LAW OFFICES OF
**PATRICK J. MALONEY**

2425 WEBB AVENUE, SUITE 100
ALAMEDA ISLAND, CALIFORNIA 94501-2922

PATRICK J. "MIKE" MALONEY (510) 521-4575 THOMAS S. VIRSIK
FAX (510) 521-4623
e-mail: PJMLAW@pacbell.net

April 15, 2004

Charles Keene
California Department of Water Resources
770 Fairmont Avenue
Glendale, California 91203.

Re: Salton Sea Ecosystem Restoration Project—Notice of Preparation

Dear Mr. Keane,

## Introduction

This office represents landowners of Imperial Valley who own approximately twenty-five percent 25% of the irrigated agricultural land in the Imperial Valley. These landowners will be referred to as the "Imperial Group" throughout this filing. The Website for the Imperial Group is www.imperialgroup.info. The members of the Imperial Group have filed multiple lawsuits against the Imperial Irrigation District and other signatories to the Quantification Settlement Agreement ("QSA"). These suits challenge the validity of the QSA and the mismanagement of water resources by IID. The members of the Imperial Group have asked the Court to make a determination that it represents all of the irrigated agricultural acreage in the Imperial Valley. The Court has not yet acted on this request. The irrigated agricultural acreage in the Imperial Valley uses over 98% of the water used in the Imperial Valley.

In this letter, the Imperial Group formally responds to the Notice of Preparation and raises the following issues: (1) the NOP should address alternative solutions should the QSA be invalidated as the Salton Sea will continue to be a problem regardless of the QSA; (2) alternatives should be considered that do not require state funding; (3) solutions to the Salton Sea must incorporate better water management in the Imperial and

Mexicali Valleys so that the water resource is optimized; (4) the NOP should promote projects that can be implemented quickly rather than continue being studied for years.

The Imperial Group is committed to developing an economically feasible plan to optimize the water resources of the Colorado River and restore the Salton Sea Ecosystem within a six-month period with a build out of five years. The Imperial Group has created a Consortium (see footnote 1) of international construction and engineering firms committed to a feasible Salton Sea Ecosystem Restoration Project, which would optimize the water resources of the Colorado River for all of California and protect the Imperial and Mexicali Valleys. While developing this plan the Imperial Group fully expects to continue its meetings with job trainers in Imperial County, members of the community, environmentalists, and governmental officials both Mexican and American.

The Imperial Group estimates that the landowners of irrigated agriculture in the Imperial Valley and their predecessors in interest have invested in excess of 1.3 billion dollars to develop the water resources of the Imperial Valley over the last 100 years. Without this investment there would be limited agricultural production in the Imperial Valley, the development of Coachella Valley and other Southern California communities would be severely limited, and finally there would be no Salton Sea. Over the years the economy of the Imperial and Mexicali Valleys have become integrated and any action which hurts the citizens and economy of the Mexicali Valley hurts the citizens and economy of the Imperial Valley and vice versa. The Imperial Group is concerned about the efforts of the State of California and its related subdivisions including but not limited to the Imperial Irrigation District, Coachella Valley Water District, Metropolitan Water District, San Diego County Water Authority and Salton Sea Authority to develop a Salton Sea Ecosystem Restoration Project as an alternative to existing conditions in the Salton Sea. The Imperial Group's concern is that the entities will just continue to study the issue and fail to develop a feasible project because there are insufficient financial resources available in the State of California and the Federal Government to finance a Salton Sea Ecosystem Restoration Project. The problem will not be solved and turned into continuing rounds of litigation while the environment and economy of the region suffers. As landowners and citizens of Imperial County the Imperial Group is concerned that the same thing will happen to the Salton Sea and Imperial County that Professor Robert Kagan described in his studies on the dredging delays in the San Francisco Bay. See Exhibit A for copies of Professor Kagan's articles on how the "extraordinarily cumbersome, legalistic, and costly method for

balancing environmental and economic considerations" caused the dredging delays in the San Francisco Bay. The environment and economy will not tolerate such delay on the Salton Sea issues and the Imperial Group will do everything in its power to prevent such delays.

## Current Condition

The situation in the Salton Sea is grave. The Salton Sea Ecosystem is rapidly deteriorating. To the extent any bird and fish Ecosystem still exists in the Imperial and Mexicali Valleys, it is due to the continued agricultural investments and activities in the Imperial and Mexicali Valleys. Indeed, the entire Ecosystem of the Western Hemisphere benefits from these continued agricultural activities. The present interpretation of the QSA contemplates massive fallowing in California and the lining of the All-American Canal. These destructive policies are best illustrated by flying over the Coachella, Imperial and Mexicali Valleys during the early Spring. One can see significant economic activities in Coachella. The only exception is the land on the east side of US 10 and the Torres-Martinez Indian Reservation. These are areas where there has been a restriction on the use of water. When you fly over Imperial County and Northern Mexico there are verdant fields and economic development where there is water. If the water is restricted either in the Imperial or Mexicali Valleys without a plan to optimize the water resources of the Colorado River for the benefit of all the people in the region and California, substantial portions of these Valleys will become deserts. The Imperial Group intends to prevent this from happening.

## Historical Facts Surrounding Mexico, Imperial Valley and the Salton Sea

The Salton Sea Reference Information supplied by the Department of Water Resources ("DWR") did not describe the Salton Sink prior to 1900. The Imperial Group offers the maps as set forth in Exhibits B1 through B8 to further illustrate the development of the Salton Sea Ecosystem. Understanding the historical development of the Salton Sea and the Alamo and All-American Canals helps to better define the environmental issues involved in considering any Salton Sea Ecosystem Restoration Project. When this analysis is made DWR necessarily must consider the conditions that existed both in Mexicali, Coachella and Imperial Valleys before the Salton Sea and the Alamo and All-American Canals were created. From that analysis a baseline can be developed which will help assess alternatives, optimize the water resources for all three Valleys and restore the historic Ecosystems of the Valleys. The baseline has to be developed

to reflect the situation prior to the investment of the 1.3 Billion Dollars by the members of the Imperial Group and other landowners in the Imperial Valley. Then if the State desires to take advantage of this investment and the opportunities for the future that this investment gives the Imperial and Mexicali Valleys, the State should fully compensate the landowners for their past investment and any loss of the landowners' future economic opportunities. Once the scope and value of the historic investment by the agricultural landowners is understood, the financially feasible alternatives available to the State for any Salton Sea Ecosystem Restoration Project are narrowed.

## Legal Basis of Imperial Group's Position

The United States Supreme Court has recognized the unique nature of the water rights held by the landowners in the Imperial Valley. See Bryant v. Yellen (1980) 447 US 352, at n. 23. These rights are inviolate. The Imperial Group vigorously objects to any attempt by any governmental agency to interfere with their exercise of these rights and until this issue is satisfactorily resolved there will be a serious impediment to any Salton Sea Ecosystem Restoration Project. IID has mismanaged the diversions from the Colorado River. See Decision 1600 of the SWRCB. In 2003 the united Stated bureau of Reclamation or BOR commenced a so-called Part 417 Process against IID to determine whether or not IID was appropriately managing its diversions from the Colorado River and permitted extensive briefing by all interested parties including but not limited to the State of California through the California Resources Agency, Imperial Irrigation District and the National Audubon Society. The Imperial Group participated in this process and its position is set forth in Exhibit C and incorporated herein by reference. Many of the positions, which the Imperial Group is taking in this proceeding, were taken in the 417 Proceeding. At the conclusion of its proceeding BOR made recommendations as to how IID could improve its management of the diversion from the Colorado River. A copy of the Decision is attached hereto marked Exhibit D and incorporated herein by reference.

The landowners of Imperial Valley have the right to use the Salton Sea as an agricultural sump or drain. This right is recognized by the State of California and the United States. However, under the principles announced in the Nacimiento Regional Water Management Advisory Committee v. Monterey County Water Resources Agency (1993) 15 Cal.App.4$^{th}$ 200 and the above referenced BOR Decision, the landowners of Imperial Valley have no obligation to maintain the Salton Sink as a sea and no EIR or environmental mitigation is required if the landowners

choose to reduce the flow of water into the Salton Sea. See also the decisions of the SWRCB in Garrapata Water Company, Decision 1639 and Monterey County Water Resources Agency, Order 2001-17.

It is the Imperial Group's position that the following principles promulgated by the BOR in the above-referenced 417 Decision should be the operating principles of IID or its successor and the landowners of Imperial Valley when water is delivered or used in the Imperial Valley:

> The materials reviewed and considered by Reclamation demonstrate that conservation and operating measures recommended below vary widely in cost, ease of implementation and the potential to conserve water. Reclamation recognizes that many of the recommendations relating to conservation measures would require investments by lID and its farmers, however others would not. While Reclamation encourages lID to seriously consider the suggested measures, the mix of measures that are ultimately adopted by lID and by the farmers within lID is a local decision. Many of the measures may be implemented simultaneously. All of the recommended measures are being successfully used in other irrigated areas of the Southwest with conditions similar to those in lID.
>
> In the following section, Reclamation presents these recommendations in order of priority based upon its independent professional analysis, but fully recognizes that implementation and prioritization of the measures identified below remains a matter of local determination.
>
> Based on these considerations, Reclamation recommends the following measures:
>
> **A. Opportunities for conservation that can be implemented by lID within existing lID policy or with some modification of existing policy.**
>
> Recommendation 1. Water Measurement. Reliable water measurement records are essential to the decisions that result in water conservation. Reclamation recommends that lID develop, maintain and use a district- wide network of water measurement devices for the consistent monitoring, recording and reporting of system and on- farm water use data.

Measurements within the lID should include: 1) canal and lateral spills, 2) actual deliveries to farmers' head gates, 3) tail water runoff, 4) drain flows, including discharges from drains, and 5) leach water and other components of water diverted from the Colorado River for use in lID.

IID may consider a carefully planned and executed measurement program approach to install continuous recorders at selected representative sites and conduct regular spot measurements at the remaining sites. This approach could be used at lateral and farm turnouts and well as drain ditches.

Recommendation 2. Scheduling Water Orders. Under current lID policy, a farmer is charged for a full 12-hour period of water delivery, whether or not the farmer needs or uses the water. Modification of this early termination policy by IID would give farmers greater flexibility with water deliveries and enhance their ability to manage and conserve water.

Recommendation 3. Tailwater Management. Currently, hundreds of thousands of acre- feet of water are not consumed by crops, but flow off the ends of fields in lID. Reclamation recommends that lID strictly enforce its ordinance limiting tail water to 15 percent. Reclamation recommends that the 15 percent tail water limit be reduced incrementally over a specified number of years. Additional measures might include implementing a tiered penalty for tailwater discharge or implementing a tiered water rate schedule that increases with additional water ordered above a set allocation. Under current practice lID farmers pay millions of dollars for water that flows off the ends of their fields. Further, Reclamation believes that the 15% is excessive over the long-term and that lID should evaluate, establish and enforce further reductions in tailwater volumes.

Reclamation supports the principal of matching delivery rate and irrigation set time required to refill the crop root zone to have the least possible amount of tail water. Reclamation believes significant efforts in this regard can be accomplished with little or no additional costs and without necessarily constructing on-farm reservoirs or tail water recovery systems.

Recommendation 4. Physical Improvements. Physical improvements can increase flexibility in the system and reduce the possibility of spills. Conservation measures might include implementing the measures identified in lid's draft Agricultural Water Management Plan (March 2002), which include constructing additional mid-lateral reservoirs and constructing both limited flexibility and full flexibility interceptor laterals. Installation of tailwater recovery systems is also addressed in the draft Agricultural Management Plan as a conservation measure, although Reclamation notes that constructing such systems to collect water from more than one field would cost less than the approach proposed in the draft Plan.

Recommendation 5. IID Farmer Outreach. IID through its Irrigation Management Unit provides a multitude of farm evaluations, demonstration projects and water conservation measures that assist till farmers in lID to conserve water. Current programs and services offered include:

Irrigation evaluations to determine best water use on a per- field basis Scheduling of Irrigations
Soil moisture sensors to better determine when to irrigate crops
Flume measurements for measuring tail water accurately
Salinity assessment global positioning system mapping to help with salinity control
Land leveling, which could include level basin, modified level and matching grade.
Field length or irrigation length reduction
Alternative irrigation methods such as high flow level basins, drip irrigation systems, linear move sprinklers, and cut-back irrigation

Reclamation encourages lID to continue and increase the level of participation in outreach activities to provide these services to farmers to assist farmers in making decisions about a wide variety of water conservation.

Recommendation 6. Irrigation Management. The goal of a good irrigation management program is to use water efficiently by scheduling irrigations to meet crop needs. Reclamation

recommends that lID assist farmers in using climatic and evapotranspiration data to help determine when to irrigate and how much water to apply. Potential benefits from scheduling irrigations to meet crop needs include:

The lengthening of irrigation intervals by two to three days on annual crops resulting in at least one less irrigation during crop season
Improved yields both quantitatively and qualitatively
Higher yields for alfalfa and less compaction by harvesting equipment Improved crop management using information gathered during field visits Salt management in areas of highly saline soils by irrigating alternate rows early in the irrigation system
Improved quality of specialty crops such as peppers, tomatoes, watermelons and cantaloupes with properly timed irrigation during bloom development and just prior to harvest

## B. On-farm activities that can be implemented by farmers in lID at little or no cost.

Recommendation 7. Cultural Practices. Cultural practices can be implemented by farmers to better manage their irrigation water and control the advancement of the water down a furrow or border to the end of the field. These practices can be implemented at little or no cost to the farmer and can result in water savings and increased yields. Practices such as these are used to some degree within lID and throughout the western United States to save water, reduce costs, optimize yields and improve profits:

The irrigator can terminate the irrigation or change the set (move the water) when the water in the border or furrow reaches a pre-determined point before the end of the field. This early cut-off practice is simple and inexpensive and can reduce the amount of water that flows off the end of the field and minimizes the amount of water standing at the bottom of the field that will cause scalding.

The ends of the rows (furrows) can be blocked to back water up the furrow at the bottom of the field. The ends

of the furrows, or a group of furrows, can be opened after a specific time period to allow water to flow off the field.

Cross-checks can be placed in borders to slow down the advance of water. Furrow dikes (portable) can be placed in furrows to reduce the advance of water down the furrow.

Border crops can be planted on the contour grade rather than in the direction of the border to reduce the advance rate of water.

Longer fields can be divided with new header rows.

Rows can be angled against the field slope at the lower end of the field.

Rows and borders can be angled against the field slope for the entire length of the irrigation run to reduce the advance rate down the row or border on the tight soils.

## C. On-farm activities that can be implemented by farmers in lID at higher costs

Recommendation 8. Land Leveling and Grading. The field slopes in lID are not great but are enough to warrant study. There is significant potential for reducing existing slopes in most fields in lID (both clay soils and light textured soils). Tailwater runoff can be reduced by improved uniformity of applied water. The elimination of field slope in either dead level or modified level systems is not recommended for lID at this time but may be appropriate as changes in technology warrant. Reducing one- half-mile irrigation runs to one- fourth mile for fields with medium and light textured soils can result in better management of the irrigation water, better uniformity of application of applied water and the reuse of any tailwater from the upper fields onto the lower fields.

Recommendation 9. Linear Move Sprinklers. Based on the layout and size of fields in the Imperial Valley, linear move systems appear to be a viable irrigation alternative. Although

they are relatively expensive and require more intensive management, linear move sprinkler systems can be used successfully on light textured soils where slopes are relatively steep and the depth of soil is such that grading or leveling is not feasible.

Recommendation 10. Drip Irrigation Many lID farmers use surface or subsurface drip irrigation to irrigate vegetable crops with no runoff from the fields. In 2002 there were approximately 12,000 acres on which drip irrigation is used in lID. Drip irrigation is a proven technology and has been successfully used in IID but its use is limited to high value crops.

See pages 62-66 of the BOR Decision. Exhibit D.

Any DEIR must consider the potential adoption of these principles and the impact they may have on flows into the Salton Sea. The adoption of these principles over an extended period of time will help to optimize the water resources of the Colorado River. If the DWR disagrees with the recommendations of BOR the DEIR should describe in detail where it disagrees with the recommendations. However, one of the ramifications of increased optimization of the water resources by IID and its potential successor and the existing agricultural landowners is that it will reduce the flow of water into the Salton Sea.

## Financial Alternatives

The DWR has been directed to look at financial alternatives to finance the Salton Sea Ecosystem Restoration Project. The Imperial Group objects to any attempt by the State of California or any other governmental entity to impose any type of assessments either directly or indirectly on their water rights to finance any modification in the Salton Sea. However, the Imperial Group has developed its own alternative and submitted it in writing to the Resources Agency and the Staff of the Governor. The Consortium consists of the Dutra Group and Bean Stuyvesant, a joint venture between CF Bean and Bosklais.[1] Its submission is attached hereto and marked Exhibit E and incorporated herein by reference. (In Exhibit E you will also find a pamphlet prepared by the Provincie Flevoland in

[1] The respective websites of the members of the Consortium are as follows: www.Boskalis.com, www.Dutragroup.com, ww.cfbean.com/cfbean/default.htm, and www.cfbean.com/beanstuy/defaultcont.htm

Holland entitled "Facts and Figures of the Zuiderzee Project." This pamphlet discusses in detail the issues involved in reclaiming the Zuiderzee. Boskalis, a member of the Consortium, was involved in the project and the project was significantly larger than the Salton Sea Ecosystem Restoration Project.) After worldwide consultation, the Imperial Group chose to develop this alternative because in part this was how Prime Minister Margaret Thatcher solved the Environmental Problems in England. See the Presentation to ACWA entitled "English Experience with the Privatization of its Water and Sewer Industries" prepared by Kathy Neal, Patrick J. Maloney and Norma Morales dated September 9, 1996. A copy of the presentation is attached hereto and marked Exhibit F. In order to accomplish a project to immediately deal with the problems of the Ecosystem of the Salton Sea there has to be recognition of the water rights of the Imperial Valley landowners. The importance of the recognition of these water rights is discussed in detail in the Imperial Group 417 filings. The environment, citizens, and landowners of Imperial Valley and northern Mexico cannot afford to have continued studies about the Salton Sea with nothing accomplished. This has been the practice of the Federal, State and Local Governments for the last 25 years.

## Issues that should be considered in the DEIR

Develop an accurate baseline that presents a fair picture of the Coachella, Imperial and Mexicali Valleys before the development of the Salton Sink and the development of agriculture in the Imperial and Mexicali Valleys.

How the water resources of the Colorado River can be optimized so that Imperial and Mexicali Valleys are not stripped of their historic resources and future potential by the current economic power of Coachella Valley and the Coast of California?

What is the extent and nature of the landowners' water rights in the Imperial Valley and the landowners' ability and obligation to control the flows into the Salton Sea?

How can the water rights of the landowners in the Imperial Valley be better protected so they can be used as an engine to help finance the Salton Sea Ecosystem Restoration Project?

How can a feasible plan be developed so the best minds in the world will participate in the design and building of the project?

## Conclusion

The Department of Water Resources has been charged with preparing a DEIR on the Salton Sea Ecosystem Restoration Project. The Agricultural landowners of Imperial Valley are fully aware of the problems in the Ecosystem of the Salton Sea. They have developed a Consortium with the most competent people capable of solving the problem in the world. Issues relating to the Salton Sea cannot be dealt with in isolation. The Restoration of the Salton Sea Ecosystem impacts multiple publics: Imperial, Coachella, Mexico, Arizona, the Coast of California, and the San Francisco Bay Delta and the problem is urgent. It is essential that an integrated approach be taken that guarantees a rapid solution and involves the parties directly impacted. Only by doing so will a viable solution be developed and successfully implemented.

Respectfully submitted,

PATRICK J. MALONEY