

**CALIFORNIA WATER NEWS**

**METROPOLITAN WATER DISTRICT DISPUTES IMPERIAL IRRIGATION DISTRICT'S PROPOSAL TO USE IMPERIAL'S COLORADO RIVER ENTITLEMENT WATER FOR QSA SALTON SEA MITIGATION**

As litigation over the Colorado River Quantification Settlement Agreement (QSA) and related agreements winds its way through the appellate process, a new dispute has arisen between Metropolitan Water District (MWD) and Imperial Irrigation District (IID). The California Third District Court of Appeal has stayed the judgment invalidating the QSA and appellate briefs from all parties are due in December 2010.

**Background**

Under the QSA, implementation of water conservation and transfer by IID of conserved water to San Diego County Water Authority (SDCWA) requires mitigation for impacts on the environment, including the Salton Sea. The QSA provides that mitigation activities for each year be determined by a "joint powers authority" (JPA) and that IID, SDCWA and Coachella Valley Water District (CVWD) contribute to a fund to pay for the mitigation, with a limit on their total required contributions. As part of the QSA, the State of California, through the California Department of Fish and Game (DFG), contracted to pay the balance of mitigation costs when that limit is reached.

The judgment invalidating the QSA found that the state's promise to pay QSA mitigation costs is unconstitutional because the legislature cancelled the continuing appropriation to DFG that was relied upon in the QSA as the source. (*See, 20 Cal. Water L. & Pol'y Rptr.* 131 (Feb 2010).) The stay allows the parties to continue with the water conservation and transfers contracted for in the QSA. (*See, 20 Cal. Water L. & Pol'y Rptr.* 305 (July 2010).)

**The QSA and the Salton Sea**

The uncertainty caused by the pending litigation gives IID concern that a significant portion of the costs of mitigation may be unfunded in the long term and that, in the short term, IID may not be paid for

the conservation of water required for the transfer and for Salton Sea mitigation for 2011. Currently IID contracts with farmers to pay them to fallow farm land to create water for the transfer and Salton Sea mitigation. Fallowing contracts run from July 1 to June 30 and solicitation for 2011-12 will begin soon. IID cannot assure farmers that the conserved water will be used or that IID will be paid for it. The uncertainty about funding for mitigation cost in excess of the amount required from the QSA parties must somehow be resolved.

IID has used water from its Colorado River entitlement rather than conserved water for QSA mitigation other than for the Salton Sea, including the replacement of All American Canal wetlands and water for a newly created managed marsh. Creating mitigation water by fallowing requires more total mitigation water for the Salton Sea because the loss of water to the sea due to fallowing to create mitigation water must itself be mitigated. IID therefore decided that a much more cost-effective source of mitigation water is consumptive use from its Colorado River entitlement. Using Colorado River water would require less water than creating mitigation water by fallowing and the cost of the water per acre-foot is lower.

**Letters to the Bureau of Reclamation**

In a letter dated September 20, 2010, IID informed the U.S. Bureau of Reclamation (Bureau) that it intends to consumptively use Colorado River water by temporarily storing 41,250 acre-feet of water in the Salton Sea in 2010 for later use to mitigate impacts on the Salton Sea during 2011 and the first half of 2012. IID estimates this would save \$6.3M in 2011-12. The letter points out that in the QSA related contracts both MWD and CVWD covenanted to not oppose IID's consumptive use of Colorado River water for QSA environmental mitigation purposes. IID's QSA agreed-upon consumptive use cap will remain at 3.1 mafa (less QSA reductions for Conserved Water

transfers) and California's cap will remain at 4.4 mafa.

By letter dated September 27, 2010, MWD requested that the Bureau deny IID's request to "deliver additional water to the Salton Sea in 2010." MWD pointed out that as a junior California priority right holder, MWD would be deprived of the additional water supply that would be available if IID were to continue to use fallowing to create Salton Sea mitigation water. MWD stated that it will be required to take delivery of its intentionally created surplus (ICS) storage credits in Lake Mead, which would reduce that reservoir by 41,250 acre-feet by the end of 2010 and therefore impact water supply to other Colorado River Basin States. MWD believes that IID's concerns about financial viability of mitigation for the QSA transfers does not justify the use of IID's Colorado River entitlement. MWD stated that IID's Boulder Canyon Project Act contract for delivery of Colorado River water is limited to use for potable and irrigation purposes. MWD also relies upon a footnote in the Colorado River Water Delivery Agreement (CRWDA) that states that mitigation water must come from "non-Colorado River sources" in support of its position.

The Southern Nevada Water Authority (SNWA) expressed concerns in a letter to the Bureau dated October 4, 2010 primarily based upon fear that withdrawing 41,250 acre-feet of water from Lake Mead, which is currently at 39 percent of capacity due to an 11-year drought, will lead to a declaration of shortage and reduce water supplies for Arizona and Nevada. SNWA urges the parties to work collaboratively to address the issues raised by IID and MWD.

IID sent another letter to the Bureau on October 5, 2010 setting forth its arguments why MWD's position is wrong. IID asserts that there is nothing in the QSA or federal or state water law that limits IID's consumptive use of water to potable and irrigation only. There are many other beneficial uses for which all Colorado River water entitlement holders use

their water and water for mitigation is a recognized beneficial use. IID underscores that MWD expressly agreed in the QSA Agreements that MWD would recognize either IID conserved water or IID consumptive use water as acceptable to satisfy QSA mitigation requirements. IID countered MWD's position that the CRWDA, Exhibit B, footnote 5 requires the use of non-Colorado River water for mitigation by explaining that it expressly allows exchanges to provide the water, and that footnote 10 to Exhibit B allows the "exchange" and "transfer" without actually moving water to facilitate the Bureau's accounting for Colorado River water. IID believes that the over \$6M savings for mitigation costs for 2011 and 2012 benefits all QSA parties and will allow that amount of money to be used for other QSA required mitigation. IID characterized MWD's "threat" to withdraw its ICS water as an effort to convert an intra-California disagreement into a Colorado River basin-wide controversy.

MWD replied by stating that it believes that IID's proposal to use unused Colorado River water for Salton Sea mitigation is illegal and that the shortfall in funding for mitigation for the QSA water transfers is not caused by any act or omission of MWD.

### Conclusion

The latest in the letter exchanges is the Bureau's letter to IID on October 14, 2010. The Bureau relies on footnote 5 to Exhibit B of the CWRDA to state it does not believe it is appropriate to account for Colorado River water in the manner proposed by IID. But, due to the huge multi-year efforts of the parties to negotiate and agree to the QSA, the Bureau recommends that all the involved parties should meet to address IID's proposal and attempt to reach a solution that all the CWRDA parties can support.

Mitigation for the Salton Sea will continue to be a controversial issue for the QSA parties so long as the State of California delays its implementation of a restoration project for the Salton Sea. (D. Osias)