Case No.
**S226036**

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

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CITY OF SAN BUENAVENTURA,

Plaintiff, Cross-defendant and Appellant,

v.

UNITED WATER CONSERVATION DISTRICT et al.,

Defendants, Cross-complainants and Appellants.

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# APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE TESORO REFINING AND MARKETING COMPANY LLC IN SUPPORT OF CITY OF SAN BUENAVENTURA

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Review Granted From a Judgment of the Court of Appeal,
Second Appellate District, Division Six (B251810)
(Santa Barbara Co. Super. Ct. Nos.
VENCI 00401714 and VENCI 1414739)

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## APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO CHIEF JUSTICE TANI CANTIL-SAKAUYE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, Tesoro Refining and Marketing Company LLC (Tesoro) submits this application for leave to file the accompanying amicus curiae brief in support of plaintiff, cross-defendant and appellant City of San Buenaventura (the City). Tesoro respectfully urges this court to reverse the judgment of the Court of Appeal with directions to affirm the trial court's judgments for the City.

Tesoro is an independent refiner and marketer of petroleum products.[1] Tesoro has owned, held and leased adjudicated pumping rights within various basins in California since 2007. Tesoro has been and is a party to a number of lawsuits in California involving disputes over water rights and the charges imposed to extract groundwater. In the course of these various lawsuits, Tesoro has become familiar with numerous issues, including those before the court in this case.

From Tesoro's perspective, this case raises important issues regarding the relationship between groundwater and the property from which it is extracted. While the parties' briefs on the merits have discussed these issues, there are authorities which do not appear to have been adequately addressed. Tesoro believes that this court can better resolve the issues by considering the authorities presented here.

In response to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. This brief was prepared solely by the undersigned attorneys. No party, counsel for a party, or other

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[1] Tesoro is a wholly-owned subsidiary of Tesoro Corporation, a publicly-traded company.

person made any monetary contribution to fund the preparation or submission of this proposed brief. Accordingly, Tesoro respectfully requests leave to file its brief in support of the City.

Respectfully submitted,

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## BRIEF OF AMICUS CURIAE

## INTRODUCTION

This court granted review to determine (1) whether groundwater extraction charges, imposed by defendant, cross-complainant and appellant United Water Conservation District (the District) to fund recharge and protection of groundwater, are "property-related" and thus subject to article XIII D of the California Constitution, and (2) whether the three-to-one rate ratio mandated by Water Code section 75594 violates that same constitutional provision. Amicus curiae Tesoro Refining and Marketing Company, LLC (Tesoro) submits this brief in support of plaintiff, cross-defendant and appellant City of San Buenaventura (the City) to assist this court in determining these issues. As will be shown below, the Court of Appeal in this case failed to address longstanding case law concerning the property rights inherent in the extraction of groundwater, misinterpreted the available evidence of voter intent concerning Proposition 218, and misapplied *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830. The extraction of groundwater from property is "incidental to property ownership," and therefore the District's charges are subject to the restrictions of article XIII D.

## ARGUMENT

### I

### The Extraction of Groundwater is a Right "Appurtenant to" and Therefore "Incidental to" Property Ownership.

In order to determine whether the extraction of groundwater is incidental to property ownership, the nature of the right to extract must be examined. The Court of Appeal attempted to do this, but its analysis was deeply flawed.

The right to extract groundwater falls into one of two categories under California law: overlying, appropriative, or prescriptive. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.) Here, the City pumps water largely for the benefit of its residents for public use; thus, its rights are appropriative in nature.[2] "Any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed." (*Barstow*, *supra*, 23 Cal.4th at p. 1241, internal quotation marks and citation omitted.)

As the City correctly observes in its opening brief, this court has held that, when a landowner operates a waterworks for commercial distribution of water to persons beyond his or her property, both the works and any distribution system connected to it are appurtenances to the owner's property. (*Trask v. Moore* (1944) 24 Cal.2d 365, 370; see City's opening brief on the merits at p. 34.) Courts of Appeal have consistently applied this concept. (See *Garden Water Corp. v. Fambrough* (1966) 245 Cal.App.2d 324, 327 [water system for distribution to subdivision homes was real property]; *Harper v. Buckles* (1937) 19 Cal.App.2d 481, 484-485.) The appropriative water right being exercised by such an owner is also appurtenant to the land where the works are situated. To the extent

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[2] The Court of Appeal's opinion observes that the City uses some of the water it pumps for itself, "for commercial rather than residential purposes." (Typed opn. at p. 19.) It is thus possible that a small portion of the City's rights could be characterized as overlying rather than appropriative. Classifying the City's rights as overlying would not change the analysis of whether the charges at issue here are property related.

appropriative rights are appurtenant to specific parcels of land, any charge directly burdening their exercise is "incidental to property ownership."

In addition, this court has held that an appropriative right is a type of property regardless of whether it is appurtenant to a particular parcel. (*Wright v. Best* (1942) 19 Cal.2d 368, 380 ["a water right by appropriation is independent of ownership and possession of land and subject to sale separately from it"]; *id.* at p. 381 [party's predecessor "was the owner of an appropriative right, severable and alienable from the land to which it is appurtenant"]; *id.* at p. 382 ["An appropriative right constitutes an interest in realty . . . . It can therefore appropriately serve as a servient estate to which an easement may be annexed"].)

In *City and County of San Francisco v. Alameda County* (1936) 5 Cal.2d 243, the issue was whether a county could collect property taxes on water rights a city in another county had purchased from a water company, which in turn had acquired them from riparian owners in the taxing county. The city asserted that the water rights were exempt public property. (Former Cal. Const., art. XIII, § 1; see now Cal. Const., art. XIII, § 3.) The county argued that they fell under a 1914 constitutional amendment permitting the taxation of "lands and . . . improvements" owned by a local public entity outside the taxing county's borders, provided the rights were subject to taxation when the entity acquired them. (Former Cal. Const., art. XIII, § 1; see now Cal. Const., art. XIII, § 11.) This court framed the issue as "whether the water rights acquired by [the city] by purchase from the . . . [w]ater [c]ompany were included within the term 'land' as used in the constitutional amendment, and, as such, therefore separately assessable in Alameda County." (5 Cal.2d at p. 246.) Relying heavily on the purpose of the amendment (discussed below), this court answered this question in the affirmative.

Similarly, in *Waterford Irr. Dist. v. Stanislaus County* (1951) 102 Cal.App.2d 839, a county sought to tax an irrigation district's right to divert river water. The district contended that "the water right, being an appropriative right and not riparian to nor appurtenant to any land, does not constitute land nor improvement on land within the meaning of those terms as used in the constitutional provisions." (*Id.* at p. 842.) The *Waterford* court agreed that the origin of the rights at issue distinguished this court's decision in *City and County of San Francisco, supra*, which "was primarily based upon the stipulated fact that the water rights there taxed were riparian in origin; and the holding that they were embraced within the meaning of the word 'land' as used in the Constitution was arrived at by considering the original nature of those rights as having been part and parcel of the riparian lands." (*Id.* at p. 843-844.) Despite this distinction, however, the *Waterford* court concluded that the water rights were taxable. It quoted at length from a treatise declaring that appropriative water rights are a species of real property: " 'A water-right of appropriation is real estate, independent of the ditch for carrying the water, and independent of ownership or possession of any land and independent of place of use or mode of enjoyment, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose . . . .' " (*Id.*, at p. 844, quoting 1 Wiel, Water Rights in the Western States (3d ed. 1911) § 288, p. 304.)

Finally, the extraction of groundwater from the land is in many ways akin to the extraction of oil and gas. This court has long recognized that "the right to drill for and extract oil and gas from the land" is a property right for tax purposes. (*Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal.2d 585, 595-596; *Graciosa Oil Co. v. Santa Barbara* (1909) 155 Cal. 140, 144-146.)

Based on the above authorities, none of which was mentioned in the Court of Appeal's opinion below, the rights burdened by a groundwater extraction charge are a species of real property, regardless of whether the charge is "incidental" to the ownership of any overlying or other property. Since an appropriative water right is itself real property, the charge in question directly burdens the exercise of that right, and the charge must therefore be deemed to be "imposed . . . upon" the City "as an incident of property ownership." (Art. XIII D, § 2, subd. (e).)

## II

## The Voters Intended Proposition 218 to Apply to Charges Such as Those Imposed by the District in This Case.

The District may argue that neither *City and County of San Francisco* nor *Waterford* rested solely on property law concepts. Both courts cited the policy objectives that apparently led voters to adopt the 1914 constitutional amendment limiting the exemption of public property from taxation. (*City and County of San Francisco, supra,* 5 Cal.2d at pp. 245-247; *Waterford, supra,* 102 Cal.App.2d at p. 847.) Just as in *City and County of San Francisco* and *Waterford,* however, an examination of the evidence concerning the voters' intent in passing Proposition 218 (and thereby adopting article XIII D) confirms that the voters intended to extend that constitutional provision to reach to the charges imposed by the District. The Court of Appeal's analysis of voter intent was incomplete.

According to the Legislative Analyst's "Overview" of Proposition 218, its chief effects would be to "[r]educe the amount of fees, assessments, and taxes that individuals and businesses pay," and "[d]ecrease spending for local public services." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73.) The argument in favor of the proposition stated that it "guarantees your right to vote on local tax

increases—even when they are called something else, like 'assessments' or 'fees' imposed on landowners." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument in favor of Prop. 218, p. 76.) It alluded repeatedly to the desirability of requiring voter approval to "raise taxes," and to some assessments and fees. (See *ibid.* ["politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees.' "].) While the argument appeared largely devoted to assessments, it characterized all offending exactions as "tax increases." (*Ibid.*) It may, however, have reflected an intent to reach monthly charges for services when it asserted that "[n]on-voted taxes on electricity, gas, water, and telephone services hit renters and homeowners hard." (*Ibid.*)

The voter pamphlet provides strong evidence that the voters expected, and thus intended, that the article would reach charges for water service. The Legislative Analyst opined that the measure would "probably" apply to "[f]ees for water . . . service." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73.) The text of the article itself establishes that the drafters viewed charges for water service as property-related fees. This implication arises from the reference to "fees or charges for sewer, water, and refuse collection services" in Article XIII D, section 6, subdivision (c), which exempts these kinds of charges from the voter ratification requirement to which all other property-related charges are subject. There would be no need to exempt these charges from that requirement unless it were expected that they would be viewed as "property related fee[s] or charge[s]." (*Ibid.*)

Finally, the Proposition 218 Omnibus Implementation Act (enacted to construe Proposition 218) defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).) Thus,

an entity "who produces, stores, supplies, treats, or distributes water necessarily provides water service." (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 595.) Just as in *Griffith*, the District's "statutory mandate to purchase, capture, store, and distribute supplemental water" constitutes water service and is therefore subject to Article XIII D.

## III

## The Court of Appeal Misinterpreted This Court's Decision in the *Apartment Association* Case.

The Court of Appeal held that *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra,* 24 Cal.4th 830, controls this case rather than this court's later decisions in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 and *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. According to the Court of Appeal, *Apartment Assn.* is dispositive because the District's pumping fee "is not imposed solely because a person owns property. Rather, it is imposed because the property is being [used to extract groundwater]." (Typed opn. at p. 20, quoting *Apartment Association, supra*, 24 Cal.4th at p. 838.)

To extent that this passage from *Apartment Assn.* can be construed as meaning that groundwater loses its relationship to the property from which it is extracted, it should be overruled as inconsistent with *Richmond* and *Bighorn*. In those cases this court concluded that the direct delivery of water to users was a property-related service such that charges for such delivery must comply with article XIII D. Similarly, the indirect delivery of water to groundwater extractors—whether by replenishment of the groundwater basin, or by measures reducing demands on it—is conceptually indistinguishable from the direct delivery of water. (*Griffith v. Pajaro Valley Water Management Agency, supra,* 220 Cal.App.4th at pp. 594-596.)

It would make no sense to hold that such "delivery" charges are property related while concluding that the pumping fees at issue here are not. The groundwater has the same relationship with the underlying land and is considered real property for the reasons set forth above. The rationale of *Apartment Assn.* was correct to resolve the issue in that case, but it cannot be applied to defeat the manifest reach of article XIII D here.

## IV

## The Three-to-One Ratio Set by Water Code Section 75594 Violates Article XIII D.

Based on the above analysis, article XIII D applies to the District's charges at issue here. As such, this constitutional provision controls over a statute like Water Code section 75594, which purports to require the District to impose a ground water charge "at a fixed and uniform rate for each acre-foot for water other than agricultural water" at least three times that charged for agricultural water. (See *Ex parte Daniels* (1920) 183 Cal. 636, 639.)

## CONCLUSION

The Court of Appeal fundamentally misapplied California law when it concluded that the District pumping fees were not incidental to property ownership and thus not subject to article XIII D. For the reasons set forth in this brief as well as in the City's briefs on the merits, the judgment of the Court of Appeal should be reversed with directions to affirm the trial court's judgment.

Respectfully submitted,

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**WORD COUNT CERTIFICATION [see CRC 8.520(c)]**

Counsel for amicus curiae hereby certify that this brief contains 2,345 words as measured by Microsoft Office Word 2010 word processing software.

Respectfully submitted,

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**PROOF OF SERVICE**
(Code Civ. Proc., § 1013a, subd. (3))

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action; my business address is 18400 Von Karman Avenue, Suite 800, Irvine, California 92612.

On November 18, 2015, I served this Application for Leave to File and Brief of Amicus Curiae, etc., on the interested parties in this action by placing true copies enclosed in sealed envelopes addressed as follows:

See attached service list.

I am readily familiar with Buchalter Nemer's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelopes were placed for collection and mailing with postage fully prepaid at Irvine, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 18, 2015 at Irvine, California.

/s/ Raquel Moreno
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