IMPERIAL IRRIGATION DISTRICT

OPERATING HEADQUARTERS • P. O. BOX 937 • IMPERIAL, CALIFORNIA 92251

Many questions have been raised about certain legal issues related to living under a limited supply of water or cap and about producing conserved water for transfer. Many have also asked about certain assertions made by the Imperial Group which are less than concise or clear as to their meaning. This memorandum is intended to help clarify IID's position and the legal authority for such position.

1. **Do landowners hold water rights to the Colorado River?**

IID Position

No. All water rights are held in trust by the IID and only by the IID. Water Code §§ 20529 and 22437. IID is the party to the Section 5 contract with the Secretary and the permittee under the California appropriative rights. The landowners are beneficiaries of the trust for purposes of water use within the District, but they hold no water rights. The Irrigation District Act provides no mechanism for a landowner to revoke this trust for his land. IID knows of no legal or factual grounds for the Imperial Group to misdescribe IID's Section 5 contract (singular) as the landowner's Section 5 contracts (plural). See quotes below. IID is not just a "middleman," as misdescribed by The Imperial Group. IID is the trustee who is a state agency formed and existing for governmental purposes. Water Code § 20500. The District may do any act necessary to furnish sufficient water in the district for beneficial use. Water Code § 22075. In fulfilling this principal purpose, districts are "created to contract for water acquisitions and delivery, to construct canal improvements, to assess water users and to regulate water use within the district." Imperial Irrigation District v. State Water Resources Control Board (1990) 225 C.A.3d 548, 567. The farmers have acquired no water right by putting the water to use in the district. "No right in any water or water right owned by the district shall be acquired by use permitted under this article." Water Code § 22262.

Imperial Group Assertions

Inconsistent. The Imperial Group states: "Under well-established California law, an irrigation district holds the water rights in trust for the benefit of the lands." 3/27/03 Maloney Memorandum, p.1. Similarly, the moving papers to intervene in the IID v. USA litigation filed by representatives of Imperial Group state: "No one has or can dispute that IID holds the Colorado River water rights in trust." Memorandum of Points and Authorities, p.9. IID agrees with these statements. But, Imperial Group then waffles on their position by also stating in the same Memorandum of Points and Authorities that "Intervenors and others have revoked IID's trust responsibility" at p.4, and "Intervenor's Section 5 contract rights to Colorado River water through IID . . . . Indeed, Intervenor's water rights are indistinguishable from the water rights that MWD and CVWD claim they must protect." (Emphasis added.) Also, at p.8, "Intervenors'

protectable interests in its Colorado River contracts." (Emphasis added.) See also: "The IID functions as a 'middleman' between the federal government that delivers the water and–based on agreements–the users of the water." Water Issues in the Imperial Valley, p.1. Thus, whether the Imperial Group believes that the landowners have rights beyond their status as beneficiaries of the trust is unclear. The law says they do not.

2. **If IID has a limited volume of water available under Priority 3a, may it apportion that water to the land in the District for use on that land?**

IID Position

Yes. See Water Code § 22250. IID may apportion on an equitable ratable basis and the landowners have no right (or RIGHT, see below) to dictate the method utilized. The decision on how to apportion ratably and equitably is left to the IID's sound discretion. See, for example, "When any charges for the use of water are fixed by a district, the water, for the use of which the charges have been fixed, shall be distributed equitably as determined by the board among those offering to make the required payments." (Emphasis added.) Water Code § 22252. See also: "Each district shall establish equitable rules for the distribution and use of water, which shall be printed in convenient form for distribution in the district." Water Code § 22257.

Imperial Group Assertions

Inconsistent. The Imperial Group loves to cite to Water Code § 22250 which states: "All water distributed by districts for irrigation purposes shall except when otherwise provided in this Article be apportioned ratably . . . . (Emphasis added.) However, they ignore the underlined language which gives the IID discretion as to how to apportion ratably. Imperial Group believes "The allocation of water is based on the California Irrigation District Act that proclaims all lands are to receive water on an equitably apportioned basis," Water Issues in the Imperial Valley, p.1. This statement is true. However, they then incorrectly conclude: "IID has not collected assessments in many years, so the most likely substitute would be a one share for one-acre basis. That is the RIGHT." (Emphasis in original.) 3/27/03 Maloney Memorandum. Although IID may apportion ratably, and must do so equitably, the manner of apportionment is not mandated, nor do landowners have control over the method chosen or any RIGHT to assert.

3. **May IID apportion ratably based on a new comparative assessed value?**

IID Position

Yes. Water Code section 22250 expressly authorizes an apportionment based on the comparative relative assessed value of any portion of land to the total assessed value. Although this method is not the only permissible method, it is expressly authorized as the apportionment method to utilize in the absence of a board decision to utilize a different ratable and equitable approach.

Imperial Group Assertions

No; must be on a one share for one acre basis. See Imperial Group statements in #2 above.

4. **May IID apportion based on other criteria?**

IID Position

Yes. In Choudry v. Free (1976) 17 C.3d 660, the California Supreme Court succinctly summarized the powers of an irrigation district as follows: "The board of directors is charged with conducting the affairs of the district (§ 21385), and among the powers which it may exercise are the following: It may supply and deliver water for irrigation and domestic use (§ 22075 et seq.) and for fire protection (§ 22077), and store, treat and salvage water (§ 22078). . . . The district derives its revenues from assessments upon the land within its boundaries (§ 22950) and from charges for the services it provides, such as water, electric power, sewage disposal, and the operation of recreational facilities (§§ 22252, 22115, 22117, 22179, 22186). It has the authority to substitute such charges for assessments (§ 22280) and may pay its bonds from the revenues other than assessments (§§ 25240, 25241), if the issuance of the bonds is authorized by an election (§ 21933)." In addition to expressly granted powers, the board has "those implied powers which are necessary to the exercise of the powers expressly granted." Crawford v. Imperial Irrigation District (1927) 200 Cal. 318, 334.

There is no mandatory legislative direction limiting the Board's discretion on how to distribute or regulate the water under its control. If a district is not dependent on assessments for financing its operations, apportionment by assessment is not required. See, for example, Water Code §§ 22252, 22257, 22252.1, 22252.3, which reference as permissible water distribution rules, for example, "equitable rules," by "applications" submitted by a specific date, or by water requirements for crops grown. Such sections also state that each described apportionment method is not exclusive. "Nothing in this section shall prohibit or limit the apportionment of available water to land given preference under section 22252.1 or this section, or to otherwise restrict or limit existing powers of the district to control and provide for distribution of water." Water Code § 22252.3.

Imperial Group Assertions

No. See Imperial Group statements quoted in #2 above.

5. **Would an apportionment grant to the landowners the right to directly transfer water?**

IID Position

No. "No right in any water or water right owned by the district shall be acquired by use permitted under this article." Water Code § 22262. Water Code section 1011 does not change this result. Water Code section 1011(a) contains the following language: "When any person entitled to the use of water under an appropriative right. . . ." The quoted phrase refers only to

water right holders based upon the complete legislative history of Water Code section 1011, State Water Resources Control Board decisions ("SWRCB") involving the application of Water Code section 1011, judicial decisions involving section 1011, and other Water Code sections containing similar language. The purpose of Water Code section 1011(a) was to provide anti-forfeiture protection to appropriative right holders to nullify any disincentive to conserve water.

The legislative history for Water Code section 1011 includes numerous references to "water rights holders" and "legal users of water," both phrases having well-established definitions which exclude those who merely use water under the water right. Additionally, Water Code section 1011(b) involves the ability to transfer conserved water. It specifically references that transfers are to be "pursuant to any provision of law relating to the transfer of water or water rights." In every SWRCB decision and case reviewed, Water Code section 1011(b) was utilized only in conjunction with other transfer statutes authorizing a change in place of use, point of diversion, and purpose of use, i.e., Water Code § 1725 et seq. Such transfers of conserved water under Water Code section 1011 required the petitioner to first establish that it was a water right holder and then to satisfy the "no-injury" requirement which involves protection against impacts to "any legal users of water," meaning other water right holders.

There are no reported SWRCB or court decisions that support an interpretation under which the phrase "any person entitled to use water" is defined more broadly than the similar term "any legal user of water."

The Legislative Counsel's Digest preceding the text of Senate Bill 1042, adding Water Code section 1011 to the Water Code in 1979, provides the following summary: "Under existing law, a person who has acquired an appropriative right pursuant to the Water Code forfeits such rights after 3 years of nonuse. The bill would provide that no forfeiture of an appropriative right shall occur where the appropriator fails to use the water because of water conservation efforts, as specified."

When Water Code section 1011 was amended by Senate Bill 970 in 1999, the Senate Committee on Agriculture and Water Resources analysis of the Bill provided the following: "Existing law defines several methods of water conservation for the purpose of allowing conserved water to be transferred by the water right holder. . . . Water rights holders who elect to transfer some or all of their water to others are protected against losing their right . . . . The bill requires the petitioner to offer proof of legal right to use the water intended to be transferred. . . ."

Additionally, the SWRCB regulations for implementing Water Code section 1011 contained in Title 23 of the California Code of Regulations, Article 20, section 847, which regulates the reporting requirements under Water Code section 1011, states that "annual reports shall be filed promptly by the permittee." Permittee means the holder of an appropriative right permit or license.

Finally, Water Code section 1011(a) does not consistently use the phrase "any person entitled to the use of water under an appropriative right." Reference is also made to "any user of water," "the user of water," and "use allowed under the existing appropriative right." Elsewhere in the Water Code, the phrases "any user of water" or "any legal user of water" are also frequently used. See, for example, Water Code §§ 1810(a), 1702, 1707, 1725, 1736. SWRCB decisions are

clear that such phrase means holders of water rights, not the customers of the water rights holders. See, for example, SWRCB Revised Decision No. 1641, March 29, 2000, where a contract holder with irrigation rights appurtenant to the land for CVP water delivery from the USBR, but where the appropriative right holder was the USBR, claimed to be an injured "legal user of water." The SWRCB disagreed. "Taken to its logical end, WWD's argument that the end users of water are the water right holders would mean that instead of having a relatively few water purveyors subject to statewide regulatory authority of the SWRCB, there would be millions of water right holders. Instead of regulating the purveyors of water, the SWRCB would regulate the use of water at the end of pipes and canals in individuals' homes, businesses, and farms."

There is no basis to assert that Water Code section 1011 would allow IID farmers to be construed as water right holders able to directly conserve and transfer water. And, this conclusion does not change even if only a limited supply of water is available to the IID, and thus is apportioned ratably for use within IID to various lands pursuant to Water Code section 22250.

Imperial Group Assertions

Ambiguous. "Under California law, a landowner who is entitled to use water and conserve some of that water is entitled to all the benefits of that conservation." Water Issues in the Imperial Valley, p.2. Do such benefits mean to the Imperial Group the right to transfer the conserved water? Unknown. Apparently the Imperial Group agrees that a landowner may not directly transfer any water. "A landowner may not, however, transfer his extra water outside of the district at his pleasure, based in large part on the common purpose of an irrigation district." 3/27/03 Maloney Memorandum, p.2. But, the Imperial Group has suggested that Water Code § 1011 may allow a landowner to transfer conserved water, even where it cannot transfer "apportioned" water. "When any acres conserve water from its RIGHT under section 1011--which includes fallowing--and an outside party is willing to pay for the conserved water, the moneys must be divided according to the RIGHTS of the land, . . . (Emphasis in original). 3/27/03 Maloney Memorandum, p.4. The law does not create the RIGHTS asserted.

6. **May IID contract with certain landowners to conserve water and then may IID transfer the conserved water for use outside of the District?**

IID Position

Yes. IID can lawfully create conserved water, either itself or by contracts with specific consenting landowners, and transfer the conserved water for use outside the service area in exchange for compensation for the conserved water. The law is clear on this point. Water Code section 1011 specifically authorizes such conservation and transfer by IID as the water right holder, subject to compliance with other water transfer statutory requirements. IID petitioned the State Water Resources Control Board for approval of the creation and transfer of conserved water pursuant to Water Code §§ 1011, 1735 and 1736. Approval, subject to certain imposed environmental conditions, was granted.

Water Code sections 1745 to 1745.09 expressly authorize such transfers of conserved water also.

"As used in this article, the following terms have the following meanings: (a) "Person" includes a public agency. (b) 'Water supplier' means a local public agency or private company supplying or storing water, or a mutual water company." Water Code § 1745.

"A water supplier may, for a consideration to be specified in the contract, contract with persons entitled to service within the supplier's service area to reduce or eliminate for a specified period of time their use of water supplied by the water supplier." Water Code § 1745.02.

"A water supplier may contract with . . . any other state or local water supplier or user inside or outside the service area of the water supplier to transfer, . . . water if the water supplier has allocated to the water users within its service area the water available for the water year, and no other user will receive less than the amount provided by that allocation or be otherwise unreasonably adversely affected without that user's consent." Water Code § 1745.04.

"(a) [W]ater made available from either of the following sources may be transferred by the water supplier pursuant to Section 1745.04: (1) Conservation or alternate water supply measures taken by individual water users or by the water supplier. (2) Water developed pursuant to a contract by a water user to reduce water use below the user's allocation or to eliminate the use of water during the water year, including a contract to grow crops without the use of water from the water supplier, to fallow land, or to undertake other action to reduce or eliminate water use. (b) The amount of water made available by land fallowing may not exceed 20 percent of the water that would have been applied or stored by the water supplier in the absence of any contract entered into pursuant to this article in any given hydrological year, unless the agency approves, following reasonable notice and a public hearing, a larger percentage." Water Code § 1745.05.

"A water supplier may transfer water pursuant to Section 1745.04 whether or not the water proposed to be transferred is surplus to the needs within the service area of the water supplier." Water Code § 1745.06.

"A transfer that is approved pursuant to this article or any other provision of law is deemed to be a beneficial use by the transferor under this code." Water Code § 1745.07.

"Nothing in this article does any of the following: (a) Creates in any person a right to require any water supplier to enter into a contract providing for the reduction or elimination of water use or for the transfer of water. (b) Creates in any person reducing water use any interest in the water rights of the water supplier. . . .(d) Makes any change in existing water rights." Water Code § 1745.09.

Imperial Group Assertions

No. "To the extent that IID is intending to transfer out of the water service area a portion of the water right appurtenant to lands n its service area, we are of the view that absent landowner consent, IID has no such right under the Irrigation District Act. . . . Neither the SWRCB proceeding nor the early 2003 negotiations with San Diego recited (much less showed) landowner consent or a waiver under IID's organic authority allowing it to reduce the water rights appurtenant to beneficiaries' lands. IID must by law treat it beneficiaries equitably, which precludes a "voluntary" sign up. In effect, IID must treat its beneficiaries as a class, not as individuals with whom it can reach separate agreements." This quote mistakenly describes the

transfer as one of water rights. No water rights transfer is involved. Only newly conserved water will be transferred.