable in light of the conservation work undertaken pursuant to the IID #1 program.

D. THE ENVIRONMENTAL IMPACTS OF THE TRANSFER AGREEMENT HAVE NOT BEEN ASSESSED.

The Notice states that the draft environmental impact report/statement ("DEIR/S") will not be completed until late 1999. The Notice provides that supplemental materials may be filed regarding unreasonable impacts on fish, wildlife or other instream beneficial uses up to 90 days after the DEIR/S is issued. MWD should reserve its right to comment on the stated environmental impacts. MWD may also want to comment on other types of environmental impacts which are likely to arise as a result of the long-term transfer. Impacts to air quality, urban growth and other environmental concerns must also be considered in the DEIR/S, and MWD may comment on such impacts. The impacts to be addressed should reflect that the place of use should be changed to the MWD service area. Additionally, the environmental assessment may be extensive as a result of the proposed transfer's impact on the Salton Sea. The protest should reserve the right to raise environmental issues, once MWD has had the opportunity to review the DEIR/S.

E. THE DESCRIBED TRANSFER IN THE NOTICE DOES NOT COINCIDE WITH THE AGREEMENT BETWEEN MWD AND SDCWA.

IID's Change Petition and SWRCB's Notice reference the wheeling agreement between MWD and SDCWA. However at the time of the filing of the Change Petition and issuance of the Notice, MWD and SDCWA had not consummated an agreement. The agreement MWD and SDCWA have entered into is not the same arrangement previously contemplated and not the arrangement reflected in the Notice. As a result, the Notice does not accurately describe the process by which water will be delivered to SDCWA and the Change Petition requests a change in place of use which appears to be insufficient. Both documents may have to be amended to accurately reflect where the water will be transferred, i.e., through MWD facilities and to the MWD service area.

It was contemplated in MWD's negotiations with SDCWA, that MWD would have to file a protest to protect its interests. Indeed, this was specifically reflected in the Board letter of November 9, 1998, transmitting for approval the Exchange Agreement. The Board letter reflected that Metropolitan would preserve its right to participate fully in the SWRCB process to insure its consistency with state and federal law and the California Plan. In addition, in the event any other administrative or other process is commenced by other parties, Metropolitan would participate as appropriate to protect its interest, consistent with the Exchange Agreement.

#### **IV. CONCLUSION**

Although several issues are raised by the Notice, the most critical appears to be whether the SWRCB has jurisdiction over the proposed transfer and, if so, to what extent. A determination of the SWRCB's jurisdiction would be helpful to MWD and other parties involved. The full range of issues likely to be addressed, assuming the SWRCB retains jurisdiction, will probably include all findings requested by IID in its Change Petition, environmental concerns, quantification of IID's water rights pursuant to Permit 7643, impact to CVWD, PVID and MWD, and Law of the River ramifications. MWD should ensure that it can participate in the hearing to protect its interests by filing a protest by April 1, 1999. MWD would address Law of the River, jurisdiction and potential environmental impact issues.

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