

FEATURE ARTICLE

COLORADO RIVER 'QUANTIFICATION SETTLEMENT AGREEMENT' INVALIDATED AS UNCONSTITUTIONAL

By Antonio Rossmann and Laurie Mikkelsen

After six years in the courts, the long-awaited Sacramento Superior Court ruling on the largest agriculture-to-urban water transfer in California's history was issued in final form on January 13, 2010. The 48-page opinion invalidated 12 of the 13 Quantification Settlement Agreement (QSA) contracts that provided for the transfer of up to 300,000 acre-feet of water each year from Imperial Irrigation District to urban southern California; the court declined to validate the remaining contract. Although the challenges to the contracts and their environmental documentation were numerous and broad-ranging, the ruling focused on a single clause in the contract that set up the funding mechanism for Salton Sea protection. That clause, which committed the state to underwrite mitigation of the Salton Sea regardless of the cost or lack of legislative appropriation, was held to violate the California Constitution's prohibition on open-ended financial commitments by the state. The remaining 11 contracts subject to validation, which evidenced their reliance on the state's commitment, were deemed dependent on the unconstitutional contract and therefore also invalid. (See, *Quantification Settlement Agreement Coordinated Special Proceeding*, Case No. JC 4353, Sacramento County Superior Court).

The QSA expressed the attempt by the state and four principal southern California water agencies—Imperial Irrigation District (IID), Coachella Valley Water District (CVWD), Metropolitan Water District of California (Metropolitan or MWD), and San Diego County Water Authority (SDCWA)—to realign California's use of Colorado River water and bring it within California's limitation of 4.4 million acre-feet annually. Although holding only 550,000

acre-feet annually of firm Colorado River water supply, MWD historically filled its Colorado River Aqueduct with nearly twice that amount. As the water purveyor for virtually all of urban southern California, MWD's inability to keep its aqueduct full threatens significant future water shortages in that region. Under pressure from both the federal and state governments, IID, the largest user of California's Colorado River water rights, reluctantly agreed to conserve water to then be transferred to the urban water districts. Under looming federal threat and California legislative deadlines, IID, MWD, SDCWA, and CVWD scrambled to reach agreement on the allocation, use, and priority of California's Colorado River water rights.

However, while the water transfers were seen as the solution to urban southern California's future water ambitions, they produced a critical if belatedly-recognized threat in the Imperial Valley. Less water for IID meant less water for its constituent farmers; more significantly, less water to IID meant less water for the Salton Sea, which relies on IID's agricultural runoff to sustain its elevation and salinity levels.

Those unhappy with the threats to the environment and economy of the Imperial and Coachella valleys challenged the QSA contracts and environmental documents in late 2003, alleging violations of the state constitution, of ethical standards and duties of trust, and of federal and state environmental laws. These cases were eventually consolidated and litigated for six years, while the transfers were allowed to continue. During this time the Salton Sea has deteriorated in both size and quality beyond that predicted in the environmental reports and beyond that required by the QSA itself.

The opinions expressed in attributed articles in *California Water Law & Policy Reporter* belong solely to the contributors, do not necessarily represent the opinions of Argent Communications Group or the editors of *California Water Law & Policy Reporter*, and are not intended as legal advice.

The Sacramento County Superior Court's invalidation of the QSA contracts vitiates the legal authority to continue these water transfers. The court further declined SDCWA's request to stay the judgment during the pendency of the inevitable appeal, instead only effecting a stay for 30 days post-judgment. With the entry of final judgment anticipated in late February, the battle over continued transfers of IID supplies to urban southern California, as well as the legal underpinning of those transfers, will now be joined in the California Court of Appeal for the Third Appellate District.

Background

In Imperial and Riverside counties lies the Salton Sea, California's largest inland body of water. Since the most recent form of the sea emerged over a hundred years ago when the Colorado River burst through an Imperial Valley dike and flooded the Salton Basin, a dynamic, though precarious, ecosystem has formed in and around this terminal lake. In particular, the sea has become an important habitat for hundreds of species of birds and provides a place of repose along the Pacific Flyway. The sea had also become in the late 1950s a significant recreational and economic resource.

Despite the Salton Sea's ecological importance, California's effort to confine its Colorado River water use to 4.4 million acre-feet annually ended up placing the viability of the Imperial Valley ecosystem, and the health of those inhabiting that valley, at risk.

In October 2003, the QSA series of agreements intended to resolve outstanding disputes regarding the delivery of Colorado River water to southern California were executed. Under the Law of the River—the aggregation of judicial, legislative, and executive legal authorities defining the use and distribution of Colorado River water—California is limited annually to 4.4 million acre-feet of Colorado River water, and half of any “surplus” water in the Lower Basin. The 1931 Seven-Party Agreement among California's Colorado River users established a priority system for Colorado River water within the state. Under this agreement, the first four priorities combined amount to the 4.4 million acre-feet annually apportioned to California. However, the individual entitlements of the agricultural users with the first, second and third priorities, amounting to 3.85 million acre-feet, were not individually quantified, although IID took the

lion's share. The fourth and fifth priorities, each of 550,000 acre-feet annually, are held by MWD—but only that fourth priority lies above the 4.4 million acre-feet line. MWD must thus obtain its fifth priority 550,000 acre-foot delivery to meet its expectation of extracting the 1.1 million-acre feet annually that fills its Colorado River Aqueduct.

Metropolitan succeeded in its expectation for most of the past half-century, because before 2003 California's diversions have not been confined to the state's 4.4 million acre-feet allocation. Because Arizona and Nevada had historically not used their full apportionments of Colorado River water, California was free to take their unused shares as surplus, yielding deliveries that averaged 5.2 million acre-feet annually. When Arizona and Nevada grew into the use of their own full apportionments, however, California's historic over-use became unsustainable. The water user facing the largest potential cutback of Colorado River water—of nearly 550,000 acre-feet of water each year—was junior-right-holder Metropolitan.

This circumstance led to state and federal pressure on the four local water agencies who would eventually sign the QSA-related agreements. Ironically, however, the QSA's origins began in an effort not to put more water into the Salton Sea, but to address the reality that too much water was being “wasted” there. In 1983, the State Water Resources Control Board (SWRCB) held a hearing on allegations that IID's water use was wasteful and unreasonable because agricultural run-off from IID was causing the level of the Salton Sea to rise and flood shoreline property. In its 1984 Decision 1600, the SWRCB concluded that IID's failure to implement additional water conservation measures was unreasonable and constituted a misuse of water in violation of article X, § 2 of the California Constitution and § 100 of the Water Code. Four years later, the SWRCB, cognizant of the impending shortage of Colorado River supplies, issued Order WRO 88-20, which directed IID to execute a water transfer with an entity willing to finance water conservation measures, to yield 368,000 acre-feet of water annually. In July 1988 IID entered into a conserved water transfer agreement with MWD for approximately 100,000 acre-feet annually. This development was followed in 1998 by IID's and SDCWA's joint petition to the SWRCB to transfer up to 300,000 acre-feet of water from IID to SDCWA annually—the transfer that ultimately emerged as the keystone component of the 2003 QSA.

In early 1999, in response to the proposed IID-SDCWA transfer, MWD asked the Secretary of the Interior (Secretary), charged with the responsibility for the delivery of Colorado River water, to increase enforcement of reasonable and beneficial use restrictions, seeking a federal determination that IID's use of water was wasteful, thereby freeing up that wasted quantity to flow down the Seven Party priority list for MWD's own use. Additionally, MWD and CVWD instigated litigation to stop the proposed conserved water transfer, again alleging IID was wasting its water, and that IID's "wasted" water should not be transferred to SDCWA, but should instead flow to them as junior appropriators without charge.

Although the Secretary, IID, MWD and CVWD attempted to find a resolution to their issues, by the end of 2002 no agreement had been reached. On December 27 of that year the Secretary informed IID that if a Quantification Settlement Agreement were signed by the end of the year then IID would receive its full 2003 Colorado River water order; if no QSA was signed, the Secretary would decrease IID's 2003 allotment by 241,000 acre-feet. When no QSA was signed, and IID's water allocation was cut, IID sued the Secretary to enjoin the water reduction. After IID successfully obtained a preliminary injunction against a reduction in its Colorado River deliveries, the Secretary reduced deliveries to CVWD and MWD to keep California within its 4.4 million acre-feet allotment. The Regional Director of the U.S. Bureau of Reclamation then commenced proceedings to make a reasonable and beneficial use determination of IID's water use under part 417 of title 43 of the Code of Federal Regulations. That proceeding, completed in July 2003, resulted in IID's annual water allocation being reduced by 276,000 acre-feet, motivating IID and the other water agencies to execute the QSA-related agreements by the end of 2003. The election to recall Governor Davis then advanced this deadline to October 12 of that year.

The QSA Agreements and Their Demonstrated Impact

The QSA and the 12 related contracts at issue in the current litigation would settle disputes among the water agencies regarding the amount, priority, and permissible use of Colorado River water rights, provide for the transfer of water from IID to the urban

coast of southern California, and establish a joint powers authority (JPA) and environmental cost sharing, funding, and habitat plan to produce a restoration plan for the Salton Sea. This JPA Agreement caps the water agencies' responsibility for mitigation costs for the Salton Sea at \$133 million, and provides that the state will unconditionally fund the remainder of the undefined costs. Not all of the parties (e.g., water agencies, California Department of Fish and Game, and Secretary of the Interior) are signatories to all of the 13 contracts; notably, MWD is neither a signatory to the JPA Agreement nor the Environmental Cost Sharing, Funding, and Habitat Conservation Plan—and thereby escapes any environmental responsibility—despite emerging as the primary beneficiary of the QSA, and having the largest user base (18 million benefited customers) by which to fund the mitigation efforts.

The "linchpin" of the QSA, the conserved water transfers from IID to urban southern California, calls for IID to make on-farm and system improvements to conserve water, which can then be transferred. Under the QSA, up to 200,000 acre-feet annually may be transferred to SDCWA and up to 100,000 acre-feet annually may be transferred to CVWD, MWD, or both, for up to 75 years. However, IID's conservation of water produces less agricultural runoff water draining into the Salton Sea, resulting in potentially devastating environmental impacts. (To paraphrase the venerable *Tulare Lindsay-Strathmore* case, what had once been a waste of water (inflow to the sea) has now become the desired reasonable and beneficial use.) As the primary source of water into the Salton Sea, reduced runoff causes the sea to shrink, exposing additional shoreline, with the incumbent potential for an air quality disaster similar to that which occurred at Owens Dry Lake, for years the largest source of life-threatening PM₁₀ emissions in the United States. As the fresh water source diminishes, the salinity of the already very saline lake further increases, threatening the fish and bird species that rely on it. Although the SWRCB's IID-SDCWA transfer permit condition requires that enough water be supplied to the sea to maintain elevation levels for 15 years, after only six years of QSA operation the sea has already lost six feet in elevation, exposing nearly eight square miles of toxic-dust-laden shoreline.

The Current Litigation

Unsurprisingly, outsiders to the QSA-related agreements objected to their terms, the secretive and haphazard process by which they were approved, and their potentially dire environmental effects. Several public and private parties filed mandate proceedings challenging the water agencies' approval of the QSA contracts based on faulty and deceptive environmental documentation. IID filed its own proceeding, pursuant to Code of Civil Procedure §§ 860-870, seeking an *in-rem* judicial determination that 13 of the QSA contracts were valid and impervious to future challenge. The mandate actions and validation action were eventually coordinated and assigned to Sacramento Superior Court Judge Roland Candee.

Over 50 parties answered IID's validation complaint. Those parties who support the validation of the contracts, which included the four southern California water agencies and the State of California, were designated "Category 1" parties. Those parties who opposed the one or more of the contracts, project approvals, or their environmental documentation—which included landowners within IID, environmental groups, and public agencies, the County of Imperial and its Air Pollution Control District—were designated as "Category 2" parties. Landowners alleged that IID breached its duties as trustee for the constituent farmers; violated state ethics laws because IID's general and outside counsel and consultant, who drove the QSA negotiations, were simultaneously representing adverse interests; violated open meeting laws; and that the state's open-ended commitment to fund Salton Sea restoration and mitigation violated article XVI, § 7 of the California Constitution, which prohibits the state from entering into unconditional financial obligations. Environmental groups, and the County of Imperial and its Air District, collectively claimed, both under writs of mandate and as affirmative defenses to IID's validation action, that IID, the other water agencies, and the Secretary of Interior, failed to comply with the California Environmental Quality Act (CEQA), the California Water Code, the National Environmental Policy Act (NEPA), and the federal Clean Air Act (CAA).

In the litigation's first half-decade, the Category 1 parties launched an unprecedented barrage of procedural defenses to delay the trial in validation, and avoid altogether trial on the merits of the CEQA claims. As a result, only after nearly six years of litigation

and more than 147 written rulings on contested matters was trial on the merits scheduled. That trial was broken into phases, the first of which consisted of IID's *prima facie* validation case and any affirmative defenses to it, with the exception of the claimed failures to comply with environmental laws. Only after the first phase would the CEQA, NEPA, and CAA trial follow.

But rather than decide the case on environmental issues, Judge Candee dispatched the entire QSA arrangement on far more fundamental grounds. The court rejected the entire premise on which the QSA was constructed—that the water agencies would go through with it and accept only limited risk, because the state unconditionally underwrote the cost of Salton Sea preservation in excess of \$133 million—thereby opening to question whether that flaw, unlike an inadequate environmental or air quality assessment, could ever be overcome.

In his January 13, 2010 final statement of decision following the validation trial, Judge Candee:

- 1). Invalidated 12 of the 13 contracts, and determined the 13th ("Agreement to Resolve Salton Sea Flooding Damage Issues" between IID and CVWD) incapable of validation.
- 2). Viewing the validation proceeding as *in rem* matters over which the United States had consented to state-court jurisdiction, rejected the assertion by some Category 1 parties that the "Court lacked jurisdiction to invalidate contracts with sovereign Indian tribes or the United States."
- 3). Declining to reach the issue of whether IID's approval of the contracts complied with open meeting laws, nonetheless ruled that there was "no evidence in the record that either the IID Board or the public ever had any opportunity to see or comment on all of the substantive and material provisions" of the QSA JPA Agreement when the IID board of directors approved that contract.
- 4). Held that the QSA JPA Agreement was invalid because it provided that the "State obligation [to pay for the mitigation of the Salton Sea] is an unconditional contractual obligation of the State of California, and such obligation is not conditioned upon an appropriation by the Legislature, nor

shall the event of non-appropriation be a defense," thereby violating the California Constitution's prohibition (article XVI, § 7) of open-ended state financial commitments.

5). Held that because the QSA JPA Agreement was the "principal mitigation funding mechanism for the QSA," and IID expressly stated "that the other contractual QSA commitments would not have been made but for the commitments of the state in the QSA JPA Agreement," the remaining 11 contracts were "interdependent with the QSA JPA Agreement" and thus likewise invalid.

6). Declined to find that IID's counsel and consultant violated ethics laws and that IID violated trust obligations to landowners within the district.

7). Based on its decision that the contracts were invalid, did not reach the CEQA, NEPA and CAA claims, ruling those matters moot.

With the contracts invalidated, legal authority is now lacking to continue the QSA water transfers. SDCWA therefore requested a stay of the effectiveness of the judgment during the pendency of the inevitable appeal. Instead, Judge Candee only stayed the judgment until expiration of the 30-day deadline to file a notice of appeal. That appeal is likely to become ripe in late February, by which time the court is expected to enter final judgment. Thus, whether and under what conditions the transfers may continue during the pendency of appeal, like the merits of any appeals or cross-appeals, will be decided in the Third District Court of Appeal.

In addition to the Category 1 parties' appeal supporting the constitutionality of the QSA JPA Agreement, cross-appeals by the environmental and public agency parties can argue that dismissal of the environmental and CAA claims as moot would prove error should the Court of Appeal fail to affirm the QSA's invalidity. In the same conditional mode, Imperial County can argue that the QSA failed to satisfy the Water Code's requirement that it not proceed until the county determines that the water transfer not unreasonably affect the county's environment or economy. Finally, the individual Imperial Valley landowners can assert their claims that IID breached its trust obligations and relied on counsel and con-

sultants whose professional loyalties were infected by conflicting interests.

Conclusion and Possible Future Outcomes

The Superior Court's rationale for rejecting the QSA engaged a rarely-invoked constitutional doctrine, the California Legislature's duty not to obligate the state to ongoing commitments of millions of dollars a year. In the handful of cases addressing claims based on debt limitation, the appellate courts have often adopted creative doctrine to reject such claims and sustain the legislature's ability to enter into just such long-term obligations. For these reasons the water agencies have asserted high confidence in their anticipated appeals.

Beneath the finesse of doctrine, however, Judge Candee's opinion is remarkably grounded in practical realities: The water agencies made clear in 2003 that they would not have assumed the risk of responsibility for Salton Sea damage but for the state's assertedly-unconditional underwriting of mitigation costs above \$133 million; and just as clearly, the legislature even when flush with cash did not adopt or advance funds to sponsor a Salton Sea restoration plan; that it would do so in the current fiscal environment is completely inconceivable. These realities offer the Court of Appeal ample reason to enforce a constitutional provision that will force the QSA parties to readdress their arrangement based not on fantasy but realistic expectations.

Even if the appellate court were to validate the contracts under the California Constitution, however, the judiciary would then need to address the environmental claims. In the environmental challengers' view, the QSA and water transfer environmental impact reports rise to the level of irrationality that the Third District Court of Appeal previously adjudicated in the Owens Valley groundwater and State Water Project Monterey Amendment cases. As to federal obligations, the failure of the Secretary of the Interior, as the watermaster enabling the Colorado River realignment, to conduct a CAA conformity determination before causing increased Imperial Valley air pollution, would be examined. In sum, those who have relied on the 2003 QSA as solving California's Colorado River conundrum have reason now to consider substitute long-term solutions.

Moreover, pending appeal the case for staying the Superior Court's judgment unconditionally might

prove difficult to sustain. Two salient facts will stand out at the Court of Appeal: the Superior Court's determination that the QSA is illegal, and accelerated environmental damage at the Salton Sea. While the water agencies may claim that allowing the QSA provisions to govern pending appeal will prove less disruptive than relegation to pre-QSA Law of the River, the respondents may counter that even if some QSA provisions continue, conditions should be imposed that will restore the Salton Sea to its 2003 condition, ensure prompt resolution of the appeal, and prompt actions to conform future Colorado River water use to the appellate court's final decision.

Of course California's Colorado River water users have another option: not awaiting appellate review to reformulate a plan that does not rely on the state's assumption of its cost, and that respects the interests of outsiders to their fraternity of water contractors. In particular, as the Owens Valley, Mono Lake, and San Joaquin resolutions have shown, water agencies that invite their erstwhile challengers to participate in the management of their water rights; and respect local governments, individual landowners, and environmental advocates as equal participants; can emerge

from litigation with a more secure supply than that which they brought to the courtroom.

If, instead of the taxpayers of California represented by the legislature, MWD's urban southern California water users who benefit from the transferred water that fills the MWD aqueduct assumed full responsibility to stabilize and preserve the Salton Sea, and address third-party economic impacts in the Imperial Valley, a renegotiated QSA could pass political muster in that valley and constitutional muster in the courts. And at home in the Imperial Valley, an IID management willing to share decision-making with its local county and air district, and its landowners, might emerge stronger and more secure than as presently exposed in the Superior Court.

Of course the water agencies may find these measures too costly, and in so doing decide that they conform their annual Colorado River withdrawals to 4.4 million-acre feet by means other than a transfer of water from the Imperial Valley. Neither outcome is inevitable, nor is either inherently "correct." The Superior Court's judgment, if affirmed by appeal or cross-appeal, at least requires that choice to be lawfully and intelligently made.

Antonio Rossmann, special counsel to the County of Imperial, is the founding partner of Rossmann and Moore. Antonio has served in the past 30 years as counsel in some of California's and the West's leading water and land-use proceedings. Antonio sits on the Board of Advisors to the *California Land Use Law & Policy Reporter*, and the *California Water Law & Policy Reporter*.

Laurie Mikkelsen is an associate counsel at Rossmann and Moore. Laurie has a background in litigation regarding water, land use, and takings issues.