

# ELR

## NEWS & ANALYSIS

## The Last Stand of the Wild West: Twenty-First Century Water Wars in Southern California

by Shannon Baker-Branstetter

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*Editors' Summary: In 2003, the Imperial Irrigation District (IID) of California agreed to transfer water from rural Imperial County to urban southern California cities as part of a quantitative settlement agreement (QSA). The Colorado River water that the IID transferred to the wealthy coastal cities was held in trust for the residents of the Imperial Valley, the poorest county in the state. In this Article, Shannon Baker-Branstetter asserts that the IID Board of Directors breached its trust to the residents and farmers of Imperial County when it sold water rights to municipal districts in southern California. The IID leased the water for less-than-market price for an unreasonable length of time, and the IID Board of Directors did not insist on adequate compensation and a formalized plan to mitigate damage to the public health that will result when the reduced runoff from agriculture exposes the Salton Sea lakebed. Thus, the IID exacerbated the poor economic conditions of residents of the county.*

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“No other resource is as vital to California’s cities, agriculture, industry, and environment as this liquid gold,” wrote Justice Vance W. Raye of water.<sup>1</sup> Indeed, the centrality of water is far from unique to California. Violent conflicts over water resources predate written history, and the first documented account in 2500 B.C. told of a water diversion by Urlama, King of Lagash, to deprive his enemy, Umma, of water.<sup>2</sup> Water is the essence of life, and like other natural resources, a requisite element of development.

Americans imagine their country as a civilized nation, and subsequent to bombings of the Los Angeles Aqueduct and retaliatory attacks between 1924 and 1927, the conflicts over water in the United States have moved civilly to the courts.<sup>3</sup> However, the incongruence between the location of urban development and natural water resources in California has created an ongoing imbalance rife with conflict. Although no blood has been shed in the current conflict over the water of the Imperial Valley and “economic harm” has

been euphemistically substituted for “stealing,” the approval of the distribution of water has been driven by political, rather than equitable considerations.

Historically, legal principles in California water law have evolved to meet the demands of hegemonic interests of the era. The “first in time” principle, or appropriation doctrine, of water ownership was instigated by the Gold Rush and other mining operations. In the late 1800s, the rise of agriculture influenced the California Legislature to grant farmers special authority to accumulate water rights, and the Bureau of Reclamation continued to subsidize agriculture’s water through vast infrastructure projects throughout the first half of the 20th century. Now the thirst and political clout of California’s coastal cities are eroding agriculture’s previously formidable hold on 90% of the state’s water.<sup>4</sup>

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1. County of Imperial v. Superior Court, 61 Cal. Rptr. 3d 145, 148 (Cal. Ct. App. 2007).
2. PETER H. GLEICK, WATER CONFLICT CHRONOLOGY 1 (Pacific Inst. for Studies in Dev., Env’t & Security 2006), available at <http://www.worldwater.org/conflictchronology.pdf>.

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3. Local ranchers and farmers in the Owens Valley, desperate to preserve water for their valley, launched several bombings along key points of the Los Angeles Aqueduct. Supported by developers’ financing, the Los Angeles Department of Water and Power had purchased all the land adjacent (riparian) to the Owens River, so that it would not have to pay Owens Valley residents directly for their water. “Riparian” water rights are acquired by virtue of owning land adjacent to a water source. See William Mulholland, PBS New Perspectives on the West, [http://www.pbs.org/weta/thewest/people/i\\_r/mulholland.htm](http://www.pbs.org/weta/thewest/people/i_r/mulholland.htm) (last visited Aug. 21, 2008).

4. The public trust doctrine is also, on occasion, a powerful counterweight to other water rights, especially when applied in combination with the Endangered Species Act of 1973. See National Audubon Soc’y v. Superior Court, 658 P.2d 709 (Cal. 1983) (applying the public trust doctrine to order the California Department of Water Resources (DWR) to reconsider the allocation of the waters of Mono Lake); California Trout, Inc. v. Superior Court, 266 Cal. Rptr. 788, 804 (Cal. Ct. App. 1990) (mandating that the DWR’s licenses for Los Angeles be conditioned upon the release of “sufficient water into the streams from its dams to reestablish and maintain the fisher-

The ultimate result of the shift in water rights may be a readjustment to a suboptimal distribution of the state's resources, but the legal principles have not yet caught up with the new policy priorities. Thus, the redistribution has the appearance of a water grab instead of an exercise of lawful eminent domain or fair renegotiation. Instead of changing the law and compensating farmers in full for their losses, southern California has chosen to redistribute water from the state's poorest county (Imperial) and send it to well-heeled coastal cities.

The quantitative settlement agreement (QSA) among southern California water authorities that transferred water from the rural Imperial Valley to the urban coastal areas of Los Angeles and San Diego is one of the latest examples that water in California is distributed in accordance with shifting power structures rather than an adherence to legal principles.<sup>5</sup> The Imperial Irrigation District (IID) held the rights to the water it agreed to transfer in trust for the residents and landowners of Imperial Valley. As trustee, the IID Board of Directors owed a duty of loyalty and other trust duties to the farmers and residents of Imperial Valley. By signing the QSA, the board failed to fulfill its legal obligations to the beneficiaries of the trust.

## I. Historical Background

### A. Water Boards Generally

An irrigation district is a type of water organization and is developed to serve the huge and long-term needs of agricultural water users.<sup>6</sup> Development of water resources is ex-

ies which existed in them prior to its diversion of water"); *Natural Resources Defense Council v. Kempthorne et al.*, No. 1:05-cv-01207-OWW-GSA (E.D. Cal. Dec. 14, 2007) (restraining the U.S. Department of the Interior and the DWR from taking any action that would destroy or adversely modify the critical habitat of the Delta smelt until further consultation with the U.S. Fish and Wildlife Service).

5. Nine lawsuits followed on the heels of the QSA, and the validity of the QSA is still pending during protracted litigation. The suits were consolidated and transferred to the California Superior Court, and the amended complaints were filed on Aug. 13, 2004. *See County of Imperial v. State Water Resources Control Bd.*, No. 03CS00082 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) (California Environmental Quality Act (CEQA) and California Water Code challenge to approval of Imperial Irrigation District (IID)/San Diego County Water District (SDCWD)/Coachella Valley Water District (CVWD) water transfer); *South Coast Air Quality Management Dist. v. State Water Resources Control Bd.*, No. 03CS00083 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) (CEQA challenge to California State Water Resources Control Board (SWRCB) approval); *Morgan v. Imperial Irrigation Dist.*, No. ECU01646 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) (CEQA challenge to QSA); *Imperial Irrigation Dist. v. All Persons*, No. ECU01649 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) ("validation action" and cross-complaint by Morgan plaintiffs); *County of Imperial v. Imperial Irrigation Dist. and SDCWA*, No. ECU01650 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) (CEQA and Water Code challenge to QSA); *County of Imperial v. MWD et al.*, No. ECU01656 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) (CEQA and Water Code challenge to QSA); *Morgan et al. v. Imperial Irrigation Dist. et al.*, No. ECU01658 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) (CEQA challenge versus QSA signatories other than United States); *Protect Our Water & Env't Rights (POWER) v. Imperial Irrigation Dist.*, No. ECU01653 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) (CEQA challenge to QSA); *Morgan v. Imperial Irrigation Dist. (II)*, No. ECU01643 (Cal. App. Dep't Super. Ct. filed Aug. 13, 2004) ("reverse validation" case challenging QSA agreements).
6. Other types of water organizations include mutual water companies, reclamation districts, irrigation ditch companies, water storage districts, water boards, and municipal water districts.

pensive, especially in arid regions. In order to establish large-scale agricultural development, farmers and investors needed assurance that sufficient water would be available for crops' substantial water needs. Water security required two components: water organizations and engineering projects. Both farming communities and urban areas established water organizations in order to take advantage of economies of scale for water delivery, centralize regional procurement, and locally control future water development.

The high infrastructure and procurement costs of a regional water distribution system are too great for individual farmers to undertake. Without organization, an individual farmer would have little incentive to farm unless he or she was a riparian landowner or resided atop a substantial groundwater aquifer; this market failure would stymie agricultural development in many fertile areas. Therefore, farmers formed irrigation districts that would accumulate and distribute water to the farms within the district. Such an arrangement allowed farmers to retain control over their water. Members of the irrigation district thus pooled their individual water rights acquired by prior appropriation and benefitted from federal and state water delivery infrastructure projects, such as canals, dams, and aqueducts. Until the post-World War II era, state and federal water projects primarily addressed the needs of agriculture and subsequently developed projects to serve municipalities.<sup>7</sup> The policy pendulum is still swinging from rural to urban use, but has a long way to go to reach equilibrium in California.

Californian irrigation districts were formed in accordance with the Wright Act, passed in 1886 in response to California's Supreme Court refusal to allow upstream irrigators to divert water to the detriment of downstream riparians.<sup>8</sup> The Wright Act established a means to create an irrigation district that would serve the irrigation needs of the lands within the district's boundaries. At the outset of the 20th century, the court described the relationship between the irrigation district and its beneficiaries that still holds today: "[An irrigation district] holds all property acquired by it solely in trust" for the "improvement, by irrigation, of the lands within the district."<sup>9</sup> Under the Wright Act, a district could not appropriate water to any other purpose or location, but this ban on other uses was lifted as irrigation districts diversified.

The need for water projects and irrigation districts was especially keen in California because of its mismatch of urban development and freshwater supply.<sup>10</sup> California's urban development historically centered around maritime ports.

7. *See* Appendix A for timetable of major water works projects.

8. *Lux v. Haggin*, 13 P. 654 (Cal. 1887) (holding that riparians had the right to the use the Kern River undiminished in quality and quantity).

9. *Jenison v. Redfield*, 87 P. 62 (Cal. 1906).

10. "About 75 percent of the water supply originates in the northern third of the state, while 80 percent of the demand occurs in the southern two-thirds of the state." University of California, Berkeley Water Resources Center Archives Exhibit, *Liquid Gold: California's Water*, <http://www.lib.berkeley.edu/WRC/exhibit.html> (last visited Aug. 21, 2008). *See* U.S. Geological Survey (USGS), *Water Resources, Precipitation, and Relief Map of California*, <http://education.usgs.gov/california/maps/water&precipitation&relief1.htm> (last visited Aug. 21, 2008) and California Department of Forestry, *Land Cover: Multi-Source Data Compiled for Forest and Range 2003 Assessment*, [http://frap.cdf.ca.gov/webdata/maps/statewide/fvegwhr13\\_map.pdf](http://frap.cdf.ca.gov/webdata/maps/statewide/fvegwhr13_map.pdf) (last visited Aug. 21, 2008) to note the incongruence between the distribution of California's urban and agricultural land uses and the location of the state's water resources.

Its agricultural development concentrated in silty and fertile valleys. As water officials and developers recognized that neither of these attractive features had the slightest correlation with a natural freshwater supply sufficient to meet the water needs of the development, engineers were called in to perform some of the grandest water projects of the era. The State Water Project and Central Valley Project brought water from the Feather River watershed to the San Joaquin Valley, Bakersfield, and Los Angeles. The Los Angeles Aqueduct brought water from Mono Lake and Owens Valley, although the outtake has been subsequently decreased by a court order to leave water available for instream uses.<sup>11</sup> San Francisco procures 85%<sup>12</sup> of its water from the Sierras, and the South Coast Region (comprised of Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties) receives approximately 57%<sup>13</sup> of its water from the Sierras and the Colorado River.<sup>14</sup> Comprising 95% of its water supply, the Imperial Valley receives Colorado River water through the All-American Canal, serviced by the Hoover and Imperial Dams.<sup>15</sup>

As the state's urban water needs dramatically increased and the municipalities' political clout grew, the legislature altered the state's water priorities, first in 1906 when it amended the California Constitution and again in 1979 when it encouraged water transfers.<sup>16</sup> The amended constitution mandated that water rights were only perfected upon "reasonable and beneficial use," muddling the previous doctrines of prior appropriation and riparian rights.<sup>17</sup> The water transfer legislation allowed water transfers through conservation to be considered reasonable and beneficial use and thus, provided a mechanism whereby the irrigation districts could maintain ownership of water rights and still transfer the water to the municipalities.<sup>18</sup> In addition to growing water rights, the municipalities required the physical infrastructure to "wheel," or convey, the water to its desired location, and the second era of grand water projects was born.

### B. The IID and Its Water Rights

Although the Imperial Valley was endowed with rich soil and a below-sea level elevation conducive to gravity-flow

water delivery, developers struggled to deliver water from the Colorado River to the arid valley. The first attempt was the Imperial Canal, which was prone to silting and eventually flooded for two years starting in 1905. The result of the massive flooding was the transformation of the Salton Sink, a primarily dry salt bed that received only occasional flows from the Colorado River, into the Salton Sea, California's largest lake with a surface area of 376 square miles.<sup>19</sup>

The unreliability of the water delivery and flooding of farms caused by the canal breach created an impetus for forming an irrigation district, over which the farmers would have control. In 1911, landowners of the Imperial Valley voted 1,298-362 in favor of forming the IID, which the legislature subsequently approved.<sup>20</sup> The IID charter established an executive board of five members, who, until 1976, were each required to be a landowner.<sup>21</sup> The first IID board was elected in 1914, and in 1916 it acquired ownership of the defunct canal and all the assets of the California Development Corporation.<sup>22</sup> Later engineering projects such as the All-American Canal, Coachella Canal, and Imperial Dam, built in the 1940s by the Bureau of Reclamation, provided IID with improved infrastructure to deliver water.

Pursuant to the 1928 Boulder Canyon Act, California was granted a disproportionately large share of the water distributed among the Colorado River Basin states.<sup>23</sup> In addition, most states agreed that California was allowed to use more than its rightful share for the time being because of its burgeoning population and because water was relatively plentiful at the time. The other states in the Colorado Plateau were guaranteed placeholder rights for increased use in the future.<sup>24</sup> This compromise allayed other states' well-founded fears that allotting the water on current usage instead of future need would cripple their development. Although the states could have independently agreed on the river's distribution through an interstate compact, Arizona refused to sign one, and as a consequence, the congressional division laid out in the Boulder Canyon Act froze California's rightful apportionment at 4.4 million acre-feet per year (maf).<sup>25</sup> However, California continued to use substantially more than 4.4 maf until 2003.

The IID's right to use Colorado River water was established through prior appropriation before it was further refined in the 1931 Boulder Canyon Act Agreement, also known as the Seven Party Agreement, which allotted water among California water districts. The IID's water rights in-

11. National Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

12. San Francisco Public Utilities Commission, *Homepage*, [http://www.sfwater.org/msc\\_main.cfm/MC\\_ID/13/MSC\\_ID/165](http://www.sfwater.org/msc_main.cfm/MC_ID/13/MSC_ID/165) (last visited Aug. 1, 2008).

13. DWR, *California Water Plan*, [http://www.waterplan.water.ca.gov/docs/regions/SC\\_Balances.pdf](http://www.waterplan.water.ca.gov/docs/regions/SC_Balances.pdf) (last visited Aug. 21, 2008).

14. See [http://www.maps.com/ref\\_map.aspx?nav=RM&cid=680%2c692%2c751%2c1067&pid=11649](http://www.maps.com/ref_map.aspx?nav=RM&cid=680%2c692%2c751%2c1067&pid=11649) for a map of California aqueducts and intrastate water distribution system.

15. See *supra* note 13; see also MWD's website (<http://www.mwdh2o.com/mwdh2o/pages/yourwater/supply/colorado/colorado04.html>), for a map of the Colorado River water distribution system in southern California.

16. See C.A. CONST. art. X, §2; CAL. WATER CODE §1011 (as amended by 1982, 1996, and 1999 legislation).

17. C.A. CONST. art. X, §2.

18. "[A]ny cessation or reduction in the use of the appropriated water" through water conservation efforts, "shall be deemed equivalent to a reasonable beneficial use of water" and "[n]o forfeiture of the appropriative right to the water conserved" ensues. Conserved water may be leased, sold, or otherwise transferred. CAL. WATER CODE §1011 (2000) (as amended by 1982, 1996, and 1999 legislation).

19. Salton Sea Authority, *Sea Geography*, <http://www.saltonseaa.gov/geography.htm> (last visited Aug. 21, 2008).

20. 1911 Cal. Stat. 119-120.

21. See *Choudhry v. Free*, 552 P.2d 438 (Cal. 1976) (invalidating California Water Code §21100, as applied to restrict IID board membership to landowners).

22. IID, *About*, <http://www.iid.com/About/GeneralHistory> (last visited Aug. 21, 2008).

23. California was allotted 4.4 million acre-feet per year (maf) out of 16.4 total maf, which included allocations for Indian lands and Mexico.

24. See U.S. Geological Survey, *Colorado Plateau and River Basin Map*, [http://geochange.er.usgs.gov/sw/changes/natural/codrought/fig\\_1.gif](http://geochange.er.usgs.gov/sw/changes/natural/codrought/fig_1.gif) (last visited Aug. 21, 2008).

25. See *Arizona v. California*, 373 U.S. 546, 565 (1963). An acre-foot is 325,851 gallons, or the amount of water needed to cover one acre with water one foot deep. An acre-foot serves the annual needs of two typical California families.

cluded third priority to 3.85 mafy<sup>26</sup> and 300,000 sixth priority water rights (shared with neighboring Coachella Valley Irrigation District (CVID)).<sup>27</sup> The Seven Party Agreement placed water rights holders in a priority system. Most of Imperial's water rights under this system take priority over most of Coachella's and are superior to all Colorado River water rights of the Metropolitan Water District (MWD or Los Angeles).<sup>28</sup> Based on its place in the priority system, Imperial is entitled to divert its full right to water before the MWD can divert any water at all. The San Diego County Water District (SDCWD or San Diego) possesses no Colorado River water priority.<sup>29</sup>

## II. Current Dispute Over the IID's Water

### A. Preface to Current Dispute

If agriculture took up the lion's share of California's water supply, Imperial Valley was an alpha lion, with an average annual usage of up to 3.8 mafy from the time of the Boulder Canyon Act until 2003. In 1950, agriculture used 90% of the state's water, and by 2000, 80%.<sup>30</sup> Even in an average year, the Colorado River flow is overallocated: its historical average flow from 1906 is about 15.1 mafy, but 16.5 mafy have been allocated.<sup>31</sup> As the Colorado River water supply decreased due to drought and other states increased their draws on the water supply, California faced enormous pressure from the U.S. Department of the Interior (DOI) and the other Colorado Basin states to reduce its water consumption from 5.1 mafy to 4.4 mafy, its rightful allotment under the Boulder Canyon Act.<sup>32</sup> The IID was a target for reducing Califor-

nia's overdraw because it was consuming an average of 3.8 mafy, or 86% of California's rightful allotment.

In 1998, San Diego and the IID went to the California State Water Resources Control Board (SWRCB) and petitioned for approval of a water transfer for 300,000 afy (acre feet per year). The SWRCB provisionally approved the transfer and the IID and the SDCWD began to negotiate over the terms of the agreement. The MWD and the CVID both claimed that any "surplus water" from the IID could not be transferred to San Diego because the MWD and the CVID both had higher priority to use any water unused by the IID than did San Diego and insisted that they be part of any such agreement. Negotiations were stalled by lawsuits by the MWD and the CVID.

In 2002, the Secretary of the Interior was prepared to cut the IID's water by 230,000 acre-feet per year and deliver the water to the MWD instead. The Secretary based her decision on the DOI's "417" investigation that concluded Imperial was not making beneficial use of its entire water right.<sup>33</sup> Imperial filed suit in federal court, and in March 2003, obtained a preliminary injunction compelling the Secretary to continue to deliver the IID's full water allotment.<sup>34</sup> Finding the DOI's investigation insufficient and improperly conducted, the court ordered the Bureau of Reclamation to conduct a proper 417 investigation of the IID's water use. The IID subsequently submitted 20 boxes of documents to support its contention that its water usage was reasonable and beneficial.<sup>35</sup> The state of California urged the federal government to consider the state's criteria and argued that the return flow from IID irrigation into the Salton Sea was a beneficial use, the curtailment of which would require costly mitigation.

In addition to the interstate and federal pressure to reduce its usage, the IID faced a barrage of intrastate claims that it was wasting water and therefore in danger of losing title to the water rights under the California Constitution's beneficial use doctrine.<sup>36</sup> The SWRCB ruled that IID's failure to

26. This amount was qualified by minor subtractions for the Palo Verde Irrigation District and Yuma Project withdrawals.

27. U.S. Bureau of Reclamation, *Boulder Canyon Act Agreement*, <http://www.usbr.gov/lc/region/g1000/pdffiles/ca7pty.pdf> (last visited Aug. 21, 2008). The IID's water rights were expanded, not created, by the Seven Party Agreement in 1931.

[W]ithout dispute, IID has pre-1914 appropriate rights dating from 1901, antedating the permit system established in Part 2 (commencing with §1200 of Div. 2). IID was adjudicated to have state perfected appropriate rights to the lesser of 2.6 million acre feet or the quantity reasonably needed to supply consumptive and related uses on 424,125 acres.

*Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 231 Cal. Rptr. 283, 284 (Cal. Ct. App. 1986).

28. MWD is a consortium of 26 cities and water districts that provides drinking water to Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties. MWD website, <http://www.mwdh2o.com/>.

29. *County of Imperial v. Superior Court*, 61 Cal. Rptr. 3d 145, 150 (Cal. Ct. App. 2007).

30. In 2000, agricultural uses accounted for 35 of California's 43 mafy of human water use. This total does not include water reserved for environmental or instream uses. DWR, *Public Affairs*, <http://www.publicaffairs.water.ca.gov/swp/supply.cfm> (last visited Aug. 21, 2008).

31. The Boulder Canyon Act of 1928 had allotted 15 mafy to all five states and Indian lands, and in 1944, another 1.5 mafy to Mexico were allocated.

32. From 1988 to 1992, the average flow was 10.9 mafy, and from 2000 to 2003, the average was only 9.9 mafy. The storage capacity of Lake Mead and Lake Powell cannot sustain continued outtake from the river for more than a few years. Both reservoirs are currently suffering from a bathtub ring effect from the increasingly low water marks. Melanie Lenart, *Low Flow in the Colorado River Basin Spurs Water Shortage Discussion Among Seven States*, SOUTHWEST CLIMATE OUTLOOK, Nov. 2004, [http://www.climas.arizona.edu/forecasts/articles/lowflow\\_Nov2004.pdf](http://www.climas.arizona.edu/forecasts/articles/lowflow_Nov2004.pdf).

33. "417" investigation refers to the DOI's beneficial water use analysis under 43 Fed. Reg. 417. (1978).

34. *Imperial Irrigation Dist. v. United States*, No. 03-CV-0069W(JFS) (S.D. Cal. filed Jan. 10, 2003), (S.D. Cal. Mar. 18, 2003) (preliminary injunction), (S.D. Cal. Apr. 17, 2003) (remand order), (S.D. Cal. Oct. 10, 2003) (dismissed as agreed in the QSA).

35. IID's evidence included: (1) water efficiency data from California's Colorado River users showing that the IID's efficiency rated at 83% compared to the CVID's 70% efficiency rating; (2) reports that Imperial Valley's productivity has dramatically increased while using the same amount of water, pointing to increased efficiency of the IID; and (3) a University of California report noting that while 20% of southern California's water is used for outdoor landscaping, the MWD has prevented the imposition of requirements on outdoor landscaping that would greatly reduce water consumption. *Daily Business Report*, SAN DIEGO METROPOLITAN, June 2, 2003.

36. The SWRCB claimed it was empowered to essentially negate perfected water rights by finding the water is not put to beneficial and reasonable use without making a detailed assessment of the waste that may occur if the water is transferred to another user or another use. Such unilateral discretion raises issues of inappropriate delegation of legislative authority and discriminatory application. California courts have found that the SWRCB's interference with the IID's use of water (deemed a misuse by the SWRCB) does not constitute a transgression on a vested right. *See Imperial Irrigation Dist. v. State Water Resources Control Bd.* (IID II), 225 Cal. App. 3d 548, 563-64 (Cal. Ct. App. 1990) (concluding the board had jurisdiction to rule on the question whether irrigation practices of the IID were reasonable or wasteful and that the IID's vested water rights did not include misuse of water), *cert. denied*, *Imperial Irrigation Dist. v. State Water Resources Control Bd.* 502 U.S. 857 (1991); *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (SWRCB) (IID I), 231

line its canals and recapture waste water flowing into the Salton Sea was evidence that the IID was not using its water beneficially in accordance with the California Constitution's beneficial use requirement. Water rights that did not comply with the federal or state beneficial use requirement were considered unperfected and therefore unprotected and undeserving of just compensation. Thus, a squeeze play was created, whereby if the IID did not sell its water under the conditions proposed by the municipalities, it would be forced by the SWRCB or the DOI to give it up for free, despite the fact that the beneficial use doctrine was not being applied with equal force to the districts to which the water would be transferred.

### B. Summary of 2003 QSA and Supporting Documents

In December 2003, all the parties reached a series of agreements known as the QSA. In signing the QSA, the IID agreed to lease 200,000 afy of conserved water to the SDCWA and an additional 100,000 afy to the CVWD and the MWD for \$250 per afy for 45 to 75 years.<sup>37</sup> The water to be transferred would be conserved through land fallowing and water conservation technology installed at individual farms at the municipal water districts' expense. In addition, the agreement required the IID to permanently reduce its water rights from 3.85 mafy to 3.1 mafy so that California as a whole could reduce its Colorado River water usage from 5.1 mafy to 4.4 and non-Californian Colorado River water users could increase their share. The IID bore the entire burden of the state's reduction and was not compensated for this portion of the transaction.

The IID's new firm cap of 3.1 mafy included the water to be transferred to the MWD, the SDCWD and the CVID, and other defined subtractions of water available for the IID's use. Over the next 75 years, the IID's net consumptive use would drop to 2.6 mafy. The QSA effectively cut the IID's net available water for the purposes of satisfying its trust obligations from 3.8 mafy to 2.6 mafy. The SDCWD and the MWD agreed to pay \$50 million for environmental mitigation to prevent air pollution from the drying Salton Sea. The state of California ostensibly assumed responsibility for environmental mitigation of the damage to result from decreased flows from the IID to the Salton Sea, but the amount dedicated at the time of the QSA was only \$100,000, the remainder subject to future appropriations. The IID agreed to drop its lawsuit against the DOI, and the MWD and the CVID agreed to drop their suit against the SDCWD and the IID.

### III. Dual Role and Nature of Water Boards

Irrigation districts have features of both public and private entities. An irrigation district encompasses a unique blend

Cal. Rptr. 283 (Cal. Ct. App. 1986) (holding that the SWRCB had adjudicatory power to determine unreasonable use of water); SWRCB Order WR 88-20 (1988) (directing the IID to submit a plan for implementing conservation measures to conserve at least 100,000 afy and take other conservation actions relating to the conservation effort); SWRCB Decision 1600 (June 1984) (finding the IID's failure to implement additional water conservation measures were unreasonable and constituted a misuse of water and directing the IID to take certain actions to increase water conservation and avoid misuse of water).

37. The QSA can be found on the IID's website at <http://www.iid.com/Water/QSA/AgreementsRelatedDocuments2003>.

of private and public functions, and the law has not clearly defined its duties to its members. Although the IID holds the water rights in trust for its members and therefore has private fiduciary duties to its members, the IID is also a public corporation approved through state legislation. Irrigation districts benefit from tax-exempt status as a political subdivision.<sup>38</sup> The IID, which local farmers voted for and the state legislature approved, assumed individual landowners' water rights and became responsible for making decisions about delivery retail prices and instituting and managing new projects for water acquisition and development.

### IV. Beneficiaries of the Trust

The beneficiaries of the trust held by the IID are all the residents and non-resident landowners of the Imperial Valley.<sup>39</sup> The trustee-beneficiary relationship for a water district is different from both a private trust for an individual or a public trust.<sup>40</sup> The character of a water district's relationship with its beneficiaries lies in between these two types of trusts.<sup>41</sup> The IID assumed its original trust for the present perfected rights of original landowners in the district (acquired through appropriation), and in 1914, California began its permitting system for water rights. Over time, the trust beneficiaries and board member eligibility were expanded to include all residents and landowners within the district's boundaries.<sup>42</sup>

Although the U.S. Supreme Court has taken a more narrow view of who must be allowed to vote and hold office in a water organization, California courts and legislature have been more generous in allowing eligibility for voting and holding office. The California Judiciary and Legislature have recognized the right of non-landowner residents to vote in most irrigation district elections, despite the fact that the Supreme Court has not recognized a one-man-one-vote constitutional requirement for water districts generally.<sup>43</sup>

38. Internal Revenue Code (IRC) §§115, 501(c)(12).

39. See *Bjornestad v. Hulse* (Sierra Lakes County Water Dist.), 272 Cal. Rptr. 864 (Cal. Ct. App. 1990) (holding enfranchisement of non-resident landowners did not unconstitutionally dilute the vote of residents in a water district that served many second-home owners). Like the Sierra Lakes County Water District in *Bjornestad*, the Imperial Valley has many properties that are locally managed for non-resident farm owners.

40. The state holds publicly owned land and natural resources in a public trust for the benefit of all Californians. Although the state owns the water itself, other entities may acquire rights to use the water. The California Supreme Court held in *Audubon* that water needed to protect public resources may be diverted from private use without compensation. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

41. The beneficiaries of the trust are not limited to those who originally petitioned to form the irrigation district, nor their descendants. In 1911, only electors eligible to vote in the state of California were allowed to vote for the formation of the IID and landowner requirements applied. At the time, Chinese descendants could not vote or become citizens in California, and a literacy test was required for voter eligibility. Women had gained the franchise on Oct. 10, 1911, but it is unlikely that many of them voted in the formation of the IID.

42. See *County of Imperial v. Superior Court*, 61 Cal. Rptr. 3d 145 (Cal. Ct. App. 2007); *Choudhry v. Free*, 552 P.2d 438 (Cal. 1976) (holding that non-landowners are also eligible to hold office on the IID Board of Directors).

43. See *Ball v. James*, 451 U.S. 355 (1981) (refusing to extend the equal protection claim sustained in *Reynolds v. Sims*, 377 U.S. 533 (1964) (one-person, one-vote) to voter eligibility for the board of directors of the Salt River Project Agricultural Improvement and Power District).

The Supreme Court in *Ball v. James*<sup>44</sup> found: “The [Irrigation] District’s purpose is sufficiently specialized and narrow and its activities bear on landowners so disproportionately as to release it from the strict demands of the *Reynolds* principle, i.e., one man one vote, regardless of land ownership.”<sup>45</sup> The Court’s finding of narrow specialization was somewhat surprising, given the fact that the district sold electricity to hundreds of thousands of people, including urban dwellers, and 40% of its water distribution was for non-agricultural purposes.<sup>46</sup> The 1981 *Ball* decision went beyond an earlier 1973 decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,<sup>47</sup> which concluded that the water storage district had a “special limited purpose” and its activities had a “disproportionate effect” on “landowners as a group,” thus falling under an exception of the *Reynolds* rule (*Reynolds v. Sims*).<sup>48</sup> The William H. Rehnquist majority noted in *Salyer* that the water storage district had “relatively limited authority” and that it provided “no other general public services such as schools, housing, transportation, utilities, [or] roads” and “there are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries.”<sup>49</sup> In 1981, *Ball* broadened the exception to *Reynolds* even when the water organization had a much broader purpose and breadth of activities.

In between the Supreme Court’s *Salyer* and *Ball* decisions, the California Supreme Court ruled that the restriction on IID board membership to landowners was unconstitutional under both the U.S. Constitution’s and California Constitution’s equal protection clauses.<sup>50</sup> In *Choudhry v. Free*,<sup>51</sup> the California Supreme Court found that the IID’s breadth of activities, authorization to pay its bonds from revenues other than assessments, and the outstanding number of residents, land, and employees that composed it in comparison to other irrigation districts, did not allow an exception to the *Reynolds* rule. The court stated that the requirement “deprives both candidates and voters in Imperial Irrigation District of equal protection of the laws in violation of the U.S. Constitution and the California constitution.”<sup>52</sup> At least in the case of the IID, the “pervasive powers exercised by this irrigation district over all residents within its vast area, whether or not they are landowners, as such that neither the right to vote nor the right to serve as a director may be confined to freeholders.”<sup>53</sup>

The IID has an obligation to supply water to all residents within the district’s boundaries, which comprise the Imperial Valley, and non-landowner residents within the district may not be excluded from voting nor from running for office in elections for the IID Board of Directors.<sup>54</sup> In *Choudhry*,

the court went on to find that “the residents of [the] vast area have no practical alternative to the district as a source of water and power,” “only about half of the housing units in the county are occupied by owners,” and is “authorized to pay its bonds from revenues other than assessments.”<sup>55</sup> The court limited its holding to the IID, finding it unnecessary to make a general rule about irrigation districts because the IID “is singular among irrigation districts in that it has more residents, land and employees than the others.”<sup>56</sup>

The IID’s voting constituency and non-landowner eligibility for board office remained unchanged even after *Ball*. *Ball* determined the Equal Protection Clause of the federal Constitution did not require the *Reynolds* principle in apportioning votes for water organizations, but it did not bar a state from expanding voter eligibility if it so chose. California courts have continued to interpret the state constitution to grant non-landowners more expansive input than the Supreme Court determined the federal Constitution requires. Although *Choudhry* was decided in between *Salyer* and *Ball*, and California courts could have relied on *Ball* to overturn or further restrict its ruling, they have not chosen to do so.<sup>57</sup> In 2006, the California Legislature paved the way for the *Choudhry* court’s ruling to be expanded to other irrigation districts. A.B. 159 (a state assembly bill) declared: “Irrigation districts that supply water for residential, business, or industrial use may no longer favor the special concerns of landowners over the general welfare of all residents. Therefore, the exclusion of non-landowners from serving as directors of those districts may be inappropriate.”<sup>58</sup>

## V. The IID Breached Its Trust to Imperial Valley Residents

The IID breached its trust when it agreed to transfer water to San Diego and the MWD for less than market price for an unreasonable period of time when it had a substantial conflict of interest. The IID holds all property, including legal title to the rights of the Colorado River water in trust for the benefit of its members.<sup>59</sup> According to California trust law, “[a] violation by the trustee of any duty that the trustee owes

55. *Id.* at 440-41, 443.

56. The claim that California Water Code §21100 is unconstitutional was uncontested by the real parties-in-interest, and other such districts should have the opportunity to present their arguments. *Id.* at 444.

57. *See Hoffman v. State Bar of California*, 6 Cal. Rptr. 3d 592, 607-08 (Cal. Ct. App. 2003) (distinguishing *Choudhry* and following *Ball-Salyer* reasoning because unlike the IID’s electoral system, which was held unconstitutional based on strict scrutiny, holding office in the State Bar of California imputes the rational basis test, and requiring candidates to be located in the state for which they hold office was reasonable); *Bjornestad v. Hulse* (Sierra Lakes County Water Dist.), 272 Cal. Rptr. 864, 871-72 (Cal. Ct. App. 1990) (invalidating the Sierra Lakes County Water District’s landowner voting scheme in part because the district had even greater authority and powers than did the IID, the landowner voting scheme of which was invalidated by *Choudhry*).

58. Section 1(a) of Stats. 2006, c. 847 (A.B.159). The legislation left room for irrigation districts that primarily irrigated farmland and served landowning constituents to show a “disproportionate effect” and “impose a distinctive burden” only on landowners to maintain restrictions on director eligibility based on land ownership. The default assumption is that non-landowners are eligible to vote in irrigation district elections.

59. *See, e.g., United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 529 (Cal. 1977).

44. 451 U.S. 355 (1981).

45. *Id.* at 362.

46. *Id.* at 357.

47. 410 U.S. 719 (1973).

48. 377 U.S. 533 (1964); *see also Salyer*, 410 U.S. at 728.

49. *Id.*

50. *Choudhry v. Free*, 552 P.2d 438 (Cal. 1976) (finding that California Water Code 21100’s limitation on IID board member eligibility was in violation of the federal and California constitutions).

51. 522 P.2d 438 (Cal. 1976).

52. *Id.* at 443.

53. *Id.* at 441.

54. *Id.*

the beneficiary is a breach of trust.<sup>60</sup> The water transfer should be invalidated and the trusteeship investigated.

A trust must be administered in accordance with the trust instrument and applicable statutes.<sup>61</sup> When landowners in the Imperial Valley created the IID in 1911, they established a public corporation that would hold their water rights perfected through appropriation in trust for its members. This trust qualifies as an express trust under California law and is subject to state law specifying a trustee's duties and obligations.<sup>62</sup> These duties and obligations include the following: (1) duty of loyalty; (2) duty to make the trust property productive in furtherance of the purposes of the trust; (3) duty to manage the trust assets as a prudent investor; (4) duty to avoid conflicts of interest; (5) duty to avoid adverse trust obligations; (6) duty to keep control of and preserve the trust property; and (7) duty to take reasonable steps to defend against a loss to the trust.<sup>63</sup> The QSA takes away water essential to the economic and physical health of Imperial Valley residents for a payment insufficient to cover the fair market value of the water and compensate for damage to the public health. By signing the 2003 QSA, the IID has breached its trust by violating each of the trust elements identified above.

#### *A. The IID Failed to Fulfill Its Duty of Loyalty When It Agreed to a Contract That Was More Likely to Harm Than to Benefit the Beneficiaries of the Trust*

The duty of loyalty is an overarching principle in trust law, and it applies to each act performed by the trustee.<sup>64</sup> A trustee "has a duty to administer the trust solely in the interest of the beneficiaries."<sup>65</sup> The purpose of the IID's original trust, as expanded by *Choudhry*, is to distribute water for the benefit of the residents and landowners of the Imperial Valley. Selling 300,000 afy of water and giving away 700,000 afy reduces the productivity of the land and economy of the Imperial Valley and undermines the very purpose the IID was created to serve. Although compensation was paid to the IID for conservation and environmental mitigation measures, the number of acres irrigated will decrease and the agricultural output of the valley is projected to decrease, causing economic distress for a county that is already the poorest in the state.<sup>66</sup> Moreover, the influx of funds have gone to fi-

nance the district's operations and staff, rather than directly benefit the farmers and residents; the trust obligations are not fulfilled by the district's expansion for the sake of empire building.<sup>67</sup> The QSA provides no tangible benefit for the beneficiaries of the trust.<sup>68</sup>

#### *B. The IID Breached Its Duty to Make the Trust Property Productive and in Furtherance of the Purposes of the Trust*

The water transferred was not surplus water, and therefore the IID's relinquishment of the water was counter to the purpose of the trust (providing water for agricultural and domestic uses) and limits the productivity of the trust assets. A trustee "has a duty to make trust property productive under the circumstances and in furtherance of the purposes of the trust."<sup>69</sup> Although the IID could use its water more efficiently, the same could be said about other irrigation districts and the QSA party municipal water districts themselves. If water efficiency is to be the criterion for perfected water rights, then the IID should insist that the state apply the standard consistently.

(2) little opportunity for agriculture in the absence of irrigation; (3) geographic isolation from other farming areas; and (4) historically marginal, depressed economy. Charles W. Howe et al., *The Economic Impacts of Agriculture-to-Urban Water Transfers on the Area of Origin: A Case Study of the Arkansas River Valley in Colorado*, 72 AM. J. AGRIC. ECONS. 1200-04 (1990) (Proceedings Issue).

Although the study was performed after the fact, a California Department of Water Resources Interagency Ecological Program 2008 report on water transfers found:

Water sales from rural areas to urban areas can significantly affect farming communities. If water is transferred away from a farming community over the long term, large amounts of acreage may be taken out of production for long periods. Short-term water transfers can, however, temporarily boost local economies by providing income from water sales.

DWR, COMPREHENSIVE MONITORING, ASSESSMENT, AND RESEARCH PROGRAM: FINAL REPORT (2008), available at <http://www.iep.water.ca.gov/cmarp/groups/wwtwt/Workplan/wt1105.doc>.

60. CAL. PROB. CODE §16400.

61. *Id.* The IID's trust must adhere to the requirements provided for in both the California Probate Code §§16000-16105 and California Water Code §§22425-22561.

62. CAL. PROB. CODE §§82 and 15001(a).

63. *Id.* §§16002, 16007, 16047, 16004, 16005, 16006, 16011.

64. *See id.* §16002.

65. *Id.* §16002(a). "The Probate Code requires the trustee to administer the trust solely in the interest of the beneficiaries," and "[a]ny violation of this duty to administer the trust solely in the interest of the beneficiaries is a breach of trust." 60 CAL. JUR. 3D TRUSTS §161 (1980).

66. The QSA specifically requires that land be fallowed until 2015, when additional conservation measures will be in place. However, by giving up 1 mafy, the IID is giving up over one-third of Imperial's previous water usage. A 1990 study of impacts in the Arkansas Valley from rural-to-urban water transfers found that while the state-wide direct employment and income losses were small relative to the costs of development of native water resources in urban areas, "the incidence of the costs is upon the rural areas, while the benefits accrue largely to the urban buyers." The Imperial Valley is strikingly similar to the Arkansas Valley for the factors found likely to cause the harm to rural areas: (1) dry climate with very low precipitation;

67. The IID's penchant for empire building is apparent from its financial statements. Between 2002 and 2004, it increased its net assets by almost \$100 million, and between 2004 and 2006, increased its net assets by another \$180 million. Despite these vast increases, Imperial water and electricity users actually faced increased prices in the same time period. The IID's energy operations are much more profitable than were its water operations, and this may have presented a conflict of interest as well. The financial statements at times commingled the revenues and expenditures between the energy and water operations, which gives the appearance of an ability to cross-subsidize energy operations from income from the water transfer. IID, *IID 2004 Financial Statement*, [http://www.iid.com/Media/financial\\_report\\_2004.pdf](http://www.iid.com/Media/financial_report_2004.pdf) (last visited Aug. 21, 2008). IID, *IID 2005-2006 Financial Statement*, <http://www.iid.com/Media/IID-Financial-Statements-2005-2006.pdf> (last visited Aug. 21, 2008).

68. IID Energy recently expanded into a brand new 20,000 square foot facility to house its growing staff, [http://www.maxonfurniture.com/aboutus/Maxon\\_IID\\_Energy.pdf](http://www.maxonfurniture.com/aboutus/Maxon_IID_Energy.pdf). In 2007, the IID negotiated to obtain \$40 million from San Diego to help offset the losses to the Imperial Valley from the conservation measures that require fallowing land. It is yet to be determined if this money will in fact be distributed for the benefit of Imperial Valley residents through economic development programs. A large portion of this money is dedicated to environmental mitigation. A permanent solution to avoid the drying of the Salton Sea and the related public health crisis from the exposed salt and dust storms (à la Owens Valley) is estimated to run in the billions of dollars. There is little oversight over how the money from the water transfer is being managed, and it is not at all clear that the money is being put to uses that will directly benefit the beneficiaries of the trust.

69. CAL. PROB. CODE §16007.

A decrease to the IID's allotment restricts future development in the Imperial Valley; Los Angeles has historically reserved the right to water it is not currently using as a pueblo water right that can be drawn upon as its population grows.<sup>70</sup> Los Angeles and San Diego have thousands of uncovered swimming pools and do not have aggressive water conservation and recycling programs. Some areas served by the municipal districts do not even have water meters. Numerous golf courses and pools line the resorts of Palm Springs in Coachella Valley. The Coachella Valley uses flood irrigation for date palms and exposed sprinkler systems that can result in up to one-half of the water applied being lost to evaporation.<sup>71</sup>

Unlike Las Vegas, San Diego blithely acts as if its supply of clean water is limitless. Las Vegas, itself far from being a model of water conservation, has placed restrictions on sprinklers, car washing, and other water uses. The Southern Nevada Water Authority spends \$7.89 per person on water conservation; southern California water agencies spend a meager \$3.33 (Los Angeles Department of Water and Power), \$2.19 (MWD), and 59 cents (SDCWA).<sup>72</sup> San Diego has opted to buy its way out of water shortages instead of conserve what it already has. San Diego officials have found it easier politically to pressure the state government to force the IID to conserve at the expense of the residents of the Imperial Valley and the environment of the Salton Sea instead of urge their own constituents to conserve water.

### C. The IID Did Not Prudently Manage the Trust Assets of the Beneficiaries

By accepting less than fair market value for the water transferred and allowing a transfer without adequate protection of economic and environmental justice concerns for Imperial Valley residents, the IID did not manage the trust assets as a prudent investor. A trustee must "manage trust assets as a prudent investor would, by considering the purposes . . . and other circumstances of the trust" while exercising "reasonable care, skill, and caution."<sup>73</sup>

#### 1. The Price of the Lease Was Below Fair Market Value

The IID did not demand fair market value at the outset of the agreement nor did it build sufficient flexibility into the pricing structure to account for projections of steep increases in the price of water in the near future. As trustee, the IID board must "administer the trust with reasonable care, skill, and

caution under the circumstances" as a "prudent person in a like capacity" would use in an "enterprise of like character" to "accomplish the purposes of the trust as determined by the trust instrument."<sup>74</sup> "A trustee must invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust."<sup>75</sup> Appropriate factors for the trustee to consider are (1) general economic conditions, (2) the possible effect of inflation or deflation, (3) the expected total return from income and the appreciation of capital, and (4) an asset's special relation or value to the purposes of the trust to one or more of the beneficiaries.<sup>76</sup>

Although water usage in California is restricted to beneficial use, fair market value is still the standard for compensation of trust assets, both for trust law and for eminent domain. The SWRCB and the DOI threatened to take away water rights from the IID because they claimed the water could be more beneficially used elsewhere, but these threats were not justified by the public trust doctrine or eminent domain. The water was not taken for the public benefit of all Californians, but from one county of California to another. Nor was it part of a comprehensive regulatory program throughout the region to generally improve water efficiency.<sup>77</sup>

If the DOI or the SWRCB had succeeded in taking the IID's water rights without the IID's acquiescence, the taking would have required just compensation through eminent domain, also assessed at fair market value.<sup>78</sup> Water rights may be "in flux" and their "evolution [may have] passed beyond traditional concepts of vested and immutable rights," but a 180-degree turnaround from perfected water rights based on appropriation to a SWRCB-run reallocation of water rights on a case-by-case basis is for the legislature to decide, not individual agencies or water districts.<sup>79</sup> The legislature has approved water marketing, not strong-arm tactics of taking away water rights.

The IID sold 300,000 afy to the SDCWD, the CVID, and the MWD for \$250 per afy; this price is not fair market value. The distribution of Colorado River water has been heavily subsidized by the Bureau of Reclamation and state water projects and was therefore cheap for farmers. How-

74. CAL. PROB. CODE §16040(a).

75. *Id.* §16047.

76. *Id.* §§16047(a), (c) (1-2, 5, 8).

77. Although such a transfer through eminent domain would not transfer property from one private use to another private use, without a comprehensive and logical regulatory framework, the isolated taking of water from Imperial and transfer to Los Angeles and San Diego would be unlikely to pass the *Kelo* test for legitimate public use. See *Kelo v. City of New London*, 545 U.S. 1158, 35 ELR 20134 (2005) (holding that a comprehensive plan that is for a public benefit may use the takings clause to pass private property to another private party). Even in *Kelo*, there was no dispute that fair market value must be paid, only whether the use was sufficiently for the public benefit that the government had the right to initiate the taking at all.

78. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 625, 32 ELR 20516 (2001) (holding that fair market value is the standard for government takings, and the calculation of fair market value may include restrictions from legitimate regulatory limitations). The SWRCB and the DOI were unlikely to succeed on a regulatory taking claim because the refusal to deliver water would be considered a physical taking, thus requiring just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that even a minor physical invasion of property was a physical taking requiring just compensation).

79. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 275 Cal. Rptr. 250, 267 (Cal. Ct. App. 1990).

70. *Los Angeles v. San Fernando* confirmed Los Angeles' claim to water in the Los Angeles River Basin. *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250 (Cal. 1975). The court relied on *stare decisis* to affirm earlier court decisions interpreting Mexican and Spanish law that predated California's admission to the United States. The earlier courts had interpreted Mexican and Spanish law as having granted Los Angeles a "pueblo" water right—a right to use all the water in the Los Angeles basin for the city's present and future use, regardless of how much water the city was actually using.

71. Based on author's own observations upon visiting Coachella Valley farms in November 2007.

72. William J. Kelly, *Greed Runs Through It*, L.A. WKLY., Mar. 15, 2006, at 6.

73. CAL. PROB. CODE §16047; 60 CAL. JUR. 3D TRUSTS §154. Although the trust held by the IID was created in 1911, the 2003 QSA decision was made subsequent to the 1995 California Uniform Prudent Investor Act, and so the Act applies to the 2003 decision.

ever, the market resale price for the water is based on the cost of alternative sources and the price of water for municipalities. Desalinated water in southern California costs between \$800 and \$2,000 per afy.<sup>80</sup> The MWD itself was selling water to member agencies at \$431 per afy in 2002, a year before the QSA. The *Los Angeles Business Journal* noted in 2002:

That price [\$431 per acre-foot] is sure to head up over the next 20 years, as the agency is forced by federal mandate to decrease its intake from the Colorado River. The Colorado River water traditionally has been the cheapest in the MWD composite, so as the agency uses less of it, the overall cost of water will go up.<sup>81</sup>

Although the reasonable investor rule does not assess unreasonableness through hindsight, recent transactions do not help the IID's case that setting a relatively flat price for 45 to 75 years was reasonable. In 2006, a Manhattan Beach staff report noted that the normal purchase price from the MWD was \$535 per afy.<sup>82</sup> In 2007, Northern California's Natomas Central Mutual Water Company agreed to transfer Bureau of Reclamation water to Folsom for roughly \$4,000 an acre-foot, with an adjustment for inflation.<sup>83</sup> Even at the time of purchase, the MWD could resell the IID's water for a significantly higher price than the IID commanded in the QSA.

The federal government's handling of leases of lands held in public trust serves as a point of reference for assessing the IID's standard of care in acting as a prudent investor. Fair market value is the standard throughout the regulations for selling publicly owned properties and resources. For example, the Secretary of the Interior can require royalties owed to the United States for oil or gas leases to be paid in oil or gas, and unless the Secretary finds that the royalty oil and gas is necessary for use by the United States, she may sell the royalty oil and gas to the highest bidder, unless the Secretary finds it "unwise in the public interest to accept the offer of the highest bidder" and cannot sell the royalty oil or gas for less than market price.<sup>84</sup> The IID could have sought out other bidders instead of taking offers only from those who had instigated the SWRCB petitions.

## 2. Compensation Was Inadequate to Mitigate the Environmental and Economic Damage to Imperial County

Compensation for environmental and economic mitigation measures was inadequate for the harm likely to ensue from the water transfer. Although the SDCWD and the MWD agreed to pay \$50 million for economic harm and environmental mitigation to prevent air pollution from the drying Salton Sea, this does not begin to cover the actual costs of maintaining or restoring the sea, estimated to run in the bil-

ions of dollars.<sup>85</sup> The Imperial Valley's agricultural output is over a billion dollars per year, and agriculture is a chief source of employment. In 2002, unemployment in the agriculture sector in Imperial Valley was approximately double that of California's average, but by 2006, Imperial's agricultural unemployment was more than triple the average unemployment rate for the state.<sup>86</sup> The amount of compensation is very unlikely to meet even the socioeconomic and environmental mitigation costs needed to cover the damage caused by the transfer, let alone provide a positive benefit for the residents of Imperial Valley. The IID did not require an attainable mitigation plan to be in place before proceeding with the agreement, thus undermining its trust obligations.

Although the IID is not solely responsible for protecting the public trust (instream uses and public health generally), its fiduciary duties to its beneficiaries do require it to take its members' health into account when making decisions on their behalf. Because of the potential risk to the air quality, the state of California provided the IID with \$100,000 for environmental mitigation and promised to provide more appropriations in the future. As part of the QSA, the state assumed responsibility for environmental damage resulting from the drying of the Salton Sea, but given California's recent budget crises, such a promise is far from a guarantee. This offer did not constitute a bond that reasonably estimates the damage to the air quality and crop production likely to occur as a result of the water transfer.<sup>87</sup>

Even if the damage caused is a fraction of that caused in Owens Valley by a decrease in lake level, \$50 million is not sufficient compensation, especially in the face of budgetary and engineering uncertainties. If the current levels of the Salton Sea are reduced, there is a strong probability that the exposed lakebed will result in air pollution that would significantly harm the public health in the Imperial Valley. Be-

80. Howard Fine, *Water Woes Spur Fresh Look at Desalination*, L.A. BUS. J., May 2, 2002.

81. *Id.*

82. STAFF REPORT, CITY OF MANHATTAN BEACH (2006), available at <http://www.ci.manhattan-beach.ca.us/agenda/2006/Ag-Min20060620/20060620-09.pdf>.

83. Mary Lynne Vellinga, *Water Deal Key to Folsom Growth: Natomas Firm's Pact Could Allow Building South of Hwy. 50*, SACRAMENTO BEE, Aug. 4, 2007, available at <http://www.sacbee.com/101/story/308481.html>.

84. 30 U.S.C. §192 (2007).

85. In 2007, the SDCWD agreed to pay \$40 million for mitigation of economic and environmental damage, but this amount still falls short of estimates needed for actual mitigation. The IID has not yet released its plan for how this money will directly benefit the beneficiaries of the trust. So far, it seems the IID is expanding its operations, staff, and facilities for its energy division, but this does not necessarily translate into a direct benefit for Imperial Valley residents. The price of water and electricity for Imperial residents has actually increased since the QSA, and the electricity production is largely distributed outside of the region. See IID, *Financial Statements, 2005-2006*, *supra* note 67. See SALTON SEA AUTHORITY BOARD OF DIRECTORS, SALTON SEA AUTHORITY PLAN FOR MULTI-PURPOSE PROJECT 18 (2006), available at [http://www.salttonsea.ca.gov/SSA-SSA\\_Plan\\_Draft\\_6-19-06\\_Exec\\_Summary\\_e.pdf](http://www.salttonsea.ca.gov/SSA-SSA_Plan_Draft_6-19-06_Exec_Summary_e.pdf) (estimating restoration at \$2.2 billion). See *Salton Sea Cleanup Estimates Higher Than Expected*, SALTON SEA COALITION NEWS, Feb. 1, 2007 (citing Bureau of Reclamation estimates up to \$9.2 billion).

86. Employment Development Department of California, *Labor Market Info Overview*, <http://www.labormarketinfo.edd.ca.gov> (last visited Aug. 21, 2008).

87. For comparison, the federal Surface Mining Control and Reclamation Act requires a permit and the posting of a bond in order to conduct surface coal mining because of the potential risk of property damage. 30 C.F.R. §740.13(f)(1). "The bond shall secure payment to the surface estate for any damage which the surface coal mining and reclamation operation causes to the crops or tangible improvements of the permittee or lessee of the surface lands." 30 C.F.R. §740.15(c)(3). The Secretary of the Interior is required to revoke the permit and order the cessation of the mining activity if the activity falls into one of several categories, including: (1) "creates an imminent danger to the health or safety of the public"; or (2) "is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." 30 C.F.R. §843.11(a)(1)(i) and (ii).

cause of this potential harm to its members, the IID should have required more definitive plans to mitigate harm to the public health, shortened the period of the lease, and allowed for a revocation or suspension if the imminent risk of ill health effects caused by the lease emerged.<sup>88</sup> Instead, the IID board actually attempted to contract out of its obligations to the Imperial Valley residents; as part of the QSA, the IID is held harmless from impacts to the Salton Sea resulting from transfers of conserved water, including harm to the public health.<sup>89</sup>

#### *D. The IID Had a Conflict of Interest in Developing Geothermal Resources*

The IID board breached its trust by acting in the face of a conflict of interest and by becoming trustee for an energy utility with interests adverse to those of the original irrigation district. A trustee has a duty to avoid conflicts of interest and to eliminate such conflicts or adverse trusts when they are discovered.<sup>90</sup> The Imperial Valley has one of the largest potential geothermal resources in the state and has over 20 companies engaged in geothermal exploration.<sup>91</sup> The IID owns 44% of the land under the Salton Sea, much of which would be a highly productive field for geothermal energy, were it not covered with water.<sup>92</sup> The IID made a geothermal deal with the CalEnergy Corporation in 2006 to build 215 megawatt (MW) Salton Sea Unit 6 geothermal power plants.<sup>93</sup> The exploitation of the geothermal fields and reve-

nues from the IID's energy division would be enhanced by the decrease of water in the Salton Sea, which will shrink in size if less water is available for irrigation in the Imperial Valley. The IID's energy holdings presented an adverse interest to its original trust when technology advanced sufficiently such that developing its geothermal resources would benefit from reducing agricultural runoff water into the Salton Sea.<sup>94</sup> When the IID acquired geothermal plants in pursuance of expanding its power division, it created a conflict of interest and absorbed a new trust obligation with interests adverse to its obligations to the original trust beneficiaries, in violation of the California Probate Code.<sup>95</sup>

A trustee "owes an undivided duty to the beneficiaries" and it would be "against public policy" for the trustee to "place himself or herself in any position that would expose the trustee to the temptation of acting contrary to the beneficiaries' best interests."<sup>96</sup> This "prohibition operates irrespective of the trustee's good or bad faith in placing himself or herself in such a position."<sup>97</sup> To avoid the conflict of interest and adverse trust, the IID should not have acquired an energy division, or as its purpose drifted from hydropower to geothermal and other forms of power, it should have divested of the energy assets or split into separate entities once the conflict emerged.<sup>98</sup> Although the IID has separate divisions of energy and water, this partition is too flimsy to insure against undue influence from an adverse trust. Ostensibly, the two divisions have separate accounting, but the same board members preside over decisions regarding revenues and expenditures of both divisions. The distinction is not sufficient to protect the interests of the beneficiaries of the IID's trust regarding water rights from interests unrelated or counter to those water rights.

When the IID's energy division was based on hydropower, its combined functions and control of both energy and water made organizational sense and did not present the acute conflict of interest imbedded in its decisionmaking in 2003. In its 2006 Integrated Resources Plan, the IID's energy department repeatedly refers to its expansion in renewable sources of energy, including geothermal, wind, solar and nuclear power, and the need to expand its load capacity for the increased production in the near future.<sup>99</sup> The Salton

88. *Protect Our Water & Env't Rights (POWER) v. Imperial Irrigation Dist.*, Nos. ECU01649 & ECU01886 (Cal. App. Dep't Super. Ct. Jan. 31, 2008) (denying motion for preliminary injunctive relief of water transfer on the basis of economic harm to Imperial Valley because while the alleged injuries may exist, the evidence lacks specificity).

89. DWR, <http://www.crss.water.ca.gov/legis/index.cfm>. The Owens Valley has been drained by Los Angeles for over 70 years, and the exposed lakebed has caused serious health problems. Without environmental mitigation measures, estimated to cost billions of dollars, part of the Salton Sea lakebed will be similarly exposed and will be double the size of the exposed lakebed in Owens Valley. In California's Owens Valley, particulate matter has been measured at the highest levels found in the United States. Strong winds over the Owens Valley dry lakebed blow large amounts of dust into the air containing a variety of particulates. The dust from the lakebed contains carcinogens such as nickel, cadmium, arsenic, as well as sodium, chlorine, iron, calcium, potassium, sulfur, aluminum, and magnesium. Fine particulates are so small that several thousand of them could fit on the period at the end of this sentence. Particulates can harm human health and the environment. They can affect breathing and cause lung damage, increased respiratory disease, and possibly premature death. Children, the elderly, and people suffering from heart and lung disease, like asthma, are especially at risk. Particulates also damage paint, soil clothing, and reduce visibility. "Air monitoring of the Owens Valley during the past 18 years has measured the highest particulate matter (PM-10) pollution in the United States." U.S. Environmental Protection Agency (EPA), *Fact Sheet*, <http://www.epa.gov/region09/air/owens/pmplan.html>.

90. "The trustee of one trust has a duty not to knowingly become a trustee of another trust adverse in its nature to the interest of the beneficiary of the first trust, and a duty to eliminate the conflict or resign as trustee when the conflict is discovered." CAL. PROB. CODE §16005. "The trustee has a duty not to use or deal with trust property for . . . or for any other purpose unconnected with the trust." *Id.* §16004.

91. SWRCB Decision 1600 (June 1984).

92. Doug Abrahms & Benjamin Spillman, *Local Geothermal Region Could Have Power of 10 Nuclear Plants*, DESERT SUN, Aug. 2005, at 2; see also SALTON SEA AUTHORITY PLAN FOR MULTI-PURPOSE PROJECT, *supra* note 85.

93. See Abrahms & Spillman, *supra* note 92.

94. The geothermal energy fields were discovered in 1958, and development began in the 1990s. California Department of Energy, *Siting Cases*, [http://energy.ca.gov/sitingcases/saltonsea/documents/applicant\\_files/afc\\_cdrom/Volume\\_1/Section\\_2/Section\\_2.0.pdf](http://energy.ca.gov/sitingcases/saltonsea/documents/applicant_files/afc_cdrom/Volume_1/Section_2/Section_2.0.pdf) (last visited Aug. 21, 2008).

95. CAL. PROB. CODE §§16004 & 16005. "The rule against the holding of adverse interests did not have its origin with the codes, but is much older, and its statutory formulation has been called a perfect echo of the common law." 60 CAL. JUR. 3D TRUSTS §162.

96. 60 CAL. JUR. 3D TRUSTS §162.

97. *Id.*

98. "Under the Probate Code, no trustee may knowingly become a trustee of another trust adverse in its nature to the interest of the beneficiary of the first trust, and must eliminate the conflict or resign as trustee when the conflict is discovered." *Id.* §165.

99.

The recently approved California renewable portfolio standards mandates have increased the demand and interest in developing new geothermal renewable resources in California, especially the ones located in Imperial Valley's Salton Sea area. In October 2004, the CEC and the IID concluded that a long-term transmission study effort should be initiated to determine transmission issues related to delivering over 2000 MW of additional renewable resources out of the Imperial Valley.

Sea Authority Plan for Multi-Purpose Project, a document that summarizes the Salton Sea Authority's proposal for restoration of the Salton Sea, notes that the geothermal energy field at the sea's south end currently has geothermal energy plants with a combined generation capacity of about 300 MW and that the energy field can support up to 2,000 MW of generation capacity. Under the authority plan, more of the energy field in the Salton Sea will be dry enough to make more geothermal production practical.<sup>100</sup>

The IID has shifted its emphasis toward power, and this priority shift presents a conflict of interest that has interfered with its duty of loyalty and avoidance of conflicts of interest and adverse trusts.<sup>101</sup> In 2006, water department revenues were \$184,455.1 million, and the energy department revenues were \$491,486.5 million.<sup>102</sup> If the water transfer benefited the energy department, and the benefits were then passed through to the Imperial Valley residents, the trust would not be considered breached, but most of the energy is sold outside of the district, and the IID is tax exempt, thus providing some jobs to the county, but no tax base, unlike the agricultural users of water. In addition, the revenues to the IID are not being passed on as a benefit to the Imperial Valley in the form of energy rebates; energy prices have actually increased for Imperial residents since the transfer.<sup>103</sup>

#### *E. The Length of the Lease Was Too Long for the IID to Keep Control of and Preserve the Water Held in Trust*

The IID also breached its duty to keep control of and preserve the trust property.<sup>104</sup> “[A] trust to manage property implies that the trustee is to retain the property under his or her control, and is inconsistent with the idea that the trustee has authority to sell or otherwise dispose of it.”<sup>105</sup> By relinquishing control of the water rights of 300,000 afy for 45 to 75 years and giving away 700,000 afy permanently, the IID board leased trust property for an unreasonable amount of time to maintain control of it and permanently gave away water rights it held in trust. Although the IID is not explicitly forbidden from leasing water it holds in trust, it may not do so at the expense of fulfilling the purpose of the trust (providing sufficient water for irrigation and household use). The requisite duty of loyalty and the explicit purpose of the trust forbid a lease when such water is needed to sustain the community in the Imperial Valley. Although in other trust obligations, leases or sales of property may be appropriate, in the case of the Imperial Valley, the monetary and technical conservation assistance provided by the water transfer is not sufficient to fulfill the trust obligations as defined by the trust's purpose, which requires the provision of water.<sup>106</sup>

ENERGY DEPARTMENT, IID, INTEGRATED RESOURCES PLAN 2006 (2007), available at [http://www.iid.com/Media/IID-2006-IRP-\(RV-7-10-07\).pdf](http://www.iid.com/Media/IID-2006-IRP-(RV-7-10-07).pdf).

100. SALTON SEA AUTHORITY PLAN FOR MULTI-PURPOSE PROJECT, *supra* note 85.
101. See CAL. PROB. CODE §§16002, 16004, 16005.
102. IID, *Meeting Minutes*, <http://www.iid.com/Media/dec-6-reg.pdf> (last visited Aug. 21, 2008).
103. See *supra* note 67.
104. CAL. PROB. CODE §16006. “The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.”
105. 60 CAL. JUR. 3D TRUSTS §192.
106. “A power to lease trust property may be directly or impliedly precluded by the trust terms or purposes.” *Id.* §199. “[G]enerally, the

By agreeing to such a long-term lease, the IID could not reasonably ensure adequate control over the water and reassess the transfer's benefit as needed. The IID could not accurately project the water needs of Imperial, the future fair market price of the water, nor the mitigation costs needed to offset the transfer over the lease period of 45 to 75 years. By comparison, leases of state and federal public lands are generally 10 to 30 years long, and the California Water Code defines a long-term lease to be “any period in excess of one year.”<sup>107</sup> Statutory and regulatory limitations on the federal and state governments regarding natural resources on public lands held in public trust provide a baseline to compare the IID's administration of its trust. Generally, these leases cannot exceed 10 to 25 years.<sup>108</sup>

In fact, the IID board itself found the lease to be unreasonably long in 2002 when it rejected a preliminary proposal.<sup>109</sup> The board's reasons for its rejection of such terms at that time included: (1) “credible estimates of the total cost of all required mitigation measures were not available”; and (2) “credible and firm funding commitments

trustee may sell trust property if the sale is necessary or appropriate to enable the trustee to carry out the purposes of the trust, unless sale is forbidden in specific words by the terms of the trust, or unless it appears from the terms of the trust that the property was to be retained in specie in the trust.” *Id.* §192. *But see id.* §199 (“Except as otherwise provided in the trust instrument, the trustee has the power to enter into a lease for any purpose as lessor or lessee, with or without the option to purchase or renew, and for a term within, or extending beyond, the term of the trust.”).

107. CAL. WATER CODE §1735.
108. Throughout federal government agencies, there is a sense of obligation to maintain control over and reassess the price and desirability of a lease of government-owned property. The United States leases federal lands for the purposes of oil, mineral, and gas mining and extraction. Each permit granted “shall be limited to a reasonable term in light of all circumstances concerning the project, but in no event more than thirty years.” 30 U.S.C. §185(n). The DOI has interpreted this limitation and issued rules that both competitive and non-competitive leases “shall be issued for a primary term of 10 years.” 43 C.F.R. §§3120.2-1, 3110.3-1. The Secretaries of Agriculture and the Interior may lease national forest land for grazing for terms of 10 years, with the right of the Secretary to cancel, suspend, or modify the lease. 43 U.S.C. §1752. Shorter leases are allowed if certain conditions are met.

The Secretary of Defense or the Secretary of a military department may not enter into any contract with a term of 18 months or more, or extend or renew any contract for a term of 18 months or more, for any vessel, aircraft, or vehicle, through a lease, charter, or similar agreement, unless the Secretary has considered all costs of such contract (including estimated termination liability) and has determined in writing that the contract is in the best interest of the Government.

10 U.S.C. §2401(a).

- The Secretary of the Air Force may lease aircraft for a period not to “exceed 10 years, inclusive of any options to renew or extend the initial lease term.” Aircraft Lease Pilot Program authorized by Pub. L. No. 107-117, 115 Stat. 2284 (2002). The U.S. Department of Defense also handles leases of government property. For example, an on-base credit union with at least 95% of its clientele as military families and federal employees may receive a no-cost office space for a period not to exceed five years. 32 C.F.R. §231.7 (D)(1)(ii)(A). If a credit union does not meet the 95% criterion and improves government-owned space, the credit union “may be provided a lease at fair market value for a period not to exceed 25 years, subject to periodic review every 5 years to assess changes in fair market value.”
109. “The IID Board's failure to approve the proposed QSA and related transfers on December 9 resulted from the unacceptable risk of making a long-term 75 year commitment in the face of substantial risks posed by unresolved environmental issues and other concerns.” IID, *News Archive*, <http://www.iid.com/Sub.php?build=view&idr=1210&page2=1&pid=762> (last visited Aug. 21, 2008).

have not been obtained from the other QSA parties to pay environmental mitigation costs as incurred.”<sup>110</sup>

In its 2002 counteroffer, the IID proposed a lease of five years, the right to reduce the transfers if the IID did not receive 3.1 mafy, an inflation adjustment for the price of water, increased environmental mitigation costs to be paid by transferees, and other guarantees protecting its right to maintain control of decisions concerning its allotment.<sup>111</sup> However, most of these conditions were not met in the final QSA. The IID also could have made year-to-year contracts that conditioned the sale of surplus water on the availability for its members.<sup>112</sup>

The IID’s agreement to lease the IID’s water for 45 to 75 years is unreasonable, both in comparison to federal natural resources leases and under the particular circumstances of the water market in California. Federal leases are long because of the high costs of entry for natural resource extraction. Capital expenditures and initial survey and development costs are exceedingly high, and so potential bidders need assurance that their projects will be long enough to give a reasonable chance of return. In contrast, the transfer of the IID water requires almost no new infrastructure because the water wheeling system is already in place (the MWD’s Colorado Aqueduct), and the additional maintenance costs are minor and spread out over time. Even if the price at which the IID agreed to sell the water was reasonable at the time of the transaction, normal inflation, frequent and increasingly intense droughts, and the growing demand for water from California’s burgeoning population all make a set price for 45 to 75 years, subject only to minor increases, nonsensical. Federal and other California leases balance both the high costs to entry and the desire to maintain control over public lands and still have a substantially shorter maximum length than does the IID water transfer. Periodic reassessment is essential for maintaining control over the property, correctly gauging the market price, and addressing emerging problems with the lease and any developing adverse impacts.

#### *F. The IID Board Was Influenced by Political Pressure to Forego Its Duty to Defend Against a Loss to the Trust*

In addition to having an internal conflict of interest, the IID board members were bombarded by external political pressures. The legislature threatened to dismantle the IID entirely if the IID did not agree to transfer its water to the coastal municipal water districts.<sup>113</sup> The IID board may very well not have acted in bad faith in signing the QSA; indeed, it fought against it in 2002 and adopted a resolution against further transfers to urban areas immediately after the QSA. Fault is not at issue. Instead, it is the conflict of interest and the unfairness of the result that points to the breach, not the subjective intentions of the IID board members. The IID tried to pacify its members and the Imperial Valley community by inserting the following language into the agreement:

110. *Id.*

111. *Id.*

112. *See, e.g.,* *Western Placer Citizens for an Agricultural & Rural Env’t v. County of Placer*, 144 Cal. App. 4th 890, 907 (Cal. Ct. App. 2006) (Nevada Irrigation District leased the use of the district’s water based on a year-to-year contract).

113. James Sterngold, *Pressure Building on Water Agency*, SAN FRANCISCO CHRON., Jan. 9, 2003.

“No person or local agency, as defined in Section 21062 of the Public Resources Code, may seek to obtain additional conserved Colorado River water from the district, voluntarily or involuntarily, until the district has adopted a resolution offering to make conserved Colorado River water available.”<sup>114</sup> However, this language cannot trump the California Constitution, which requires that water rights only belong to parties putting the water to “beneficial use.” This language does little to prevent future claims against the IID that there are more beneficial uses for the IID’s allocation in other parts of California or other Colorado River water users.

By deciding to sell its water in the face of the federal and state government pressure, the IID did not fully pursue its legal options in order to prevent loss to the trust assets. Despite threats from the DOI and the SWRCB to take away the IID’s water, the IID must take “reasonable steps” to defend against a loss to the trust. A trustee has a “duty to take reasonable steps to defend actions that may result in a loss to the trust.”<sup>115</sup> As part of the QSA, the IID agreed to drop its lawsuit against the DOI for trying to redirect its water to the MWD and forewent other options to resist DOI and SWRCB attempts to take its water. The IID prevailed on preliminary motions in its case against the DOI and had significant data to support its claim that its water use was beneficial and reasonable, as required by state and federal law.<sup>116</sup> The IID cannot give away its water rights to another water agency or passively accept SWRCB or DOI decisions that try to strip away its rights.

The IID must follow the law, but in an area such as water rights, the law is ill-defined, and maintaining its water rights requires affirmative effort and diligence on the part of the IID. The SWRCB is not allowed to approve a water transfer if it would injure a legal user of the water right.<sup>117</sup> Instead of prematurely giving in to pressure to give up the water rights, the IID could have pursued its beneficiaries’ legal interests to the full extent of the legal process while encouraging the adoption of technology to keep up with the evolving standards of the beneficial use doctrine.

#### **VI. The Result of the IID’s Breach of Trust Harms Its Beneficiaries**

The IID gave up too much water too early to satisfy even the current water needs of the Imperial Valley, let alone its future needs or potential for growth. Demand for water will increase as development in California and along the Colorado Basin intensifies. The Imperial Valley could put its water to new beneficial uses instead of transferring it to other counties. For example, the Imperial Valley could irrigate more acres planted with less-water dependent crops, rather than fallow productive land and give up the water rights. In addition, snowbird retirees are settling in the northern part of the Salton Sea, and the Imperial Valley will be unable to benefit from such development if its water supply is cut short. If the Salton Sea is restored, it could again be a major tourist desti-

114. CAL. WATER CODE §1013(e).

115. CAL. PROB. CODE §16011.

116. *See supra* note 35, at 7.

117. “The [SWRCB], after providing notice and opportunity for a hearing . . . may approve such a petition for a long-term transfer where the change would not result in substantial injury to any legal user of water.” CAL. WATER CODE §1736.

nation as it was in the 1950s to 1970s before environmental damage made it less desirable. The restoration of the sea and economic growth require more water, not less.

However noble and equitable the goal of the beneficial use doctrine, it has not been fairly applied, and the IID has not demanded that the same principles be applied to those vying for its water. The California Constitution requires that water rights are conditional upon the use of water being reasonable and beneficial.<sup>118</sup> Politically powerful municipalities have tried for years to use this doctrine to bludgeon the IID into handing over its water, with some success. Coachella Valley, Los Angeles, and San Diego spend relatively little on water conservation measures, and yet, expect the IID to water crops using the best available conservation technology. The municipalities have found it cheaper to pressure IID into selling them water than to conserve the water they already have; this arrangement does not reflect a beneficial use of water, but rather, a self-serving use of political clout.

The political influence of southern California cities was powerful and the SWRCB decisions were against the IID, but the IID chose to drop its lawsuit against the DOI as part of the QSA and did not defend the interests of its beneficiaries in the face of threats not predicated on sound legal principles. If the state was determined to take the water from the people of the Imperial Valley, the IID did not have to be its accomplice. The history of Los Angeles is the history of deception and exploitation in a quest to procure water.<sup>119</sup> In allowing the IID water transfer to stand, California is once again perpetuating legality's subservience to political expediency in the distribution of water.

The IID is central to the lives of the farmers and residents of the Imperial Valley, and its breach of trust destabilizes their livelihoods and their health. The palpable role of power and wealth in the water transfer is distasteful, and the example of IID's lack of loyalty to its members and conflict of interest from geothermal development undermine the legitimacy of California's entire water allocation system. The IID appears to operate more like a for-profit corporation than a nonprofit trustee. The IID's agreement to the QSA violates beneficiary rights from a trust established almost a century ago.

The types of conservation measures and water transfers executed in the QSA, if administered comprehensively and equitably, would likely benefit the public in California and other parts of the country. However, the farmers and residents of the Imperial Valley, the poorest county in the state, should not have to shoulder the entire burden of coastal southern California's thirst and California's shortsighted water planning. To be sure, the rural-urban distribution of water was and is problematic.<sup>120</sup> Bureau of Reclamation and

state-funded canals, dams, and aqueducts built throughout the 20th century have heavily subsidized agricultural water users.<sup>121</sup> Perhaps today, there is little justification in providing water to farms for a fraction of the price municipalities pay for drinking water. Agriculture in California uses 35 mafy, and many farms can undoubtedly improve their water efficiency. Improved efficiency is a laudable goal.

However, the southern California municipalities, the MWD especially, do not come to the negotiating table with clean hands and have their own history of water grabbing from rightful owners. Municipal water districts in California are not a model of efficiency either, but have the political clout to pressure the state into threatening to take away the IID's water rights in the name of efficiency. Singling out the IID for inefficiency and pressuring the IID to forsake its trust duties does not fix California's long-standing water management problems and is likely to have drastic consequences for the Imperial Valley. To find a long-term solution, the question should not be: "Who can cities take water from for urban uses?" but rather: "How can the state best utilize and conserve its water resources in a fair and equitable manner?"

## VII. Conclusion

The state must address its water consumption holistically—partial redistribution based on political pressure and expediency is neither equitable nor efficient. The transition from state and federal policies favoring agriculture to increased emphasis in serving municipalities cannot ignore the property rights of residents of agricultural areas and the economic dependence that has arisen because of an historical distribution of water that now appears less socially desirable. California's history has shaped its distribution of water, and when its priorities change, its legislators should take care that the burden of the transition is fairly apportioned and those whose lives have been built around the current distribution are not casualties of the state's next page in history.

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slightly over 1¢ per cubic meter, just 2 percent of what Los Angeles pays for its drinking water and only 10 percent of its replacement value" and identify "one analysis of a new U.S. project in central Utah found that the water it will provide will cost close to 40 times more than irrigators pay for it." Earth Policy Report, *Updates*, <http://www.earth-policy.org/Updates/2007/Update64.htm> (last visited Aug. 21, 2008).

121. Although cheap water serves to reduce the cost of food, the agribusiness model in California makes the market far from competitive, and much of the benefit of cheap inputs simply increases the profit margins of agricultural firms. A legislative policy choice that corrects the historical rural-urban imbalance of water allocation is likely reasonable and desirable. However, allowing federal and state agencies to make case-by-case determinations of which water rights are vested and which are not based on reasonable and beneficial use, is not equitable. This is especially true in light of SWRCB and DOI decisions that unfairly targeted the poorest county in the state in attempts to redistribute the water to urban areas that are also wasting water.

118. C.A. CONST. art. X, §2.

119. See *supra* note 4.

120. Earth Policy analysts note that "farmers in California's Central Valley use roughly one fifth of the state's water and pay on average

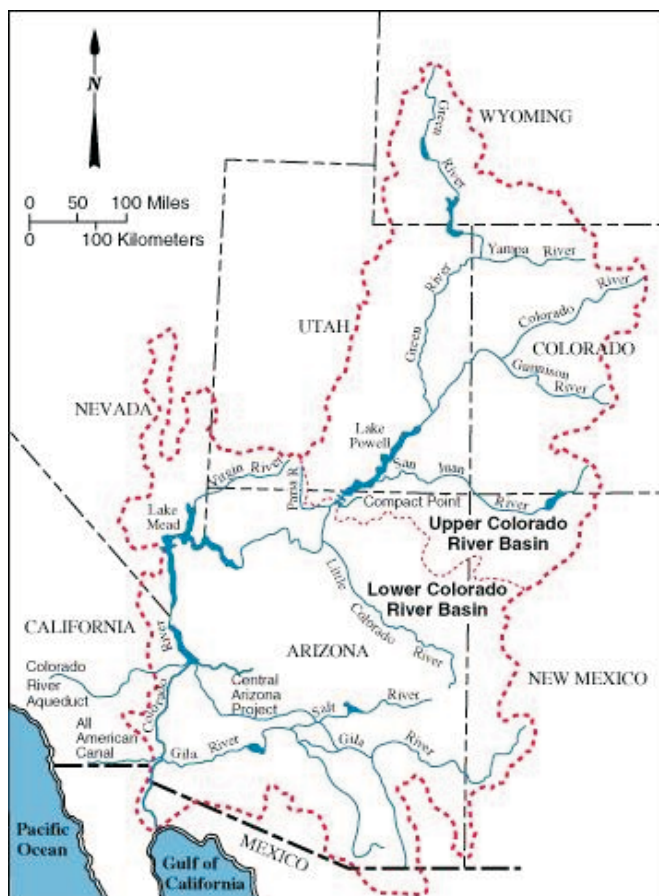
**Appendix A: Timeline of Water Delivery and Storage Projects\***

1887	The Wright Act, a California state law enabling citizens to create local irrigation districts, is adopted.
1900	The Colorado Development Company begins construction on the Imperial Canal. By 1904, 700 miles of canal support 8,000 settlers and 75,000 acres of crops.
1902	Congress passes the Reclamation Act and creates the Bureau of Reclamation.
1903 – 1906	The Imperial Valley is flooded resulting in dramatic loss of crops. Salton Sink, long-time reservoir of Colorado floods, becomes the Salton Sea and later develops into a major recreation and wildlife area.
1908	Construction begins on the Los Angeles Aqueduct to bring water from the Owens Valley to Los Angeles. Five years later, the first water deliveries flow into the San Fernando Valley.
1910	The Hetch Hetchy water project is approved by bay area voters. It creates a dam and reservoir in the Sierra Nevadas near Yosemite Valley to provide a water supply for San Francisco; project delivers water in 1934.
1911	The IID, through the Southern Pacific Company, purchases California Development Company properties in the Imperial Valley for \$3 million.
1922	The Colorado River Compact is signed, providing for the apportionment of water among the basin states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming).
1928	Boulder Canyon Project Act apportions the lower basin's 7.5 mafy among the states of Arizona (2.8 mafy), California (4.4 mafy), and Nevada (0.3 mafy).
1928	The California Legislature mandates, under the state's constitution, that water must be put to reasonable and beneficial uses.
1931	Boulder Canyon Project Agreement (California Seven Party Agreement). Palo Verde Irrigation District, IID, Coachella Valley, MWD, city of Los Angeles, city of San Diego, and county of San Diego agree to the apportionments and priorities of water from the Colorado River for use in California.
1932	The newly formed MWD begins building the Colorado River Aqueduct, completed in 1945.
1933	The state legislature, and later voters, approves the Central Valley Project Act and a \$170 million bond. But because of depressed economic conditions, the state is unable to pay for its construction.
1934	Construction on the All-American Canal begins and is completed eight years later, bringing Colorado River water to Coachella Valley and Imperial Valley in southern California.
1936	The federal Flood Control Act of 1936 reflects a major policy transition to support the multi-use concept of flood control. The era of building dams as multi-purpose structures begins.
1937	The federal government takes over the Central Valley Project as a public works project and begins work on the project. The Central Valley Project provides up to 4 mafy of water, mainly to agricultural water users in the Central Valley.
1938	The federal government begins work on Shasta Lake and Shasta Dam. The project is completed in 1945. A part of the federal Central Valley Project, it is California's largest reservoir.
1938	Construction on Coachella Canal begins and is completed 10 years later.
1957	The first California Water Plan outlines preliminary plans for full development of the state's water resources to meet its ultimate water needs. It includes local development projects and a system to transfer water from north to south.
1963	Construction begins on San Luis Reservoir, which is completed in 1967 and filled in 1969. It is the nation's largest offstream reservoir. Work begins on the California Aqueduct in the Delta.
1965	A partially completed South Bay Aqueduct starts service to Alameda County and Santa Clara County.
1988	North Bay Aqueduct Phase II is completed, providing water to Napa and Solano counties.
1997	Coastal Branch Phase II is dedicated and begins water deliveries to San Luis Obispo and Santa Barbara counties.
1998	The IID and the SDCWA enter into a long-term conservation and water transfer agreement.
2001 – 2003	The IID, the CVWD, and the MWD engage in QSA negotiations with the state of California and the Bureau of Reclamation.
2003	The Colorado River Water Delivery Agreement is signed by the Secretary of the Interior, the CVWD, the IID, the MWD, and the SDCWA. The QSA and Related Agreements are signed by the Secretary of the Interior and representatives of various Indian tribes, the Bureau of Reclamation, the CVWD, the IID, the MWD, and the SDCWA. The IID implements a 13-month Emergency Fallowing Program; the IID pays water users to fallow 69 fields to generate water to meet transfer and mitigation obligations of the QSA.
2004	The IID implements the second Fallowing Program; 118 fields are fallowed. The IID initiates contract for project management and construction management of the All-American Canal Lining Project.
2007	The seven Colorado River Basin states sign a compact agreeing to DOI guidelines for water allocation and conservation based on the current drought and future scarcity.**

\* See DWR, *150 Years of California's Water History*, <http://www.news.water.ca.gov/1999.fall/150yr.html> (last visited Aug. 21, 2008); IID, *IID Water Timeline*, [http://www.iid.com/Water\\_Index.php?pid=52](http://www.iid.com/Water_Index.php?pid=52) (last visited Aug. 21, 2008).

\*\* U.S. DOI, *Issues of Interest: Colorado River Programs and Projects*, <http://www.doi.gov/issues/colorado.html> (last visited Aug. 21, 2008).

**Appendix B: Colorado River Basin\*\*\***



\*\*\* See *supra* note 24.