

# CENTRAL CALIFORNIA IRRIGATION DISTRICTS: ARE THEY THE NEW STANDARD OIL?

## I. INTRODUCTION

The United States of America was founded on freedom–freedom from tyrannical leaders who placed hardships and restraints on their “subjects.”<sup>1</sup> During the Revolutionary War in America, the people focused on getting out from under the heavy burden of the Royal Crown of England.<sup>2</sup> They sought to think, worship, and pursue happiness according to each individual’s will.<sup>3</sup>

Fast-forward over 100 years from the time of the Revolution.<sup>4</sup> Business was booming.<sup>5</sup> Inventions and manufacturing were the new waves of the future.<sup>6</sup> The Industrial Revolution had arrived and was in full swing.<sup>7</sup> This new prosperity brought with it great opportunity but also resurrected old trials that plagued early colonial America.<sup>8</sup> Big business and monopolies were born, and the fear that these business magnates would utilize their power to control the market and prevent competition began to spread across the nation.<sup>9</sup> Senator John Sherman, author of the Sherman Antitrust Act of 1890, stood before Congress with a determination to free the American economy and declared, “If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the

---

<sup>1</sup> See DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *Industrial Revolution – Facts & Summary*, HISTORY.COM, <http://www.history.com/topics/industrial-revolution> (last visited Jan. 30, 2015).

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See THOMAS LANDBURG, UNIT 7 BUSINESS REGULATION CASE STUDY: STANDARD OIL, 33, *Digital History* (2007), available at [http://www.digitalhistory.uh.edu/teachers/lesson\\_plans/pdfs/unit7\\_8.pdf](http://www.digitalhistory.uh.edu/teachers/lesson_plans/pdfs/unit7_8.pdf).

<sup>9</sup> See *id.*

necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade . . .<sup>10</sup>

The Sherman Antitrust Act in 1890 was passed by Congress and quickly signed into law as an effort to curb the emergence of American robber barons.<sup>11</sup> This was the start of antitrust laws in the U.S.<sup>12</sup> At the turn of the century this new law found itself within the chambers of the United States Supreme Court.<sup>13</sup> In 1909, the U.S. Department of Justice sued Standard Oil for sustaining a monopoly and restraining trade.<sup>14</sup> It was accused of impeding trade through rebates, preferences, and other discriminatory practices that favored other large businesses.<sup>15</sup> At one point, Standard Oil controlled ninety percent of the oil production in the U.S.<sup>16</sup> The Supreme Court's ruling broke the massive monopoly into thirty-four independent companies.<sup>17</sup> Some descendants of the once-great Standard Oil are the largest and most successful oil companies today.<sup>18</sup> Companies like ExxonMobil, Chevron, and Conoco all came from the division of Standard Oil.<sup>19</sup>

As exemplified by the Standard Oil case, antitrust lawsuits typically target large businesses.<sup>20</sup> Some notable cases targeted companies like Microsoft, AT&T, and Kodak.<sup>21</sup> Should entities that do not fit the mold of big business be regulated by antitrust laws when they establish similar dominance and control over those in a particular industry? What about government organizations or other public services? What about irrigation and water districts? What happens when these entities begin to wield too much control over services and products vital to the public welfare? Can and should a California irrigation district suffer

---

<sup>10</sup> Eric Holder, Attorney General, Address at the Sherman Act Award Ceremony (Apr. 20, 2010).

<sup>11</sup> See LANDBURG, *supra* note 8, at 33.

<sup>12</sup> See LANDBURG, *supra* note 8, at 33.

<sup>13</sup> LANDBURG, *supra* note 8, at 34.

<sup>14</sup> The Learning Network, *Supreme Court Orders Standard Oil to Be Broken Up*, THE NEW YORK TIMES (May 15, 2012, 4:02 AM), <http://learning.blogs.nytimes.com>.

<sup>15</sup> LANDBURG, *supra* note 8, at 35.

<sup>16</sup> The Learning Network, *supra* note 14.

<sup>17</sup> *Id.*

<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See United States v. Microsoft Corporation*, 253 F.3d 34, 34 (D.C. Cir. 2001); *see also MCI Comm. Corp. v. AT&T*, 708 F.2d 1081, 1081 (7<sup>th</sup> Cir. 1983); *see also Eastman Kodak v. Image Tech. Services, Inc.*, 112 U.S. 2072, 2072 (1992).

<sup>21</sup> *See id.*

the same fate as Standard Oil when it prevents its farmers from participating in the efficient trade of water to those outside its district?

The year 2014 saw a dramatic reduction in available water in California.<sup>22</sup> It is no secret that California is in a drought, placing much of the San Joaquin Valley at risk of running out of water; this has left many farmers in the area looking to purchase water from outside their irrigation district in an effort to keep their farms alive.<sup>23</sup> In the relatively water-rich districts of the Central Valley, farmers are paying a mere thirty dollars per acre-foot of water, while others in more desolate districts are willing, if not economically forced, to pay upwards of \$2,000 per acre-foot.<sup>24</sup> It makes sense, both logically and economically, for a farmer with excess water to sell his or her surplus water to farmers in drought-stricken areas.<sup>25</sup> The farmer selling the water profits financially, while the farmer purchasing it obtains the necessary irrigation to continue business operations.<sup>26</sup> The freedom of farmers to sell their water to other farmers contributes to a free market economy; however, current circumstances are much more regulated and complex. Many California irrigation districts restrain farmers from trading their water with farmers outside their district; thus, many farmers throughout the San Joaquin Valley are left without necessary water.<sup>27</sup> Irrigation districts that restrict the trade of water to needy farmers in other districts are creating a trust akin to that formed by Standard Oil and are violating federal policy.

---

<sup>22</sup> See Rob Parsons, *Farmers Await News from Merced Irrigation District on Water Season*, MERCED SUN STAR, Mar. 14, 2014, [http://www.mercedsunstar.com/2014/03/14/3548478\\_irrigation-season-start-date-expected.html?rh=1](http://www.mercedsunstar.com/2014/03/14/3548478_irrigation-season-start-date-expected.html?rh=1).

<sup>23</sup> See Ethan A. Huff, *Top 10 U.S. Cities Running Out of Water*, NATURAL NEWS, Aug. 14, 2014, [http://www.naturalnews.com/046459\\_drought\\_California\\_water\\_supplies.html](http://www.naturalnews.com/046459_drought_California_water_supplies.html); see also Dan Charles, *California Farmers Ask: Hey Buddy, Can You Spare Some Water?*, NAT'L PUB. RADIO, June 9, 2014, <http://www.npr.org/blogs/thesalt/2014/06/09/317011698/california-farmers-ask-hey-buddy-can-you-spare-some-water>.

<sup>24</sup> CHARLES, *supra* note 23 (comparing Turlock Irrigation District with Westlands Irrigation District); PARSONS, *supra* note 22 (“an acre-foot of water is an amount of water to cover an acre of land one foot deep, or about 325,900 gallons”).

<sup>25</sup> See CHARLES, *supra* note 23.

<sup>26</sup> See *id.*

<sup>27</sup> See CHARLES, *supra* note 23; see also TURLOCK IRRIGATION DISTRICT, 2012 AGRICULTURAL WATER MANAGEMENT PLAN, 19 (2012), available at <http://www.water.ca.gov/wateruseefficiency/sb7/docs/2014/plans/Turlock%20ID%20Final%20AWMP%2012-11-2012.pdf>.

This Comment will show that a strong case for a violation of federal antitrust laws can be made against certain irrigation districts in the California San Joaquin Valley, and that ensuring free trade of water between farmers will aid in resolving the Valley's water shortages. Part II will provide a brief history of California water rights, discuss the current water conditions in California, and offer insights into how certain irrigation districts are restricting the trade of water throughout the Valley. Part III will delve into the laws to be considered. Specifically, Part III will analyze the California Water Code, theories of property law, the Sherman Antitrust Act, and other antitrust case law to demonstrate how certain irrigation districts are violating federal antitrust laws. Additionally, Part III will consider a potential immunity available to those irrigation districts. Part IV of this comment will recommend that antitrust laws be applied to monopolistic irrigation districts and that water marketing policies, similar to those implemented in Australia, be adopted here to ensure the free trade of water between California farmers. Part V will conclude that failure to reduce the power of irrigation districts to prohibit the trade of water will only add to the challenges of an unyielding drought.

## II. LAYING THE FOUNDATION

### A. *History of California Water Rights*

California water rights are complex and vary between irrigation districts.<sup>28</sup> It is essential to first understand the history of California water, including what kind of water rights each irrigation district in the Central Valley has, and by what means those rights were obtained.<sup>29</sup> California water rights fall into the form of a hierarchy or priority.<sup>30</sup> The first priority of water rights in California is riparian rights.<sup>31</sup> In general, riparian rights include the use of water running through one's property.<sup>32</sup> Second in line are "pre-14" rights.<sup>33</sup> These are rights acquired prior to December 19, 1914.<sup>34</sup> California law recognizes and

---

<sup>28</sup> Interview with Kenneth Robbins, Attorney at Law, Mason, Robbins, Browning & Godwin, in Merced, Cal. (July 28, 2014).

<sup>29</sup> *See id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> CAL. WATER CODE § 101 (1943).

<sup>33</sup> ROBBINS, *supra* note 28.

<sup>34</sup> *Id.*

protects riparian and pre-14 rights over rights initiated following the Water Commission Act or the Water Code.<sup>35</sup> Rights acquired pursuant to the Water Code are known as “post-14” rights, or appropriated rights.<sup>36</sup> These rights rank lowest among California water rights.<sup>37</sup> They are known and best described as “first in time, first in right,” or, in other words, “first come, first served.”<sup>38</sup>

Prior to the Nineteenth Century, the San Joaquin Valley of California was largely untouched by agriculture.<sup>39</sup> In the late 1800’s, Henry Miller, an owner of the large Miller and Lux cattle empire, claimed riparian and pre-14 rights to the San Joaquin River and the Kings River running through California’s Central Valley.<sup>40</sup> Henry Miller later constructed canals that diverted the water from those rivers for irrigation on his property throughout the Valley.<sup>41</sup> These canals successfully irrigated his massive estate in the western portions of Fresno, Madera, Merced, and Stanislaus counties.<sup>42</sup>

In 1933, the United States Department of Interior commenced the California Valley Project in order to expand agricultural growth further east and south.<sup>43</sup> This project constructed dams and canals throughout the Valley.<sup>44</sup> It was determined that in order to supply the areas between Chowchilla and Bakersfield, water needed to be diverted from the San Joaquin River where Henry Miller had both riparian and pre-14 rights.<sup>45</sup> For this to be accomplished, the federal government requested that the heirs of Miller and Lux exchange their pre-14 and riparian rights to the San Joaquin River for guaranteed deliveries of substitute water from the Sacramento Delta.<sup>46</sup> This agreement was known as the Exchange Contract.<sup>47</sup> The irrigation districts that exchanged their rights are known as the San Joaquin

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> San Joaquin River Water Authority, SJRECWA.NET, <http://www.sjrecwa.net/history.html> (last visited Oct. 27, 2014).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

River Exchange Contractors (“Exchange Contractors”), and the beneficiaries of the agreement are known as Federal Contractors.<sup>48</sup>

Members of the Exchange Contractors consist of the Central California Irrigation District, San Luis Canal Company, Firebaugh Canal Water District, and Columbia Canal Company, which serve areas around Los Banos, Gustine, Dos Palos, and Firebaugh.<sup>49</sup> The Exchange Contractors were promised 100% of their water in normal years, and seventy-five percent of their water in critical years; however, in the agreement, the Exchange Contractors never abandoned their San Joaquin River water rights.<sup>50</sup> As a result, if the Exchange Contractors do not receive their guaranteed amount of water, they have priority rights over the Federal Contractors to receive water from the San Joaquin and Kings River to satisfy their needs.<sup>51</sup>

During the years of Henry Miller and the transaction between the Federal Government and the Exchange Contractors, other irrigation districts were forming further north in the Valley.<sup>52</sup> In the late 1800’s irrigation districts like the Merced Irrigation District (“MID”) and the Turlock Irrigation District (“TID”) were founded primarily by railroad magnets.<sup>53</sup> These two irrigation districts, along with other surrounding districts, like Modesto and Oakdale Irrigation Districts, are often known as the Tributary Agencies.<sup>54</sup> Founded under private ownership, these districts operate differently than the other districts in the Central Valley.<sup>55</sup> For example, TID operates as a special district under the government.<sup>56</sup> A special district is “any agency of the state for the

---

<sup>48</sup> See San Joaquin River Water Authority, *supra* note 40; Robbins, *supra* note 28.

<sup>49</sup> See San Joaquin River Water Authority, SJRECWA.NET, [http://www.sjrecwa.net/about\\_us.html](http://www.sjrecwa.net/about_us.html) (last visited Oct. 27, 2014).

<sup>50</sup> San Joaquin River Water Authority, *supra* note 40.

<sup>51</sup> *Id.*

<sup>52</sup> Robbins, *supra* note 28.

<sup>53</sup> Merced Irrigation District, MERCEDID.COM, <http://www.mercedid.com/index.cfm/about/history-of-the-district/> (last visited Oct. 27, 2014); Robbins, *supra* note 28.

<sup>54</sup> Robbins, *supra* note 28; see Peter F. Baker, Terence P. Speed, & Franklin K. Ligon, *Presentation of the Tributary Agencies to the State Water Resources Control Board on San Joaquin River Salmon & Striped Bass Issues* (Sep. 29, 1994, 10:48 AM), available at [http://www.swrcb.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/wq\\_control\\_plans/1995wqcp/admin\\_records/part03/180.pdf](http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/1995wqcp/admin_records/part03/180.pdf).

<sup>55</sup> See Robbins, *supra* note 28.

<sup>56</sup> Turlock Irrigation District, TID.COM, <http://www.tid.org/about-tid/tid-overview> (last visited Oct. 27, 2014).

local performance of governmental or proprietary functions within limited boundaries.”<sup>57</sup> These districts own the water rights and essentially lease them to the farmers within the district.<sup>58</sup> This differs from many of the other irrigation districts in the Valley, and consequently, the Tributary Agencies may set restrictions on whether or not their farmers can sell water to farmers outside their district.<sup>59</sup>

The current structure of San Joaquin Valley irrigation districts is confusing.<sup>60</sup> Some rely on eighty-year-old contracts for their water; some districts allow free inter-district water trades; others place heavy restrictions on such transfers.<sup>61</sup> A confusing system coupled with severe drought has left farmers wondering where to turn for relief.<sup>62</sup>

### *B. Current California Water Conditions*

Early in 2014, Governor Brown declared a drought state of emergency in California.<sup>63</sup> The scarcity of water had a larger impact on the Central Valley than other areas of the state.<sup>64</sup> In a Natural News article published in August of 2014, it was found that eight of the top ten cities running out of water in the U.S. were located in the San Joaquin Valley.<sup>65</sup>

An example of how this drought has impacted farmers in the San Joaquin Valley is captured in the story of Mr. Fred Lujan who farms

---

<sup>57</sup> California Government Code § 16271(d) (1978).

<sup>58</sup> Robbins, *supra* note 28.

<sup>59</sup> Robbins, *supra* note 28; *see* TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19; CHARLES, *supra* note 23.

<sup>60</sup> *See* Robbins, *supra* note 28.

<sup>61</sup> *See* TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19; *see also* MERCED IRRIGATION DISTRICT, RULES AND REGULATIONS GOVERNING DISTRIBUTION OF WATER (1992), *available at* <http://www.mercedid.com/default/assets/File/WaterRules.pdf>; *see* CHARLES, *supra* note 23; *see also* San Joaquin River Water Authority, *supra* note 40.

<sup>62</sup> *See* CHARLES, *supra* note 23; *see also* Diana Marcum, *California Drought Imperils a Dream*, LOS ANGELES TIMES, July 4, 2014, <http://www.latimes.com/local/great-reads/la-me-cl-drought-terra-bella-20140704-story.html#page=1>.

<sup>63</sup> Office of Governor Edmond G. Brown Jr., *Governor Brown Declares Drought State of Emergency*, CA.Gov (Jan. 14, 2014), <http://gov.ca.gov/news.php?id=18368>.

<sup>64</sup> *See* HUFF, *supra* note 23.

<sup>65</sup> *Id.*; *see* Valley CAN, [http://www.valleycan.org/fact\\_sheets\\_info/sjv\\_fact\\_sheet.php.html](http://www.valleycan.org/fact_sheets_info/sjv_fact_sheet.php.html) (last visited Oct. 29, 2014).

pistachio trees in the Terra Bella Irrigation District.<sup>66</sup> After nurturing his pistachio crop for nearly a decade, Mr. Lujan was preparing to harvest his first mature crop.<sup>67</sup> However, in February of 2014 the irrigation district sealed off his water and informed him that the irrigation water was unavailable for that year.<sup>68</sup> This was the first such occurrence since the Federal Government began diverting water to farmers from the Sierra Nevada Mountains.<sup>69</sup> To Mr. Lujan's relief, Setton Farms, a large corporate farm located within the same water district, sold Mr. Lujan ten acre-feet of emergency water to keep his farm alive another year.<sup>70</sup> This emergency water was a temporary mend for Mr. Lujan. Many irrigation districts in the South Valley do not receive enough water to adequately irrigate the farms, which means trades between farmers of the same district will not last forever, and farmers like Mr. Lujan will need to seek resources from outside their irrigation district.<sup>71</sup> Considering the current structure of many irrigation districts, Mr. Lujan will be faced with an uphill battle.<sup>72</sup>

Mr. Lujan's troubles procuring necessary water during times of severe drought are not an anomaly.<sup>73</sup> Rather, they are a stark reality faced by many farmers throughout California.<sup>74</sup> Farmers in MID are likely to face higher water prices and a shorter-than-normal irrigation season.<sup>75</sup> The typical rainfall in Merced County is approximately 9.63 inches.<sup>76</sup> From July 1, 2013, to March 14, 2014, Merced County collected a mere 3.67 inches.<sup>77</sup> In a normal year MID sells around 300,000 acre-feet of water.<sup>78</sup> A report released in early summer of 2014, stated that MID anticipated only having 98,000 acre-feet of

---

<sup>66</sup> See MARCUM, *supra* note 62.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See MARCUM, *supra* note 62; see also WESTLANDS WATER DISTRICT, *Annual Water Use and Supply*, <http://wwd.ca.gov/> (last visited Oct. 30, 2014).

<sup>72</sup> See MARCUM, *supra* note 62.

<sup>73</sup> See PARSONS, *supra* note 22; see Garance Burke, *Calif. Famers Want to Sell Water*, USA TODAY, Jan. 25, 2008, [http://usatoday30.usatoday.com/news/nation/2008-01-25-3056143700\\_x.htm](http://usatoday30.usatoday.com/news/nation/2008-01-25-3056143700_x.htm).

<sup>74</sup> See PARSONS, *supra* note 22; see BURKE, *supra* note 73; see CHARLES, *supra* note 23.

<sup>75</sup> PARSONS, *supra* note 22.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

water available to farmers; that is not even one-third of the necessary amount.<sup>79</sup>

Aside from Mother Nature taking its toll on the farmers and citizens of the Central Valley, modern environmental laws have added to the strain.<sup>80</sup> The California Endangered Species Act states that “all native species of fishes, amphibians, reptiles, birds, mammals, invertebrates, and plants, and their habitats, threatened with extinction or experiencing a threatening decline will be protected and preserved.”<sup>81</sup> In 2007, a Federal District Court concluded that pressure from the pumps sending water from the San Joaquin-Sacramento River Delta reversed the natural direction within the estuary and damaged the habitat.<sup>82</sup> This was reportedly eliminating delta smelt, a fish that experts opine may be near extinction.<sup>83</sup> Basing its rationale on the Endangered Species Act, the court ordered the pumping of agricultural water from the Delta to the South Valley be reduced by one-third.<sup>84</sup>

This ruling, coupled with the extremely dry conditions over the past few years, has significantly restricted the flow of water running from the Sacramento Delta to farmers in the Central Valley.<sup>85</sup> In fact, in February 2014 it was announced that the Exchange Contractors would only receive forty percent, instead of seventy-five percent, of their contractual water during a critical year.<sup>86</sup> The Federal Government guaranteed this water to the Exchange Contractors during the California Valley Project of 1939.<sup>87</sup> The Exchange Contractors now have the right to obtain water from the San Joaquin and Kings Rivers

---

<sup>79</sup> *Id.*

<sup>80</sup> See Robbins, *supra* note 28.

<sup>81</sup> California Department of Fish and Wildlife, WILDLIFE.CA.GOV, <https://www.wildlife.ca.gov/Conservation/CESA> (last visited Oct. 29, 2014).

<sup>82</sup> THE ASSOCIATED PRESS, *California Judge Helps Declining Fish*, N.Y. TIMES, Sep. 2, 2007, [http://www.nytimes.com/2007/09/02/us/02delta.html?\\_r=0](http://www.nytimes.com/2007/09/02/us/02delta.html?_r=0).

<sup>83</sup> *Id.*

<sup>84</sup> Max Schulz, *Emptying Reservoirs in the Middle of a Drought*, THE AMERICAN SPECTATOR, Sept. 2009, <http://spectator.org/articles/40982/emptying-reservoirs-middle-drought>.

<sup>85</sup> See Maven, *Reclamation Notifies San Joaquin River Exchange Contractors Authority That They Will Only Receive 40% of Their Entitlement, Far Below Their Contractual 75% Critical Year Entitlement*, MAVEN'S NOTEBOOK (Feb. 17, 2014), <http://mavensnotebook.com/2014/02/17/this-just-in-reclamation-notifies-san-joaquin-river-exchange-contractors-authority-that-they-will-only-receive-40-of-their-entitlement-far-below-their-contractual-75-critical-year-entitlement/>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

to satisfy their water needs.<sup>88</sup> Consequently, a greater strain has been placed on the districts of the Federal Contractors.<sup>89</sup> Not only are the irrigation districts of the Federal Contractors struggling to stay afloat due to dry conditions, but they are also forced to share what little they have with the Exchange Contractors who have been limited by poor conditions and restriction of water flow through the Delta.<sup>90</sup> The impact on the members of the Federal Contractors is well explained on the website of the Westlands Water District, a district that serves the areas around Fresno, California.<sup>91</sup> It states:

Unlike water agencies with more abundant supplies, Westlands must allocate (ration) water to its farmers, even in the wettest years. The District's primary annual contract entitlements, plus reassignments contracts for a full entitlement, from the Central Valley Project total 1,193,000 acre-feet. The annual safe yield of the confined underground aquifer adds another 135,000 to 200,000 acre-feet. Thus, the total water available is about 215,000 acre-feet short of the 1,500,000 acre-feet required to irrigate the entire District.<sup>92</sup>

Water scarcity in California is not a new issue.<sup>93</sup> In the past, when such issues arose, farmers expressed interest in selling their water as a method of resolving shortages and capitalizing on a financial opportunity.<sup>94</sup> In 2008, an article in USA Today entitled *Calif. Farmers Want to Sell Water* was written about the increasing number of farmers wanting to sell their excess water.<sup>95</sup> The article stated that farmers could collect more money by selling their water than by harvesting crops.<sup>96</sup> Because California water rights operate on a "first-come, first-served" basis, farmers in irrigation districts who were late to the game of water rights are asking to buy water from other farmers

---

<sup>88</sup> *See id.*

<sup>89</sup> *See* WESTLANDS WATER DISTRICT, *Water Transfers*, <http://wwd.ca.gov/water-management/water-supply/water-transfers/> (last visited Oct. 30, 2014); *see also* Robbins, *supra* note 28.

<sup>90</sup> *See* MAVEN, *supra* note 85; THE ASSOCIATED PRESS, *supra* note 82 (noting the court order restricting the flow of water through the Delta has restricted the amount of water the Exchange Contractors are permitted to use for irrigation); *see also* Robbins, *supra* note 28.

<sup>91</sup> *See* WESTLANDS WATER DISTRICT, *supra* note 71.

<sup>92</sup> *Id.*

<sup>93</sup> *See* BURKE, *supra* note 73.

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

who are willing to sell theirs.<sup>97</sup> Some farmers are offering to pay thousands of dollars per acre-foot to other farmers in districts where the cost of water is approximately thirty dollars per acre-foot.<sup>98</sup> It makes financial sense for a farmer to sell water to another farmer willing to pay top dollar.<sup>99</sup> Not only would the farmer selling the water benefit, but the farmer receiving the water would be able to keep his farm operational.<sup>100</sup> Although such a mutually beneficial arrangement seems simple enough, actual implementation is not quite that easy.<sup>101</sup>

### *C. Irrigation Districts Restricting the Transfer of Water*

Considering the massive aqueduct system engineered in California, inter-district water transactions between farmers appear to be a logical way to solve water shortages, requiring simple bookkeeping.<sup>102</sup> Sellers forfeit their rights to pull excess water from the state's aqueduct and buyers are then permitted to use the amounts purchased.<sup>103</sup> Unfortunately, the reality is not that simple because there are certain water districts in the State that restrict the trade of water between farmers.<sup>104</sup> According to TID's 2012 Agricultural Water Management Plan, the district will allow the sale of surplus water, but *only* to lands adjacent to TID.<sup>105</sup> The adjacent water districts to TID consist of the other Tributary Agencies (Merced, Modesto, and Oakdale).<sup>106</sup> Most of the districts in the Tributary Agencies have similar rules.<sup>107</sup> MID's Rules and Regulations Governing Distribution of Water state that the board of directors determines whether any water can be sold outside the district.<sup>108</sup> In many cases, the water is simply "not allowed to move."<sup>109</sup> In 2013, Modesto Irrigation District, TID, and MID pumped

---

<sup>97</sup> CHARLES, *supra* note 23.

<sup>98</sup> *Id.*

<sup>99</sup> See BURKE, *supra* note 73; see also Edward P. Lazear, *Government Dries Up California's Water Supply*, THE WALL STREET JOURNAL, June 27, 2014, at A6.

<sup>100</sup> See LAZEAR, *supra* note 99.

<sup>101</sup> See CHARLES, *supra* note 23.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19.

<sup>106</sup> See Robbins, *supra* note 28; see also Presentation of the Tributary Agencies, *supra* note 54.

<sup>107</sup> See Robbins, *supra* note 28.

<sup>108</sup> MERCED IRRIGATION DISTRICT, *supra* note 61.

<sup>109</sup> CHARLES, *supra* note 23.

a combined 185,625 acre-feet of ground water, but MID was the only district that sold water outside its district.<sup>110</sup>

It appears that these restrictions set by irrigation districts in comparatively water-rich areas like Turlock keep the much-needed water in those areas and out of the more “thirsty” districts like Westlands Water District.<sup>111</sup> Westlands, a member of the Federal Contractors, has faced hard times the last few years.<sup>112</sup> Due to the inability to adequately irrigate the district, many of its farmers have had to seek water from other farmers.<sup>113</sup> However, some of the nearest districts are a part of the Exchange Contractors and due to the agreement already in existence between the Exchange Contractors and Federal Contractors, any water acquired from the Exchange Contractors must be accomplished through an exchange.<sup>114</sup> Consequently, for every acre-foot of water Westlands obtains from the Exchange Contractor, the district is obligated to return the same quantity of water within ten years.<sup>115</sup> The current water supply, and unreliability of water in the future, makes it too risky for Westlands to confidently commit to such an exchange.<sup>116</sup> As a result, farmers of the Federal Contractors districts are looking to trade water with districts of the Tributary Agencies.<sup>117</sup>

These districts operate differently than the others.<sup>118</sup> Since the districts of the Tributary Agencies essentially own the water rights, rather than the farmers, the district’s board of directors has the authority to approve or disapprove each sale of water to buyers outside

---

<sup>110</sup> J.N. Sbranti, *Bee Special Report: Continuing to Pump, San Joaquin Valley Irrigation Districts Selling Surplus*, MODESTO BEE, Mar. 15, 2014, <http://www.modbee.com/news/special-reports/groundwater-crisis/article3161992.html>.

<sup>111</sup> See CHARLES, *supra* note 23.

<sup>112</sup> See *Westlands Water District Water Supply 1988 Through 2014*, WESTLANDS WATER DISTRICT (2014), available at <http://wwd.ca.gov/wp-content/uploads/2014/06/Water-Supply-Charts.pdf>.

<sup>113</sup> See CHARLES, *supra* note 23.

<sup>114</sup> See Robbins, *supra* note 28; see also WESTLANDS WATER DISTRICT, *supra* note 71.

<sup>115</sup> WESTLANDS WATER DISTRICT, *supra* note 71.

<sup>116</sup> See *id.*; see also *Westlands Water District Water Supply 1988 Through 2014*, *supra* note 112.

<sup>117</sup> See CHARLES, *supra* note 23.

<sup>118</sup> See Robbins, *supra* note 28.

the district.<sup>119</sup> As illustrated earlier, the selling of water outside these districts is not a common occurrence.<sup>120</sup> Furthermore, some of these districts (i.e. TID) will not even allow water to be transferred to non-adjacent districts.<sup>121</sup>

Where does this leave farmers who belong to the Federal Contractor districts? They were late to the game of California water rights and are reliant on a contract established by the Federal Government.<sup>122</sup> The extreme drought, the whims of an exchange contract, and environmental laws have left them looking for help.<sup>123</sup> Discouragingly, the boards of the Tributary districts have been largely unresponsive and slow to trade.<sup>124</sup> This unresponsiveness and unwillingness to trade resemble the acts of many robber barons of the Sherman Act era.<sup>125</sup>

### III. CONVERGING WATER AND ANTITRUST LAWS

#### A. California Water Code and Theories of Property

It is essential to verify the legality of the trade of water between farmers. According to California Water Code section 1011(b), “water, or the right to the use of water, as a result of water conservation efforts, may be sold, leased, exchanged, or otherwise transferred.”<sup>126</sup> The California legislature encourages the free trade of water under section 475, which states, “[V]oluntary water transfers between water *users* can result in a more efficient use of water, benefiting both the buyer and the seller . . . (and) transfers of surplus water . . . can help alleviate water shortages, save capital outlay development costs, and conserve water and energy.”<sup>127</sup> These codes demonstrate that the transferring of water between farmers is not only legal but encouraged.<sup>128</sup> Moreover, section 1014 of the Water Code states that “[T]he transfer of water, shall not cause, or be the basis of causing, a

---

<sup>119</sup> *Id.*; see generally MERCED IRRIGATION DISTRICT, *supra* note 61; see also TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19.

<sup>120</sup> See SBRANTI, *supra* note 110.

<sup>121</sup> TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19.

<sup>122</sup> CHARLES, *supra* note 23.

<sup>123</sup> See WESTLANDS WATER DISTRICT, *supra* note 71.

<sup>124</sup> See SBRANTI, *supra* note 110.

<sup>125</sup> See LANDBURG, *supra* note 8, at 33.

<sup>126</sup> CAL. WATER CODE § 1011(b) (1979).

<sup>127</sup> CAL. WATER CODE § 475 (1986).

<sup>128</sup> *Id.*; CAL. WATER CODE § 1014 (1999).

forfeiture of any water right to use the water.”<sup>129</sup> In essence, California has given farmers the green light to transfer any excess water between themselves without fear of losing their rights to that water.<sup>130</sup>

These codes create the illusion that free trade of water between farmers is encouraged and should operate in a free market.<sup>131</sup> This principle is reinforced by theories in property law, which seek to maximize societal happiness.<sup>132</sup> Essentially, “[P]roperty exists to ensure that owners use resources in an *efficient* manner—that is, in a manner that maximizes economic value defined by a person’s willingness to pay.”<sup>133</sup> “Property rights must have three features: universality, exclusivity, and *transferability*.”<sup>134</sup> Without transferability, the economy becomes stagnant and “no gains from trade can be made.”<sup>135</sup> The restrictions in place by the Tributary Agencies inhibit trade and the potential gains of the farmers from these trades.<sup>136</sup> Eliminating such impediments to trade was one of the goals of the Sherman Antitrust Act.<sup>137</sup>

### B. The Sherman Antitrust Act

The policy behind federal antitrust laws was clearly stated by Senator John Sherman; if the U.S. would not suffer a king as a political leader, the U.S. should not endure a king to rule over the economic markets of the country.<sup>138</sup> Title 15 of the United States Code, also known as the Sherman Antitrust Act, declares “every contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce is illegal.”<sup>139</sup> Section 12 of the code clarifies that this law applies to corporations and associations existing under or

---

<sup>129</sup> CAL. WATER CODE § 1014 (1999).

<sup>130</sup> *See id.*

<sup>131</sup> *See* CAL. WATER CODE, *supra* notes 128-130.

<sup>132</sup> *See* Stuart L. Somach & Andrew M. Hitchings, *Antitrust Considerations in Water Marketing*, 11 NATURAL RESOURCES & ENVIRONMENT 26, 26 (1996) (discussing property rights and how it relates to water rights).

<sup>133</sup> JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 5 (2<sup>nd</sup> ed. 2012).

<sup>134</sup> *Id.*

<sup>135</sup> *See id.*

<sup>136</sup> *See* TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19; *see also* MERCED IRRIGATION DISTRICT, *supra* note 61; *see also* CHARLES, *supra* note 23.

<sup>137</sup> *See* HOLDER, *supra* note 10.

<sup>138</sup> *Id.*

<sup>139</sup> 15 U.S.C.A. § 1 (2004).

authorized by the laws of the United States.<sup>140</sup> A trust is clearly defined in the California Business and Professions Code as a “combination of capital, skill, or acts by two or more persons for the purpose of creating or carrying out restrictions in trade or commerce.”<sup>141</sup>

Each of the districts within the Tributary Agencies are controlled and directed by a board of directors.<sup>142</sup> Those directors have established various rules and regulations that limit trade of water outside of the district.<sup>143</sup> TID requires that water traded outside the district be traded only with adjacent districts.<sup>144</sup> MID has placed heavy controls on whether or not water can be traded outside the district.<sup>145</sup> According to its rules and regulations, water transferred outside the district must first be approved by its board of directors.<sup>146</sup> Such restrictions have significantly reduced the trade of water between farmers within Tributary Agencies and farmers outside.<sup>147</sup> These restraints have largely kept the water within the control of the Agencies, which purposefully limit the trade of water and effectively hinder agricultural commerce throughout the Valley.<sup>148</sup> These facts indicate that the Tributary Agencies are combining capital, skill, and committing acts to restrict trade and are thus operating as a trust.

### *C. Controlling the Market and Refusing to Deal*

After determining that the Tributary Agencies meet the legal definition of a trust, the subsequent concern is whether they have

---

<sup>140</sup> 15 U.S.C.A. § 12 (2002).

<sup>141</sup> CAL. BUS. & PROF. CODE § 16720 (1941).

<sup>142</sup> See generally TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19; see also MERCED IRRIGATION DISTRICT, *supra* note 61.

<sup>143</sup> See generally TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19; see also MERCED IRRIGATION DISTRICT, *supra* note 61.

<sup>144</sup> See generally TURLOCK IRRIGATION DISTRICT, *supra* note 27, at 19.

<sup>145</sup> See MERCED IRRIGATION DISTRICT, *supra* note 61.

<sup>146</sup> *Id.*

<sup>147</sup> See generally SBRANTI, *supra* note 110.

<sup>148</sup> See generally Garth Stapley, *Modesto Irrigation District Blocks Oakdale Water Sale to SF, For Now*, Modesto Bee, Jan. 23, 2014, <http://www.modbee.com/news/special-reports/groundwater-crisis/article3159608.html>; see also CHARLES, *supra* note 23; see also SBRANTI, *supra* note 110 (stating that these sources all provide examples of how districts within the Tributary Agencies purposefully restrain the trade of water and keep the water within those districts).

caused a restraint on the market.<sup>149</sup> Market restraint offenses are placed into one of two categories: horizontal and vertical.<sup>150</sup> Horizontal restraints are formed through collaborating competitors who sell in the same market.<sup>151</sup> Vertical restraints are formed by entities that sell at a different position in the same chain of sale.<sup>152</sup> Because the Tributary Agencies operate as separate irrigation districts rather than as partners along the same supply chain, a horizontal restraint analysis should be applied.<sup>153</sup>

There are three major types of horizontal restraints: “(1) restraints relating to pricing of goods; (2) restraints relating to allocation or division of markets; and (3) concerted refusals to deal.”<sup>154</sup> Concerted refusals to deal are the most applicable to the issue of selling water rights and occur when a “group of competitors refuse to buy from, or sell to, other competitors.”<sup>155</sup> To prove a per se violation for concerted refusals to deal, it must be shown that competitors possess “[M]arket power or unique access to a business element necessary for effective competition.”<sup>156</sup> The court will apply the per se approach where there have been “[J]oint efforts by a firm or firms to disadvantage competitors by directly denying . . . relationships the competitors need in the competitive struggle.”<sup>157</sup> If such facts are inadequate to prove a per se violation, a court must rely on an analysis based on reason.<sup>158</sup>

To prove the Tributary Agencies have violated antitrust law under concerted refusals to deal, the plaintiff must show they jointly control a significant portion of a given market or an element of business necessary to compete effectively in that market.<sup>159</sup> Such a showing is difficult where it concerns the Tributary Agencies and their respective control over the San Joaquin Valley water market because of the

---

<sup>149</sup> See Joseph N. Eckhardt & Andrea L. Hamilton, *Antitrust Law: Unreasonable Restraint of Trade Under Section 1 of Sherman Act* (2003), <http://www.mwe.com/info/pubs/complaw0305.pdf>.

<sup>150</sup> *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See *id.*

<sup>154</sup> ECKHARDT & HAMILTON, *supra* note 149.

<sup>155</sup> See *id.*

<sup>156</sup> *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 298 (1985).

<sup>157</sup> *Id.* at 294.

<sup>158</sup> See *infra* Part III.D.

<sup>159</sup> *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 296 (1985).

complex water rights system and the fluctuations in the environment from year to year.<sup>160</sup> Nonetheless, the largest industry within the San Joaquin Valley is agriculture.<sup>161</sup> “[F]ive of [the Valley’s] counties—Fresno, Kern, Tulare, Merced, and Stanislaus—rank among the state’s top ten counties in farm production.”<sup>162</sup> In order for any farm to be successful, regardless of the crop, the supply of water is an essential element to compete effectively.<sup>163</sup> Without water, plants do not grow and produce.<sup>164</sup> Without a crop, farmers cannot be competitive in the agricultural industry.<sup>165</sup> These facts establish that access to water is an element necessary to compete successfully in the agricultural market.

Farmers in districts from Chowchilla to Bakersfield are faced with a unique challenge and are arguably facing a harder time than farmers in other regions.<sup>166</sup> Farmers within the Tributary Agencies are challenged with the drought, but, unlike their farming competitors to the south, they are not faced with external districts consuming their much-needed water because of a failed federal contract.<sup>167</sup> Therefore, the ability to purchase water from the Tributary Agencies is a necessary business option for those farmers who wish to compete effectively in the agricultural market.<sup>168</sup> Are the Tributary Agencies willing to sell?

In 2013, both TID and Modesto Irrigation District did not sell any water outside their respective districts.<sup>169</sup> Modesto Irrigation District announced in March of 2014 that all water transfers must be within the district, and that no transfers outside the district would be permitted.<sup>170</sup>

---

<sup>160</sup> See PARSONS, *supra* note 22; see also Robbins, *supra* note 28.

<sup>161</sup> Valley CAN, *supra* note 65.

<sup>162</sup> *Id.*

<sup>163</sup> See David Whiting, *Plant Growth Factors: Water*, Colorado State University Extension (2011), <http://www.ext.colostate.edu/mg/gardennotes/144.pdf>.

<sup>164</sup> See *id.*

<sup>165</sup> See American Farmland Trust, *Washington Future of Farming Study: Status of Existing Programs for Protecting Agricultural Lands in Washington*, available at <http://agr.wa.gov/fof/docs/LandProtectionPrograms.pdf>.

<sup>166</sup> See MAVEN, *supra* note 85 (noting that the Exchange Contractors hold superior rights to the available water from the San Joaquin River than the districts between Chowchilla and Bakersfield); see also WESTLANDS WATER DISTRICT, *supra* note 71 (noting that these districts must rely on water that will be allocated to other districts and on contracts with other districts rather than direct rights to water).

<sup>167</sup> See Robbins, *supra* note 28.

<sup>168</sup> See CHARLES, *supra* note 23.

<sup>169</sup> SBRANTI, *supra* note 110.

<sup>170</sup> *Drought Edition*, 1 THE IRRIGATOR, no. 1, March 2014, available at [http://www.mid.org/water/drought/documents/TheIrrigator\\_2.pdf](http://www.mid.org/water/drought/documents/TheIrrigator_2.pdf).

This is not due to a lack of desire from surrounding districts and municipalities to acquire water from the area.<sup>171</sup> In 2013, Oakdale Irrigation District sold 40,000 acre-feet of water outside its district, and has attempted to capitalize on a free water market.<sup>172</sup> It has also contemplated selling some of its water to districts in the “Fresno area and beyond.”<sup>173</sup> Regardless of Oakdale’s interest and success in inter-district water transactions, in January of 2014, the Modesto Irrigation District obstructed the Oakdale Irrigation District from selling water to the City of San Francisco.<sup>174</sup> Since Modesto Irrigation District shares water rights with San Francisco on the Tuolumne River, Modesto Irrigation must provide its consent for the trade between San Francisco and Oakdale, which it did not.<sup>175</sup>

The districts within the Tributary Agencies are preventing water trades with other districts, and are even preventing other irrigation districts, like Oakdale, from trading water as they see fit.<sup>176</sup> This is strong evidence that districts within the Tributary Agencies have made concerted refusals to sell water to other districts and municipalities in need of the Agencies’ water.<sup>177</sup> These refusals largely influence the agricultural markets of the South Valley.<sup>178</sup> Westlands Water District services nearly 550,000 acres of cropland and, in 2014, only had enough water to properly supply an estimated 400,000 acres.<sup>179</sup> The remaining 150,000 acres of profitable agricultural land was left unirrigated.<sup>180</sup> This is just an example of one irrigation district suffering from the prohibition of inter-district water exchange enforced by districts within the Tributary Agencies.

---

<sup>171</sup> See STAPLEY, *supra* note 148; see also SBRANTI, *supra* note 110; see also Eric Caine, *Modesto Terminates Water Transfer to SFPUC, From the Tuolumne River Trust*, THE VALLEY CITIZEN, Sep. 20, 2012, <http://thevalleycitizen.com/modesto-terminates-water-transfer-to-sfpuc-from-the-tuolumne-river-trust/>.

<sup>172</sup> SBRANTI, *supra* note 110; STAPLEY, *supra* note 148.

<sup>173</sup> STAPLEY, *supra* note 148.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 296 (1985); see also STAPLEY, *supra* note 148; see also SBRANTI, *supra* note 110; see also CAINE, *supra* note 177.

<sup>178</sup> See *Westlands Water District Water Supply 1988 Through 2014*, *supra* note 112; WESTLANDS WATER DISTRICT, *supra* note 71.

<sup>179</sup> *Westlands Water District Water Supply 1988 Through 2014*, *supra* note 112.

<sup>180</sup> See *id.*

By preventing the trade of water, a vital resource for farmers, irrigation districts of the Tributary Agencies jointly control “[A]n element essential to effective competition in the market.”<sup>181</sup> Though such control might be beneficial to these districts, it puts them in direct conflict with federal antitrust laws and meets the elements of a per se violation of concerted refusal to deal.<sup>182</sup> However, if a court were to determine that the conduct of the Tributary Agencies does not rise to the level of a per se violation, it would resort to a rule-of-reason analysis.<sup>183</sup>

#### *D. Rule-of-Reason Analysis*

Pursuant to a rule-of-reason analysis, trade restraints through concerted refusal to deal are deemed lawful when the “...negative effects on competition are either outweighed by offsetting competitive benefits or supported by a reasonable business justification.”<sup>184</sup> When faced with a drought the irrigation districts need to ensure adequate water is circulated throughout their districts before any water can be sold externally.<sup>185</sup> Under rules of the California Environmental Quality Act, in order for any transfer of water to occur outside a particular district, the district must identify any significant environmental impacts of its actions and avoid or mitigate those, if feasible.<sup>186</sup> Also, all inter-district trades must first be open for protest by environmental groups.<sup>187</sup> For the districts to identify any significant environmental impact, and allow protests to all proposed water trades, would require an extensive investigation.<sup>188</sup> Such thorough evaluations and critiques take large amounts of time, money, and effort to obtain approval.<sup>189</sup> These are strong reasonable business justifications for refusing to trade with outside districts. Regardless, Oakdale and Manteca Irrigation Districts sold a combined 80,000 acre-feet of water to outside districts

---

<sup>181</sup> Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 296 (1985).

<sup>182</sup> See *supra* Part III.B-C.

<sup>183</sup> Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 297 (1985).

<sup>184</sup> ECKHARDT & HAMILTON, *supra* note 149.

<sup>185</sup> Robbins, *supra* note 28.

<sup>186</sup> California Natural Resources Agency, <http://resources.ca.gov/ceqa/more/faq.html> (last visited Oct. 31, 2014).

<sup>187</sup> Robbins, *supra* note 28.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

in 2013, each earning nearly \$4,000,000 in revenue from the sales.<sup>190</sup> This demonstrates not only that inter-district water transfers are a lucrative practice, but also that it is possible to navigate the bureaucracy required to conduct such transactions.<sup>191</sup>

If the court failed to find a per se violation of a concerted refusal to deal and instead conducted a rule-of-reason analysis, the court may find that the irrigation districts of the Tributary Agencies are not in violation of antitrust laws.<sup>192</sup> However, adjacent irrigation districts successfully navigating the environmental burdens diminish the strength of this argument as a reasonable business justification<sup>193</sup>

### *E. Shielding the Irrigation Districts*

Irrigation districts alleged to have violated antitrust law may escape prosecution through a claim of state action immunity.<sup>194</sup> The state action immunity doctrine was first explained in *Parker v. Brown*, 63 U.S. 307 (1943).<sup>195</sup> The United States Supreme Court ruled that where a state authorizes restraints on competition, the state's authorization should be exempt from antitrust prohibitions.<sup>196</sup> The Court stated, "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."<sup>197</sup> This immunity directly protects states and municipalities from antitrust liability.<sup>198</sup> Forty years later this immunity was tested in a case analogous to the current irrigation issue.<sup>199</sup>

In *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9<sup>th</sup> Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), state action immunity was successfully applied.<sup>200</sup> *Kern-Tulare* involved a water transfer between Kern-Tulare Water District and the City of Bakersfield.<sup>201</sup>

---

<sup>190</sup> SBRANTI, *supra* note 110.

<sup>191</sup> *See id.*

<sup>192</sup> *See supra* notes 185-87 and accompanying text.

<sup>193</sup> *See supra* notes 187-90 and accompanying text.

<sup>194</sup> *See SOMACH & HITCHINGS, supra* note 132, at 27.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 27-8.

<sup>198</sup> *Id.* at 28.

<sup>199</sup> *See Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514, 514 (9<sup>th</sup> Cir. 1987).

<sup>200</sup> SOMACH & HITCHINGS, *supra* note 132, at 28.

<sup>201</sup> *Id.*

The court held that the City of Bakersfield was protected by this immunity when it denied Kern-Tulare Water District the ability to trade water.<sup>202</sup> Kern-Tulare Water District had entered into a contract with the City of Bakersfield.<sup>203</sup> Under the contract, the district would pay \$400,000 annually for 20,000 acre-feet of water from the city.<sup>204</sup> The contract also prohibited the district from transferring water it received from the city without the city's consent.<sup>205</sup> The water district endeavored to sell the majority of its entitlement received from the City of Bakersfield to various districts, but the city dissented.<sup>206</sup> The water, therefore, was never utilized and ultimately flowed out to the aqueduct.<sup>207</sup>

The water district alleged, *inter alia*, that by not consenting to the sale of water the city was in violation of the Sherman Antitrust Act.<sup>208</sup> The District Court ruled in favor of the water district, concluding that the city was not entitled to state action immunity because it was not sovereign.<sup>209</sup> The Court of Appeal reversed the District Court's ruling on the grounds that, though a city is not itself sovereign, the state "as sovereign" may allow such anticompetitive activities and can shield its cities.<sup>210</sup> It also stated "municipalities are empowered to furnish themselves and their inhabitants with water, consistent with beneficial and reasonable use and the prohibition against waste."<sup>211</sup> Irrigation districts of the Tributary Agencies largely operate as special districts under the State government.<sup>212</sup> This could be a strong argument in

---

<sup>202</sup> Kern-Tulare Water District v. City of Bakersfield, 828 F.2d 514, 518 (9<sup>th</sup> Cir. 1987).

<sup>203</sup> *Id.* at 516.

<sup>204</sup> *Id.*

<sup>205</sup> SOMACH & HITCHINGS, *supra* note 132, at 28 (1996); Kern-Tulare Water District v. City of Bakersfield, 828 F.2d 514, 516 (9<sup>th</sup> Cir. 1987).

<sup>206</sup> Kern-Tulare Water District v. City of Bakersfield, 828 F.2d 514, 516 (9<sup>th</sup> Cir. 1987).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 518.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 519.

<sup>212</sup> *See generally* Turlock Irrigation District, *supra* note 56 (providing that an example of an irrigation district in the Tributary Agencies that operates as a special district).

support of the Tributary Agencies being protected under the state action immunity.<sup>213</sup>

However, the same argument could be used against them in that the Tributary Districts act as special districts under state government and are *not* in fact a state, city, or county government.<sup>214</sup> The Tributary Districts are governed by a board of directors that make decisions independent of the state's interests.<sup>215</sup> This is demonstrated by the inconsistencies in how irrigation districts regulate their respective constituents throughout the state.<sup>216</sup> Some districts, like those of the Tributary Agencies, highly restrict the trade of water; while other districts, like Westlands, maintain a more free trade approach to water transactions.<sup>217</sup> Hence, special districts should *not* be protected by the state action immunity.<sup>218</sup> This immunity should be reserved for actual government bodies.<sup>219</sup> If applied to special districts it would undermine the policy of the Sherman Act.<sup>220</sup> The policy of antitrust laws is to prevent U.S. economic markets from being dictated by a single individual or group, just as the U.S. sought to remove itself from under the political rule of a king.<sup>221</sup>

#### IV. RECOMMENDATIONS

##### A. Antitrust Litigation

The Sherman Antitrust Act should be applied to irrigation districts comparable to those of the Tributary Agencies.<sup>222</sup> Many of these irrigation districts are operating as trusts by controlling available

---

<sup>213</sup> See Government Code § 16271(d) (1978); see also *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514, 519 (9<sup>th</sup> Cir. 1987).

<sup>214</sup> See Senate Local Government Committee, California State Senate, *What's So Special About Special Districts?* (4<sup>th</sup> ed. 2010), available at <http://www.rsrpd.org/admin/Whatsso.pdf>.

<sup>215</sup> *Id.*

<sup>216</sup> See Robbins, *supra* note 28.

<sup>217</sup> See *id.*; see also *TURLOCK IRRIGATION DISTRICT*, *supra* note 27, at 19; see also *THE IRRIGATOR*, *supra* note 170; see also *MERCED IRRIGATION DISTRICT*, *supra* note 61.

<sup>218</sup> See Robbins, *supra* note 28; see also *SENATE LOCAL GOVERNMENT COMMITTEE*, *supra* note 214; see also Government Code § 16271(d) (1978).

<sup>219</sup> See Robbins, *supra* note 28; see also *SENATE LOCAL GOVERNMENT COMMITTEE*, *supra* note 214; see also California Government Code § 16271(d) (1978).

<sup>220</sup> See *HOLDER*, *supra* note 10.

<sup>221</sup> *Id.*

<sup>222</sup> See *supra* Part III.B-C.

water, precluding inter-district water trades, and due to the resulting impact these actions have on competing farmers.<sup>223</sup> These restrictions of trade are not only harming Valley residents and farmers but are violating federal law in a manner reminiscent of the robber barons of the 1800's.<sup>224</sup> These irrigation districts should be stripped of the power to control such a vital resource in the way Standard Oil was stripped of its monopoly on the petroleum market.<sup>225</sup>

### *B. Arguments for Water Marketing*

Despite strong arguments for antitrust litigation, a judicial resolution favorable to the farmers in the South Valley may be a long, and potentially fruitless, battle.<sup>226</sup> Due to precedent cases, like *Kern-Tulare*, a court may find that irrigation districts should enjoy immunity from antitrust laws as a branch of government or because of satisfactory business justifications.<sup>227</sup> Notwithstanding the potential impasse through litigation, farmers may obtain relief by lobbying legislation for a water rights system favoring water marketing as an appropriate method of reallocating water supplies.<sup>228</sup> Water marketing is “the transfer, temporary or permanent, of water rights from one purpose or place of use to another, without the loss of priority.”<sup>229</sup> The concept of water marketing has been supported by many scholars as a partial solution to water shortages in the west.<sup>230</sup> It is founded on the economic theory that “free market forces will dictate how water is allocated.”<sup>231</sup> An advantage of this is the prospect for allocating existing water supplies to the most valuable use without external interference.<sup>232</sup> This would diminish the need to develop new water sources.<sup>233</sup>

Mr. Edward Lazear, former chairman of the President's Council of Economic Advisers and current professor at Stanford University's

---

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *See supra* Part III.E.

<sup>227</sup> *See id.*

<sup>228</sup> *See* SOMACH & HITCHINGS, *supra* note 132.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

Graduate School of Business, wrote a persuasive article in *The Wall Street Journal* in June of 2014 supporting water marketing.<sup>234</sup> He stated, “[W]eather isn’t the only problem: Government-dictated prices, coupled with restrictions on the transfer of water, have made a bad situation much worse.”<sup>235</sup> Lazear posits that the first step to solving California’s water problem is “to let all owners of water sell their rights with minimal government limitations,” explaining that, “this would ensure that water goes to its highest valued use.”<sup>236</sup>

Richard Howitt, an economist at the University of California, Davis, has argued that “[I]rrigation water should flow more freely to places where it is needed most.”<sup>237</sup> He feels that a free market in water would benefit everyone, and that it is “good for both producers and consumers to have more efficient use of our basic natural resource.”<sup>238</sup>

Australia has put the idea of water marketing to the test for the past fifteen years and the economic impact has been significant.<sup>239</sup> It was estimated that water trading between farmers increased Australia’s gross domestic product by \$220 million in 2008.<sup>240</sup> The report also indicated that between 2005 and 2008 the available water for agriculture dropped by fifty-three percent.<sup>241</sup> During this same period, the gross agricultural production only fell by twenty-nine percent.<sup>242</sup> The fact that the reduction in agricultural yield was less than the decrease in available water indicates the efficiency of free water trade.<sup>243</sup> “The ability to trade water has provided [Australian farmers with] flexibility in water use, production and farm management that was not previously available.”<sup>244</sup> Farmers in California’s Central Valley should be entitled to these same proven benefits.

---

<sup>234</sup> See LAZEAR, *supra* note 99.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> CHARLES, *supra* note 23.

<sup>238</sup> *Id.*

<sup>239</sup> NATIONAL WATER COMMISSION OF AUSTRALIA, WATER MARKETS IN AUSTRALIA: A SHORT HISTORY 3 (2011), *available at* [http://www.nwc.gov.au/\\_\\_data/assets/pdf\\_file/0004/18958/Water-markets-in-Australia-a-short-history.pdf](http://www.nwc.gov.au/__data/assets/pdf_file/0004/18958/Water-markets-in-Australia-a-short-history.pdf).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (noting that available water dropped by 53% while crop yield only dropped 29%).

<sup>244</sup> *Id.*

## V. CONCLUSION

In order to solve the water issues currently placed before California farmers, special districts, like the irrigation districts of the Tributary Agencies, should not be protected from federal antitrust law through the state action immunity.<sup>245</sup> Irrigation districts are not the actual government and, therefore, should not be privileged to have this same protection.<sup>246</sup> Failure to reduce the power of individual water districts to prohibit the trade of water between consenting farmers will only serve to exacerbate the harsh economic realities created by an unrelenting drought.<sup>247</sup>

In addition, the trade of water should be opened, similar to methods used in Australia, and operated without restraint from any third party aside from actual government agencies.<sup>248</sup> This would place the decisions of trade in the hands of the farmers throughout the state, unrestrained by district boards.<sup>249</sup> The trade of water would be controlled by free market forces, and, "...ensure that water goes to its highest valued use."<sup>250</sup> Individual farmers throughout the Valley would be liberated to exercise efficient trade and develop their business.<sup>251</sup>

Without such drastic action, farming operations like that owned by Mr. Lujan, the small pistachio farmer, will be left to die of thirst in the shadow of the new Standard Oil.

JEFFREY C. CASTLETON<sup>252</sup>

---

<sup>245</sup> See *supra* notes 214-18 and accompanying text.

<sup>246</sup> See *supra* note 212 and accompanying text.

<sup>247</sup> See *supra* Part III.B-C; see also *supra* Part IV.B.

<sup>248</sup> See *supra* Part IV.A.

<sup>249</sup> See *supra* note 237 and accompanying text.

<sup>250</sup> See LAZEAR, *supra* note 99.

<sup>251</sup> See *supra* notes 237, 239, 14-19 and accompanying text.

<sup>252</sup> J.D. Candidate, San Joaquin College of Law, 2017. This comment would not have been possible without the loving support of my wife and children who have sacrificed so much in my pursuit to become a lawyer. I love and appreciate my parents, in-laws, and siblings who have assisted my family and me through law school. Also, I am grateful for a wonderful editorial board and faculty advisors that sacrificed so much time and energy as they provided invaluable insight to my comment.