No. D072850

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION 1

MICHAEL ABATTI, AS TRUSTEE, ETC., ET AL.,
Plaintiffs/Respondents/Cross-Appellants,

vs.

IMPERIAL IRRIGATION DISTRICT,
Defendant/Appellant/Cross-Respondent.

On Appeal from the Imperial Superior Court, Case No. ECU07980,
Dept. 9, Honorable L. Brooks Anderholt, Judge Presiding
Telephone: (760) 482-2200

COMBINED APPELLANT'S REPLY & CROSS-RESPONDENT'S BRIEF

Declaratory Judgment Entered August 25, 2017
Writ of Mandate Entered August 31, 2017

NOSSAMAN LLP
*Frederic A. Fudacz, SBN 50546
ffudacz@nossaman.com
Jennifer L. Meeker, SBN 260138
jmeeker@nossaman.com
Gina R. Nicholls, SBN 270174
gnicholls@nossaman.com
Tara E. Paul, SBN 305366
tpaul@nossaman.com
777 S. Figueroa Street, 34th Floor
Los Angeles, California 90017
Telephone: (213) 612-7800
Facsimile: (213) 612-7801

Attorneys for Defendant, Appellant and Cross-Respondent
IMPERIAL IRRIGATION DISTRICT

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Imperial Irrigation District ("IID") is the sole owner of the water rights used to supply water to the Imperial Valley from the Colorado River, which is the Valley's sole source of water. Yet, foundational to the trial court's decision is the conclusion that the farmers within IID hold those water rights, abrogating IID's ability to manage the water. This conclusion is flatly wrong as a matter of law.

Respondents Michael Abatti, Trustee of the Michael and Kerri Abatti Family Trust, and Mike Abatti Farms, LLC, argue that they hold pre-1914 vested water rights through their ancestors, and equitable and beneficial ownership of the water rights held by IID, by virtue of being an irrigating landowner. (E.g., RB 29, 51, 68.) Under this construct, IID is simply an irrigation district with powers so limited that they exist solely to the extent they serve those with ancestors who secured vested water rights and are irrigating landowners today (e.g., RB 53) to the exclusion of all other water users within the service area of IID. (E.g., RB 19, 72.)

Without any evidence to rely upon, Respondents argue that prior to 1914 their ancestors beneficially used Colorado River water diverted by the infrastructure of the local mutual water companies to irrigate property within the Imperial Valley, which is located within IID today. Respondents argue that this beneficial use by unknown and unidentified ancestors gives them vested water rights to the Colorado River water serving the Imperial Valley. Respondents claim their undocumented pre-1914 water rights survived the formation of IID and remained in place after IID acquired the documented water rights that existed at that time and acquired the local mutual water companies and the infrastructure necessary to divert Colorado River water and deliver it to the Imperial Valley. (RB 51.)

Respondents also claim that they, as irrigating landowners, and other "Farmers,"[1] are the equitable and beneficial owners of the water rights held by IID, a claim primarily based on the Supreme Court's decision in *Bryant v. Yellen* (1980) 447 U.S. 352. However, Respondents' interpretation of this case stretches far beyond its holding. In contradiction to Respondents' "water rights" claim, the Court in *Bryant v. Yellen* only recognized the existence of "the landowners[']. . . legally enforceable right, appurtenant to their lands, to continued service by the District." (*Bryant, supra*, 447 U.S. at p.371, fn. 23.)

In contrast, IID has unquestionably established that it legally acquired and owns the water rights to the Colorado River water that it diverts and delivers to the Imperial Valley. Those water rights are held by IID "in trust" "for its uses and purposes" under the Irrigation District Law. (Wat. Code, § 22437.) Further, IID "may do any act necessary to furnish sufficient water in the district for *any beneficial use*." (Wat. Code, § 22075, emphasis added.) And the IID Board of Directors ("Board") is granted broad statutory authority to exercise its discretion to determine the equitable distribution of the water within its service area. (Wat. Code, § 22252.) IID therefore was well within its powers when it adopted the Equitable Distribution Plan ("EDP") to apportion water to all its water users for all lawful purposes, including but not limited to irrigation.

Nevertheless, the trial court's decision determined no such discretion exists based on the erroneous legal conclusion that the Farmers hold constitutionally protected water rights. Respondents do not have water

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1 Respondents define "irrigating landowners" as "Farmers." (RB 17.) The trial court's decision refers to "agricultural water users," "farmers" and "present owner of the lands" interchangeably, but "farmers" is primarily used. For ease of reference, IID will use the term "Farmers" as defined by Respondents.

rights. IID holds the rights, and Water Code section 22262 prevents water users such as Respondents from acquiring any "right in any water or water right owned by the district . . . ." The trial court's incorrect conclusion hamstrings IID's legislative discretion to determine the equitable distribution of the water it holds in trust for all users. The trial court's newly created Farmer priority water right first diminishes and then destroys the decision-making authority of IID's duly elected Board, reducing it to a kind of decorative afterthought. The trial court's holding eviscerates the legislative grant of discretion conferred on IID's Board by Water Code section 22252. The trial court's error on the nature of ownership of the water rights led to its inevitable, but erroneous conclusion that the Board abused its discretion when, in fact, no such abuse of discretion was shown.

How this Court resolves the issue of Respondents' so-called "water rights" will have far-reaching consequences. If this Court were to uphold the trial court's incorrect legal conclusion that Farmers hold constitutionally protected water rights, the discretion afforded IID and all other irrigation districts in California to manage water supplies and distribution within the district boundaries will have been stripped away by judicial fiat unsupported by law. IID (along with other irrigation districts) will face challenges from Farmers for each and every decision affecting water for which the Board may appear to be exercising discretion. This will undermine and effectively eliminate the purpose of an elected governing body.

What has become abundantly clear is that this case involves a power grab sponsored by large agricultural enterprises like Respondents to secure an entitlement to natural resources at the expense of all other water users within the Imperial Valley. The trial court's decision not only impedes IID's ability to supply water to non-agricultural users and implement required conservation measures, it would restrict all other California

irrigation districts' discretionary decisions. This Court should not invade the Board's discretion unless there is shown to be a clear abuse of that discretion. There was no such abuse of discretion here when IID's Board adopted and implemented the EDP. If an irrigation district's statutory discretion to make decisions to conserve and manage water is usurped by judicial recognition of non-existent water rights or ownership interests, no irrigation district in California can fulfill its mission to protect the public interest.

This Court should reverse the trial court's judgment and writ,[2] and the EDP should be reinstated so that IID can meet its legal duties to all of its water users, and preserve its entitlement to the Colorado River water on which the future of the Imperial Valley depends.

ARGUMENT

I. RESPONDENTS' ENTIRE CASE DEPENDS ON A FALSE PREMISE THAT THEY HAVE WATER RIGHTS.

Respondents have the same right to water service as all other water users in the District. They own no individual water rights. The trial court's decision to invalidate the EDP based on its stunning misunderstanding of the nature of Respondents' rights is contrary to law and, as such, was an unlawful invasion of the Board's discretion.

A. IID Acquired The Water Rights And Owns Them, And Its Ownership Is Recognized By State And Federal Law.

IID alone owns the water rights that allow distribution of water to the land within its service area. IID acquired the water rights in the early 1900s, and it continues to own them today. IID's sole ownership of the

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2 The trial court issued a Statement of Decision ("decision"), a Declaratory Judgment ("judgment") and a Peremptory Writ of Mandate ("writ").

water rights is recognized by the state and federal governments and is enshrined in the federal "Law of the River."

IID established its ownership of the water rights by reference to the contracts and deeds through which it acquired title to them in the early 1900s. (See, e.g., discussing and citing AR 0001586; AR 0000035-00037; AR 0000134-00154; AR 0000197-00251; AR 0000321-00338; AR 0000612-01244; AR 0001251.) Beginning in 1898 and continuing until August 19, 1911, the individual rights of appropriation were consolidated in the California Development Company ("CDC"). (AR 0000035-00040*; Thayer v. California Dev. Co.* (1912) 164 Cal. 117, 120-124.) In the years that followed, the CDC was involved in long and complicated litigation with its creditor, the Southern Pacific Company, and two Mexican companies. (See, e.g., AR 0000134-00154.) IID was formed by popular vote in 1911 and obtained deeds to the water rights after the CDC went bankrupt. (See AR 0000197-00251; AR 0000321-00338.) IID also purchased all of the local mutual water companies in the area between 1922 and 1923, acquiring all of their assets, properties, and shares of water stock and any water rights arguably associated with each. (See generally AR 0000612-01244; AR 0001251; *Bryant, supra*, 447 U.S. at p. 357, fn. 3.) IID thus acquired ownership of the canal system, water rights and properties of the CDC, the two Mexican companies and the local mutual water companies. IID has been "solely responsible . . . for the diversion, transportation, and distribution of water from the Colorado River to the Imperial Valley" ever since. (*Ibid*.)

This history of the Imperial Valley water rights, which resulted in IID holding title to the Colorado River water rights, is undisputed and described almost identically by IID and Respondents. (See RB 21.) Respondents admit outright that "IID acquired all of the mutual water companies" that had facilitated distribution of water within the Imperial

Valley "and began to deliver the water" directly to Farmers. (RB 21-22.) Having acquired the water rights of the CDC and wholly acquiring the mutual water companies, IID is the sole owner of the water rights of the Imperial Valley. (*Erwin v. Gage Canal Co.* (1964) 226 Cal.App.2d 189, 192-194 [confirming that when an entity buys water rights, it gets them free and clear of prior interests].)

IID's sole ownership of the water rights is recognized under federal and state law and cannot reasonably be disputed. The federal "Law of the River" includes a series of historical contracts, federal laws and court decisions; among these are the Boulder Canyon Project Act (43 U.S.C. § 617 et. seq.), the California Seven-Party Water Agreement (AR 0001260-1264), and IID's agreement with the Department of Interior for the diversion and delivery of water. (AR 0001530-1585.) Pursuant to the Law of the River, Colorado River water is allocated among seven U.S. states and the Republic of Mexico. (AR 0001245-1250.) The United States Supreme Court decision, *Arizona v. California* (1979) 439 U.S. 419, confirms IID's pre-1914 "present perfected rights" of 2.6 million acre-feet ("MAF") per year. (*Id.* at p. 429.) IID's water rights are recognized by the State of California pursuant to California State Water Resources Control Board ("SWRCB") Permit 7643 (the "Permit"), authorizing IID to divert a maximum of 10,000 cubic feet per second from the Colorado River for total water rights of up to 3.85 MAF per year (AR 0001487; AR 0006820-6827), which is capped at 3.1 MAF per year under the 2003 Quantification Settlement Agreement ("QSA") for the term of that agreement. (*In Re Quantification Settlement Agreement Cases* (*QSA Cases*) (2011) 201 Cal.App.4th 758, 785.)

Only IID holds title to the Colorado River water rights for the Imperial Valley. At the same time, IID is the only contractor with the federal government for the diversion of Colorado River water to the

Imperial Valley. (AR 0001530-1585; see also *Arizona v. California*, *supra*, 439 U.S. at p. 429; *QSA Cases*, *supra*, 201 Cal.App.4th at pp. 758, 773, 784.) Respondents presented no evidence of their ownership of water rights because they cannot. None of the aforementioned agreements nor the above-cited cases mention or state that Respondents, their "ancestors" or predecessors in title hold any of these rights.

B. IID Holds The Water Rights In Trust Under The Irrigation District Law.

IID holds title to all the property it acquires, including the Colorado River water rights, "in trust for its uses and purposes." (Wat. Code, § 22437.) The powers and authority of IID as an irrigation district are defined by the Irrigation District Law, Water Code section 20500, et seq. (the "District Law"). IID is subject to the provisions of the District Law that establish the parameters of this trust, including the valid uses and purposes of IID's property. (See generally *ibid.*) While Respondents agree that IID is subject to the District Law, they argue that the powers granted under it are narrow and limited. (RB 65-67.) Yet, the District Law empowers IID to "do any act in order to put to any beneficial use any water under its control." (Wat. Code, § 22076.) The scope of that control is broad; it allows IID to furnish the water "for any beneficial use" within the district. (Wat. Code, §§ 22075, 22078.) Beneficial uses recognized by state law include municipal, domestic, irrigation, industrial, aquaculture, water quality and fish and wildlife protection. (Cal. Code Regs., tit. 23, § 659, et seq.)

Under the District Law, IID distributes water in accordance with Water Code section 22252 because it charges fixed water rates for the delivery and use of water within its water service area. Water Code section 22250 requires the ratable apportionment of water among assessment-

paying landowners, except when another provision under the District Law (such as section 22252) applies:

> "All water distributed by districts for irrigation purposes shall **except when otherwise provided in this article** be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes."

(Wat. Code, § 22250, emphasis added.) Because of the exception in section 22250 and because IID charges fixed water rates,[3] this section does not apply and Water Code section 22252 governs the distribution of water within IID:

> "**When any charges for the use of water are fixed by a district** the water for the use of which the charges have been fixed **shall be distributed equitably as determined by the board** among those offering to make the required payment."

(Wat. Code, § 22252, emphasis added; see also 2 AA 1485:12-13 [finding that "Water Code section 22252 requires that [IID] establish equitable rules for the distribution of water"]; 1 AA 730:10-11 [finding that IID is "funded on water rates, as opposed to assessments"]; AR 0015834; AR 0016368; AR 0002096.) Section 22252 specifically authorizes IID to sell its water to any and all paying customers within IID and, as a result of doing so, it is required to equitably apportion the water among all its paying customers as determined by the Board. Water Code section 22252 is mandatory, not permissive, and falls within the exception of section 22250. Not only is there no basis or requirement for ratable apportionment, but IID is actually required to distribute water in accordance with Water Code section 22252 because it charges fixed water rates and does not impose assessments on the

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3 IID charged assessments following its formation beginning in 1912, but ceased doing so before the EDP was adopted.

value of land. (See 2 AA 1485:12-13; 1 AA 730:10-11; see also AR 0015834; AR 0016368; AR 0002096.) Consequently, Water Code section 22250—and cases that rely on it or similar precursor statutes—simply do not apply here.

Farmers do not exist in splendid isolation from other types of water users, and the District Law does not tell IID how to balance competing needs to determine what is equitable among those needs. Competing uses include municipal, industrial and others, all of which had a role in the early development of the water rights now held by IID. (See, e.g., *Thayer, supra,* (1912) 164 Cal. at p. 123.) In times of shortage, there is no rule or criteria suggesting that IID should provide water to agribusiness enterprises before all others. There is no statute, regulation or principle of fairness that suggests the water is to be provided to Farmers and denied to municipal areas where residences, businesses, recreation and a whole host of non-agricultural uses converge. Despite Respondents' statements regarding the priority of domestic uses, which are misguided as discussed herein, this permanent state of inequity would be the unreasonable result of the trial court's decision.

The District Law gives the IID Board broad discretion to determine what is equitable for this purpose. Respondents seek to usurp control from this popularly elected Board by arguing that the overall purpose and intent of the District Law must be read to recognize "Farmers' pre-existing water rights" to use the water for irrigation purposes to meet their "reasonable needs," to the exclusion of all others not holding such rights. (RB 68, 79, 109.) If the Farmers were entitled to receive the amount of water necessary to meet what they contend are their "reasonable needs," then there would be very little water, if any, left over to meet the needs of other users. No reading of federal or state law can possibly justify this sweeping result, which ignores the controlling provisions of the District Law, discussed

above, that require IID to equitably apportion water among ***all*** beneficial uses. In addition, the argument presumes Farmers have "pre-existing water rights." They do not, as we now go on to explain.

C. Users In The District—Including Landowning Farmers—Have Only A Right To Water Service.

Respondents have a right to water service, but no greater right than do other water customers within IID. The U.S. Supreme Court confirms the nature of this right: "the landowners have a legally enforceable right, appurtenant to their lands, to continued service by the District." (*Bryant, supra*, 447 U.S. at p.371, fn. 23, emphasis added.)

Respondents focus and rely on the statement for which this confirmation of a right to service was made, specifically that "[i]ndeed, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water." Respondents' misinterpretation of this statement fails to recognize that the Court confirms that the right is limited to continued service by the District. (*Id.* at p. 371, fn. 23.) The only reasonable interpretation of the language cited by Respondents is that it applies to the right of service, not to the water rights held by IID.

This right to water service is not a water right and is not treated the same as a water right:

> . . . no private estate can be created in property devoted to a public use, and **a consumer of water cannot have a water right in the sense of a private freehold interest in the real estate of the distributing company**; that **his right is simply a right of service**. This, of course, carries with it the right to that service so long as the public utility controls the instrumentality rendering the service. The exercise and enjoyment of such right of service **does not create an easement** such as is contemplated by section 552, Civil Code, but is a service rendered by a public utility **subject to the**

> **regulation and control of the state in such manner as may be prescribed by law**.

(*Glenn-Colusa Irr. Dist. v. Paulson* (1925) 75 Cal. App. 57, 69-70, emphasis added.)

Even the case law cited by Respondents confirms that their right is not as an owner of a water right, but rather a much more limited right to receive water service. For example, Respondents cite to *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, which affirms that when a water system supplies water that has been appropriated for the use of all the inhabitants of an area, all of those customers have a right to continued water service:

> . . . In case of the establishment of a water system of this character, all the persons to whose use the water is appropriated or dedicated are **vested with a right to have the supply continued** by whomsoever may be in control thereof. (Const., art. 14, §1; Civ. Code, §§549-552; *Crow v. San Joaquin, etc., Co.*, 130 Cal. 309, 62 Pac. 562, 1058; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264; *Price v. Riverside, etc., Co.*, 56 Cal. 432) If the water is supplied for use upon land for its benefit, as for irrigation, the right to receive and use it becomes in the nature of an appurtenance to the land. If it is supplied for personal use to all persons within a certain territory or to all of a certain class within the territory, the right to its use is personal to the inhabitants of the territory, or to the members of the class, as the case may be, so long as they remain such. . . .

(*Id.* at pp. 587-588, 593, emphasis added.) Like *City of South Pasadena*, Respondents rely on and cite to the decisions in *Greeson v. Imperial Irr. Dist.* (S.D. Cal. 1931) 55 F.2d 321, 325, *aff'd*, 59 F.2d 529 (9th Cir. 1932) and *Brooks v. Oakdale Irr. Dist.* (1928) 90 Cal.App. 225, 241, which also confirm the existence of a right to water service.

The right to water service is a significant right. However, that right does not rise to the level of a water right, and none of these cases recognize

any right to continue to obtain any specific quantities of water, as argued by Respondents and erroneously found by the trial court, including Respondents' most recent argument for an amount that will meet their "reasonable needs." The entire factual and legal premise for the trial court's decision is therefore without merit.

D. Respondents Have Not Established A Constitutionally Protected Private Property Interest In The Water.

Respondents' statements about the nature of the Farmers' water rights are baseless, nonsensical, confusing and contradictory. They fail to argue consistently for any particular legally recognizable type of water right, because they have none.

Respondents do not hold any type of water right recognized under state or federal law.[4] The Colorado River is a surface water body, so groundwater rights such as overlying rights[5] are irrelevant. Because the Colorado River does not pass through the Imperial Valley, no land in the Valley has riparian rights.[6] Through the acquisition of the water rights

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4 Federal law looks to the state to define the nature and scope of water rights within that state. (See, e.g., *Bryant, supra*, 447 U.S. at pp. 371-373.)

5 Overlying rights are special rights to use groundwater under the owner's property, for reasonable and beneficial uses on the overlying land. Overlying rights are correlative, meaning that the reasonable share of water is cut back proportionally to meet the needs of all overlying users. (See, e.g., *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1237, fn.7, 1241, 1252; *Katz v. Walkinshaw* (1903) 141 Cal. 116, 135-136.)

6 Riparian rights are special rights to use water in a waterway adjoining the owner's property, for reasonable and beneficial uses on the riparian land. Riparian land is land that touches a water course, such as a river. Riparian rights are correlative, meaning that the reasonable share of water is cut back proportionally to meet the needs of all riparian users. (See, e.g., *City of Barstow, supra*, 23 Cal.4th at pp. 1236, fn.6, 1241.)

from the CDC and wholly acquiring the local mutual water companies, only IID holds the appropriative rights[7] to Colorado River water for the Imperial Valley; Respondents do not. Nor do Respondents have any other type of traditional water right or any evidence to show otherwise.

Respondents' lack of water rights is conclusively established by the fact that they have never produced any evidence of ownership of any water right, by deed reservation, chain of title, contract, or otherwise. (See, e.g., *Erwin, supra*,226 Cal.App.2d at p. 192 [the conveyance of water rights, in the absence of a reservation of rights in favor of landowners, terminates any former ownership of the water rights by the landowners].) Despite Respondents' arguments implying that pre-1914 vested water rights pre-existing IID's formation were somehow reserved for the benefit of landowners, there were no such reservation of rights in the acquisition of the water rights from the CDC or the acquisition of the local mutual water companies. Respondents have not presented any evidence supporting this argument.

Respondents also do not have prescriptive rights[8] because they are precluded by Water Code section 22262, which states that "[n]o right in any water or water right owned by the [irrigation] district shall be acquired by use permitted under [the Irrigation District Law]." (Wat. Code, § 22262.) Water Code section 22262 precludes a water user from claiming that their use of the water supplied by the irrigation district constitutes an

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7 Appropriative water rights allow the holder to take a specific amount of water for use on distant land (i.e., land that does not abut the water source. (See, e.g., *City of Barstow, supra,* 23 Cal.4th at pp. 1240-1241; *Katz, supra*,141 Cal. at pp. 135-136.)

8 A prescriptive right is a right that is acquired through adverse possession of someone else's water right. (See, e.g., *City of Barstow, supra*, 23 Cal.4th at pp. 1240-1241.)

actual appropriation of water as though it has been diverted from a stream. Further, prescription of water rights can never be invoked against water rights owned by a public entity such as IID. (Civ. Code, § 1007.) The truth is, since 1914, the only way to acquire a surface water right is to apply for and receive a permit from the SWRCB (see Wat. Code, § 1201 [making appropriation of surface water subject to SWRCB jurisdiction]), which Respondents do not claim to have done.

In sum, IID is the sole owner of the rights to water from the Colorado River as recognized by law. Respondents have invented their so-called water rights from misapplied and misstated law in order to convince this Court that water rights exist where they cannot exist.

1. Respondents Do Not "Jointly" Own IID's Water Rights.

Respondents do not claim to hold legal title to IID's water rights because they cannot make such a claim. Having no basis for outright ownership of these rights, Respondents assert "equitable ownership." (RB 22.) The purported basis for such "equitable ownership" is explained in the vaguest possible terms. For example, Respondents argue that because ancestors of the modern Farmers participated in the development of the Imperial Valley water rights through their irrigation use of the water diverted through the infrastructure of the local mutual water companies, the Farmers have "joint" ownership of IID's water rights. (RB 46.) Respondents cite no authority or basis for the existence of "joint" rights, which plainly do not exist. In effect, they deconstruct a claimed history of water use and reassemble it into a water right. Respondents make this fantastical argument without any evidence to support it. To the contrary, IID is the sole owner of the water rights, as recognized by the U.S. Supreme Court case *Arizona v. California*, *supra*, 439 U.S. at p. 429,

decreeing the present perfected rights to IID and again by the U.S. Supreme Court in *Bryant, supra*, 447 U.S. at p.370, confirming the decree.

Respondents also falsely and maddeningly equate the Farmers' "ancestors" with all the landowners who participated in the development of the Imperial Valley's water rights. This false equivalency is misleading and intentionally confusing. Having declared the existence of "joint" water rights, they now seek to limit such rights only to themselves. Assuming *arguendo* their self-proclaimed water right is possible under the law, nothing supports their goal to limit it to their ancestors. Many different kinds of water users participated in the development of the Imperial Valley. For example, in the years before IID acquired and consolidated all the water rights, early water users included municipalities and industrial power companies. (See *Thayer, supra,* 164 Cal. at p. 123.)[9] Therefore, even if Respondents' unsupported assertion of "joint" rights based on their ancestors' early development of the Imperial Valley were valid (which it is not), participation by other early water users – such as industrial and municipal users – could not be ignored and would hold the same rights.

Today it is impossible to know what proportion of IID's water rights can be attributed to early irrigators, much less any particular Farmer's ancestors. If participation in early water development of the Imperial Valley gives rise to a "joint" or "equitable" ownership, who holds these

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9 Respondents mis-cite the date of *Thayer* as "1928"; *Thayer* actually was decided in 1912 when IID was a year old. (RB 22.) Whether *Thayer* held that the early mutual water companies were organized in a way that made their stockholders the "indirect owners" of the mutual water company's water rights (see RB 22) has no significance. As previously addressed, any ownership rights of stockholders were not reserved and thereby extinguished when IID wholly acquired the local mutual water companies.

rights? Which farmers? Which cities and businesses? And in what proportion?

Respondents never offered proof of history of their specific entitlement, presumably because they cannot.[10] Thus, even if there were such a thing as "joint" rights, any interests the Farmers' ancestors may have had in the Imperial Valley's Colorado River rights were lost by virtue of conveyances, ultimately to IID. (See, e.g., *Erwin, supra,* 226 Cal.App.2d at pp. 192-194.)

2. The Reasonable Use Doctrine Does Not Bestow Any Water Rights On The Farmers.

Respondents falsely claim that their "vested property rights" create an "entitlement to reasonable use of water." (RB 75, 77.) Respondents' argument lacks merit. It is based on an overarching misinterpretation of the reasonable use doctrine (see RB 75, citing *Katz, supra*, 141 Cal. at p. 116; W. Hutchins (1956) *The California Law of Water Rights*, pp. 431, 436), which does not create any water rights. The reasonable use doctrine is a rule of limitation on rights that otherwise exist. (See, e.g., *Light v. SWRCB* (2014) 226 Cal.App.4th 1463, 1479.)

Respondents rely on numerous irrelevant cases regarding adjudications of competing rights to groundwater to support their claim that the reasonable use doctrine entitles them to reasonable use of water. (See, RB 75, citing *City of Barstow, supra,* 23 Cal.4th at pp. 1247-1248 [adjudication of Mojave River Basin]; *City of Los Angeles v. City of San*

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10 Indeed, Respondents never identify any specific "ancestors," much less show that the ancestors are predecessors-in-interest of the Respondents or other Farmers. Instead, Respondents argue in general terms that Respondent Michael Abatti's "ancestors have farmed the Valley for over one hundred years, including on acreage he continues to farm today." (RB 29.)

Fernando (1975) 14 Cal.3d 199, 265, and fn. 61, overruled in part in *City of Barstow, supra,* 23 Cal.4th 1224 [adjudication of groundwater underlying the Upper Los Angeles River Area]; *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992 [Cummings Basin].) Cases adjudicating overlying groundwater rights are inapplicable here because overlying groundwater rights have nothing to do with the appropriative surface water rights to the Colorado River that IID owns and are the subject of this dispute. The legal framework applicable to groundwater rights is irrelevant to appropriative surface water rights.

Respondents rely on more irrelevant cases regarding competing riparian rights to support their claim that the "beneficial water needs" of the Farmers is reasonable use and, therefore, the distribution of water must take into account various factors to reflect the "beneficial water needs" of the Farmers. (See, RB 83, citing *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 525-526 [Temecula-Santa Margarita River].) The only type of surface water right that permits users to fully satisfy their reasonable needs (supply permitting) is riparian. (See, e.g., *Rancho Santa Margarita, supra,* 11 Cal.2d at pp. 515, 526, 528-529, 535.) But, again, Respondents' "rights" cannot be riparian because none of the land in the Imperial Valley abuts the Colorado River. Therefore, the legal framework applicable to riparian rights is also irrelevant here.

California law does not recognize the existence of any water right that allows Farmers to take all the water they claim to reasonably need from a distant river such as the Colorado—not under the reasonable use doctrine or any other doctrine.

3. The Farmers Have No Rights To Water Based On Their Historical Use.

Respondents also assert rights based on their history of water use. (RB 86.) According to Respondents, such "historical" uses create a right

that precludes new water uses, such as irrigation by previously uncultivated acreage and for new industry.[11] (See RB 63, citing the trial court's Statement of Decision, 2 AA 1351:8-10.) This assertion finds no support in California water rights law. It is suggestive of appropriative and prescriptive rights, perhaps akin to an implied easement, but Respondents have no such rights, nor can they acquire them under California law. Again, IID holds the appropriative rights, not Respondents because they did not appropriate the water (AR 0001530-1585; see also *Arizona v. California*, *supra*, 439 U.S. at p. 429; *QSA Cases*, *supra*, 201 Cal.App.4th at pp. 758, 773, 784). And Water Code section 22262 strictly prohibits water users from acquiring any "right," prescriptive or otherwise, "in any water or any water right owned by [IID]" based on historical use permitted under the District Law. (Wat. Code, § 22262; see also *Ivanhoe Irr. Dist. v. All Parties & Persons* (1957) 47 Cal.2d 597, 646 ["*Ivanhoe I*"] [affirming that rights of landowners have been modified over time by the District Law and its amendments, in particular Water Code section 22262], rev'd on other grounds by *Ivanhoe Irr. Dist. v. McCracken* (1958) 357 U.S. 275 ["*Ivanhoe II*"].) Consequently, historical use over the past 25-30 years does nothing to guarantee Respondents a right to an amount of water that they contend they need in the future. This should not be surprising because IID's water rights are for use by all of its water users, and cannot support private property interests in the same sense as a water right, as opposed to

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11 The Ninth Circuit rejected a lawsuit by irrigators within IID, the "gist" of which was an effort to preclude the Board from annexing more irrigable land within IID, and thereby protect alleged vested water rights from being diminished. (*Greeson*, *supra*, 55 F.2d at p. 323.) The court held that the irrigators lacked standing to proceed. (*Ibid.*) The court reasoned that the specific action challenged by the irrigators was "within the lawful exercise of the powers of said board of directors." (*Id.* at p. 324.)

an interest in water service. (*Glenn-Colusa Irr. Dist.,supra,* 75 Cal. App. at pp. 69-70; *City of South Pasadena, supra,* 152 Cal. at pp. 587-588.)

Respondents rely on *Ivanhoe I, supra*, 47 Cal.2d 597 for the incorrect proposition that the Farmers have an equitable ownership interest in the water rights held by IID. (RB 47-48.) *Ivanhoe I* is inapplicable because it dealt with an irrigation district that ratably apportioned water among assessment-paying landowners under an old statute that resembles Water Code section 22250. (*Ivanhoe I, supra*, 47 Cal.2d at pp. 624-625) IID currently, and in 2013 when it adopted the EDP, charges fixed water rates and is, therefore, governed by Water Code section 22252 and not Water Code section 22250. (See 2 AA 1485:12-13 [finding that "Water Code section 22252 requires that [IID] establish equitable rules for the distribution of water"]; 1 AA 730:10-11 [finding that IID is "funded on water rates, as opposed to assessments"]; see also AR 0015834; AR 0016368; AR 0002096.)

Ivanhoe I is also inapplicable because it does not decide any issue of water rights that is binding here. *Ivanhoe I* is one of four cases in which the California Supreme Court refused to validate water delivery contracts with the United States that contained prohibitions against furnishing the water for lands with more than 160 acres in single ownership. In passing on the validity of the federal contracts in all four cases,[12] the California Supreme Court discussed the relationship between an irrigation district and landowners within the district. (*Ivanhoe I, supra*, 47 Cal.2d at pp. 624-625.) The *Ivanhoe I* Court relied on *Merchants' Nat. Bank of San Diego v.*

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12 The other three cases include *Madera Irrigation Dist. v. All Persons* (1957) 47 Cal.2d 681, which Respondents have criticized IID for citing (RB 52), even though Respondents rely heavily on *Ivanhoe I*, which was reversed by the same U.S. Supreme Court decision as *Madera Irrigation Dist.* for essentially the same reasons.

Escondido Irr. Dist. ("*Merchants'*") (1904) 144 Cal. 329,[13] which in turn interpreted an old statute, identified as "Stats. 1887, pp. 34, 35, secs. 11, 13," that "vested *by the express provisions of the statute*, in each, the right to the several use of a definite proportion of the water of the district . . . ."[14] (*Ibid.*, emphasis added.) This discussion is irrelevant to the present case because the applicable statute no longer appears to exist and, IID is not subject to it or any other statute containing such an express guarantee. *Ivanhoe I* does not mention, much less abrogate, Water Code section 22252, which confers on IID the authority and obligation to equitably distribute water to all its customers.

Hall v. Superior Court (1926) 198 Cal. 373, on which Respondents also rely (RB 46), is irrelevant for reasons similar to *Ivanhoe I* and *Merchants'*. *Hall* prohibited judges who were landowners within IID from presiding over a lawsuit affecting property held by IID. (198 Cal. at p. 376.) In identifying a disqualifying interest on the part of the judges, *Hall* relied on *Merchants'* and "Stats. 1887, pp. 34, 35, secs. 11, 13." (*Id.* at p. 383.) *Ivanhoe I*, *Hall*, and *Merchants'* are irrelevant for the same reason – i.e., these cases all depend on interpretation of statutory language – "Stats.

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13 *Merchants'* was overruled in part by *La Mesa, Lemon Grove & Spring Val. Irr. Dist. v. Halley* (1925) 197 Cal. 50, 59-60:

> It was not our intention in [*Merchants'*] to hold that, as to the general powers of irrigation districts, or as to the methods of their management and conduct, or as to the method or manner of issuing bonds for the purpose of carrying on the work of said districts or fulfilling the purposes of their organization, such districts were to be limited or the people or property owners within the same confined to the precise terms of the statutes in force at the time of the organization thereof.

14 This is the passage of *Ivanhoe I* upon which Respondents rely. (RB 47-48.)

1887, pp. 34, 35, secs. 11, 13" – that no longer exists and does not apply to IID.

Although Respondents insist that *Bryant v. Yellen, supra*, 447 U.S. 352 recognizes their claimed water rights (RB 47, 48-50), the United States Supreme Court made no such holding. In fact, the Court expressly declined to find that any "individual farm in the District has a permanent right to any specific proportion of the water held in trust by the District." (*Id.* at p. 371.) Like *Ivanhoe I, Bryant* is another case dealing with the federal prohibition against irrigation water deliveries to lands consisting of more than 160 acres under single ownership. In *Bryant*, the United States Supreme Court declined to uphold the acreage limit as applied to certain private lands within IID. (*Id*. at p. 368.) The Court reasoned that under section 6 of the Boulder Canyon Project Act, the Secretary of the Interior must satisfy present perfected rights notwithstanding the acreage limit. (*Id.* at p. 370.) The Court then looked to state law to determine the character of the water rights adjudicated to IID in *Arizona v. California, supra*, 439 U.S. 429, and whether they amount to "present perfected rights" within the meaning of section 6 of the Boulder Canyon Project Act. (*Id.* at pp. 370-371.) The Court stated:

> **It may be true, as the Court of Appeals said, that no individual farm in the District has a permanent right to any specific proportion of the water held in trust by the District.** But there is no doubt that prior to 1929 the District, in exercising its rights as trustee, delivered water to individual farmer beneficiaries without regard to the amount of land under single ownership. It has been doing so ever since. There is no suggestion, by the Court of Appeals or otherwise, that as a matter of state law and absent the interposition of some federal duty, the District did not have the right and privilege to exercise and use its water right in this manner. Nor has it been suggested that the District, absent some duty or disability imposed by federal law, could have rightfully denied water to individual farmers owning more than 160

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

(*Id.* at p. 371, emphasis added.) The Court thereby declined to recognize any right on the part of landowners to a specific amount or proportion of IID's water.

Bryant v. Yellen also cites Water Code section 22250 for the proposition that irrigation water must be apportioned ratably to each landowner in accordance with his or her share of the total assessments in the District. (447 U.S. at p. 371, fn. 23.) However, as discussed above, Water Code section 22250 does not apply to IID. Regardless of whether IID imposed assessments at one time, at the time of adoption of the EDP in 2013, IID charged fixed water rates for the delivery and use of the water and, therefore, it was governed by Water Code section 22252, as it is today. (See 2 AA 1485:12-13; 1 AA 730:10-11; see also AR 0015834; AR 0016368; AR 0002096.) Thus, nothing in federal or state law, including *Bryant v. Yellen*, gives the Farmers a right to a specific amount or proportion of the water owned by IID.

In sum, California law does not recognize any type of water right with the characteristics Respondents have attributed to their "rights." Respondents have no constitutionally protected right to any amount or proportion of IID's water, and certainly not as much water as they contend they reasonably need. They have the right to continued water service as set forth in federal and state law, specifically including *Bryant*. The trial court's decision to invalidate the October 2013 EDP is based on its own glaring misunderstanding of the nature of Respondents' rights contrary to law, and thereby improperly invaded the Board's discretion.

E. The No Injury Rule Does Not Apply.

Based on Respondents' incorrect conclusion that they are legal holders of water rights, they argue that they are protected by the no injury rule. That is not correct. Respondents cannot invoke the no injury rule, and even if they could, there is no injury.

IID's Opening Brief at pages 28-31 explains that the no injury rule has no application in the present case. The EDP does not give rise to any injury that could trigger any version of the rule, including Water Code sections 1702 and 1706.

Respondents argue based on *SWRCB Cases, supra*, 136 Cal.App.4th 674, they have standing to assert injury under Water Code section 1702, which applies to post-1914 water rights. (RB 60-61.) This argument fails for at least two reasons:

First, even if Water Code section 1702 applied (which it does not), Respondents lack standing to invoke its protection for "legal users" of water. *SWRCB Cases* interprets the phrase "legal users" to encompass not only traditional water rights holders, but also persons who have a contract with a permit holder for use of the water under certain circumstances. (*Id.* at pp. 801-805.) The contract holder must show that it has a *right* to the water, *and* that the proposed permit change will cause it to receive less water. (*Id.* at p. 805, emphasis in original.) *SWRCB Cases* held that Westlands Water District ("Westlands"), a contractor for water from the U.S. Bureau of Reclamation ("Bureau"), lacked standing to invoke section 1702. (*Ibid.*) Although Westlands had a contract, its terms allowed the United States to reduce its deliveries of water to the district. Therefore, Westlands had no contractual right to the water, and changes in the Bureau's permits could not injure Westland's "rights," so it was not a legal user with standing. (*Ibid.*) Respondents are not traditional water rights

holders and do not have a contract for Colorado River water,[15] and therefore no grounds exist to invoke the no injury rule under section 1702.

Second, *SWRCB Cases* confirms that Water Code section 1702 applies when there is a proposed change in the point of diversion, place of use or purpose of use of a water right subject to SWRCB jurisdiction – i.e., a permit change for a post-1914 water right. (See 136 Cal.App.4th at p. 674.) When such a change is proposed, SWRCB must make a "no injury" finding prior to approving the necessary permit amendment. (*San Luis Unit Food Producers v. U.S.* (9th Cir. 2013), 709 F.3d 798, 807 cert. denied.) Respondents do not argue that IID needs a permit amendment for the EDP, thereby conceding that IID does not need one. There simply is no need for a permit amendment, and section 1702 does not apply.

Nor can Respondents invoke Water Code section 1706 (RB 60-61), which applies to pre-1914 water rights. IID's sole ownership of pre-1914 Colorado River rights is confirmed by *Arizona v. California, supra*, 439 U.S. at p. 429, thus IID is the only "person entitled to the use of the water" with standing to invoke the protection of section 1706. The Farmers have no such entitlement. They cannot invoke any version of the no injury rule.

F. IID Is Not Estopped From Refuting Respondents' Claim Of Water Rights.

Citing out of context IID's briefing in a different case almost 40 years ago, *Bryant v. Yellen* (1980) 447 U.S. 352, Respondents attempt to bolster their water rights claim by asserting that IID is collaterally and judicially estopped from refuting it. (RB 48.) Neither collateral nor judicial estoppel applies here.

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15 IID holds the contracts with the United States. (AR 0001530-1585.)

1. Collateral Estoppel Does Not Apply Because The Issues Are Not Identical.

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, citation omitted.) The doctrine applies "only if several threshold requirements are fulfilled.

[¶] First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding.

[¶] Second, this issue must have been actually litigated in the former proceeding.

[¶] Third, it must have been necessarily decided in the former proceeding.

[¶] Fourth, the decision in the former proceeding must be final and on the merits.

[¶] Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921, 943.) Collateral estoppel does not apply here because Respondents cannot satisfy all of the foregoing elements.

Respondents have not satisfied the first three elements of collateral estoppel because the issue sought to be precluded from relitigation here is not identical to that decided in *Bryant.* As discussed in *Ass'n of Irritated Residents v. Dep't of Conservation*, "[t]he 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.' " (2017) 11 Cal.App.5th 1202, 1231–1232, review denied (Aug. 23, 2017) ("*Ass'n of Irritated Residents*") [citing *Lucido v. Superior Court, supra*, 51 Cal.3d at p. 342, 272 Cal.Rptr. 767, 795; *Diocese of San Joaquin v. Gunner* (2016) 246 Cal.App.4th 254, 266, 202 Cal.Rptr.3d 51].) The court in *Ass'n*

of Irritated Residents rejected respondents' application of collateral estoppel because the legal issues to be decided in the case were applied in factually distinct circumstances from the earlier case. (*Ibid*.; see also *Flores v. Transamerica HomeFirst, Inc*. (2001) 93 Cal.App.4th 846, 852 [" . . . the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue."].)

The issues in this case are not identical to the issues resolved in *Bryant*, the main one being whether Respondents have a constitutionally protected water right that has been violated by IID's adoption and implementation of the EDP. As discussed in Section I.D.3 above, *Bryant* arose in a completely different context. *Bryant* examined the legality of the federal prohibition against irrigation water deliveries to lands consisting of more than 160 acres under single ownership. The *Bryant* Court declined to uphold the acreage limit as applied to certain private lands within IID. (447 U.S. 352.) In doing so, the Court looked to state law to determine whether the water rights adjudicated to IID in *Arizona v. California, supra*, 439 U.S. 429 amount to "present perfected rights" within the meaning of section 6 of the Boulder Canyon Project Act. (*Id.* at pp. 370-371.) Contrary to the position Respondents advance here, the Court expressly declined to find that any "individual farm in the District has a permanent right to any specific proportion of the water held in trust by the District." (*Id*. at p. 371.) Instead, the Court recognized only the existence of "the landowners[']. . . legally enforceable right, appurtenant to their lands, to continued service by the District." (*Id.* at p. 371, fn. 23.)

The factual predicate of the Court's findings regarding water rights in *Bryant* was also different. *Bryant* was decided based on law that applied when IID imposed assessments on the value of land holdings under Water

Code section 22250. (See *ibid*.) In a footnote, the *Bryant* Court acknowledged that under Water Code section 22250, irrigation water must be "apportion[ed] . . . ratably to each landowner in accordance with his share of the total assessments in the District." (*Ibid.*) However, as discussed above, IID no longer follows Water Code section 22250, having transitioned to a system of service charges governed by Water Code section 22252. (See 2 AA 1485:12-13; 1 AA 730:10-11; see also AR 0015834; AR 0016368; AR 0002096.) The issues in *Bryant* simply were not identical to the issues here. Collateral estoppel does not apply.

2. Judicial Estoppel Does Not Apply Because IID Has Not Taken Two "Totally Inconsistent" Positions.

Respondents' invocation of the doctrine of judicial estoppel also fails. For judicial estoppel to apply, Respondents must prove:

> (1) the same party has taken two positions;
>
> (2) the positions were taken in judicial or quasi-judicial administrative proceedings;
>
> (3) the party succeeded in asserting the first position (i.e., the tribunal adopted the position or accepted it as true);
>
> (4) the two positions are totally inconsistent; and
>
> (5) the first position was not taken because of ignorance, fraud, or mistake.

(*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.) Respondents cannot satisfy all the elements to invoke judicial estoppel.

Respondents cannot show that IID has taken two "totally inconsistent" positions on the issue of the existence (or lack thereof) of the Farmers' water rights. As the court in *Bell v. Wells Fargo Bank, N.A.* recognized,

> The doctrine is invoked only after a very high threshold is cleared. Judicial estoppel is applied only against a party that

> has taken positions or made statements that are 'totally inconsistent.' [Citations.] Put another way, the party must have taken positions that are so irreconcilable that, as *Prilliman* put it, "'one necessarily excludes the other.'"

(1998) 62 Cal.App.4th 1382, 1387, as amended (May 5, 1998) [citing *Prilliman v. United Air Lines, Inc.* (1977) 53 Cal.App.4th 935, 960; *Ng v. Hudson* (1977) 75 Cal.App.3d 250, 258].) Respondents have not satisfied this rigorous standard. Again, any position that IID took in *Bryant* with respect to the nature of the Farmers' water rights was taken in the context of that case. There, IID was opposing the federal prohibition against irrigation water deliveries to lands consisting of more than 160 acres under single ownership and discussing water rights in that context. IID also was formerly governed by Water Code section 22250, which no longer applies to IID. (2 AA 1485:12-13; 1 AA 730:10-11; see also AR 0015834; AR 0016368; AR 0002096.) Viewed in context, the statements on which Respondents hang their hat cannot fairly be said to represent IID's "position" on the nature and extent of Respondents water rights (or lack thereof). (See *Tuchscher Dev. Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1244-1247 [the doctrine of judicial estoppel does not apply where the allegedly inconsistent position had no meaningful relevance to issues in second action.].)

Even if IID argued in *Bryant* that the Farmers have a constitutionally protected right to a specific amount or proportion of IID's water under the system in use at that time, judicial estoppel does not apply in any event because IID was unsuccessful in asserting that position. A tribunal must adopt the position to satisfy the element that a litigant be "successful in asserting the first position." (*Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 845; *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 138-39, quoting *New Hampshire v. Maine*, (2001) 532 U.S. 742, 750.) Again, the *Bryant* Court expressly declined to find that any "individual farm in the

District has a permanent right to any specific proportion of the water held in trust by the District." (*Bryant, supra*, 447 U.S. at p. 371.) Respondents cannot satisfy all of the elements of judicial estoppel.

Finally, judicial estoppel is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." (*Jogani v. Jogani*, (2006) 141 Cal.App.4th 158, 169 [quoting *Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 490–491].) It should be applied "with caution" (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 511), and only when "a party's inconsistent behavior will otherwise result in a miscarriage of justice." (*Id.*, at p. 511.) Thus, even where all necessary elements are present, the application of judicial estoppel is discretionary. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.) Here, Respondents have not satisfied all of the elements of judicial estoppel; nor have they shown that IID has engaged in intentional wrongdoing or has attempted to obtain an unfair advantage. Judicial estoppel does not apply.

IID owns the water rights that allow it to supply Colorado River water to the Imperial Valley. The trial court's incorrect legal conclusion that landowners, and in particular farmers, hold constitutionally protected water rights, permeates the decision and judgment, and is the basis for the writ requiring IID to repeal the EDP. The judgment and writ should be reversed in light of this legal error.

II. THE EDP IS A PROPER EXERCISE OF THE BOARD'S DISCRETION.

A. This Court Reviews IID's Decision To Adopt The EDP De Novo.

The parties agree that a writ of mandate under section 1085 may be issued against an agency, "*but only* if the action taken is so palpably

unreasonable and arbitrary as to show an abuse of discretion as a matter of law," **which requires the court to determine only whether "the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair."** (AOB 21-23, quoting *Carrancho v. California Air Res. Bd.* (2003) 111 Cal.App.4th 1255, 1265, italics in original, emphasis added, and citing *Ass'n of Irritated Residents, supra,*206 Cal.App.4th at p. 1494; 2 AA 1347:24-1348:2; 2 AA 1026:7-9; 2 AA 1062:8-19; RB 42-44.) While the IID Board's discretion is not unfettered, the applicable abuse of discretion is a "highly deferential" standard, as it must be when a court is asked to intervene after a governmental body has exercised discretion. (*Carrancho, supra*, 111 Cal.App.4th at p. 1265.)

The parties also agree that in a mandamus case under Code of Civil Procedure section 1085, "the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review . . . is de novo." (AOB 21, quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427; RB 44.)

Respondents attempt to deprive this Court of its de novo review of IID's decision to adopt the EDP by characterizing certain findings made by the trial court as "factual," subject to the substantial evidence standard. (See, e.g., RB 82, 88-89.) Respondents further falsely claim that IID "waived" the right to argue that substantial evidence does not support the trial court's purported "factual" findings because IID did not object to the trial court's decision. Both arguments fail.

All of the trial court's findings pertinent to this appeal are based on its interpretation of the terms of the EDP. It is well-settled that "[i]nterpretation of an administrative regulation . . . like [the] interpretation of a statute, is a question of law which rests with the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 9,

quoting *American Hospital Supply Corp. v. State Bd. of Equalization* (1985) 169 Cal.App.3d 1088, 1092.) This Court therefore reviews any "finding" made by the trial court that is based on its interpretation of the terms of the EDP de novo.

Likewise, there has been no waiver by IID for not objecting to the statement of decision. (See RB 89, invoking Code of Civil Procedure section 634 and *In re Marriage of Arceneaux*, (1990) 51 Cal.3d 1130, 1132.) A party need not object to findings with which the party *disagrees*; an objection is required only as to ambiguous or omitted findings, which is not the basis for IID's challenge in this case. (Code Civ. Proc., § 634.) It is sufficient that the decision set forth ultimate findings; it need not address all legal and factual issues. (See *Almanor Lakeside Villas Owners Ass'n v. Carson* (2016) 246 Cal.App.4th 761, 770.) In any event, a failure to object would affect no waiver of IID's right to challenge the trial court's incorrect legal conclusions that are based on its interpretation of the terms of the EDP or governing law. (*United Services Auto. Assn. v. Dalrymple* (1991) 232 Cal.App.3d 182, 186 [if a conclusion of law is wrong, there are no "findings" to be implied in the prevailing party's favor].)

The trial court's error in this case is based on its incorrect legal conclusions about the nature of Respondents' rights and its interpretation of the plain terms of the EDP. This Court independently reviews the IID Board's adoption of the EDP for an abuse of discretion, without deference to the trial court's invalidation of the EDP.

B. The Incorrect Legal Conclusion That Farmers Hold Constitutionally Protected Water Rights Was The Legal Predicate For The Trial Court's Decision To Invalidate The EDP.

IID demonstrated in its opening brief that its elected Board did not abuse its discretion when it adopted the October 2013 EDP because the

terms of the EDP are lawful and consistent with IID's water rights (AOB 23-28), and the adoption of the EDP was well within the scope of authority delegated to it by Water Code section 22252. (AOB 32-35.) IID showed that the EDP was supported by evidence (AOB 35-38), and the adoption of the straight-line and municipal apportionment features of the EDP were not arbitrary or capricious.

Respondents' incorrect conclusion that landowners, and in particular Farmers, hold constitutionally protected interests in IID's water rights is the platform upon which all their other points are built. Remove that platform and their house-of-cards arguments collapse. (RB 45-87.) For example, Respondents' claim that the IID Board acted outside of the enabling statute (RB 65-73), and their reasonable use challenge to the straight-line apportionment method (RB 73-79) are based on a fatal misunderstanding of the nature of IID's water rights and the law: "[F]or an allocation of water within an irrigation district to be equitable, it must take into account the existing water rights users' entitlement to reasonable use of water" (RB 75, emphasis added); "IID could not establish an equitable apportionment plan that deprived Farmers of their existing vested property rights to use water for their reasonable irrigation needs . . ." (RB 77, emphasis added); "Thus, the trial court properly relied upon existing law involving water rights to conclude that an apportionment of water is not 'equitable' as a matter of law if it disregards the Farmers' vested rights to the reasonable and beneficial use of water for their irrigation needs in favor of others, including those without any vested water rights." (RB 79, emphasis added.)

Moreover, the trial court never made any finding that the Board's adoption of the EDP was arbitrary or capricious. (See generally 2 AA 1346-1353.) Instead, the court incorrectly interpreted the terms of the EDP as being inconsistent with water rights, and therefore unlawful. (See, e,g, 2 AA 1348:14-26.)

Respondents based all their arguments on the legal misapprehension that they, the Farmers, have a water right greater than simply the right to service. Their entire challenge to the EDP derives from this misapprehension. Thus, like the collapse of a house of cards when the base is removed, when Respondents' argument about the nature of their water rights collapses, so does their entire challenge to the EDP.

When this Court reviews the Board's action for abuse of discretion de novo (see AOB 21; RB 44), the record will show a measured and complete review of numerous factors contributing to the creation of the EDP. (AOB 35-38.) Respondents even admit that they did not challenge IID's adoption of the EDP as being "entirely lacking in evidentiary support" or "procedurally unfair," and offered no substantive response to the evidence presented by IID in its opening brief. (RB 87; see *Carrancho, supra,* 111 Cal.App.4th at p. 1265.) This Court should thus conclude that the EDP was supported by sufficient evidence and was procedurally fair.

C. The EDP's Municipal Apportionment Does Not Prioritize Any User And Is A Valid Exercise Of The Board's Statutory Discretion To Equitably Apportion Water Among All Of Its Users.

Respondents argue that the EDP "discriminate[s] against the Farmers' vested water rights" (RB 67) by, for example, favoring industrial users,[16] feedlots, dairies, fish farms and environmental resources over

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16 The Abatti family has brought repeated legal challenges to IID's apportionment of water for use by geothermal power plants pursuant to industrial water supply contracts. In a similar lawsuit by James Abatti challenging the 2008 version of the EDP, the Court of Appeal concluded that the "2008 EDP Regulations **did not increase the priority preference that future industrial users of water would receive over agricultural users in times of shortage, but rather, permitted the District to limit water delivery to future industrial users** to an amount less than that to

irrigation users. (See RB 63-73.) This challenge is to the EDP's "Municipal Apportionment," which allocates a small portion of IID's water supply to non-agricultural uses. (AR 0012421-12422; AR 0015808-15810; AR 0017207-17209; AR 0025230-25232; AR 0025588-25590; AR 0027537-27539.) The trial court inexplicably agreed with Respondents and invalidated the EDP's Municipal Apportionment because, according to the court, it "prioritizes other groups of water users, in addition to domestic water users, over farmers." (2 AA 1350:21.) The trial court also interpreted the EDP as placing *no limits* on the amount of water for industrial use, municipal use, feed lots, dairies, fish farms, and environmental. (2 AA 1350:27-1351:3.) Finally the trial court found fault that the EDP allowed IID to provide water to new water users. (2 AA 1351:6)

The trial court's rulings are based on nothing other than the EDP itself and the court's incorrect interpretation of its Municipal Apportionment,[17] which does not prioritize any user and instead imposes customized limits on all water users. These limits are consistent with IID's duty under the District Law to hold and administer its water rights "in trust" "for its uses and purposes" (Wat. Code, § 22437), and equitably distribute its water supply among all the water users in the District for any beneficial use. (Wat. Code, §§ 22252, 22075, 22078.)

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which they would have been entitled under the 2007 EDP Regulations." (*Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, 682-683, emphasis added.)

17 Exhibit 1 to Respondents' Brief constitutes inadmissible extra-record evidence that was neither part of IID's administrative record nor the record before the trial court. (RB 73, 98.) Even if the categories of municipal use experience the growth projected by 2050 in the Exhibit, that growth would not undermine the factual basis for the EDP adopted in October 2013. The Board retains broad discretion under Water Code 22252 to adjust at any time its methods of equitably apportioning water to its customers.

Contrary to Respondents' argument that the Municipal Apportionment requires "that agricultural users and only agricultural users suffer from a shortage of water or water conservation efforts by IID to reduce its use of Colorado River water" (RB 72, emphasis in original), Municipal Apportionment establishes rules under which all of IID's water customers bear the consequences of water shortages and conservation. This is done in a manner that recognizes each category of use (i.e. agricultural; municipal; industrial; feedlots, dairies and fish farms; and environmental resources) has fundamentally different water needs, and each is subject to different laws, regulations and contracts. Because there are important differences among the categories of use, the EDP subjects each of them to apportionment and limitations that are specifically tailored to that category.

The mechanics of the Municipal Apportionment are fully explained in IID's Opening Brief at pages 42-45. The Board properly exercised its discretion to adopt specific rules and limits for each category of use under the EDP. Category-specific limits are consistent with IID's legal duty to equitably distribute water to all of the users in the District. The fact that agricultural users face a different set of rules and limits does not support the trial court's conclusions that certain categories have "priority" over others, or that agricultural users are the only class of users subject to rules and limits.

Respondents' claim that the EDP "prioritizes" non-agricultural users over agricultural users is also unsubstantiated. Indeed, to shore up this conclusion, Respondents resort to improperly citing inadmissible, extra-record documents to suggest bias on the part of IID. (RB 74, n.22.) This Court should disregard those documents. (See IID's Opposition to Respondents' RJN, challenging the relevance and admissibility of Respondents' RJN Exhibits.)

IID's Board properly exercised its discretion to adopt the EDP that equitably distributes and conserves water in order to avoid inadvertent overruns, which would adversely affect all seven basin states that depend on the Colorado River for water. (See AR 0027719.) The trial court unlawfully restrained the IID Board's discretion to meet these responsibilities when it invalidated the EDP's Municipal Apportionment.

1. The District Law Does Not Limit IID's Board's Discretion To Provide Water For Other Than Irrigation Purposes.

Respondents claim that IID was "first and foremost created to irrigate the land within the district," arguing that the provisions of the District Law granting expansive authority to the Board "cannot expand its or the Board's powers beyond the purpose of an irrigation district." (RB 67.) Respondents' argument depends on applying irrelevant sections of the District Law while ignoring the governing sections.

As discussed above, the District Law specifically authorizes and requires IID to sell its water at cost to any and all customers within IID. (Wat. Code, § 22252.) When IID exercises this statutory authority, it must equitably apportion the water among all its customers (*ibid.*), and may provide the water for any beneficial use. (Wat. Code, §§ 22075, 22078.)

Respondents minimize the importance of section 22252, and cite to other Water Code sections that Respondents claim support their argument that the Board should exercise its discretion to benefit Farmers. Those other sections do not apply here at all.

Respondents first rely on Water Code sections 22085 and 22085.5, which apply only when an irrigation district appoints or serves as watermaster within a "watermaster service area" established by the Department of Water Resources ("DWR"). (See Wat. Code, § 22080 et seq., especially §§ 22080, subd. (b) and 22081.) DWR's watermaster

program ensures that water is allocated according to established water rights determined by court adjudications or agreements. (See generally Wat. Code, § 4000 et seq.) IID has never participated in or implemented DWR's watermaster program. Respondents' reliance on these sections is misleading, to say the least, as they are utterly irrelevant.

Respondents also stretch the meaning of Water Code sections 22252.1 and 22252.3 beyond all recognition in contending that they have priority rights to as much water as they claim to need. Specifically, they assert that IID lacks authority to limit farmers' water use except in times of shortage, and then, it must allocate the water based on the farmers' "beneficial needs" during the upcoming irrigation season. (RB 69-70.) Sections 22252.1 and 22252.3 do not support Respondents' contention. These sections *allow* irrigation districts to take certain actions to address shortage conditions (the board "may"), but they do *not* impose any mandatory duties or tie the Board's hands in any way. Contrary to settled canons of statutory construction, under which courts must respect the plain language chosen by the Legislature, Respondents insist that in this context, "may" actually means "must." (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 894 ["[W]e presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language."], citing *In re Christian S.* (1994) 7 Cal.4th 768, 776.)

SWRCB Cases, *supra*, 136 Cal.App.4th at p. 731, upon which Respondents rely for this proposition, is easily distinguishable. Unlike the specific statute discussed in *SWRCB Cases*,[18] Water Code sections 22252.1

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18 *SWRCB Cases*, *supra*, 136 Cal.App.4th at p. 731 construes Water Code sections 1257 and 1258, which states: "In acting upon applications to appropriate water, the board shall consider water quality control plans

and 22252.3 expressly preserve IID's broad discretion by stating that "[n]othing in this section shall . . . restrict or limit existing powers of the board[/district] to control and provide for distribution of water." Thus, Respondents' argument that the Legislature's use of "may" in sections 22252.1 and 22252.3 actually mandates that the Board act in a particular way would render the express statutory language reserving IID's discretionary authority mere surplusage, contrary to established rules of statutory interpretation. (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110.)

2. The EDP's Municipal Apportionment Neither Triggers Nor Violates The "No Injury" Rule.

Respondents argue that "[i]f IID had sought to change its permits to allow for industrial water use, such as geothermal power use, environmental use, or other non-domestic and non-irrigation uses, as provided for in the Permanent EDP," IID would have had to demonstrate compliance with the no-injury rule. (RB 62.) Not so.

The EDP does not trigger the no injury rule. The rule applies when there is a proposed change in the point of diversion, place of use or purpose of use of a water right that injures another legal user, such as a water rights holder. (See Wat. Code, §§ 1702, 1706; *SWRCB Cases, supra*, 136 Cal.App.4th at p. 736.) Under the EDP, IID continues to distribute water consistent with its longstanding water rights. There is no change and no injury.

IID has ample water rights that can serve all of the beneficial uses under the Municipal Apportionment, without any change to its water rights. IID is authorized under its SWRCB Permit and amendments to divert more

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which have been established pursuant to . . . this code, and may subject such appropriations to such terms and conditions as it finds are necessary to carry out such plans."

than 3 MAF of Colorado River water for irrigation, domestic and municipal uses. (AR 0006820-06827.) The Permit also includes a number of environmental conditions as part of the SWRCB approval of the QSA transfers. (*Ibid.*) Under California law, "municipal use" is defined broadly to include industrial uses incidental to towns and cities.[19] Thus, the Permit allows IID to use its post-1914 rights to divert water for all of the following: irrigation, domestic, municipal and incidental industrial uses and environmental protection. (AR 0006738; AR 0006820-06827.)

Under the Law of the River, IID also holds pre-1914 present perfected rights of 2.6 MAF. (AR 0006784, citing *Arizona v. California, supra,* 439 U.S. at p. 429.) The 2.6 MAF can be applied to irrigation and domestic uses, with "domestic uses" defined extremely broadly to include water for "household, stock, municipal, mining, milling, industrial, and other like purposes." (AR 0001247; see *Arizona v. California* (1963) 373 U.S. 546, 566.) In light of this expansive definition of "domestic use," these water rights can be used for almost anything. If any category of Municipal Use cannot be served with these 2.6 MAF, it can be served under the Permit.

Because all categories of Municipal Use can be served under IID's Permit and/or its pre-1914 water rights without any changes, the Board's decision to adopt the Municipal Apportionment cannot violate the no-injury rule.

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19 "Municipal use means the use of water for the municipal water supply of a city town, or other similar population group, and use incidental thereto for any beneficial purpose." (Cal. Code Regs., tit. 23, § 663, emphasis added.)

3. The EDP Does Not Violate Water Code Section 106.

Respondents also argue in support of the trial court's erroneous conclusion that the EDP violated Water Code section 106 because it prioritizes classes of water users, other than domestic, ahead of agricultural water users. (RB 71-73, citing 2 AA 1349:1-4; 1352:26-1353:3.)

Section 106 provides that "the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." Nothing in the EDP violates this section. The overwhelming majority of IID's 3.1 MAF annual entitlement of Colorado River water has been allocated to agricultural water users under the EDP. (AR 0027466-27467; AR 0027557.) The hybrid method of apportioning water to agricultural users offered an apportionment of water between 2.86 and 7.86 acre-feet per acre in 2014. (*Ibid.*) The sheer amount of water apportioned for agricultural use, alone, disproves Respondents' assertion that other categories of use have an illegal "priority" over agriculture use.

Moreover, under the Law of the River, IID's Colorado River entitlement is dedicated to irrigation and domestic uses, with "domestic uses" broadly defined to include almost anything, such as water for "household, stock, municipal, mining, milling, industrial, and other like purposes." (AR 0001247; *Arizona v. California, supra,* 373 U.S. at p. 566.) Pursuant to the Law of the River, almost all of the EDP's categories of Municipal Apportionment (e.g., "household," "industrial" and "stock" uses) are domestic purposes entitled to the highest policy preference under Water Code section 106, and ahead of irrigation. For this additional reason, the EDP is consistent with section 106, and does not violate it.

Respondents impermissibly read Water Code section 106 in isolation. In exercising its discretion, IID's Board is bound not only by the District Law and Law of the River discussed above, but must harmonize other sections of the Water Code that have policy implications for IID as

well. While Water Code section 106 expresses a preference for domestic and irrigation purposes, Water Code section 106.5 establishes a policy preference for municipal use. The EDP harmonizes these considerations. Among other things, it allocates water to municipal users on a per capita basis that is designed to comply with statewide conservation laws. (AR 0027538; AR 0021539-21540; Water Conservation Act of 2009, codified at Wat. Code, § 10608.18 et seq.) Also, the EDP prioritizes irrigation by delivering the overwhelming majority of its water (97 percent) for irrigation use. (AR 0027466-27467; AR 0027557.)

In sum, Respondents' argument and the trial court's finding that the adoption of the Municipal Apportionment feature of the EDP was an abuse of discretion ignores the terms of the EDP and reality, and is unsupported and contrary to law. The trial court invaded the Board's discretion when it invalidated the EDP on this basis.

D. Respondents' Argument That Straight-Line Apportionment Is Inequitable Is Simplistic and Irrelevant.

1. IID Has Implemented A Hybrid Method Of Apportionment Under The EDP.

Respondents' argument that straight-line apportionment is inequitable attacks a straw man that does not exist—i.e., agricultural apportionment using a pure straight-line method. (See, e.g., RB 79 ["EDP used a straight-line method to apportion Farmers' appurtenant rights . . . ."]; RB 80 [straight-line method "treats all acres of agricultural land as requiring the same volume of water . . . ."]; RB 81 ["Straight-line allocation provides water based on acreage, not need."].) Respondents' disingenuous argument ignores the hybrid apportionment method that was implemented by IID under the EDP and the flexibility the EDP provides for that. Hypothetical arguments about pure straight-line apportionment are

irrelevant and pursued with the intent to confuse this court when assessing whether the Board properly exercised its discretion.

As discussed in more detail in IID's Opening Brief at pages 39-42, pure straight-line apportionment is a default method under the October 2013 EDP. (AR 0027466-27467; AR 0027557.) Conflating this default method authorized by the Board for implementation under the October 2013 EDP creates intentional confusion. The EDP allows several different methods of apportionment, and it gives the Board significant discretion to establish the specific method for each ensuing calendar year to allow for flexibility in implementation. (AR 0027537.) With the adoption of the October 2013 EDP, IID implemented a hybrid methodology of agricultural apportionment. (AR 0027466-27467; AR 0027557.) The hybrid method allows each eligible agricultural acre to receive half of its average historical use calculated over a 10-year period, excluding the highest and lowest years. (AR 0027557; AR 0027531-7532.) The other portion of each acre's apportionment is a straight-line fixed amount. (AR 0027557.) In 2014, the first year after the EDP went into effect, this hybrid apportionment method resulted in allocations of 2.86 acre-feet per eligible agricultural acre at the low end, up to a maximum of 7.86 acre-feet per acre for parcels with the highest historical use. (*Ibid.*)

In addition to ignoring the reality of IID's implementation of a hybrid method of apportionment, Respondents and the trial court also ignore that the EDP provides for the Clearinghouse and the farm unit approach under the EDP. Even if the straight-line method of apportionment were employed, these features allow Farmers to access water needed or let go of water that is not. These features provide a thoughtful and sensible functionality to the system that affords Farmers access to additional water to satisfy their reasonable needs. (AR 0027535-27536; AR 0027540-27541; see also AR 0027557; 4 AA 2584-2585 [¶¶ 27, 29].) Because of

this predictability and ease of operation, no agricultural water user has ever been denied the water requested. (10 RT 360:1-14.) Indeed, IID adopted this nuanced approach precisely because it equitably addresses variances in water needs due to a myriad of factors, including but not limited to soil types, crop rotations and changes in commodity markets. (AR 0027367-27368; AR 0027377-27378.) Respondents' argument about pure straight-line apportionment is a red herring, intended to mislead this Court and should be disregarded. The IID Board properly exercised its discretion to adopt the EDP's provisions for the apportionment of water for agricultural use.

2. Respondents Turn The Constitutional Reasonable Use Doctrine On Its Head In Order To Attack Straight-Line Apportionment.

Respondents' argument that straight-line apportionment is unlawful finds no support in the reasonable use doctrine. To the contrary, straight-line apportionment is perfectly consistent with the doctrine because, as discussed above, it promotes conservation and efficient use of water. (See Cal. Const., art. X, § 2; Wat. Code, § 100.) Respondents persuaded the trial court to turn the reasonable use doctrine on its head by contending that the EDP's provisions for the apportionment of water for agricultural use "encourages waste." (2 AA 1352:1-8.) Of course the opposite is true. The Board has a duty, consistent with the doctrine, "to adopt all reasonable measures to prevent the excessive use and waste of water." (*Willard v. Glenn-Colusa Irrigation Dist.* (1927) 201 Cal. 726, 745.) The EDP comports with that duty by limiting the amount of water available to each acre of farmland.

Respondents contend that the doctrine bestows upon agricultural users a right to use as much water per acre as they reasonably need for irrigation. (See RB 75.) This is legally wrong, contrary to the prohibition

against acquiring rights by using a district's water (Wat. Code, § 22262), and at odds with the core purpose of the reasonable use doctrine. The doctrine is a rule of limitation; it is not a safe harbor for traditional uses of water. (See, e.g., *Light, supra*, 226 Cal.App.4th at pp. 1479 [explaining no one has a right to use water unreasonably, and uses deemed unreasonable are subject to curtailment]; see also *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (*Tulare*) (1935) 3 Cal.2d 489, 567 [noting even a well-established beneficial use can become unreasonable as a result of changed circumstances]; *IID v. SWRCB* (1990) 225 Cal.App.3d 548, 570 [same], citing *Tulare, supra,* 3 Cal.2d at p. 567.)

The cases upon which Respondents rely for a contrary rule deal with adjudications among those who hold competing, correlative ownership rights to the same source of water. For example, *Katz, supra,* 141 Cal. 116, establishes the applicability of correlative rights to overlying landowners who draw water from the same groundwater basin. *City of Barstow v. Mojave Water Agency*, *supra*, 23 Cal.4th 1224, and its predecessor, *City of Los Angeles v. City of San Fernando*, *supra*, 14 Cal.3d 199, overruled in part in *City of Barstow v. Mojave Water Agency*, *supra,* 23 Cal.4th 1224, involve adjudications among competing holders of groundwater rights. *Tehachapi-Cummings County Water Dist. v. Armstrong, supra,* 49 Cal.App.3d 992, is irrelevant for essentially the same reason—it involved an adjudication of competing overlying groundwater rights. *Simon Newman Co. v. Sanches* (1945) 69 Cal.App.2d 432, discussed correlative rights to water in an irrigation ditch as between the parties owning lands contiguous to the ditch. All of these cases adjudicate competing correlative water rights claims, rather than granting rights to a subset of a public agency's customers to receive a specific amount of water from the agency. Respondents are not overlying groundwater rights holders or riparian right

holders with correlative rights. These cases are neither instructive nor responsive.

Respondents discount the examples discussed in IID's Opening Brief at page 40 demonstrating that straight-line methods are commonly used to apportion agricultural water by public agencies in the Western United States. (AR 0009440 [Straight-line is the "most common method of allocation in other parts of California and in several other western states."]; AR 0009577 [Sausalito Irrigation District and Lindmore Irrigation District in California both use straight-line apportionments.]; *State ex rel. Reynolds v. Niccum* (1985) 102 N.M. 330, 331-332 [upholding a straight-line approach in New Mexico as "an appropriate and reasonable procedure for determining" water apportionment to users].) Respondents miss the mark. What these examples show is that straight-line methods serve as an important water management tool by promoting conservation by effectively creating a water budget for each acre of land. (AR 0025590-25591.) Indeed, an expert report commissioned by IID recommended straight-line as a common and appropriate method of apportionment. (AR 0010222; AR 0010244-10245.) Although IID has implemented a hybrid method of apportionment, the straight-line method is an important tool and should not be dismissed simply because it does not reflect or anticipate the water needs of the Farmers. The unreasonable result of that argument would be that only methods of apportionment that can predict the water needs of the Farmers could be used to ensure compliance with the reasonable use doctrine. This not only misses the purpose of that doctrine, but also turns it upside down.

The trial court ignored the plain terms of the EDP; and, it ignored the mountain of evidence in the record supporting the Board's decision to adopt the EDP. Instead, the court set up a constitutional issue by adopting a crabbed reading of the EDP, and then substituting its own judgment for the

Board's on whether the EDP, so read, was equitable. (2 AA 1352:1-8 ["to the extent Respondent District has opted to use as part of the 2013 EDP a straight-line apportionment method, which allocates the same volume of water to each acre of farmland regardless of soil type or crop, such apportionment method is not equitable. . . . To the extent it encourages waste, straight-line apportionment violates Article X, Section 2 of the California Constitution."].) The trial court's approach is contrary to the rule of construction that courts should avoid constitutional or other legal infirmities. (E.g., *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373; *Steen v. Appellate Div., Superior Court* (2014) 59 Cal.4th 1045, 1053-1054.)

The question is whether the Board abused its discretion in adopting the EDP with the framework for apportioning water to agricultural users that allowed IID to utilize a straight-line approach. Respondents and the trial court may have adopted a different method, but "[i]n determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.) The Board acted well within its discretion in undertaking the complex task of balancing the competing interests of IID's various users when it adopted the EDP's provisions that utilize the straight-line method of apportioning water as the default for its agricultural users.

3. The Trial Court's Determination That The Straight-Line Apportionment Method Is Unconstitutional Must Fail.

The trial court's conclusion that straight-line apportionment is unconstitutional is legally unsound and is not supported by any evidence. It is entirely based on an erroneous legal interpretation of the EDP and non-existent water rights. This Court interprets the terms of the EDP de novo.

(See *Yamaha Corp. of America, supra,* 19 Cal.4th at pp. 7, 9.) A cursory review of the EDP will demonstrate that it employs a variety of allocation methods that may be adjusted to allow the Board to meet its equitable allocation obligations. (AR 0027537; see also AR 0011103-11105; AR 0012342-12358; AR 0015813-15824; AR 0017213-17226; AR 0025310-25315; AR 0025570-25584.)

Ignoring that the trial court's interpretation that the EDP's straight-line apportionment provision violates the constitutional reasonable use doctrine is a question of law reviewed de novo by this Court, Respondents claim that substantial evidence supports the trial court's invalidation of the straight-line method of apportioning water. (RB 80.) This argument improperly encourages this Court to depart from reviewing questions of law de novo. To the extent the trial court's conclusion that the straight-line apportionment method encourages "waste" can be considered factual, it is not supported by <u>any</u> evidence.

On page 82, Respondents conclude that the trial court's invalidation of straight-line apportionment is supported by substantial evidence. (RB 82.) In support, Respondents rely predominantly on the California Supreme Court's decision from 1927 in *Willard*, *supra*, 201 Cal. at p. 740. (RB 80-81.) But *Willard* is not <u>evidence</u> at all. Moreover, *Willard* does not arise out of a similar factual situation. *Willard* upholds assessments imposed by an irrigation district. (*Id.* at pp. 749–750.) It does not mandate any method of apportionment, and it does not even address equitable distribution of water pursuant to *Water Code* section 22252. It is not precedent for requiring IID to utilize specific factors to determine equitable distribution of water, and it certainly is not evidence supporting the trial court's erroneous conclusion that the EDP violates the reasonable use doctrine. This is another attempt by Respondents to mislead this Court, and it should be rejected out of hand.

The only other "evidence" that Respondents identify to support the trial court's erroneous conclusion that the EDP's method of apportioning water to agricultural users encourages "waste," is a pair of charts used at an October 2013 IID Board Meeting to demonstrate the 10-year average historical use of water per acre, and a comparison of water allocations under the different approaches under consideration at that meeting, including two different hybrid methods. (RB 82, citing AR 0027531; AR 0027533.) The historical use chart does not demonstrate any information pertinent to straight line allocations. The chart simply demonstrates how many acres would receive different amounts of water under different allocation methods. (AR 0027531.) The second chart additionally shows that the *hybrid* allocation method that the Board actually adopted is the closest approach to meeting historical use within the District. (AR 0027533.) Moreover, neither chart takes into account the EDP's provisions for the Clearinghouse and the farm unit, or the fact that straight-line apportionment is only a default methodology for agricultural apportionment in the EDP and does not preclude historical use as a basis for the period of time that IID has reliable field-specific data.

The two pages of "evidence" cited by Respondents are incomplete and taken out-of-context, such that they are not substantial evidence that the EDP's method of apportioning water to agricultural users is unconstitutional. At bottom, Respondents' brief makes clear that there is no substantial evidence supporting the trial court's conclusion that the straight-line method of apportioning water unconstitutionally encourages "waste." In any event, Respondents' "evidence" has nothing do with the trial court's ruling, which reflects the trial court's legal construction of the EDP based on claimed water rights that do not exist in California.

Finally, IID was not required to object to the trial court's legal conclusions and interpretation of the EDP set forth in the decision with

which it disagrees. (See *U.S. Auto. Assn., supra*, 232 Cal.App.3d at p. 186; *Almanor Lakeside Villas Owners Association, supra*, 246 Cal.App.4th at pp. 770–771.)

4. The Trial Court's Establishment Of Historical Use As The Only Equitable Method Of Apportionment Impermissibly Usurps The Board's Discretion.

Respondents persuaded the trial court to rule that an equitable apportionment plan must consider crop type, soil type, and the practicability of irrigation, *which factors are reflected by historical water use*. (RB 83.) The trial court went even further, establishing "***historical use . . . is the equitable and acceptable method of apportionment.***" (2 AA 1353:8-10, emphasis added.) This rule finds no support in California law. The trial court's mandate usurps the Board's discretion, and it conflicts with the constitutional reasonable use doctrine.

Respondents misstate IID's position as being that "consideration of 'past use' is inconsistent with" the reasonable use doctrine. (RB 84.) IID has not argued that historical use is *ipso facto* unconstitutional. The EDP permits the Board to consider historical use (AR 0027537), and IID implemented a hybrid method partially based on historical use. (AR 0027557.) Such consideration of historical use falls within the Board's broad discretion under Water Code section 22252 to determine what is equitable, and it does not violate the reasonable use doctrine.

On the other hand, the trial court's ruling that "***historical use . . . is the equitable and acceptable method of apportionment***" (2 AA 1353:8-10, emphasis added) conflicts with the reasonable use doctrine (Const., art. X, § 2; Wat. Code, § 100), because historical uses that may be reasonable at one time, because of changed conditions, may become a waste of water at a later time. (See, e.g., *Light, supra*, 226 Cal.App.4th at p. 1479; *IID, supra*, 225 Cal.App.3d at p. 570.) No one has a right to use water unreasonably,

and uses deemed unreasonable are subject to curtailment. (*Light, supra,* 226 Cal.App.4th at p. 1489.) The Board must have the flexibility to apportion water to account for changing circumstances in order to prevent waste. The EDP provides the Board with that flexibility. The trial court's requirement that water be apportioned based on historical use alone does not.

The Board's adoption of the straight-line apportionment as the default method for apportioning water to agricultural users, which may be changed for any water year, and which also takes into account the Clearinghouse and farm unit provisions of the EDP, did not violate the constitutional reasonable use doctrine. The trial court's opposite conclusion invalidating the straight-line apportionment method and mandating that IID apportion water based exclusively on historical use is contrary to law, is not supported by any evidence, and constitutes an improper invasion of the Board's discretion. (*Helena F., supra,* 49 Cal.App.4th at p. 1799.)

III. RESPONDENTS' CHALLENGES TO THE EDP BASED ON STRAIGHT-LINE APPORTIONMENT, MUNICIPAL APPORTIONMENT AND THE CLEARINGHOUSE ARE TIME-BARRED.

IID set forth compelling reasons why Respondents' challenges to the features of the EDP that were contained in the December 2007, November 2008 or April 2009 versions of the EDP are time-barred. The specific features of the EDP that have remained the same and were challenged by Respondents are (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse. Because it has been more than three years[20] since the adoption of those versions of the

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20 Respondents do not contest that the longest potentially applicable statute of limitations is three years. (Code Civ. Proc., § 338.)

EDP, Respondents are time-barred from challenging the EDP based upon those common features. (*Buena Park Motel Assn. v. City of Buena Park* (2003) 109 Cal.App.4th 302, 307-308.) Alternatively, because the 2008 version of the EDP was validated in *Morgan v. Imperial Irrigation District*, Case No. ECU 04936 ("*Morgan*"), which contained all of the same features contained in the October 2013 EDP challenged by Respondents, their challenge to the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse features should have been denied. (*Colonies Partners, L.P. v. Superior Court* (2015) 239 Cal.App.4th 689, 694.)

Respondents offer no direct response, and their arguments bearing on the timeliness issue should be rejected.

A. The Terms Of The EDP Versions Are Undisputed: This Court Independently Reviews The Trial Court's Interpretation Of Those Terms.

Respondents falsely state that the "pertinent facts" relevant to the determination of whether their challenges were time-barred were disputed. (RB 88.) The issue comes down to whether the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse features of the EDP have remained constant throughout all versions of the EDP. To resolve the question simply requires this Court to interpret each version of the EDP. There are no disputed facts. Each version of EDP says what it says.

The trial court's incorrect conclusion that Respondents' challenge to the entire 2013 EDP was timely is a legal conclusion that is not entitled to any presumption or weight by this Court.[21] (*Yamaha Corp. of America,*

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21 Based on their incorrect characterization of the court's interpretation of the terms of the EDPs as factual, Respondents again claim that IID

supra, 19 Cal.4th at p. 9.) This Court interprets each version of the EDP de novo, and makes its own independent determination of whether the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse features of the EDP have remained constant throughout all versions of the EDP.

B. Respondents Do Not Plausibly Dispute That The (i) Straight-Line Apportionment, (ii) Municipal Apportionment, and (iii) Operation Of The Clearinghouse, Have Remained Constant Features Throughout All Versions Of The EDP.

Respondents claim that the EDP is "fundamentally different" from any earlier EDPs by citing to purported differences in the plans. (See RB 89-91.) But, as did the trial court, they are focusing on features of the EDPs that are inapt because they are not the subject of IID's untimeliness claim. (See RB 89-91; 2 AA 1349:19-28.) For example, Respondents claim that the "main difference from the 2008 SDI EDP is that the Permanent EDP was intended to operate as a permanent allocation plan governing the distribution of water by IID and not a temporary plan that would only apply in times of declared water shortage or SDI condition." (RB 89.) It is irrelevant that the 2013 EDP is "permanent" whereas earlier versions were "temporary." The transition from the SDI mechanism to permanent mechanism was driven by drought conditions, Colorado River shortages and Inadvertent Overrun and Payback Policy ("IOPP"); it did not change the specific allocation mechanisms in place since 2007.

"waived" the right to challenge the trial court's conclusion that the 2013 EDP was a "new, complete . . . plan" by not objecting to the Tentative Decision or Statement of Decision. False again. There is no waiver where, as here, the trial court committed legal error. (*U.S. Auto. Assn.*, *supra*, 232 Cal.App.3d at p. 186.)

IID has never claimed that the October 2013 EDP is identical to the earlier EDP versions, or that Respondents are time-barred from all challenges to the EDP. IID made this clear in the trial court on February 19, 2015. (2 AA 1121:11-17 ["those policies that have been adopted and in place for many, many years now are simply not subject to attack"].) It has always been IID's position that Respondents simply cannot challenge the elements of the EDP that were contained in the December 2007, November 2008 or April 2009 versions of the EDP.

Respondents expend seven pages about the Honorable Diane B. Altamirano's findings that were set forth in her ruling on IID's challenges to Respondents' Second Amended Complaint. The parties disagree over the meaning of the trial court's finding that*:* "For this reason, Petitioners/Plaintiffs can only attack the October 2013 EDP with respect to any change that it contains from the May 2013 EDP, as to which, along with all prior EDP's, attack is barred by the passage of time." (1 AA 729:15-18.) Respondents claim that this finding only barred Respondents from challenging provisions that appeared in both the October 2013 EDP and the May 2013 EDP. (RB 92-99.) It is IID's position that the court intended to bar any challenge to any feature of the October 2013 EDP that was in any "prior EDP's." (AOB 51; 2 AA 1115:1-26.) Ultimately, it is for this Court to independently decide whether the constant features of the EDPs were timely challenged in this case or not.

As set forth in IID's Opening Brief at page 53, a simple comparison of the versions of the EDP makes it clear that the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse, have remained constant features throughout all versions of the EDP. (AR 0012419-12426 [2007 EDP]; AR 0015806-15812 [2008 EDP]; AR 0017205-17211 [2009 EDP]; AR 0025227-25272 [April 2013

EDP]; AR 0025585-25592 [May 2013 EDP]; AR 0027534-27542 [October 2013 EDP].)

First, each version of the EDP has included the same apportionment structure for non-agricultural uses: municipal users, industrial users, feedlots, dairies and fish farms and environmental resources.

Second, each version of the EDP has utilized the straight-line method of apportionment for agricultural lands: Per-acre flat amount calculated by subtracting the non-agricultural apportionment from total available water supply and then dividing the remaining water supply by the total number of eligible agricultural acres.

Third, each version of the EDP includes the Clearinghouse, formerly called the "District Water Exchange," which is a market mechanism designed to transfer water from agricultural water users that have employed conservation measures or otherwise do not need the full apportionment offered to other agricultural water users with greater needs.

Respondents have failed to dispute that (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse, have remained constant features throughout all versions of the EDP, because they cannot plausibly do so. A simple review of the undisputed terms of the EDPs affirms that all versions of the EDP possess these constant features.

C. Respondents' Challenge To The Features Of The EDP That Have Remained Constant Are Time-Barred As A Matter Of Law

Respondents fail to account for the preclusive effect of the decisions in *Buena Park Motel Assn., supra*, 109 Cal.App.4th at p. 308, *Napa Citizens for Honest Govt. v. Napa Cnty. Bd. of Supervisors* (*Napa Citizens*) (2001) 91 Cal.App.4th 342, 387-389, and *De Anza Properties X, Ltd. v. Cnty. of Santa Cruz* (9th Cir. 1991) 936 F.2d 1084, 1086, which IID cited

in its opening brief at page 52. All three of these cases that Respondents blithely ignore are illuminating because they all stand for the rule that the time limit for challenging provisions in ordinances, general plans, and policies that have remained the same/unaltered, does not restart simply because the ordinance, plan or policy is amended.

The reasoning of *Buena Park Motel Assn., supra,* 109 Cal.App.4th at p. 308, *Napa Citizens, supra,* 91 Cal.App.4th at pp. 387-389, and *De Anza Properties X, Ltd., supra,* 936 F.2d at p. 1086, makes sense. If Respondents can subject IID to a legal challenge attacking policies that have been in place for a decade (and that include Respondents' participation),[22] the discretion of IID's duly elected Board to implement needed policy changes would be unjustifiably and improperly constrained. Indeed, to allow such an attack here would open virtually every public agency tasked with adopting and implementing plans, policies or quasi-legislative acts of any kind to ongoing litigation every time they adopted revisions or modifications. No plan, policy or quasi-legislative act could ever be truly settled. Faced with such a risk, public agencies and their boards will undoubtedly be hesitant to issue needed modifications or revisions.

The trial court should have applied the California law cited above, which does not allow litigation of the portion of the EDP that has been constant for many years. It is clear from the face of the documents that the EDPs were revisions or amendments. (AR 0027534; AR 0027546.) And a simple comparison of the undisputed terms of the versions of the EDP

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22 It cannot be over-emphasized that, as a member of the Board, Respondent Michael Abatti voted to approve the 2007 and 2009 versions of the EDP, which included the same (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse challenged here. (AR 0012514; AR 0017189.)

demonstrates that IID's Board kept certain provisions the same, and modified others. (AR 0012419-12426 [2007 EDP]; AR 0015806-15812 [2008 EDP]; AR 0017205-17211 [2009 EDP]; AR 0025227-25272 [April 2013 EDP]; AR 0025585-25592 [May 2013 EDP]; AR 0027534-27542 [October 2013 EDP].) Respondents are time-barred from challenging the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse, which have remained constant features throughout all versions of the EDP, as a matter of law.

D. Respondents' Challenges To The Common Features Of The EDP Are Also Barred By The *Morgan* Validation Action.

Alternatively, because the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse features of the October 2013 EDP were included in the 2008 version of the EDP, which was validated in *Morgan, supra*, Case No. ECU04936, their challenge to these features should have been dismissed. (See AOB 54-56.)

Respondents claim that their challenge to the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse features of the October 2013 EDP were not validated in the *Morgan* action because the October 2013 EDP "did not then exist when the Morgan action was filed on September 21, 2009." (RB 100.) Again, Respondents miss the point. The point is that the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse features of the October 2013 EDP have remained constant throughout all versions of the EDP, including the 2008 version of the EDP that was validated in *Morgan*. The features of the October 2013 EDP that were carried over from the 2008 version of the EDP could have been adjudicated in the *Morgan* action, and were adjudicated in the *Morgan* action, and were thus validated in the *Morgan* action.

Respondents ignore the trial court's order validating the 2008 EDP cited by IID. (AOB 54.) It is true that the *Morgan* petitioner and defendant eventually dismissed the causes of action challenging the November 2008 EDP, but the trial court nonetheless validated the EDP in its statement of decision, reasoning that "in adopting an EDP, the [IID] was discharging its obligation to establish equitable rules for the distribution of water" conforming with Water Code section 22252. (*Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 927.) The trial court's validation of the November 2008 EDP was not challenged on appeal. Thus, the trial court's validation is conclusive and binding. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 844.)

Finally, Respondents admit that the *Morgan* validation action was brought pursuant to and authorized by a statute (RB 101), but claim that the portion of the trial court's order validating the November 2008 EDP was not authorized by statute. (RB 100.) The gist of Respondents' argument is that a validation action should be dissected to determine which claims asserted in the validation action are authorized by statute, and to hold only those claims validated. Respondents do not cite any authority for this proposition, nor has IID identified any authority on the issue.

Under the validation statutes (Code Civ. Proc., § 860 et seq.), all matters that are *or could be* adjudicated in a validation action, including constitutional challenges, must be raised in the validation action, or they are waived and forever barred. (Code Civ. Proc., § 870, subd. (a).) Moreover, "[t]he validating statutes should be construed so as to uphold their purpose, i.e., 'the acting agency's need to settle promptly all questions about the validity of its action.'" (*McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1166, citing *Friedland, supra,* 62 Cal.App.4th at p. 844; see *N.T. Hill Inc. v. City of Fresno* (1999) 72 Cal.App.4th 977, 990–991.)

Respondents should not have been allowed to challenge the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the operation of the Clearinghouse features of the October 2013 EDP that were included in the 2008 version of the EDP and validated in *Morgan, supra*, Case No. ECU04936.

IV. IID'S APPEAL IS NOT MOOT.

Respondents disingenuously claim that the appeal from the writ requiring repeal of the EDP and that part of the judgment precluding implementation of the EDP is "moot" because IID repealed the EDP. Respondents conspicuously omit that IID repealed the EDP only under compulsion, after the Court of Appeal held that enforcement of the writ and judgment was not stayed pending appeal, and IID was therefore faced with the threat of contempt if it did not repeal the EDP. (See Appellant's Reply Appendix ("ARA") 118.)

In California, waiver of an appeal will be implied where there is *voluntary* compliance with a judgment. (*Lee v. Brown* (1976) 18 Cal.3d 110, 115.) Where compliance arises under compulsion of risk or forfeiture, waiver will not be implied. (*Id.* at p. 116; *Cunningham v. Magidow* (2013) 219 Cal.App.4th 298, 302 [finding there is no authority for the proposition that, "in order to preserve her right to appeal, [appellant] was required to defy the court's order and thereby risk being held in contempt."].)

Here, the parties filed competing motions in the trial court regarding the applicability of the automatic stay on the enforcement of the writ and judgment. (3 AA 1706-1719; 3 AA 2108-2124.) IID argued that the automatic stay applied to enforcement of the writ and judgment, and Respondents sought an order that the automatic stay did not apply. (*Ibid*.) IID exhausted all available trial court remedies to confirm or obtain the stay. (3 AA 1706-1719.) The trial court declined to provide a clear ruling on whether the automatic stay applied (see 4 AA 2594-2595), and both

parties petitioned for writ relief in this Court. (See ARA 004-058; 059-117.) IID filed a petition for writ of supersedeas to confirm that the stay applied; Respondents filed a writ of mandate to confirm that the stay did not apply. (*Ibid.*) This Court found that the automatic stay did not apply, "[b]ecause the writ of mandate and declaratory judgment constitute a prohibitory injunction, *precluding the [IID] from continued enforcement* of the *October 2013 [EDP]*." (See ARA 118, emphasis added.)

Moreover, it was clear to IID that Respondents had every intention of enforcing the writ and judgment pending appeal if IID did not repeal the EDP. For example, on November 13, 2017, Respondents sent a letter threatening to move for contempt if IID executed an amendment of the Ormesa agreement as violating the trial court's judgment. (4 AA 2362.) Respondents then argued to the court that IID's annual notices implementing the EDP were additional examples of actions that could be considered contempt. (4 AA 2200:9-10.) Indeed, the trial court all but invited Respondents to move for contempt when it stated that it could potentially entertain a motion for contempt, and Abatti responded that bringing "*a motion for contempt . . . as a necessary first step"* is *"something we may have to do if that's the way the Court would like to see it.*" (See ARA 069 [IID Writ of Supersedeas, at p. 11.) Further, in Respondents' Petition for Writ of Mandamus, they argued that the Court should issue a writ or order, among other things, to "*allow punishment* of the IID for violating the declaratory judgment and/or the writ of mandate." (ARA 010, 049 [Abatti Writ of Mandamus, at p. 7, emphasis added; *id.* at p. 40 ["P]ermit the Abatti Petitioners to enforce any future violations of the Declaratory Judgment by IID."]) One of the main reasons IID filed its petition for writ of supersedeas was to stave off Respondents' clear intention of moving for contempt, which necessitated this Court's

determination of the applicability of the automatic stay. (See ARA 089 [IID's Writ of Supersedeas, at p. 31].)

The only case Respondents cite in support of their argument that the appeal is moot is *Sierra Club v. Bd. Of Supervisors* (1981) 126 Cal.App.3d 698, 704-705. (RB 45.) In *Sierra Club*, the Court of Appeal held that the central issue of the appeal, challenge to a zoning ordinance based on inconsistency with a general plan, became moot when, during the pendency of the appeal, a new general plan was adopted with which the ordinance was consistent. (*Sierra Club, supra*, 126 Cal.App.3d at pp. 704-705.) The new general plan adopted in *Sierra Club* that caused the appeal in that case to be moot was not adopted in response to threats of contempt proceedings. *Sierra Club* did not involve the situation here, where IID repealed the EDP after exhausting all of its remedies in the trial court and in this Court to confirm that enforcement of the writ and judgment were stayed pending this appeal.

In short, Respondents' argument here finds no support from *Sierra Club*. IID did not voluntarily comply with the writ and judgment during the pendency of the appeal; instead, it repealed the 2013 EDP only after this Court found that the automatic stay did not apply and in the face of Respondents' repeated threats to file contempt proceedings. There was no waiver of IID's appeal, nor is any aspect of IID's appeal moot. Indeed, if IID prevails in this appeal, it will reinstitute the EDP in accordance with this Court's decision.

CONCLUSION

For all these reasons, the trial court's decision must be vacated and judgment entered denying Respondents' petition in its entirety.

CROSS-RESPONDENT'S BRIEF

INTRODUCTION

Respondents challenge in their cross-appeal the trial court's (i) order sustaining of the demurrer on the Third (Takings) and Fourth (Breach of Fiduciary Duties) Causes of Action asserted in Respondents' Second Amended Petition, and (ii) discussion of the Validation Statutes, section 860 et seq. The trial court's ruling on IID's demurrer should be affirmed.

Respondents argue that their takings and breach of fiduciary duty claims should have withstood IID's demurrer because they alleged that they have a property interest in IID's water that was affected by the Board's adoption and implementation of the EDP. Respondents' incorrect legal conclusion that they hold property rights in IID's water dominates their briefing on the demurrer and Second Amended Petition, and the trial court correctly found that Respondents do not have a property interest in a specific allocation of IID's water. Thus, because Respondents do not have a property right in IID's water, and it is undisputed that Respondents have never received less than the amount of water reasonably required to maintain their crops (10 RT 360:1-14; 4 AA 2585:3-4; 4 AA 2208:11-23), they could not (and cannot), as a matter of law, be damaged by the adoption and implementation of the EDP. The trial court correctly dismissed Respondents' claims for taking and breach of fiduciary duty.

Moreover, the trial court correctly found that Respondents did not plead facts supporting their bare legal conclusion of damages. Respondents only provided allegations that speculate about potential future injury. (See 1 AA 410:1–5 [Verified Second Amended Petition].) Respondents did not plead that there has been a reduction in water, or that there has been any impact on Respondents' use of the water in a reasonable and beneficial manner, and Respondents could only speculate that they "could" lose water as a result of the EDP. (See *ibid.* [stating that Abatti "could" lose water as

a result of the EDP].) Because the Second Amended Complaint lacked any allegations that Respondents have suffered or necessarily will suffer a specific appreciable injury, the trial court properly sustained IID's demurrer on the taking and breach of fiduciary duty causes of action.

Respondents also take issue with Judge Altamirano's discussion of the Validation Statutes in her ruling on the demurrer. Respondents' complaint with the trial court's discussion of the Validation Statutes is perplexing and it is manifestly unclear what relief they are seeking from this Court on that basis. Respondents conclude without any support that Judge Altamirano somehow violated their due process rights relating to the Validation Statutes (RB 104), but fail to explain how they were harmed. As discussed below, Judge Altamirano's ruling sustaining the demurrer on Respondents taking and breach of fiduciary duty claims was not based on any findings about the Validation Statutes. Respondents have waived the right to challenge the decision on appeal to the extent those findings formed the basis for the court's ruling on IID's motion to strike. To the extent Judge Altamirano erroneously found that Respondents' should have filed a validation action to challenge the April and May 2013 versions of the EDPs, any such error was harmless because those versions of the EDP were moot once the Board adopted the October 2013 EDP. And Respondents ultimately were allowed by Judge Anderholt to challenge all aspects of the October 2013 EDP. Respondents have not shown how they are entitled to any relief from this Court on this cross-appeal regarding Judge Altamirano's discussion of the Validation Statutes.

RELEVANT BACKGROUND

On November 27, 2013, Respondents filed a Verified Petition for Writ of Mandate and Complaint. (1 AA 35-56.) The case was assigned to the Honorable Diane B. Altamirano. (1 AA 78.) Respondents filed a

Verified Amended Petition on February 20, 2014 (1 AA 84-106), to which IID demurred on March 27, 2014. (1 AA 115-139.)

On June 9, 2014, Respondents filed a Verified Second Amended Petition for Writ of Mandate and Complaint asserting four causes of action for declaratory relief, mandamus under Code of Civil Procedure section 1085, taking without compensation and breach of fiduciary duty. (1 AA 392-424.)

On July 28, 2014, IID filed a demurrer challenging Respondents' claims for taking without compensation and breach of fiduciary duty. (1 AA 425-436.) IID demurred on the grounds that Respondents could not state a claim for either of these claims because Respondents' alleged damages were speculative and the claims were not ripe. It is undisputed that Respondents have never received less than the amount of water reasonably required to maintain their crops, and that no water request has gone unfulfilled while the EDP was in effect. (4 AA 2585:3-4; 4 AA 2586:5-9.)

Respondents opposed IID's demurrer on August 21, 2014. Respondents argued that the fact that they have received all of the water reasonably required to maintain their crops was irrelevant. (1 AA 653:27-28.) According to Respondents, their "third and fourth causes of action implicitly require a determination of who owns the water rights exercised to irrigate the Imperial Valley . . . ." (1 AA 648:13-15.) Respondents thus opened the door on the issue of who owns the water rights in the Imperial Valley in their opposition to IID's demurrer.

IID also filed a Motion to Strike Respondents' allegations challenging aspects of the October 2013 EDP that were contained within the earlier versions of the EDP as time-barred. (1 AA 437-463; see AOB 50-56.) That order has not been challenged by Respondents.

On November 12, 2014, the court issued an order sustaining the demurrer on Respondents' cause of action for taking and breach of

fiduciary duty without leave to amend. The court's ruling started with a discussion of the Validation Statutes, sections 860, et seq. The court then found that Respondents "can only attack the October 2013 EDP with respect to any change that it contains from the May 2013 EDP, as to which, along with all prior EDP's, attack is barred by the passage of time." (1 AA 729:15-18.) The trial court further stated that "there is no allegation of ultimate facts showing arbitrariness, capriciousness, or an entire lack of evidentiary support or a failure to follow procedure or give notices required by law on the part of the Respndent[sic]/Defendant District." (1 AA 729:19-22.) The trial court then found that "there is an allegation of the bare legal conclusion of damage, without the allegation of facts to back it up." (1 AA 730:4-5.) Finally, the court found that

> Although the court agrees that by virtue of past dealings, Plaintiffs/Petitioners have a reasonable expectation of an allocation of water that is fair and equitable, the court disagrees with Plaintiffs/Petitioners' claim that they have property rights in allocations of water on a specific basis such that they can claim damages for changes in such allocations, if such changes in fact occur.

(1 AA 730:7-10.) Because Respondents had already amended twice before and made "no showing as to how they could in good faith amend to remedy the defects in their pleading to actually state a cause of action," the court granted IID's demurrer on Respondents taking and breach of fiduciary duty claims without leave to amend.

At the same time the court granted IID's demurrer, it also granted IID's motion to strike certain allegations that are specified in the court's order. (1 AA 730-731.)

On November 25, 2014, Respondents filed a Third Amended Petition for Writ of Mandate, which is the operative petition in this case. (1 AA 735-757.) The matter was reassigned to the Honorable L. Brooks Anderholt on December 26, 2014. (2 AA 879-880.) After unsuccessfully

moving to strike portions of Respondents' Third Amended Petition (2 AA 978), IID filed its answer on March 18, 2015. (2 AA 979-994.)

ARGUMENT

I. STANDARD OF REVIEW.

"When a demurrer is sustained by the trial court, [this Court] reviews the complaint de novo to determine whether, as a matter of law, the complaint states facts sufficient to constitute a cause of action. [Citations.]" (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031.) This Court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citations.]" (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.) **"**The plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on which the trial court sustained the demurrer, and if the defendant negates any essential element, [this Court] will affirm the order sustaining the demurrer as to the cause of action. [Citations.]" (*Martin, supra,* 173 Cal.App.4th at p. 1031.)

II. THE TRIAL COURT PROPERLY DISMISSED RESPONDENTS' THIRD CAUSE OF ACTION (TAKING) AND FOURTH CAUSE OF ACTION (BREACH OF FIDUCIARY DUTY).

To maintain their Third (Takings) and Fourth (Breach of Fiduciary Duties) Causes of Action, Respondents must have alleged that they have suffered or necessarily will suffer a specific appreciable injury.

At a minimum, in order to establish that a compensable taking has occurred, the plaintiff must allege "an invasion or appropriation of some valuable property right which the landowner possesses and the invasion or

appropriation must directly and specifically affect the landowner to his injury." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 119-120.)

A breach of fiduciary duty claim is a species of tort. (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1534.) As such, the cause of action does not accrue until the plaintiff has suffered "actual and appreciable harm." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 515.) Thus, the "mere breach" of a duty that causes "only nominal damages, speculative harm, or the threat of future harm" will not suffice to create a cause of action. (*Id.* at p. 514; see also *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [same]; *Walker v. Pac. Indem. Co.* (1960) 183 Cal.App.2d 513, 516–518 [mere exposure to potential future harm insufficient]; *Mosier v. Southern California Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1044 [damage proximately caused by the breach is an essential element of the claim], citing *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

The trial court dismissed Respondents' Third (Takings) and Fourth (Breach of Fiduciary Duties) Causes of Action after finding that Respondents failed to allege, as they must, that they suffered or necessarily will suffer a specific appreciable injury. The trial court correctly found that Respondents have no property right to a specific allocation of IID's water and failed to plead facts sufficient to establish the damage element of their taking and breach of fiduciary causes of action. The trial court's order sustaining IID's demurrer should be affirmed.

A. The Trial Court Properly Dismissed Respondents' Taking And Breach Of Fiduciary Duty Claims Because They Have No Property Right in IID's Water.

The trial court correctly dismissed Respondents' taking and breach of fiduciary duty claims after finding that Respondents do not have "property rights in allocations of water on a specific basis such that they

can claim damages for changes in such allocations, if such changes in fact occur." (1 AA 730:7-10.) As discussed in IID's opening brief at pages 23-28, and in Argument Section I of IID's Reply brief above, Respondents are not overlying groundwater rights holders, riparian right holders or appropriative right holders, nor are their "rights" correlative to those held by IID. Respondents have no constitutionally protected right to any amount or proportion of IID's water, and certainly not as much water as they contend they reasonably need. Instead, as confirmed in *Bryant*, *supra*, 447 U.S. at pp. 364–365, state law determines the nature of Respondents' rights, and that right is limited to continued water service that runs appurtenant to Respondents' land. Because Respondents do not have a property right to a specific allocation of IID's water, and have never received less than the amount of water reasonably required to maintain their crops (10 RT 360:1-14), they could not (and cannot), as a matter of law, be damaged by the adoption and implementation of the EDP. The trial court correctly dismissed Respondents' claims for taking and breach of fiduciary duty.

1. Respondents' Desperate Argument That The Trial Court Aas Constrained In Its Ability To Determine Respondents' Water Rights Should Be Rejected.

Respondents imply that the trial court did something wrong when they disingenuously claim that "the trial court nonetheless rule *sua sponte* that the Abattis have no 'property rights in allocations of water on a specific basis such that they can claim damages for changes in such allocations, if such changes in fact occur.'" (RB 107.) There was nothing "sua sponte" about the trial court's decision. Respondents put the question of whether or not they have water rights before the court on IID's Demurrer. As discussed above, Respondents opposed IID's demurrer on the grounds that their "third and fourth causes of action implicitly require a determination of who owns the water rights exercised to irrigate the

Imperial Valley . . . ." (1 AA 648:13-15.) Indeed, the vast majority of Respondents' opposition to IID's demurrer is based on the false assertion that they have property rights in IID's water. (See 1 AA 648-655.) Respondents cannot ignore that they opened the door on the nature of their purported water rights in connection with IID's demurrer, and then do a turn-about to argue to this Court that the trial court somehow acted improperly when it rejected Respondents' position and sustained IID's demurrer on that very issue.

In any event, Respondents' complaint with the trial court's ruling on the demurrer is yet another obfuscation. This Court "will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings. [Citation.]" (*Martin, supra,* 173 Cal.App.4th at p. 1031.)

B. The Trial Court Correctly Dismissed Respondents' Takings And Breach of Fiduciary Duty Claims After Finding Respondents Failed To Allege Facts Supporting Their Bare Legal Conclusion of Damage.

The trial court correctly dismissed Respondents' taking and breach of fiduciary duty causes of action because Respondents failed to allege facts supporting their bare legal conclusion of damage. Respondents alleged that they have water rights and that IID interfered with, breached or violated those rights; but Respondents do not allege facts supporting damages. It is axiomatic that appreciable harm is essential to any lawsuit. (See *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 744, 750.) Respondents quote three paragraphs from the Second Amended Petition and claim that these allegations satisfied their burden to plead facts supporting all of the elements of their takings and breach of fiduciary duty claims. (See RB 105.) Not so. Respondents' selected examples actually

prove the correctness of the trial court's ruling because they do not contain any allegation that Respondents suffered or necessarily will suffer a specific appreciable injury as a result of the adoption and implementation of the EDP.

Respondents first quote Paragraph 3 of their Second Amended Petition, which simply sets forth Respondents' position on the nature of their water rights: "the water rights involved in this case constitute a species of real property." (*Ibid.*) Respondents next quote Paragraph 5, which alleges how the EDP purportedly violates "irrigators" water rights, but does not allege any facts supporting actual harm. (*Ibid*.) Finally, Respondents quote Paragraph 11, wherein Respondents' conclude: "to exacerbate the harm that it has caused through all three water distribution plans, IID implemented the Plans" after Respondents had planted and financed crops to be grown later. Noticeably absent from any of these quoted allegations are any facts showing that Respondents have suffered or necessarily will suffer a specific appreciable injury. For example, how did IID's adoption of the EDPs after Respondents planted and financed crops result in damage to Respondents? Did they lose crops? Did they default on their financing obligations? The answer is no, because it is undisputed that Plaintiffs have never received less than the amount of water reasonably required to maintain their crops (10 RT 360:1-14), and that no water request has gone unfulfilled as a result of the EDP. (4 AA 2585:3-4; 4 AA 2586:5-9.)

Respondents also quote Paragraph 96 of the Second Amended Petition, which summarily concludes that "IID has taken and damaged such private property right of Abatti . . . . ." (RB 105.) The mere allegation that there has been a taking, however, is insufficient to establish a takings claim, because a court disregards contentions and conclusions of law when ruling on a demurrer. (See *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

Respondents further rely on their counsel's argument at the hearing on the demurrer in the trial court to support their claim that they sufficiently pled all of the elements of their causes of action. Counsel's argument is irrelevant. The question that was before the trial court, and now before this Court, is whether Respondents' met their burden of showing that the facts pleaded are sufficient to establish every element of Respondents' taking and breach of fiduciary duty causes of action. They did not meet that burden because Respondents failed to plead facts sufficient to establish damages. Respondents did not plead that there has been a reduction in water, or that there has been any impact on Respondents' use of the water in a reasonable and beneficial manner, and Respondents could only speculate that they "could" lose water as a result of the EDP. (See 1 AA 410:1–5 [Verified Second Amended Petition] [stating that Abatti "could" lose water as a result of the EDP].)

Thus, the most Respondents provided were allegations that speculate about potential future injury. (See *ibid.*) It is well established that this speculation is simply not enough to maintain a takings claim. (E.g., *Northwest La. Fish & Game Pres. Comm'n v. United States* (2006) 446 F.3d 1285, 1291 ["A possible future taking of property cannot give rise to a present action for damages."]; *Pacific Legal Foundation v. Cal. Coastal Comm'n* (1982) 33 Cal.3d 158, 173-174 [explaining that courts should "not be drawn into disputes which depend for their immediacy on speculative future events"]; *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328 ["[I]t is not 'the province of a court to speculate on future intentions of a public entity and allow recovery in inverse condemnation for a taking yet to occur.'"], quoting *Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600, 604.)

Such speculation is simply inadequate to maintain a damages claim. This is particularly true when, as in this case, Respondents did not plead,

nor could they plead in good faith, that any of their water requests have gone unfulfilled as a result of the EDP. (See *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 780-783, 785 [concluding claim not ripe because property owner could submit application to board to increase rents]; *CalProp Corp. v. City of San Diego* (2000) 77 Cal.App.4th 582, 592 ["Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."].)

The trial court properly dismissed Respondents' Third (Takings) and Fourth (Breach of Fiduciary Duties) Causes of Action because, consistent with controlling case law, mere speculation regarding future injuries does not constitute appreciable harm or give rise to a cause of action.

III. RESPONDENTS' APPEAL OF JUDGE ALTAMIRANO'S FINDINGS IN HER RULING ON THE DEMURRER RELATING TO THE VALIDATION STATUTES FAILS.

Respondents state that they filed a "protective cross-appeal in the event IID were to argue on appeal that Judge Anderholt was precluded, because of Judge Altamirano's prior ruling on the Demurrer, from considering Abattis' challenges to any aspects of the October 2013 EDP that were carried over from the April and May 2013 EDPs." (RB 103.) Respondents' argument is inane and presents nothing more than one more diversionary tactic.

It is unknown what relief Respondents are seeking in the cross-appeal for any purported error in Judge Altamirano's findings relating to the Validation Statutes, or how they have been harmed. It is foundational that a party must be aggrieved for appellate standing. A party is considered aggrieved when he or she has an "immediate, pecuniary, and substantial" interest that is affected by the order or judgment. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) Thus, for example, a party may not

appeal objectionable findings that are not essential to the judgment's validity (see *Estate of Funkenstein* (1915) 170 Cal. 594, 595), or on the basis that the relief given was wrong. (*See Forkner v. Forkner* (1950) 96 Cal. App. 2d 363, 369.)

Respondents conclude without any support that Judge Altamirano somehow violated their due process rights relating to the Validation Statutes (RB 104), but fail to explain how they were harmed—most likely because they did not suffer any harm. As discussed below, Judge Altamirano's ruling sustaining the demurrer on Respondents' taking and breach of fiduciary duty claims was not based on any findings about the Validation Statutes. Respondents have waived the right to challenge the decision on appeal to the extent those findings formed the basis for the court's ruling on IID's motion to strike. The April and May 2013 versions of the EDPs were moot upon the adoption of the October 2013 EDP. And Respondents ultimately were allowed by Judge Anderholt to challenge all aspects of the October 2013 EDP. Respondents have not shown how they are entitled to any relief from this Court on this cross-appeal regarding Judge Altamirano's discussion of the Validation Statutes.

First, as discussed above, IID demurred to Respondents' third and fourth causes of action for taking and breach of fiduciary duty. The demurrer was sustained only as to Respondents' third and fourth causes of action after the trial court found that there was only a bare legal conclusion of damage (1 AA 730:4-5), and Respondents did not have a property right in a specific allocation of water. (1 AA 730:7-10.) The demurrer was not sustained based on Judge Altamirano's findings relating to the Validation Statutes, or the timeliness of Respondents' challenge to the EDP with respect to their first and second causes of action for declaratory judgment and writ of mandate, and it makes no sense to construe the demurrer ruling in such a way. (See 1 AA 729:2-24.) To the extent these findings formed

the basis for Judge Altamirano's ruling on the motion to strike, Respondents have not challenged that ruling in their cross-appeal, and have waived any such challenge to that ruling. (See *Tisher v. California Horse Racing Bd.* (1991) 231 Cal. App. 3d 349, 361.)

Second, Respondents consume seven pages discussing Judge Altamirano's findings about the applicability of the Validation Statutes to Respondents' challenges to the April and May 2013 versions of the EDP. (RB 97-103), but this entire discussion is irrelevant. The April and May 2013 versions of the EDP were mooted by the adoption of the October 2013 EDP. (See *Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 142 [challenge mooted as a result of amendment to ordinance]; *O'Neal v. Seabury* (1938) 24 Cal.App.2d 308, 311 [challenge mooted by superseding regulation]; 1 AA 459:7-16; 1 AA 701:14-702:16.) Thus, any purported error by Judge Altamirano in her findings relating to the validation statutes is harmless.

Third, IID has never claimed that Respondents are time-barred from all challenges to the EDP, and never argued that Respondents' challenges to the April or May 2013 versions of the EDPs are barred because Respondents did not file validation actions. As clearly set forth above and in Appellant's Opening Brief at pages 50-53, it has always been IID's position that Respondents' challenges to the features of the EDP that were contained in the December 2007, November 2008 or April 2009 versions of the EDP are time-barred, and moved to strike those allegations. (1 AA 451:2-20; 452:11-454:25; 455:15-458:16; 703:3-707:7; 2 AA 1121:11-17.) Thus, Judge Altamirano's discussion in her ruling on the demurrer about whether Respondents were required to file validation actions with respect to the April and May 2013 versions of the EDPs has no bearing on this Court's legal determination of whether Respondents' challenges to the (i) straight-line apportionment, (ii) Municipal Apportionment, and (iii) the

operation of the Clearinghouse features of the October 2013 EDP are time-barred.

Respondents' cross-appeal complaining about Judge Altamirano's demurrer ruling regarding the Validation Statutes should be denied.

CONCLUSION

Respondents' overarching grievance against IID, separate from their objection to the district, a public agency, carrying out its public mission to allocate a finite resource among all of its users, is that its elected board won't treat them as a special class of water user that occupies a higher rung on the hierarchy of reasonable and beneficial use than everyone else.

A higher rung, even, than the Imperial Valley electorate that votes for the IID Board of Directors and from which it derives its authority.

What Respondents seek from this Court is something they have thus far been denied by IID and could not hope to obtain from local voters, which is a private right in a public resource. The trial court may have been persuaded that such a thing is possible, but IID continues to believe – and has starkly shown in this brief – that decision was wrong not only as a matter of law but of basic equity, and it now falls to this Court to right that wrong and restore that equity.

There are no preferred rights or any special class of water user within the IID service area, because by law there cannot be. Certainly, there are no private water overlords. There is only the IID and its water resource, the public trust and the people of the Imperial Valley, who are the beneficiaries of that trust.

That is what the people voted for in 1911 when they created the IID, public control of the Imperial Valley's water rights, and it is what the law and the public interest demand today.

For all these reasons, the trial court's ruling sustaining IID's demurrer to the Second Amended Petition should be affirmed in its entirety.

Dated: February 15, 2019

NOSSAMAN LLP
FREDERIC A. FUDACZ
JENNIFER L. MEEKER
GINA R. NICHOLLS
TARA E. PAUL

By:_____
FREDERIC A. FUDACZ

Attorneys for Appellant and Cross-Respondent IMPERIAL IRRIGATION DISTRICT

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 22,839 words as counted by the Windows Word Count Tools feature of the Microsoft Word word-processing program used to prepare this brief.

Dated: February 15, 2019

NOSSAMAN LLP
FREDERIC A. FUDACZ
JENNIFER L. MEEKER
GINA R. NICHOLLS
TARA E. PAUL

By:_____
GINA R. NICHOLLS

Attorneys for Appellant and Cross-Respondent IMPERIAL IRRIGATION DISTRICT

CERTIFICATE OF SERVICE

I certify that on February 15, 2019, I electronically filed the following document(s) **COMBINED APPELLANT'S REPLY & CROSS-RESPONDENT'S BRIEF** with the Clerk of the California Court of Appeal, Fourth Appellate District, Division One, by using the Court's electronic filing service, TrueFiling. The participants listed below are registered with TrueFiling, and electronic service will be accomplished by TrueFiling as follows:

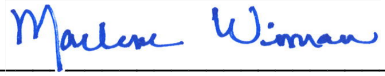
Lee E. Hejmanowski Marisa Janine-Page CALDARELLI HEJMANOWSKI & PAGE LLP 12340 El Camino Real, Suite 430 San Diego, CA 92130 Telephone: (858) 720-8080 Facsimile: (858) 720-6680 leh@chpllaw.com mjp@chpllaw.com	Cheryl A. Orr MUSICK, PEELER & GARRETT LLP 624 South Grand Avenue, Suite 2000 Los Angeles, CA 90017 Telephone: (213) 629-7881 Fax: (213) 624-1376 c.orr@mpglaw.com

On February 15, 2019, I also served this **COMBINED APPELLANT'S REPLY & CROSS-RESPONDENT'S BRIEF** by first class mail as follows:

Hon. L. Brooks Anderholt
Imperial County Superior Court
Department 9
939 West Main Street
El Centro, CA 92243

My business address is NOSSAMAN LLP, 777 S. Figueroa Street, 34th Floor, Los Angeles, California 90017.

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



Marlene Wiman