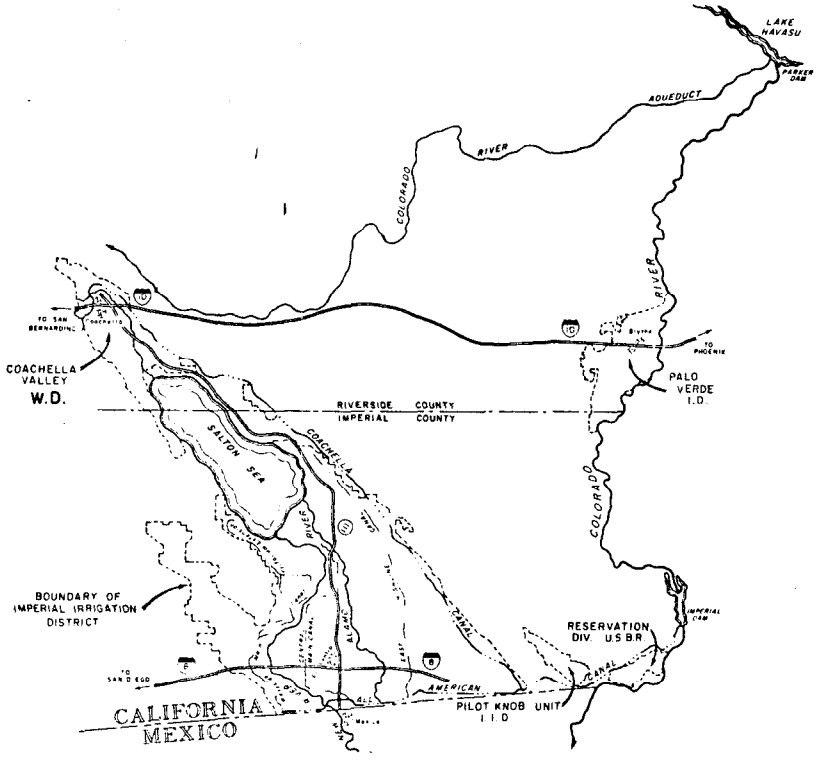
Del: D-1600

IMPERIAL IRRIGATION DISTRICT

ALLEGED WASTE AND UNREASONABLE USE OF WATER

ORDER: 84-12

Affirming Decision 1600 and Denying Petitions for Reconsideration



SEPTEMBER 1984

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of ALLEGED WASTE AND UNREASONABLE USE OF WATER BY IMPERIAL IRRIGATION DISTRICT	ORDER: WR 84-12 SOURCE: Colorado River COUNTY: Imperial

ORDER AFFIRMING DECISION 1600 AND
DENYING PETITIONS FOR RECONSIDERATION

BY THE BOARD:

The Board having issued Decision 1600 on June 21, 1984; Decision 1600 having directed Imperial Irrigation District to take certain specified actions to increase water conservation; petitions for reconsideration of that decision having been filed by Imperial Irrigation District and Metropolitan Water District of Southern California; and the petitions having been duly considered; the Board finds as follows:

1.0 GROUNDS FOR RECONSIDERATION

The hearing notice dated August 23, 1983 informed the parties that the Board would conduct the proceedings in this matter as closely as practicable to the procedures applicable to appropriative water right proceedings as set forth in the California Administrative Code, Title 23, Article 14, Sections 731 through 735, and Article 14.5, Sections 737.1 through 737.5. Section 737.1 provides that reconsideration of a Board decision or order may be requested for any of the following causes:

a. A procedural irregularity which has prevented the petitioner from receiving a fair hearing;

b. The decision is not supported by substantial evidence;

c. There is relevant evidence available which, in the exercise of reasonable diligence, could not be produced at the hearing; or

d. An error in law.

2.0 SUMMARY OF PETITIONS AND RELATED SUBMITTALS

2.1 Imperial Irrigation District

The Imperial Irrigation District (District or IID) requests that the Board reconsider Decision 1600 based on the contention that the evidence shows the District is beneficially using all water which it diverts from the Colorado River. The District suggests that the Board should find no misuse at the present time and dismiss the proceeding. The arguments presented in support of the District's position are discussed in Section 3 below.

2.2 Metropolitan Water District of Southern California

The Metropolitan Water District of Southern California (MWD) requests that the Board delete the finding on page 66 of Decision 1600 regarding the current misuse of water by the District and substitute in its place a statement that additional water conservation measures are necessary to prevent a misuse of water. MWD also requests that the order be phrased as an "interim interlocutory order" since

additional data will be necessary to evaluate District operations more fully. Finally, MWD requests that the phrase "Water Rights Decision" be deleted from the cover of the Decision since the proceeding does not involve an application to appropriate water.

2.3 United States Bureau of Reclamation

The United States Bureau of Reclamation (Bureau) submitted a letter dated July 18, 1984 stating that the Board would be justified in reconsidering the decision since several points did not appear to be given adequate consideration. The Bureau stresses the contention that "surpluses" have existed in the Colorado River system for the past several years. The Bureau also argues that a comprehensive water conservation plan cannot be completed by the date specified in the Board's order.

2.4 John and Stephen Elmore

John and Stephen Elmore submitted a memorandum of points and authorities which responds to the points raised in the petitions for reconsideration and which urges that reconsideration be denied.

3.0 ISSUES RAISED IN IID PETITION

The Imperial Irrigation District requests reconsideration because it contends that the evidence shows the District is beneficially using all water which it diverts from the Colorado River. The District does not challenge the Board's findings on specific factual issues (IID Petition for Reconsideration, p. 6), but contends that the facts do not support a finding of misuse.

The District's position that there is no misuse of water is based upon the following supporting contentions:

a. The District is making beneficial use of all water which it diverts;

b. There is no other present competing use for water used by IID; and

c. If not diverted by IID, the water would be "wasted" to the Gulf of California. (IID Petition for Reconsideration, pp. 3-5.)

In addition to presenting the District's view of the law and facts regarding the above contentions, the District's petition discusses several subjects referred to in Decision 1600 and argues at length that the existence of the particular fact or situation "does not constitute a misuse of water". (IID Petition for Reconsideration, pp. 6-35.)

Decision 1600 does not conclude that the existence of any particular fact in isolation requires a finding of misuse. Rather, the issue is whether all of the relevant facts together result in a misuse of water. Therefore, the discussion of each of the subjects addressed in the District's petition will focus upon the relevance of that subject to the issue of misuse.

3.1 Beneficial Use of Water by IID

The first point stressed in the District's petition is that the District makes beneficial use of all water diverted for consumptive

use and operational losses; power production; and fish, wildlife and recreational uses. The District argues that Decision 1600 should be reconsidered because the "evidence shows that IID is beneficially using -- not misusing -- all water diverted." (IID Petition for Reconsideration, p. 1).

At the outset, it is important to recognize that the existence of a beneficial use of water does not foreclose a finding of misuse under the California Constitution. To the contrary, Article X, Section 2 requires that the use of water be both beneficial and reasonable. The distinction between the dual requirements of beneficial use and reasonable use was addressed by the California Supreme Court in Joslin v. Marin Municipal Water District, 67 Cal.2d 132, 60 Cal.Rptr. 377, 429 P.2d 899 (1967) as follows:

> "[P]laintiffs have not shown how their claimed use of the stream in the instant case, when measured by the constitutional mandate, is a reasonable one. In essence their position is that such use is a beneficial one encompassed within their riparian rights and that all beneficial uses are reasonable uses. Such a position ignores rather than observes the constitutional mandate. Article XIV, section 3, [now Article X, section 2] does not equate 'beneficial use' with 'reasonable use.' Indeed the amendment in plain terms emphasizes that water must be conserved in California 'with a view to the reasonable and beneficial use thereof in the interest of the people,' that the right to use water 'shall be limited to such water as shall be reasonably required for the beneficial use to be served,' and that riparian rights 'attach to, but to no more than so much of the flow' as may be required 'in view of such reasonable and beneficial uses.' (Emphasis added.) (Cal.Const., art.XIV, §3; see fn. 5, ante.) Thus the mere fact that a use may be beneficial to a riparian's lands is not sufficient if the use is not also reasonable within the meaning of section 3 of

> article XIV and, as indicated, plaintiffs' use must be deemed unreasonable." (Id., 67 Cal.2d at 142, 143, emphasis in original).

In the present situation, there is no dispute that some beneficial use is made of the water diverted by IID. The critical issue is whether the use, method of use, and method of diversion are reasonable in light of all relevant conditions. Examining the beneficial use or uses made of the water diverted by the district is relevant to determining the reasonableness of District practices, but it is not dispositive of the issue. With that in mind, we proceed to discussion of the contentions raised in the District's petition regarding beneficial use of water.

3.1.1 Irrigation and Operational Losses

As mentioned above, the fact that IID makes some beneficial use of all water diverted for either irrigation or power production is not at issue. The Board does take issue, however, with the District's characterization of canal spills, tailwater and excess leachwater as a "beneficial use" of water. (IID Petition for Reconsideration, p. 9.) Testimony presented by the District and other parties at the hearing focused on how these losses of water could be reduced. The fact that a portion of the losses may be difficult to eliminate does not make the losses "beneficial". Attempting to portray such losses as "beneficial" -- and therefore as desirable -- serves only to divert attention from the promotion of more efficient use of water.

The District also argues that "the amount of water used by IID consumptively and operationally is probably sanctioned by" the duty of

water provisions of Section 657(a)(1) of Title 23 of the California Administrative Code. (IID Petition for Reconsideration, p. 16.) The water duties specified in the regulation, however, provide only rough guidelines ranging from 1 cubic foot per second (cfs) for each 50 acres to 1 cfs for each 150 acres, depending upon the circumstances. The existence of such guidelines does not foreclose inquiry into the reasonableness of the method of use and the method of diversion of the water which is applied. In the case of IID, where large quantities of imported water end up in the Salton Sea, it is reasonable to expect better control of tailwater discharges and canal spills than was shown to exist by the evidence presented at the hearing.

3.1.2 Power Production

The District's petition for reconsideration discusses at length the value which it receives and has received from hydroelectric power production. Three observations with respect to the petition's discussion of hydroelectric power production are in order. First, Decision 1600 expressly acknowledges the use of water for hydroelectric generation and the economic benefit which IID receives from it. (Decision 1600, pp. 7 and 8.) Second, Mr. Welch's affidavit dated July 19, 1984, which is referred to repeatedly in the petition for reconsideration is not part of the hearing record, and in the exercise of reasonable diligence, much of the information presented in that affidavit could have been produced at the hearing. To the extent that the affidavit refers to more recent information, the Board does not believe the information is of sufficient significance to justify

reopening the hearing record. Therefore, the information in that affidavit does not provide grounds for reconsideration. (Section 737.1, Title 23, California Administrative Code.)

Finally, it is not clear what the potential reduction of hydroelectric power generation and resulting revenue has to do with reconsideration of Decision 1600. The District has repeatedly stressed the efforts it is making to conserve water which, when successful, necessarily result in the reduction of diversions and a corresponding decrease in hydroelectric power generation. IID Board of Directors' Resolution No. 8-84 establishes that District policy is to expand its conservation program with the goal of reducing inflow to the Salton Sea by 100,000 acre-feet by July 1, 1985. (IID Memorandum, 2/21/84, Exhibit 1.) If successfully implemented, this policy will reduce the District's revenue from hydroelectric power generation. Thus, the District's existing policy, as reaffirmed by Resolution No. 8-84, stresses that water conservation efforts within IID should be increased at the present time, even at the expense of incidental hydroelectric power generation. The District cannot seriously contend that Decision 1600 should be reconsidered for following the same policy.

3.1.3 Fish, Wildlife and Recreation

The District urges that use of Colorado River water for maintenance of the Salton Sea fish, wildlife, and recreational uses "constitutes a present beneficial use -- not a misuse". (IID Petition, p. 21.)

Two points should be noted at the outset. First, the evidence establishes that the Imperial Irrigation District is not operated with

any intention of promoting the Salton Sea fishery. Neither its appropriative water right permits, nor its contract for water delivery with the Secretary of the Interior provide that fish and wildlife enhancement or recreation are authorized purposes of use for the water diverted by the District. IID presently treats the Salton Sea and surrounding property as a drainge reservoir for agricultural return flow and canal spills. An incidental beneficial effect of that inflow is to postpone the increase in the Salton Sea salinity. The fact that IID's operations result in an incidental beneficial effect does not mean that the District is making an authorized beneficial use of water.

The second point to be recognized is that the issue is not whether the inflow into the Salton Sea has an incidental beneficial effect, but whether it is a reasonable and beneficial use of water. Decision 1600 expressly recognizes the beneficial effect of inflow to the Salton Sea on temporarily postponing the increase in the salinity. (Decision 1600, p. 26, 59.) However, the decision also recognizes that the rising water level of the Salton Sea between 1971 and 1981 resulted in the flooding of approximately 15,750 acres of adjoining private and public land, and that, as of May of this year, the water level was continuing to rise. (Decision 1600, pp. 57, 58.)

In view of the limited life of the Salton Sea fishery under current conditions (Decision 1600, p. 61), the Board concludes that the beneficial effect of the present quantity of IID inflow is outweighed

by the adverse effect of the rising water level on surrounding property and various uses associated with that property. Under present conditions, we do not believe that the existing quantity of IID inflow to the Salton Sea can be considered a reasonable use of water.[1] Although contrary to the position urged in the District's petition, the Board's conclusion is consistent with the District's announced goal of reducing inflow to the Salton Sea by 100,000 acre-feet by July 1, 1985. (IID Board of Directors Resolution No. 8-84.)

3.2 Propriety of Considering the Effect of IID Operations on Flooded Property

The second point stressed in the District's petition for reconsideration is that "the fact that water which is beneficially

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[1] A statement presented by the Salton Sea Fish and Wildlife Club at the Board meeting on June 21, 1984 urged that an order resulting in reduction of inflow to the Salton Sea would violate the Board's duty to protect the public trust. The Board recognizes the beneficial effects of freshwater inflow on Salton Sea salinity. The Board also recognizes, however, that in the absence of an expensive salinity control project, the salinity will inevitably increase unless ever greater amounts of freshwater are diverted into the Salton Sea resulting in an ever larger body of water. The public trust doctrine is based upon the State's ownership of navigable waterways and underlying lands as trustee for the benefit of the people. Colberg Inc. v. State of California (1967) 67 Cal.2d 408, 416; 62 Cal.Rptr. 401, 406. Upon its admission to the Union in 1850, California acquired title as trustee to navigable waterways and underlying lands. National Audubon Society v. Los Angeles (1983) 33 Cal.3d 419, 435, 189 Cal.Rptr. 346, 355. No such title or public trust easement was acquired to the property underlying the present Salton Sea since the Sea was not created until 1905. Therefore, regardless of the extent to which the public trust doctrine may or may not apply to an artificial body of water, it is apparent that the doctrine does not justify continued inundation of property to which no public trust easement attaches. Although we believe that maintaining present levels of inflow is an improper way to postpone increases in the salinity level, we are encouraged by the District's concern about the fishery and by the discussion of physical solutions which could preserve the fishery indefinitely.

used may contribute to flooding does not constitute a misuse of water." (IID Petition, p. 24.) The issue, however, is not whether the existence of flooding constitutes a misuse of water, but whether the fact that productive property is being flooded should be considered in evaluating the reasonableness of IID water management policies. In essence, the position of the District is that the Board must consider the incidental beneficial effect of IID inflow on the Salton Sea fishery, but that it is barred from considering the adverse effects of that same inflow on the adjacent property and associated uses of that property. Such a position is neither logical nor consistent with prior judicial decisions.

The nature of the inquiry into the reasonableness of a particular use or method of use of water was addressed by the California Supreme Court as follows:

> "The scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts. What constitutes a reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situations changes." Environmental Defense Fund v. East Bay Municipal Utility District (1977) 20 Cal.3d 327, 344, 142 Cal.Rptr. 904, 913, 572 P.2d 1128, 1137. (Emphasis added.)

The District's petition repeats its previously stated position that determination of the nature and extent of private property rights is outside the jurisdiction of the Board. Contrary to the District's repeated inferences, the Board has made no attempt to evaluate issues regarding easements and liability for damages to others' property. In

view of the broad interpretation which the courts have consistently given to Article X, Section 2 of the California Constitution, however, it is inconceivable how the District can argue that the adverse effects of District operations on thousands of acres of productive property are irrelevant to an evaluation of the reasonableness of District operations. Even if the Board's inquiry were limited to examination of the beneficial uses of water for irrigation, domestic uses and other purposes within the District, it is indisputable that the flooding of property in the vicinity of the Salton Sea has virtually eliminated the beneficial uses of water which previously existed on that property and which could be reestablished if the water level of the Salton Sea recedes.

Contrary to declared District policy, the petition for reconsideration suggests that it is reasonable for the District to continue the present methods of operation, at least until the demand for water for other uses increases. In reference to Decision 1600, the petition states:

> "Finally the Board suggests that 'the danger level for fish reproduction, [may occur] in less than five years whether or not a planned reduction in inflow takes place.' Decision 1600, 61. Again it is not understood what prompts the Board to postulate either the probability or advisability of 'a planned reduction in inflow.' ... It is known that a reduction in inflow will not change the fact that damages have been caused to some private property in the past. But it is not known why IID should, at the present time, plan a reduction in inflow, only to have the water pass wastefully to the Gulf." (IID Petition for Reconsideration, p. 34.)

We make two observations with respect to the above statement. First, although a reduction of inflow will not eliminate past damage, it can reduce future damage to presently submerged property and prevent future flooding of additional property caused by continuing increases in the Salton Sea water level. Second, the Board was prompted to "postulate" the probability of a planned reduction in inflow to the Salton Sea based, in part, upon the provisions of IID Board of Directors Resolution No. 8-84. Among other things, the IID Resolution refers to the policy of the State Constitution that the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water should be prevented, and it declares that the District shall improve its water conservation programs "with the goal of reducing inflow to the Salton Sea [by] 100,000 acre-feet by July 1, 1985." (Emphasis added.)

Decision 1600 expresses the Board's concern about the need for the District to identify precisely how the planned reduction of inflow is to be achieved. From the language of Resolution No. 8-84, however, it is apparent that announced District policy recognizes the relationship between the present quantity of inflow to the Salton Sea and the reasonable use of water. The fact that Decision 1600 contains the same recognition does not provide grounds for reconsideration.[2]

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[2] The petition for reconsideration also objects that the beneficial effects of reduced inflow to the Salton Sea discussed in Decision 1600 are "generalized speculations". (IID Petition, pp. 30-34.) There is ample evidence in the record for the Board's conclusions that a reduction in inflow would be likely

(CONTINUED)

3.3 Other Beneficial Uses For Conserved Water

The District's argument concerning other beneficial uses for conserved water is twofold. First, the District contends that there are no other beneficial uses for conserved water at the present time. Second, the District submits that the impending shortages of Colorado River water are irrelevant to a finding of present misuse. These contentions are discussed below.

3.3.1 Present Beneficial Uses

With respect to present alternative uses for conserved water, the record indicates that the parties to the Seven Party Agreement have had their orders for Colordo River water satisfied in recent years. From this evidence, the District asks us to conclude that there are presently no other beneficial uses to be made of conserved water and that any water not diverted by IID would flow "wastefully" to the Gulf of California in violation of the constitutional mandate to maximize beneficial use. This argument cannot be accepted for several reasons.

First, as the Elmores point out, there was uncontroverted testimony that there is substantial storage capacity available in three Southern

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[2] (FOOTNOTE CONTINUED)

to have the benefits noted. (Decision 1600, pp. 56-61 and passim.) Since the District's announced goal is to reduce inflow into the Salton Sea, however, we fail to understand the vehemence with which the petition argues that a reduction in present inflow would not be beneficial.

California groundwater basins. The arrangement betwen MWD and the Coachella Valley Water District provides an example of how a groundwater recharge project can work to the advantage of participating agencies. (Decision 1600, p. 54.) In recognition of the benefits of placing water in groundwater storage for future use, Water Code Section 1242 specifically provides that such storage is a beneficial use of water. Increased water conservation by IID would make additional water available for groundwater storage programs.

Also significant are the instream uses which could be made of water that becomes available as a result of IID conservation efforts. The discussion of alternative uses in Decision 1600 and much of the testimony at the hearing focused primarily on uses of conserved water for various consumptive uses within California. This was due to the evidence that present California water users will face reductions in Colorado River deliveries in the near future.[3] Since many of the potential water conservation measures identified may not be fully implemented before the impending shortages are expected to occur, it was reasonable to focus on the expected consumptive use requirements as alternative uses for conserved water. That does not mean, however, that water which is conserved by IID in the meantime would serve no beneficial purpose.

The evidence in the record shows that the fishery and riparian vegetation in the lower Colorado River has improved significantly

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[3] See Decision 1600, pp. 51-56, for discussion of impending reductions of Colorado River water available to California water users.

during past periods of high flows. There is also evidence that the fish populations downstream from Imperial Dam would be substantially increased by timed releases of water from Lake Mead and Lake Havasu. (Board 14, p. 31.) In most years, such releases would be facilitated by the availability of additional water due to increased water conservation by the Imperial Irrigation District.

Additional water made available as a result of water conservation could also be used to reduce the salinity in the Colorado River below Imperial Dam. The federal government has been extensively involved in the development of numerous salinity control projects aimed at decreasing salinity in the lower Colorado River. (USBR 1, pp. 1 and 2; Public Law 93-320, 43 U.S.C. §1571 et seq.; Public Law 98-63). Some of these projects are directed at making more water available to be used for salinity control purposes below Imperial Dam. Ensuring that there is adequate water to meet the United States' treaty commitments to Mexico is purely a federal responsibility which is to be met without reducing the quantity of water allocated by the U. S. Supreme Court to California or to water users within California. Nevertheless, in view of the relatively high salinity normally present in the lower Colorado River, it is incorrect for IID to suggest that making water available for increased flows below Imperial Dam would serve no useful purpose.

In summary, water conserved by IID will be needed for consumptive use within California in the very near future. In the interim, however, any water which may be conserved could be placed in groundwater

storage or could be left in the Colorado River where it would serve the important purposes of fishery enhancement and salinity reduction.

3.3.2 Future Beneficial Uses

The IID petition argues that the impending shortages of Colorado River water available to other California users "can hardly influence a determination of whether IID is misusing water at the present time." (IID Petition for Reconsideration, p. 35.) As discussed above, the record shows that water conserved by IID could be put into groundwater storage or could be used for various instream uses in the lower Colorado River.

It is also important to realize that many water conservation measures will take a considerable period of time to implement fully. If, as the evidence shows, a serious water shortage is approaching in 1985, 1986, or shortly thereafter, then it is unreasonable not to take steps now to deal with the impending shortage. It is entirely appropriate for the Board's evaluation of District operations to be based, in part, on conditions which will exist within the period necessary to implement certain water conservation measures.

3.4 Availability of Water Conservation Measures

The petition for reconsideration contends that IID is not required to make investments to improve efficiency in order to provide water to junior appropriators. The petition further contends that adoption of any potential conservation measures will increase the cost for IID water users. As noted in Decision 1600, however, a recent appellate

court decision acknowledged the fact that water users may be required to incur reasonable expenses if necessary to comply with the constitutional mandate of reasonable use. People ex rel. State Water Resources Control Board v. Forni, 54 Cal.App.3d 743, 751-752; 126 Cal.Rptr. 851 (1976). Furthermore, in this instance, there was considerable evidence presented that implementation of additional water conservation measures in IID would be cost effective. If done as part of a water transfer arrangement with another user, the evidence indicates that additional water conservation would be in the District's economic interest. Under existing circumstances, the availability of practical water conservation measures is clearly relevant to evaluation of the reasonableness of IID's water management practices.

3.5 Future Planning

The District's petition stresses the desirability of planning for efficient water use at the local level. (IID Petition for Reconsideration, pp. 40-42.) Planning at the local level is entirely consistent with the provisions of the Board's order which directs the District to prepare the required water conservation plan. This plan will be subject to review and approval by the Board, but the initial preparation of a plan is primarily the District's responsibility.

3.6 Summary of Board's Position Regarding IID Petition

Most of the contentions raised in the District's petition were raised previously and were addressed in Decision 1600. The preceding paragraphs elaborate further on the Board's position regarding these

subjects. The Board concludes that the petition does not provide grounds for reconsidering or revising Decision 1600.

4.0 ISSUES RAISED IN METROPOLITAN WATER DISTRICT PETITION

4.1 Conclusion Regarding Misuse

Metropolitan Water District requests that the Board rephrase the last sentence of the first paragraph on page 66 of Decision 1600 to state that additional water conservation measures are necessary to prevent a misuse of water. The suggested change would delete the finding of present misuse of water by IID. MWD suggests that the proposed wording would provide ample justification for the Board's order since Section 275 of the Water Code directs the Board to undertake all appropriate proceedings to "prevent" misuse. The MWD petition also argues that the present inability to quantify IID water losses accurately makes a finding of present misuse inappropriate.

The Board agrees that Water Code Section 275 provides jurisdiction to enter preventative orders to avoid an impending misuse of water. For the reasons described with respect to the IID petition, however, the Board believes that the record supports the finding of current misuse. The record is clear that the present method of District operations has had substantial adverse impacts on the District and others, that the District has not stringently or consistently implemented certain elements of its announced water conservation program and that there are other beneficial uses to be made of conserved water. Several additional practical methods of conserving

water are described in the record. Under the circumstances, it is not necessary for the Board to quantify the amount of water which is unreasonably used in order to conclude that a misuse is ocurring.

The difficulty in accurately quantifying the amount of water savings achievable through specific conservation measures is in large part due to incomplete or inaccurate recordkeeping by IID. The inability of the District to account for the large quantities of water losses in District operations is itself evidence that the District's existing water management practices are unreasonable. The District has acknowledged that it "has a present obligation to adopt more sophisticated measuring devices" and the Board's order specifically calls for development of accurate water accounting procedures by February 1, 1985. (IID Petition for Reconsideration, p. 40; Decision 1600, pp. 67, 68). In the interim, the Board has not directed the District to undertake any large capital improvements. Therefore, it is not necessary to revise any provisions of the decision due to the present limitations on data regarding IID operations.

MWD also expresses concern that a finding of present misuse may disrupt its efforts to participate in a joint water conservation program with IID "by unnecessarily polarizing the issues and the participants." (MWD Petition for Reconsideration, p. 5.) Its concern is based upon the possibility that Decision 1600 may be injected into

ongoing litigation against the District involving issues outside of this Board's jurisdiction.[4]

The Board's interest and responsibility in this proceeding do not extend to providing ammunition for parties in private litigation, on any side. It would be untenable to suggest, however, that the existence of private litigation justifies a policy of Board inaction in the face of substantial evidence of misuse of water. Such inaction would indeed abrogate the Board's true interest and responsibility, which is plainly articulated in Water Code Section 275 and reinforced by decisions of the Supreme Court and appellate courts of this State. (Environmental Defense Fund, Inc. v. East Bay Municipal Utility District, 20 Cal.3d 327, 142 Cal.Rptr. 904 (1977); People v. Shirokow 26 Cal.3d 301, 162 Cal.Rptr. 30 (1980); and People ex rel. State Water Resources Control Board v. Forni 54 Cal.App.3d 743, 126 Cal.Rptr. 851 (1976).) In addition, our research has failed to disclose any judicial recognition of a private cause of action for money damages predicated upon the Constitutional mandates and prohibitions of Article X, Section 2. It is true that the Constitutional requirements may provide a basis for granting injunctive relief to a private party; however, the existence of this remedy is fully consistent with the

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[4] Although this point is not mentioned in the IID Petition for Reconsideration, it was also raised on page 10 of the Supplemental Comments submitted by IID, dated June 20, 1984. These "Supplemental Comments" were resubmitted as an appendix to the IID Petition for Reconsideration. From counsel's oral remarks before the Board on June 21, 1984, the District's primary objection to the decision apparently is based on the concern that the decision might adversely affect the District's position in litigation not involved in this proceeding.

policy enunciated by the people of this State in approving the Constitutional provision which prohibits the waste or unreasonable use of water.

The Board shares MWD's concern that Decision 1600 not disrupt efforts to develop a more effective water conservation program. Whatever the Board's finding, however, it is equally possible that the finding would be referred to by some party in the ongoing litigation. The District has recently announced its willingness to prepare a water conservation plan as was previously requested by the Department of Water Resources. In view of this development, it is unfortunate for all parties that the matter was not resolved earlier without need of a formal hearing. Having conducted an adjudicatory hearing as provided by law, however, the Board's findings must be governed by the record before it rather than on speculation regarding how a particular party might respond.

4.2 Form of Order

MWD also requests that the order be phrased as an "interim interlocutory order" due to the recognized need to develop additional information regarding IID operations. The Board recognizes that the order entered in Decision 1600 is not a final resolution of what water conservation measures should be implemented by IID. Based on that recognition, the Board has reserved jurisdiction, and any future orders will be based upon the record before the Board at that time. It is not necessary to change the form or title of the present order.

4.3 Description of Proceeding

MWD's final request is that the phrase "Water Rights Decision" be deleted from the cover of Decision 1600 since the proceeding does not involve an application to appropriate water. First, we note that although the phrase is on the cover of the decision, it is not a part of the actual decision adopted by the Board. Second, we note that although the proceeding did not involve Board action on an application to appropriate water, it does involve Board findings and an order regarding the manner in which IID's water rights must be exercised. Thus, we believe that Decision 1600 is properly referred to as a water rights decision.

5.0 BUREAU OF RECLAMATION COMMENTS

A letter dated July 18, 1984, was received from the Bureau of Reclamation stating that the Bureau believes the Board "would be justified in reconsidering" Decision 1600. It is not clear whether the letter was intended to be a petition for reconsideration. If so, however, much of the proposed evidence referred to in the letter cannot be considered since: (1) the information was not presented at the hearing; (2) there is no showing that it could not have been produced at the hearing in the exercise of reasonable diligence, and (3) it is not presented in the form of an affidavit as required for new evidence submitted in support of a petition for reconsideration. (California Administrative Code, Title 23, Sections 737.1, 737.2.) Nevertheless, to the extent that the Bureau's arguments are based on evidence in the record, the Board will briefly address them.

The Bureau's first contention is that several points were given inadequate consideration in reaching a conclusion of present misuse. With the exception of new evidence which is not in the record, all of the facts referred to in the Bureau's letter were considered in the formulation of Decision 1600. Most of the subjects to which the Bureau refers are further elaborated on in the preceding sections of this order. The Board believes there is ample evidence to support a finding of current misuse.

The second point raised in the Bureau's letter is the contention that a comprehensive water conservation plan cannot be prepared by February 1, 1985. However, the District advised the Board prior to adoption of Decision 1600 that the "scope of the proposed order, as understood by IID, is acceptable to IID." (Supplemental Comments by IID, June 20, 1984.) Similarly, the District's petition for reconsideration makes no suggestion that the required plan cannot be prepared by the time specified. The Board recognizes that certain aspects of the District's plan may be revised based on future information and future developments, but that is no justification to postpone preparation of a water conservation plan which is necessary to eliminate a current misuse of water. The Board believes that the seven-month period previously specified in Decision 1600 for preparation of a water conservation plan is adequate.

6.0 CONCLUSION

None of the parties requesting reconsideration of Decision 1600 argue that Imperial Irrigation District should not expand its water

conservation efforts. Prior to adoption of the order, the District even advised the Board that the scope of the proposed order was acceptable. The stated concern of the three parties seeking reconsideration is that the Board is unjustified in finding a current misuse of water. For the reasons discussed above and in Decision 1600, we affirm our previous conclusion that the District's failure to implement additional water conservation measures is unreasonable. Further, the record demonstrates that the present water management practices of the Imperial Irrigation District are resulting in a misuse of water. The petitions for reconsideration do not present sufficient cause to reconsider Decision 1600.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

a. The petition for reconsideration of Decision 1600 filed by the Imperial Irrigation District is denied.

b. The petition for reconsideration of Decision 1600 filed by The Metropolitan Water District of Southern California is denied.

c. The request for reconsideration of Decision 1600 submitted by the United States Bureau of Reclamation is denied.

d. The findings and order of Decision 1600 are affirmed.

Dated: **SEP 2 0 1984**

CAROLE A. ONORATO, Chairwoman

WARREN D. NOTEWARE, Vice-Chairman

KENNETH W. WILLIS, Member

DARLENE E. RUIZ, Member

Abstained

EDWIN H. FINSTER, Member