

**AGENDA
ITEM**

3

Imperial Valley Coalition for Fair-Sharing-of-Water

Presentation by:

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Equitable Distribution Plan

Updated July 3, 2018

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

Background

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

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

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

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

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

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

[August 15, 2017 Statement of Decision \(PDF\)](#)

[August 22, 2018 Appellate Court Order \(PDF\)](#)

[February 6, 2018 Board Memo and Resolution Repealing EDP \(PDF\)](#)

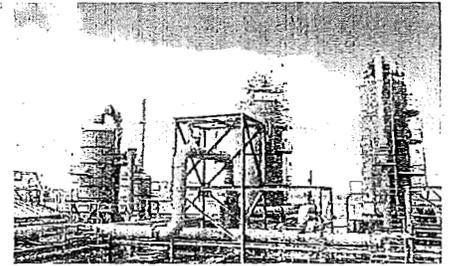
[May 2, 2018 Appeal \(PDF\)](#)

[May 8, 2018 Board Memo \(PDF\)](#)

[June 19, 2018 IID Counter Brief \(PDF\)](#)

[EDP Lawsuit Factsheet from 2018 \(PDF\)](#)

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



BACKGROUND

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

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

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

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

The EDP serves three primary purposes:

- 1) Satisfies IID's responsibility to equitably distribute water to all water users.
- 2) Provides a water budget for customer planning to prevent overruns, facilitate water conservation and reduce potential waste allegations.
- 3) Allows IID to meet Quantification Settlement Agreement milestones within California and on the Colorado River.

A SUIT AGAINST THE DISTRICT

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

WHAT IF IID HAD NOT APPEALED?

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

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



MAJOR LEGAL ERRORS IN THE LOWER COURT RULING

TRIAL COURT STATEMENT: IID lacked authority to adopt the Equitable Distribution Plan.

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

TRIAL COURT STATEMENT: The 2013 Equitable Distribution Plan is "a new, complete, fully integrated plan."

FACT: IID adopted the EDP in 2007 after it sought public input and conducted a thorough analysis. In 2013 IID adopted a revision to the plan, which does not override prior court validation nor does it exempt the plan from statutes of limitation.

TRIAL COURT STATEMENT: As a trustee, IID "holds mere title to the water rights."

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

TRIAL COURT STATEMENT: Farmers' beneficial interest is a "constitutionally protected property right" and subject to the no-injury rule.

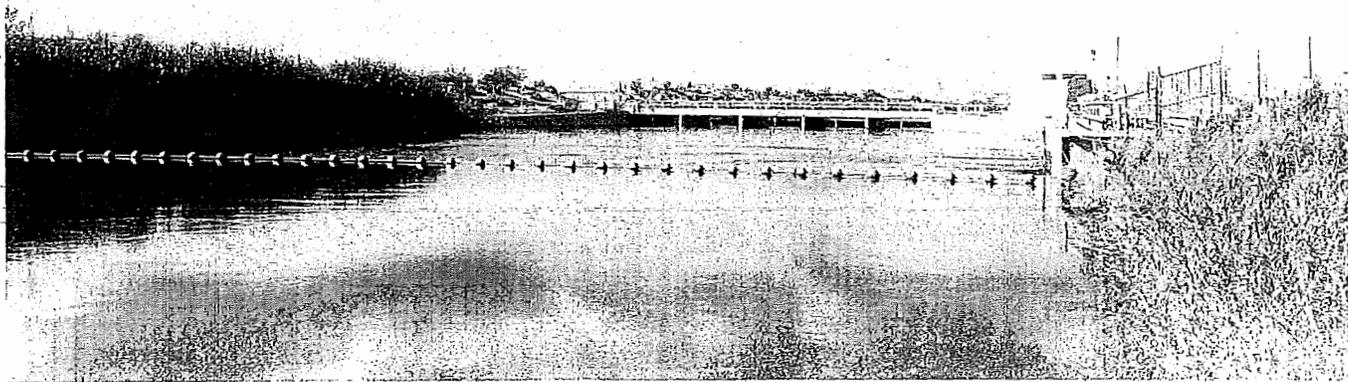
FACT: Landowners within the district have a right to water service, not an independent water right; the rule does not apply as there can be no injury when there is no individual water right.

TRIAL COURT STATEMENT: Water for new industrial supply contracts can only be procured through "appropriate consideration."

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

TRIAL COURT STATEMENT: The only equitable and acceptable method of apportionment for IID is historical use.

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



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07/30/2018

To: Whom this may Concern

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

My reasons are as follows:

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

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

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

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

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

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

The farmers' equitable and beneficial interest in the water rights is appurtenant to their lands and is a constitutionally protected property right.

"Such fallacy interferes with the Imperial Irrigations District's statutory right to equitably determine how much water to deliver to water users willing to pay the charges for the use of the water".

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

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

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

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

The law office of Allen Matkins will be filing the *Amicus* brief.
David L Osias, will be the lead attorney.

The law firm is located at:

One America Plaza
600 West Broadway, 27th Floor
San Diego, CA 92101-0903

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

Checks should be made out to:

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

Sincerely,



Wally J. Leimgruber