Quantifying the risk of walking away from the QSA

Testimony of
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There is a common misperception in the Imperial Valley that the Imperial Irrigation District is transferring conserved water to urban Southern California because it isn't needed here and there is money to be made in sending it elsewhere.

In fact, IID is a signatory to the Quantification Settlement Agreement and the water transfers it authorized for precisely the opposite reason: to protect the Imperial Valley's water rights that would otherwise be subject to legal challenge under the reasonable and beneficial consumptive use standard that applies to all Colorado River contractors. In other words, IID is voluntarily transferring conserved water as a means of preserving its historical rights and eliminating the threat of a forced taking of water from the Imperial Valley.

The reason this myth of "selling water" has taken hold locally, I believe, is because the internal debate over the valley's water rights has

been raging for so long that fatigue has set in and only a few people are still around who can recall the chain of events leading up to the 2003 signing of the agreement, which, in turn, set into motion the nation's largest agricultural-to-urban water transfer.

The makeup of the IID Board of Directors, and of the Imperial Valley, has changed in the last six years, but the drought conditions that culminated in the decision to transfer up to 300,000 acre-feet of the area's water per year to the district's urban partners have, if anything, become more intractable since the QSA went into effect.

IID is transferring water to the San Diego County Water Authority and the Coachella Valley Water District because of a ruling in 1982 by the State Water Resources Control Board that the district was failing to put its water to reasonable and beneficial use. IID has always maintained that its water use is as efficient as any district's in the West, but a determination was made that the costs of future legal fights were outweighed by the safety and certainty of a water transfer agreement that would pay for greater efficiency and shore up the district's exposure to reasonable and beneficial use challenges.

In 1989, IID entered in to a water transfer agreement with the Metropolitan Water District of Southern California to perform system improvements that would conserve 105,000 acre-feet annually, a water-sharing pact that remains in place today. Then, in 1995, the district began negotiations with the San Diego County Water Authority to conserve and transfer up to 200,000 acre-feet a year through a combination of system and on-farm water conservation measures that would create an economic stimulus in the Imperial Valley.

Those talks produced a signed agreement in 1998, but its implementation was put on hold by a larger effort on the part of the federal government to quantify water use in the lower basin of the Colorado River and to bring California into conformity with its annual entitlement of 4.4 million acre-feet from the river. The purpose of this overarching Quantification Settlement Agreement was to resolve longstanding disputes between water agencies and arrive at a compromise among California, Arizona and Nevada that would, according to then-Secretary of the Interior Gale Norton, “usher in an era of limits” on the Colorado River.

But achieving “peace on the river” was easier to do in a proclamation than it turned out to be in practice. The next four years would be taken up with crafting agreements that would not only pass muster with the seven Western states that rely on the Colorado River but would also find support on the IID board. The linchpin of this agreement was always the water transfer between IID and San Diego, but the priority system among Colorado River contractors as well as the state’s interest in addressing impacts caused by the transfer on the Salton Sea introduced two new aspects to the discussion.

One was that the Coachella Valley Water District, which had subordinated its water right to that of the district’s in 1934, threatened to block the transfer of water from going forward unless it could obtain additional water as part of any final agreement. The other was the Salton Sea, a troubled body of water that would be adversely impacted from any reduction in inflows caused by the water transfer. In both instances, an accommodation was made. The first was to allow CVWD into the transfer agreement for an additional 100,000 acre-feet a year; the second was to

adopt fallowing as the sole means of generating water for the transfer during the first 15 years of the deal to mitigate its effects on the Salton Sea.

Neither of these changes was well-received by IID or, for that matter, within the Imperial Valley, but it remained constructively engaged in the process because the alternative, the summary taking of a quantity of its water by the federal government for no compensation, was considered too great a risk for the district and its water users.

And that is exactly what happened in January 2003, following a New Year's Eve vote to approve the QSA by the IID board that failed 3-2. Within a matter of days, the district saw its annual water order cut by 327,000 acre-feet and only got it back by winning an injunction in U.S. District Court. But this victory was only temporary, as the Bureau of Reclamation was allowed to prepare its case for a part 417 investigation into the reasonable and beneficial use of water in the Imperial Valley and there was no doubt that if IID did not find a way to re-engage in the QSA process it would be back in court, with no guarantee of a favorable outcome and an unspecified quantity of water hanging in the balance.

This proved to be sufficient motivation for the board to try again, which it did on October 3, 2003, passing the landmark agreement by a 3-2 vote that was as controversial then as it is today. IID went to court to validate the agreement, a legal process that would join all of the litigation that was bound to ensue, and the QSA coordinated cases were taken up before Judge Roland Candee in Sacramento Superior Court. In the meantime, water to meet the district's obligations to the urban water agencies and to mitigate the transfer's impacts on the Salton Sea would be produced primarily through fallowing.

Throughout this six-year period, IID's position has been the same: the water transfer agreements authorized by the QSA are far from perfect but they are needed to afford the district and its water users both a revenue stream to pay for conservation and sufficient time to stave off any future legal challenge to its reasonable and beneficial consumptive use. The QSA is the product of decades of conflict resolution, compromise and consensus and if it is allowed to unravel, the result will be chaos. This isn't a scare tactic but a stark fact: remove the basic protections provided to IID under the QSA from hostile legal action by either the state or the federal government, and the vacuum created in its wake will become a vortex of legal uncertainty and political vulnerability.

The public has a right to know – and to comprehend – why the IID, in light of Judge Candee's recent decision to invalidate the QSA over its perceived deficiency in parceling out responsibility for the mitigation of the transfer's effects on the Salton Sea, would seek a stay of this ruling and to appeal it so that the transfer of water can continue indefinitely. Why, our critics ask, hasn't the district just walked away from the QSA and announced to the world that it now wants a better and more lucrative water transfer agreement than the one found to be invalid by a state court?

Perhaps the best way to understand it is to consider what IID would be walking away from:

- An annual cap of 3.1 million acre-feet from the Colorado River and an inadvertent overrun and payback policy that allows the district, under certain circumstances, to exceed that cap.
- A revenue stream to fund needed system and on-farm water conservation improvements vital to protecting the Imperial

Valley's water rights and forestalling the possibility of future reasonable and beneficial consumptive use challenges.

- Nearly finalized habitat conservation and natural community conservation plans to mitigate not only the transfer's impacts on the Salton Sea but also to the district's drain and agricultural field forage habitats.
- Early-start habitat and air impacts mitigation efforts that are already under way at the Salton Sea and would cease to exist without the QSA in place.

It is this last point having to do with the Salton Sea that warrants careful consideration in the Imperial Valley. That's because the basis of Judge Candee's decision to invalidate the QSA, the joint powers authority that assigns financial responsibility for the transfer's impacts among the participating water agencies and the state of California, could stand as an impediment to any water-sharing agreement going forward, now or in the future.

The existing agreement, even though it has been ruled invalid, offers the most viable framework and least risk to the district in reaching accord on the Salton Sea mitigation question. That doesn't mean we will necessarily succeed, only that we have the greatest chance of success in pursuing, and attempting to fix, the plan that is already on the table.

The promise of a better deal must be measured against the prospect of no deal. For this reason, above all others, abandoning the QSA and starting over again wouldn't just be bad public policy.

It would be bad for the Imperial Valley.