

Imperial Valley farmers are embroiled in a fight over water rights — and it could decide who controls Colorado River water

Ian James

The Colorado River provides water for seven western states and Mexico. Heavily overallocated and ravaged by years of drought, the river is also under growing strains due to climate change. Wochit

A legal fight over water rights is heating up in the Imperial Valley, pitting farmers against their own irrigation district in a struggle for control of the biggest water entitlement along the Colorado River.

A judge's ruling has forced the Imperial Irrigation District to repeal its plan for apportioning water, which had set limits on how much water individual growers could use on their fields.

The case has also touched off heated arguments at meetings — and sharply worded letters between lawyers — about landowners' water rights and the role the district should play as a "trustee" in divvying up and delivering water. While some farmers suggest the two sides should settle the dispute, others argue the differences are too substantial to reach an agreement and will need to be decided by a California appeals court.

Michael Abatti, the farmer who sued the district to challenge its water apportionment plan, stood at a meeting on Tuesday and told the IID board he strongly disagrees with the agency's statement in a recent letter that it has "broad powers" to determine how much water is distributed to growers.

"There are no ongoing settlement discussions," Abatti said, reading [his](#)

[written response](#) to the board. “Given the many significant differences between what we believe to be the district’s duties to its landowners, and what the district believes those duties to be, it appears unlikely that any settlement can be achieved.”

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Abatti, a former IID board member, criticized the agency’s elected leaders for choosing to appeal the court’s decision, saying they’re doing it “presumably because they believe there are no legal limits to their authority to apportion water.”

The dispute has created new uncertainty about how water will be managed in the Imperial Valley, and it’s likely to further complicate long-stalled negotiations among agencies in California, Arizona and Nevada on a proposed plan to cope with shortages along the Colorado River.

The river has dwindled during an 18-year run of mostly dry years, and the water rights system has continually doled out more water than the river’s total flow, pushing the level of Lake Mead near a point that would trigger cutbacks in water deliveries — which would hit Arizona and Nevada first.

The lawsuit doesn’t deal with those larger issues, though. It focuses on local disagreements over whether individual farmers hold rights to a certain quantity of water, how far the IID’s powers extend and how the agency should be managing its share of the Colorado River.



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Colorado River water flows through the All-American Canal in Calexico. (*Photo: Ian James/The Desert Sun*)

The case has elicited arguments stretching back over a century of western water law, from the 1922 Colorado River Compact to a 1980 U.S. Supreme Court decision, *Bryant v. Yellen*, in which the justices said Imperial Valley landowners “have a legally enforceable right, appurtenant to their lands, to continued service” by the irrigation district.

The Imperial Valley enjoys some of the oldest rights to Colorado River water, which began flowing to the area via canal in 1901 and turned this swath of the Sonoran Desert into a lush, green agricultural powerhouse.

Farming drives the local economy, contributing an estimated \$4.5 billion annually in economic output and spending by ag companies and employees. The valley produces crops including alfalfa, wheat, lettuce, broccoli, onions, carrots, sugar beets, cauliflower, cabbage, Brussels sprouts and cantaloupes,

among others.

The irrigation district supplies about 530 agricultural customers, delivering water through a network of canals and pipes that fan out across the valley like the lines on a circuit board.

The amount of water the district delivers is subject to an overall annual cap. When there are overruns, as happened in 2011 and 2012, the district is required to pay back the difference by taking less during subsequent years.

Responding to the two consecutive years of overruns, the IID board adopted its so-called Equitable Distribution Plan in 2013 in an attempt to stay within the annual limit. The district's officials used what they called a "hybrid" method, basing the per-acre water limits partly on each farmer's historical water use and partly on a standard amount applied to all growers.



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Farmer and former IID board member Michael Abatti greets Matt

Dessert during a 2016 event. (Photo: Jay Calderon/The Desert Sun)

A month after the plan was approved, Abatti filed his lawsuit to challenge it in Imperial County Superior Court. He argued the plan should be thrown out because it prioritized other water users over farmers and because it failed to apportion water among growers based on how much they used historically and without considering factors such as the types of crops grown.

In a decision in August, Judge L. Brooks Anderholt agreed. He said in [his ruling](#) that the IID's plan prioritizes other groups of water users and "apportions water to municipal users, industrial users, feed lots, dairies, fish farms, and environmental water users before farmers." He said the plan "disadvantages farmers, who should not be treated differently and with a lesser priority."

Anderholt ordered the district to repeal the plan and said the agency should instead apportion water based on historical water use. He cited the 1980 Supreme Court ruling and said IID "holds mere legal title to the water rights and the users own the equitable and beneficial interest" in the water rights, which he stressed are tied to their lands.

Responding to the ruling, the district's board voted last month to repeal the plan. That's left growers, at least temporarily, without a plan limiting how much water they're supposed to use.

'It's going to be complicated'

The district still has an overall water cap of 3.1 million acre-feet per year — about 1 trillion gallons — which includes water IID is selling to Southern California cities under transfer deals.

But the district has consistently underused water between 2013 and 2017, with annual underruns varying between 797 acre-feet and 97,188 acre-feet. All of that water — about 264,000 acre-feet during the past five years — has

gone free-of-charge to the next water rights holder in line: the Metropolitan Water District of Southern California, which supplies about half the state's population in counties from San Diego to Ventura.

Some farmers say there's always a worry that if the Imperial Valley continually has those underruns, Metropolitan may begin to depend on that extra water.

Yet, the lack of a water distribution plan could soon lead to the opposite problem. Michael Cohen, a water researcher with the Pacific Institute, said without the clear water allocation plan, farmers now have more ability to order additional water for their crops, even if the district is approaching its overall annual limit.

"It suggests that IID will experience overruns again," Cohen said, because the agency "now lacks the authority to deny irrigators water, at least within the general bounds of 'historic use.'"



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Water flows through a canal next to an alfalfa field near Brawley in the Imperial Valley. (Photo: Jay Calderon/The Desert Sun)

The Equitable Distribution Plan was designed so that it would kick in during a year when demand for water exceeded the available supply.

Several farmers said as far as they've heard, everyone has gotten the water they needed. The plan established a local water bank, and the district urged growers who didn't need some of the water they were allocated to put it into the bank.

"If you needed extra water on your farm, all you had to do was call the district and order extra water," farmer Al Kalin said. "But Judge Anderholt's ruling called a change to all that."

To make a new allocation system work, Kalin said, farmers will need to be able to again use the water bank. He said another complication in developing a new plan is that if it's based on farmers' history of water use, it'll be important to adjust for errors that have left some growers with unduly small amounts.



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Imperial Irrigation District general manager Kevin Kelley, left, and IID general counsel Frank Oswalt seen at an IID board of directors meeting on July 18, 2017. (Photo: Jay Calderon/The Desert Sun)

Kevin Kelley, IID's general manager, said the old method of apportioning water worked.

"A replacement program is needed but it's going to be complicated," Kelley said. The district's officials talked with the valley's water users for months to develop the 2013 plan, he said, and they'll need to start the same sort of process again.

Kelley said the district will stay engaged in Colorado River negotiations, "but there's no doubt that this ruling introduces a whole new complexity that we'll have to deal with."

On Feb. 16, the leaders of three groups representing most of the valley's farmers wrote to the IID board and Abatti urging them to dismiss their appeals and asking the district to prepare a new water distribution plan in line with the court ruling.

The three groups — Imperial Valley Water, the Imperial County Farm Bureau and the Imperial Valley Vegetable Growers Association — said dropping the appeals would avoid the risk that an appeals court decision could “severely limit or damage those water rights.”

“We ask that IID begin to work with agricultural users and others on a fair and equitable water apportionment plan,” the groups [said in the letter](#), which was signed by farmers Craig Elmore, Jack Vessey and Tom Brundy. They said the court ruling provides a “basic outline” for coming up with a fair method of apportioning water.



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The All-American Canal carries Colorado River water through

Calexico, passing between neighborhoods and farmland. (Photo: Ian James/The Desert Sun)

While both IID and Abatti have said they're going forward with appeals, an El Centro lawyer representing seven other farmers has weighed with a series of letters [questioning the IID's position on water rights](#). Attorney Lowell Sutherland said in an interview by phone that the farmers he represents have concerns about water rights and generally support Abatti's position in the lawsuit. Sutherland called IID water plan flawed and referred to parts of the Supreme Court's 1980 ruling that said the water rights are held in trust by the IID for landowners and are tied to the land.

"If you sell the land, whoever buys the land gets the water right," Sutherland said. "But the right itself can't be separated from the land, and that's what it means when it says it's 'appurtenant to the land.'"

Sutherland said the farmers he represents agree with Anderholt's ruling that industrial water customers or other categories of users shouldn't be prioritized ahead of agriculture. That issue would come to the forefront if there's eventually a water shortage.

"The principle that we believe should be applied if there's a shortfall is that, with the exception of cities, everybody takes a hit equally. Everybody's got to tighten their belt one notch — or two notches or three notches, however the shortage is," Sutherland said. "No landowner should be singled out as having preference over the others."

97 percent of the water

IID General Counsel Frank Oswalt responded to Sutherland's questions in a [March 22 letter](#), saying the Supreme Court's ruling 38 years ago is "is among many case decisions recognizing that it is IID that is the water right holder."

Oswalt wrote there is a "permanent, legally enforceable, vested equitable

right to receive water service from IID,” but that the right “is not to a specific amount of water every year,” since that may vary.

“IID is necessarily vested with broad discretion in carrying out its powers and duties and it is precisely because Judge Anderholt took the position that the district did not have that discretion... that the IID Board is obligated to challenge his decision,” Oswalt said. “There is no reason to suggest that providing water to municipal and industrial uses will cause harm to the agricultural community, which currently receives approximately 97 percent annually of the water... There should not be conflict among water users.”

That letter prompted debate at Tuesday’s meeting.

Abatti started the discussion, accusing Oswalt of raising “a new legal theory” that contradicts the district’s long-standing recognition of landowners’ ownership of water rights.

He also pointedly addressed the board members’ political future. If the IID board succeeds in their appeal, Abatti said, “their suggestion that those unhappy with their methods of apportionment should vote them out of office may be the only recourse.”

In the upcoming June 5 elections, three IID board members are running for re-election: Juanita Salas, James Hanks and Norma Sierra Galindo.

As the debate continued, Hanks and board member Bruce Kuhn were questioned by other farmers. They included Larry Cox and Jimmy Abatti — Michael’s brother and president of the Imperial County Farm Bureau.

Kuhn said if he had written the IID’s letter, he would have worded it differently.

“But to say that this board is anti-farming, no. Nothing is further from the truth,” Kuhn said. “I don’t know anyone up here that’s anti-ag. ... And I really feel bad that it’s come to this.”

Cox said farmers have had a good working relationship with the district's board but that in various court documents, "the IID's lawyers did come off as anti-ag."

The back-and-forth between the farmers and board members touched on past legal fights in the valley as well as a 2003 water transfer agreement. Under that deal, which the IID board approved under pressure from state and federal officials, the district is selling increasing amounts of water to cities in San Diego County and the Coachella Valley.

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During the first 15 years of the deal, farmers were paid to leave some of their lands unplanted and fallow — at the height of the program as much as 35,000 acres a year out of the valley's more than 440,000 acres of farmland. That fallowing program ended last year, and the district is now focusing on a different program that pays farmers for conservation measures that help free up water.

Cox asked whether farmers should be concerned about the possibility of a future IID board deciding to take some of the agricultural water and sending it to other types of businesses.

"I do not think we should be concerned. I think that there's ample water for farming and I believe that there'll be ample water for industry as it comes in here," Kuhn said. "I think there's ample water for all that are here."

When Kuhn touched on what the Supreme Court ruling said about farmers' water rights, Cox asked: "Is there an amount that goes along with that right to service?"

"You have an absolute right to water, as long as you use it reasonably and beneficially," Kuhn said. "Could future events change that? Maybe. Maybe we

could get a decree from the federal government, from the secretary of the Interior, that we have to do something. We can't rule that out."

Seeming frustrated with the answer, Cox said: "A continued right to service doesn't do us any good if it's not enough water to farm with." The IID board, he added, already voted to reduce the amount of water for agriculture under the apportionment, "and what's to keep the board from doing it again in another way?"

Hanks, the board's president, said he'd prefer to talk over the disagreements in a more amicable way — at least until the lawyers get involved.

"When we get a letter threatening us that we're going to be sued," Hank said, "I'm going to get a lawyer to respond to that."

"And you know what? It doesn't do any of us good in the state of California to have this debate, to handle it this way," Hanks said. "The judge made a ruling and it's kind of tied everybody's hands, so we're all trying to work through that."

The IID recently made a settlement offer to Abatti, and his lawyer rejected that offer in a letter on Monday. Kelley, the general manager, said after the meeting that depending how the case plays out it, there's a chance it might bring "unintended consequences" that would be harmful for the Imperial Valley.

"It's a very risky and potentially reckless dispute, because while we're sitting down here shooting at each other, others outside this valley are watching it all play out," Kelley said. "There's always the chance that peace will break out, reason will prevail."

Ian James writes about water and environmental issues for The Desert Sun. Reach him at ian.james@desertsun.com, (760) 778-4693 or @TDSIanJames.