RIVER KINGS: IN CALIFORNIA'S IMPERIAL VALLEY, WHO OWNS THE WATER FROM THE COLORADO RIVER, AND WHAT RIGHTS DOES THAT OWNERSHIP CONFER?

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I. INTRODUCTION

Water in Southern California is like a flat-screen TV on Black Friday—scarce and popular. This has been the case for some time.[1] One of the few sources of freshwater in the American Southwest, the Colorado River runs from the central Rocky Mountains all the way to the Gulf of California, serving as a border between Nevada, Arizona, and California. Since Spanish explorers began constructing

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1. Quantification Settlement Agreement Cases, 134 Cal. Rptr. 3d 274, 287 (Cal. Ct. App. 2011).

acequias (irrigation canals) in the 1500s, the Colorado River has been a valuable source of freshwater for much of the region.[2]

As with any resource, access to it is hotly contested. This note will explore a dispute playing out in California's Imperial Valley—one of the most productive farming areas in the United States—over who exactly owns the rights to water delivered to Imperial Valley farms from the Colorado River. As we will see, when a state irrigation district is charged with allocating water to landowners within the district, it has substantial discretion to fashion a distribution plan for the equal benefit of all landowners—an interest superior to any individual landowner. This position finds support in California and United States Supreme Court case law and is buttressed substantially by Idaho's approach to this issue.

II. BACKGROUND

Beginning in the early 1920s, population growth in the American Southwest caused states in the Colorado River Basin to fret about how to protect their access to the river's water.[3] In 1922 the Secretary of the Interior submitted the Fall-Davis Report to Congress, which recommended construction of two things: a dam on the Colorado River to create a large reservoir, and a canal connecting the reservoir to the Imperial Valley in California.[4] While this proposal was generally well-received by the states, those in the upper Colorado River Basin (Colorado, New Mexico, Utah, and Wyoming) feared that water created by these projects would be "gobbled up in perpetuity" by the lower basin states, particularly fast-growing California.[5] In response to this, Congress passed an act permitting all seven states in the Colorado River Basin to negotiate an agreement regarding the disposition and apportionment of the river's water.[6] In November of 1922, those seven states entered into an agreement called the Colorado River Compact (CRC) which apportioned a fixed amount of river water to which each basin state would be entitled by law.[7]

The CRC has a tangled history which is beyond the scope of this note. Instead, this note examines one of the underlying drivers of the CRC: fear among the upper basin states, as well as Arizona, that California would take advantage of

2. *Colorado River Timeline*, WATER EDUC. FOUND., https://perma.cc/68JP-V3S4 (archived June 23, 2019).

3. Joe Gelt, *Sharing Colorado River Water: History, Public Policy and the Colorado River Compact*, ARROYO, Aug. 1997, at 1, 2.

4. Arizona v. California, 373 U.S. 546, 555 (1963).

5. *Id.*

6. Act of Aug. 19, 1921, Ch. 72, 42 Stat. 171 (1921).

7. Arizona v. California, 373 U.S. at 556-57.

its growth by exploiting the law of prior appropriation, or "first in time, first in right."[8] Under this common law, which prevailed during the settlement of the Western United States, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time."[9] This right was given interstate effect in 1922 in *Wyoming v. Colorado*.[10] Because of this, the upper basin states feared that California, with its exploding population, would be the first to put this new water to beneficial use and thereby hold title to it in perpetuity to the detriment of the other basin states.[11]

This anxiety produced a litany of litigation including *Arizona v. California*, a set of cases decided by the United States Supreme Court, in which Arizona challenged California's water allocation under the CRC, among other things.[12] In response, Congress passed the Boulder Canyon Project Act in 1928, which, in addition to authorizing construction of the Hoover Dam,[13] established a statutory apportionment scheme closely mirroring the CRC.[14] The bottom line for our purposes is that California was ultimately given an annual allotment of 4.4 million acre-feet of Colorado River water.[15] Additionally, the Secretary of the Interior was given authority, in times of drought, to compel the basin states to accept proportional reductions in their water allotments.[16]

Fast forward to 2003. After several years of drought, California negotiated with the Department of the Interior and several California water districts to implement water conservation and transfer programs, known as the Quantitative Settlement Agreement (QSA).[17] The goal of the QSA was to stabilize the state's water supply and reduce its overdependence on the Colorado River, in an effort to live within its allotment of 4.4 million acre feet of river water.[18] One party to this agreement was the Imperial Irrigation District (IID).[19]

8. *Id.* at 555.
9. *Id.*
10. Wyoming v. Colorado, 259 U.S. 419, 471 (1922).
11. Arizona v. California, 373 U.S. at 555-56.
12. *Id.* at 550-51.
13. Boulder Canyon Project Act, Ch. 42, 45 Stat. 1057 (1928).
14. Arizona v. California, 373 U.S. at 560.
15. Dana Goodyear, *The Dying Sea*, NEW YORKER (Apr. 27, 2015), https://perma.cc/3E5S-SZVP.
16. Arizona v. California, 373 U.S. at 561-62.
17. SAN DIEGO CTY. WATER AUTH., QUANTIFICATION SETTLEMENT AGREEMENT 1 (2019), https://perma.cc/V757-DL3Z.
18. *Id.*
19. *Id.*

The IID is a public agency which supplies farmland in California's Imperial Valley with water from the Colorado River.[20] Of the 4.4 million acre-feet of water allotted to California, the IID manages 3.1 million, by far the lion's share.[21] In 2013, the IID formally adopted a policy called the Equitable Distribution Plan (EDP), which sought to enable the IID to meet its obligations under the QSA.[22]

In short, the EDP had one goal: to provide a framework for equitably distributing river water to Imperial Valley farms for irrigation purposes.[23] To calculate how much water a farmer would receive, the EDP employed a hybrid of two methods: historical-use and "straight-line."[24] A farmer's allotment is thus calculated by adding two figures: "50% of the average annual historical use calculated for the field from 2003 to 2012, excluding the highest and lowest years," and "[a] straight-line component of 2.94 acre-feet per acre."[25] Under the historical-use method, a farmer's allotment is based on his previous use, which inherently takes into account many factors including the type of crop grown, soil characteristics, and the farmer's own conservation efforts.[26] Straight-line, by contrast, simply assigns a fixed per-acre amount of water based on land area.[27] By utilizing both, the EDP's drafters hoped to accommodate as many factors as possible, and thus achieve the fairest possible distribution scheme.[28]

III. THE ISSUE AND THE PARTIES' POSITIONS

Mike Abatti is a prominent Imperial Valley landowner whose family has been farming in the area since it was settled over a century ago.[29] He and his family currently own and operate approximately 20,000 acres of farmland there.[30] In 2013, Abatti and several other landowners sued to force the IID to repeal the EDP, arguing the straight-line method of calculating water allocations to farmers was an unfair usurpation of the farmers' right to water under the doctrine of prior

20. *IID History*, IID, https://perma.cc/JPB8-JQMP (archived June 23, 2019).

21. Goodyear, *supra* note 15.

22. Betty Miller, *IID water lawsuit sets precedent for next generation*, DESERT REV. (May 14, 2018), https://perma.cc/5YUX-UMMJ.

23. *Id.*

24. *Id.*

25. *Equitable Distribution FAQs*, IID, https://perma.cc/EHL5-GYY3 (archived June 23, 2019).

26. Miller, *supra* note 22.

27. *Id.*

28. *Equitable Distribution FAQs*, *supra* note 25.

29. Sammy Roth, *In the California desert, a farm baron is building a water and energy empire*, DESERT SUN (Aug. 1, 2018), https://perma.cc/MUF4-UZZ7.

30. *Id.*

appropriation, which is discussed in Part IV.[31] The Imperial County Superior Court of California agreed, ruling in his favor.[32]

Abatti's primary complaint was the section of the EDP which contemplated how the IID would distribute water in the event that demand exceeded supply.[33] In the event of a shortage, the EDP required farmers to accept a reduction in their water allotment, but did not require industrial facilities to do the same.[34]

Abatti and his fellow plaintiffs made three arguments. First, they argued the IID was merely a trustee which managed the river water for the benefit of the farmers who, under the doctrine of prior appropriation, had a vested, beneficial interest in it, commensurate with the volume of water they historically used in a given time period.[35] Second, under California Water Code Section 106, irrigation has priority over every other water use except domestic purposes;[36] thus a policy which prioritizes industrial use over irrigation violates state law. Finally, Abatti argued that the straight-line method of apportionment promotes waste in violation of Article 10, Section. 2 of the California Constitution, which states that the right to water is "limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not . . . extend to the waste or unreasonable use or . . . unreasonable method of diversion of water."[37] In the plaintiffs' view, because straight-line apportionment does not take into account the particular crops grown or the characteristics of the soil, this apportionment method will not only underserve some farmers, but will overserve others, thereby promoting waste in violation of California's Constitution.[38]

The IID made three counter-arguments. First, irrigation districts have statutory authority under the California Water Code to exercise discretion in managing their water supplies and are not bound by any one method of calculating users' allotments.[39] Second, the underlying rationale of that statutory authority is

31. *See* Miller, *supra* note 22; *see also infra* Part III (describing prior appropriation).

32. Abatti v. Imperial Irrigation Dist., No. ECU07980, *7 (Cal. Super. Ct. Aug. 15, 2017).

33. Roth, *supra* note 29.

34. *Id.*

35. Combined Respondents' Brief & Cross-Appellants' Brief at *18, Abatti v. Imperial Irrigation Dist., No. D072850 (Cal. Ct. App. filed Oct. 3, 2017), 2018 WL 4827900.

36. *Id.* at *72; *see* CAL. WATER CODE § 106 (West 2019).

37. CAL. CONST. art. X, § 2; Combined Respondents' Brief & Cross-Appellant's Brief, *supra* note 35, at *80.

38. *See* CAL. CONST. art. X, § 2; Combined Respondents' Brief & Cross-Appellant's Brief, *supra* note 35, at *80.

39. CAL. WATER CODE § 22252 (West 2019); Appellant's Opening Brief at *7, Abatti v. Imperial Irrigation Dist., No. D072850 (Cal. Ct. App. filed Oct. 3, 2017), 2018 WL 2305598.

to enable California to meet its obligations under the QSA, which was enacted specifically to ensure compliance with the CRC for the public's benefit. Therefore, these interests should prevail over the comparatively smaller interests of individual landowners.[40] Third, from a public policy standpoint, depriving irrigation districts of the ability to use discretion in managing their water will undermine efforts to conserve water and, ironically, result in more waste in violation of Article X, Section 2 of the California Constitution.[41]

IV. THE RULES

There are many conflicting rules governing this dispute. In the interest of clarity, Part IV will set forth relevant black letter law as it relates to various facets of the discussion.

A. Water as a Property Interest

"The right to take water in its natural state, whether on or below the surface, is considered an interest in real property, and is either part of, or appurtenant to, the land."[42] Superior Court Judge Brooks Anderholt, in holding for Abatti in the above-referenced case, relied on this to conclude that IID abused its discretion by implementing the EDP, thereby unlawfully usurping the landowner's interest in the water.[43]

B. Bryant v. Yellen

In *Bryant v. Yellen*, the United States Supreme Court examined water rights in the context of the Boulder Canyon Project Act, enacted by Congress in 1928.[44] Unlike the matter before us in which the tension is between a state irrigation district and individual landowners, *Bryant v. Yellen* involved tension between the Boulder Canyon Project Act (federal law) and state law as applied by a water irrigation district.[45]

Bryant overturned a decision by the Ninth Circuit in *United States v. Imperial Irrigation District*, which held, *inter alia*, that individual farmers did not

40. WATER § 22252; Appellant's Opening Brief, *supra* note 39, at *7, *9.

41. *See* WATER § 22252; Appellant's Opening Brief, *supra* note 39, at *9.

42. 3 FIRM OF MILLER STARR REGALIA, MILLER AND STARR CALIFORNIA REAL ESTATE § 9:29 (4th ed. Supp. Sept. 2019).

43. Abatti v. Imperial Irrigation Dist., No. ECU07980, *3 (Cal. Super. Ct. Aug. 15, 2017).

44. *See* Boulder Canyon Project Act, Ch. 42, 45 Stat. 1057 (1928).

45. Bryant v. Yellen, 447 U.S. 352, 355 (1980).

have a right to a *specific proportion* of water managed by the irrigation district.[46] The Court did not address that point head on, but instead referred obliquely to it, noting that while it may be true "that no individual farm in the District has a permanent right to any specific proportion of the water held in trust by the District[,]" it was also true that "the District, in exercising its rights as *trustee*, delivered water to individual farmer *beneficiaries* without regard to the amount of land under single ownership" and has done so ever since.[47] In other words, while historical use by an individual landowner may not be the proper metric by which to measure his future allocation, neither is the size of his land—which begs the question, what is the proper metric?

The Court also noted the presence of perfected water rights acquired under state law were "an unavoidable limitation" on the Secretary of the Interior's power to administer the Act.[48] Thus, an owner of a water right acquired under the law of prior appropriation can function as a bulwark against federal regulation. The Court further recalled that in *Arizona v. California*, "we defined a present perfected [water] right as one that had not only been acquired pursuant to state law but as one that had also been exercised by the diversion of water and its actual application to a specific area of land."[49] In other words, a water right acquired via prior appropriation is considered "perfected" when it has been exercised in a beneficial manner, as is the case with Abatti and other farmers who have put the water to use for irrigation.

C. The "No-injury" Rule

There exists a common law rule in California (now codified) called the "no-injury rule," which states "the owner of a common law right to appropriate water from a natural watercourse . . . has the right to change the purpose and place of use of the water, so long as any change does not injure others with rights in the watercourse."[50] This right is freely transferable, but is subject both to the no-injury rule and to the waste restriction in Article 10, Section 2 of the California Constitution.[51]

46. *Id.* at 369.

47. *Id.* at 371 (emphasis added).

48. *Id.* at 370-71.

49. *Id.* at 373.

50. N. Kern Water Storage Dist. v. Kern Delta Water Dist., 54 Cal. Rptr. 3d 578, 581 (Cal. Ct. App. 2007) (footnote omitted).

51. *Id.*; *see* CAL. CONST. art. X, § 2.

D. Statutes

Irrigation districts are authorized under Division 11 of the California Water Code.[52] One purpose of irrigation districts is to furnish sufficient water for any beneficial use (e.g., irrigation).[53]

Among the powers granted to an irrigation district is the apportionment of water to landowners within the district.[54] A district is authorized by statute to apportion irrigation water "ratably" to each landowner.[55] *Black's Law Dictionary* defines ratable as "[p]roportionate."[56] Accordingly, water districts in California appear to have statutory authority to use some level of discretion in adopting an apportionment scheme.

E. Trust Theory

California law provides that, with respect to irrigation districts, water rights are held in trust by the district for the benefit of the landowners within the district.[57] In a trust, of course, a trustee administers property for the benefit of beneficiaries in accordance with a specified purpose. The trustee owes fiduciary duties to the beneficiaries. However under California's public use doctrine, the water rights are not held in trust for any particular landowner, but rather are held in common by all landowners in the district.[58] Thus, according to the Ninth Circuit, "[t]he right of any individual landowner to the use of water . . . comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated."[59] The effect of this rule is that no individual landowner or piece of land is entitled to any specific proportion of water whose rights are held by the district.[60] The court reasoned that as new landowners come into the district, the water would have to be re-apportioned to accommodate them, necessarily altering all other landowners' proportional shares.[61]

52. CAL. WATER CODE § 20500 et seq. (West 2019).
53. CAL. WATER CODE § 22075 (West 2019).
54. CAL. WATER CODE § 22078 (West 2019).
55. CAL. WATER CODE § 22250 (West 2019).
56. *Ratable*, BLACK'S LAW DICTIONARY (11th ed. 2019).
57. United States v. Imperial Irrigation Dist., 559 F.2d 509, 529 (9th Cir. 1977).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

This system is not unique to California; Idaho, Colorado, and Nebraska employ a similar bifurcation of water rights.[62] Idaho has actually codified this ownership scheme, although it does not explicitly make the distinction between "legal" and "equitable" ownership.[63]

F. The Conflict

We have, thus, a conflict between five competing rules. First, under *Bryant v. Yellen*, we have no clear metric as to how to apportion water to landowners in an irrigation district.[64] Second, we have a well-established system of bifurcated ownership of water rights, in that irrigation districts hold water in trust for the benefit of landowners in the district.[65] Third, the no-injury rule prevents the owner of a common law right to water from altering the purpose and use of the water in any way which injures others' rights to that water.[66] Fourth, the California Constitution prohibits unreasonable or wasteful use of water, a policy reflected in Water Code Section 22075, which gives irrigation districts the authority to direct water for beneficial use.[67] Finally, Water Code Section 22250 directs irrigation districts to proportionately determine individual landowners' apportionment of the water within the district.[68]

An additional matter to consider in evaluating the relative priority of these rules is the California doctrine of public use, which provides that an irrigation district holds the water rights in trust for the common benefit.[69] This can be applied to the present matter such that "[t]he right of any individual landowner to the use of the water . . . comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated."[70] As such, the district must be endowed with some level of discretion to equitably apportion this common benefit, such as providing water service to new lands or landowners who "come

62. Anderson v. Grand Valley Irrigation Dist., 85 P. 313, 316 (Colo. 1906) (holding that "all the property acquired by the districts, including the water rights, in equity belongs to [the landowners]"); Jensen v. Boise-Kuna Irrigation Dist., 269 P.2d 755, 760 (Idaho 1954); Birdwood Irrigation Dist., Water Div. No. 1-A v. Birdwood Irrigation Dist., 46 N.W.2d 884, 891 (Neb. 1951).

63. IDAHO CODE § 43-316 (2018).

64. *See generally* Bryant v. Yellen, 447 U.S. 352 (1980).

65. *See generally* Imperial Irrigation Dist., 559 F.2d 509.

66. N. Kern Water Storage Dist. v. Kern Delta Water Dist., 54 Cal. Rptr. 3d 578, 581 (Cal. Ct. App. 2007).

67. CAL. CONST. art. X, § 2; WATER § 22250.

68. *See* WATER § 22250.

69. Imperial Irrigation Dist., 559 F.2d at 529.

70. *Id.*

within the jurisdiction of the irrigation district," which would necessarily alter the existing landowners' proportionate shares.[71]

The tangle in which our characters find themselves is this: the California Supreme Court in *United States v. Imperial Irrigation District* explicitly stated that individual farmers are *not* entitled to a specific proportionate share of water provided by an irrigation district because the water is held in trust for the "common benefit of landowners within the district."[72] The United States Supreme Court in *Bryant v. Yellen*, however, stated that even if "it may be true" individual farms are not entitled to a particular proportionate share of the district's water, they are entitled to *some* share, and the right held in equity by the farmers is historically not tied to the *size* of the farm.[73] Thus, Abatti argues if the equitable title is not tied to the size of the farm, it has to be tied to something; thus, the only other ascertainable metric has to be historical-use. In *Abatti v. Imperial Irrigation District*, Superior Court Judge Brooks Anderholt agreed.[74]

V. THE SUPERIOR COURT DECISION AND RATIONALE

We have thus arrived at the central issue in Abatti's lawsuit against the IID: How do you calculate the scope of an individual landowner's right to receive water from a state irrigation district? Is it derived strictly from land area? Or is it commensurate with the volume of water historically needed to irrigate that land area? Abatti and other landowners contend this right should be measured by the latter; they argue historical-use maximizes fairness on a broad scale, in that it takes into account land area, soil type, soil conditions, and the water requirement of certain crops.[75] The IID agrees in part, but insists that a component of straight-line apportionment must exist in order to avoid being hamstrung in the event new landowners or land comes into the district.[76]

In the Superior Court decision, the fighting issue was the fairness of the EDP's calculation method. The court noted that the Plan "prioritizes other water users over agricultural water users," "[f]ails to apportion water based [solely] upon historical water usage," fails to consider soil types and crop varieties grown on a

71. *See id.*

72. *Id.*

73. Bryant v. Yellen, 447 U.S. 352, 371 (1980) (emphasis added).

74. Abatti v. Imperial Irrigation Dist., No. ECU07980, *3 (Cal. Super. Ct. Aug. 15, 2017).

75. *Id.* at *6.

76. *Id.* at *7.

given plot, and "uses a straight line basis as the default method of apportioning water among farmers."[77]

The court first observes that IID's right to distribute water from the Colorado River is subject to an annual cap of 3.1 million acre-feet under the QSA, based, notably, on the district's historical-use.[78] The court also invokes trust theory, relying on *Bryant v. Yellen* for the assertion that "[t]he farmers' equitable and beneficial interest in the water rights is appurtenant to their lands and is a constitutionally protected property right."[79]

The court further examines California Water Code Section 22252, which requires that "water . . . shall be distributed equitably as determined by the board."[80] While this seems to give discretion to the IID Board, the court cites a pair of California Appeals Court cases that hold certain factors *must* be considered in determining whether an apportionment scheme is "equitable."[81] Such factors include land area, soil characteristics, difficulty or expense of irrigation, and "the comparative profit of the different crops which could be made of the water on the land."[82] Further, the California Court of Appeals has explicitly stated that in the absence of such an evaluation, "the apportionment may not be deemed to be equitable."[83] Taken together, Abatti's push for historical-use calculation has some precedential support in California.

VI. OTHER JURISDICTIONS

Several states employ the same trust-model bifurcation of water rights as California. This is, however, not the end of the inquiry; even with a bifurcation of ownership rights, there remains the question of *how the equitable owners' share of the benefit is derived*, which is the central issue. For the sake of context, an examination of how other states handle this issue is instructive.

77. *Id.* at *2.

78. *Id.* at *3; *see* Quantification Settlement Agreement Cases, 134 Cal. Rptr. 3d 274, 296 (Cal. Ct. App. 2011).

79. Abatti, No. ECU07980 at *3; *see also* Bryant v. Yellen, 447 U.S. 352, 371 n.23 (1980).

80. WATER § 22252; Abatti, No. ECU07980 at *3.

81. Tehachapi-Cummings Cty. Water Dist. v. Armstrong, 122 Cal. Rptr. 918, 925 (Cal. Ct. App. 1975); Simon Newman Co. v. Sanches, 159 P.2d 81, 84 (Cal. Ct. App. 1945) (emphasis added) (outlining factors required for an apportionment to be deemed equitable).

82. Armstrong, 122 Cal. Rptr. at 925.

83. Sanches, 159 P.2d at 84.

A. Colorado

Colorado's water law, like California, is based on the doctrine of prior appropriation,[84] but it is a bit less forgiving. For example, Colorado allocates water based exclusively on priority dates; during shortages, there is no equitable sharing.[85] Additionally, unlike California, Colorado is a "pure" prior appropriation jurisdiction, which means "there is no preference for particular water uses over other uses."[86] As discussed in Part III, California Water Code Section 106 provides that water used for irrigation of farmland holds priority over every other water use except for domestic purposes.[87] Thus, in a water shortage in California, industrial water use will receive a reduction in water service before agricultural irrigation or domestic use.[88] In Colorado, by contrast, there is no such hierarchy; in a shortage, those with earlier priority dates (first in time) are entitled to their full appropriation (first in right) before those with later priority dates receive any water—regardless of how those with junior rights use the water.[89]

B. Idaho

Idaho also employs a similar bifurcation of water rights.[90] Unlike California, however, Idaho has actually codified this ownership scheme, providing that legal title of the water in an irrigation district "shall be held by such district *in trust for,* and is hereby dedicated [to] and set apart" for the recipient landowners.[91] The Idaho Supreme Court, notably, does not explicitly differentiate between legal and equitable ownership.[92]

An instructive case is *Nelson v. Big Lost River Irrigation District*, a 2009 decision by the Idaho Supreme Court, which evaluated competing methods of allocating water to landowners which is held in trust by an irrigation district.[93] The case involved a group of plaintiffs who owned tracts of land near the Big Lost

84. Paul Noto, *Water Law Basics for Real Estate Practitioners*, COLO. LAW., Nov. 2015, at 63, 63.

85. *Id.*

86. *Id.*

87. WATER § 106.

88. *See id.*

89. Noto, *supra* note 84.

90. *See* IDAHO CODE § 43-316 (2018).

91. *Id.* (emphasis added).

92. *Id.*; JEFFREY C. FEREDAY, OWNERSHIP OF WATER RIGHTS IN IRRIGATION WATER DELIVERY ORGANIZATIONS 21 (1993), https://perma.cc/ELL3-H3NG.

93. Nelson v. Big Lost River Irrigation Dist., 219 P.3d 804, 805 (Idaho 2009).

River in Idaho, downstream from a dam and reservoir.[94] The terrain downstream from the dam consists of gravel deposits and porous soil, and when the river flows over these areas, certain quantities of water are lost through seepage.[95] The effect is that landowners downstream receive a significantly smaller volume of water than do those further upstream.[96] The irrigation district, however, owns the water "in trust" for *all* landowners (the beneficiaries), and, as trustee, must take steps to ensure that the beneficiaries receive a volume of water commensurate with the scope of each of their respective rights.[97]

To address the seepage problem, the Big Lost River Irrigation District employed a "universal shrink" method, whereby the seepage loss over the pertinent distance "was allocated on a pro rata basis to all landowners in the district, regardless of the locations of their respective points of diversion from the river."[98] The district used this method from approximately 1936 when it purchased the water rights, until 1994.[99] Beginning in 1994, however, the district employed a different method, the "river reach" method,[100] which divided the river into discrete stretches, and apportioned the seepage loss based on the land's location in one of these stretches.[101] The effect was that landowners in the upper reaches (closer to the reservoir), experienced much less "shrink" to their allocations than those further downstream.[102] This policy existed for over a decade until the district resumed the universal shrink method in 2005.[103] The resumption of the universal shrink method resulted in *Nelson*, which arose when landowners from the upper reaches of the river banded together to file suit against the District, seeking to return to the pre-2005 "river reach" method, which afforded them less of a water-volume loss than the older universal shrink method.[104]

The pertinent issue on appeal was whether the universal shrink method of apportioning losses among landowners in an irrigation district is lawful under the relevant state regulation, referred to as Rule 40.03.b.[105] The rule provides in

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 810 (emphasis added); *see also* Bradshaw v. Milner Low Lift Irrigation Dist., 381 P.2d 440, 449 (Idaho 1963).
98. Nelson, 219 P.3d at 805.
99. *Id.*
100. *Id.* at 810.
101. *Id.* at 805.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 806.

pertinent part: "The proportioning shall be done on a river reach basis. Impounded water flowing through a river reach that does not have a conveyance loss will not be assessed a loss for that reach."[106] Under this method of apportionment the landowners in the upper reaches of the river would not see a meaningful reduction in their share, as their "reach" of river is not as susceptible to seepage as those further downstream.[107]

In its analysis, the Idaho Supreme Court examined a series of cases which were concerned with whether an irrigation district could charge landowners more or less for water service based on how expensive it was to deliver it to them.[108] The court held that "an irrigation district cannot vary the assessments to the landowners within the district based upon the cost of delivering them water."[109] It reasoned that lands served by an irrigation district benefit equally from the district's services, and that "the actual expenses of carriage and delivery to each individual consumer" should not be the basis for apportioning charges.[110] The court noted that if it were, landowners who had the good fortune of being located close to the water source would be charged comparatively little, while those at the far end of the system would be charged such an exorbitant sum "as to prohibit [the water's] use and make agricultural pursuits an impossibility with him."[111]

The main takeaway from the Idaho Supreme Court's interpretation is that the benefit conferred from the water should inform the cost paid for receiving it.[112] When interpreting the scope of a landowner's right to water delivered by an irrigation district, Idaho looks at the cost of delivering water versus the benefit to the landowners; where the benefit received is the same, so should be the cost paid for it.[113] To uncouple these factors would be to treat similarly situated landowners dissimilarly, in contravention of the Idaho Legislature's intention that the lands in an irrigation district "must be considered as a whole," with the costs of supplying water to the district spread among its beneficiaries.[114]

106. *Id.* (citing IDAHO ADMIN. CODE r. 37.03.12.040(03)(b) (2019)).

107. *See id.* at 805.

108. *Id.* at 810-12 (citing Gedney v. Snake River Irrigation Dist., 104 P.2d 909, 911 (Idaho 1940); Colburn v. Wilson, 132 P. 579, 581-82 (Idaho 1913); and Niday v. Barker, 101 P. 254, 256 (Idaho 1909)).

109. *Id.* at 812.

110. *See id.* (quoting Gedney, 104 P.2d at 911).

111. *Id.* (quoting Niday, 101 P. at 256).

112. *See id.* at 810-12.

113. *See id.*

114. *See id.* at 811 (quoting Colburn v. Wilson, 132 P. 579, 581-82 (Idaho 1913)) (emphasis omitted).

The pertinent Idaho state statute grants irrigation districts the power "to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same."[115] The court in *Nelson* ultimately concluded that because all landowners in the district received an equal benefit from the water, they should all pay an equal price for it—regardless of how expensive it is to get the water to them.[116] The district therefore acted within its authority to apportion water among landowners "under the universal shrink method so that all water users receiving the . . . water bear their proportionate share of the conveyance loss."[117]

In Idaho, we see, any losses incurred by an irrigation district are shouldered by all recipients in proportion to the benefit they receive, and an irrigation district has discretion to allocate water such that it provides a "just and proper distribution" to all landowners within it.[118]

VII. ARGUMENT

For the reasons outlined in this section, the IID should prevail in its dispute with Abatti, and should invoke Idaho's framework to do it. IID can probably even sidestep the dispute about whether a landowner's right is calculated by historical-use or straight-line and argue the outcome of this question is not actually determinative; the real issue is whether a district may use discretion to allocate water for the benefit of the district as a whole. As a state irrigation district, IID has statutory authority to use discretion. On top of that, IID has strong persuasive authority in Idaho's approach, which gives irrigation districts robust authority to allocate water in whatever reasonable manner accomplishes equal benefits for all landowners in the district.

Outlined in Part III, Abatti's primary argument is that IID's Equitable Distribution Plan is unlawful because its method of allocating water in times of shortage include a straight-line component based on land area.[119] In Abatti's view, the IID is merely a trustee, which manages the water for the benefit of the landowners who—under the prior appropriation doctrine—have a vested, beneficial interest in it commensurate with their historical use. Abatti also argues the straight-line method promotes waste by not taking into account the crops grown

115. IDAHO CODE § 43-304 (2018).
116. Nelson, 219 P.3d at 812.
117. *Id.*
118. *Id.*
119. *See* Miller, *supra* note 22.

on a plot of land, or the soil characteristics.[120] The IID argues, by contrast, it has statutory authority to exercise discretion in allocating the water in its charge for the benefit of all landowners in the district, which includes selecting a method of apportionment.[121]

In arguing against the straight-line method of apportionment, Abatti cites a pair of California Appeals Court cases. The first, *Tehachapi-Cummings County Water District v. Armstrong*, concerns a dispute over landowners' overlying water right, which is "the right to take water from the ground underneath the land for use on the land."[122] The court notes in the event of a shortage, each landowner "is limited to his proportionate fair share of the total amount available based upon *his reasonable need*."[123] The second case, *Simon Newman Co. v. Sanches*, concerns a dispute over whether a deed properly conveyed rights to irrigation ditches when adjacent land was sold.[124] The court in *Sanches* notes an apportionment of water which takes only land area into account may be proper if it is shown the land in question "is susceptible of producing the same variety of crops, or that it may reasonably be used for similar purposes. Otherwise, the apportionment may not be deemed to be equitable."[125]

Abatti contends that the language in these cases supports his position that historical-use is the only proper metric, as historical-use inherently takes into account the characteristics of the land and what sorts of crops have been traditionally grown on it. However, his reliance on these cases is misplaced.

First, *Tehachapi* concerns overlying rights. An overlying groundwater right is one which allows a landowner to use groundwater *under his land*, for use *on that land*.[126] Abatti's case concerns rights to water delivered from afar by an irrigation district, which pumps the water to his land from the Colorado River.[127] Because the water delivered by IID originates somewhere other than Abatti's land, Abatti has no overlying right to it. To this extent, *Tehachapi* is inapplicable to Abatti's position.

120. *See* Combined Respondents' Brief & Cross-Appellant's Brief, *supra* note 35, at *86-87.

121. Appellant's Opening Brief, *supra* note 39, at *7.

122. Tehachapi-Cummings Cty. Water Dist. v. Armstrong, 122 Cal. Rptr. 918, 1000 (Cal. Ct. App. 1975).

123. *Id.* (emphasis added).

124. Simon Newman Co. v. Sanches, 159 P.2d 81, 82 (Cal. Ct. App. 1945).

125. *Id.* at 84.

126. *Water Rights: Frequently Asked Questions*, CAL. WATER BOARDS, https://perma.cc/7VHB-S3FJ (archived June 23, 2019).

127. *See* Appellant's Opening Brief, *supra* note 39, at *8.

Second, *Sanches* does not suggest that land area cannot be taken into account when apportioning water via irrigation ditches. It merely states the land's characteristics and the crops historically grown on it should be taken into account only when then the apportionment is based s*olely* on land area.[128] As discussed in Part I, the EDP employed a two-factor method of calculating a landowner's apportionment; 50% of his or her apportionment consisted of the landowner's historical-use, and the other 50% consisted of a straight-line 2.94 acre-feet per acre.[129] Not only does the *Sanches* court imply the land's characteristics merely should be taken into account (as opposed to *must*), it states they should be taken into account only when the apportionment scheme is based solely on land area.[130] The EDP, with its hybrid approach, is not based solely on land area. Like *Tehachapi*, *Sanches* is thus inapplicable and fails to support Abatti's argument that the IID has abused its discretion in adopting the EDP to calculate apportionments to landowners in the district.[131] Without this precedential support, Abatti must rely nearly exclusively on his argument that the IID board does not have sufficient discretion to apportion water in the manner specified under the EDP.

Since IID does, in fact, have statutory discretion to apportion the water under its purview, Abatti's only remaining hope is to establish that the scope of this discretion is so narrow that it cannot be wielded against existing landowners with a sufficient record of historical use. With a conspicuous dearth of California case law on point in this area, a reasonable inference might be made that the language in California Water Code Section 22252, which provides that any charges fixed by a water district "shall be distributed equitably as determined by the board,"[132] and California Water Code Section 22250, which provides that water shall be apportioned "ratably to each landowner," is not particularly ambiguous or contentious.[133] To the extent it is ambiguous, two considerations are relevant: How these sections have been interpreted by the few decisions they have appeared in, and how these interpretations compare to other jurisdictions which employ similar frameworks for distributing water for irrigation—particularly Idaho.

An examination of both considerations reveals a compelling case for affording IID broad discretion to manage its water for the benefit of all landowners in the district, irrespective of any individual landowner's interests. First, the California Supreme Court in *Ivanhoe Irrigation District v. All Parties & Persons*

128. Sanches, 159 P.2d at 84 (emphasis added).
129. *Equitable Distribution FAQs*, *supra* note 25.
130. Sanches, 159 P.2d at 84 (emphasis added).
131. *See id.*
132. WATER § 22252.
133. WATER § 22250.

noted that, with respect to Section 22250, "No pertinent exceptions appear" to the rule that irrigation districts *must* apportion water proportionately on the basis of how the landowner's last assessment compared to the district's overall distribution.[134] In other words, Abatti is correct in the sense that IID lacks complete discretion. He is incorrect, however, to characterize this lack of discretion as a prohibition on adjusting landowners' apportionments partly on the basis of land area. Rather, the district is barred from implementing an apportionment scheme that in any way is *not* proportional. The California Supreme Court echoes this sentiment in *Ivanhoe*, when it noted "[d]iscrimination among water users in an irrigation district is *expressly contrary to state law* as expressed in . . . section 22250 of the Water Code."[135] In other words, all landowners must receive an equal benefit from the district. Allocating water exclusively on the basis of historical-use would inevitably result in discrimination against those landowners who have used less water in the past due to crop varieties or conservation efforts. Thus, it seems clear from California-specific sources that Abatti's position that the IID lacks the authority to implement its EDP hybrid apportionment scheme holds little water.

Second, to the extent that few cases clearly define the scope of a California irrigation district's authority to devise its own apportionment scheme, IID can find considerable support for the position that its authority likely mirrors that of Idaho irrigation districts. Discussed in Part VI Section B, both Idaho and California employ a bifurcation system of water rights—whereby irrigation districts created by state statute hold water in trust for the benefit of the landowners it serves.[136] In analyzing whether the Big Lost River Irrigation District could implement an apportionment scheme which spread water losses equally to every landowner in the district, regardless of the cost of providing such service to each landowner, the court focused on the benefit each landowner received from the district's delivery services.[137] Landowners close to the Big Lost River argued that because the cost of delivering water to them was lower than, say, the cost to deliver it to the landowner twenty miles away, they shouldn't have to share responsibility for the loss incurred through seepage along that twenty mile journey.[138] The court reasoned, however, that because all landowners benefited equally, each should

134. Ivanhoe Irrigation Dist. v. All Parties & Pers., 350 P.2d 69, 79 (Cal. 1960) (emphasis added).

135. *Id.*

136. IDAHO CODE § 43-316 (2018); United States v. Imperial Irrigation Dist., 559 F.2d 509, 529 (9th Cir. 1977).

137. Nelson v. Big Lost River Irrigation Dist., 219 P.3d 804, 811 (Idaho 2009) (emphasis added) (quoting Gedney v. Snake River Irrigation Dist., 104 P.2d 909, 911 (Idaho 1940)).

138. *Id.* at 805.

share equally (or proportionately) in any losses.[139] The statutory language, therefore, reflects the legislative intent that the landowners in the district will swim or sink together.[140]

This framework provides strong support for IID's position that it has authority to implement the EDP over Abatti's and other landowners' objections. Like the Big Lost River Irrigation District, the IID has statutory authority to fashion an apportionment scheme which, in its discretion, best accomplishes its statutory purpose of administering its 3.1 million acre-feet of water in trust for the benefit of all landowners in the Imperial Valley district.[141] Additionally, like the landowners in Idaho's Big Lost River District, all landowners in the IID likely benefit equally from IID's water service. Equity suggests in the event of a shortage, each landowner should collectively share the loss in proportion to his or her benefit.

Abatti will argue, correctly, Idaho's statutes were construed this way by the court because it is consistent with the Idaho Legislature's intent.[142] Scant evidence exists as to the intent underlying California's statutes, as they were passed in their original form in 1897.[143] However, a California Supreme Court case from 1906, *Jenison v. Redfield*, discusses these recently passed laws, and is instructive in evaluating their legislative intent.[144]

In *Jenison*, the plaintiff was the owner of farmland located within the Walnut Irrigation District, and was entitled to a proportionate share of water based on the value of his land.[145] The plaintiff also owned land outside the district, which he used for farming.[146] The question presented was whether the plaintiff was entitled to receive any portion of his share for use outside the district.[147] In dismissing the plaintiff's claims, the Court held that "to sustain the claim of plaintiff, it must be held that the effect of our statutes . . . is to make each owner of land within a district the absolute owner of the proportionate share of the water . . . to do with as he sees fit."[148] This, the court concluded, would controvert the Legislature's intent, which was to organize a district that would acquire and hold water "solely for a certain

139. *See id.* at 810-12.
140. *See id.* at 811 (quoting Colburn v. Wilson, 132 P. 579, 581-82 (Idaho 1913)).
141. IDAHO CODE § 43-316 (2018); Imperial Irrigation Dist., 559 F.2d at 529.
142. *See* Nelson, 219 P.3d at 811 (quoting Colburn, 132 P. at 581-82).
143. *See* 1897 Cal. Stat. 259.
144. *See generally* Jenison v. Redfield, 87 P. 62 (Cal. 1906).
145. *Id.* at 63.
146. *Id.*
147. *Id.*
148. *Id.*

specified purpose, viz., the procuring and furnishing of water for the improvement by irrigation of the lands included therein."[149] The court reasoned that holding for the plaintiff would transform the district "into a mere agency for the distribution of its water to individuals for use by them outside the district for any purpose whatever;" thus ignoring the purpose of forming an irrigation district, which is to hold water in trust for a specific purpose—namely, irrigation within the district.[150] Finally, the court minced no words when it concluded the plaintiff's right to use water supplied by the district is "always in subordination to the ultimate purpose of the trust."[151]

In sum, then, the California Supreme Court interpreted the Legislative intent of the pertinent Water Code statutes to be that irrigation districts were meant to hold water in trust for the carrying out of the specific purpose of the trust, which is the irrigation of lands within the district. Any interests of individual landowners are secondary to the district in carrying out the purpose of the trust for the benefit of all beneficiaries.

VIII. CONCLUSION

Based on the foregoing, on appeal Abatti may not have a leg to stand on in his dispute with the IID over the apportionment scheme set out in the EDP. First, under the California Water Code, the IID is charged with acting as trustee to manage Colorado River Water for the benefit of all landowners in the Imperial Valley.[152] Trust law is premised on the idea that a trustee must administer the trust's principal in accordance with the trust's specific purposes and owes fiduciary duties to the beneficiaries to do so. Under *Jenison*, no beneficiary's interest is superior to the trustee's interest in ensuring the trust is administered according to its purpose, and the legislative intent of creating irrigation districts is to ensure the benefit of irrigation inures to all landowners in a district.[153]

Second, the two California Appeals Court cases Abatti cites in support of his contention that historical-use is the only acceptable metric for determining the scope of a landowner's rights to district-supplied water are inapplicable to his situation and thus irrelevant. The first, *Tehachapi*, deals only with overlying rights to groundwater, as opposed to rights to water supplied by an irrigation district.[154]

149. *Id.*

150. *Id.*

151. *Id.* at 64.

152. *See* Imperial Irrigation Dist., 559 F.2d at 529.

153. Jenison, 87 P. at 64.

154. Tehachapi-Cummings Cty. Water Dist. v. Armstrong, 122 Cal. Rptr. 918, 924 (Cal. Ct. App. 1975).

The second, *Sanches*, does not support Abatti's contention that the land's characteristics and crops grown *must* be taken into account when determining the land's apportionment.[155] Rather, *Sanches* only stands for the proposition land characteristics and crops should be taken into account only where the apportionment scheme is based solely on land area.[156] The EDP utilized a hybrid approach, only 50% of which was comprised of a land-area metric.[157] Thus, the effect is that Abatti has no basis for arguing the IID lacks authority to implement the EDP.

Finally, to the extent any ambiguity exists in California with respect to the scope of an individual landowner's rights to water in the context of an irrigation district, Idaho's well-settled system provides a workable framework for resolving it. As a Western state, Idaho's water system is similar to California's, it is largely codified, and a line of Idaho Supreme Court cases provides clear contours of the scope of these rights.[158]

IX. FUTURE IMPLICATIONS OF THE SCOPE OF WATER RIGHTS

The scope of ownership of water rights is likely to stay relevant for some time to come. Harvard University, for example, in 2012 began quietly using its $39 billion endowment fund to purchase thousands of acres of vineyards in California's Central Valley for just over $100 million.[159] The goal was not merely to produce grapes but to acquire access to vast water sources in the heart of California.[160] These vineyards have subsequently nearly tripled in value.[161]

Michael Burry (Burry) was one of a handful of investors who foresaw the implosion of the bond market in 2008.[162] By betting on the collapse of subprime mortgage bonds, Burry earned his hedge fund a return of nearly 500% while the rest of the country entered a financial recession.[163] In the aftermath of the crisis,

155. *See* Simon Newman Co. v. Sanches, 159 P.2d 81, 84 (Cal. Ct. App. 1945).

156. *Id.*

157. *Equitable Distribution FAQs*, *supra* note 25.

158. IDAHO CODE § 43-316 (2018); *see* Nelson v. Big Lost River Irrigation Dist., 219 P.3d 804 (Idaho 2009).

159. Russell Gold, *Harvard Quietly Amasses California Vineyards—and the Water Underneath*, WALL STREET J. (Dec. 10, 2018), https://perma.cc/A5EM-4H9L.

160. *Id.*

161. *Id.*

162. Michael Lewis, *Betting on the Blind Side*, VANITY FAIR: HIVE (Apr. 2010), https://perma.cc/LJ4Q-S7PH.

163. *Id.*

Burry decided to close his fund and "[t]he small investing he still does is all focused on one commodity: water."[164]

In evaluating Abatti's case, as well as the inevitable future cases involving disputes between irrigation districts and their customers, irrigation districts in California should adopt the approach herein as a sensible solution to water ownership disputes.

164. THE BIG SHORT (Paramount Pictures 2015).