(3/18/15) Public Workshop
Salton Sea
Deadline: 3/11/15 by 12:00 noon

SMILAND CHESTER ALDEN LLP
William M. Smiland (State Bar No. 041928)
wsmiland@smilandlaw.com
Theodore A. Chester, Jr. (State Bar No. 105405)
tchester@smilandlaw.com
Mary C. Alden (State Bar No. 100023)
malden@smilandlaw.com
140 South Lake Avenue, Suite 274
Pasadena, California 91101
Telephone: (213) 891-1010

Attorneys for Farmers

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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF

WATER RIGHTS ORDER 2002-0013 AND QSA REVISED WRO 2002-13

IMPERIAL IRRIGATION DISTRICT'S (IID) AND SANDIEGO COUNTY WATER AUTHORITY'S (SDCWA) AMENDED JOINT PETITION FOR APPROVAL OF A LONG-TERM TRANSFER OF CONSERVED WATER FROM IID TO SDCWA AND TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, AND PURPOSE OF USE

Under Permit 7643 on Application 7482 of Imperial Irrigation District

Water Rights Order 2002-0013; QSA
Revised WRO 2002-13

FARMERS' COMMENTS AND NOTICE OF INTENT TO APPEAR RE: PETITION OF IMPERIAL IRRIGATION DISTRICT FOR MODIFICATION OF REVISED WATER RIGHTS ORDER 2002-0013

Workshop: March 18, 2015

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I. SUMMARY OF COMMENTS

On November 18, 2014, the Petition of Imperial Irrigation District for Modification of Revised Water Rights Order 2002-0013 (the "Petition") was filed by Imperial Irrigation District ("IID") with the State Water Resources Control Board (the "Board").

On February 6, 2015 the Board published its Notice of Public Workshop and Solicitation of Comments (the "Notice") in response. The Notice sets a workshop for March 18, 2015 and solicits comments and information. In particular, it asks for input on key issues to be addressed and the appropriate role of the Board.

These Comments and Notice of Intent to Appear (the "Comments") relate to and are filed in connection with the Petition by owners and operators of approximately 20,000 acres of irrigated farmland within IID (the "Farmers").[1] They are filed with the Board pursuant to the Notice.[2]

These Comments do not address many of the factual assertions and legal contentions in the Petition. As to those which are here addressed, the Farmers present no objection or protest; instead, they supplement, expand, or expound upon such matters.

The Petition arises under a 1950 permit granted to IID by the Board's predecessor to appropriate Colorado River water. The permit was amended in a 2002 order to change the rights and authorize annual transfers of water thereunder. The Petition seeks a modification of the

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[1] The Farmers on whose behalf these Comments are filed are: Michael and Kerri Abatti Family Trust; Mike Abatti Farms, LLC; Ben and Margaret Abatti Family Trust; Ben Abatti Farms LLC; the Abatti Family Trust; Madjac Farms Inc.

[2] The Farmers are also constitutionally entitled to submit these Comments under Article 5, § 3 of the California Constitution.

order to add a condition relating to implementing and funding a plan to restore the Salton Sea. The Farmers find the relief requested by IID to be warranted.

These Comments center upon the underlying water rights, which the Farmers and other irrigators equitably and beneficially own, and the water diverted, conveyed, and distributed thereunder, which they use to irrigate crops. They appear in major part to protect and preserve their rights and water against further governmental impairment, and to restore those rights which were unconstitutionally taken or deprived or otherwise wrongfully injured in the past.[3]

Part II of these Comments sets out the factual overview of the water project, water rights, and diversion, conveyance, distribution, and use of the water, as well as various apportionments, limitations, and caps to the rights, and transfers of the water. A common theme is politics crowding out law.

The narrative starts with the original development of Imperial Valley for irrigated agriculture. Commencing in 1901, private companies built diversion, conveyance, and distribution works to deliver water from the Colorado River to the initial service area. The original facilities, serving phase one of the project, could carry and divert at least 2,600,000 acre feet of water per year. During the first quarter of the twentieth century, irrigated acreage served by that phase grew to more than 424,145 acres. Imperial Valley was one of the earliest, most rapidly developed, largest, and most successful irrigation projects in the West.

The necessary appropriative water rights for both phases of the project had been acquired at common law by the project developers in the late 1800s. They posted and recorded notice of their right to divert 7,239,680 acre feet of water per year and to irrigate 992,548 acres. The

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[3] Government 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 Government might see fit." *Nevada v. U.S.*, 463 U.S. 110, 126 (1983).

rights needed for phase one, at the very least, were perfected (as of 1901) by the irrigators' use of the water to grow crops. These "pre-1914" appropriations did not require approval by any state agency.

All seven of the Colorado River basin states applied the common law rules of the appropriative rights doctrine to develop the river. Appropriators along the river, whether towns or irrigation colonies, were guided by economic forces, as protected by the governing constitution and facilitated and mitigated by the common law. The Imperial Valley irrigation project was not the first on the river, but it was quite early and very large.

After the early 1920s, new institutions emerged. The legislative, executive, and judicial branches of the national government intervened. So, too, did governments of the six basin states to the east of California. The Legislature and the Governor of California claimed stakes, as did several executive agencies thereof. Seven public diverters in California remained highly involved throughout. Other agencies lacking any rights later sought out the water for environmental purposes. These various governmental entities tended to show little interest in preexisting water rights acquired by senior appropriators, including Imperial Valley irrigators.

In 1922, title to the water rights was sold in trust by the private developers to IID. The trustee's duties to the irrigators continued thereafter.

Throughout the Thirties and Forties, the federal government and IID worked to increase storage on the river and upgrade the project's diversion and conveyance facilities, aiming to enhance the water supply and expand the acreage supplied for phase two.

Before and during this period, California and IID, among other government agencies, took various actions that purported to apportion or limit the water rights, as the project was later enhanced. First, a 1922 interstate compact among the seven basin states apportioned 7,500,000 acre feet of water per year to the three lower states. Then, as of 1929, federal and state statutes

limited California diversions to 4,400,000 acre-feet each year. Next, a 1931 agreement among seven California diverters, including IID, apportioned its main Imperial Valley water right at 3,850,000 acre-feet. In a 1932 agreement with the federal government, IID agreed to these apportionments and limitations. IID's 1933 application to the Board's predecessor, like its notices of the late 1800s, sought to appropriate 7,239,680 acre-feet, but also referred to the 1931 apportionment; the Board's 1950 permit did the same. In 1979 the three lower basin states, including California, and their diverters, including IID, consented to, and the U.S. Supreme Court entered, a decree fixing, as of 1929, the present perfected right (priority 1901) at 2,600,000 acre-feet per year. The purported apportionments and limitations to the water rights have, over time, substantially increased the irrigators' risk of annual shortages, despite the growth of infrastructure.

The threat to the water rights became more pronounced in the 1980s. Landowners to the north charged IID with discharging unreasonably high amounts of spillwater and tailwater into the Salton Sea. The Board so concluded and issued two orders to IID to conserve water to reduce such discharges. As suggested by the Board, IID made a deal with a coastal wholesaler and junior appropriator for the transfer each year of 100,000 acre-feet of conserved water.

Before the turn of the twenty-first century, the federal and state governments combined forces to escalate the assault, with two competing diverters and junior appropriators waiting in the wings ready to pounce.[4] The U.S. unilaterally reduced water flows to IID. Under pressure from both federal and state officials, IID negotiated a change of rights and annual transfers of conserved water per year to the coastal plain and elsewhere which the Board conditionally approved in 2002. The order and the contracts eventually signed in 2003 capped irrigation water

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[4] *See* II.F below.

use in the valley at 3,100,000 acre-feet each year, from which nearly 500,000 acre-feet per year would be transferred, and from which an additional 1,600,000 acre-feet would be transferred to the state over 15 years. These changes and transfers, unlike those of the 1980s, involve mitigation water for aquatic wildlife habitat at the Salton Sea, necessitate land fallowing in the valley, and require dust suppression at both places.

Now, in order to implement these changes and transfers, IID has adopted a purportedly permanent distribution plan which further impairs irrigators' water rights and threatens to reduce future water deliveries. Under its 2013 plan, IID distributes water to its irrigators without considering crop type or soil type, and it transfers water out-of-district for urban and environmental uses. Thanks to this and prior actions, the water supply, despite bigger and better facilities, has dwindled from abundance to shortage for some users in IID.

Part III of these Comments frames certain legal issues that, the Farmers believe, have been overlooked, neglected, or ignored, but should finally be considered and evaluated by the Board and participants in connection with the initial workshop and perhaps resolved, as appropriate, in any subsequent formal proceedings. These legal issues fall within four interrelated categories.[5]

First, the Board lacks authority over pre-1914 appropriative water rights. Thus, it may not grant any permit, approve any change or transfer, nor impose any condition that affects such rights. At issue, the Farmers believe, is whether the federal improvements in the project created or resulted in any new post-1914 rights. This threshold question has never been adjudicated by a court of record and, thus, the proper role of the Board, if any, has long been unclear. It involves certain basic principles of the prior appropriation doctrine. As with the early private works, the

[5] This preliminary listing of possible legal issues for future analysis and possible disposition does not waive the Farmers' right to argue or brief the merits at subsequent times, and such right is reserved.

governing perfection, timing, and priority rules controlled. Construction of the subsequent public works appears to have been commenced promptly, and the work seems to have been prosecuted diligently and uninterruptedly to completion, as originally intended. If so, all rights likely related back to 1901. Thus, the Farmers presently contend that there is doubt whether the Board had authority to issue the 1950 permit or the 2002 order.

A second legal issue is whether the Farmers may appear in any formal Board proceedings after the workshop as full participants. The interests they own and the continuing threats thereto strongly support full participation in any further proceedings under general principles governing standing. Other aspects of the prior appropriation doctrine are directly pertinent. The basic rule of priority is first use. The irrigators' water rights are usufructuary in nature. It is the irrigators who use reasonable and customary amounts of the water supplied pursuant thereto for irrigation, a beneficial use. These senior water rights are appurtenant to the lands irrigated. Importantly, the Farmers and other irrigators own the equitable and beneficial interests in the water rights; IID holds mere title to the rights in trust for such uses. The rights cannot be changed nor the water transferred if injury results to the legal users. Courts apportion the waters of interstate rivers in the West according to these rules of prior appropriation. Thus, the links between the irrigators' legal interests and the rights underlying this proceeding entitle the Farmers to full standing.

Third, the Farmers believe that the Petition implicates certain issues of a constitutional dimension that have historical and immediate significance. As to several clauses, despite their age, the language has not been fully explicated by the courts. These issues, as applied here, nonetheless merit careful analysis in connection with the workshop and, perhaps, beyond.

According to the above appropriation rules, the equitable and beneficial interests in the water rights owned by irrigators constitute property protected by the taking property for "public use" clause of the California Constitution. Various actions of the Legislature, the Governor,

executive officials under his control, and other local agencies since the 1920s, have undoubtedly taken irrigators' property. The Farmers raise the question whether diversions in other states for use there or diversions in California for local environmental uses are "public" uses.

Two constitutional issues arise from executive agencies' failure or refusal to enforce the appropriative rights doctrine and related laws. The Farmers question whether executive actions depriving irrigators of their property satisfy the "due process of law" requirement. It may also be doubtful whether the law, including the above common law rules, was "faithfully executed."

Another constitutional issue the Farmers put forward for early evaluation arises out of the separation of powers principle. The questionable actions taken by the Governor and other executive branch officials (making and performing contracts, granting and modifying permits, litigating disputes, operating facilities, distributing water, suppressing dust, managing habitat) appear to be exercises of "executive" power. At issue, the Farmers suggest, is whether any such action can properly be characterized and justified as "legislative" or "judicial."

Fourth, a group of nonconstitutional issues that have not been adjudicated by the courts should now be carefully examined in connection with the upcoming workshop and any other proceedings: (1) Does the California irrigation district act permit IID to distribute water outside of its boundaries? (2) Is the use of water for habitat management or dust suppression consistent with the executive and legislative contracts of the Twenties, which limit use to irrigation and domestic uses? (3) Is the use of fresh river water to suppress dust on fallowed land or exposed shoreland a beneficial use? (4) Are California executive officials free to exercise dominion over water equitably and beneficially owned by irrigators in this state? (5) Are they empowered to confer use of such water on users residing in other states? (6) Have IID's actions been consistent with its duties to irrigators as trustee of the water rights? (7) Have the actions of other participating agencies or recipients been consistent therewith?

The remedy sought by the Petition is a new condition to the 2002 order requiring the state to implement and fund a restoration plan for the Salton Sea. It also addresses two possible alternate remedies, contractual litigation and statutory litigation. Part IV of these Comments addresses each such alternative remedy. It also discusses the merits of two other executive actions. The Farmers contend that such executive actions would support the new condition requested in the Petition.

In particular, IID or agencies of the state that are signatories to the 2003 contracts should consider submitting to other such state agencies a demand for adequate assurances. The Board's executive power would authorize it to endorse any such demand.

A formal resolution of the Board addressing the requirements for contractual and statutory implementation and funding of a restoration plan for Salton Sea should also be considered. The resolution could be transmitted to the Governor and other responsible executive officials in connection with finalizing and implementing a plan. It could also be transmitted to the Legislature in connection with funding.

Finally, Part V of these Comments sets forth the Farmers' basic positions and the relief they support in these proceedings.

First, as a matter of procedure, the Farmers are entitled to occupy full party status in any follow-up proceedings. The Board should so determine.

Second, the relief requested in the Petition is warranted.

Third, the state's failure to implement and fund any Salton Sea restoration plan, as pledged by contract and statute, is inexcusable. The Board should exercise all its executive powers to require or encourage compliance.

Fourth, any action taken by the Board should avoid further injury to, but affirmatively protect, irrigators' interests in the water rights and water, and it should take feasible actions to

restore those rights which were unconstitutionally taken or deprived or unlawfully injured in the past. Policy can no longer be allowed to trump the law.

II. FACTUAL OVERVIEW

The Petition discusses briefly the diversion and beneficial use by Imperial Valley developers and irrigators of river water since before the turn of the twentieth century, resulting in senior water rights with a claim of more than seven million acre feet of water. It also refers to the federal and state statutes of 1929, the 1931 intrastate agreement, and the 1950 permit. Petition, pp. 1, 2, 12, 13. However, the Petition's factual background concentrates on events since the late 1990s, including the Board's 2002 order approving changes to the rights and transfers of water, various agreements effecting those changes and transfers, statutes relating to the resulting implementation and funding of a plan to restore Salton Sea, and several such proposed plans. Petition, pp. 8-12, 13-29. This section of these Comments sets forth a more detailed account, especially of the early and middle periods.[6]

A. DEVELOPMENT OF IMPERIAL VALLEY

The initial phase of the Imperial Valley irrigation project was developed in the late nineteenth and first quarter of the twentieth century by California Development Company ("CDC"). CDC's principals included George Chaffey and C.R. Rockwood, water engineers and entrepreneurs held in high repute westwide. As early as 1893, Rockwood conceived a 750,000

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[6] This factual overview is based upon one IID history, two Board orders, and seven cases. M.J. Dowd, Executive Officer, *IID*: *The First 40 Years: History of Imperial Irrigation District and the Development of Imperial Valley* (IID, 1956); Decision 1600 (1984); Order WRO 2002-0013 (2002); *Thayer v. California Development Co.*, 164 Cal. 117, 120-24 (1912); *Hall v. Superior Court*, 198 Cal. 373, 376-78 (1926); *Arizona v. California*, 373 U.S. 546, 551-62 (1963); *Bryant v. Yellen*, 447 U.S. 352, 356-66 (1980); *Imperial Irrigation District v. State Water Resources Control Board*, 186 Cal.App.3d 1160, 1162-63 (1986); *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal.App.3d 548, 552 (1990); *Quantification Settlement Agreement Cases*, 201 Cal.App.4th 758, 776-91 (2011).

acre service area. CDC's business plan involved a phased development: the first phase would serve the valley's bottom lands; the second would extend the project to surrounding mesas.

CDC's first step was to acquire the necessary water rights. Between 1895 and 1899, CDC and its principals, under the common law of California at the time (as codified), duly posted and recorded notices of appropriation of Colorado River water for irrigation uses. Given its phased development plan, CDC claimed the right to divert the equivalent of 7,239,680 acre feet of water for use on 992,548 acres of irrigated land. These "pre-1914" appropriative water rights would be perfected as of 1901, when CDC commenced construction of the planned diversion and conveyance works. CDC initially held title to the rights in trust for the benefit of the irrigators, who owned the equitable and beneficial interest therein.

After the turn of the century, CDC diligently prosecuted construction of the necessary water works, including several diversion facilities and the Alamo Canal. The water diverted and the acreage irrigated grew significantly each year, as intended.

The early efforts were soon disrupted, however, when the west bank of the river collapsed in 1905, flooding the valley. Multiple attempts by CDC to stop the rampage failed. Thus, it brought in Southern Pacific Company ("SPC"), which had provided rail transport to the valley, to do the job. The flood was stopped by SPC in 1907. The flood waters settled in the long-dry Salton Sink, forming the Salton Sea.

As a part of the financial arrangements relating to stopping the river's flow, CDC sold the project property, including its title interest in the water rights, to SPC. During the next decade and a half, SPC and its affiliates diligently continued to construct the water works, including the distribution system. The valley floor was divided into 13 sectors, each with its own mutual water company. The articles of incorporation and bylaws of CDC and two of its affiliates and the mutual water companies and various contracts among them, as well as SPC contracts, confirm

the plan to expand in two main phases. By the mid-Teens, private investors had organized to develop the two largest mesas, East Mesa and West Mesa. By the early 1920s, the project irrigated 449,000 acres of farmland in the valley bottom, making phase one thereof one of the fastest-growing, largest, and most successful irrigation projects in the history of the West.[7]

B. ADVENT OF IID

Eventually, SPC made a strategic decision to exit from the water business and to sell and transfer its interests in the Imperial Valley irrigation project. In order to liquidate its substantial investment in the project, SPC sought a buyer that was able to make an all-cash purchase at an acceptable price. Under California's new Irrigation District Act (the "IDA"), a district could borrow money by issuing tax-free bonds; it could also raise revenue each year by means of land assessments or water charges. These factors suggested to SPC that a new irrigation district would make a suitable buyer.

By the efforts of the interested parties, IID was formally organized by 1911, and it acquired from SPC and the mutual water companies the project properties, including the water rights, by 1922. This transfer included interests in the perfected pre-1914 appropriative rights. Under the IDA, IID acquired title in trust for the benefit of such uses, while the owners of the land irrigated continued to own the equitable and beneficial interests in the rights.

C. PHASE TWO: GOVERNMENT EXPANSION

When CDC made the original plan of development and acquired and perfected the necessary water rights, and when SPC built out phase one of the project, phase two was also intended to be accomplished privately. But during the early part of the twentieth century, the rise

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[7] Much such land was owned or operated by predecessors, both proprietary and familial, of the Farmers.

of new governmental institutions—public works and administrative agencies—intervened. This led to certain alterations to the second phase of the project during the middle decades.

In 1902 Congress enacted the Reclamation Act (the "1902 Act"), which put the U.S. Bureau of Reclamation (the "Bureau") in the irrigation project business. Among other things, the 1902 Act directed the Bureau to follow western water law, the prior appropriation doctrine. The Bureau soon developed a taste for tapping the mainstreams of major Western rivers, including those whose basins occupied territory in multiple states. The possibility that the Bureau might actually take over the Imperial Valley project was widely discussed in the valley and the capital. Indeed, as early as 1907, President Theodore Roosevelt made such a proposal to Congress.

After IID became operator of the project and holder of title to the rights, it considered the possibility that, rather than develop phase two itself, the Bureau might do so. The Bureau was open to the possibility of constructing and operating a new upstream storage facility in the river and larger diversion and conveyance facilities for the valley. But much groundwork was thought to be necessary first. This would include a 1922 interstate compact, 1929 federal and state statutes, a 1931 agreement among California appropriators, a 1932 agreement between the Bureau and IID, and a 1933 application to and a 1950 permit of the Board's predecessor. These disparate governmental actions recognized the original appropriation and the perfected rights but, at the same time, envisioned basin, state, and local apportionments and limitations seemingly inconsistent with the plan for phase two.

There were many rivers in the West whose basins occupied territory in multiple states, all of which followed the doctrine of prior appropriation. By 1922, the U.S. Supreme Court had provided two avenues of relief for those involved in interstate disputes over water rights. In 1911, it ruled that the federal courts could adjudicate disputes among all appropriators in all the

governing states of a basin. In 1922, it further concluded that the states, themselves, could litigate such disputes before it as representatives of their respective appropriators. But as to the Colorado River, neither of those avenues was taken. Instead, under pressure from the federal government, especially then Secretary of Commerce Herbert Hoover, the basin states took a third route.

In 1922, the State of California ("California" or the "State") and the six other basin states entered into the Colorado River Compact (the "1922 Compact"). The 1922 Compact did not apportion the river water among each basin state. Instead, Article III thereof "apportioned" from the river to the upper basin and the lower basin, respectively, for "agricultural" and "domestic" uses, 7,500,000 acre-feet of water per year, which included "all water necessary for the supply of any rights which may now exist."[8] Thus, the river was divided in two. 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." All "other such rights" shall be "satisfied" solely from the water "apportioned" to the basin. The apportionment had little basis in hydrogeology and virtually no basis in law, including the law of prior appropriation; it was a political bargain. As applied to Imperial Valley, Articles III and VIII were ambiguous as to the definitions of present perfected rights, post-storage rights, and any other rights.

Congress enacted the Boulder Canyon Project Act, effective in 1929 (the "1929 Federal Act"), authorizing the Bureau to build and operate a new upstream storage facility, Hoover Dam, a new diversion facility, Imperial Dam, and a new conveyance facility, the All-American Canal. Several provisions thereof would be applied over time to affect IID growers. Section 1 authorized the Bureau to create a reservoir for purposes including "storage" and the "delivery of

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[8] In addition, the lower basin was given the right to increase use by 1,000,000 acre-feet per year.

the stored water" to various places, including the valley. Section 4 of the 1929 Federal Act provided that it should not take effect unless the California Legislature agreed to a "limit" on annual consumption of river water within the state of 4,400,000 acre-feet. Section 5 authorized the Bureau to contract for the "storage" of water in the reservoir and delivery thereof for "irrigation" and "domestic" uses. Section 6 of the 1929 Federal Act required the Bureau to use the new facilities for such uses and "satisfaction of present perfected rights." It did not address unstored water nor define present perfected rights in the valley or elsewhere.

In 1929 the Legislature of California enacted the Limitation Act (the "1929 State Act") which provided that the State agrees irrevocably and unconditionally with the U.S. and "for the benefit of the other six basin states" as an express covenant and in consideration of the passage of the 1929 Federal Act that the use in California under federal contracts and "all water necessary for the supply of any rights which may now exist," "shall not exceed" 4,400,000 acre-feet. This was a unilateral act of the State intended to benefit water users in other states. The 1929 State Act was silent about the original appropriation, pre-1914 rights, present perfected rights, phase two, and future rights.

In 1931, seven public diverters of river water in California, including IID, made an agreement (the "1931 Intrastate Agreement") as to amounts and priorities. The first four sub-articles of Article I thereof provided that river waters available for use in California under the 1922 Compact and the 1929 Federal Act shall be "apportioned" among four senior diversions, totaling 4,400,000 acre-feet. Subarticle 3 provides for a third priority shared by IID, Coachella Valley Water District ("CVWD"), and "other lands under or that will be served from" the All American Canal in Imperial Valley for beneficial consumptive use of 3,850,000 acre feet of

water per year less priorities 1 and 2.[9] Newly organized Metropolitan Water District of Southern California (the "MET") agreed to a fourth and more junior priority. The 1931 Intrastate Agreement was also silent about future growth of the water supply or the irrigated acreage in IID.

In 1932 IID and the Bureau entered into an agreement (the "1932 IID-Bureau Agreement") under Section 5 of the 1929 Federal Statute. Article 17 required the Bureau to deliver water in accord with the 1931 Intrastate Agreement. It provides that Hoover Dam shall be used for "satisfaction" of perfected rights and that it is without prejudice to "any other or additional rights" which IID then had or might thereafter acquire.

In 1933, IID filed with the Board's predecessor Application No. 7482 which was amended in 1935 (with supplement), to appropriate unappropriated water from the river (the "1933 Application"). It was filed "without waiver" of "existing rights," and stated that the land to be irrigated has "another water right or source of water supply" other than that applied for. As to the amount of water to be diverted for direct application to beneficial use without storage, the 1933 Application specified an amount equivalent to 7,239,680 acre-feet per year, as in the notices of the late 1800s, but also provided that diversions were subject to the 1931 Intrastate Agreement. It referenced by name or description, the proposed federal storage facility (Hoover Dam), diversion facility (Imperial Dam), and conveyance facility (All American Canal). As to place of use, the 1933 Application specified a total of 992,548 acres of land, consisting of 612,656 acres then within IID itself and a total of 379,652 acres on eight surrounding mesas (including East Mesa and West Mesa). As to completion schedule, it stated that construction work had begun and will be completed within 10 years of approval and that water will be

[9] Several years later IID and CVWD agreed that IID's rights were senior to CVWD's rights.

completely applied to the proposed use within 50 years thereof. The Board's predecessor would not act upon the 1933 Application for 17 years.

During the Thirties and Forties, the Bureau built Hoover Dam, Imperial Dam, and the All American Canal. Water could be stored behind Hoover by 1935, diverted from Imperial by 1942, and conveyed by the All-American by 1952. As a result of these improvements, water stored behind Hoover Dam was able to be released at propitious times. This, combined with the increased capacity of Imperial, enhanced diversions. The larger All-American Canal also permitted greater conveyance. Diversions of stored water to IID ranged from 100,000 to 800,000 acre-feet per year. Consistently, irrigated acreage within IID expanded over time, as did the size of IID, itself. In 1911, the district area was 513,368 acres, and it grew to 539,068 acres in 1915, 612,656 acres in 1930, and 889,244 acres in 1942 (reflecting the inclusion of East Mesa). Ironically, this period of growth in water supply and land watered overlapped with the period of the apportionments and limitations of the irrigators' water rights. The project was going in two different directions at once.

In 1950, the Board's predecessor approved the 1933 Application in Permit No. 2643 (the "1950 Permit"). The amount of water appropriated was equivalent to 7,239,680 acre-feet per year, reflecting the appropriation notices posted and recorded in the late 1890s, which were perfected as of 1901. The approval was "subject to vested rights" and "without prejudice to rights held . . . under appropriation." The 1950 Permit refers to the 1922 Compact, the 1929 Federal Statute, the 1929 State Statute, the 1931 Intrastate Agreement, and the 1932 IID Bureau-Agreement. It discussed no change of water rights or transfer of water, nor did it contain any conditions relating to the Salton Sea.

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D. U.S. SUPREME COURT CASES

From the beginning, the other basin states, particularly Arizona, were concerned about the scale and pace of agricultural and urban growth in Southern California. Imperial Valley irrigators had appropriated nearly half the water in the river as of 1901 for phase one, and phase two was planned and proceeding. Los Angeles had appropriated a large amount and planned to establish the MET which would build the Colorado River Aqueduct. Conversely, the cities and valleys in the other states were at that time relatively small and remote. In 1952, Arizona, invoking the U.S. Supreme Court's original jurisdiction, sued California and seven of its public diverters, including IID, for an apportionment of the river water among the three lower basin states. The other states and the Bureau also became parties to the litigation.

The court's decision was handed down in 1963. The parties had not raised, and the court did not decide, the legality or equity of the 7,500,000 acre-foot apportionment to the lower basin states, the 4,400,000 acre-foot limitation on California diverters and users, or the 3,850,000 acre-foot apportionment of IID's third priority appropriation. Nor did it address any quantification of IID's perfected rights, except to note the Bureau's duty under Section 6 of the 1929 Federal Act to "satisfy" them. Even though all the states followed the prior appropriation doctrine and the 1902 Act required the Bureau to do so, the court declined to apply it to the Colorado. It similarly disregarded its own precedents under which such doctrine guided apportionment among appropriation states in a multi-state river basin. Instead, the court held that the Colorado River was to be apportioned among the basin states by the Bureau under its power, set out in Section 5 of the 1929 Federal Act, to make contracts with diverters. *Arizona v. California*, 373 U.S. 546 (1963). The import of the Section 5 holding, however, would be considerably narrowed by the court in a 1978 case, and the three subsequent cases focused, instead, on Section 6.

The court's 1964 decree generally defined the term "perfected right" in the lower basin as a water right acquired in accordance with state law which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land. A "present perfected right" was defined as one existing as of 1929. While it did not address post-1929 enhancements, the decree provided for future determination thereof. *Arizona v. California*, 376 U.S. 340 (1964).

A supplemental decree, agreed to by all governmental parties in the lower basin, including California and IID, was entered by the court in 1979 (the "1979 Decree"). It was agreed and adjudged that IID would have 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 IID's consumptive use required for irrigation of 424,145 acres, whichever is less, with a priority date of 1901. *Arizona v. California*, 439 U.S. 419 (1979). The 1979 Decree did not discuss other water rights, including any governing increased supply and expanded acreage after 1929.

Finally, in 1980 the U.S. Supreme Court decided another dispute between the Bureau, on the one hand, and aspiring buyers of excess lands in IID, on the other. The court held that lands irrigated prior to 1929 were not subject to the excess lands provisions of reclamation law. It relied primarily on Section 6 of the 1929 Federal Act, which provided that Hoover Dam, Imperial Dam, and the All American Canal were to be used, among other things, for satisfaction of present perfected rights. Importantly, the court also reaffirmed prior state law that the rights were equitably owned by the beneficiaries to whom IID was obligated to deliver water; as trust beneficiaries, and that landowners have a legally enforceable right, appurtenant to their lands, to continued service. Again, the court did not address post-1929 diversions and use on such lands

served by the original works or the new improvements, nor did it decide the rights of additional lands. *Bryant v. Yellin*, 447 U.S. 352 (1980).

E. PROCEEDINGS DURING THE EIGHTIES

In 1980 a landowner on the northern border of IID adjacent to the Salton Sea complained that large volumes of spillwater and tailwater were being discharged from IID's system and inundating his land. The resulting dispute between the landowner and IID was settled to both their satisfaction.

Nevertheless, the Board took up the matter. After a 1983 hearing, it handed down in 1984 Decision 1600 ("D-1600") determining that IID had unreasonably used water within the meaning of Water Code § 100 and related provisions (the general welfare requires that unreasonable use of water be prevented). The Board ordered IID to prepare a conservation plan that would reduce discharges to the Salton Sea. It also stated that "the role of the state permit system is not entirely clear." D-1600, p. 17.

In 1988 the Board issued a revised order (the "1988 Order") approving IID's plan. The 1988 Order pointed to a water transfer to the MET as a means of funding conservation measures. IID and the MET entered into an agreement pursuant to which each year, for 35 years, IID would transfer 100,000 acre-feet of conserved water to the MET. A year later, the Board determined that IID had complied with the 1988 Order. [10]

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[10] The Farmers' present understanding is that no application for a change of rights or transfer of water was filed and neither D-1600 nor the 1988 Order modified the 1950 Permit. Neither decision explicitly approved any such changes or transfers. Order WRO 2002-0013 (the "2002 Order"), discussed next, reflects certain requests on this matter and contains one condition purporting to modify the 1988 Order. 2002 Order, pp. 19, 89. The decision and order of the 1980s provide little guidance here. The problem dealt with there was too much IID water flooding private farmlands near the lake's shore. They said little, if anything, about environmental concerns, including bird and fish habitat or dust prevention. They underestimated the projected costs of conservation such as canal lining and tailwater recovery. Predictions of changes of salinity and elevation were off the mark. Goals and plans for possible future conservation were problemmatic.

F. THE QSA CHANGES AND TRANSFERS

In 1996, the Bureau declared that California must comply with the 4,400,000 acre-foot limitation. This initiated a series of actions and threats by the federal and state governments over the next seven years to compel California diverters, IID prime among them, to reduce water use still further.

Two years later, IID and the San Diego County Water Authority ("San Diego") entered into a long-term agreement (the "1998 Transfer Agreement") under which IID would have transferred to San Diego each year 300,000 acre-feet of conserved water.

Thereupon, IID and San Diego applied to the Board to approve the necessary changes to the water rights and the transfers of water. The MET and CVWD promptly filed protests.

In 1998 Congress enacted the Salton Sea Restoration Act. It mandated that the Bureau study options, including "pumping water out of" the sea; another option was "augmented flows . . . into" the sea. Congress was not then sure whether restoring the sea would require more water or less.

Federal and state officials turned up the pressure on IID. Illustrative is a damning confidential memorandum, dated October 8, 1999, to Mary Nichols, Secretary of the California Resources Agency (the "Resources Agency") from David Hayes, Deputy Secretary of Interior (the "1999 Memorandum"). It proposed to "unilaterally quantify" the Imperial Valley water rights, stating that the "risks to water rights will increase by many times" if IID resists. The 1999 Memorandum notably opined that "IID fears having the Secretary and the Governor . . . *combining forces* against it and with MET and CVWD *waiting in the wings, ready to pounce* on, and take, additional water without compensation." (Emphasis added) The federal and state governments did combine forces and the MET and CVWD did pounce.

As the key California parties continued to negotiate, the Bureau wrote threatening letters to, and instituted administrative proceedings against, IID. Finally, in 2002, IID, San Diego, the MET, and CVWD reached an accord under which the MET and CVWD dropped their protests and IID would transfer 200,000 acre-feet per year to San Diego and 100,000 acre-feet per year to MET and CVWD. The Board issued the 2002 Order approving the changes to the rights and the transfers of the water. It was to be effective upon possible future execution of the Quantification Settlement Agreement (the "QSA") and various other ancillary agreements.

The Board took a calculated risk by issuing the 2002 Order before the QSA and other agreements were negotiated and signed. It could, and did, not then know what the final documents, their parties, or their terms would be. Thus, the Board's analysis was necessarily incomplete. It could not know that several important terms would later be added that could injure IID irrigators. It could not analyze the true costs and benefits of the changes and transfers, particularly the costs of conservation, mitigation, and restoration. Furthermore, forecasts of Salton Sea elevation and salinity were not robust. In the 2002 Order, the Board reserved continuing authority to revisit such issues.

As negotiations continued, the Bureau unilaterally withheld water from IID. IID sued for an injunction, and the MET and CVWD intervened on the Bureau's side. The court granted a preliminary injunction, ruling that the Bureau had, in all probability, wrongfully invaded the Imperial Valley water rights.

Finally, in 2003 the QSA and 34 ancillary agreements were signed among multiple parties. One of the ancillary agreements was the Joint Powers Agreement, signed by the Department of Fish and Game (the "DFG"), on behalf of the State. Another was an agreement between the Department of Water Resources ("DWR") and IID (the "DWR Agreement"). Still another was an agreement among IID, the MET, and CVWD (the "Three-Party QSA").

These agreements, especially the QSA itself, as well as the 1998 Transfer Agreement, the DWR Agreement, the Joint Powers Agreement, and the Three-Party QSA, were consequential. They required large transfers to San Diego, the MET, and CVWD. New terms, not known to the Board, appeared in the agreements. Habitat mitigation distributions to the Salton Sea and land fallowing had been added. Dust suppression was required on exposed shoreland and fallowed farmland. A "cap" of 3,100,000 acre-feet per year was instituted. Diversions of up to 1,600,000 acre feet over 15 years were agreed to.[11]

G. IID DISTRIBUTION PLAN

An irrigation district is required under the IDA to establish "equitable" rules for the distribution of water and to distribute water "equitably." Where a district appoints a watermaster to operate diversion works, it is authorized to make reasonable regulations to secure distribution of water in accordance with determined "rights" as may be needed, and the watermaster shall distribute water among users entitled to its use according to the "rights" of the users.

In light of the above limitations, apportionments, and caps on the Farmers' water rights, changes thereto, and transfers of water thereunder, IID has recently altered its approach as to how it distributes water. For 90 years, IID had distributed to each irrigator within its boundaries each year, in accord with the water rights and the above IDA provisions, all water reasonably

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[11] The 2002 Order had been based upon certain assumptions about future legal actions, certain models predicting future hydrogeologic conditions, and certain projections of future costs and benefits. Since then, possibilities have become actualities. The 35 QSA agreements by and among a dozen or so public agencies were negotiated and signed, several statutes on implementation and funding of a restoration plan were enacted, and several plans have been published. Actual data on salinity and elevation of the lake have been recorded. Costs and benefits of transfers, mitigation, and fallowing have been measured. The workshop and possible future proceedings would afford the Board, in executing the law, the opportunity to assess the facts that have occurred during the past 13 years. The Farmers believe that such an assessment would be revealing.

needed per acre, given the particular soil type and crop selection, both of which vary substantially among irrigated lands. But it adopted a new type of plan in 2013 (the "2013 Plan").

Under the 2013 Plan, two major changes in distribution have been made. First, water is now distributed by IID to non-irrigators who reside outside its boundaries and have no (or junior) water rights, including urban and environmental users. Second, IID now distributes water to irrigators inside its boundaries on a uniform per-acre basis, without regard to soil or crop type, resulting in water shortages for many acres. The 2013 Plan states the new distribution rules are to be permanent.[12]

H. THE FARMERS' PREDICAMENT

After the expansion of the Thirties and Forties, water diverted to and acres irrigated in IID initially grew, especially after mainstream storage and increased diversion and conveyance capacities became available at mid-century. Phase two seemed to be well underway.

Yet even earlier, starting in 1922, and continuing to this day, various contracts, statutes, applications, permits, judgments, changes, transfers, and plans have at the same time purported to apportion, limit, cap or otherwise burden the water rights created and exercised to serve Imperial Valley irrigators.

Evidence of annual water use between 1914 and 1998 shows that between 1914 and 1922 (era of private ownership and operation) use grew from about 1.7 million to about 2.7 million acre-feet per year. By 1937 (after IID had been in control for 15 years) use was roughly 3.0 million acre-feet. By 1953 (upon completion of federal improvements) use reached its peak, about 3.5 million acre-feet. During the last half of the century, water use fluctuated between 2.6

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[12] Several of the Farmers have challenged IID's 2013 Plan in another forum. *See Abatti v. Imperial Irrigation District*, Imperial Sup. Ct. No. ECU07980. One contention is that distributions inconsistent with rights are not equitable. They seek, among other things, declarations of violation of duty and invalidation thereof as contrary to law.

and 3.2 million acre-feet. IID Transfer-Phase I, Ex. 11; Bureau of Reclamation, Water Accounting Reports.

The documents are generally silent about the nature and extent of rights perfected and attached after 1929. They leave us little but cryptic allusions to "other" or "additional" rights and an acknowledgment by the Board in D-1600 that the role of the permit system is "unclear."

Now, the project has also been replumbed. Water that once flowed for diversion to the All American Canal is today intercepted upstream for diversion to the Colorado River Aqueduct for urban use on the coastal plain served by the MET and San Diego. Fresh water is also diverted from the All American Canal to the CVWD service area. IID water flows to the Salton Sea for bird and fish habitat and dust suppression. Irrigators are required to fallow land and control dust there too.

According to a recent IID board resolution, since 2003 IID has delivered 375,000 acre-feet of mitigation water to the Salton Sea and will deliver 390,000 more during the next three years. Since then, irrigators have fallowed 250,000 acres of farmland to generate 1,500,000 acre-feet of conserved water, and are currently fallowing 50,000 acres, or 12% of IID's irrigable acreage.

Between 2010 and 2017, mitigation transfers will have quadrupled, as irrigation use will have declined from about 2,800,000 acre-feet per year to about 2,600,000 acre-feet per year. After 2017, transfers to San Diego will double, leaving irrigators, again, about 2,600,000 acre-feet per year through 2047. This is approximately the same amount of water covered by the present perfected right (1901 priority) which irrigators have equitably and beneficially owned for more than a century.

IID irrigators, including the Farmers, face great uncertainty as to any Salton Sea restoration plan, and its possible implementation and funding. If the past is any guide, the risks of further injury and shortage are high.

III. LEGAL ISSUES

The legal discussion in the Petition spotlights the "no injury" rule, one of the rules making up the prior appropriation doctrine. Petition, pp. 4, 15, 31. These Comments address that rule and other rules of that doctrine and raise still other legal issues as they relate to the Board's power, the Farmers' standing, constitutional infirmities, and nonconstitutional infirmities. The list of legal issues is long and, the Farmers believe, they have been overlooked, neglected, or ignored for decades. The law comes first; only after obedience may executive officials turn to complementary policy preferences.

A. BOARD POWER: PRE-1914 OR POST-1914 RIGHTS

The Board is part of and directly under the supervision of the executive branch of the government of California. *Imperial Irrigation District*, 225 Cal.App.3d at 566, 567. Executive actions include conducting studies, publishing reports, preparing legal opinions, prosecuting and defending suits, granting, denying, and modifying permits, issuing enforcement orders, and the like. The Farmers currently hold the view that the 1950 Permit and the 2002 Order were executive actions.

The Board's powers are confined to post-1914 rights. *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 741-42 (2006) (pre-1914 rights grandfathered).[13] The Board

[13] Two recent court of appeal opinions suggest, on differing rationales, that the Board may enforce the ban on the unreasonable use of water subject to a pre-1914 right. *Light v. State Water Resources Control Board*, 226 Cal.App.4th 463, 1487 (1914); *Young v. State Water Resources Control Board*, 219 Cal.App.4th 397, 403-07 (1913). These suggestions are not pertinent here.

has expressly determined that it lacks power over the pre-1914 rights involved here. 2002 Order, pp. 3-4, 52.

The present perfected rights, as they existed in 1929, have been finally adjudicated by the U.S. Supreme Court in the 1979 Decree.[14] Thus, the State (including the Board) and IID, among other parties, are precluded from relitigating such rights. The rights, as exercised each year after 1929 but used for irrigation in the same area of the valley floor, have not been formally adjudicated. But the Farmers believe that any such future adjudication would have a similar outcome.

The central question, the Farmers believe, arises from the fact that the second phase of development to serve new lands was in the end mainly effected by the Bureau's construction during the Thirties and Forties of Hoover Dam, Imperial Dam, and the All-American Canal. These works had the potential to enlarge the water supply and, thus, the irrigated acreage. Two principles of law seem to be at play.

First, under the common law rules of appropriation (as codified in 1872), certain interrelated timing, perfection, and priority rules should be consulted. As between appropriators, the one first in time is the first in right. Civil Code § 1414. An appropriator who duly posts and records the required notice may change the intended place or means of diversion or place of use if others are not injured by such change. Civil Code § 1415; Water Code § 1706. Notably: "[T]he claimant must commence the . . . construction of the works in which he intends to divert the water . . . and must prosecute the work diligently and uninterruptedly to completion," or conduct the waters to the place of intended use. Civil Code §§ 1416, 1417; *Millview County Water District v. State Water Resources Control Board*, 229 Cal.App.4th 879, 897 (2014);

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[14] Had IID been absent, it might have been bound by California. *See Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995). But IID represented itself and agreed to the 1979 Decree. The Farmers question whether irrigators were bound by California or IID because of absence of common interests and lack of adequate representation.

DeWolfskill v. Smith, 5 Cal.App. 175, 181-87 (1907). By compliance with these rules, the claimant's right to the use of the water relates back to the time the notice was posted. Civil Code § 1418. Here, there appears to be little doubt that the work on the new expansion facilities was prosecuted diligently and uninterruptedly to completion.

During the early phase of private development of the valley floor, the transition of the Twenties, and the second phase of public enlargement, the intention of the developers remained substantially the same: develop the valley floor first, and then the mesas.

As early as 1893, Rockwood planned to water 750,000 acres of land. The notices of appropriation posted and recorded between 1895 and 1899 specified diversions of 7,239,680 acre feet. In 1907, President Theodore Roosevelt described the project as 700,000 acres. By the early Twenties, phase one was essentially complete.

As early as the mid-Teens, private parties had organized to develop the East Mesa and the West Mesa. Phase two became an apparent reality with operation of the new federal facilities. District acreage and acreage irrigated, as well as water supply, did initially increase. The Imperial Valley irrigation project (at least its infrastructure) remained a going—and a growing—concern. Thus, the work appears to have been diligently prosecuted to completion.

Second, the Bureau built, owns, and operates the mainstream storage facility and built and owns the newer diversion and conveyance works. IID operates the latter two and owns and operates the distribution system. This joint ownership and operation should not alter the above outcome. The IDA authorizes an irrigation district to construct and own its own diversion, conveyance, and distribution works. Water Code § 22226. But it may also operate through contracts with other owners, such as the Bureau. Water Code § 22228. It is immaterial to this issue that ownership of the water rights by IID and its irrigators is also joint.

In light of these facts, it is the Farmers' current view that all water rights, including any increment due to federal enhancement, likely retain their 1901 priority and their status as pre-1914 rights. The Farmers are not aware of any authority establishing that such enhancement created any new and separate post-1914 appropriative right. None of the statutes, contracts, applications, permits, or decrees made at mid-century dealt with this issue adequately or at all. No court of record at any of three levels has adjudicated this issue. Thus, there is significant doubt whether the Board had power to take action in this matter, even executive action, including the 1950 Permit and the 2002 Order. This question should be analyzed in connection with the upcoming workshop and any further proceedings.

B. STANDING: NEXUS BETWEEN RIGHTS AND IRRIGATORS

Any executive action arising out of proceedings initiated by the Petition will presumably involve possible additional conditions relating to State implementation and funding of a Salton Sea restoration plan. Any such condition would modify the 2002 Order. The 2002 Order, in turn, modified the 1950 Permit, which recognized appropriative rights that irrigators, including the Farmers, beneficially and equitably own. The above and other substantive rules of prior appropriation underlie the Farmers' right to appear here for all purposes. For such reason, these Comments assert the Farmer's right to full party status in any formal proceedings.

The Farmers believe that the right of a person to appear and participate fully in proceedings of the type sought by the Petition is unclear under the statutes and regulations governing Board proceedings. Under familiar principles governing arguably analogous court proceedings, however, the answer would generally turn, the Farmers contend, on the nature of the interest asserted by the person, its nexus to the issues to be raised, the threat of injury to that interest, and the person's ability to protect his interest as a non-party. *See* Code of Civil Procedure § 367 (real parties in interest), § 387 (intervenors), § 389 (necessary parties).

More particularly, where property is held in trust, as here, the beneficiaries may appear and assert a claim for breach of trust against the trustee, including a claim that the trustee refused or neglected to assert a claim against a third party wrongdoer. The beneficiaries also have standing to appear and be heard against third parties who knowingly participated in or assisted a trustee's breach or were transferees of trust property. *Nasrawi v. Buck Consultants*, 231 Cal.App.4th 328, 343-45 (2014); *Estate of Bowles*, 169 Cal.App.4th 684, 691-94 (2008); *Wolf v. Mitchell*, 76 Cal.App.4th 1030, 1038-41 (1999).

Here, the right of irrigators, including the Farmers, to appear and fully participate is manifest. Their interest in the matter at hand is direct and powerful. From an economic standpoint, the profitability of their farming businesses and the value of their lands depends on a reliable water supply. Petition, pp. 1, 3, 4, 5, 7, 8. And, as demonstrated in detail below, their interests are also legally protected. Other parties, who may appear and participate, including the Bureau, the State, the MET, and CVWD, pose a significant risk of further impairment of the water rights. If the Farmers are not permitted to be fully active, their interests are unlikely to be protected, let alone restored. IID, itself, as trustee, cannot necessarily be counted on to champion the irrigators' rights. The focus of the Petition is restoring Salton Sea; the focus of these Comments is restoring water rights. Furthermore, the interests of IID and its landowners may be adverse. While the Farmers offer no protest and find the relief warranted here, certain of them are challenging the 2013 Plan in another forum.

The nexus between the Farmers' interests and the appropriative rights underlying these proceedings could hardly be stronger or more intimate. No other persons, private or public, enjoy a closer connection to the rights or the water or a greater interest in these proceedings. The Farmers' interests are largely based on certain substantive rules of the prior appropriation doctrine, to which we now turn.

(1) **Priority Within California**

As discussed above, priority of use is a central tenet of the appropriation doctrine: first in time is first in right. Civil Code § 1414; *El Dorado Irrigation District v. State Water Resources Control Board*, 142 Cal.App.4th 937, 961-62 (2006).

Here, the Imperial Valley appropriative rights are early and large. The 1979 Decree reveals that the present perfected rights had one of the earliest priority dates (1901) among all lower basin rights and are by far larger than any right prior thereto. This senior status of the rights, equitably and beneficially owned by irrigators, accentuates not only all irrigators' substantive rights but also the Farmers' claim to the right to appear and participate fully in these proceedings.

(2) **Usufructuary Rights**

A right to divert and use water is private property at common law. *Nicoll v. Rudnick*, 160 Cal.App.4th 550, 557-59 (2008); *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 726-27 (1908). This rule applies specifically to the rights exercised to water the Imperial Valley. *Thayer*, 164 Cal. at 125. A right of prior appropriation (first use) does not confer ownership of the water of the stream, but a "usufructuary" interest, or right to the use of such water. *Nicoll*, 160 Cal.App.4th at 556; *Kidd v. Laird*, 15 Cal. 161, 179-80 (1860); *Eddy v. Simpson*, 3 Cal. 249, 252 (1853). [15]

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[15] To attain perfection and avoid forfeiture of an appropriative right, it must be exercised so as to use the water for a "beneficial" purpose. The irrigation of farmland to grow crops is such a beneficial purpose. An appropriative right is measured by reasonable use; it does not extend to waste. *Haight v. Costanich* 184 Cal. 426, 431, 493 (1920); *Senior v. Anderson*, 130 Cal. 290, 297 (1900). Use of water in an amount consistent with local custom is reasonable. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal.2d 489, 547, 570, 573-74 (1935); *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 22-23 (1929); *Barrows v. Fox*, 130 Cal. 290, 297 (1895).

Here, it is the irrigators, including the Farmers, who use the water upon exercise of the rights. The actual users of the water in question are entitled above all others to appear and participate.

(3) <u>Appurtenant Rights</u>

An appropriative water right to use surface water to irrigate crops is "appurtenant" to the land irrigated. *Nicoll*, 160 Cal.App.4th at 558; *Erwin v. Gage Canal Co*., 226 Cal.App.2d 189, 192, 193 (1964); *South Pasadena v. Pasadena Land and Water Co.*, 152 Cal. 579, 588 (1908); *Farmer v. Ukiah Water Co.*, 56 Cal. 11, 13-14 (1880). Prior to 1922, when the Imperial Valley irrigation project remained in private hands, the appropriative water rights exercised to irrigate farmers' lands were appurtenant to such lands. *Thayer*, 164 Cal. at 136. They have remained so under the post-1922 regime of IID. *Bryant*, 447 U.S. at 371 n.23.

In the instant matter, the rights are appurtenant only to the lands owned and operated by irrigators inside IID, including the Farmers. They are not appurtenant to lands of urbanites on the coastal plain nor to any lands managed by wildlife habitat personnel at the shore of the Salton Sea or by dust suppression specialists there or elsewhere.

(4) <u>Joint Ownership of Water Rights</u>

Where surface water is diverted by one party, but used by others, as is common in California and the West, the acquisition, ownership, and exercise of the appropriative water rights are joint. At common law, the diverter holds mere title to the rights; the irrigators are the beneficial and equitable owners thereof. *Quist v. Empire Water Co.*, 204 Cal. 646, 651-52, 653 (1928). Also, where the diverter is an irrigation district, the irrigators, on "familiar equitable principles," are the equitable and beneficial owners of the water right, while the district holds legal title only in trust for the irrigators. *Merchants' National Bank of San Diego v. Escondido Irrigation District*, 144 Cal. 329, 334 (1904). The IDA codified this principle: "The title to all

property acquired by a district is held in trust for its uses and purposes." Water Code § 22437. "Property" embraces all "water rights." Water Code § 20529. "Acquire" includes "jointly" acquire when "joint" acquisition is permitted. Water Code § 20532.[16] The courts have specifically applied the joint ownership principle to IID and its farmers. *Bryant*, 447 U.S. at 371 n.23; *Hall*, 198 Cal. at 383. As the above cases hold, appropriative rights jointly held are private property under California law. *See Tulare Lake Basin Water Storage District v. U.S.*, 49 Fed.Cl. 313, 318-20 (2001) (end users own interest in right to use water appropriated, diverted, and conveyed by state agency); *Casitas Municipal Water District v. U.S.*, 543 F.3d 1276, 1289-90, 1294, 1295 n.16, 1296 (Fed.Cir. 2008) (local agency owns right to use water appropriated and diverted by federal agency).[17]

Here, during the period of private development, CDC, SPC, or the mutual water companies held title to the water rights, while the irrigators owned the equitable and beneficial interest therein. Since 1922, IID has held title to the water rights in trust for such uses and purposes and the irrigators, including the Farmers, own the equitable and beneficial interest. No one else claims any such interest. This, alone, entitles the Farmers to full participation in any formal proceedings.

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[16] *See Ivanhoe Irrigation District v. All Parties*, 47 Cal.2d 587, 624-27 (1957) (applying joint ownership rule), *reversed on other grounds*, *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), *on remand*, *Ivanhoe Irrigation District v. All Parties*, 53 Cal.2d 692, 716 (1960) (original statement dicta).

[17] At least two high courts in western states have recently enforced and explained the joint ownership rule. *Klamath Irrigation District v. U.S.*, 348 Ore. 15, 36-50, 57 (2010); *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 109-15 (2007). In three landmark cases, the U.S. Supreme Court explicated the rule, applying the law of several other states. *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Nevada*, 463 U.S. at 125-26.

(5) **Priority Within a Western Multistate Basin**

Where a river traverses more than one western state, each of which follows the doctrine of prior appropriation, a senior appropriator in one state enjoys priority over a junior appropriator in the other. *Bean v. Morris*, 221 U.S. 485 (1911). The same guiding principle applies where multiple states through which a western river flows (each acting as a self-appointed representative for its diverters) invoke the Supreme Court's original jurisdiction to apportion its waters. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419, 467-68, 470-71 (1922).[18]

While the water rights underlying the Petition were established under California law and both IID and the irrigators are California occupants, other diverters and users of Colorado River water occupy other basin states. Under *Bean*, the Farmers may assert their California senior rights (usufructuary, appurtenant, and jointly owned) in federal court against out-of-state junior competitors. This enhances the Farmers' right to appear and fully participate in any proceedings here.

(6) **Changes and Transfers: No Injury**

At common law, rights could be changed and water could be transferred if there was no injury to legal users. *Kidd*, 15 Cal. at 179-81. The "no injury" rule has been frequently codified. *E.g.*, Civil Code § 1415, Water Code § 1702 (post -1914), § 1706 (pre-1914).[19] The

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[18] *Compare Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 101-10 (1938) (interstate compact that equitably apportions river trumps prior appropriation doctrine), *reversing La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 130-33 (1935), *La Plata River & Cherry Creek Ditch Co, v. Hinderlider*, 101 Colo. 73, 75-77 (1937) (doctrine trumps compact). While these cases address relevant principles, the Farmers contend that they are factually distinguishable.

[19] Despite differences in wording, the various statutes are construed consistently. *State Water Resources Control Board Cases*, 196 Cal.App.4th 674, 736-45 (2006).

"legal users" are those who put the water to use; without such use, there is no right. *State Water Resources Control Board Cases*, 136 Cal.App.4th at 800-04. The word "injury" means interference with rights to use water. *State Water Resources Control Board Cases*, 136 Cal.App.4th at 805.

The 2002 Order approved such changes and transfers. The irrigators are, not only the equitable and beneficial owners of the water rights in question, but also the sole legal users of the water. The protection the law affords to such legal users under the "no injury" rule also establishes the Farmers' right to appear and participate in any future proceedings.

(7) <u>Equitable Distributions</u>

An irrigation district shall establish "equitable" rules for the distribution of water. Water Code § 22257. Water shall be distributed "equitably." Water Code § 22252. When an irrigation district employs a watermaster to operate diversion works, it may make reasonable distribution regulations in accordance with determined "rights" as may be needed. Water Code § 22085. A district's watermaster shall distribute the water among users entitled to its use according to the "rights" of the users. Water Code § 22085.5.

The Farmers contend that, to be equitable, a distribution plan must comport with the rights fixed under the above rules of prior appropriation. Distribution in accord with rights is clearly reasonable and equitable; indeed, no other basis is evident. In particular, an irrigation district should distribute water inside its boundaries to irrigators according to soil and crop needs, rather than uniformly. *Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1246 (2000); *Williard v. Glenn-Colusa Irrigation District*, 201 Cal. 726, 742-43 (1927); *Nelson v. Anderson-Cottonwood Irrigation District*, 51 Cal.App. 92, 96 (1921). A diverter may not distribute water to non-irrigators who reside outside its borders and own no (or lower priority) rights. *Barstow*, 23 Cal.4th at 1248, 1249, 1252.

The Farmers claim statutory entitlement to equitable distributions based on rights. IID complied with the above statutes for 90 years. This right further supports standing of the Farmers to appear and participate fully in all Board proceedings.

C. HISTORICAL CONSTITUTIONAL ISSUES

The Farmers' list of legal issues for the upcoming workshop includes four constitutional questions that have remained unresolved over time. The words of the ancient and familiar clauses at issue seem clear enough, but still have not been fully explained and construed by the courts. The Farmers here suggest how these fundamental principles might be applied here.

(1) Taking Property: Public Use Clause

In the 1999 Memorandum, Deputy Secretary Hayes wrote to Secretary Nichols that the MET and CVWD were waiting in the wings ready to pounce and "take" additional water without compensation; they were not the only takers. Private property may be taken for "public use" only when just compensation has first been paid to the owner. Cal.Const. Art.I, § 19.[20]

As shown above, the term property, as used in the public use clause, is defined by state law. Irrigators own the equitable and beneficial interests in the usufructuary and appurtenant water rights. California water rights of all types constitute property. *Los Angeles v. Aitkin*, 10 Cal.App.2d 460, 466-72 (1935); *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-55 (1950); *Dugan v. Rank*, 372 U.S. 609, 619-26 (1963). This includes appropriative rights. *Tulare Lake Basin Water Storage*, 49 Fed.Cl. at 318-20; *Casitas Municipal Water District*, 543 F.3d at 1289-90, 1294, 1295 n.16, 1296.

The above cases also show that water rights are taken (whether by physical or regulatory action) where the State acts to impair the right and, consequently, reduce water supply and use.

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[20] The quoted phrase is defined as the public's beneficial right to use property. *Black's Law Dictionary* (9th Edition).

Various actions of the State and its subordinate agencies here (apportionments, limitations, caps, transfers, plans) have likely taken the property of IID irrigators.

A taking of property is constitutional, however, if it is for a "public use." The court decisions focus more on the noun "use" than on the adjective "public;" "use" has been construed broadly to mean "purpose." *See Stockton and Visalia Railroad Co. v. Stockton*, 41 Cal. 147, 168, 175 (1871); *Kelo v. City of New London*, 545 U.S. 469, 480 (2005). But it still must be "public," not private.[21] Another clause of the Constitution that uses the phrase "public use" has been interpreted to mean a use for the "general public," not for "particular individuals." *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 89-90 (1909).

No court of record has adjudicated whether any taking of the irrigators' water rights here was for a public use. This issue should be evaluated by the Board and participants in connection with the workshop and, perhaps, beyond.

The Farmers do not address at this time whether the shift of water from valley irrigation use to coastal domestic and industrial use meets the test.[22] Instead, they believe that analysis should initially focus on out-of-state economic uses and local environmental uses.

As to the former, when the people of California framed its Constitution, they made it for themselves, not for the people of any other state. Uses that are "public" almost surely were intended to refer to those within California, not out-of-state uses.

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[21] *Black's* defines the adjective as "[r]elating or belonging to an entire . . . state . . ." or "[o]pen or available for all to use . . ." The meaning, as explicated in a leading general dictionary, is authorized or administered by or acting for "the people as a political entity;" accessible to or shared by "all" members of the community (public water supply); "supported by or for the benefit of the people as a whole;" or "of, by, for, or directed to the people." *Webster's Third New International Dictionary of the English Language, Unabridged* (Springfield: G.&C. Merriam Co.).

[22] In *Stockton and Visalia Railroad*, exercising judicial restraint, the court upheld a statute that directed Stockton to subsidize a private railway between Stockton and Visalia.

The 1922 Compact with its 7,500,000 acre-foot apportionment, had the purpose and effect of shifting water from California uses to uses in other basin states. In the 1929 State Act, the State agreed with the United States that the use of river water in California shall not exceed 4,400,000 acre-feet per annum; it was expressly made "for the benefit of the [six other basin] States." Moving water uses in California to water uses in other states, the Farmers suggest, may not be a "public" use. California politicians are elected (and administrators are appointed) to serve users of water in California, not users in other states.

As to local uses, the plain meaning of the adjective "public" is acting for the people of California as a whole.[23] Local, limited, or specialized use does not seem to be public use.

The 2002 Order and the QSA agreements provide for mitigation transfers for fish and bird habitat and dust suppression in the locality. These transfers directly benefit a small group of wildlife managers at one California lake and they also indirectly benefit fishers and birdwatchers who travel to that area. Direct benefits from dust suppression aid a few managers and could also assist indirectly certain adversely affected persons in the vicinity of the sea and fallowed lands. There exists an issue whether such limited uses of mitigation water by such narrow groups of users can be deemed "public" uses. If so, there are very few private uses of water that do not meet the constitutional test.

The Farmers ask whether their property has been taken, at least in part, for other than "public" uses. Statewide uses satisfy the requirement, but it is doubtful that out-of-state economic uses do, and limited local ecological uses may be in doubt too.

(2) <u>Deprivation of Property: Due Process Clause</u>

A person may not be deprived of property without "due process of law." Cal.Const., Art.

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[23] *Webster's* defines it as acting for the people as a political entity, shared by all therein, and for their benefit as a whole.

I, § 7(a). For the reasons outlined above, there is little doubt that irrigators interests in the water rights are property and California executive officials have deprived them of it. At issue, the Farmers contend, is whether they were deprived of their property without "due process of law."

The "due process of law" clause governs property deprivations committed by all three branches of state government. Where a property deprivation is effected by executive action, the Governor or subordinate executive official fails to afford "due process" if he or she fails or refuses to act according to existing "law," which includes judicial precedents published by appellate courts of record, as well as legislative codifications thereof. *People v. Brown*, 29 Cal.3d 150, 157-58 (1981).[24]

In the instant matter, the "law" to be executed by the executive branch included the judicial precedents and legislative codifications manifesting the prior appropriation doctrine. The "process" that was "due" was carrying into effect that existing law.

The executive actors here did not execute the applicable rules of appropriation law, as codified. Instead, they repeatedly overlooked, neglected, or ignored the governing law and substituted new notions of policy (apportionments, limitations, caps, transfers, etc.) to effect the property deprivations. The Farmers' present thinking is that such deprivations may not satisfy the "due process of law" test and, therefore, would likely be unconstitutional.

(3) <u>Faithful Execution of Laws</u>

Another constitutional clause is to similar effect. The supreme executive power of the State is vested in the Governor. Cal. Const. Art. V, §1. The duty of an executive official is to

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[24] *Black's* defines the phrase, as follows: "The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case." *Webster's* defines the noun "process" as a progressive forward movement from one point to another on the way to completion and the adjective "due" as satisfying a requirement, obligation, or duty; thus, "due process" is "a course of proceedings at law . . . that is in accordance with the law of the land."

"see that the law is faithfully executed." Cal. Const., Art. V, §1. The governing body of a municipality violates its duty to see that the law is faithfully executed when it uses "artful bureaucratic devices" to circumvent and avoid obeying a state statute it does not like. *Wilson v. Laguna Beach*, 6 Cal.App.4th 543, 546, 557-58, 560-61 (1992) (dicta). The "law" includes common law principles, as well as legislative codifications thereof. *Brown*, 29 Cal.3d at 157-58 (same word in another clause).[25]

This issue before the Board has not been adjudicated by the courts. The Farmers contend that the Board, the parties, and others should in these proceedings analyze the multiple governmental actions of the past for obedience to this principle.[26]

First, they should consider whether the State's execution of the 1922 Compact faithfully executed the law. The laws in question include the doctrine of prior appropriation applicable in California (as codified) and all basin states, as well as the *Bean* and *Wyoming* cases, decided before such execution. No *Bean* action against other basin diverters was instituted. If apportionment by states (as opposed to appropriators) was deemed necessary or desirable, a *Wyoming* action by California would have achieved that objective. Signing and performing the 1922 Compact, it appears, did not faithfully execute the law; it was a political compromise that disregarded the controlling law.

Also worthy of careful consideration, the Farmers believe, is whether the apportionment that was made in the 1922 Compact (7,500,000 acre-feet to the lower basin states) complied with

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[25] The executive must execute the law, not make it. *See Medellin v. Texas*, 522 U.S. 491, 523-30, 532 (2008) (comparable federal clause).

[26] According to *Webster's*, the verb "see" means to look ahead, direct attention, attend, make sure, or take care. The adverb "faithfully" means "dutifully" and "loyally," as well as "accurately." The verb "execute" means to "put into effect: carry out fully and completely," to "give effect to: do what is provided or required," or to "perform the acts necessary to the effectiveness" of the law. *Black's* definition is: "To perform or complete (a . . . duty)."

the constitutional mandate. No California law of which the Farmers are familiar required, or even authorized, the State to agree to divide the basin in two. No legal precedent compelled any such apportionment. It did not seem to serve any valid interest of the State, let alone its appropriators. Indeed, its primary effect has been to impair the water rights of California appropriators, including the Imperial Valley irrigators.

IID is a political creation of the State that exercises executive power (operating diversion and conveyance works, owning and operating distribution works, conducting litigation, making contracts, seeking permits, and making distribution plans). When IID and six other California diverters signed the 1931 Intrastate Agreement, each impliedly accepted the 4,400,000 acre-foot California limitation. This acceptance, in effect, purported to waive a large portion of the entitlement owned by the Imperial Valley irrigators. IID explicitly also agreed to the 3,850,000 acre-foot limitation.[27] The Farmers' current view is that IID may not have faithfully executed the law.

IID filed the 1933 Application with the Board's predecessor. As discussed above, the water rights covering the supplemental federal supply are best characterized as pre-1914 rights over which the Board lacked power. Filing the 1933 Application appears to be inconsistent with IID's constitutional duty to see that the law is faithfully executed. In the 1933 Application, IID stated that total diversions shall not exceed 3,850,000 acre-feet per year. This, too, was constitutionally dubious.

The issuance of the 1950 Permit by the Board's predecessor was arguably beyond the scope of its executive power, because all rights were likely pre-1914 rights. By reviewing the

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[27] IID landowners unsuccessfully challenged IID's action on contractual grounds (failure of consideration) and statutory grounds (*ultra vires*). *Greeson v. Imperial Irrigation District*, 59 F.2d 529 (9th Cir. 1932).

1933 Application and granting the 1950 Permit, the Board's predecessor arguably failed to see that the law was faithfully executed.

IID applied for, and the Board granted, the 2002 Order. The Farmers currently hold the view that the Board's and IID's actions may not have faithfully executed the law, as they acted on policies that contradict the rules of prior appropriation.

The Farmers believe that each of these and other executive actions may be constitutionally suspect. No tri-level court of record has adjudicated any one of them. This issue should be evaluated by the Board and other participants in connection with the upcoming workshop and any subsequent proceedings.

(4) <u>Separation of Powers</u>

The Farmers have heretofore in these Comments treated the actions of the Board and IID as exercises of executive power. The Board is directly under the supervision and a part of the "executive" branch. *Imperial Irrigation District*, 225 Cal.App.3d at 566, 567. An irrigation district also exercises executive power when it operates irrigation works, makes water distributions, makes contracts, litigates disputes, seeks permits, or adopts plans. *Federal Construction Co. v. Curd*, 179 Cal. 489, 494 (1918).

But the Legislature has also purported to redelegate legislative powers or assign judicial powers to state boards and local districts. Here, for example, the Board by statute shall exercise the "adjudicatory" and "regulatory" functions of the State in the field of water resources. Water Code § 174. One court has said that irrigation districts, including IID, are also vested by statute with "judicial" and "legislative" powers. *Imperial Irrigation District*, 225 Cal.App.3d at 565, 566, 567.

The Farmers now hold the view that such statutes and any actions taken thereunder may violate the separation of powers doctrine. The "powers" of state government are "legislative,

executive, and judicial;" however, persons charged with the exercise of one power "may not exercise either of the others . . ." Cal.Const. Art. III, § 3; *Estate of Cirone*, 189 Cal.App.3d 1280, 1286 (1987). Any statutes purporting to confer judicial or legislative power on the Board or IID appear to violate this constitutional mandate.

The "judicial power" of the State is vested in the "Supreme Court, courts of appeal, and superior courts, all of which are courts of record." Cal.Const., Art VI, § 1. It was not within the power of the Legislature to vest judicial power in the Board's predecessor. *Department of Public Works v. Superior Court*, 197 Cal. 215, 221 (1925). Neither the Board nor IID is such a tri-level court of record.

The "legislative power" of the State is vested in "the California Legislature which consists of the Senate and Assembly . . ." Cal.Const., Art. IV, § 1. The Legislature may not attempt to redelegate its own legislative powers to a water agency by conferring unlimited or uncontrolled discretion; it must, at least, resolve fundamental issues, make basic policy decisions, and adopt specific standards and safeguards. *Light*, 226 Cal.App.4th at 1491, 1493; *Bayside Timber Co. v. Board of Supervisors*, 20 Cal.App.3d 1, 10-11 (1971); *People v. Parks*, 58 Cal. 624, 641-44 (1881). Neither IID nor the Board is the Senate or Assembly, nor have they been given such guidance.

In the early days of the State the appellate courts of record established in their precedents the rules of the prior appropriation doctrine. Over the years, especially in 1872 and 1943, the Senate and Assembly have passed various statutes codifying those rules. The judicial and legislative powers having been duly exercised, the role of the executive is to execute those laws, not to overlook, neglect, or ignore them and invent contrary policies under the guise of quasi-legislative or quasi-judicial discretion.

Here, if and to the extent the Board or IID purported to exercise judicial or legislative powers to impair the irrigators' water rights, reduce distributions, require land fallowing, transfer water to urban households and businesses, fish and bird habitat managers and recreationalists at the Salton Sea, or dust suppression experts, the Farmers suggest that such action was beyond its constitutional power. This issue too, should be taken up in connection with the workshop.

D. NONCONSTITUTIONAL ISSUES

(1) Uses Within IID Boundaries

The IDA provides that an irrigation district may do any act necessary to furnish sufficient water "in the district" for any beneficial use. Water Code § 22075. It may distribute water for beneficial uses of district "inhabitants" or "owners of rights to waters therein." Water Code § 22078.[28] By way of exception, an irrigation district may lease or sell "any surplus water or use of surplus waters not then necessary for use within the district for use . . . without the district." Water Code § 22259. Also, out-of-district use is authorized where it was required at the time the district acquired the supply. Water Code §§ 22258, 22280(c). These statutes have not been repealed. More recent, but more general, statutes, however, also warrant consideration.

Voluntary transfers of water and water rights should be facilitated, and the Board must encourage them. Water Code § 109. State agencies should provide assistance for voluntary transfers. Water Code § 475. These provisions are silent about use of water outside an irrigation district. Furthermore, both express solicitude for the protection of the underlying water rights. At issue is whether these provisions impliedly repeal the above IDA provisions, and that seems doubtful.

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[28] Several other IDA provisions refer to use of water for irrigation of lands "in the district" or "within the district." Water Code §§ 22250, 22251, 22252.3, 22280(f).

Other statutes should also be consulted. Any person entitled to use water may reduce use through conservation (including land fallowing) and transfer the conserved water. Water Code § 1011. However, this statute benefits users, and is silent about transfers outside of an irrigation district. An implied repeal of the IDA provisions appears improbable.

Furthermore, a local public agency supplying water may contract with a local water supplier for a transfer outside the service area whether or not the water is surplus to the needs within the service area. Water Code §§ 1745.04, 1745.06. However no such transfer shall cause a diminution or impairment of any water rights. Water Code § 1745.07. Furthermore, such transfer is authorized only if the water supplier has allocated to the water users within its service area the water available for the water year, and no other user will receive less than the amount provided by that allocation or be otherwise unreasonably adversely affected without that user's consent. Water Code § 1745.04. The exceptions appear to render the rule inoperative here.

This issue should have been finally adjudicated by the courts prior to the transfer to the MET promoted by D-1600. It merits analysis by the Board, the parties, and commentators now in connection with the workshop and any further proceedings.

(2) <u>Irrigation and Domestic Uses</u>

In the 1922 Compact, California made an executive promise to the other basin states to apportion 7,500,000 acre-feet of water to the lower basin for "agricultural" and "domestic" use. In the 1929 Federal Statute and 1929 State Statute, California made a legislative promise to the U.S. to limit the State to 4,400,0000 acre-feet for "irrigation" and "domestic" use. In the 1932 IID-Bureau Agreement, IID promised the Bureau it would confine itself to such types of use.

The 2002 Order and certain of the QSA agreements, however, provide for other types of use, including fish and bird habitat at the Salton Sea and dust suppression there and on fallowed land in IID. At issue is whether these new uses comport with the uses specified in the early

contracts. While the transfers to the urban centers are mainly for domestic use, the transfers for environmental uses do not seem to be for either "irrigation" or "domestic" uses.

It would have been useful if the courts had adjudicated this question before the 2002 Order and the QSA agreements. At the very least, this issue should be evaluated in connection with the workshop and any subsequent proceedings.

(3) <u>Dust Suppression</u>

The 2002 Order discussed possible dust (particulate) emissions from fallowed farmland and exposed shoreland. 2002 Order, pp. 72-74. One condition required compliance with several plans and reports issued by other agencies. 2002 Order, pp. 90-91.

The 2002 Order cited no case or statute supporting the Board's authority to impose the condition. In another context (wildlife habitat) the Board relied primarily on Water Code § 1736. That section also provides that the Board may approve a change and transfer that "would not unreasonably affect . . . instream beneficial uses."

The uses of water to inundate two types of land area from which dust might be emitted do not seem to be "instream" uses. Fallowed land never was instream, and exposed shoreland no longer is. The Farmers are aware of no law holding that the use of water to suppress dust is a beneficial use. Arguably analogous uses are held to be nonbeneficial. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 2 Cal.2d 489, 567 (1935) (gopher extermination); *Joshin v. Marin Municipal Water District*, 67 Cal.2d 132 (1967) (transporting gravel).

Ideally, this legal issue should have been adjudicated by a court of record (sole depository of judicial power) prior to the 2002 Order. Absent any such judgment or precedent, it would have been desirable had the Board, in imposing the condition, analyzed the issue therein pursuant to its statutory duties relating to water rights and the appropriation of water. (Water Code §§ 174, 179) and its constitutional duties to faithfully execute the law and exercise due

process of law. The Board, the parties, and other interested persons should now evaluate this issue in connection with the upcoming workshop, as well as in connection with any subsequent proceedings.

(4) Wrongful Exercise of Dominion

The executive contract of 1922 and the legislative contract of 1929 raise another legal issue. Each contains a promise by the State, which it has carried out over many decades, to exercise dominion and control over the private property interests of a select group of California owners, including IID irrigators, for the benefit of third persons.

One has a duty at law not to exercise dominion and control over specific and identifiable personal property of another. *Meeker v. Belridge Water Storage District*, 2006 U.S. Dist. LEXIS 91775, 105-106 (E.D. Cal. Oct. 18, 2006). Once severed, reduced to possession, and contained, water becomes personal property subject to this duty. *Santa Clara Water Co. v. Lyons*, 161 Cal.App.3d 450, 461 (1984).[29] The Farmers are not aware of any authority holding that a different substantive result obtains simply because the parties asserting wrongful dominion were political officials.

This issue has not been adjudicated by a court of record. It should be taken up in the instant proceedings.

(5) Out-of State Subsidies

Another concern arising out of the public contracts of the Twenties is their extraterritorial benefits. They shift water to users in the six other basin states. Neither provided any benefit to any citizen or resident of California.

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[29] Courts in at least three other basin states have held that irrigators may assert such a claim against a third-party. *Hagerman Irrigation Co. v. McMurray*, 113 P. 823 (N.M. 1911); *Whitmore v. Utah Fuel Co.*, 131 P. 901 (Utah 1913); *Gila Land and Water Co.*, 30 Ariz. 569 (1926).

As discussed above, California officials were elected or appointed to serve people within their jurisdiction. One can hardly imagine, say, DWR building and operating a water project to serve irrigators in Colorado, the Board granting a permit to appropriate water there, or DFG managing fish or bird habitat there. The Farmers are aware of no authority permitting such extraterritorial benefits or subsidies.

This question has not been adjudicated in any court, but should be evaluated in the workshop and any further proceedings.

(6) <u>Trust Duties of IID</u>

The terms of the trust that holds the water rights include relevant duties of IID under the California Constitution, the IDA, and the prior appropriation doctrine, as codified. IID is also bound to obey the general duties of a trustee with respect to trust property under the California law of trusts, including the duties of care, candor, and loyalty owed by a fiduciary. Probate Code §§ 16000 et seq. The trustee may not transfer trust property for the benefit of third persons, nor may he or she neglect to assert claims against third persons who injure trust property. *Nasrawi*, 231 Cal.App.4th at 344; *Bowles*, 169 Cal.App.4th at 691-94; *Wolf*, 76 Cal.App.4th at 1037-38.

These duties bound IID when it signed the 1931 Intrastate Agreement, the 1932 IID-Bureau Agreement, and the 1933 Application, and when it applied for approval of QSA changes and transfers and signed the QSA agreements. But it appears to have overlooked, neglected, or ignored the rules of prior appropriation when the water rights of the irrigators were shifted to other users.

These obligations of IID, as trustee, to its irrigators, as beneficiaries, of the trust should be kept in bold relief in connection with the workshop and any further proceedings.

(7) <u>Trust Duties of Others</u>

A third person may not participate with a trustee in a breach of trust, nor may he or she

wrongfully take or use trust property. *Nasrawi*, 231 Cal.App.4th at 344, 345; *Bowles*, 169 Cal.App.4th at 692; *Wolf*, 76 Cal.App.4th 1038-40.

Here, as detailed above, the State, its executive agencies, and certain district diverters have arguably either participated with IID in breaches of trust or received more water as a result thereof.

Again, these legal obligations of participants are important. The Farmers contend that they should be taken into due account in connection with the workshop and any resulting Board proceeding.

Here, as with each of the issues listed above, executive officials must first follow the law; only then may they indulge in policy implementation consistent therewith.

IV. <u>ALTERNATIVE REMEDIES</u>

A. CONTRACTUAL LITIGATION

In *QSA Cases*, 201 Cal.App.4th 758, 796-805 (2011), widely cited in the Petition, the court held that the Joint Powers Agreement did not violate the appropriation clause of the California Constitution. In connection therewith, the court discussed a hypothetical case in which IID sued the State for breach of contract and won a judgment but, in the absence of an appropriation, could not enforce it. *QSA Cases*, 201 Cal.App.4th at 796-97, 804-05. The Petition analyzes other contractual principles, including detrimental reliance and failure of consideration. Petition, pp. 41-44.

The Farmers submit that still another contractual principle should also be considered in the workshop phase of this proceeding and, perhaps, thereafter—a demand for adequate assurances. When reasonable grounds for insecurity arise with respect to performance of a contract, the promisee may demand adequate assurance of due performance and suspend his or her own; failure of the promisor to provide such assurance is a repudiation of the contract.

Commercial Code § 2609;[30] Restatement 2nd Contracts § 251. IID (and DWR, FGD and, perhaps, the Board, itself) could submit letters to the Governor demanding assurances in the form of a restoration plan and the Assembly and the Senate demanding assurance in the form of an appropriation.[31]

B. STATUTORY LITIGATION

The Petition analyzes the State's statutory commitment to restore the Salton Sea under Fish and Game Code §§ 2931 and 2940. Petition, pp. 29-41.

The Farmers believe that IID's analysis merits careful consideration.

C. CONDITION TO 2002 ORDER

The 2002 Order contained 17 conditions. None dealt explicitly or directly with implementing or funding Salton Sea restoration. The 2002 Order was made before all the QSA agreements were executed, the statutory commitments were enacted, and any proposed plan was published, and before the decade of State inaction.

The Petition requests that the Board, following resolution of the restoration plan, modify the 2002 Order to add State implementation and funding thereof as a condition of transfers under the QSA. Petition, pp. 48-51.

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[30] The majority rule in the U.S. is that a transfer of water is a sale of goods. *See Bennett v. Milford Water Co.*, 2012 Mass.Super. LEXIS 341 *20-*24; *Adel v. Greensprings of Vermont, Inc.*, 363 F.Supp2d 692, 696-97 (D. Vt. 2005).

[31] The Petition states that under Section 6.2 of the Three-Party QSA, "a failure of any one of the premises in Section 6.2 has the effect of discharging the contracting parties from their obligations under the contract." It argues that under Section 6.2(13) the QSA is "premised" on the "the State's commitment to undertake the restoration of the Salton Sea. It notes that this possible contractual issue is not presented to the Board at this time. Petition, pp. 42-44. The Farmers note that under Section 6.2(11), the QSA is also "premised" on the "adoption and continuation in full force and effect of the [2002] Order, as the same may be amended from time to time in a manner and to the extent acceptable to the Parties." Thus, the Board and all participants in these proceedings should be aware that any modification to the Order that might come from these proceedings or otherwise, unless accepted by the Parties, could potentially undo the QSA.

The Farmers believe that such an exercise of executive power by the Board is warranted. They further believe that the Board should consider adopting and transmitting to the Governor and Legislature a resolution reciting and explaining such action.[32]

V. THE FARMERS' POSITIONS

1. The Farmers intend to appear at the workshop and any subsequent proceedings with full rights and request the Board's express approval of such status.

2. IID's requested relief is warranted.

3. The Board should take all appropriate executive action in support of any new condition. It should consider endorsing any demand to California by IID or others for adequate assurances and adopting and transmitting to the Legislature and Governor a resolution of support.

4. The Board should take no action that would injure or impair irrigators' equitable and beneficial interests in the water rights and take all appropriate executive actions that protect and preserve them. The Board's water rights function is to consider the availability of unappropriated water whenever applications for appropriation of water are granted. Water Code § 174. The Board is vested with all powers and duties conferred by laws under which permits to appropriate water are issued. Water Code § 179. By virtue of these and other provisions, the Board should also take all appropriate executive action to restore the irrigators' property interests that have been unconstitutionally taken or deprived or otherwise unlawfully injured on the long train of abuses outlined above.

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[32] The Farmers are prepared to discuss at the workshop technical matters, such as local storage, overrun and underrun management, dust suppression, and implementation of the 2013 Plan.

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SMILAND CHESTER ALDEN LLP
William M. Smiland
Theodore A. Chester, Jr.
Mary C. Alden

By /S/ Theodore A. Chester, Jr.
Theodore A. Chester, Jr.
Attorneys for Farmers

COURTESY COPIES SERVICE LIST

Mr. Kevin E. Kelley
General Manager
Imperial Irrigation District
333 East Barioni Boulvard
Post Office Box 937
Imperial, CA 92251

Mr. Stephen W. Benson
President
IID Board of Directors
Imperial Irrigation District
333 East Barioni Boulvard
Post Office Box 937
Imperial, CA 92251

Ralph Cordova, Jr.
Executive Officer
Imperial County of California
940 West Main Street, Suite 211
El Centro, CA 92243

Mr. Ryan E. Kelley
Chairman of the Board
Imperial Valley Board of Supervisors
940 Main Street
El Centro, CA 92243

Ross G. Simmons, Esq.
Joanna Smith Hoff, Esq.
Imperial Irrigation District
333 East Barioni Boulevard
Post Office Box 937
Imperial, California 92251

Ronald L. Olson, Esq.
MUNGER TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Charles T. DuMars, Esq.
Law & Resource Planning Associates, P.C.
Albuquerque Plaza
201 Third Street NW, Suite 1750
Albuquerque, New Mexico 87102

David R.E. Aldjem, Esq.
DOWNEY BRAND LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Hon. Jerry Brown
Governor of the State of California
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Hon. Kevin de Leon
President Pro Tem of the Senate
State Capitol, Room 205
Sacramento, CA 95814-4900

Hon. Toni G. Atkins
Speaker of the Assembly
Post Office Box 942849, Room 219
Sacramento, CA 94249-0078

Hon. John Hickenlooper
Governor of the State of Colorado
Office of the Governor
136 State Capitol Bldg
Denver, CO 80203

Hon. Matthew Mead
Governor of the State of Wyoming
State Capitol
200 West 24th Street
Cheyenne, WY 82002-0010

Hon. Doug Ducey
Governor of the State of Arizona
1700 West Washington Street
Phoenix, Arizona 85007

Hon. Susana Martinez
Governor of the State of New Mexico
Office of the Governor
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501

Hon. Gary R. Herbert
Governor of the State of Utah
350 North State Street, Suite 200
Post Office Box 142220
Salt Lake City, Utah 84114-2220

Hon. Brian Sandoval
Governor of the State of Nevada
State Capitol Building
101 N. Carson Street
Carson City, NV 89701

Hon. Michael L. Connor
Deputy Secretary of the Interior
U.S. Department of Interior
1849 C Street, N.W.
Washingtion, D.C. 20240

Hon. Estevan Lopez
Commissioner of U.S. Bureau of Reclamation
Bureau of Reclamation
1849 "C" Street NW
Washington D.C. 20240-0001

Hon. John Laird
Secretary of California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Hon. Charlton H. Bonham
Director of California Department of Fish & Wildlife
CDFW Headquarters
1416 9th Street, 12th Floor
Sacramento, CA 95814

Hon. Mark W. Cowin
Director of California Department of Water Resources
1416 9th Street, Room 1115-1
Sacramento, CA 95814

Mr. Jeffrey Kightlinger
General Manager
The Metropolitan Water District of Southern California
700 North Alameda Street
Post Office Box 54153
Los Angeles, CA 90012-2944

Mr. James Barret
General Manager
Coachella Valley Water District
Post Office Box 1058
Coachella, CA 92236

Ms. Maureen A. Stapleton
General Manager
San Diego Water Authority
4677 Overland Avenue
San Diego, CA 92123

Mr. Roger Shintaku
General Manager, Salton Sea Authority
44-199 Monroe Street, Suite “C”
Indio, CA 92201