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January 2, 2001

**Metropolitan Water District
Water Resource Management Group
P.O. Box 54153
Los Angeles, CA 90054-0153
Attn: Mr. Jack Safely and Mr. Dirk Reed**

B10

**Bureau of Land Management
California Desert District
6221 Box Springs Boulevard
Riverside, CA 92507-0714
Attn: Mr. James Williams**

**Re: Supplemental EIR/EIS
Cadiz Groundwater Storage and Dry-Year Supply Program, San Bernardino
County, California**

I. Introduction

Mr. Gus Lizalde ("Mr. Lizalde") has owned Chambless Station, a historical gas and service station, market and diner, since 1990 and has spent substantial time and resources in preparing [executing] a plan to restore the historic landmark. He possesses water rights to the subterranean aquifer from which his two wells supply water to Chambless Station and the adjacent mobile home estate park, eight cabins, and five homes. The aquifer that Mr. Lizalde draws water from and has rights to is the same aquifer in which MWD proposes to store water and from which it will later extract water.

Cadiz, Inc. ("Cadiz") has entered into an agreement with Metropolitan Water District ("MWD") as part of the Colorado River 4.4 Plan. As a supplemental water source, MWD would store Colorado River water in the basin underneath Cadiz' land, then extract it, along with indigenous groundwater, in dry years. MWD purports to compensate Cadiz for the use of the aquifer and for the later extraction of water. However, MWD does not propose to compensate any of the other owners of the aquifer, including Mr. Lizalde, for storage and extraction. There is also expert testimony and grave concern that the plan will create dust pollution and exhaust the natural supplies of underground water as well as infect the natural water with inferior quality water from the Colorado River. MWD proposes a monitoring team composed largely of those who have the most to gain from seeing that the plan is implemented without interruption.

B10-1

II. The Mitigation and Monitoring Plan is woefully inadequate.

The Mitigation and Monitoring plan would monitor water levels and impose safe yield requirements. Two groups would be charged with enforcement responsibilities: the Technical Review Team (TRT) and the Bureau Management Group (BMG). The TRT would help develop "Action Criteria," used to trigger mitigation measures. Once Action Criteria levels are prompted, the TRT would be the first line of defense for those who complain that their water levels have dropped or that the water quality has been compromised. The TRT would decide the cause of the complaint, perhaps concluding that the Project was not at fault for a change in water quantity or quality. The BMG would act as an appellate board, and assist should the TRT fail to reach a consensus or make a controversial evaluation.

The problem with these review boards is that, as currently proposed, Metropolitan and Cadiz would be included among their limited memberships. Inclusion of Metropolitan and Cadiz on the TRT and/or BMG groups poses a blatant conflict of interest. A decision to curtail water storage or pumping would be precisely contrary to Metropolitan's and Cadiz's pecuniary interests and therefore their membership on either of these boards is entirely unacceptable. That Metropolitan or Cadiz would ever decide to mitigate or halt the pumping project because of adverse impacts to neighboring landowners, after having spent millions of dollars to develop the infrastructure necessary to facilitate the project, is unfathomable.

Should Metropolitan and Cadiz be allowed to sit on either or both the TRT and/or BMG boards, Chambless Station would almost assuredly be ruined. Without its already limited water source, the service station and surrounding real property would be uninhabitable. The property would be rendered economically useless. The boards must include representatives from all parties affected, and from all parties who own water rights to the aquifer.

The TRT and BMG have been charged with managing the Project and preserving the region's Critical Resources. The landowners possess rights to many of the region's critical resources, and stand to be directly and economically affected by decisions that the TRT and BMG make. Hence, the TRT and BMG owe a fiduciary duty to the adjacent landowners. They must act as a prudent person would with respect to his or her own business affairs. All interested parties are entitled to full disclosure with regards to decisions made by the TRT and BMG. Metropolitan and Cadiz have a vested fiscal interest in the Project. They will find it very difficult to act in the landowners' best interest when it conflicts with their pecuniary interest. In order to avoid a conflict of interest, the TRT and BMG have two acceptable alternatives: either Cadiz and Metropolitan should be precluded from voting, or the concerned landowners should be allowed to veto on any decision adversely affecting their water rights. Thus, Mr. Lizalde and other affected landowners should be included on the TRT and/or the BMG.

B10-2

III. Mr. Lizalde has preexisting rights to the aquifers from which Cadiz intends to extract, appropriate, and use groundwater.

Cadiz and MWD should be prevented from continuing with their plan to provide as much as 2 million acre-feet of water to MWD over the next fifty years.

- a. *Cadiz should be precluded from exceeding surplus water usage in the Cadiz Valley Aquifer.*

Groundwater rights are analogous to riparian rights, which are the right to take water from the ground underneath the land for use on that land. The right is appurtenant to the land itself. Between overlying owners, the rights are correlative, or mutual and reciprocal. Each overlying owner has a common right to take all that can be beneficially used on the land if the water source is sufficient. If the quantity is insufficient, each owner is limited to his proportionate fair share of the total amount available based upon his reasonable need. (See Tehachapi-Cummings County Water District v. Armstrong (1975) 49 Cal.App.3d 992, 1001.)

B10-3

The plan proposes to pay Cadiz for storage and extraction of water in the aquifer. Unless it can be shown that Mr. Lizalde's water rights to the aquifer will not be affected, Mr. Lizalde is entitled to compensation in the same was Cadiz is being compensated. The assumption that Cadiz alone has the right to control the aquifer is false. Each landowner has an equal right to be heard and be fairly compensated. The plan is defective and subject to judicial review because it does not take into account these correlative water rights.

- b. *Cadiz's anticipated agricultural use should be curtailed.*

The Project proposal aside, Mr. Lizalde's pecuniary interests are further endangered by the amount of water Cadiz may use in its agricultural endeavors over the next fifty to one hundred years.

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According to a report prepared by Mr. Timothy Durbin of the U.S. Geological Society, Cadiz and MWD have not considered the cumulative impacts of projected groundwater development in estimating the safe yield requirement. Groundwater currently is pumped for agricultural irrigation within Cadiz Valley. In recent years, the annual pumpage has been about 5,000 acre-feet (GeoScience, 1999). However, the annual pumpage may be expanded to 30,000 acre-feet (URS Consultants, 1993a and 1993b), if additional lands are irrigated. This is pumping in addition to that associated with the Cadiz Valley Groundwater Storage Project. The Project may extract and export as much as 2 million acre-feet of groundwater over a 50-year period. If the agricultural operation were to expand concurrently to the maximum acreage, the agricultural pumping would extract and consume as much as an additional 1.5 million acre-feet of groundwater over a 50-year period. These combined operations would dramatically diminish the basin's groundwater supply, limiting and perhaps excluding Mr. Lizalde and other landowners from making beneficial use of their correlative water rights. This completely ignores the well-settled doctrines of groundwater rights and is legally wrong.

IV. The Project will result in an unconstitutional taking of Mr. Lizalde's water rights.

Should the project proceed in the direction it is headed, such action would adversely affect Chambless' water source, and constitute an illegal taking. Chambless and the surrounding property owners must be compensated. Without provision for fair and reasonable compensation in the plan it is defective and subject to judicial scrutiny.

Article I, section 19 of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." Under this provision, if private property is wrongfully damaged or destroyed by government action, then an inverse condemnation action may lie to establish the owner's damages. (Holtz v. Superior Court, 3 Cal.3d 296, 301-3 (1970).) The inverse condemnation action is based upon the constitutional provision and is independent of any right to sue under traditional tort theories. (Albers v. County of Los Angeles, 62 Cal.2d 250, 260 (1965).)

The inadequacies of the TRT and BMG boards, as currently composed, hasten the demise of Chambless' water supply. Chambless is only three to four miles from the Project site and the Cadiz wells are 1,000 feet deep. The Cadiz wells will immediately affect the Chambless area wells. Robbing Chambless of its water is tantamount to robbing it of any economically beneficial use and would be a constructive taking, as it would completely destroy the property's value as a historic service station and mobile home estate park.

In the United States v. Kansas City Ins. Co. (1949) 339 U.S. 799, the United States Supreme Court held that a "taking" within the contemplation of the federal Constitution occurred under circumstances similar to those here presented. There, the Corps of Engineers maintained the Mississippi River at a high flood level. (Id., at 800.) The groundwater table level was raised because of the increased pressure and water percolated from the river to respondent's land preventing the land from draining, which resulted in destruction of its value as farmland. (Id., at 802.) The Supreme Court held that a compensable taking had occurred. (Id., at 809.)

The quality of water in Chambless' wells is also threatened. In F & L Farm Co. v. City of Lindsay, F016555, three farm owners recovered judgments against the city of Lindsay on an inverse condemnation theory for their losses caused by the city's pollution of the groundwater. The farm company's injury consisted primarily of lost profits from crops and permanent reduction of the value of the land comprising the farms. Should Chambless' water quality be compromised, it will incur the same type of economic injury as the Plaintiffs in this matter. Cadiz and Metropolitan should be enjoined from this Project that threatens the continued operation of Chambless.

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B10-6

The implementation of the plan as it now stands without compensation directed to all landowners whose water rights are affected will occasion litigation to insure court supervision of the plan.

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V. Chambless Station is protected under Public Law No: 106-45.

The highway formerly known as Route 66, extending from Chicago to Los Angeles, is a nationally significant part of American history, foremost among the early highways that helped change and shape America as it entered the twentieth century. Beginning with the Dust Bowl migration to California, Route 66 enabled American businesses to move commerce, individuals to seek better lives, and the government to move troops and war supplies. It also opened up the Southwestern landscape to tourism and post-war migration of families to the booming job market of California. Through books, television, songs, and movies, Route 66 has become an enduring part of American culture.

Unfortunately, as Americans became more mobile, this two-lane roadway could not handle the increasing volume of truck and vehicle traffic. Route 66 became so fragmented and confusing that in 1979 it lost its official U.S. Highway 'Route 66' designation. The remaining portions of the former Route 66 have been incorporated into state and local highway systems.

B10-7

In August of 1999, Congress passed and the President signed a public law that would preserve the cultural resources of the Route 66 corridor and authorize the Secretary of the Interior to provide assistance. As a historic landmark along Route 66, Chambless Station is protected under this law.

The law requires that the Secretary of the Interior "... guide efforts to protect the most important or representative resources of the corridor." Mr. Lizalde fully intends to avail himself of the protection the Department of the Interior is required to provide, in seeing that Chambless Station is preserved as an important Route 66 historic structure. The Project threatens Chambless Station's critical resources, and thus violates Public Law 106-45.

VI. Chambless Station is protected by § 106 of the National Historic Preservation Act of 1966.

The National Historic Preservation Act of 1966 establishes programs for the preservation of historic properties throughout the nation and establishes a system to classify properties on or eligible for inclusion on the National Register of Historic Places. This act establishes that prior to approval of an undertaking that will adversely affect resources eligible for or listed in the National Register, the approving federal agency must evaluate the effects of the undertaking and afford the State Historic Preservation Officers and the Advisory Council on Historic Preservation an opportunity to comment on the undertaking. The act also provides for reviews at the state and federal level. National Historic Preservation Act of 1966 (as amended) (PL 89-665; 16 U.S.C. 470a, et seq.) (PL 89-665; 80 Stat. 915, amended 1980, 1992) (PL 96-515; 94 Stat. 2997). The act furthermore created the President's Advisory Council on Historic Preservation (Advisory Council). Federal agencies are required to consider the effects of their

B10-8

undertakings on historic resources and to give the Advisory Council a reasonable opportunity to comment on those undertakings.

The State Historic Preservation Officers and the National Park Service are currently considering Chambless Station for National Registry status. It was built more than seventy-five years ago, and played a significant role in American history. Chambless Station acted as a rest stop to weary travelers in the early days of Route 66 travel. This site embodies the distinctive characteristics of the Southwestern expansion during the first half of this century, and possesses integrity of location, setting, feeling, and association, with that era.

B10-8

Upon receiving National Registry status, Chambless Station will enjoy further protection from Section 106 of the National Historic Preservation Act of 1966, and Metropolitan must show that there is no effective Project alternative that would prevent an adverse impact to Chambless' water source.

VIII. Mr. Lizalde and other landowners in the Cadiz Valley have been deprived of due process and equal protection of law.

Original language in the Water Bond Bill AB 1584, Section 79181(b)(2) required that groundwater projects "limit the extraction of the groundwater to not more than the water that is stored or recharged by the project participants." This language is generally essential to protect basins that have many users. However, the final draft had language that would protect Cadiz's interests over those of adjacent landowners.

The final draft, Section 79181 requires only that groundwater projects comply "with all laws and contract terms governing the extraction, appropriation and use of groundwater by the project participants." This language, allegedly negotiated behind closed doors, would allow a water project to remove more water than it replaces, provided all project participants agree.

Procedural due process requires that interested parties receive notice and an opportunity to be heard when their financial interests are threatened. Here, the democratic process was, by some accounts, abandoned when Cadiz sympathizers changed draft language to advance the Project. This denied Lizalde and other landowners due process of law, as their interests were not fairly represented in the Water Bond draft negotiations.

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The Fourteenth Amendment prohibits a state action from denying any person within the state's jurisdiction equal protection of laws. Cadiz, Inc. and Mr. Lizalde are similarly situated landowners, as both own land and correlative groundwater rights in the Cadiz Valley. By drafting the Water Bond language in a way that would create Cadiz's right to extract and appropriate water, limited only by the "project participants" consent, over Mr. Lizalde and other landowners' rights to have their supply of water unaffected by the proposed extraction, legislators have chosen to discriminate against those landowners who have less land, but similar water rights in the aquifer. This is a denial of equal protection of the law and is therefore unconstitutional and void.

IX. Summation.

It is clear that the plan will be attacked in court if it is not changed to provide for an accommodation to Mr. Lizalde's water rights as well as the rights of all the other landowners who overlie the aquifer. It is also clear that the monitoring mechanism is flawed unless all the owners have the right to speak, and vote their interests with respect to the implementation of the plan. Because of the abundance of expert testimony that proves the entire region will be adversely impacted, it is clear that the entire plan is subject to review by the courts should the MWD see fit to attempt to push it through as is.

B10-10

Respectfully submitted



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