**Agenda Item No.** E-2

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|---|---|---|---|
| DATE SUBMITTED | 10/10/2018 | COUNCIL ACTION | (X ) |
| SUBMITTED BY | CITY MANAGER'S OFFICE | PUBLIC HEARING REQUIRED | ( ) |
| | | RESOLUTION | ( X ) |
| DATE ACTION REQUIRED | 10/17/18 | ORDINANCE 1ST READING | ( ) |
| | | ORDINANCE 2ND READING | ( ) |
| | | CITY CLERK'S INITIALS | |

# IMPERIAL CITY COUNCIL
# AGENDA ITEM

SUBJECT: DISCUSSION/ACTION: IMPERIAL VALLEY COALITION FOR FAIR-SHARING-OF-WATER

1. APPROVAL OF RESOLUTION NO. 61 TO SUPPORT AND JOIN THE AMICUS BRIEF FILED BY THE IMPERIAL VALLEY COALITION FOR FAIR-SHARING-OF-WATER IN THE ABATTI V. IMPERIAL IRRIGATION DISTRICT LITIGATION

DEPARTMENT INVOLVED: N/A

BACKGROUND/SUMMARY:

At the request of City Council, Staff has prepared a resolution to join the Imperial Valley Coalition for Fair-Sharing-Of-Water in support of their amicus brief filed in the Abatti v. Imperial Irrigation District, No. D072850.
During the Regular Meeting of the City Council on October 3, 2018 the Imperial Valley Coalition for Fair-Sharing-Of-Water presented information regarding the ongoing litigation and asked for the City's support in joining their amicus brief. Other jurisdictions that have joined are City of El Centro, City of Calipatria and City of Westmorland.

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|---|---|
| FISCAL IMPACT: N/A | FINANCE INITIALS _____ |
| STAFF RECOMMENDATION: N/A | DEPT. INITIALS _____ |
| MANAGER'S RECOMMENDATION: n/a | CITY MANAGER's INITIALS _____ |

MOTION:

SECONDED:
AYES:
NAYES:
ABSENT:

APPROVED ( ) REJECTED ( )
DISAPPROVED ( ) DEFERRED ( )

REFERRED TO:

**RESOLUTION NO. 2018 –61**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF IMPERIAL SUPPORTING AND JOINING THE AMICUS BRIEF TO BE FILED BY THE IMPERIAL VALLEY COALITION FOR FAIR-SHARING-OF-WATER IN THE ABATTI V. IMPERIAL IRRIGATION DISTRICT LITIGATION**

WHEREAS, the Imperial Irrigation District (the "District" or "IID") is a California Irrigation District established and governed by California statutory provisions generally found in the Water Code; and

WHEREAS, IID provides domestic and other water (including Colorado River Water) to the City and its residents and businesses; and

WHEREAS, the recent Imperial County Superior Court decision in *Michael Abatti v. Imperial Irrigation District* raises substantial and serious factual and legal questions regarding who holds the rights to Colorado River Water; and

WHEREAS, the decision also raises the issue of IID's authority to equitably determine how to distribute a finite amount of water when the demand for such water exceeds the supply; and

WHEREAS, in the event that the decision is not reversed, non-agricultural water uses, including but not limited to the City and other existing users within the City, may face severe hurdles in obtaining and preserving a reliable water supply, regardless of the substantial economic employment, environmental and recreational benefits of such non-agricultural existing uses; and

WHEREAS, a review and reversal of the decision is necessary to confirm IID's rights to Colorado River Water historically and as expressly assigned to IID, perfected by IID under California Law, and modified by federal law and contract in the Colorado River Compact, Boulder Canyon Project Act, Seven Party Agreement, IID's contract with the Secretary of the Interior and the Quantification Settlement Agreement as well as other related agreements; and

WHEREAS, the appellate court also should confirm IID's rights to equitable deliver Colorado River Water for reasonable and beneficial uses including irrigation, industry, mining, livestock, power generation and domestic uses and incidental uses associated with uses, including but not limited to environmental mitigation; and

WHEREAS, the appellate court also should confirm IID's express and implied authority to charge for the use of the water it delivers; and

WHEREAS, the Imperial Valley Coalition for Fair-Sharing-of-Water ("Coalition") has requested that the City support its amicus brief to the appellate court in the *Michael Abatti, as Trustee, etc. et al v. Imperial Irrigation District*, No. D072850, Fourth District Court of Appeal.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF IMPERIAL DOES HEREBY RESOLVE AS FOLLOWS:

1. The foregoing is true, correct and adopted;
2. The City Council hereby supports the Coalition amicus brief in the appellate court and agrees to be a signatory on such brief, and directs the City Attorney to sign said brief on behalf of the City;
3. Directs the City Manager and City Attorney of the City of Imperial to take any actions necessary to carry out this Resolution.

PASSED, APPROVED, AN ADOPTED at a Regular Meeting of the City Council this 3rd day of October, 2018.

_____

GEOFF DALE, MAYOR

ATTEST:

_____

DEBRA JACKSON, CITY CLERK

# WATER CODE
# SECTION 100-112

100. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

100.5. It is hereby declared to be the established policy of this state that conformity of a use, method of use, or method of diversion of water with local custom shall not be solely determinative of its reasonableness, but shall be considered as one factor to be weighed in the determination of the reasonableness of the use, method of use, or method of diversion of water, within the meaning of Section 2 of Article X of the California Constitution.

101. Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this and the next preceding section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing in this or the next preceding section shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled.

102. All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**IN AND FOR THE FOURTH APPELLATE DISTRICT**
**DIVISION ONE**

| | |
|---|---|
| MICHAEL ABATTI, as Trustee, etc., et al.,<br><br>*Plaintiffs, Respondents and Cross-Appellants;*<br><br>v..<br><br>IMPERIAL IRRIGATION DISTRICT,<br><br>*Defendant, Appellant and Cross-Respondent.* | Appeal Case No. D072850<br><br>Imperial County Superior Court Case No. ECU07980 |

On Appeal From the Imperial County Superior Court
Hon. L. Brooks Anderholt

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# COMBINED RESPONDENTS' BRIEF & CROSS-APPELLANTS' BRIEF

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MUSICK, PEELER & GARRETT LLP
Theodore A. Chester, Jr. (SBN 105405)
Cheryl A. Orr (SBN 132379)
624 South Grand Avenue, #2000
Los Angeles, CA 90017
Phone: (213) 629-7881
Fax: (213) 624-1376

CALDARELLI HEJMANOWSKI PAGE & LEER LLP
Lee E. Hejmanowski (SBN 166236)
12340 El Camino Real, #430
San Diego, CA 92130
Phone: (858) 764-8106

*Counsel for Plaintiffs, Respondents and Cross-Appellants MICHAEL ABATTI, as Trustee of the Michael and Kerri Abatti Family Trust, and MIKE ABATTI FARMS, LLC*

TO BE FILED IN THE COURT OF APPEAL **APP-008**

| COURT OF APPEAL | APPELLATE DISTRICT, DIVISION | COURT OF APPEAL CASE NUMBER: |
|---|---|---|
| OF CALIFORNIA | FOURTH APP. DIST., DIV. 1 | D072850 |


ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 132379
NAME: Cheryl A. Orr
FIRM NAME: MUSICK, PEELER & GARRETT LLP
STREET ADDRESS: 624 South Grand Avenue, Suite 2000
CITY: Los Angeles STATE: CA ZIP CODE: 90017
TELEPHONE NO.: (213) 629-7881 FAX NO.: (213) 624-1376
E-MAIL ADDRESS: c.orr@musickpeeler.com
ATTORNEY FOR (*name*): Respondents MICHAEL ABATTI, et al.


SUPERIOR COURT CASE NUMBER: ECU07980

APPELLANT/
PETITIONER: IMPERIAL IRRIGATION DISTRICT

RESPONDENT/
REAL PARTY IN INTEREST: MICHAEL ABATTI, et al.

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

*(Check one):* [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

**Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.**

1. This form is being submitted on behalf of the following party (*name* ): Respondents MICHAEL ABATTI, et al

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

| | Full name of interested entity or person | Nature of interest *(Explain):* |
|---|---|---|
| (1) | | |
| (2) | | |
| (3) | | |
| (4) | | |
| (5) | | |

[ ] Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: September 28, 2018

Cheryl A. Orr
(TYPE OR PRINT NAME)

S/ Cheryl A. Orr
(SIGNATURE OF APPELLANT OR ATTORNEY)

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## I. INTRODUCTION

Appellant Imperial Irrigation District ("IID") casts this appeal as involving a routine exercise of discretionary power by the Board of a municipal corporation that should have been rubber-stamped by the trial court. The trial court was not persuaded and neither should this Court be.

Make no mistake, this case presents a pivotal struggle over the ownership and control of what may be the most historic and invaluable water rights in the Southwest United States.

The trial court properly concluded that IID violated the law in several fundamental respects and IID abused its discretion by ignoring the vested water rights of the irrigating landowners (the "Farmers") in the district when IID adopted its 2013 water distribution plan. The Judgment for declaratory relief and the Writ of Mandate should be affirmed.

## II. SUMMARY OF ARGUMENT

IID holds in trust for its beneficiaries senior water rights to the Colorado River.[1] The Farmers, as beneficiaries of that trust, own the beneficial and equitable title to the water rights. These rights have been enshrined in multi-State compacts approved by the United States ("U.S.") Congress, federal and state statutes and regulations, and contracts which include the United States as a party.[2] The Farmers' vested interest in these

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[1] IID currently has the rights to 3.1 million acre feet ("MAF") of water per year from the river, over 70% of California's 4.4 MAF entitlement.

[2] The complex contractual, regulatory and litigation history governing the diversion of Colorado River water is commonly referred to as the "*Law of the River*." (*See*, Wilbur and Ely, The Hoover Dam Documents, House Doc. No. 717, 80th Cong., 2d. Sess., 1948; Milton N. Nathanson, Updating The Hoover Dam Documents, United States Department of the Interior Bureau of Reclamation, 1978.)

water rights has previously been litigated to finality in the U.S. Supreme Court.

In 2013, IID enacted a permanent water allocation plan, denominated an "Equitable Distribution Plan" ("EDP"), that fundamentally sought to extinguish the Farmers' vested rights to use Colorado River water. The plan and its various iterations were timely challenged by Respondents and Cross-Appellants Michael Abatti, the Trustee of the Michael and Kerri Abatti Family Trust, and Mike Abatti Farms, LLC (collectively, the "Abattis"). The Abattis run a family farm on land they own within the District. They rely exclusively upon Colorado River water delivered by IID for irrigation.

Far from what its name implies, the new allocation plan was not equitable, but was a "water grab," plain and simple. IID's Board sought to take unfettered control over the water rights to distribute water for whatever purposes the Board may choose, now or in the future, including new industrial and other purposes outside IID's limited powers as an irrigation district or its permitted rights to the use of that water. IID also sought to sever the permanent and appurtenant water rights of the Farmers *in violation of the Law of the River* by devaluing it to merely a "right to water service" at the Board's discretion, like one would have from a public utility or municipal water corporation. *Under the permanent plan, all other water users took priority over agricultural users*. Whatever water remained for use thereafter was to be apportioned among the agricultural water user class on a per acre basis, which allocation arbitrarily limited Farmers' water rights without regard for their reasonable needs for irrigation purposes and allocated water to some landowners who did not need any or all of that water for irrigation.

IID's narrative that its water conservation efforts and its ability to satisfy its obligations under existing interstate agreements relating to the Colorado River require the Board be given unfettered discretion to manage the water supply to the detriment of Farmers' water rights should be seen for the false optic that it is. While conservation is a laudable goal, and Farmers within the district have become extraordinarily efficient at conserving water, IID is an *irrigation district*, not a water conservation district or a municipal water delivery agency. It does not have the authority to abandon its irrigation purpose and force Farmers - and only Farmers - to bear unfair reductions in their water supply resulting in forced crop changes, fallowed lands, and negative economic consequences. Furthermore, IID's conduct and its challenge on this appeal to the water rights of Farmers runs directly afoul of those vested constitutionally protected rights long recognized under the *Law of the River*. IID does not have discretion to violate those established property rights.

For more than 100 years, and beginning before the existence of IID, it was the accepted rule that Colorado River water be distributed for the reasonable and beneficial needs of the Farmers who originally established and created the unique water rights. IID's new plan drastically altered this rule. IID's new permanent apportionment plan was contrary to California law in several fundamental respects.

The trial court correctly held that IID's plan granted distribution priority to persons who do not beneficially own appurtenant water rights, and thereby wrongly subordinated the interests of Farmers, including the Abattis, that do, thus violating Farmers' appurtenant rights and the "no injury" rule of water law.

The trial court correctly determined that prioritization of all other water users ahead of agricultural users violated other long-standing principles of California water law and Water Code section 106.

The trial court also properly concluded that the plan's utilization of a straight-line method of apportionment ignored Farmers' rights to irrigation water for their reasonable needs. The trial court correctly found that the straight-line apportionment method promotes waste in violation of article X, section 2 of the California Constitution. This finding was supported by substantial evidence and IID waived the right to challenge the finding on appeal by failing to object to the trial court's Tentative or final Statement of Decision.

The Abattis' challenges to the apportionment plan were not time-barred or precluded as a legal matter.

With respect to the Cross-Appeal, the Abattis' challenges to the apportionment plan were not subject to the Validation Statutes, Code of Civil Procedure section 860, *et seq.*, the Abattis timely challenged each iteration of the permanent plan, and the Abattis were not precluded from challenging any earlier versions or any part of the final version of the permanent plan based on section 860 or any other limitations period. The trial court also erred in dismissing the Abattis' breach of fiduciary duties and takings causes of action.

## III. STATEMENT OF THE CASE

### A. The History of IID and Development of the Water Rights[3]

As the trial court recognized (10 RT 340:8-13), IID is a unique irrigation district that has been the subject of extensive litigation and regulation, on the state and federal level. IID simply cannot disregard the controlling *Law of the River* which distinguishes IID from every other irrigation district in the state. IID's hyperbolic argument that affirming the trial court's decision will "decimate" the powers of irrigation districts should not distract the Court's attention from the controlling law.

#### 1. The Development of Imperial Valley

In 1896, the California Development Company ("CDC") was formed to facilitate the irrigation of desert lands in Imperial Valley using Colorado River water. (AR0000033-34.) Between 1895 and 1899, CDC and its principals duly posted and recorded notices of appropriation of Colorado River water for irrigation and hydropower production uses. (*Ibid.*) CDC first diverted water from the River in 1901. (*U.S. v. IID I*, *supra*, 322 F. Supp. at pp. 12-13.)

CDC formed several mutual water companies to facilitate distribution of water within Imperial Valley, which water companies issued stock to the landowners in their districts affording them the right to receive water. (AR0001251.)

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[3] A history of Imperial Valley and its water rights was published by IID in 1956 (Request for Judicial Notice ("RJN"), Exh. 1) and is summarized in *United States v. Imperial Irr. District* (S.D. Cal. 1971) 322 F. Supp. 11, 13 ("*U.S. v. IID I*"), *rev'd.* 559 F.2d 509 (9th Cir. 1977) ("*U.S. v. IID II*"), *rev'd in part sub nom Bryant v. Yellen* (1980) 447 U.S. 352.

In 1905, Southern Pacific Rail Road ("SPRR") took a controlling security interest in CDC when it advanced funds to CDC to control flooding of Imperial Valley when the company's diversion on the Colorado River failed. (*U.S. v. IID I, supra,* 322 F. Supp. 11 at p. 13.) In 1909, an action to foreclose upon the CDC was initiated and a receiver was appointed over CDC. (*Thayer v. Cal. Dev. Co*. (1928) 164 Cal. 117, 124.)

To maintain local control over distribution of water for irrigation, the Farmers in Imperial Valley formed IID in 1911 to purchase CDC's assets, including its legal water rights. (AR0000321-338.) In 1916, IID acquired CDC's assets and assumed the distribution of Colorado River water to the mutual water companies. (*Ibid*.) From 1922 to 1923, IID acquired all of the mutual water companies, and began to deliver the water directly to Farmers in the Valley. (AR Tab 46.)

**2. Recognition of Farmers' Water Rights**

In *Thayer,* when a non-stockholder in one of the mutual water companies formed by CDC sought to compel delivery of irrigation water to her lands, the California Supreme Court determined the delivery of Colorado River water to the mutual water companies by CDC under its appropriative rights was made for "private use" and not for "public use". (*Thayer, supra,* 164 Cal. at p. 131.) The Court held that the landowners-stockholders of the water companies were the "indirect owners of the water." (*Id.* at p. 136.)

In 1926, the California Supreme Court first considered the relationship *between IID and irrigating landowners*. (*Hall v. Superior Court* (1926) 198 Cal. 373.) The Court held that the Farmers of the district are the equitable owners of IID's water rights (*id*.at p. 383), quoting *Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist.* (1904) 144 Cal. 329, 334 [irrigation district owns " `the legal title,' only . . . in trust . . . and

. the land owners in the district . . . in whom [are] vested . . . the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water-rights. . . . *Such rights as these cannot be distinguished in any way from other private rights . . . .*'"] emphasis added.)

### 3. The *Law of the River*

In 1902, Congress enacted the Reclamation Act (the "1902 Act"). Section 8 of the 1902 Act directed the Secretary of the Interior (the "Secretary") to follow western water law, including the prior appropriation doctrine and provided:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder*, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.
>
> (43 U.S.C. § 372, emphasis added.)

In 1922, the U.S. Supreme Court held that the doctrine of prior appropriation would be given interstate effect. (*Wyoming v. Colorado* (1922) 259 U.S. 419, 470). The decision intensified fears of the other Basin States on the Colorado River that they would not get their fair share of water because the "first in time, first in right" principle of the prior appropriation doctrine would favor California's rapid declaration of appropriative claims, especially by Farmers in Imperial Valley. (*Arizona v. California* (1963) 373 U.S. 546, 556–57.) The six other Basin States sought a settlement. (*Id*.)

California and the six other states entered into the Colorado River Compact (the "1922 Compact"). (AR Tab 45.) Article III of the 1922 Compact "apportioned" 7.5 MAF of water per year, which included "all water necessary for the supply of any rights which may now exist," each to the upper basin and the lower basin. (AR0001247.) Article VIII provided that "present perfected rights" to the use of river water are "unimpaired" thereby and shall "attach to and be satisfied from water that may be stored." (AR0001249.) When asked about the language of Article VIII concerning protection of "present perfected rights," Herbert Hoover, the federal representative for the 1922 Compact, stated that it "is inserted to obviate any fears on the part of present users that their rights might be impaired by the compact." (Wilbur & Ely, p. A-42.) Those "users" included Imperial Valley Farmers.

In 1928, Congress ratified the 1922 Compact in the Boulder Canyon Project Act (the "1928 Project Act"), which also authorized the Secretary to build and operate Hoover Dam, Imperial Dam, and the All-American Canal. (Pub. L. No. 70-642, 45 Stat. 1057, codified as amended at 43 U.S.C. §§ 617-619.) At the time, IID had a 1,700 mile long distribution and drainage system providing for the irrigation of 424,145 privately owned acres with water diverted from the Colorado River. (*Bryant v. Yellen* (1980) 447 U.S. 352, 356.) Section 6 required the Secretary to use the new facilities for such uses and "*satisfaction of present perfected rights*" in conformity with Article VIII of the 1922 Compact. (43 U.S.C. § 617e, emphasis added.)

In 1929, the California Legislature enacted the Limitation Act (the "1929 Limitation Act") by which the State agreed irrevocably and unconditionally that the use of Colorado River water in California under federal contracts and "all water necessary for the supply of any rights which

may now exist," "shall not exceed" 4.4 MAF per year. (Act of March 4, 1929; Ch. 16, 48th Session; Statutes and Amendments to the Codes, 1929, pp. 38-39.)

In 1931, seven public diverters of Colorado River water in California, including IID, agreed to the amounts and priorities of their water rights (the "Seven Party Agreement"). (AR Tab 48.) California's 4.4 MAF entitlement was "apportioned" among four senior diversions. The first three priorities totaling 3.85 MAF were for agricultural uses, including "Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys." (AR0001261.)[4] Newly organized Metropolitan Water District of Southern California ("MWD") agreed to a fourth, more junior priority. (*Ibid*.)

In 1932, IID and the U.S. entered into a contract for the construction of Imperial Dam and the All-American Canal, and for the delivery of water (the "1932 IID-U.S. Agreement"). (AR Tab 60.) The agreement required the U.S. to deliver water in accord with the Seven Party Agreement, which terms were incorporated into Article 17. (AR0001544-1546.) Article 17 further provided that Hoover Dam shall be used for "satisfaction" of "perfected rights." (*Id.* at AR0001546.) The 1932 IID-U.S. Agreement was validated by the Imperial County Superior Court on May 24, 1933. (RJN, Exh. 2.) The Superior Court determined that all landowners' water rights were protected under that agreement, which states that "contracts respecting water for irrigation and domestic uses shall be for permanent service." (*Id.* at p. 24.)

In 1933, pursuant to the requirement of the Seven Party Agreement that the parties to amend their appropriations to conform to the agreement

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[4] IID and Coachella Valley Water District ("CVWD") later agreed that IID's rights were senior to CVWD's. (AR 0001265-1299.)

(AR0001263), IID filed with the State Water Rights Board (predecessor to the State Water Resources Control Board) (the "State Board") an application to appropriate water from the Colorado River to be applied upon 992,548 acres of land located both inside and outside the district.[5] (AR0001487-1492.) In 1950, the State Board approved the application in Permit No. 7643 (the "1950 Permit"). (AR Tab 52.) The amount of water appropriated was consistent with the appropriation notices posted and recorded in the late 1890s by CDC. *(Ibid.)* The approval was "subject to vested rights" and "without prejudice to rights held . . . under appropriation." (*Ibid*.) The 1950 Permit authorized water for "irrigation" and "domestic" uses. (*Ibid*.) The 1950 Permit specifically excluded "power use," "municipal use," "mining use," "industrial use," or "recreational use" as approved uses. (*Ibid*.) Municipal use was later added as an approved use. (AR0006820.)

**4. The U.S. Supreme Court Confirms IID Holds the Right to Colorado River Water in Trust, and Farmers Own Equitable Title**

The U.S. Supreme Court's 1963 decision in *Arizona v. California*, *supra,* 373 U.S. 546, held that the 1928 Project Act provided a "complete apportionment of Colorado River water among Arizona, California, and Nevada." (*Id*. at p. 575.) The Court, citing section 6, noted: "One of the most significant limitations in the Act is that the [Secretary] is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." (*Id*. at p. 584.)

[5] These lands included East Mesa, West Mesa, and Pilot Knob, lands that were subsequently annexed to the district. (RJN, Exh. 3.) The district now comprises 1,061,637 acres. (AR0024754.)

The Court's 1963 opinion concerning present perfected rights was carried into effect with its 1964 decree, which defined "present perfected rights" as "perfected rights, as here defined, existing as of June 25, 1929," the effective date of the 1928 Project Act. (*Arizona v. California* (1964) 376 U.S. 340, 341.)

A supplemental decree was entered by the Court, in which it was adjudged that IID had a present perfected right,

> in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary *to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses*, whichever of (i) or (ii) is less, with a priority date of 1901.
>
> (*Arizona v. California* (1979) 439 U.S. 419, 429, emphasis added.)

The next year, the U.S. Supreme Court decided a dispute between the U.S., on the one hand, and IID and a defendant class of landowners (which included the plaintiff Michael Abatti's father, Ben Abatti),[6] on the other. (*Bryant v. Yellen, supra,* 447 U.S. 352.)

The Supreme Court held that the "obligation to satisfy present perfected rights in Imperial Valley were provided for by Art. VIII of the [1922] Compact and § 6 of the [1928] Project Act and adjudicated by the Court [in 1963 and 1979] in *Arizona v. California*." (*Bryant v. Yellen*, 447 U.S. at p. 369.)

The Ninth Circuit had held that the perfected rights had been adjudicated *to IID*, not to individual landowners, that individual landowners

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[6] The defendants were a "certified class of all landowners owning more than 160 acres," comprised of about "800 owners in the District owning in aggregate approximately 233,000 acres of excess lands." (447 U.S. at p. 365, fn. 15.)

had no right under the law to a particular proportion of the District's water, and that denying water to excess lands "would merely require reallocation" of the water. (*Id*.)

In *Bryant v. Yellen*, the Supreme Court reversed the Ninth Circuit, after concluding:

> . . . as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but *also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water*.
>
> (*Id*. at p. 371, emphasis added.)[7]

The Court thus held: "As beneficiaries of the trust, the landowners have a legally enforceable right, appurtenant to their lands, to continued service by the District." (*Id*. at p. 371, fn. 23.) The Court referred to the "rights of the farmer-beneficiaries in the District," (447 U.S. at p. 372), and emphasized the 1928 Project Act was intended to "insure that persons actually applying water to beneficial use would not have their uses disturbed." (*Ibid*. at fn. 24.)

**5. <u>The QSA</u>**

From 1990 through 1999, California consistently used between 100,000 and 800,000 AF more Colorado River water annually than its 4.4 MAF apportionment. In 1996, the Secretary declared California must implement a strategy to limit its annual use of Colorado River water without jeopardizing the use or delivery of water to other Basin States. (*See*, *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758,

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[7] The Court confirmed California law applies in any dispute regarding the nature of IID's water right: "[S]tate law was not displaced by the Project Act and must be consulted in determining the content and characteristics of the water right that was adjudicated to the District by our decree [in *Arizona v. California*]." (447 U.S. at pp. 370-71.)

787 ["*QSA Cases*"].) To assist in reducing California's water use, IID agreed to a series of conserved water transfers with urban water agencies, in what became the largest agricultural to urban transfer in the nation. IID agreed to transfer 500,000 AF of conserved water per year to San Diego, MWD, CVWD and others. (AR0007287-7321.)

During public hearings on the proposed water transfers, IID's General Manager, Jesse Silva, assured Farmers that their water needs would be met even with adoption of conservation measures by IID: "the water available for the plants on your farm should remain the same, and we should be able to maintain the same capabilities to grow the same types of crops we have been growing through the history of the District." (AR0004239, lns. 17-21.)

Most significantly, a temporary "cap" of 3.1 MAF per year, roughly equivalent to its average annual historical use, was imposed on IID's water right for a period of thirty-five years. (AR0007331.) In October 2003, the QSA and 34 ancillary agreements were signed. (*QSA Cases*, *supra*, 201 Cal.App.4th at p. 789.) A key component of the QSA was inclusion of an Inadvertent Overrun Payback Policy ("IOPP"), allowing IID to overrun its cap and later payback the same quantity of water in subsequent years, thereby mitigating potential impacts on IID's own water needs. (AR0007303-7306.)

### B. The Abattis' Water Rights

Michael Abatti has been farming in Imperial Valley for nearly 40 years, exclusively in reliance upon water distributed by IID. (4 AA 2245, ¶ 3; 2214, ¶3.) His ancestors have farmed in the Valley for over one hundred years, including on acreage he continues to farm today. (*Ibid*.)

The Abattis own or lease approximately 7,000 acres and grow a variety of crops, including grains, hay, alfalfa, vegetables and melons.

(*Ibid.*) A significant portion of those 7,000 acres have sandy, or "light," soil, which require more water to farm than land with denser soils. Based on historical data over a ten-year period, on a gross acreage basis, the Abattis' farmland requires an average of approximately 6.1 to 6.2 AF of water per year, but many acres require between 9 and 11 AF per year. (4 AA 2245, ¶ 3; 2215, ¶ 7; 2216, ¶¶ 8-9.)

The continued availability of water for crop irrigation is essential to the Abattis' farming business and is intrinsic to the value of their property. (4 AA 2247, ¶17.) The total value of the Abattis' 2013 crops was approximately $10,000,000. (4 AA 2245, ¶5.)

**C. IID's Prior EDPs**

Given the 3.1 MAF limitation in the QSA and normal fluctuations in IID's water use[8] (as well as the inability to store water from year to year) the demand by district water users was expected to exceed the available water supply *in some years*, a condition IID defined as a "supply/demand imbalance" ("SDI"). (AR0010925.) IID proposed a plan to apportion waters among users when it was determined an SDI was likely to occur. (AR0010925.)

In November 2006, the Board adopted Resolution 22-2006 directing the General Manager "to prepare the rules and regulations necessary or appropriate to implement the Equitable Distribution Plan within the District … so that water users will be made aware of, and be able to rely upon, the rules and regulations which will be used in the future when an SDI occurs." (AR Tab 225, emphasis added.)

In December 2007, the Board adopted Resolution 31-2007 approving the *Regulations for Equitable Distribution Plan*, which proposed to allocate

[8] IID's water use ranged from as low as 2.0 MAF to as high as 3.5 MAF annually. (AR0004031).

water to municipal water users as a first priority and thereafter to agricultural water users on a straight-line per acre basis when an SDI condition was declared by the Board ("the SDI EDP"). (AR Tab 251.)

In November 2008, the Board adopted revisions to the SDI EDP. (AR Tab 292.) This plan was challenged by various Farmers within the district on CEQA and non-CEQA grounds in the action entitled, *James Abatti, et al. v IID*, Imperial County Superior Court Case No. ECU04899. (AR Tab 302; *Abatti v. Imperial Irr. Dist.* (2012) 205 Cal.App.4th 650, 653-54.) The Farmers later dismissed their non-CEQA claims, and appealed the trial court's determination that adoption of the 2008 EDP did not warrant additional CEQA review. (*Id.* at p. 654.)

A different version of an SDI EDP was adopted in April 2009. (AR Tabs 317, 319.) In that version, IID was required to track actual supply of and demand for water during each "Water Year" and to determine whether the probability of the total demand exceeding IID's allotment of the water supplied by the Colorado River in the following year would be greater than fifty percent. (AR0017208.) If the probability exceeded fifty percent, IID was permitted (but not required) to declare an SDI condition for the *following* Water Year. (*Id*.) If IID declared an SDI, IID was required to send written notice to its agricultural water users of the anticipated apportionment in the next year, no later than December 1 of the previous year. (AR0017209.)

Each of the SDI EDPs provided for the imposition of a temporary water distribution scheme that would take effect **only if** a shortage condition was declared to exist within the district and would last **only until** the condition no longer existed.

Notably, IID never apportioned water as proposed under the earlier plans. The Board declared an SDI once, but the declaration was rescinded before implementation. (AR0023887.)

**D. IID's Adoption of the Permanent EDPs**

Of note, in the *James Abatti* case, this Court rejected the Farmers' argument that additional CEQA review of the 2008 EDP was required because it constituted a "`permanent reallocation of water over the long term'" as compared to the "temporary" 2007 EDP, because both of those SDI EDPs provided apportionment of water would take place "upon SDI [supply/demand imbalance] declaration." (*Abatti v. Irrig. Dist., supra,* 205 Cal.App.4th at pp. 680-81.)

After that decision, IID undertook to investigate adoption of a new permanent water apportionment plan. IID acknowledged, however: "Until 2011, the 3.1 maf cap had proved generally sufficient to meet IID's water user demands, and the overrun policy had filled the gap when its annual entitlement wasn't sufficient. . . . The underuse during this same eight year period exceeded 800,000AF. . . ." (AR0023885-886.)

Due to improved agricultural commodity prices, in 2011, IID first experienced an overrun of its QSA entitlement, that was followed by another overrun in 2012. (*Id.* at p. AR0023886.) These overruns triggered obligations under the IOPP. (*Ibid.;* AR0007303-7306.)[9]

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[9] IID makes much of the $22 million "payback obligation" for the two years of overruns and makes alarmist claims about water shortages. This Court should not be taken in. The overruns were paid back by Farmers' conservation of water as contemplated under the QSA's IOPP. (10 RT 359:22-28.) More important, the overruns are dwarfed by the value of IID's underuse of water. From 2003-2011 alone, IID underused 800,000 AF of water (AR0023886) worth hundreds of millions of dollars. IID simply allowed this water to flow to MWD, a junior priority holder, for free. (AR0001261.) By doing so, IID risks forfeiture of the unused

The new apportionment program developed in 2013 was contemplated to be a new, permanent system of apportionment that did not depend on the declaration of any SDI condition. (AR0023887.)

The planning documents show IID was considering a host of different "tools for consideration." (AR0024053-60; AR0023888-89.) The only reason IID called it a "revised" plan was to avoid the prospect of obtaining CEQA approval for the new plan and ostensibly because a tiered-pricing rate structure would require a cost-of service study, public hearings and a possible Proposition 218 rate protest hearing. (AR0024090; AR0023887.)

On February 19, 2013, the Board voted to convert the 2009 EDP that had never been operational "into a system of apportionment." (AR0024110.)

On April 23, 2013, the Board adopted Resolution 13-2013. (AR Tab 451.) For the first time, IID adopted a *permanent* water apportionment scheme to be imposed annually *regardless of whether water shortage conditions were likely to exist* (the "Permanent EDP"). (AR Tab 449.)

The Permanent EDP was significantly different from the prior SDI EDPs in that it eliminated the provision which required IID to declare an

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portion of the water right it holds in trust. (Cal. Water Code §§ 1240, 1241.) In breach of its trust obligations, IID fixated on permanently reducing Farmers' water rights, while consistently ignoring the need to create infrastructure for the storage of its water to protect the district against temporary overruns and preserve IID's full water entitlement, which storage facilities could have been funded from the sale of underused water. Furthermore, the historical evidence that IID more often than not *underutilizes* its annual water entitlement belies IID's claim that a permanent apportionment of water that restricts Farmers from their full beneficial use of water was necessary to avoid persistent overrun problems facing the district.

SDI condition for any calendar year, if at all, by October 1 of the previous year. (*Compare* AR0017208-09 *with* AR0025231.)

The Permanent EDP provided for a priority system; municipal or domestic water users were afforded the first priority and industrial users with which IID had existing contracts *or with which IID may contract in the future* were afforded the next priority. (AR0025589.) Industrial users were guaranteed all of the water specified in their contracts. (*Ibid*.) Agricultural water users were relegated to the last and final class of water users, after feed lots, dairies, fish farms (even though that was previously categorized as an "agricultural use") and environmental resources water users. (*Ibid*.) *All of the non-agricultural water users were entitled to water based on past usage.* (*Ibid*.) The volume of water use by all "non-agricultural water users" was not limited. (*Compare* AR0025232, § 3.2 ["Non-Agricultural Water users shall be allowed to use that amount of water needed for reasonable and beneficial use."] *with* § 3.3.)

The Permanent EDP provided that the remaining water IID chose to allocate in any given year would be limited and apportioned among the agricultural water users based on a "straight-line" per acre basis, without regard to whether the land had any historical water use whatsoever, whether the land had any existing need for water for irrigation use, and irrespective of the Farmers' needs based on soil type or crops planted on their lands. (*Id*. at AR0025230; AR0025232.)

The definition of "Available Water Supply" was different than in the SDI EDPs and subtracted from IID's 3.1 MAF entitlement any water attributable to system efficiency conservation measures and any "Water Management Reduction," which term was defined ambiguously, thus providing IID with the ability to curtail the available water supply for apportionment to Farmers even further. (AR0025228; AR0025231.)

The Permanent EDP contained a provision for an "Agricultural Water Clearinghouse," the stated purpose of which was "to facilitate the movement of apportioned water between Agricultural Water Users between Farm Units." (AR0025232-233.)

Another significant change in the new Permanent EDP was the inclusion of a provision, "Overrun Payback Program," requiring those users who exceeded their apportionments (*i.e.*, agricultural water users) to bear the cost of IID's IOPP payback obligations under the QSA. (AR0025230.)

Prior to the Board's adoption of the Permanent EDP, Mr. Abatti raised his objections to the Permanent EDP, including the prioritization of all other users above agricultural water users, and the failure to consider agricultural water users' baseline needs by reference to their historical water use. (AR Tab 448.)

On April 23, 2013, at the Board Meeting at which the Permanent EDP was approved, Board Members went on record to admit the plan was flawed from inception, was <u>not</u> fair or equitable, and was too harsh on Farmers, but nonetheless approved it for the sake of expediency.

Director Stephen Benson acknowledged: "we're pretty sure that it won't work. I think we've all agreed on that." (AR0025176, lns. 15-16.) Board President James Hanks agreed that the EDP "ha[d] some major flaws." (AR0025177, ln. 23.) With respect to the straight-line allocation among agricultural users, Director Benson stated unequivocally:

> *I for one think it does not work to be fair and equitable to people that have historically had higher water use.* When you look at our on-farm conservation, it actually looks at a baseline. So if we take the time to set up everyone's baseline, that would be a better way to apportion water. We really don't have that time today.
>
> (*Id.* at lns. 19-25, emphasis added.)

Director Hanks stated that straight-line allocation "kills the future on farm program" and IID needed to move away from it because it was "too harsh on the higher water users, puts them at the mercy of – of low water users." (AR0025178, ln. 23-AR0025179, ln. 2.) Director Benson acknowledged IID had historical use records to apportion water based upon soil type, but simply rejected doing so, because: "That also takes a lot of work." (AR0025177, lns. 3-9.) Director Benson agreed Mr. Abatti had raised valid points, but concluded IID needed to move forward nonetheless. (AR0025177, lns. 11-13.)

IID adopted Resolution 15-2013 on May 14, 2013 (AR Tab 464), approving further revisions to the Permanent EDP (the "May 2013 EDP"). (AR Tab 465.) The May 2013 EDP facially changed the priority among water users, putting agricultural users second behind municipal or domestic water users, and ahead of all other users, including industrial users. (AR0025589.) The May 2013 EDP eliminated the prior plan's language adopting the straight-line method of apportionment, and replaced it with the following vague statement: "[A] method will be developed to determine the apportionment of water available for Agricultural Water Users during a Water Year. Apportionment models understood and discussed to date are historical, straight-line, soil type and hybrids of a combination of these methods." (AR0025588.)

Nonetheless, IID established a straight-line method of apportionment for agricultural users for the rest of 2013 as a "pilot program." (AR0025614.)

### E. The Initial Abatti Petition

On May 23, 2013, the Abattis filed their first writ proceeding, Imperial County Case No. ECU07667 (the "Initial Abatti Petition"), challenging the Permanent EDP first adopted on April 23, 2013 and the

revised May 2013 EDP. (AR Tab 468.) The matter was later assigned to the Hon. Diane B. Altamirano. (AR Tab 509.) After the Abattis filed for a preliminary injunction (AR Tabs 498-502), the first writ proceeding was stayed by stipulation. (AR Tab 514.)

**F. The October EDP**

IID adopted yet another different Permanent EDP on October 28, 2013 (the "October 2013 EDP"), which superseded entirely the May 2013 EDP. (AR Tab 534.) As described *infra* at pp. 89-92, the October 2013 EDP is significantly different from the prior SDI EDPs and differs from the April and May versions of the Permanent EDP. Most importantly, the October 2013 EDP went back to the earlier prioritization that placed agricultural water users last behind all other water users and gave industrial users the second highest priority behind municipal or domestic users. (AR0027538.) Straight-line apportionment was stated to be the default method of apportionment. (AR0027537.)[10]

**G. The Instant Proceeding**

The Abattis filed this judicial proceeding on November 27, 2013, just thirty days after adoption of the October 2013 EDP (the "Instant Proceeding"). (1 AA 35.) The Abattis filed a Notice of Related Case, referencing the Initial Abatti Petition. (1 AA 32-33.) The Instant Proceeding was transferred to Judge Altamirano. (1 AA 78.)

On February 20, 2014, the Abattis filed a Verified Amended Petition for Writ of Mandate and Complaint (the "Amended Petition"). (1 AA 84-106.) The parties then entered into a Stipulation, which stated:

[10] Under pressure from Farmers, IID instead used a "hybrid" allocation method, 50% straight-line and 50% historical use, (10 RT 394:4-5; 398:17-28), but did not revise the Permanent EDP.

> WHEREAS, to avoid overlapping litigation, *Respondent agrees to waive in the present Action the statute of limitations, laches and any other defenses based solely on the time that has passed since May 23, 2013, the date when Petitioners filed the ECU078667 Action.* In exchange, *Petitioners agree* to dismiss the ECU07667 Action and *to prosecute all claims relating to Equitable Distribution Plan and revisions thereto in the present Action*.
>
> (1 AA 107-11, emphasis added.)

The trial court entered the Stipulation as the Order of the court on February 25, 2014. (1 AA 110.) The Abattis subsequently dismissed the Initial Abatti Petition *without* prejudice. (RA 230.)

IID filed a Demurrer to the Amended Petition. (1 AA 127-31.) Among other things, IID argued the Amended Petition was barred by the doctrine of collateral estoppel based on the Court of Appeal's prior decisions in *Morgan v. Imperial Irr. Dist.* (2014) 223 Cal.App.4th 892 and the earlier *James Abatti* litigation, and the Abattis' challenges were time-barred. (1 AA 115-39.) The Abattis opposed the Demurrer. (1 AA 233-50; 251-54; 255-59.)

The trial court overruled the Demurrer as to the first and second causes of action, but sustained it with leave to amend as to the breach of fiduciary duties and takings causes of action. (1 AA 376; 1 RT 16.)

The Abattis filed a Verified Second Amended Petition for Writ of Mandate and Complaint, which contained additional allegations designed to address the perceived deficiencies in the third and fourth causes of action (the "Second Amended Petition"). (1 AA 392-424.)

IID filed another Demurrer and another Motion to Strike. IID's second Demurrer was *solely* on the grounds that the third and fourth causes of action were premature and/or the property damage claims were speculative. (1 AA 425-35.) IID argued outside the four corners of the

pleadings that IID had yet to deny any of the Abattis' requests for water. (1 AA 430:26-28; 434:2-3.) In its Motion to Strike, IID sought to strike various allegations of the Second Amended Petition based on its *Morgan* validation argument. (1 AA 455-57.)

After the Abattis opposed the Demurrer and Motion to Strike (1 AA 642-56; 657-72; 673-81), the Demurrer and Motion to Strike came on for hearing. (2 RT.) The trial court subsequently entered its Order on Submitted Matters. (2 AA 728-32.) The trial court ruled *sua sponte* that IID's legislative actions in creating and implementing the Permanent EDPS in 2013 were the subject of the Validation Statutes, Code of Civil Procedure sections 860, *et seq*., and the Abattis had not timely filed a reverse validation action with respect to the April and May 2013 EDPs, but could only challenge the October 2013 EDP. (*Id.* at 729.) The trial court also sustained the Demurrer to the third and fourth causes of action without leave to amend. (*Ibid*.)

Based on its validation ruling on the Demurrer, the trial court granted IID's Motion to Strike in part and denied it in part. (1 AA 729-31.)

On November 26, 2014, the Abattis filed their Verified Third Amended Petition for Writ of Mandate and Complaint (the "Third Amended Petition"). (1 AA 735-36.)

IID filed another Motion to Strike. (1 AA 758-76.)

On December 26, 2014, the Instant Proceeding was re-assigned to the Hon. L. Brooks Anderholt. (2 AA 879.)

After the Abattis opposed the Motion to Strike (2 AA 881-92; 893-964), the Motion to Strike was heard. (4 RT.) The newly assigned trial judge denied the Motion to Strike, refusing to revisit Judge Altamirano's ruling and strike additional allegations. (*Id.* at pp. 109, 110; 2 AA 978.)

In advance of the bench trial, the parties filed their respective trial briefs. (2 AA 1009-43; 1044-83; 1178-1200.) The parties stipulated to a jointly prepared Administrative Record. (10 RT 329-30.) A hearing on the matter was held on April 17, 2017 before Judge Anderholt, after which the trial court issued its Tentative Decision pursuant to California Rules of Court, Rule 3.1590. (2 AA 1330-38.) IID did not file any objections to the Tentative Decision pursuant to Rule 3.1590, subd. (g). The Abattis did. (2 AA 1344-45.)

On August 15, 2017, the trial court entered its Statement of Decision, finding in favor of the Abattis. (2 AA 1346-54.) The trial court determined a peremptory writ of mandate should issue invalidating the October 2013 EDP and commanding its repeal. (*Id.* at 1352:22-25.)

On August 25, 2017, Respondent entered the Declaratory Judgment, awarding declaratory relief in favor of the Abattis consistent with its Statement of Decision. (2 AA 1355-56.) On August 31, 2017, Respondent entered its Writ of Mandate. (2 AA 1373-74.)

On September 26, 2017, IID filed its Notice of Appeal from the Judgment and the Writ of Mandate. (2 AA 1425.) On October 16, 2017, the Abattis timely filed their Notice of Cross-Appeal. (2 AA 1701-05.)

## IV. ISSUES PRESENTED ON APPEAL AND CROSS-APPEAL

### A. On Appeal

1. Is IID's appeal moot because Resolution No. 26-2013 was repealed after IID filed its appeal?

2. Is IID foreclosed under the doctrines of *stare decisis*, collateral estoppel and/or judicial estoppel from arguing here that Farmers, like the Abattis, have no constitutionally protected interest in the water rights held by IID?

3. Did the trial court properly exercise its power of judicial review of agency action to determine that the new Permanent EDP enacted in October, 2013 was an abuse of discretion or contrary to law because:

(a) the Permanent EDP ignored the Farmers' vested and constitutionally protected equitable interests in the water rights held by IID that are appurtenant to their lands and violated the "no injury" rule?

(b) IID exceeded its powers as an irrigation district by granting priority to industrial and other non-irrigation users before agricultural users, disregarding the Farmers' vested rights to use water for irrigation?

(c) the Permanent EDP violated Water Code section 106;

(d) the Permanent EDP was inequitable as a matter of law because it apportioned water among Farmers on a straight-line basis, not on the basis of their reasonable needs for water?

(e) the Permanent EDP violated the law because it utilized a straight-line apportionment between all agricultural water users, including lands previously not irrigated, thereby allocating excessive water to land not used for irrigation or other beneficial uses in violation of article X, section 2 of the California Constitution?

4. Did IID waive various of its challenges to findings that sustain the Judgment and Writ of Mandate because of IID's failure to object to the Proposed Statement of Decision?

5. Did this Court's decision in *Morgan v. Imperial Irr. District, supra,* 223 Cal.App.4th 892, or the underlying trial court's Statement of Decision, validate the new Permanent EDP enacted almost six years after the first SDI EDP and even though the validation of the earlier SDI EDPs was never actually litigated or resolved on the merits in the *Morgan* lawsuit?

6. Was the Instant Proceeding filed on November 27, 2013 timely where the subject of the action is the Permanent EDP adopted on October 28, 2013?

**B. On Cross-Appeal**

1. Did the trial court err in ruling on the Demurrer to the Second Amended Petition, when it concluded the Abattis could not challenge any aspects of the October 2013 EDP contained in the earlier April and EDPs because: (i) the Validation Statutes did not apply to the Abattis' challenges to the Permanent EDPs; and (ii) even assuming they did, the parties stipulated and the trial court ordered that the challenges to the April and May 2013 EDPs could be litigated in the Instant Proceeding, IID waived the right to assert the claims relating to those EDPs were not time-barred based on the passage of time between the filing of the Initial Abatti Petition and the Instant Proceeding, and the Initial Abatti Petition challenging the April and May EDPs was filed within sixty days of the enactment of both of those EDPs?

2. Did the trial court err in sustaining the Demurrer to the breach of fiduciary duties and takings causes of action?

## V. STANDARDS OF REVIEW

Quasi-legislative acts are reviewed by mandate under Code of Civil Procedure section 1085. (Cal. Code Civ. Proc. § 1085; *Katosh v. Sonoma County Employees' Retirement Assn* (2008) 163 Cal.App.4th 56, 62, fn. 4.) "Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts." (*Wulzen v. Bd. of Supervisors* (1894) 101 Cal. 15, 35.) IID has consistently taken the position that enactment of the EDP is quasi-legislative action. (2 RT at 43.)

A trial court generally reviews whether agency action is "arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 786; *see also, Carrancho v. Cal. Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1265 [challenging agency action for violation of law].) Though deference is usually afforded, "the agency must act within the scope of its delegated authority, employ fair procedures and be reasonable." (*California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control. Dist.* (2009) 178 Cal.App.4th 120, 129.)

Mandate is available where the agency violates the law, including a violation of a vested property right, or discriminates. (*Willard v. Glenn-Colusa Irr. Dist.* (1927) 201 Cal. 726, 741-42 [recognizing that if irrigation district unlawfully discriminates against landowners or engages in illegal action, redress is available from the court]; *Kissinger v. City of Los Angeles* (1958) 161 Cal.App.2d 454, 460 ["it is the duty of the courts to set aside an ordinance which under the facts is clearly unreasonable and oppressive and discriminating" and "in effect, is an attempt . . . to take plaintiffs' property without due process of law and without payment of compensation for that taking"].)

If agency action involves a fundamental right, such as a property right, the trial court does not review any findings of the agency under the substantial evidence standard, but is required to conduct an independent judgment review of the administrative record. (*See, Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-44.)

"Administrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void." (*Terhune v.*

*Superior Court* (1998) 65 Cal.App.4th 864, 972-73; Cal. Gov't. Code § 11342.1 ["Each regulation adopted [by a state agency], to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."] and 11342.2; *see also, Morris v. Williams* (1967) 67 Cal.2d 733, 748.) "An administrative agency may not, under the guise of rulemaking, abridge or enlarge its authority or exceed the powers given to it by the statute - the source of its power." (*Benton v. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1480; *see also, Bisno v. Santa Monica Rent Control Bd.* (2005) 130 Cal.App.4th 816, 821-22.].)

The Court of Appeal's independent review of a trial court's judgment or entry of a writ of mandate invalidating agency quasi-legislative action is subject to these same standards. (*California Bldg. Industry Ass'n, supra,* 178 Cal.App.4th at p. 130.)

> The purpose of the writ of mandamus procedure is not to rubber-stamp every administrative decision that is rendered. If that were the case, there would be no point in reviewing decisions at all. . . . While the agency has discretion to act, that discretion is not unfettered.
>
> (*Hankla v. Long Beach Civil Service Com.* (1995) 34 Cal.App.4th 1216, 1222.)

The Court of Appeal does not engage in fact-finding anew, but is bound by the determination of factual issues made by the trial court where they are supported by substantial evidence (*Guyman v. State Bd. of Accountancy* (1976) 55 Cal.App.3d 1010, 1016) or not challenged in the trial court by objections to the proposed Statement of Decision (*In Re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134-35).

The interpretation of the Validation Statutes presents an issue of law decided *de novo*. (*Katz v. City of Seaside* (2006) 143 Cal.App.4th 13, 28.)

An order sustaining a Demurrer is reviewed *de novo*. (*Santa Teresa Citizen Action Group v. State Energy Resources Conservation and Dev. Com.* (2003) 105 Cal.App.4th 1441, 1445; Cal. Code Civ. Proc. § 452.)

## VI. LEGAL DISCUSSION

### A. The Appeal is Moot

IID repealed Resolution No. 26-2013 after filing its appeal. (RJN, Exh. 4.) The appeal from the Writ of Mandate requiring its repeal and that part of the Declaratory Judgment precluding implementation of the Permanent EDP adopted by that resolution is thus moot. (*Sierra Club. v. Bd. of Supervisors* (1981) 126 Cal.App.3d 698, 704-05.)

### B. The Trial Court Was Correct: the Farmers Own an Equitable and Beneficial Property Interest in the Water Rights Held in Trust by IID

The centerpiece of IID's argument that the trial court erred in granting the Abattis relief is as stated:

> The trial court's conclusion that Respondents have a constitutionally protected property right – as opposed to continued service of water – is inconsistent with statutory and extensive case law.
>
> (AOB, p. 25; *see also*, AOB, 31, fn. 12 ["Respondents, in fact, are not water rights holders at all . . . ."].)[11]

IID's argument is utterly fallacious and inconsistent with the established *Law of the River* and the replete decisional law, including both California and U.S. Supreme Court case law, on the subject of the Farmers' rights in the water held in legal title by IID.

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[11] As is shown *infra*, IID's argument that *Bryant v. Yellen* recognizes IID as the "single water rights holder" and did not recognize the landowners' equitable and beneficial interest in the water rights of the district and "cannot possibly be construed to do so" (AOB, p. 24) is improper advocacy

Where surface water is diverted by one party, but used by others, the acquisition, ownership and exercise of the appropriative water rights are joint. At common law, the diverter, here IID, holds mere legal title to the right and the user owns the equitable and beneficial interest in the right. (*Quist v. Empire Water Co.* (1928) 204 Cal. 646, 651-53.) A right of prior appropriation does not confer ownership of the water of the stream, but only a usufructuary interest, or a right of use of such water. (*Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550, 558; *Eddy v. Simpson* (1853) 3 Cal. 249, 252.) An appropriative water right to use surface water to irrigate crops is "appurtenant" to the land irrigated. (*Nicoll, supra*, 160 Cal.App.4th at 558; *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 724-25, 727.)

The landowners' equitable and beneficial interest in the water rights of an irrigation district was thus recognized as a private right entitled to constitutional protection by the California Supreme Court as early as 1904 in *Merchant Nat'l. Bank of San Diego, supra*, 144 Cal. at p. 333. That property right was recognized in multiple California cases following the *Merchant* decision. (*See, e.g., City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 587.)

Before 1911, when the Imperial Valley irrigation project was in private hands, the appropriative water rights exercised to irrigate Farmers' lands were appurtenant to such lands. (*Thayer, supra*, 164 Cal. at p. 136.) They remain appurtenant to the Farmers' irrigated lands under the post-1911 regime of IID. (*Hall, supra*, 198 Cal. at p. 383 [specifically addressing IID, "*the land owners [of IID], as members of an irrigation district, sustain such a relation to the district as to give them a proprietary interest in the district's property*."].)

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by IID's counsel. (Cal. Bus. & Prof. Code § 6068, subd. (d); Cal. Rules Prof. Conduct, Rule 5-200(B) and (C).)

In *Greeson v. Imperial Irr. Dist.* (S.D. Cal. 1931) 55 F.2d 321, *aff'd*, 59 F.2d 529 (9th Cir. 1932), the Ninth Circuit recognized that, under California law, IID, as successor-in-interest to CDC, SPC and the mutual water companies, *was obligated to honor the landowners' "vested . . . right to have the supply continued [which right] becomes in the nature of an appurtenance to the land [and] the right may be enforced against the person in control of the supply and the works by which it is distributed, regardless of the title, by means of an action in mandamus to compel the continuance of the distribution, in the usual and proper manner, to those entitled*." (*Id.*, citing *City of South Pasadena, supra*, 152 Cal. at p. 587, emphasis added; *see also, Brooks v. Oakdale Irr. Dist.* (1928) 90 Cal.App. 225, 241 [irrigation district as successor-in-interest assumed the burden of continued service to lands *in the manner previously provided*].)

Finally, in *Bryant v. Yellen*, the U.S. Supreme Court specifically held that IID's water right is held in trust by IID for the landowners and is "*equitably owned by the beneficiaries to whom the District was obligated to deliver water*." (447 U.S. at p. 371, emphasis added.)

The Supreme Court's decision in *Bryant v. Yellen* was predicated on an exhaustive analysis of California water law, including the Irrigation District Law (the "IDL"), IID's enabling act, and state decisional law, including *Ivanhoe Irr. Dist. v. All Parties & Persons* (1957) 47 Cal.2d 597, 624–26, *rev'd sub nom.* on other grounds, *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275, which stated:

> It has long been the established law of the state that an irrigation district is trustee for the landowners within the district and limited in its trust to receive and distribute water to them. . . . [*T*]*he beneficiaries of the trust, who, upon familiar equitable principles, are to be regarded as the owners of the property, are the landowners in the district* with whose funds the property has been acquired (Civ. Code §

853.) . . . *Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article I of the state Constitution that "no person shall be . . . deprived of . . . property without due process of law,' and of the similar provision of section 1 of the fourteenth amendment to the constitution of the United States*." [Citations omitted.]

(*Ivanhoe, supra*, 47 Cal.2d at pp. 624-25.)

The *Ivanhoe* decision concluded that, as a result of that trust relationship, an irrigation district cannot violate the rights of the beneficiaries in the exercise of its powers. (*Ivanhoe*, 47 Cal.2d at p. 625 ["*They must administer [their trust] consistently with and not in violation of the rights of the beneficiaries.*"], emphasis added.)

The existence of the Farmers' water rights held in trust by IID is no longer open for discussion or debate by IID, but is a matter of *stare decisis*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [tribunal of inferior jurisdiction must follow decision of court of superior jurisdiction]; *Ivanhoe, supra*, 53 Cal.2d at p. 709 [U.S. Supreme Court decision "is, of course, binding" on California court].)

The trial court's conclusion that Farmers in the district possess the equitable and beneficial interest in the water rights held in trust by IID is entirely consistent with established law. Furthermore, the trial court properly determined, under the authority of *Bryant v. Yellen*, 447 U.S. at p. 371, that "[t]he farmers' equitable and beneficial interest in the water is appurtenant to their lands and is a constitutionally protected property right." (2 AA 1348:14-17.)

### C. The Doctrine of Collateral Estoppel Precludes IID From Re-Litigating the Farmers' Water Rights

IID is also bound under the doctrine of collateral estoppel by the decision in *Bryant v. Yellen.*

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd*. (1962) 58 Cal.2d 601, 604.) Collateral estoppel applies where these threshold requirements are fulfilled: "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Lucido, supra*, 51 Cal.3d at p. 341; *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807, 813-14 [allowing offensive use of collateral estoppel against a party who litigated the same right or identical issue in a prior lawsuit].)

These requirements are met here. The issue of Farmers' water rights in the water held in trust by IID is identical to the issue that was decided in *Bryant v. Yellen.* The issue was actually litigated and necessarily decided by the Supreme Court to reverse the Ninth Circuit's decision. IID is a party here and was the party who litigated that very issue before the U.S. Supreme Court.

IID's claim on appeal that the trial court's holding on Farmers' water rights "rejects an unbroken line of appellate cases since 1906" is utterly unfounded and simply ignores the established *Law of the River,* which has defined and now enshrines the water rights held by IID in trust for the Farmers of the district to whose land the water rights are appurtenant.

IID attempts to avoid the controlling decisional law simply by ignoring the holding in *Bryant v. Yellen* and the long-standing California

decisional law pre-dating that landmark decision, all recognizing Farmers' equitable and beneficial water rights to the water held in trust by IID, which is a property interest of constitutional stature under California law. (AOB, pp. 25-28.) It cannot do so. IID is bound by *Bryant v. Yellen* and cannot relitigate that issue before this Court.

IID relies on inapposite cases involving municipal water companies, or other irrigation districts the rights of whose landowners have not already been adjudicated, to argue that Farmers within the district have "simply a right of service," which is not "private property," and that Farmers are nothing more that "consumers" of water, not beneficial owners of a water right. (AOB p. 25.) None of these cases is apposite.

*Miller v. Railroad Comm'n.* (1937) 9 Cal.2d 190, 198, *Hildreth v. Montecito Creek Water Co.* (1903) 139 Cal. 22, 29, and *Coulter v. Sausalito Bay Water Co.* (1932) 122 Cal.App. 480, 497 involved public utilities.

In *Miller*, the petitioner, a customer of the public utility, claimed legal title to a specific portion and quantity of the company's water right.[12]

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[12] IID seems to argue that a "right to service" is not a right at all. Yet, there is a long line of California cases establishing that individual landowners within a water company's service area can indeed compel continued service to their lands without discrimination. (*See, e.g., San Bernardino Val. Mun. Water Dist. v. Meeks & Daley Water Co.* (1964) 226 Cal.App.2d 216, 222-23; *Henderson v. Oroville-Wyandotte Irr. Dist.* (1929) 207 Cal. 215, 220; *see also, Butte County Water Users' Ass'n v. Railroad Commission of Cal.* (1921) 185 Cal. 218, 225 [holding that water company supplying water for irrigation purposes was required to prorate the supply of water among its various consumers during times of shortage and not discriminate between different water users]; *Fellows v. City of Los Angeles* (1907) 151 Cal. 52, 63.) Even if IID were a public utility company, which it is not, IID could not add whatever new water users it chooses to share in the existing and limited supply of the district's water to the detriment and exclusion of existing users and not pro-rate the supply of water *among all users* during times of shortage. In *Butte County*, the Supreme Court noted that none of the company's consumers were operating under pre-1914 water

*Hildreth* generally sets forth the law in 1903 relating to public and private use of waters. It did not apply that law to facts that are in any way similar to the facts of the instant case. In fact, *Thayer*, one of the first cases to consider the *very water rights that are the subject of this case*, distinguished *Hildreth*, 164 Cal. at 130, and held that the landowners in the Imperial Valley were the "indirect owners" of the water right. (*Thayer, supra*, 164 Cal. at p. 136.) *Paulson* involved the Railroad Commission's consideration and approval of a transfer of irrigation facilities from a public utility water company to an irrigation district. The continuing rights of public utility customers were determined. (*Paulson*, 75 Cal.App. at pp. 71-2.) *Coulter* dealt with an agreement of a water company to deliver water that was not appurtenant to the land, but merely a personal obligation by contract. (*Coulter*, 122 Cal.App.2d at pp. 495-96.)

*Glenn-Colusa Irr. Dist. v. Paulson* (1925) 75 Cal.App. 57, 69 concerned an irrigation district's purchase of facilities from a public utility water company, whose customers did not own water rights prior to the district's acquisition of the irrigation facilities.

At issue here are water rights that *pre-date* IID's formation, which gave rise to IID's water right, which have been defined and protected by a complex set of laws and agreements, that have satisfied the irrigation needs of Imperial Valley Farmers for the last 100 years, and that have on multiple occasions been adjudicated to be appurtenant to the lands within the district. *Miller*, *Hildreth, Paulson*, *Coulter, Glen-Colusa,* and similar cases are simply not applicable.

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rights and therefore were to be treated consistently. (*Id.* at p. 225.) Here, IID's Farmers have pre-1914 water rights that are vested water rights entitled to constitutional protection. Thus, the trial court properly determined that equitable distribution could certainly not require anything less than pro-ration among all water users. (2 AA 1350-51, 1353.)

IID cites *Madera Irr. Dist. v. All Persons* (1957) 47 Cal.2d 681, 691-93 as its most "persuasive" case. (AOB, p. 26.) IID violates California Rules of Court, Rule 8.1115, subd. (a) in doing so. (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1529.)

*Madera* is not authority, let alone persuasive authority, on the issue before this Court. ***Madera* was reversed *sub nom* by the U.S. Supreme Court in *Ivanhoe Irr. Dist. v. McCracken* (1957) 357 U.S. 275, 277 discussed *supra*.** Neither *Madera* nor *Ivanhoe* involved landowners' interests in pre-existing perfected water rights, which IID acknowledged in its briefing to the Supreme Court in *Bryant v. Yellen*. (AR0001656.) Moreover, *Madera* explicitly recognized *Merchants Nat'l. Bank*, and stated:

> Nothing said herein is inconsistent with the cases which hold that the *members of an irrigation district are the beneficial owners of the water rights of the district*. (*Merchants Nat. Bank v. Escondido Irr. Dist.*, 144 Cal. 329 [77 P. 937], and cases there cited.) *The trust under which water rights and other property of an irrigation district is held by the district is for the benefit of a particular class of individuals. Those individuals are the equitable owners.* Individual members within that class can demand services to which they are entitled if they qualify and as long as they qualify as members of that class.
>
> (*Madera*, 47 Cal.2d at p. 693, emphasis added.)

Importantly, the Ninth Circuit in the *Bryant v. Yellen* case cited *Madera* for the proposition that IID could "redistribute" water among lands within the district. (*U.S. v. IID II*, *supra*, 559 F.2d at p. 530.) The Ninth Circuit reasoned that "lands of a particular landowner could be deprived of water without reducing the total amount of water delivered" to the district, and that "redistribution of deliveries . . . would not violate the trust under which the Imperial Irrigation District owns the water rights for the common benefit." (*Ibid.*) *The Supreme Court rejected that reasoning in Bryant v.*

*Yellen.* (447 U.S. at pp. 372-73.) The Court stated that such a redistribution "would go far toward emasculating the substance, under state law, of the water right decreed to the District, *as well as substantially limiting its duties to, and the rights of, the farmer-beneficiaries in the District.*" (*Id*. at p. 373, emphasis added.)

The decision in *Bryant v. Yellen* thus considered and emasculated the argument that IID makes before this Court in reliance on *Madera.* IID *cannot* redistribute water rights among the district's landowners to deprive those Farmers, like the Abattis, who have been irrigating their lands for years, of their water rights and re-distribute them to other landowners in the district who have no rights or not to the same extent of usage. IID certainly cannot re-distribute those water rights to industrial users who never acquired such water rights.

IID's reliance on Water Code section 22262 to argue that water rights cannot be created by any use permitted under the IDL fails to recognize the district's Farmers' water use established the water right at issue and those vested rights of the Farmers *predated* the creation of IID. In light of the entire body of case law previously adjudicating the Farmers' water rights in the district's water, some of which predates enactment of the IDL, section 22262 can only be read to prevent *new water users* serviced by IID from claiming any legal title or equitable interest in the water held in trust by IID.

IID's argument that the "trust relationship" is not one "in the classic probate sense" (AOB, pp. 26-27) is a straw argument of no consequence; the Abattis never argued below that it was and the trial court did not so hold. And, virtually all of the cases cited by the IID pre-dated *Bryant v. Yellen*, which confirmed the Farmers *are* the beneficial owners of the water rights IID holds in trust.

IID also relies upon *Jenison v. Redfield* (1906) 149 Cal. 500 for the proposition that the rights of landowners are "subordinate." *Jenison* does not hold that Farmers do not have discernible and protectable rights, or that their rights to water are subject to alteration by the unfettered discretion of the Board. The Court merely held that use of water to irrigate lands *outside of the district* violates the IDL and is inconsistent with the purposes of the IDL. (*Id*. at p. 501.) IID ignores the most salient language of *Jenison,* which explains the fundamental purpose of an irrigation district is to provide water *for irrigation purposes*. (*Id*. at pp. 502-04.) As the Supreme Court stated:

> The ultimate purpose of a district organized under the irrigation act *is the improvement, by irrigation, of the lands within the district*. Such a district holds all property acquired by it solely in trust for such ultimate purpose, and can divert it to no other use. . . . So far as [a landowner] proposes to use the water for the irrigation of lands within the district, he is proposing to use it in furtherance of the purpose of the trust, and is entitled to have distributed to him for that purpose.
>
> (*Id.* at p. 503; emphasis in original.)

IID's arguments based on case law involving public utilities, other water districts, or cases relating to different issues are simply not availing. The California and the U.S. Supreme Court have already addressed the very issue of *the water rights of the Farmers in Imperial Valley to the water held in trust by IID.* IID is collaterally estopped by the decision in *Bryant v. Yellen.* IID's refusal to acknowledge the holding of that decision – for which IID advocated – and its reliance on inapposite case law, including citation to a decision which has been reversed and the reasoning of which was expressly rejected by the Supreme Court in *Bryant v. Yellen,* are appalling. IID's arguments are specious and should be rejected.

### D. IID is Judicially Estopped to Disavow the Vested Water Rights Possessed by Farmers, Like the Abbatis

IID is judicially estopped to argue that Farmers do not have a constitutionally protected interest in the water rights of IID. (*See, e.g.*, *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183; *see also, Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121-22.)

Judicial estoppel applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (*i.e.*, the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the position was not taken as a result of ignorance fraud or mistake" (*Jackson, supra,* 60 Cal.App.4th at p. 183.)

In its Petition for Certiorari in *Bryant v. Yellen*, IID argued that the Ninth Circuit erred "*in failing to recognize that under California law the rights of landowners to water delivered by irrigation districts are property rights*[.]" (AR0001621, emphasis added.) IID specifically cited to *Merchants Nat'l. Bank*, *supra*, 144 Cal. 329, 334 for that proposition. (*Id*. at pp. 0001621-22.)

IID asserted in its Petition:

> The court's conclusion that the application of acreage limitations to individual landowners (as distinguished from the District) would not impair present perfected rights is premised on a misunderstanding of the nature of water rights `owned' by irrigation districts in California. *Although it is true that the District holds the legal title to the water rights, it holds this title in trust for the landowners, who own the beneficial interest.* It is the individual landowner – not the District – who put the water to beneficial use. Under California law, each individual landowner has a statutory right to a definite proportion of the District's water. And each individual landowner has a statutory right to assign his

> proportionate share. *Moreover, the right to such proportionate share becomes appurtenant to the land on which the water is used*.
>
> (AR0001622, emphasis added.)

Among other statutes, IID relied upon Civil Code section 662 (*ibid.*), which states: "A thing is deemed to be . . . appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, . . . from or across the land of another." (Cal. Civ. Code § 662.) IID also relied upon section 8 of the 1902 Act, which provides: "[T]he right to the use of water . . . shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (AR0001622-1623.)

In a Reply Brief, IID contrasted the *Bryant v. Yellen* case with the *Ivanhoe* case: "*Nor did any of the Landowners or the irrigation districts involved in Ivanhoe have present perfected or even vested rights.*" (AR0001656, emphasis added.)

In IID's Opening Brief on the merits in *Bryant v. Yellen*, IID reiterated: "*[A]as a matter of California law, the District is merely the trustee of the water rights for landowners, who are the beneficial owners, and their beneficial interest is a constitutionally protected property right which is appurtenant to the land irrigated.*" (AR0001670, emphasis added.) IID again distinguished *Ivanhoe* on the ground, *inter alia*, that "the landowners in *Ivanhoe* did not have vested water rights. . . ." (AR0001671.) IID asserted:

> Under California law, (i) the landowners within an irrigation district are the equitable owners of the water rights – including present perfected rights – held by the district, and have a constitutionally protected interest therein, and (ii) water rights – including present perfected rights – are appurtenant to the land on which the water is used. Both of

> these aspects of a present perfected right would necessarily be impaired if the Secretary or the District were to withhold water subject to such rights from excess lands within the District's boundaries.

(*Id.* at p. 0001677.)

IID cited again to the *Merchants Nat'l. Bank* case to state: "the equitable ownership of the present perfected rights [of IID] is vested in the landowners, not the District." (*Ibid*., emphasis added.)

IID also argued that Farmers' water rights were appurtenant to their lands: "The concept of appurtenance is enshrined in the California Civil Code and has been confirmed by California courts on a number of occasions." (AR0001678, citations omitted.) IID cited the U.S. Supreme Court decision in *Ickes v. Fox* (1937) 300 U.S. 82 for the proposition that *the U.S. Supreme Court* "*rejected the notion that an appropriative right may be severed by the trustee rather than the equitable owner*." (AR0001678, emphasis added.) IID urged: "From all of this it follows that, if water is withheld from excess lands in the district, as required by the Court of Appeals' decision, *the equitable owners of present perfected rights will be denied the use of the water subject to those rights, as will the lands to which the rights are appurtenant.*" (*Ibid.*, emphasis added.)

In *Bryant v. Yellen*, the Supreme Court agreed with IID's arguments and reversed the Ninth Circuit. (447 U.S. at p. 369.) Again, the Court held:

> Indeed, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but *also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water*.

(*Id.* at p. 371, emphasis added.)

All of the elements of judicial estoppel are established here. IID is judicially estopped from arguing that Farmers in the district do not have a vested, equitable and beneficial ownership interest of constitutional stature in the water rights held in trust by IID that is appurtenant to their lands, but are merely entitled to water service, like municipal water users in a municipal water district, at IID's discretion.

### E. The Trial Court Properly Determined the Permanent EDP Disregarded the Farmers' Vested Water Rights Appurtenant to Their Lands and Violated the "No Injury" Rule

Based on the Farmers' constitutionally protected rights to Colorado River water, the trial court thus properly concluded in its Statement of Decision that agricultural water users within the district are "among the class of legal water users to which the 'no injury' rule applies." The trial court relied upon *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674 ("*SWRCB Cases*") in so holding. (2 AA 1348.) Relying on *Bryant v. Yellen,* the trial court also concluded Farmers' equitable and beneficial interests in the water rights are "appurtenant" to their lands. (*Ibid.*) The trial court thus found IID's "prioritization" of other water users ahead of Farmers "violates both the 'no injury' rule and the 'appurtenancy rule' and is contrary to law." (2 AA 1350.)[13]

#### 1. IID Violated the Farmers' Appurtenant Rights

As discussed above, IID is bound and estopped from challenging the holding in *Bryant v. Yellen, supra,* 447 U.S. at p. 371 that Farmers' water rights are appurtenant to their lands. In *Bryant v. Yellen,* the U.S. Supreme

[13] The appurtenant water right is "measured by the amount of water that is reasonably and beneficially used on the land." (*Nicoll, supra,* 160 Cal.App.4th at p. 561.)

Court rejected the reasoning of the Ninth Circuit that "lands of a particular landowner could be deprived of water without reducing the total amount of water delivered" to the district as a whole, and that "redistribution of deliveries . . . would not violate the trust under which the Imperial Irrigation District owns the water rights for the common benefit." (447 U.S. at pp. 372-73.) The Court stated that such a redistribution "would go far toward emasculating the substance, under state law, of the water right decreed to the District, *as well as substantially limiting its duties to, and the rights of, the farmer-beneficiaries in the District.*" (*Id*. at p. 373, emphasis added.)

If the federal government cannot redistribute water rights in violation of the vested appurtenant water rights of the farmer-beneficiaries within the district, IID cannot do so either. To paraphrase the Supreme Court in *Nevada v. U.S.* (1983) 463 U.S. 110, 126, IID is "completely mistaken" if it believes that water rights for irrigation use are "like so many bushels of wheat, to be bartered, sold, or shifted about as the [IID] might see fit."

IID does not present any legal argument specifically challenging the trial court's ruling that Farmers have appurtenant water rights (2 AA at p. 1348) and does not argue that the trial court erred in its holding that the Permanent EDP violated the "appurtenancy rule." IID thus waived those arguments. (*In Re Marriage of Brandes* (2015) 239 Cal.App.4th 1461, 1488, fn. 14.) The trial court's invalidation of the October EDP and Declaratory Judgment that IID may not adopt any type of EDP that prioritizes or favors any class of water user, other than domestic, ahead of Farmers' reasonable and beneficial needs, may thus be affirmed on the appurtenancy grounds.

### 2. IID Violated the "No Injury" Rule

IID only argues that the trial court misapplied the "no injury" rule. (AOB, pp. 29-31.) The common law "no injury" rule bans (a) a change in

the purpose or place of use or the point of diversion or (b) a transfer of water or water rights that causes injury to others. (*Kidd v. Laird* (1860) 15 Cal. 161, 179-82.) The "no injury" rule with respect to pre-1914 water rights has become codified at Water Code section 1706. (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 559.)

IID accepts that the "no injury" rule originated as part of the common law of water rights. (AOB, p. 31.) *SWRCB Cases, supra,* 136 Cal.App.4th 674, 739-40, specifically so holds. Citing *SWRCB Cases,* IID asserts that the "no injury" rule protects only "legal holders" of water rights. (AOB, pp. 29-30.) Yet, *SWRCB Cases* holds exactly the opposite.

In *SWRCB Cases,* a contractor for water from the U.S., Westlands Water District, on behalf of itself *and its landowners*, challenged the State Board's decision granting the U.S.'s request to allow it to use more water for fish and wildlife enhancement and less for irrigation. Westlands claimed the U.S.'s change of use violated Water Code section 1702, which sets forth the version of the "no injury" rule applicable to post-1914 water rights.[14] Westlands argued that it *and its landowners* were "legal users" with standing to make a claim under section 1702. (*SWRCB Cases,* 136 Cal.App.4th at p. 799.)

The Court of Appeal agreed that the landowners as water users had standing to rely upon section 1702, concluding: "We cannot agree" that

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[14] Water Code section 1702 provides: "Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved." Water Code section 1706 provides: "The person entitled to the Use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change . . . ."

the "term 'legal user of water' was intended to be limited to "traditional water right holders and to no one else." (136 Cal.App.4th at p. 801.) The Court found that a broad reading of section 1702 is appropriate and "recognizes the importance of *all* those who are ultimately responsible for putting water to beneficial use in California. California law has long recognized that the fundamental basis of a right to appropriate is that the water must be put to beneficial use." (*Id*. at p. 804, emphasis in original.) When beneficial use is accomplished by others, "the persons who use the water are an integral part of the appropriator's right to take that water from its natural course [and w]ithout their beneficial use of the water, the appropriator would have no right to take the water." (*Id*.)

The *SWRCB Cases* does not support IID's contention that the "legal title holder" or the irrigation district is the only party that may claim standing to assert the "no injury" rule. Rather, just the opposite, the Court recognized that the beneficial users of the water who gave rise to the right of the appropriation also have standing to assert the protection of the "no injury" rule. The same must be true with respect to beneficial users of pre-1914 water rights who have standing to assert the "no injury" rule under the broader language in Water Code section 1706.

IID's 1950 Permit also states that it is "subject to vested rights" and "without prejudice to rights held . . . under appropriation." (AR Tab 52.)

If and to the extent any part of IID's Colorado River water right is governed by the 1950 Permit, IID would have no power to transfer unilaterally any water other than for the irrigation and domestic purposes for which water was originally appropriated. (Cal. Water Code § 1700 ["Water appropriated ... for one specific purpose shall not be deemed to be appropriated for any other or different purpose, but the purpose of the use of such water may be changed as provided in the Code."].)

The use of water is limited "to the extent and for the purpose allowed in the permit." (Cal. Water Code § 1381.) If IID had sought to change its permits to allow for industrial water use, such as geothermal power use, environmental use, or other non-domestic and non-irrigation uses, as provided for in the Permanent EDP, IID would have had "to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water." (Cal. Water Code § 1701.2.) Again, the "no injury" rule would have operated as a bar to the re-allocation of water to non-domestic and non-irrigation purposes.

The trial court therefore properly invalidated the October 2013 EDP, declared that IID could not prioritize other water users ahead of Farmers, and prohibited IID from entering into contracts that guarantee water to industrial users during times of shortage at the expense or Farmers. (*See, e.g., Neubert v. Yakima-Tieton Irr. Dist.* (Wash. 1991) 117 Wash.2d 232, 241-42 [applying Washington water law, which is like California's, to hold that an irrigation district's resolution establishing a preference to certain water users over others was invalid because it improperly interfered with agricultural users' existing appurtenant water rights for irrigation and because the water distribution rules were discriminatory by subrogating those existing holders' rights to new water users].)

The trial court also correctly concluded that IID could not transfer the Farmers' appurtenant water rights to others without such water rights, like industrial users or non-irrigating landowners, without consideration, simply by ignoring the vested rights to use of water via the Permanent EDP and claiming the discretion to do so. (2 AA 1348.)

In the May 24, 1933 Opinion in *Hewes v. All Persons,* validating the 1932 IID-U.S. Agreement, the court ruled that the water right of any landowner in the district may not be "taken by the district or by the

government without compensation." (RJN, Exh. 2, at p. 232*; see also*, Cal. Water Code § 22263 [requiring compensation for detriment to a person having a right in water].) That validation decision is conclusive on that issue and IID is precluded from arguing otherwise. (Cal. Code Civ. Proc. § 870.)

### F. IID Abused Its Discretion in Adopting the Permanent EDP Which Unlawfully Discriminated Against Farmers With Vested Water Rights

The trial court properly determined that IID abused its discretion and violated the law in enacting the October 2013 EDP because:

- "[It] prioritizes other groups of water users, in addition to domestic water users, over farmers. More specifically, the 2013 EDP apportions water to municipal users, industrial users, feed lots, dairies, fish farms, and environmental water users *before farmers*. [AR0027538]" (2 AA 1350, emphasis added.) and ". . . the 2013 EDP places no limits on the volume of water that Respondent District is required to provide under [contracts with industrial water users]." (2 AA 1350:27-1351:1.)

- "The 2013 EDP similarly does not limit the amounts of water that can be consumed by municipal users, feed lots, dairies, fish farms, and environmental water users. [AR0027538]." (2 AA 1351:1-3.)

- "The 2013 EDP allows water to be provided to new water users, such as new industrial and environmental users, which, in a period of shortfall, would disproportionately affect existing farmers." (*Id.* at p. 1351:8-10.)

#### 1. The Trial Court Properly Exercised its Power of Judicial Review

The trial court did not violate the separation of powers doctrine by conducting review of the Board's quasi-legislative act involving constitutionally protected water rights. As the Supreme Court has stated:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. [Citations.] *Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights,* whether of individual or minority, from obliteration by the majority.
>
> (*Bixby v. Pierno, supra,* 4 Cal.3d at p. 141, emphasis added.)

IID's argument that the trial court "interfered with the Board's authority" and "substituted its own anecdotal experience" for the Board's (AOB, p. 33) is not well-taken. The trial court was exercising its fundamental judicial power to ensure IID did not abuse its discretion, violate the law, and deprive Farmers of their constitutionally protected water rights. (10 RT 376:19-23.) Judge Anderholt made clear that he was not going to attempt to "red line" the EDP and identify what was fair and what was not, but recognized: "I'd become a legislator. I'm not a member of the board of directors of IID, nor do I want to be." (10 RT 334:19-22.)

As the trial court recognized: "And the question is whether what they have done violates the law . . . or whether they act[ed] arbitrary [sic] or capricious[ly] [in] failing to take into account things they need to take into account." (10 RT 376:19-23.)

The trial court fully understand the scope of review, but was simply not susceptible to IID's repeated arguments that the court should rubber-stamp the Permanent EDP as within the Board's discretion:

> THE COURT: You can hammer the Board exercising discretion in every answer if you wish. I already understand they exercise discretion. Understand I'm looking at that to see if they have abused it in their actions here. . . .
>
> (10 RT 351:22-26.)

The trial court was correct. IID's discretion was not unlimited.

### 2. IID's Powers Are Limited by the IDL to Providing Water for Irrigation and Domestic Purposes

IID seems to forget that it is an "irrigation district." As the Supreme Court long ago emphasized: "[T]he prime object and purpose of such an organization is to provide water for the use of its inhabitants and landowners *for irrigation and domestic purposes . . . .*" (*Crawford v. Imperial Irr. Dist.* (1927) 200 Cal. 318, 328; *see also*, Cal. Water Code § 20720 [petition for formation of irrigation district must describe the land to be irrigated and source of irrigation].)[15]

IID is a creature of statute, the IDL, Water Code sections 22075 to 22982. "[I]t is universally recognized that an irrigation district has only those powers granted to it under the enabling legislation." (*Turlock Irr. Dist. v. Hetrick* (1999) 71 Cal.App.4th 948, 952-53.) *Wood v. Imperial Irr. Dist.* (1932) 216 Cal. 748, 753, cited by IID, confirms that an irrigation district is not a municipal corporation.

The powers of an irrigation district are thus narrower in scope than in the case of a city or other municipal corporation. (*Crawford, supra*, 200 Cal. at p. 326 [IID is not a public corporation and its powers are those set forth in the IDL to accomplish its limited and specific work, including to "do any and every lawful act necessary to be done, that sufficient water may be furnished to each landowner in said district for irrigation and domestic purposes"].)

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[15] Under California law, "domestic" water use does not include water used for industrial purposes. (*Prather v. Hoberg* (1944) 24 Cal.2d 549, 561-562 [domestic use, for sustenance of human beings, household use and care of livestock, is distinguished from commercial use]; *Deetz v. Carter* (1965) 232 Cal.App.2d 851, 856.)

Acts of the Board of an irrigation district outside the enabling statute or in violation of the provisions of the IDL are void. (*Selby v. Oakdale Irr. Dist.* (1934) 140 Cal.App. 171, 177-78 [holding that Board resolution that established a priority or preference for certain bondholders to be repaid before others, contrary to the IDL, was "ultra vires"].) Just like in *Selby*, the new water priorities established in the Permanent EDP that put agricultural water users in last priority behind all other water users was "ultra vires." IID's Board does not have the discretion or authority to act beyond its power or in violation of the provisions of the IDL, including discriminating against or providing preferences to certain water users over agricultural water users with vested water rights.

The *Jenison* case, cited by IID, recognized the very purpose of an irrigation district is to enable the landowners to obtain and distribute water to irrigate their lands. (*Jenison, supra,* 149 Cal. at pp. 502-04.) In rejecting the landowner's claim for water on land outside the district, the Supreme Court made a statement that is particular instructive:

> *It seems very clear that such a conclusion would be opposed to the whole plan or scheme of the legislation for irrigation districts, converting a district organized, acquiring and holding water solely for a certain specified purpose* – viz. the procuring and furnishing of water for the improvement by irrigation of the lands included therein, *into a mere agency for the distribution of its water to individuals for use by them* outside the district for any purpose whatever. *Under plaintiff's theory, the use to which the water is to be appropriated is entirely immaterial and the irrigation district is*, in effect, although constituted and avowedly acquiring its water for an entirely different purpose, *nothing more or less than an ordinary water company . . . Such a construction of the provisions of the Irrigation Act entirely ignores the object of its enactment.*
>
> (*Jenison, supra,* 149 Cal. at p. 502, emphasis added.)

The Supreme Court could not have been any clearer. An irrigation district is not simply a water company. It is created first and foremost to irrigate the land within the district. While IID may cite to various portions of the IDL which it claims provide the Board with expansive authority, those provisions must be read in the context of the IDL as a whole and cannot expand its or the Board's powers beyond the purpose of an irrigation district.

IID was not formed by the irrigating landowners so IID could create a water system for the development of new industries because IID's Board may think that those are better uses for the water than irrigation.

The Board is actually not empowered to divert or withhold IID's water supply to the detriment of and discriminate against the Farmers' vested water rights, when those Farmers have a present need for the water for the continued irrigation of their land to which the water rights are appurtenant and have been consistently used. (*See, e.g., Barker v. Sunnyside Valley Irr. Dist.* (1950) 37 Wash.2d 115, 122-23 [irrigation district acted arbitrarily and capriciously by discriminating against landowners in delivery of water]; *Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.* (1931) 111 Cal.App. 688, 702 [irrigation district could not discriminate and resolution interfering with landowners' right to receive proportion of water to which he was entitled was void].)

### 3. Under the IDL, IID Cannot Disregard Farmers' Vested Water Rights in Favor of Others and Impose a Limitation Solely on the Exercise of Farmers' Rights

IID focuses exclusively on section 22252 as the statutory authority for its enactment of the Permanent EDP, which states:

> When any charges for the use of water are fixed by a district the water for the use of which the charges have been fixed

> shall be distributed equitably as determined by the board among those offering to make the required payment.
>
> (Cal. Water Code § 22252; *but see*, Cal. Water Code § 22250.)

IID was formed to provide water for domestic and irrigation purposes. (*Crawford*, *supra*, 200 Cal. at pp. 326, 328; Cal. Water Code § 22078.) Any regulations regarding equitable distribution of water must therefore protect the Farmers' vested equitable rights to the beneficial use of the water in the district *for irrigation*.

Section 22252 must not be read in isolation. There are several other provisions of the IDL that reflect the Legislature's intention that an irrigation district's distribution of water must conform to California water law and may not disregard Farmers' pre-existing water rights in favor of distribution to other users without such rights.

For example, Water Code section 22085 provides:

> The district may make such reasonable regulations to secure distribution of water *in accordance with determined rights* as may be needed.
>
> (Cal. Water Code § 22085, emphasis added.)

Section 22085.5 provides:

> The watermaster shall divide the water of the streams or other sources of supply among the several conduits and reservoirs taking water therefrom and . . . regulate the controlling works of reservoirs as may be necessary *to insure a distribution of the water among the water users entitled to its use, according to the rights of the users*.
>
> (Cal. Water Code § 22085.5, emphasis added.)[16]

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[16] These provisions apply to irrigation districts which elect to provide watermaster service for which the State Board had previously appointed a watermaster.

A party aggrieved by the distribution of water under that section may seek relief by way of an injunction if the watermaster has "failed to distribute the water according to the rights as determined by the decrees of court, agreements, permits, or licenses." (Cal. Water Code § 22087.5.)

The IDL provides specific guidance for the allocation of irrigation water during times of shortage. Section 22252.3 states:

> In any year in which the board determines that the water supplies of the district will be inadequate to provide water in the quantity furnished in year of average precipitation, the board may specify a date prior to which applications for water for the ensuing irrigation season are to be received. In districts where meters or other volumetric measuring instruments or facilities are not available or are inadequate to measure substantially all agricultural water deliveries, the district may establish annual water requirements in the district for growing each type of crop grown in the district, accept such applications for water based on proposed crops to be gown and acreage of each such proposed crop, and determine the quantity of water apportioned under Sections 22250, 22251, 22252, and 22252.1 expressed in terms of acreage of each type of proposed crop to be served. . . .
>
> . . .
>
> This section provide a means of measuring the allocation of water to lands based on the type of crop grown and does not authorize a district to designate the crops to be grown on such land. . . ."
>
> (Cal. Water Code § 22252.3.)[17]

Although the statute uses the word "may," it must be construed as mandatory where the "public interest or private right requires that a thing should be done." (*SWRCB Cases, supra*, 136 Cal.App.4th at pp. 731-32.)

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[17] *See also*, Cal. Water Code § 22252.1 (Board may require applications for water for ensuing irrigation season, and, in the event of water shortage,

Section 22252 therefore must be read in context of these other provisions to ensure that, even when charges are fixed for water use within the district, water is distributed equitably *taking into account water users' respective legal rights to apportionment of the water for which the rates are fixed and, in the case of Farmers, their annual irrigation requirements.* (*See, United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1090 [statute must be interpreted as part of scheme as a whole].)

For example, it may be equitable to charge more for delivery of water to a particular farm unit that is more costly because of the distance or geography involved. It is not equitable to disregard entirely the Farmers' vested water rights and limit them from receiving the water they need for their irrigation purposes, and instead provide that water to industrial users that have no such rights.

The existence of these other provisions in the IDL demonstrates the Legislature only intended for an irrigation district's water to be rationed or limited to Farmers *in times of shortage* – not on a permanent basis as the Permanent EDP contemplates.[18] Furthermore, the language of section 22252.3 demonstrates the Legislature intended that, if Farmers are to have their water rights limited because of a perceived shortage condition, advance notice should be provided and the water is to be allocated among Farmers based on their beneficial needs in the ensuing irrigation season.

The trial court did not err in finding IID abused its discretion in adopting the Permanent EDP that limited the Farmers' water rights, but not

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may give preference or serve only lands for which application was received or not required).

[18] The notice provisions in the earlier SDI EDPs is a tacit admission by IID that its allocation of water for irrigation during a perceived shortage is subject to section 22252.3.

any other water users' rights. When the IDL is viewed as a whole, with each provision giving meaning to the others, the Court should reject IID's argument that section 22252 provided the Board with unfettered authority to go beyond the scope of the IDL to provide water to industrial and other water users without regard to the Farmers' vested water rights. IID is required to distribute water to Farmers who possess water rights for irrigation purposes. Furthermore, section 22252.1 and 22252.3 specifically require that, with respect to any expected shortage of water, IID must provide notice and take into account the Farmers' beneficial needs for the water considering the types of crop grown.

#### 4. The Permanent Plan Violated Water Code Section 106

Under California water policy, "the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation." (Cal. Water Code § 106.) While IID tries to conceal its discrimination against irrigation users in violation of Water Code § 106 by characterizing all non-agricultural users as falling within the "Municipal Apportionment," the fact remains that IID placed *non-domestic uses* – industrial, feedlots, dairies, fish farms and environmental resources – all above water for irrigation use in violation of section 106 (2 AA 1348-49.) The trial court's finding that the Permanent EDP violated the law for this reason (2 AA 1352-53) is an independent basis for affirming the Writ of Mandate and Declaratory Judgment. (*See, Deetz, supra*, 232 Cal.App.2d at pp. 854, 856 [under section 106, domestic use includes "consumption for the sustenance of human beings, for household conveniences and for the care of livestock," but not "commercial purposes"].)

The Permanent EDP did not provide for any ratable reduction in water use by any of the non-agricultural water uses given a priority over

agricultural use. *At bottom, the result is that agricultural users and only agricultural users suffer from a shortage of water or water conservation efforts by IID to reduce its use of Colorado River water.* This is discriminatory rule-making plain and simple because it gives a priority to water users that do not have equal rights and privileges to the use of the water supply. (*See, Neubert, supra,* 117 Wash.2d at pp. 241-42.)

IID enacted the Permanent EDP to provide "cover" for its making of contracts for periods of 20 years or more with geothermal power companies guaranteeing their water needs throughout the term of those long-term contracts. (*See, e.g.*, AR0001758-67; AR0015511-26.) While IID touts its contracts as promoting conservation, none of these industrial users is obligated to limit use of water during times of drought. (*Ibid*.) The contracts essentially guarantee deliveries of fresh water to water-thirsty geothermal companies to the exclusion of Farmers. (AR0018271.)[19]

Although IID argues that industrial water use will be proportionately reduced during times of shortage (AOB, p. 43), the Permanent EDP did not so provide. All water users, other than Farmers, were allowed to use as much water as they need. (AR0025232, sec. 3.2.) Farmers were not. (*Id.*, sec. 3.3.) This violated section 106.

While IID argues that the "Municipal Apportionment" only utilized approximately 3% of IID's water supply in 2009 (AOB, p. 44), the threat to Farmers in the long-term is very real. IID's Integrated Regional Water Management Plan adopted in October 2012 has projected that industrial or geothermal water use will grow to as much as 187,092 AFY by 2050 (AR0021395) and municipal water use is projected to more than double.

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[19] Yet, use of fresh inland water -- suitable for domestic, municipal or agricultural use -- for geothermal cooling purposes violates the State Board's Resolution No. 75-58. (AR Tab 64.)

(*Ibid.*) As Exhibit 1 attached demonstrates, if the October 2013 EDP continued in effect, the water available for agricultural users would be reduced from 83.2% of the available water to only 67.6% by 2050 and, under a straight-line method of apportionment, the irrigating users would only be allocated 4.43 AF of water per year.[20]

The trial court properly found that IID has no authority to violate the fundamental public policy set forth in section 106 by prioritizing classes of water users, other than domestic, ahead of agricultural water users. (2 AA 1349:1-4; 1352:26-1353:3.)

### G. The Straight-Line Methodology Is Contrary to the Established Water Law Principle That Water Be Apportioned Based on Reasonable Need

The notion that IID requires the Permanent EDP in order to ensure that it meets its 3.1 MAF limitation under the QSA and is not financially burdened by a shortfall or "overrun" that imposes onerous pay back obligations under the IOPP established by the Bureau to enforce the QSA (AOB, p. 17) should be seen for the false narrative that it is. As the trial court found, IID operated for over 100 years without implementing an EDP. (2 AA 1334:9-10.) In only two of the last 15 years did IID "overrun" its water entitlement because of extraordinary agricultural market conditions and a record-breaking drought. (AR0023886.) The parties to the QSA all recognized the potential for overruns, and that specific contingency was addressed by the IOPP's pay back provisions. (AR0007303-7306.)

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[20] If IID were to expand the definition of "Eligible Agricultural Acres" in the future to include all acres of land within the district, the per acre allocation of water to farmers would be further reduced to less than 2 AF of water per year (2,095,549 AF÷1,061,637), not enough to sustain most crops in the Valley.

The provisions of the IOPP worked as they were designed to work; providing the flexibility in times of temporary water shortage for IID to exceed its entitlement by providing the ability to "pay back" the overrun in subsequent years through conserved water. (10 RT 359:22-28.)[21]

By adopting the Permanent EDP, IID went far beyond addressing how to deal with water in times of shortage, and, instead, undertook to purposely ration water to Farmers, depriving them of the water for their reasonable needs, and permanently re-ordered the priorities of water users within the district. The "overrun" issue is simply a smokescreen for IID's "water grab" which sought to sever the Farmers' equitable rights to use water and to place all of the water in the hands of IID's Board to dole out to whatever water users it chooses to favor and to provide the Board with the power to negotiate away the Farmers' long-vested water rights in favor of new users, such as geothermal power users the Board favors.[22] IID cannot do so under California water law.

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[21] While the Permanent EDP may eliminate the chance IID might exceed its QSA cap, IID's forced reduction of the use of water by Farmers within the district threatens to undermine IID's water rights. The Permanent EDP results in the permanent non-use of water, which is distinguishable from "conserved" water under Water Code section 1011 for which IID would receive credit. Under California law, water rights of an appropriator are lost by a sustained period of five years of non-use. (*See, Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 891 ["pre-1914 appropriation rights are subject to forfeiture for nonuse"]; Cal. Water Code §§1240, 1241.) IID's plan to reduce permanently the water use of Farmers for irrigation purpose thus risks having IID lose its water rights permanently *for all purposes.*

[22] The farming community is legitimately concerned the Board's discrimination in guaranteeing water to geothermal companies to the detriment of Farmers was improperly motivated by financial interests of Board members and senior IID staff, some of whom, just prior to or subsequent to the time the Permanent EDP was adopted, went to work for

The trial court correctly understood that, for an allocation of water within an irrigation district to be equitable, it *must* take into account the existing water rights users' entitlement to reasonable use of water. (*See, e*.g., *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1247-48 [reversing a judgment establishing a physical solution in an over-drafted basin because it failed to recognize the water users' respective rights vis-à-vis one another]; *see also, City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 265, and fn. 61 ["A true equitable apportionment" requires consideration of established uses.].)

The doctrine of "reasonable use" was first established by the California Supreme Court in *Katz v. Walkinshaw* (1903) 141 Cal. 116. The Court held that landowners with rights of equal dignity to the use of a "common supply" of water have "correlative" rights. (*Id.* at p. 136; *see also*, W. Hutchins (1956) *The California Law of Water Rights*, pp. 431, 436 ("Hutchins") [the "doctrine of reasonable use" and its corollary "rule of correlative rights" is an "acknowledged rule of property in the State."].) Each has the right to make use of the total available supply based upon his or her "reasonable necessities." (*Id*. at pp. 507-08.)

*City of Barstow*, quoting *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, declared the principle as follows: When the water is insufficient, the landowners are "limited to their 'proportionate fair share of the total amount available based upon [their] reasonable need[s].'" (*City of Barstow*, 23 Cal.4th at p. 1253; *Katz, supra*, 141 Cal. at p. 136.)

In *Tehachapi*, the Court of Appeal reversed a trial judgment allocating water based on a straight-line per acre basis because "where there

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one of the geothermal companies in need of water for a new project. (*See*, RJN, Exhs. 6-14.)

is insufficient water for the current reasonable needs of all the . . . owners, many factors are to be considered in determining each owner's proportionate share: the amount of water available, the extent of ownership . . ., the nature of the projected use – *if for agriculture, the area sought to be irrigated, the character of the soil, the practicability of irrigation . . . all those and many other considerations must enter into the solution of the problem.*" (*Id.* at pp. 1001-002.)[23]

In *Simon Newman Co. v. Sanches* (1945) 69 Cal.App.2d 432, the Court made it clear that any per acre apportionment that did not consider reasonable needs for water was not "equitable" *as a matter of law*. The Court stated:

> It is apparent that an apportionment of water based solely on the relative number of acres of land which each owner possesses, without determining the quantity of water necessary for use on any parcel or portion thereof should depend upon an accurate estimate of the actual number of acres in each parcel subject to similar irrigation and that all of the land in each tract is susceptible of producing the same variety of crops, or that it may reasonably be used for similar purposes. Otherwise, the apportionment may not be deemed to be equitable.
>
> (*Id.* at p. 438.)

The Permanent EDP's straight-line methodology, adopted as the "pilot program" and later as part of the "hybrid" plan, allocated water without regard to landowners' beneficial use of the water, but simply on a per acre basis. Thus, some lands with no need for any water or in the amount allocated would be provided water and those landowners with a

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[23] In *Katz*, Justice Shaw said that the task of apportioning water among a large number of users could be difficult, "but, if the rule is the only just one—as we think has been shown—the difficulty in its application in

greater need for their beneficial use would be deprived of the water they have historically used to satisfy their irrigation needs.

Here, the trial court found that "different parcels of farmland require different amounts of water because of soil types and conditions, and crop water requirements vary. The decision to grow different types of crops at different times of the year can also affect the water needs of a given parcel." (2 AA 1351) Relying on the above authorities, the trial court held that straight-line apportionment "which allocates the same volume of water to each acre of farmland regardless of soil type or crop . . . is not equitable." (2 AA 1352.)[24]

IID argues that *Tehachapi, Simon* and *City of Barstow,* and the fundamental principles of water apportionment set forth therein, are not applicable here because this case, IID claims, "only involves the right to the service of water." (AOB, pp. 48-49.) But, as shown above, the Farmers' rights here are clearly established water rights of constitutional stature.

The trial court was correct. IID could not establish an equitable apportionment plan that deprived Farmers of their existing vested property rights to use water for their reasonable irrigation needs, let alone one that did not limit other users' water rights proportionately.

In *City of Barstow,* the Supreme Court confirmed "we have never endorsed a pure equitable apportionment that completely disregards . . . owners' existing rights." (*City of Barstow, supra,* 23 Cal.4th at p. 1248.) The Supreme Court held: "Thus, to the extent footnote 61 in *City of San Fernando, supra,* 14 Cal.3d at pp. 25-266 . . . could be understood to allow

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extreme cases is not a sufficient reason for abandoning it and leaving property without any protection from the law." (141 Cal. at pp. 136-37.)

[24] The trial court also concluded that IID's change to a hybrid-methodology was a "tacit admission" by the Board that the 100% straight-line methodology was inequitable. (10 RT 339-340; 2 AA 1351.)

a court to completely disregard California landowners' water priorities, we disapprove it." (*City of Barstow, supra*, 23 Cal.4th at p. 1248.) Although the Court was discussing overlying water rights in that case, the Court's underlying rationale extends to any water rights, including appropriative water rights appurtenant to land.

The Supreme Court again rejected the notion that practicality or convenience can ever trump vested water rights. (*Id*. at p. 1250.) Neither administrative convenience nor the "practical problem" that agricultural water use has been historically the greatest use within the district gave IID the power to ignore the Farmers' water rights.

The Supreme Court in *City of Barstow* also rejected the argument, like that urged here by IID, that article X, section 2 of the Constitution, can justify any "equitable allocation" of water that disregards the rights of those with vested water rights. (*Id.* at pp. 1249-51.) The Court held: "In ordering a physical solution, therefore, a court may neither change priorities among the water rights holders *nor eliminate vested rights* in applying the solution *without first considering them in relation to the reasonable use doctrine*." (*Id*. at p. 1250, emphasis added, citing to 1 Rogers & Nichols, Water for California (1967) § 404, p. 540 and cases cited; *see also, Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1737 [reversing order that redefined parties' water rights and sought to limit use on a proportionate share and assess landowner for any use of water in excess of that proportionate share].)

The Supreme Court also rejected the contention that *Imperial Irr. Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 572, relied upon by IID here, provided authority for the trial court's equitable allocation and concluded that the City of Barstow and Mojave Water Agency had failed to "produce compelling authority for their

argument that courts can avoid prioritizing water rights and *instead allocate water based entirely on equitable principles*." (*Id.* at p. 1251, emphasis added.) The Supreme Court thus affirmed the Court of Appeal's decision which reversed the trial court judgment that had ignored the appealing parties' "preexisting legal water rights." (*Id.* at pp. 1252-53.)

These fundamental legal principles relating to apportionment of water apply equally to administrative agencies who undertake to make water apportionments. (*See, e.g., Santa Barbara Channel Keeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1183 [water rights determine allocation in times of shortage]; *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961-64 [state water resources board could not contravene priority of El Dorado's appropriative water right when water is available and even when water is scarce and holding that water rights must be enforced so long as they do not lead to unreasonable use], quoting *City of Barstow, supra,* 23 Cal.4th at p. 1243.)

Thus, the trial court properly relied upon existing case law involving water rights to conclude that an apportionment of water is not "equitable" as a matter of law if it disregards the Farmers' vested rights to the reasonable and beneficial use of water for their irrigation needs in favor of others, including those without any vested water rights.

IID's Permanent EDP used a straight-line method to apportion Farmers' appurtenant rights, owned in common, to Colorado River water, which method did not take into account the Farmers' reasonable water needs. The fundamental principle that such reasonable needs must be taken into account for any distribution of water to be equitable should be upheld and the trial court's determination to that effect should be affirmed.

## H. The Trial Court's Finding That Straight-Line Water Allocation is Unconstitutional is Supported By Substantial Evidence and Should Be Affirmed

Article X, section 2 of the California Constitution, provides that the right to water is "limited to such water as shall be reasonably required for the beneficial use to be served." The provision has been held to prevent waste. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 366-67; *see also*, Cal. Water Code § 100.)

The straight-line methodology is not "limited to such water as shall be reasonably required for the beneficial use to be served," as required by the California Constitution. Rather, it treats all acres of agricultural land as requiring the same volume of water, while the actual reasonable beneficial needs of the various acres of farm land in the district vary widely. The straight-line methodology is unconstitutional.

In *Willard, supra,* 201 Cal. at pp. 741-43, the California Supreme Court described the inequities associated with a straight-line-type of apportionment approach, there based on assessed land value, as follows:

> Under the strictly assessment plan lands having high valuation and requiring only a small amount of water would, of course, pay a relatively large assessment, in which event the owner thereof would be entitled to receive a proportionate amount of water, possibly largely in excess of his needs. On the other hand, land of less value might require a large amount of water. Following the rule, however, as applied to the first piece of land the amount of water this land owner would receive would be in proportion to the amount of assessment paid by him, based upon the value of his land. It would possibly transpire that he would be without sufficient water to meet the requirements of his land. It is true the first land owner with an excess amount of water may sell or assign his excess water to his neighbor who is without sufficient water, but he is not obliged to sell it to anyone. In case he should refuse to sell his excess water, the second land owner is without sufficient water to properly irrigate his land, while the

> excess water of the first land owner is permitted to run to waste. **Such a situation is contrary to every principle of the law governing the use of water from the time when water was first applied for irrigation purposes in this state**.
>
> (*Id.*, emphasis added.)

Straight-line allocation provides water based on acreage, not need. Some landowners will be allocated too much water, others will be allocated too little water. Those who are allocated too much water may or may not decide to sell or transfer their surplus. The farmer allocated too little water to meet his needs will be subject to great uncertainty. (*Willard, supra*, 201 Cal. at 743 [“He will not have a permanent supply which he can depend upon, but, instead, he may be able one year to purchase sufficient water for his land and the next year he may not. . . . It is needless to say that such an uncertainty is not conducive to the operation of a successful farming venture.].) California Supreme Court Chief Justice Gibson invoked similar concerns, stating that water apportionment based on a proportional formula is "uncertain[] and inequit[able]." (*McCracken, supra,* 47 Cal.2d at p. 652 [dissenting opinion], *rev'd* 357 U.S. 275; *see also, In re Waters of Long Valley Creak Stream System v. Ramelli* (1979) 25 Cal.3d 339, 355-357 [“compelling policy considerations” support curtailing “[u]ncertainty concerning the rights of water users”].) Those conclusions apply equally here.

Farmers in the Valley, like the Abattis who have finance arrangements to grow and sell $10 million a year in crops, cannot reasonably be subjected to such uncertainty. The Legislature recognized as much in enacting sections 22252.1 and 22252.3, requiring advance notice to irrigating landowners when water supplies are to be restricted for the ensuing irrigation season.

As IID's own data demonstrated, the straight-line method allocated more water to one half of the district's landowners than they have historically needed, including over 55,000 acre feet of water to lands that never had any historical use, and one half of the landowners will get less water than they have historically needed for farming. (AR0027531; AR0027533.) This allocation wastes water in violation of article X, section 2.

IID's argument that a straight-line methodology is used by other irrigation districts is beside the point. Many of those districts have alternative sources of water, like groundwater, they may rely upon. Furthermore, IID's reliance on *State ex rel. Reynolds v. Niccum* (1985) 102 N.M. 330, 331-32 is inapposite. New Mexico water law is different than California water law and the New Mexico Supreme Court was not even addressing a challenge to a pure straight-line methodology that divided water on a per acre basis, let alone under a constitutional provision comparable to article X, section 2. In *Niccum*, the Court was addressing a nationally recognized formula "developed to determine `consumptive use' water by irrigated crops" to estimate average water requirements among groups of irrigating users. (*Ibid*.)

The trial court's determination that the straight-line methodology violated article X, section 2 (2 AA 1352:1-8) by encouraging waste and non-beneficial use and must not be used to apportion water among landowners (2 AA 1353:4-6) is supported by substantial evidence in the record and must be affirmed. The question of reasonable and beneficial use under this Constitutional provision is a question of fact. (*SWRCB Cases, supra,* 136 Cal.App.4th at p. 762.) IID has waived the right to challenge this finding of fact by failing to object to the Tentative or final Statement of Decision. (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at

pp. 1134-35; *Fladeboe v. American Isuzu Motors, Inc.* (2014) 150 Cal.App.4th 42, 58-60.)

The trial court's Declaratory Judgment that IID must not use any "straight-line" apportionment in its allocation of water should thus be affirmed.

## I. The Trial Court's Declaratory Judgment Directing IID to Consider The Farmers' Beneficial Needs for Water is Not Unconstitutional

The irrigation of farmland to grow crops is a "beneficial purpose." (*Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 467-68.) Use of water in an amount consistent with local custom is reasonable. (*Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.* (1935) 3 Cal.2d 489, 547, 570, 573-74.) A farmer's historical use of irrigation water gives rise to a presumption of necessary and beneficial use. (*Joerger v. Pac. Gas & Elec. Co.* (1929) 207 Cal. 8, 23.)

The trial court properly concluded by reference to existing California water law that an equitable apportionment plan must consider the relevant factors that reflect an irrigating landowner's beneficial water needs, including crop type, soil type, and the practicability of irrigation, which factors are reflected by historical water use. (2 AA 332:4-6; 353:6-10, emphasis added.)[25] (*See, Barstow, supra,* 23 Cal.4th at p. 1246; *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 525-26; *Tehachapi, supra,* 49 Cal.App.3d at p. 925; *Simon Newman Co., supra,* 69 Cal.App.2d at p. 438; *see also,* Cal. Water Code § 22252.3.)

The trial court did not err in so holding. The case law makes clear that consideration of the factors that reflect the irrigating Farmers'

[25] Contrary to IID's arguments, neither the Judgment nor the Writ of Mandate specifically dictates the exact parameters of any historical use allocation.

beneficial needs for water is entirely consonant with their appropriative rights to continued reasonable and beneficial use of water that does not violate article X, section 2. The cases actually hold that to do otherwise when apportioning water is "inequitable."

IID's complaint that consideration of "past use" is inconsistent with article X, section 2 is contrary to the law. Moreover, if accepted, it would mean that the Permanent EDP was unconstitutional because it afforded *non-agricultural water users, other than environmental,* the right to use water based upon past use. (AR0027538, § 3.1.a.b. and c.)

IID's argument that consideration of the Farmers' beneficial water needs encourages waste or unreasonable use of water in violation of article X, section 2 is just IID's *ipse dixet* that finds no support in the case law or the record. IID has not pointed to any evidence in the record demonstrating Farmers in the district, or the Abattis specifically, engaged in any unreasonable use of water in 2013 that justified reducing their water rights, let alone depriving them permanently of the water for their reasonable and beneficial needs.

To the contrary, the record shows that agricultural water users have become markedly more efficient in their water use since the QSA. (AR0024260-261; AR0002489-290.) The Abattis themselves are not wasting water. The Abattis have the reasonable and beneficial need annually for *several acre feet of water more* than had been allocated even under the hybrid methodology which used a 50% straight-line and 50% historical use allocation. (AA002245;002215-16.) If IID were to adopt a pure straight-line methodology, the Abattis would suffer an even greater shortage of water than necessary for their reasonable needs.

Although it may be easier for IID's staff to use a straight-line methodology, in whole or in part, practicality or convenience does not

trump compliance with the law requiring consideration of Farmers' vested water rights to beneficial use for their reasonable needs, which is best measured by historical use.

IID's own expert originally agreed that allocation based on existing histories going back to 1987 would more accurately reflect differences in Farmers' *water needs* than other allocation methods because of differences in soil and crops, would average out irrigation and cropping skills, and would be sufficiently representative over time of other factors influencing water use, like temperature and precipitation differences. (AR0009436-9438.) Far from concluding that "historical use" would be "challenging from an administrative perspective" as IID claims (AOB, p. 37), it was originally concluded that the costs of establishing and administering an allocation program "based on individual historical use should be minimal "[g]iven that the District has data on historical deliveries[.]" (AR0009438.)

Although recognizing the straight-line method was common and the simplest, IID's expert recognized that it may be viewed as unfair because of "differences in per-acre water needs due to differences in soil and/or differences in crops being grown." (AR0009440.) Furthermore, the expert's conclusions all relate to the earlier SDI EDPs which "consider[ed] apportionment *only in the context of an SDI situation and not in any other context.*" (AR0010230; AR0010236.)

As a result of the QSA and the IOPP's "conserved water" program, IID admittedly has compiled the historical water use data for all the farm units within the district since at least 1987 and has field data going back at least ten years, if not more. (10 RT 364:23-27, 342-43; AR0009437-38; AR0027467.) According to its expert Dr. Hanemann: "IID is rather unique . . . because of the large amount of data that is recorded on water

flows and deliveries. Since 1987, IID has maintained a sophisticated computerized data system for recording how much water is delivered. . . ." (AR0010239.)

For IID to argue before this Court that IID does not have this historical data (AOB, p. 39) is contrary to the record evidence. Furthermore, the trial court's finding that IID did have the histories going back to 1987 was based on the admission of its General Counsel at the time of trial. (2 AA 1351:25-27.) Having failed to object to the Statement of Decision, IID cannot challenge the trial court's finding on appeal and the finding is conclusive. (*Fladeboe, supra,* 150 Cal.App.3d at pp. 58-60.)

In fact, IID's water transfer programs and the IOPP's overrun payback provision utilize historical use as the benchmark against which conservation is determined. (AR0001799-2010, AR0007322-7349, AR0020997-21009, AR0008402-8416.) IID uses Farmers' historical water use as the basis for compensating farmers for on-farm conservation and/or fallowing and then securing "conservation" credits under these programs. (AR0026522-26613; AR0024348-24363 and AR0026641-26661.)

If a water apportionment plan does not recognize Farmers' historical use, the fundamental premise under which the QSA and the IOPP operates will be undermined. Any precedent established here that water use history is irrelevant to one's water entitlement would threaten future conserved water transfers among all of the diverters on the Colorado River within the Upper and Lower Basin States, including those contemplated by the proposed Drought Contingency Plan for the Colorado River that has been under negotiation since 2013 (RJN, Exh. 15.)

For all these reasons, the trial court did not err in declaring, consistent with California law, that "an equitable apportionment of water

must take into consideration factors including the area to be irrigated, the character of the soil, the crops to be grown, and the practicability of irrigation" (2 AA 1356), or that consideration of these factors by resort to "historical use" was the equitable means of apportionment (*id.*), not the arbitrary and wasteful straight-line methodology that failed to take into account Farmers' reasonable needs for water for their beneficial use.

### J. IID's Substantial Evidence Argument Is Irrelevant and Has Been Waived

The trial court's Declaratory Judgment and Writ of Mandate were properly based on determinations that IID acted arbitrarily and capriciously and/or in violation of the law for a variety of reasons discussed above. The Abattis did not challenge the Permanent EDP on the basis that the Board made any findings of fact that were not supported by substantial evidence or failed to follow any procedural requirements. (1 AA 748-52.) IID's substantial evidence argument therefore is entirely off the mark and irrelevant.

IID also never made a substantial evidence argument in the trial court either in its Response Brief on the merits or in its Proposed Statement of Decision. (2 AA 1044-82; 1316-29.) IID is not entitled to make this argument for the first time on appeal. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 863.)

Finally, this Court conducts an independent review of agency action involving a fundamental property right, not a substantial evidence review. (*Bixby*, *supra*, 4 Cal.3d at pp. 143-44.)

### K. The Instant Action Challenging the Permanent EDP First Enacted in 2013 Is Not Time-Barred

Although IID argues the statute of limitations issue is a pure question of law (AOB, p. 51), IID is incorrect. "Questions concerning whether an

action is barred by the applicable statute of limitations are typically questions of fact." (*Sahadi v. Scheaeffer* (2007) 155 Cal.App.4th 704, 713.) It is a question of fact here, because the "pertinent facts" were not "undisputed." (*Ibid.*)

### 1. IID Has Waived the Right To Argue the Permanent EDP is the Same as Earlier SDI EDPs

IID contends "the 2008 version of the EDP . . . contained all of the same features contained in the October 2013 EDP challenged by Respondents . . . ." (AOB, p. 50.) IID also contends "[t]he specific features of the EDP challenged by respondents, (i) straight-line apportionment, (ii) the Municipal Apportionment, and (iii) the operation of the Clearinghouse, have remained constant features throughout all versions of the EDP." (*Ibid.*)

These factual arguments are identical to the factual arguments urged in IID's trial brief below. (2 AA 1056-57, 1077.) The trial court rejected IID's contentions, finding:

> *the 2013 EDP was* not merely piecemeal revisions or amendment to such previous plans, and were adopted in October 2013 as *a new, complete and fully integrated plan* which did not require resort to older plans for interpretation. *That is because the 2013 EDP contained substantial changes from the prior equitable distribution plan*s, including changes to the operational definitions of terms in the plan, addition of new provisions impacting agricultural users, and most particularly, the provision that farmers would have the lowest priority among municipal users, industrial users, environmental resources and other water users. Because of this, the court finds Petitioners' challenge to the entirety of the 2013 EDP by the instant proceeding, filed within one month of its adoption, was timely.
>
> (2 AA 1333; 2 AA 1349:19-28.)

IID never objected to the Tentative Decision or Statement of Decision and has thus waived the right to challenge the trial court's findings that the 2013 EDP was a "new, complete . . . plan" and "contained substantial changes from the prior equitable distribution plans." (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at pp. 1134-35; *Fladeboe, supra,* 150 Cal.App.4th at pp. 58-60; Cal. Code Civ. Proc. §§ 632 and 634.) The trial court's findings in the Statement of Decision, including any implied findings that the specific features of the Permanent EDP challenged by the Abattis were not the same or identical to the versions of the earlier EDPs adopted by IID, are conclusive and not subject to IID's challenge before this Court. (*Arceneaux, supra,* 51 Cal.3d at pp. 1134-35.)

The legal conclusion that the Abattis' Petition in the Instant Proceeding was timely, based on the trial court's factual findings that the October 2013 EDP was different than the earlier EDPs adopted by IID, may not be disturbed.

### 2. IID is Wrong: The Permanent EDP is Fundamentally Different Than Any Earlier SDI EDP

IID's arguments that the October 2013 EDP contained all the same features as the earlier SDI EDP adopted by IID in 2008 is a gross overstatement and mischaracterizes the record evidence.

The October 2013 EDP is significantly different from the prior SDI EDPs and even the earlier versions of the Permanent EDP adopted in April and May 2013.

The main difference from the 2008 SDI EDP is that the Permanent EDP was intended to operate as a permanent allocation plan governing the distribution of water by IID and not a temporary plan that would only apply in times of a declared water shortage or SDI condition. (AR Tab 534.) The October 2013 EDP was designed to transfer water from existing

agricultural users to new industrial users by providing them with *a permanent priority* over agricultural users. For example, IID reclassified fish farms as non-agricultural water use to put them in line before Farmers. (AR0027538, § 3.1(c).) All water users were placed before Farmers *and suffered no impairment or reduction in their usage of water at any time*. Farmers received the final allocation of the remaining available water, if any, that was pro-rated on a straight-line apportionment across all "Eligible Agricultural Acres." (AR0027538.)

IID redefined "Eligible Agricultural Acres" to include serviceable lands which had not previously been committed to farming. (AR0027536, § 2.15; AR0027537, § 2.23.) *The Permanent EDP therefore transferred the right to water use to lands within the district that had not previously had such water rights and which do not necessarily need water at all or in the amount allocated.*

IID also redefined the term "Available Water Supply" to exclude any reduction of water because of a district-wide overrun payback requirement, regulatory limitation, or reduction in IID's Colorado River water supply. (AR0027535, § 2.6.) IID thus enabled itself to avoid paying for fallowing land to produce payback water and instead created a new "Overrun Payback Program" that imposed the cost of IID's paybacks under the IOPP on Farmers, and only Farmers, if they overran their apportionments – even though the apportionments were not tied to the Farmers' historical water use for their crop growing needs, but were simply arbitrary straight-line apportionments. (AR0027537, § 2.22; AR0027540, § 4.2.)

IID created the Agricultural Water Clearinghouse and the Water Distribution Board, tasking the later with managing the transfers of water. The October 2013 EDP allowed for a priority to water in the Water Clearinghouse other than on a "first come, first serve" basis used in the

prior to SDI EDPs. (*Compare* AR0027416 with AR0012351, AR0015811, AR0017210.) The October 2013 EDP incorporated IID's existing On-farm Conservation Program into the Allocation Program. (AR Tab 534.) These two additional features of the new October 2013 EDP inequitably prioritized water for landowners in the fallowing and on-farm conservation programs over Farmers who actual need the water for their existing crop production, a result that no earlier EDP had achieved.

The trial court concluded that the priority provision in the October 2013 EDP was a new provision that was not in the May EDP and, in the October EDP, agricultural users were at the bottom of the priority ranking. (10 RT 344:8-345:20.) IID's counsel conceded this point at trial: "MR. FUDACZ: Your Honor is correct about that there is a change in language going from October to May." (*Id.* at 346:6-8.)

IID admitted at trial that the October EDP was different than the earlier SDI EDPs: "Mr. FUDACZ: There's been a change in the methodology employed. It used to be in prior versions of the EDP there has to be a supply, demand imbalance. That isn't the case anymore. (*Id.* at 336:2-5.)

As IID has previously conceded in its Writ Petition filed with this Court in January 2018, under the October 2013 EDP, for the first time, IID adopted "implementation of a hybrid methodology for agricultural apportionment in 2014." (IID's Writ Petition, p. 19.)

Moreover, unlike the SDI EDPs that were never implemented, IID's counsel admitted that the plan was in effect and operational. (10 RT 336:6-17.)

IID's admissions during the proceedings below and in its Writ Petition are fatal to their claims that the October 2013 was the same as the earlier SDI EDPs.

The Permanent EDP was a comprehensive, new permanent apportionment plan which the Board intended to replace entirely the earlier plans and which did not depend on the existence of any water shortage. IID could not simply insulate its entirely new legislative enactment from judicial review by identifying the plan as a "modification" or a "revision" of the substantially different and temporary SDI EDPs that were never implemented. To allow an agency to do so would exalt form over substance and invite agencies to engage in such artifices at the encouragement of counsel in an attempt to insulate new, but so-called "revised," legislative action from effective judicial review.

The October 2013 EDP was a new and substantially different EDP than any of the earlier SDI EDPs and the Abattis timely initiated this Instant Proceeding on November 27, 2013 to challenge it. (1 AA 35.)[26]

### 3. Judge Altamirano's Prior Ruling With Respect to the Second Amended Petition Did Not "Agree" With IID's Time-Bar Arguments and Was Erroneous

IID seeks to rely upon Judge Altamirano's prior Order on the Demurrer to the *Second Amended Petition* as a conclusive ruling that the claims in the Third Amended Petition that went to trial are time-barred. IID even suggests the Abattis somehow violated that Order in pursuing the claims alleged in the Third Amended Petition. Neither gambit is viable.

First, IID's argument that Judge Altamirano "agreed" with IID's arguments that the Second Amended Petition was "barred by collateral estoppel and/or the statute of limitations [under section 338]" (AOB, p. 51) is overreaching. Judge Altamirano *overruled* IID's Demurrer to the Amended Petition on the grounds that the *Morgan* case validated the 2013

[26] By Stipulation and Order, the Abattis had the right to challenge herein all aspects of the April, May and October 2013 EDPs. (1 AA 107-11.)

EDPs and the Abattis' legal challenges were time-barred under Code of Civil Procedure section 338. (1 AA 127-31; 376.) IID's Demurrer to the *Second* Amended Complaint was *solely* on the grounds that the third and fourth causes of action were premature and/or the property damage claims were speculative. (1 AA 425-35.) IID did not assert any arguments that the Second Amended Petition was entirely precluded by the *Morgan* decision, or was time-barred under any statute of limitations, or Code of Civil Procedure sections 860, *et seq.* (*Ibid*.)

In its Motion to Strike, IID sought to strike various allegations of the Second Amended Petition on the grounds that various portions of the Permanent EDPs alleged in the Second Amended Petition were like those in the earlier SDI EDPs, which had allegedly been validated by the *Morgan* decision. (1 AA 455-57.) IID also sought to strike those same allegations on the grounds that the Abattis' challenges to the Permanent EDP in the Instant Proceeding first adopted in April 2013 were time-barred because it had been more than three years since the adoption of the 2008 SDI EDP. (1 AA 457-58.) IID moved to strike other allegations of the Second Amended Petition on the grounds that they had been mooted by the adoption of the October EDP and were thus irrelevant. (1 AA 459.)

On November 12, 2014, the trial court entered its Order on Submitted Matters. (1 AA 728-32.) On an issue that was not asserted by IID in its Demurrer, the trial court ruled *sua sponte* that IID's legislative actions in creating and implementing the Permanent EDPS in 2013 were the subject of the Validation Statutes, Code of Civil Procedure sections 860, *et seq.*, and that the Abattis had not timely filed a reverse validation action with respect to the April and May 2013 EDPs, so could only challenge the October 2013 EDP. (1 AA 728-29.)

The trial court ruled:

> *For this reason*, Petitioners/Plaintiffs can only attack the October 2013 EDP with respect to any change that it contains from the May 2013 EDP, as to which, along with all prior EDP's, attack is barred by the passage of time.
>
> (1 AA 729, emphasis added.)

Based on its own validation ruling, *not the arguments made by IID that the 2013 EDPs had been validated in the Morgan case or were time-barred by the three year statute of limitations*, the trial court granted IID's Motion to Strike in part and denied it in part. (1 AA 730-31.)

A review of the allegations that were stricken versus those that were not reveals that Judge Altamirano only struck the allegations *relating to challenges to the April and May 2013 EDPs*, which she concluded were barred under section 860, because the Instant Proceeding was initiated more than sixty (60) days after the enactment of those EDP.

IID did not file the Demurrer to the Second Amended Petition on the basis of the collateral estoppel or statute of limitations arguments now urged on appeal. Thus, IID's Demurrer did not seek to bar this lawsuit on those grounds and Judge Altamirano certainly did not "agree" with IID's collateral estoppel argument under *Morgan* and its statute of limitations argument under section 338. In fact, the trial court had already overruled IID's prior Demurrer to the First Amended Petition on those grounds. Had the court "agreed" with IID, the judge would not have simply stricken the paragraphs of the Second Amended Petition relating to the April and May 2013 EDPs, but would have stricken all of the other paragraphs identified in IID's Motion to Strike.

The Abattis filed a Third Amended Petition that studiously followed the Order striking out the allegations relating to the April and May 2013 EDPs. (*Compare* 1 AA 392-424 *with* 2 AA 735-56.)

IID filed another Motion to Strike. (1 AA 758-76.) Emboldened by the trial court's Demurrer ruling, IID resurrected its arguments that the provisions of the October 2013 EDP that were similar to provisions contained in the 2008 EDP had allegedly been validated by the *Morgan* case and that the challenges to those provisions were also time-barred – which the trial court, Judge Altamirano presiding, had already rejected in favor of its own and very different validation argument. (1 AA 758-76.) All of the allegations IID moved to strike were allegations that had been contained in the Second Amended Petition. (*Compare* 1 AA 392-424 *with* 2 AA 735-56; *see also*, 2 AA 925-35.) IID had already moved to strike twelve of the sixteen items in its prior Motion to Strike, which relief had been denied. (2 AA 884-87.)

The Motion to Strike came on for hearing before the newly assigned Judge Anderholt. (4 RT.) IID requested that the trial court strike even those allegations that the prior judge had refused to strike. (*Id.* at 71-73, 75-76.) IID's counsel argued that Judge Altamirano had intended to prevent the Abattis from arguing about the elements of the October 2013 that were in the prior versions of April or May 2013 EDP, or the earlier SDI EDPs. (*Id.* at 89.) Under scrutiny from the trial court, IID's counsel had to admit that Judge Altamirano had only stricken some, but not all, of the allegations that IID had moved to strike. (*Id.* at 74:7-9; 76:308; 83:10-84:5.)

The newly assigned trial judge properly refused to relitigate the issues already ruled upon by Judge Altamirano, including refusing to strike the straight-line apportionment, municipal apportionment and the water exchange components of the plans that Judge Altamirano did *not* strike from the Second Amended Petition. (*Id.* at 75, 84, 86.) The trial court refused to find an intent that was directly contrary to the trial court's ruling

on the original Motion to Strike. (*Id.* at 90, 102, 104.) The trial court properly denied the motion to strike. (*Id.* at 109, 110; 2 AA 978.)

IID's citation to *In re Marriage of Oliverez* (2015) 238 Cal.App.4th 1242, 1248 is misplaced. IID's Motion to Strike was essentially an improper motion for reconsideration of Judge Altamirano's prior order without new facts, evidence or law, and IID had failed to demonstrate that Judge Altamirano had intended to rule in IID's favor. Thus, Judge Anderholt properly refused to reconsider and overturn Judge Altamirano's prior ruling as urged by IID. The trial court acted consistently with the general principle set forth in *Oliverez* .

The trial court properly did not consider the earlier ruling on the Demurrer and Motion to Strike on *the Second Amended Petition* as binding on its consideration of IID's subsequent Motion to Strike the *Third Amended Petition*. (10 RT 331.) The trial court also had the inherent constitutional power to act on its own to reconsider, correct and change interim decisions of the court which it considered erroneous. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108-09.

IID also cannot demonstrate any prejudicial error in the failure to apply Judge Altamirano's validation ruling in the subsequent proceedings on the Third Amended Petition. The validation ruling was made in violation of the Abattis' due process rights and was legally erroneous.[27] IID never filed a Demurrer to the Second Amended Petition urging that section 860 was a time-bar to preclude the challenges to the April and May

[27] The Abattis filed a protective cross-appeal to preserve their right to argue herein that all of their challenges to the April, May and October 2013 versions of the EDP were timely. IID did not, however, assert an argument in its AOB that the trial court was precluded from considering any specific aspects of the October, 2013 that were included in the April or May

plans because this proceeding was not filed within sixty (60) days of the April and May enactments. IID thus waived that objection. (*See, e.g.*, Cal. Code Civ. Proc. § 430.60 ["A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint …. are taken."]; Cal. Code Civ. Proc. § 430.80 [failure to object to pleading by demurrer or answer waives the objection].)

Furthermore, the trial court could not grant a Demurrer on a grounds not specified, without giving the Abattis notice and an opportunity to oppose the court's new validation argument on the merits. (*See, e.g., Bergman v. Rifkind & Sterling, Inc.* (1991) 227 Cal.App.3d 1380, 1387 [even if a court may act *sua sponte*, notice and an opportunity to be heard is required].)

Had the Abattis been given that opportunity, they would have apprised the trial court that the parties and the court had agreed that the Abattis' challenges to the April and May 2013 EDPs, asserted in the Initial Abatti Petition, would be litigated *in this proceeding*, and that IID would not raise the statute of limitations relating to the passage of time between May 23, 2013, the filing date of the Initial Abatti Petition, and the date of the filing of the Instant Proceeding as a defense. (1 AA 275.) The Initial Abatti Petition was filed within sixty (60) days of the April 23, 2013 (2 AA 834) and May 14, 2013 (2 AA 849) resolutions adopting the earlier EDPs. (AR0025636.) The challenges to those earlier EDPs were not time-barred under section 860.

Also, Judge Altamirano erroneously concluded that all quasi-legislative acts are subject to Section 860. (1 AA 729.) "[N]ot all actions of a public agency are subject to validation." (*Katz, supra,* 143

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2013 versions, so has waived that argument. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

Cal.App.4th at p. 19.) Section 860 only applies to "any matter which under any *other* law is authorized to be determined pursuant to this chapter . . ." (*Id.* at p. 31, emphasis added.) It is well-established that there must be another statute subjecting the subject matter of the lawsuit to the Validation Statute. (*Ibid*.; *see also, City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 343-44 [historically, the statutes authorizing validation proceedings relate to bonds, warrants, assessments, indebtedness, and related contracts].)

If the challenged act of the administrative agency is not identified in a specific statute rendering it subject to section 860, the action is not the subject of a validation or reverse validation proceeding and the deadlines under the Validation Statutes, sections 860, *et seq.* do not apply. (*See, e.g., Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1098-99.)

Under the IDL, there is no statute providing for validation of the adoption of a water apportionment plan. To the contrary, Water Code section 22670, under the heading "Validation Proceedings," only makes contracts entered into for a period of more than 3 years or the levy of assessments or bonds subject to section 860. Also, under the Irrigation District Federal Cooperation Law, Water Code section 23225 authorizes a validation action under section 860 to determine the validity of any contract or bonds made under the authority of that law. The Permanent EDPs the Abattis challenged are not subject to validation under any other statute that IID has identified to this Court or in the trial court. Therefore, there is no requirement that a "reverse validation" action challenging the Permanent EDPs be brought within the sixty (60) limitations period under section 860. (*Santa Clarita Organization, supra,* 1 Cal.App.4th at p. 1099.) Judge Altamirano was wrong.

This Court should not be persuaded that Judge Altamirano actually agreed with the very different validation argument presented by IID under the *Morgan* case or its statute of limitations argument under Code of Civil Procedure section 338. The record demonstrates that IID's arguments were routinely objected by the trial court below, Judge Altamirano or Judge Anderholt presiding, any time they were raised. Furthermore, the trial court committed no error in refusing to apply the prior validation ruling on the Second Amended Petition to strike any allegations of the Third Amended Petition or in considering all of the Abattis' challenges to the October 2013 EDP.

### L. The Morgan Case Did Not Validate the Permanent EDPs or Operate As Collateral Estoppel to Limit the Abattis' Challenges to the October 2013 EDP

IID argues the Abattis are precluded from challenging the Permanent EDPs first enacted in 2013 because they have been validated by the Statement of Decision in the *Morgan* case.

The trial court considered and rejected the *Morgan* validation argument, when it was first raised by IID on the Demurrer to the First Amended Petition (1 AA 127-31; 376), when IID renewed the argument on its Motion to Strike the Third Amended Petition (2 AA 978) and, finally, when it was raised at the time of trial. (2 AA 1349-50.) In its Statement of Decision, the trial court rejected IID's reliance on the *Morgan* decision because the challenges to the equitable distribution plan in that case had been dismissed as moot and were therefore not adjudicated, and because the October 2013 EDP was a new and substantially different plan that did not exist at the time of the *Morgan* decision. (*Id.* at 1349:1-5.) The trial court properly rejected IID's *Morgan* validation argument.

The Abattis challenged the permanent EDPs first adopted in April 2013, revised in May 2013, and amended in October 2013. None of these

EDPs was the subject of the *Morgan* case or could have been, because they did not then exist when the *Morgan* action was filed on September 21, 2009. (2 AA 813, ln. 1.)

Moreover, as discussed above, not all agency action or quasi-legislative action is subject to the validation statute. Section 860 requires that another statutory provision authorize a validation action. (*Katz, supra*, 143 Cal.App.4th at p. 31; *City of Ontario, supra*, 2 Cal.3d at p. 340.) Like in the trial court, on appeal, IID fails to cite to any statutory provision authorizing a validation action for its apportionment plan adopted under Water Code section 22252.

There is no statutory provision whatsoever under the IDL which authorizes the validation of a regulation establishing a water apportionment or distribution plan. That fundamental flaw in IID's validation argument is fatal. In the absence of such a statutory provision, neither 860 nor the reverse validation statute, Code of Civil Procedure section 863, applies. Thus, the Abattis were free to bring their mandate action under section 1085 of the Code of Civil Procedure and seek declaratory relief under section 1060 of the Code of Civil Procedure. (*See*, *Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 932 [nonparties cannot be deprived of the right to challenge illegal ordinance when a prior stipulated judgment neither validates nor invalidates it].)

IID's reliance on cases involving agency action which is subject to a specific statute authorizing a validation action are simply not persuasive here, where IID cannot point to any such authorizing statute. *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 938, involved a taxpayer's challenge to a resolution approving revenue bond financing of an aquarium project which financing had already been validated in a prior lawsuit pursuant to Government Code section 53511, authorizing a local agency to

bring a validation action to determine validity of its bonds and indebtedness. *Colonies Partners, L.P. v. Superior Court* (2015) 239 Cal.App.4th 689, 692, involved taxpayers' challenges to a settlement agreement made in an eminent domain action, which the County had paid for by issuing obligation bonds pursuant to a Board of Supervisors resolution, and which had all been validated in a prior action brought by the County under Government Code section 53511.

*Griffith v. Pajaro Valley Water Mgmt. Agency* (2013) 220 Cal.4th 586, and *Eiskamp v. Pajaro Valley Water Mgmt. Agency* (2012) 203 Cal.App.4th 97, both involved challenges under Proposition 218 to ordinances setting groundwater pumping charges, which assessments were subject to validation at least in part under Government Code section 66022. (*See, e.g., Pajaro Valley Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1375, disapproved on other grounds by *City of San Buenaventura v. United Water Conservation Dist.*（2007）3 Cal.5th 1191.)

In *Morgan*, the plaintiffs asserted Proposition 218 challenges to IID's 2009 water rate-setting resolution, and assessment of fees that were included in the earlier 2008 SDI EDP, but which were superseded by the 2009 version. (*Morgan, supra,* 223 Cal.App.4th at pp. 901, 924*;* 2 AA 1088.) Actions to determine the validity of an irrigation district's water rates or assessments are subject to a validation action under Water Code section 22670.

The portion of this Court's appellate decision in the *Morgan* case addressing IID's challenge to the trial court's award of attorneys' fees to the plaintiffs makes clear that all of the non-CEQA causes of action were dismissed as moot by a stipulation before trial, because the 2008 SDI EDP was never used and no fees or penalties were ever actually charged or assessed by IID. (*Morgan, supra*, 223 Cal.App.4th at 924-27, esp. p. 927

["this exchange indicates the parties agreed the validity of the EDP was not going to be an issue at trial."].) Thus, no evidence was presented at trial regarding the EDP. (*Ibid*.) IID had thus opposed the motion for attorneys' fees "*because the EDP issue was not litigated* and the Individuals *did not obtain any judicial resolution of the issue*." (*Id.* at p. 928, emphasis added.) The Court of Appeal's decision ultimately agreed that the EDP issues were moot, were never tried to the court, and the trial court never made any findings regarding the constitutionality of the fees. (*Id*. at p. 930.) Contradictory to IID's position on appeal, this Court even acknowledged that, if IID imposed fees in relation to the 2008 SDI EDP in the future, customers could challenge such a fee because the EDP had not been litigated. (*Id*. at p. 931.)

The *Morgan* decision cannot operate as collateral estoppel because the validity of the 2008 SDI EDP was never actually litigated or decided on its merits in the trial court, but all of the non-CEQA challenges were rendered moot by the parties' stipulation to dismiss them. (*Robinson v. U-Haul Company of California, Inc*. (2016) 4 Cal.App.5th 304, 322 ["A decision that a matter is moot is not a decision on the merits." . . . Quite the opposite, it is a decision that the merits need not be reached because there is no longer a live controversy."]; Cal. Code Civ. Proc. § 870 [a validation judgment is only binding and conclusive as to "matters therein adjudicated"].)

Finally, even if the Superior Court in *Morgan* did purport to validate the 2008 SDI EDP, it did not validate any version of the Permanent EDP first adopted in 2013. Therefore, it could not operate to preclude this proceeding to challenge the Permanent EDP. (*City of Galt v. Cohen* (2017) 12 Cal.App.5th 367, 381 [section 870 only forecloses challenging agency action "which at that time could have been adjudicated" and did not

validate action not yet taken by agency]; *cf. Eiskamp, supra,* 203 Cal.App.4th at pp. 100, 106 [holding the judgment validating 2002 ordinance operated as res judicata under section 870 to bar a lawsuit challenging that same exact ordinance].)

## VII. THE CROSS-APPEAL

### A. The Trial Court Erred in its Demurrer Ruling

The Abattis filed a protective cross-appeal in the event IID were to argue on appeal that Judge Anderholt was precluded, because of Judge Altamirano's prior ruling on the Demurrer, from considering the Abattis' challenges to any aspects of the October 2013 EDP that were carried over from the April and May 2013 EDPs. As described above, Judge Altamirano's validation ruling was erroneous and did not preclude consideration of all of the Abattis' challenges to the Permanent EDP.

On May 23, 2013, the Abattis filed the Initial Abatti Petition, challenging the first Permanent EDP adopted on April 23, 2013 and the revised version adopted on May 14, 2013. (AR Tab 468.) The proceeding was thus filed within thirty (30) days of the adoption of the April 2013 EDP and nine (9) days of the adoption of the May 2013 EDP. (2 AA 834, 839.)

After the adoption of the October 2013 EDP, the Abattis initiated the Instant Proceeding on November 27, 2013. (1 AA 35-56.)

The parties then stipulated that all of the challenges to the April, May, and October 2013 EDPs would be litigated in the Instant Proceeding and IID waived any right to assert any statute of limitations or other defense based on the passage of time since the May 23, 2013 filing date of the Initial Abatti Petition. (1 AA 108.) The trial court entered the Stipulation as the Order of the court on February 25, 2014. (1 AA 107-11.)

Rather than repeat its legal arguments, the Abattis incorporate herein those arguments made above in Section VI.K. and VI.L of this brief.

The Abattis submit that Judge Altamirano's ruling violated the Abattis' due process rights without providing notice and an opportunity to be heard on a new legal arguments raised *sua sponte* by the trial court relating to the Validation Statutes, sections 860, *et seq.* Judge Altamirano's ruling was also legally erroneous because: (1) section 860 did not apply to any of the 2013 EDPs because no statute authorizes IID to validate regulations adopting a water allocation or distribution plan; (2) IID waived the right to object under section 860 by failing to Demurrer on that grounds and by stipulating with the Abattis that all of their challenges to the April and May 2013 EDPs were to be litigated in the Instant Proceeding; (3) the trial court entered an Order on the parties' stipulation; and (4) the Initial Abatti Petition was a timely challenge to the April and May 2013 EDPs even if section 860 applied.

### B. The Trial Court Erred in Dismissing the Breach of Fiduciary Duties and Takings Causes of Action

The Second Amended Petition alleged facts sufficient to allege the breach of fiduciary duties and takings causes of action, admitting all material facts properly pleaded and only considering matters of which judicial notice was proper. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

IID's Demurrer was *solely* on the grounds that the third and fourth causes of action were premature and/or the Abattis' property damage claims were speculative. (1 AA 430-34.) IID argued outside the four corners of the pleadings that IID had not yet denied any of the Abattis' requests for water. (1 AA 430:26-27; 434:2-3.)

The Abattis opposed the Demurrer and directed the trial court to the allegations of the Second Amended Petition that alleged the Abattis' present

perfected water rights appurtenant to the land and damage to those water rights from the Permanent EDP. (1 AA 642-56, esp. 650.) For example, the Second Amended Petition alleged:

> ¶3. *The water rights involved in this case constitute a species of real property.* They were acquired by the original developers of Imperial Valley and perfected by use for irrigation more than a century ago. The water rights are usufructuary in nature, entitling the holder to use the water for irrigation. They are appurtenant to the irrigators' lands. . . .
>
> …
>
> ¶5. . . This violates Abatti's rights and exceeds IID's statutory authority. *It unlawfully takes water rights and water away from irrigators and confers them on non-irrigators who have no legal rights to the water rights or water.*
>
> …
>
> ¶11. *To exacerbate the harm that it has caused through all three water distribution plans, IID implemented the Plans in April 2013, May 2013 and October 2013, respectively, **after** Abatti and other farmers already had planted crops and, in many instances, financed both those crops and other crops to be planted later in the growing season. . . .*
>
> …
>
> (1 AA 392, 394, 396, emphasis added.)

These allegations were incorporated in the third and fourth causes of action. (*Id.* at 416-17.)

> The Abattis specifically alleged a taking:
>
> ¶96: In adopting and implementing its facially discriminatory water apportionment and distribution plan, *IID has taken and damaged such private property rights of Abatti* and other similarly-situated agricultural property owners *both through a physical taking of water and a regulatory taking of rights without compensation*."
>
> (*Id.* at 416.)

Having alleged that IID stands in a trust relationship to the Abattis as owners of irrigating lands within the district, the Abattis alleged that IID owed fiduciary duties to them, and breached those fiduciary duties by improperly apportioning water to the detriment of the Abattis, the equitable and beneficial owners of the water. (*Id.* at 417.)

The trial court was concerned "that there might not be property rights that are being taken. . . . And that there may not be any damages." (2 RT 34.) In response, the Abattis' counsel urged the trial court to review the allegations as to the Abattis pre- and post-1914 water rights and claims for damages to those rights.

> He has property rights. . . . The District says because Abatti so far has received the water that he needs, he doesn't have any harm. But the allegation of the pleading is that as soon as the equitable distribution plan was implemented, there was harm to those water rights.
>
> . . .
>
> Take a look at Paragraph 4, where it says that the EDP, quote, impairs the water rights of Abatti. Look at Paragraph 5, where we allege that the EDP, quote, takes water rights and water away from irrigators. Take a look carefully at Paragraphs 6, 10, 72 and 96, where that same theme is repeated multiple times.
>
> Abatti has water rights. He is the beneficial owner of them. They are held in trust by the District. The EDP, the moment it went live in spring of 2013, eroded those property rights, constituted a taking and a breach of fiduciary duty. For purposes of a demurrer, a legally sufficient claim has been stated. . . . the necessary legal allegations are there.
>
> . . .
>
> There is harm. . . . That is what the complaint alleges, and that's why the demurrer should be overruled, so we can get this to an adjudication on the merits.

(*Id*. at 35-38.)

The Abattis' counsel made a proffer as to diminution in value evidence:

> . . . I've got an appraiser . . . Assume that appraiser is going to come in and say that the value of the real property has been impacted; it has been reduced because of the uncertainty caused by this equitable distribution plan. I may or may not be able to convince the Court or trier of fact that there is a proper element of damage, but the time to prove it factually is at the trial, not on my pleading. We have alleged a degradation of property rights and show the law that that can be the subject of a takings claim.

(*Id.* at 42-43.)

The trial court nonetheless ruled *sua sponte* that the Abattis had no "property rights in allocations of water on a specific basis such that they can claim damages for changes in such allocations, if such changes in fact occur." (1 AA 730.) The Court concluded there was no claim of a "`taking' which would give to a claim for inverse condemnation damages." (*Ibid*.) Although IID had never raised the Abattis' lack of any property right in water in its Demurrer, the trial court sustained the Demurrer to both the takings and the breach of fiduciary duties causes of action without leave to amend. (2 RT 34, 38; 1 AA 726-31.)

The trial court erred as a matter of law. The allegations of the Second Amended Petition sufficed to state a cause of action for breach of fiduciary duties against IID. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086; Cal. Water Code § 22437 [all property held in trust].) The trust relationship has been recognized by the U.S. and California Supreme Courts. (*Bryant v. Yellen*, *supra*, 447 U.S. at p. 371; *Merchant Nat'l. Bank, supra,* 144 Cal. at p. 333.) The California Supreme Court has decreed that an irrigation district shall not act to violate the vested rights of

its beneficiaries that are protected property rights under the federal and state Constitutions. (*Id*.)

The Second Amended Petition sufficiently alleged all of the required elements of a taking of the Abattis' water rights without compensation. (*See, e.g., Peabody, supra,* 2 Cal.2d at pp. 374-75 [impairment of a water right, taking into account past and reasonable prospective recognized uses, is an impairment for which compensation must be made]; *Salton Bay Marina, Inc. v. Imperial Irr. Dist.* (1985) 172 Cal.App.3d 914, 938 ["where ordinance acts as a subterfuge for a taking of property without just compensation . . . the courts will not enforce it unless that compensation is paid"]; *Kissinger, supra,* 161 Cal.App.2d at p. 460 [same].) Board Chairman Hanks has publicly conceded: "when [a water use] is appurtenant to the land it makes it a form of property right, which means it cannot be taken without compensation." (RJN, Exh. 16, 1:2635.)[28]

The trial court was required to accept as true the sufficiently pleaded allegations of the Second Amended Petition.

If the Court is inclined to reverse and direct that the Permanent EDP may be reinstated, the Abattis are entitled to pursue their claims for damages. Alternatively, as the pleadings issues may arise if IID adopts another apportionment plan in the future, the Court should provide guidance for the lower court as to whether the claims were adequately pled.

---

[28] Federal case law recognizes landowners' water rights are property interests for purposes of the Takings Clause of the Fifth Amendment of the U.S. Constitution. (*Klamath Irr. Dist. v. United States* (Fed. Cir. 2011) 635 F.3d 505, 517-18; *Baley v. United States* (2017) 134 Fed. Cl. 619, 659 [landowner class members asserted cognizable property interests for which they may seek compensation from the United States].)

## VIII. CONCLUSION

For all these reasons, the trial court did not err in determining the Permanent EDP established by IID abused the Board's discretion and was contrary to the law, or in declaring that no future water distribution scheme could operate similarly and without taking into account Farmers' vested water rights for their reasonable needs.

The Declaratory Judgment and Writ of Mandate should be affirmed. The Abattis request reinstatement of their third and fourth causes of actions for damages if there is any remand or, alternatively, instructions that those causes of action are viable if IID implements a future distribution plan that limits or curtails the Abattis' water rights.

DATED: September 28, 2018 MUSICK, PEELER & GARRETT LLP

By: 

Cheryl A. Orr
Counsel for Plaintiffs,
Respondents and Cross-Appellants
MICHAEL ABATTI, AS
TRUSTEE OF THE MICHAEL
AND KERRI ABATTI FAMILY
TRUST, and MIKE ABATTI
FARMS, LLC

## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 27,958 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: September 28, 2018 MUSICK, PEELER & GARRETT LLP

By: 

Cheryl A. Orr
Counsel for Plaintiffs,
Respondents and Cross-Appellants
MICHAEL ABATTI, AS
TRUSTEE OF THE MICHAEL
AND KERRI ABATTI FAMILY
TRUST, and MIKE ABATTI
FARMS, LLC

| EXHIBIT 1<br>EDP WATER APPORTIONMENT SCHEME | | |
|---|---|---|
| | **2013** | **2050** |
| **Colorado River Entitlement (AF)** | **3,100,000** | **3,100,000** |
| - AAC Conservation | - 67,700 | - 67,700 |
| - 1988 MWD Transfer | - 105,000 | - 110,000 |
| - Miscellaneous PPRs | - 11,500 | - 11,500 |
| - QSA Conservation Transfers | -31,000 | -300,000 |
| *Total System Deductions* | *- 215,200* | *- 489,200* |
| **Remaining Supply for Distribution (AF)** | **2,884,800** | **2,610,800** |
| - System Losses | - 200,000 | - 200,000 |
| **Available Water Supply for Equitable Distribution (AF)** | **2,684,800** | **2,410,800** |
| - Municipal Users | - 43,000 | - 83,139 |
| - Industrial Users | - 28,000 | - 187,092 |
| - Feed Lots, Dairies, and Fish Farms | - 33,000 | -33,000 |
| - Environmental Mitigation | - 2,400 | - 12,020 |
| *Total User Deductions* | *- 106,400* | *- 315,251* |
| **Remaining Supply for Agricultural Lands (AF)** | **2,578,400** | **2,095,549** |
| **% of 3.1 MAF** | **83.2%** | **67.6%** |
| **Apportionment Farmable Acreage (AC)** | **473,412** | **473,412** |
| **Unit Apportionment (AF/AC)** | **5.45** | **4.43** |

Notes:

1. 2013 water use estimates from IID's "2013 Water Apportionment Worksheet". (AR0025351).

2. 2050 conserved water transfer quantities as provided in the Colorado River Water Delivery Agreement ("Federal QSA") Exhibit B. (AR0007362).

3. 2050 water use estimates for municipal, industrial, and environmental mitigation from the 2012 Imperial Integrated Regional Water Management Plan ("IIRWMP") Table 5-22. (AR0021394). 2050 water use estimate for feed lots, dairies, and fish farms assumed unchanged from 2013.

## PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within entitled action; my business address is 624 South Grand Avenue, Suite 2000, Los Angeles, California 90017-3383.

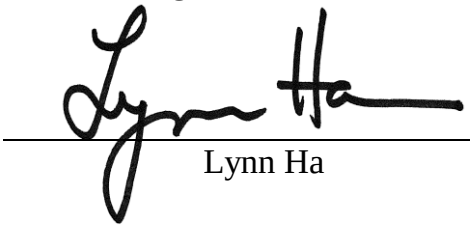
On September 28, 2018, I served the foregoing document(s) described **COMBINED RESPONDENTS' BRIEF & CROSS-APPELLANTS' BRIEF** on interested parties listed below in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

Judge L. Brooks Anderholt - Dept. 9
IMPERIAL COUNTY SUPERIOR COURT
939 W. Main Street
El Centro, CA 92243

**BY MAIL:** I enclosed the document(s) in a sealed envelope addressed to the person/entity at the listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Musick, Peeler & Garrett LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 28, 2018, at Los Angeles, California.



Lynn Ha

in this chapter...



chapter 2

# A Capsule View of Water Rights Law

## Introduction

California's system for managing its water resources is unique among western states. It is a highly complex system that has evolved in piecemeal fashion over more than a century, and certainly would not have been invented in its present form. From 1850, when California became a state, until 1914, water use regulation was left entirely to the courts. Early water "law" came from judicially developed doctrines, some derived from English common law and some adapted to meet current conditions such as the appropriation of stream flows for mining operations. Even today, groundwater law is largely court-made, based upon decisions in individual cases.

## Property-Based Rights

Water rights were first tied to property ownership. An owner of land touching a stream ("appurtenant" to the stream) had a "riparian right" to take water from the stream for use on the land. Likewise, an owner of land overlying a groundwater basin had an "overlying right" to drill a well and pump water for use on the land. These water rights passed with a sale or transfer of the land and were part of the land. These rights are not quantified, but allow for whatever amounts of water that may be needed for use on the appurtenant land. They have no priorities, either as to the time when use began, or as to upstream or downstream location. All these rights are shared, or "correlative."

*Early water rights were tied to ownership of land.*

### Water Rights Apart from Land Ownership

Over the years, other ways have been recognized to establish a water right that are not tied to ownership of land. The essence of a water right is "the

right to use the water," that is, it is "usufructuary." *Imperial Irrigation District v. SWRCB* (1990) 225 Cal. App. 3d 548, 562. Before 1914, an "appropriative right" could be obtained merely by taking water from a river or stream and putting it to use, no matter where the place of use was located. *Irwin v. Phillips* (1855) 5 Cal. 140. Since 1914, a state permit has been required to establish such a right to surface water. Water Code § 1225. Appropriative rights to groundwater, however, can be developed by a public agency merely by pumping and delivering the water to its customers. *OCWD v. City of Riverside* (1959) 173 Cal. App. 2d 137, 165. Appropriative rights are quantified and operate under a priority system—"first in time, first in right."

*Major water rights today are held by public agencies.*

In certain situations, contract rights to receive water can be "water rights" that are vested property rights. *Madera Irrigation District v. Hancock* (1993) 985 F. 2d 1397, 1401; *Maricopa-Stanfield Irrigation Dist. v. U.S.* (1998) 158 F. 3d 428; *U.S. v. SWRCB* (1986) 182 Cal. App. 3d 82, 101; *Ickes v. Fox* (1937) 300 U.S. 82, 94. Similarly, shares in a mutual water company evidence a water right that is separate from the company's right to the water source. *Bent v. Second Extension Water Co.* (1921) 51 Cal. App. 648; *SBVMWD v. Meeks & Daley Water Co.* (1964) 226 Cal. App. 2d 216. Water rights, no matter how acquired, are generally considered to be real property.

## Reasonable Use Doctrine

The most important and overriding principle for all water rights and water use is the doctrine of reasonable use. Early cases recognized this limit on the use of water (*Katz v. Walkinshaw* [1903] 141 Cal. 116), and since 1928 the doctrine has been embedded in the California Constitution, now in Article X, section 2. The Constitution prohibits the waste and unreasonable use of water, and requires that water use be "limited to such water as shall be reasonably required for the beneficial use to be served." Art. X, § 2. The use of water for environmental or instream purposes is also subject to the reasonable use requirements of the Constitution. *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 443.

*All uses of water must be "reasonable," including the use of water for environmental purposes.*

## Statutory Regulation

California had no statutory system for the allocation and regulation of water until 1914, and that system applied only to stream flow, not groundwater. Before that time, substantial development of surface waters had already occurred (for example, the construction of the first Don Pedro Dam on the Tuolumne River by the Modesto and Turlock Irrigation Districts, and the development of their extensive irrigation systems). Water rights to stream flow acquired before 1914, called "pre-1914" water rights, are still exempt from the state permit system.

*California had no statutory system for the regulation of water rights until 1914.*

# Imperial Valley Coalition for Fair-Sharing-of-Water

Presentation by:

Wally J. Leimgruber
Land-use Consultant
1725 Towland Rd
Holtville, CA 92250

# Equitable Distribution Plan

***Updated July 3, 2018***

IID's board approved a resolution repealing the EDP on February 6, 2018. IID water users will not be limited by an apportionment of water; however, in the absence of the EDP, all water users will continue to be subject to the requirement of reasonable and beneficial use standards. In addition, the district will continue to be subject to the 3.1 million acre-foot annual consumptive use cap set forth under the Quantification Settlement Agreement and the rules of the federal Inadvertent Overrun and Payback Policy.

***Background***

Facing the threat posed by the longest drought in a century for the Colorado River basin, IID adopted the Equitable Distribution Plan to manage its Colorado River water supply—its sole source of water for the entire Imperial Valley—in accordance with IID's duty under Water Code section 22252 to distribute water "equitably as determined by the board." (Wat. Code, § 22252).

The IID Board of Directors undertook extensive study and analysis beginning in 2004, eventually adopting an EDP in 2007, which was revised several times, most recently in October 2013. The revised EDP included a hybrid method of apportionment that had a historical use component and a straight-line component. The lawsuit by Michael Abatti challenging the Equitable Distribution Plan adopted in October 2013 (Michael Abatti, et al. v. Imperial Irrigation District case No. ECU07980) was filed on November 27, 2013.

On August 15, 2017, Judge Brooks Anderholt issued a statement of decision in the case. A writ of mandate and a declaratory judgment were issued on August 25 and September 19, 2017, respectively. The writ of mandate, attached, directs IID to repeal the EDP. IID filed a notice of appeal on September 26, 2017.

Mr. Abatti filed a notice of cross-appeal on October 16, 2017. Mr. Abatti sought an order from the appellate court to mandate the trial court to enforce its writ of mandate and declaratory judgment while the appeal on the merits is pending. In contrast, IID sought appellate court confirmation that a stay is in place pending the appeal on the merits of the case to maintain the status quo of implementation of the EDP with the hybrid method of apportionment, which has been in place since its adoption in 2013.

On January 31, 2018, the appellate court issued two orders, denying both Abatti's and IID's writs. The net effect of the appellate court orders is that there is no stay and the court is not directed to pursue any enforcement of its writ of mandate and judgment.

In the absence of an EDP, all IID water users continue to be subject to the requirement of reasonable and beneficial use of water under the California Constitution, Article X, section 2. IID continues to be subject to the 3.1 million acre-foot annual consumptive use cap under the Quantification Settlement Agreement and the rules of the federal Inadvertent Overrun and Payback Policy, which set forth the limitations under which IID may exceed its annual consumptive use cap, including payback requirements, and the circumstances under which IID cannot exceed its annual consumptive use cap.

August 15, 2017 Statement of Decision [PDF]

August 22, 2018 Appellate Court Order [PDF]

February 6, 2018 Board Memo and Resolution Repealing EDP [PDF]

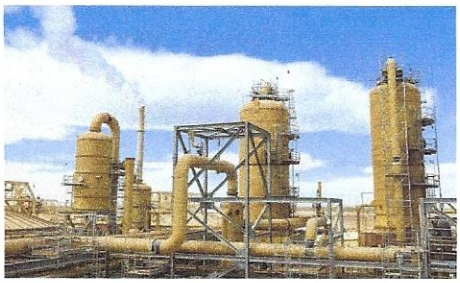
May 2, 2018 Appeal [PDF]

May 8, 2018 Board Memo [PDF]

June 29, 2018 IID Opening Brief [PDF]

EDP Lawsuit Factsheet July 2018 [PDF]

# WHY IS IID APPEALING THE JUDGE'S DECISION IN THE ABATTI LITIGATION?



## BACKGROUND

Imperial Irrigation District currently holds rights to 3.1 million acre-feet per year of Colorado River water supplies. IID's senior priority water rights comprise over 70 percent of California's Colorado River entitlement. For more than 100 years, IID and its water users have managed this precious natural resource to the benefit of our community and the nation it helps to feed, serving both agricultural and domestic water users.

Since its formation, the district has held these water rights in trust for the benefit of all water users, with over 97 percent of its supplies delivered for agricultural use and the balance for municipal, commercial and industrial use.

Law of the River changes, including the Quantification Settlement Agreement and the U.S. Department of Interior approved Inadvertent Overrun and Payback Policy, created a need for a workable water management plan. Understanding it needed a plan that would simultaneously conserve water and meet the needs of all its users, IID began in 2004 evaluating different methods for equitably distributing water within its service territory.

After intensive fact-finding, publicly held workshops and exhaustive deliberations, the IID Board of Directors adopted an Equitable Distribution Plan in 2007.

The EDP serves three primary purposes:

1) Satisfies IID's responsibility to equitably distribute water to all water users.

2) Provides a water budget for customer planning to prevent overruns, facilitate water conservation and reduce potential waste allegations.

3) Allows IID to meet Quantification Settlement Agreement milestones within California and on the Colorado River.

## A SUIT AGAINST THE DISTRICT

A lawsuit challenging the Imperial Irrigation District's Equitable Distribution Plan was initiated by Michael Abatti, et. al. On August 15, 2017, a statement of decision was issued against IID by the Imperial County Superior Court, invalidating IID's EDP and mandating its repeal. The judgement also incorporated other provisions of great concern to IID, including a fundamental misunderstanding of the nature of the water rights held by IID and many legal errors that could jeopardize the Imperial Valley's historical water rights and restrict the district's ability to provide reliable water supplies to all of its customers in the future. Therefore, the district filed an appeal with the California Fourth Appellate District Court to overturn the trial court's ruling in *Michael Abatti, et. al vs IID.*

## WHAT IF IID HAD NOT APPEALED?

If the decision stands, the discretion that is statutorily provided to irrigation districts under the Water Code to manage their water supplies will be vanquished. The result will be that efforts to prevent waste and unreasonable use of water and incentivize conservation will be compromised. Not only will local efforts to improve on-farm water use efficiencies be compromised, but allowing the trial court's ruling to stand will have adverse and far-reaching effects on longstanding interstate agreements on the Colorado River.

What's even more troubling, is the court's decision has undermined the publically elected IID Board of Directors' statutory authority making it almost impossible for it to continue operating effectively with constraints such as this. If this decision stands, it has the potential to impact every water user in Imperial County and every irrigation district in California.

IID

*A century of service.*

## MAJOR LEGAL ERRORS IN THE LOWER COURT RULING

*TRIAL COURT STATEMENT:* ***IID lacked authority to adopt the Equitable Distribution Plan.***
***FACT:*** Vested by the Legislature, the IID Board of Directors is afforded specific authorities, including the discretion to manage its water supply. According to Water Code section 22252, "when any charges for the use of water are fixed by a district the water for the use of which the charges have been fixed shall be distributed equitably as determined by the board..."

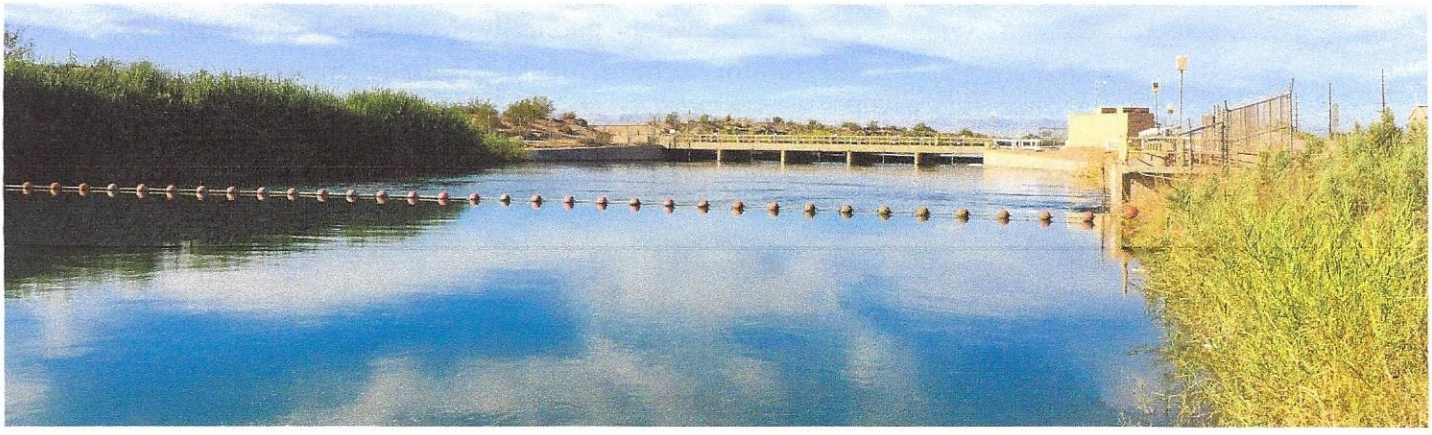
*TRIAL COURT STATEMENT:* ***The 2013 Equitable Distribution Plan is "a new, complete, fully integrated plan."***
***FACT:*** IID adopted the EDP in 2007 after it sought public input and conducted a thorough analysis. In 2013 IID adopted a revision to the plan, which does not override prior court validation nor does it exempt the plan from statutes of limitation.

*TRIAL COURT STATEMENT:* ***As a trustee, IID "holds mere title to the water rights."***
***FACT:*** IID holds the water rights in trust for public uses as defined by the state Water Code, not Probate Code, and no water user holds an individual or higher right. In order to have standing under this trust, you merely need to be a resident of the valley and be able to put that water to reasonable and beneficial use.

*TRIAL COURT STATEMENT:* ***Farmers' beneficial interest is a "constitutionally protected property right" and subject to the no-injury rule.***
***FACT:*** Landowners within the district have a right to water service, not an independent water right; the rule does not apply as there can be no injury when there is no individual water right.

*TRIAL COURT STATEMENT:* ***Water for new industrial supply contracts can only be procured through "appropriate consideration."***
***FACT:*** The court decision implies that IID may be required to purchase water for new municipal, commercial and industrial customers from its agricultural water users, driving up costs and limiting economic development opportunities for non-agricultural water uses. IID is required to serve water to all of its customers, including municipal and industrial users. Each category of non-agricultural use has different water needs and is subject to different laws, regulations and contracts.

*TRIAL COURT STATEMENT:* ***The only equitable and acceptable method of apportionment for IID is historical use.***
***FACT:*** The court erred in ruling that other apportionment models, such as straight-line (which is commonly used throughout the West) or hybrid methodologies, are unlawful. Apportionments based on purely historical data would be unfair to those who have already invested in water efficiency measures. Of greater concern, though, is the court's unconstitutional undermining of an elected board's statutory discretion by imposing the judge's personal choice of resource management tools that may actually encourage waste, penalize conservation and limit water supplies for new uses.



**For copies of the appeal, EDP and other related documents, please visit www.iid.com/edp.*

Wally J. Leimgruber
Land-use Consulting
1725 Towland Rd.
Holtville, CA 92250

07/30/2018

To: Whom this may Concern

As a life-long resident of Imperial County, and a property owner with over twenty-eight years in the farming industry, and twelve years as the 5th District Supervisor of Imperial County, and now involved in land-use consulting, I am respectfully requesting that you join with me and other business and civic leaders, in filing an *amicus* brief in support of IID's position in the Appeal identified as *Michael Abatti, as Trustee, etc., et al. vs. Imperial Irrigation District*, California Court of Appeal, Fourth Appellate District, No. D072850.

My reasons are as follows:

The Imperial Irrigation District is a California irrigation district established and governed by California statutory provisions found in large part in the California Water Code.

The Colorado River is the source of water for all reasonable and beneficial uses of water within the Imperial Irrigation District.

The right to Colorado River water vests solely in the Imperial Irrigation District as a result of historic water rights expressly assigned to the District, perfected by the District under California law, and then modified to a certain extent by contract and federal law pursuant to the Colorado River Compact, Boulder Canyon Project Act,Seven Party Agreement, contract between the District and the Secretary of the Interior, and the Quantification Settlement Agreement and Related Agreements. The Imperial Irrigation District water's rights to the Colorado River entitle the District to deliver Colorado River water for reasonable and beneficial use involving the following purposes: irrigation, industrial, mining, stock, power generation and household, and incidental uses associated therewith, including environmental mitigation connected with such uses.

California Water Code section 22252 expressly grants the Imperial Irrigation District the right to establish charges for the use of the water that it delivers and **to equitably determine how to distribute** such waters to those willing to pay the charges.

The Imperial County Superior Court decision in the Abatti litigation includes factual and legal errors that jeopardize the ability of the Imperial Irrigation District to equitably determine how a finite amount of Colorado River water shall be shared when demand for such water within the District exceeds the available supply.

For example, the Imperial County Superior Court incorrectly held that the Imperial Irrigation district "*holds **mere legal title to the water rights** and the users own the equitable and beneficial interest in the water rights.*

***The farmers' equitable and beneficial interest in the water rights is appurtenant to their lands and is a constitutionally protected property right.***
" Such fallacy interferes with the Imperial Irrigations District's statutory right to equitably determine how much water to deliver to water users willing to pay the charges for the use of the water".

In fact, the Imperial County Superior Court virtually prohibited the District from making any equitable determination by stating that "*District's **agricultural water users** are among the class of legal water users to which the 'no injury' rule applies.*"

Thus, the Superior Court ruled that "*Imperial Irrigation District is **not empowered to enter into any new contracts committing to the provision of water to any non-domestic or non-agricultural user** which guarantees the supply of water during times of shortage in a manner that is inconsistent with the court's findings herein.*"

Non-agricultural water users, both existing users and future users, will face severe hurdles in obtaining and preserving a reliable water supply if the Superior Court ruling is left intact, regardless of the substantial economic, employment, recreational, or environmental benefits that such uses may sustain or create for the benefit of those who live and work in Imperial County.

If you are as concerned as I am about our present and future water supply, I would respectfully ask that you give serious consideration to this endeavor.

The law office of Allen Matkins will be filing the *Amicus* brief.
David L Osias, will be the lead attorney.
The law firm is located at:
One America Plaza
600 West Broadway, 27th Floor
San Diego, CA 92101-0903

The suggested amount that I am asking for is $2500 to $5000, to support the payment for the *amicus* and court costs.

Checks should be made out to:
Wally J. Leimgruber
Land-use Consulting
1725 Towland Rd.
Holtville, CA 92250

If you have any additional questions, please feel free to call me at 760-996-7028 or e-mail: wallyleimgruber@outlook.com

Sincerely,

Wally J. Leimgruber

Wally J. Leimgruber

**From:** Wally Leimgruber
**Subject:** IV Coalition Members Labor and Public Agencies
**Date:** Wednesday, September 26, 2018 5:49:55 AM

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# IV Coalition Members, Labor, and Public Agencies, who have agreed to sign onto the Amicus Brief

09/26/2018

John P. Menvielle (former Imperial Irrigation District Director)
Mike Vogt, Ire Development
John F. Menvielle
Vincent Signorotti
Mike Carson Construction
Ray Carson Construction
Reed Olson
Larry Bratton
Eric Reyes
Edie Harmon
Ed Snively
Mike Entzminger
Wally J. Leimgruber (former Imperial County Board of Supervisor)
Matthew Dessert (former Imperial Irrigation District Director)
Haydee Rodriguez
Brian McNeece
Stephen Fairbanks
Steven Honse
Victor Carrillo (former Imperial County Board of Supervisor)
Also, I do have five (5) financial contributors that want to stay anonymous, for business reasons.

Public Agencies:
City of El Centro
City of Calipatria
City of Calexico (pending)
Imperial County Board of Supervisors
(the support for IV Coalition resolution will be on the BOS agenda for 10/02/18

or 10/09/18

Labor:
Imperial County Building & Construction Trades Council AFL-CIO

# IMPERIAL IRRIGATION DISTRICT
## BOARD AGENDA MEMORANDUM

**TO:** Board of Directors
**FROM:** General Counsel
**SUBJ:** Presentation by Stuart Somach
**DATE:** July 24, 2007

**Discussion:**
Discussion with attorney Stuart Somach regarding irrigation district issues

**Background:**
Mr. Somach is a partner at Somach, Simmons and Dunn, a Sacramento law firm specializing in natural resources, real estate, environmental and government law. Mr. Somach represented IID in the past and currently represents IID regarding the state water rights fee litigation. The IID Board requested that Mr. Somach appear at a board meeting to discuss irrigation district law and water law issues.

**Financial Impact:**
None

**Recommendation:**
The board and public may address issues with Mr. Somach as appropriate.

No. 7 cont'd

(2) That the general manager be directed to bring back a policy for insertion in the governance manual that would meet the spirit of Section 5.3.2 of having an attorney on retainer for the board's benefit.

Motion carried 5-0.

No. 8
Water issues
Stu Somach

Stu Somach, with the law firm of Somach, Simmons and Dunn from Sacramento, was invited to speak to the board on irrigation district law and water law issues.

Mr. Somach introduced himself and provided a brief summary of a litigation issue concerning water rights fees imposed by the State Water Resources Control Board since 2004. IID pays about $750,000 a year for generation of power and for water that passes through its power generation facilities. The case was appealed, overturned and is currently before the state Supreme Court. It will be heard later this year.

Mr. Somach also provided a short resume of work he has done for the IID over the years and other clients he represents in California. He indicated that the issue of who owns the water and the responsibilities and obligations of the district and its board are prevalent all over California and the West. He has litigated this very same issue before the U. S. Supreme Court for another agency in California.

He added that the problem of ownership stems from the word "trust" and begins with the Irrigation District Act, which makes reference to the way an irrigation district holds water in trust. It has been used as being akin to the kind of "trust" found in a probate situation, but this is a misuse of the word. IID holds water in trust as a public trust just as it does a number of other assets. The trust cannot be reduced into private ownership nor incrementalized – that is not the law. The water resource is held in trust for all the people within the IID area. To reduce it would be against the law and ignore years and years of case law. The law states that the board has a responsibility to its constituents -- and those are the voters.

Director Hanks asked about the board obligation to those living in a service area that have no voting rights. Mr. Somach said that it was an interesting question and he would defer it to IID's general counsel, who said he would research it.