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IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

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CITY OF SAN BUENAVENTURA,
Plaintiff, Cross-defendant and Appellant,

v.

UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT,
Defendants, Cross-complainants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. VENCI-00401714 AND 1414739

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS; AMICUS CURIAE BRIEF OF WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS 1

AMICUS CURIAE BRIEF 6

LEGAL ARGUMENT 6

I. PROPOSITION 218 DOES NOT APPLY TO CHARGES IMPOSED ON THE ACTIVITY OF PUMPING GROUNDWATER 6

A. Article XIII D applies to (1) "a user fee or charge for a property-related service" and (2) any other charge on a parcel or person "as an incident of property ownership." 6

B. A pump charge is not "a user fee or charge for a property-related service." 9

C. A pump charge is not a charge on a parcel or on a person "as an incident of property ownership." 11

D. Article XIII D applies to charges imposed as an incident of *parcel* ownership, not as an incident of *water rights* ownership 16

E. *Pajaro* should be disapproved to the extent it held that article XIII D applies to pump charges 18

II. PROPOSITION 26 DOES NOT APPLY TO CHARGES IMPOSED ON THE ACTIVITY OF PUMPING GROUNDWATER WHERE, AS HERE, THE CHARGES DO NOT EXCEED THE REASONABLE COSTS OF REGULATING THE ACTIVITY 24

III. IF THE COURT HOLDS THAT THE DISTRICT'S PUMP CHARGES VIOLATE PROPOSITIONS 218 OR 26, THE COURT SHOULD RESERVE THE

QUESTION WHETHER THOSE PROPOSITIONS APPLY TO REPLENISHMENT ASSESSMENTS IMPOSED ON PUMPERS IN ADJUDICATED BASINS. 27

CONCLUSION 33

CERTIFICATE OF WORD COUNT 34

TABLE OF AUTHORITIES

Page(s)

Cases

Alpaugh Irr. Dist. v. County of Kern
(1952) 113 Cal.App.2d 286 14

Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization
(1978) 22 Cal.3d 208 .... 6, 16

Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles
(2001) 24 Cal.4th 830 .... *passim*

Bighorn-Desert View Water Agency v. Verjil
(2006) 39 Cal.4th 205 .... *passim*

California Redevelopment Assn. v. Matosantos
(2011) 53 Cal.4th 231 21

Greene v. Marin County Flood Control & Water Conservation Dist.
(2010) 49 Cal.4th 277 .... 6, 7

Griffith v. City of Santa Cruz
(2012) 207 Cal.App.4th 982 26

Howard Jarvis Taxpayers Assn. v. City of Riverside
(1999) 73 Cal.App.4th 679 7

Howard Jarvis Taxpayers Assn. v. City of Roseville
(2002) 97 Cal.App.4th 637 7

Howard Jarvis Taxpayers Assn. v. City of Salinas
(2002) 98 Cal.App.4th 1351 9

Orange County Water Dist. v. Farnsworth
(1956) 138 Cal.App.2d 518 11

Pajaro Valley Water Management Agency v. Amrhein
(2007) 150 Cal.App.4th 1364 .... *passim*

Paland v. Brooktrails Township Community Services Dist. Bd. of Directors
(2009) 179 Cal.App.4th 1358 6

Richmond v. Shasta Community Services Dist.
(2004) 32 Cal.4th 409 .... 10, 15, 16, 22, 23

Schmeer v. County of Los Angeles
(2013) 213 Cal.App.4th 1310 .... 6, 8, 12, 24

Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority
(2008) 44 Cal.4th 431 20

Wright v. Best
(1942) 19 Cal.2d 368 14

Constitutions

Cal. Constitution
art. X, § 2 30
art. XIII A 6, 24
art. XIII C 7, 24, 26
art. XIII C, § 1, subd. (e) 24
art. XIII C, § 1, subd. (e)(1) 4, 25
art. XIII C, § 2, subd. (b) 25
art. XIII D .... *passim*
art. XIII D, § 2, subd. (d) 17, 25
art. XIII D, § 2, subd. (e) 3, 8, 9, 15, 22, 23
art. XIII D, § 2, subd. (h) 9, 10, 22
art. XIII D, § 2, subd. (g) 30
art. XIII D, § 3 17
art. XIII D, § 4, subd. (a) 17
art. XIII D, § 4, subd. (f) 17
art. XIII D, § 6, subds. (a)(1)-(2) 17
art. XIII D, § 6, subd. (b)(3) 18
art. XIII D, § 6, subd. (c) 10

Statutes

Water Code
§ 10720.1 30
§ 10720.8 31
§§ 10720-10736.6 31
§ 10730.2, subd. (a) 30
§ 10730.2, subd. (c) 30
§ 60000 et seq. 1, 32
§ 60022 29
§ 60220 2
§ 60222 2
§ 60305 .... 2, 29
§§ 60306-60309 .... 29, 32
§ 60325 .... 2, 13, 29
§ 60327.1 .... 2, 13, 29
§ 60317 31
§ 60317, subd. (a) 29
§§ 60325-60327.1 31
§ 74000 et seq. 32
§ 75522 .... 10, 13
§ 75560-75601 32
§§ 75590-75591 31
§ 75591 11
§ 75593 31
§ 75594 31
§ 75612 13
§ 75614 13

Miscellaneous

Black's Law Dictionary (9th ed. 2009) 17

List of adjudicated basins and subbasins (2013) Cal. Dept. of Water Resources <http://goo.gl/yeqqSi> [as of Nov. 13, 2015] 28

Sen. Bill No. 1168 (2013-2014 Reg. Sess.)
§ 1, subd. (a)(2) 32
§ 1, subd. (a)(4) 32
§ 1, subd. (b)(4) 31

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN BUENAVENTURA,
Plaintiff, Cross-defendant and Appellant,

v.

UNITED WATER CONSERVATION DISTRICT AND BOARD OF DIRECTORS OF UNITED WATER CONSERVATION DISTRICT,
Defendants, Cross-complainants and Appellants.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS

Pursuant to California Rules of Court, rule 8.520(f), the Water Replenishment District of Southern California (WRD) requests permission to file the attached amicus curiae brief in support of defendants, cross-complainants and appellants United Water Conservation District and Board of Directors of United Water Conservation District (collectively, the District).

WRD is a government agency established by a vote of the people in 1959 under the Water Replenishment District Act of 1955. (Wat. Code, § 60000 et seq.) WRD's primary responsibility is to replenish water pumped from two connected groundwater basins in southern Los Angeles County known as the Central Basin and the

West Coast Basin. (Water Replenishment District of Southern California, Cost of Service Report (Apr. 2, 2015) pp. 49, 81 (COS Report).)[1] WRD's service area encompasses about 420 square miles, 43 cities, and a population of nearly 4 million people. (*Id.* p. 7.)

WRD is generally empowered to take acts necessary to replenish and protect the quality of the groundwater in the basins it manages. (Wat. Code, §§ 60220, 60222.) To help fund the ongoing replenishment program, WRD's board is authorized to levy a "replenishment assessment" on "the operators of all water-producing facilities in the district." (Wat. Code, §§ 60305, 60325, 60327.1.) Among the operators are municipal water utilities, investor-owned water companies, and mutual water companies, all of whom extract groundwater from the basins pursuant to pumping rights adjudicated by the superior court decades ago.[2] (COS Report, *supra*, p. 1.)

One of the two issues before this Court is whether the District's groundwater pump charges violate Proposition 218 or Proposition 26. WRD is currently litigating a similar issue—whether Proposition 218 governs WRD's replenishment

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[1] The COS Report is available at http://www.wrd.org/WRD-CSR-2015-16.pdf.

[2] The judgment adjudicating pumping rights in the West Coast Basin was entered in August 1961 in *California Water Service Co. v. City of Compton*, Los Angeles Superior Court Case No. 506,806. The judgment adjudicating pumping rights in the Central Basin was entered in October 1965 in *Central and West Basin Water Replenishment Districts v. Adams*, Los Angeles Superior Court Case No. C786656.

assessments. Plaintiff, cross-defendant and appellant City of San Buenaventura (the City) mentioned the WRD litigation in its petition for review. (See PFR 36 & fn. 21.) This Court's decision could affect not only the course and outcome of that litigation but also the process by which WRD levies replenishment assessments going forward. WRD thus has a vital interest in the Court's decision in this case.

WRD's counsel has reviewed the parties' briefs on the merits and believes the Court would benefit from additional briefing on the issue whether the District's pump charges violate Proposition 218 or Proposition 26. WRD's proposed amicus brief explains:

- Proposition 218 does not apply to the District's pump charges. Proposition 218 applies only to (1) "a user fee or charge for a property related service" and (2) any other charge on a parcel or person "as an incident of property ownership." (Cal. Const., art. XIII D, § 2, subd. (e).)[3] The District's pump charges do not fall into either of these categories.

- The City errs when it argues that because water rights themselves are "property," pump charges are necessarily imposed as an incident of property ownership. Proposition 218 applies only to charges imposed as an incident of *parcel* ownership, not as an incident of *water rights* ownership.

- The Court of Appeal's opinion in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364

[3] In this application and the accompanying amicus curiae brief, all undesignated citations to "articles" are to the California Constitution.

(*Pajaro*), on which the City heavily relies, was poorly reasoned and should be disapproved to the extent it held Proposition 218 applies to pump charges.

- Proposition 26 does not apply to the District's pump charges. Proposition 26 applies to "taxes," but a charge is not a "tax" when it is (1) "imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged" and it (2) "does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." (Art. XIII C, § 1, subd. (e)(1).) The District's pump charges satisfy both of these requirements. Consequently, they are not "taxes" governed by Proposition 26.

- If this Court nevertheless decides that either Proposition 218 or Proposition 26 does apply to the District's pump charges, the Court's opinion should respect the distinction between unadjudicated groundwater basins (at issue in this case) and adjudicated groundwater basins (such as those WRD manages) by making clear that the opinion does not necessarily apply to replenishment assessments imposed on pumpers in adjudicated basins. The parties do not address the distinction between unadjudicated and adjudicated basins, but it is of critical importance to WRD.

No party or counsel for a party authored or helped to fund any portion of WRD's proposed amicus brief, which has been funded solely by WRD.

For these reasons, WRD respectfully requests that this Court accept for filing the attached amicus curiae brief.

November 18, 2015

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AMICUS CURIAE BRIEF

LEGAL ARGUMENT

I. PROPOSITION 218 DOES NOT APPLY TO CHARGES IMPOSED ON THE ACTIVITY OF PUMPING GROUNDWATER.

A. Article XIII D applies to (1) "a user fee or charge for a property-related service" and (2) any other charge on a parcel or person "as an incident of property ownership."

Proposition 218 is best understood in its historical context. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 284 (*Greene*).) The history traces back to 1978, when the electorate adopted Proposition 13 adding article XIII A to the California Constitution.[4] (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365, fn. 8.) The principal purpose of Proposition 13 was "to assure effective real property tax relief" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 (*Amador Valley*)) by limiting local taxes on

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[4] For a more detailed history of Propositions 13, 218 and 26, see *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317-1326 (*Schmeer*).

homeowners (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 836, 839 (*Apartment Assn.*)).

Proposition 13's "principal provisions limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to 2 percent per year unless and until the property changed hands." (*Greene, supra,* 49 Cal.4th at p. 284.) Proposition 13 also barred local governments and special districts from enacting any special tax without a two-thirds vote of the electorate. (*Apartment Assn., supra,* 24 Cal.4th at p. 836.)

In 1996, reacting to certain judicial interpretations of Proposition 13 and other perceived "government-devised loopholes in" the measure, the electorate adopted Proposition 218. (*Apartment Assn., supra,* 24 Cal.4th at p. 839; see *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681-682 [discussing background of Proposition 218].)

Proposition 218 added articles XIII C and XIII D to the California Constitution. Article XIII D governs imposition of local taxes, assessments, fees and charges related to property, while article XIII C governs imposition of all local "taxes," as defined. (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 215-216 (*Bighorn*); *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640.)

Proposition 218 " 'buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges,' " as defined in Proposition 218. (*Apartment Assn., supra,* 24 Cal.4th at p. 837; see

Schmeer, *supra*, 213 Cal.App.4th at p. 1321 ["Proposition 218 . . . established procedural requirements for the imposition of new or increased fees and charges relating to real property and requirements for existing fees and charges"].)

Article XIII D authorizes four categories of local property taxes: (1) ad valorem property taxes, (2) special taxes, (3) assessments, and (4) fees or charges. (*Apartment Assn.*, *supra,* 24 Cal.4th at p. 837.) In this case, the City does not contend the District's pump charges implicate the first three categories of local property taxes; the controversy is whether the pump charges fall within the fourth category—fees or charges—governed by article XIII D. (See OBOM 27, 40-53 [discussing provisions of article XIII D applicable to fees and charges].)

Article XIII D's definition of "fee" and "charge" narrows the commonly understood meaning of those terms.[5] " 'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Art. XIII D, § 2, subd. (e).) The word "including" in this definition is a term of enlargement. (*Bighorn*, *supra*, 39 Cal.4th at p. 217.) Consequently, a charge is governed by article XIII D if it is (1) "a user fee or charge for a property-related service" or (2) a charge imposed on a parcel or person "as an incident of property ownership."

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[5] As defined in article XIII D, the terms "fee" and "charge" are synonymous. (*Bighorn*, *supra*, 39 Cal.4th at p. 214, fn. 4.) We use the terms interchangeably in this brief.

As we explain below, the pump charges at issue do not fall into either category and thus are not governed by article XIII D.

B. A pump charge is not "a user fee or charge for a property-related service."

As used in article XIII D, section 2, subdivision (e), the term "user fee" means an " 'amount[ ] charged to a person using a service where the amount of the charge is generally related to the value of the services provided.' " (*Bighorn*, *supra*, 39 Cal.4th at p. 217.) The amounts of the pump charges at issue are not related to the value of any service the pumper receives from the District. Instead, the amounts are determined by the volume of water the pumper extracts from the ground. (Typed opn. 1; see OBOM 18 [the District requires pumper to pay a fee "per acre-foot of water pumped"].)

Accordingly, the pump charges are not "user fees" within the meaning of article XIII D. The City does not disagree; its briefs on the merits do not address "user fees."

Nor are the pump charges imposed "for a property-related service." A property-related service is "a public service having a direct relationship to property ownership." (Art. XIII D, § 2, subd. (h).)

Examples of property-related services include delivering water through an existing pipeline (*Bighorn*, *supra*, 39 Cal.4th at p. 217) and managing storm water runoff from developed parcels (*Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1354-1355). Other examples appear in article

XIII D, section 6, subdivision (c), which regards sewer, water, and refuse collection as property-related services. (See art. XIII D, § 6, subd. (c) [addressing voter-approval requirements for "property related fees[s] or charge[s]" *other than* fees "for sewer, water, and refuse collection services"]; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 426 (*Richmond*).)

In this case, the District does not deliver water to the City or provide any other property-related service to the City in return for the City's payment of the pump charge. The Court of Appeal correctly concluded that "in charging property owners for pumping groundwater, the District is not providing a 'service' to property owners in the same way that the *Bighorn* agency provided a service by delivering water through pipes to residences." (Typed opn. 22.) The District's pump charges help fund its "water management activities and ongoing operating expenses" (typed opn. 4), which are devoted to "conserving water resources" (typed opn. 19) "for the benefit of all who rely directly or indirectly upon the ground water supplies of the district" (Wat. Code, § 75522). While the District's efforts to conserve water resources may fairly be characterized as a public service, those efforts have no "direct relationship to property ownership." Property owners and non-owners alike benefit from the District's conservation of groundwater. The District's efforts thus do not amount to a " '[p]roperty-related service' " as defined in article XIII D, section 2, subdivision (h).

C. A pump charge is not a charge on a parcel or on a person "as an incident of property ownership."

Pump charges are not imposed on parcels; they are imposed on "persons operating ground water-producing facilities within the zone or zones" established by the District. (Wat. Code, § 75591; see *Pajaro, supra,* 150 Cal.App.4th at p. 1381 [groundwater augmentation charge imposed on operators of water-producing wells was "not a charge 'upon real property,' but one upon an activity—the extraction of groundwater"].)

Nor are the pump charges imposed on persons "as an incident of property ownership." A charge is imposed "as an incident of property ownership" only when it is "imposed directly on property owners in their capacity as such," that is, solely because they own property. (*Apartment Assn., supra,* 24 Cal.4th at p. 838; see *id.* at pp. 839-840 ["The foregoing language means that a levy may not be imposed on a property owner as such—i.e., in its capacity as property owner—unless it meets constitutional prerequisites"]; 842 ["taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners,*" i.e., when they are levied "solely by virtue of property ownership"].)

When a levy is imposed on a person not because he owns property but because he engages in an activity that he is free to continue or not, the levy is not imposed "as an incident of property ownership." (See *Orange County Water Dist. v. Farnsworth* (1956) 138 Cal.App.2d 518, 528, 530 [rejecting challenge to validity of

replenishment assessment levied by Orange County Water District under 1953 amendment to Orange County Water District Act; levy "on the act of producing underground water," which was imposed "upon the operator of the water-producing facility," was not a tax on ownership of property but on "the activity of producing ground water by pumping operations"].)

The fact that an activity is *related* to land or *involves* land does not necessarily mean that a charge on that activity is imposed "as an incident of property ownership."

For example, in *Apartment Assn.*, a city imposed a fee on owners of residential rental properties to pay for safety inspections of the properties. This Court held article XIII D did not apply to the inspection fee because the city imposed it on landowners in their capacity as operators of rental businesses, not in their capacity as landowners:

> [A]rticle XIII D only restricts fees imposed directly on property owners in their capacity as such. The inspection fee is not imposed solely because a person owns property. Rather, it is imposed because the property is being rented. It ceases along with the business operation, whether or not ownership remains in the same hands. For that reason, the city must prevail.

(*Apartment Assn., supra,* 24 Cal.4th at p. 838; see *id.* at p. 840 ["[T]he fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. . . . It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business."]; *Schmeer, supra,* 213 Cal.App.4th at p. 1321 [in

Apartment Assn., Supreme Court "held that article XIII D of the California Constitution restricted only fees imposed on real property owners in their capacity as owners and therefore did not apply to an inspection fee imposed by the City of Los Angeles on property owners in their capacity as landlords"].)

The pump charges at issue here are analogous to the inspection fees at issue in *Apartment Assn.* The pump charges are not imposed on persons in their capacity as landowners but on persons—landowners or not—in their capacity as operators of groundwater-producing facilities, and only while the operations continue. (See Wat. Code §§ 75522 [authorizing groundwater charges "upon the production of ground water from all water-producing facilities, whether public or private, within the district"], 75612 [allowing operator to submit statement of non-production of water], 75614 [allowing operator to submit notice that water-producing facility has been permanently abandoned]; *Pajaro, supra,* 150 Cal.App.4th at p. 1383 [fact that agency imposed groundwater augmentation charge on well operator, even when well operator was not landowner, "lends strong support to [agency's] contention that the augmentation charge is in fact and in law an activities-related charge"].)[6]

Like the inspection fees in *Apartment Assn.*, the District's pump charge "ceases along with the business operation, whether or

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[6] Similarly, replenishment assessments levied by WRD are billed to and payable by "the operators of all water-producing facilities in the district." (Wat. Code, §§ 60325, 60327.1.)

not ownership remains in the same hands."[7] (*Apartment Assn.*, *supra*, 24 Cal.4th at p. 838.)

The two dissenting justices in *Apartment Assn.* would have construed the phrase "as an incident of property ownership" to mean "dependent upon such ownership": "In other words, if the imposition of a fee depends upon one's ownership of property, it comes within the purview of article XIII D unless otherwise excepted." (*Apartment Assn.*, *supra*, 24 Cal.4th at p. 846 (dis. opn. of Brown, J., with Baxter, J., conc.).)

Notably, however, even under this minority view, the pump charges at issue here are not imposed "as an incident of property ownership." The pump charges do not depend on property ownership. "[A] water right by appropriation is independent of ownership and possession of land and subject to sale separately from it . . . ." (*Wright v. Best* (1942) 19 Cal.2d 368, 380; see also *Alpaugh Irr. Dist. v. County of Kern* (1952) 113 Cal.App.2d 286, 294 [tax assessor lawfully assessed groundwater rights separately from land on which pumping took place because "[t]he water rights which were here assessed did not arise from mere ownership of the lands and were not a part and parcel of it"].) The holder of an appropriative water right who extracts groundwater from land *owned by others* would be subject to the pump charge, as would a

[7] The City's pumping operations are akin to a business operation; the City does not consume the pumped water but sells it to residential customers. (Typed opn. 1, 21; see OBOM 35.) Thus, this case does not require the Court to decide whether the same analysis would apply to a homeowner who pumps groundwater for personal consumption.

licensee of a water right who extracts groundwater from land *owned by others*.[8]

Richmond further illuminates the meaning of the phrase "as an incident of property ownership" as used in article XIII D. In *Richmond*, this Court held that a "connection fee" imposed on property owners who requested new connections to a local agency's water system was not a "fee" or "charge" under article XIII D. (*Richmond*, *supra*, 32 Cal.4th at p. 426.) The Court reasoned that because an owner incurred the charge only by voluntarily requesting a service connection, and could avoid the charge by not requesting a connection, the charge was not imposed "as an incident of property ownership":

> The District does not impose the fee on parcels of real property but on persons who apply for a water service connection. The District does not impose the fee on such persons "as an incident of property ownership" but instead as an incident of their voluntary decisions to request water service. . . .
>
> We agree that a connection charge, because it is not imposed "as an incident of property ownership" (art. XIII D, § 2, subd. (e)), is not a fee or charge under article XIII D. A connection fee is not imposed simply by virtue of property ownership, but instead it is

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[8] Holders of adjudicated pumping rights in WRD's service area can lease their rights to other parties. (COS Report, *supra*, p. 83.) Consequently, the operator of a water-producing facility, responsible for paying a replenishment assessment levied by WRD (see *ante*, fn. 6), does not necessarily own the land on which the facility operates.

> imposed as an incident of the voluntary act of the property owner in applying for a service connection.

(*Ibid.*; see *id.* at p. 427 ["a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection"].)

Pump charges are akin to the connection fees at issue in *Richmond.* The operator of a groundwater-producing facility incurs the charge only by voluntarily pumping water and can avoid the charge by ceasing operations. Accordingly, the pump charge is not imposed as an incident of property ownership.

D. Article XIII D applies to charges imposed as an incident of *parcel* ownership, not as an incident of *water rights* ownership.

The City contends that "the right to use groundwater is itself a property right. . . . Thus, a charge that burdens appropriative water rights is necessarily incidental to property ownership." (OBOM 34, boldface omitted; see RBOM 25 ["The right to use groundwater is a property right"].) The City's reasoning and conclusion are flawed. The City mistakenly assumes the term "property" as used in article XIII D refers to *all* property, including water rights. Not so. "Property" refers to parcels of land.

The purpose of Proposition 218, which included article XIII D, was to tighten Proposition 13, which itself was designed "to assure effective *real property* tax relief." (*Amador Valley*, *supra*, 22 Cal.3d at p. 231, emphasis added.) Consistent with that purpose, article

XIII D uses the term "property" to mean a "parcel," i.e., a tract of land. (Black's Law Dictionary (9th ed. 2009) p. 1221 [defining "parcel"].)

Thus, section 2 defines " 'District' " to mean "an area determined by an agency to contain all *parcels* which will receive a special benefit from a proposed public improvement or *property-related service*." (Art. XIII D, § 2, subd. (d), emphasis added.) Under section 2, *property*-related services benefit *parcels*.

Likewise, section 3 states: "No tax, assessment, fee, or charge shall be assessed by any agency upon any *parcel of property* or upon any person *as an incident of property ownership* except" as permitted in the section. Again, "property" means a "parcel of property." (Art. XIII D, § 3.)

Similarly, section 4 prescribes the procedures an agency must follow before it may impose an assessment on a "parcel" to cover the cost of a "property related service" benefitting that parcel. (Art. XIII D, § 4, subd. (a).) After detailing the procedures governing assessments on "parcels," the section provides: "In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the *property or properties* in question receive a special benefit . . . ." (Art. XIII D, § 4, subd. (f), emphasis added.) Again, "property" and "parcel" are used interchangeably.

Finally, subdivision (b)(3) of section 6, the section titled "Property Related Fees and Charges," removes any doubt that "parcel" and "property" are synonymous. Section 6 sets forth the procedures for imposing fees and charges on "parcels." (Art. XIII D,

§ 6, subd. (a)(1)-(2).) Subdivision (b)(3) states: "The amount of a fee or charge imposed upon any *parcel* or person *as an incident of property ownership* shall not exceed the proportional cost of the service attributed to the *parcel*." (Art. XIII D, § 6, subd. (b)(3), emphases added.)

Thus, when article XIII D speaks of levies imposed on a person "as an incident of property ownership," it means "as an incident of *parcel* ownership," not "as an incident of water rights ownership." As explained in Part I.C. above, the District's pump charges are not imposed as an incident of parcel ownership.

E. *Pajaro* should be disapproved to the extent it held that article XIII D applies to pump charges.

The City relies heavily on *Pajaro*, devoting the first section of its legal argument to that case. (OBOM 27-31.) The Court of Appeal here "distinguish[ed]" and "disagree[d]" with *Pajaro*. (Typed opn. 2, 21.) For the following reasons, this Court should disapprove *Pajaro* to the extent it held that pump charges are imposed "as an incident of property ownership" and are governed by article XIII D.

In *Pajaro*, a water management agency filed an action to validate an ordinance increasing the "groundwater augmentation fee" charged to "all extractors of groundwater" within the agency's jurisdiction. (*Pajaro, supra,* 150 Cal.App.4th at pp. 1369, 1374-1375.) The fee was imposed under legislation authorizing the agency to levy " 'groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the

agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency.' " (*Id.* at p. 1372.) The agency billed the fee to the owner of the land on which a well appeared, except "that if a case arose in which a well were shown to belong to a person other than the landowner, the Agency would bill the well owner." (*Id.* at p. 1374.)

The Court of Appeal held the fee was " 'imposed . . . as an incident of property ownership' " and thus subject to article XIII D. (*Pajaro, supra,* 150 Cal.App.4th at pp. 1370, 1393.) The Court of Appeal believed this Court's decision in *Bighorn* compelled this conclusion. (*Id.* at p. 1386.)

In *Bighorn,* this Court confirmed that a charge for ongoing water delivery through an existing connection is a charge imposed "as an incident of property ownership" and is thus subject to article XIII D. (*Bighorn, supra,* 39 Cal.4th at p. 216.) *Bighorn* further explained that this holding applied to all water delivery charges, whether consumption-based or fixed. (*Id.* at p. 217.)

The *Pajaro* court saw no material difference, for purposes of applying article XIII D, between a charge based on the volume of delivered water consumed and a charge based on the volume of groundwater extracted. (*Pajaro, supra,* 150 Cal.App.4th at pp. 1388-1389.) Indeed, the court explained, the latter charge "is not actually predicated upon the *use* of water but on its *extraction,* an activity in some ways more intimately connected with property ownership than is the mere receipt of delivered water." (*Id.* at p. 1391; see *id.* at pp. 1391-1392 [An owner's or tenant's extraction of

water "represents an exercise of rights derived from his ownership of land. In that respect a charge imposed on that activity is at least as closely connected to the ownership of property as is a charge on delivered water."], 1393 ["the charge [at issue] appears as closely related to property ownership as the charges at issue in *Bighorn*"].)

The *Pajaro* court acknowledged that this Court's opinion in *Apartment Assn.* might have supported a contrary conclusion, "that affected persons incurred delivery charges not as [property] owners but as voluntary consumers of water." (*Pajaro*, *supra*, 150 Cal.App.4th at p. 1391.) *Pajaro*, however, questioned the continuing "vitality" of *Apartment Assn.* because this Court did not cite it in *Bighorn*. (*Id.* at p. 1389.)

The *Pajaro* court added that, even if *Apartment Assn.* "retains vitality" (*Pajaro*, *supra*, 150 Cal.App.4th at p. 1390), it was inapposite because it involved a charge on a business activity—renting apartments—while the augmentation charge at issue in *Pajaro* was "imposed not only on persons using water in a business capacity but also on those using water for purely domestic purposes" (*ibid.*). In the court's view, a homeowner extracting water for domestic purposes "cannot be compared to a businessman who, as described in *Apartment Association*, elects to go into the residential landlord business." (*Ibid.*)

Pajaro misunderstood both *Apartment Assn.* and *Bighorn*.

First, contrary to *Pajaro*'s comment, *Apartment Assn.* retains its "vitality." This Court quoted at length from the *Apartment Assn.* opinion in 2008 (see *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 442-443)

and cited it again as recently as 2011 (see *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 279). No court (except *Pajaro*) has questioned its "vitality."

Second, *Apartment Assn.* did not hold that article XIII D's application depends on whether the charge in question is imposed on a "business" activity as distinct from a "domestic" activity. Rather, article XIII D's application depends on whether the charge is imposed on an *activity*, as distinct from an incident of *parcel ownership*. This Court made clear "that article XIII D only restricts fees imposed directly on property owners *in their capacity as such*." (*Apartment Assn.*, *supra*, 24 Cal.4th at p. 838, emphasis added.) Article XIII D does *not* apply when the agency imposes a charge on a person who chooses to engage in an *activity* on land, such as extracting groundwater. The inspection fee at issue in *Apartment Assn.* happened to be a charge imposed on a business activity—renting apartments—but nothing in the opinion suggested that its holding was *limited* to business activities. The holding applies to charges on both business and domestic activities—because charges imposed on activities are not "imposed directly on property owners in their capacity as such."[9] (*Ibid.*)

Pajaro also misunderstood *Bighorn*, which held that a charge for water delivery through existing pipelines is imposed "as an

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[9] *Pajaro* could be distinguished on the ground the present case does not involve extraction or consumption of water for domestic purposes. (See *ante*, fn. 7.) But because *Pajaro*'s misunderstanding of this Court's opinions will continue to spawn legal confusion, the Court should not only distinguish *Pajaro* but also disapprove it.

incident of property ownership," regardless whether the *amount* of the charge is fixed or variable depending on the volume consumed. *Pajaro* erred by concluding that the method of calculating the *amount* of the charge determines whether it is imposed "as an incident of property ownership." Under *Bighorn*, the legal analysis must focus on the activity, asset, or service on which the charge is imposed. "[D]omestic water delivery through a pipeline is a property-related service" as defined in article XIII D, no matter how the charge for that service is calculated. (*Bighorn*, *supra*, 39 Cal.4th at p. 217; see *ibid*. ["[O]nce a property owner or resident . . . has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. . . . Because it is imposed for the property-related service of water delivery, the Agency's water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D . . . ."].)

Pajaro also failed to appreciate the important legal distinction between water *delivery* and groundwater *extraction*. Article XIII D governs charges imposed "as an incident of property ownership" and charges for "property related service[s]." (Art. XIII D, § 2, subd. (e).) A property related service is "a public service having a direct relationship to property ownership." (*Id.* § 2, subd. (h).)

Water *delivery* through a pipeline is a public service having a direct relationship to land ownership and is therefore a "property-related service" within the meaning of article XIII D. (*Bighorn*, *supra*, 39 Cal.4th at p. 214; *Richmond*, *supra*, 32 Cal.4th at p. 426.)

Also, a charge for water delivery through a pipeline is imposed "as an incident of property ownership" because incurring the charge "requires nothing other than normal ownership and use of property." (*Richmond*, at p. 427.)

In contrast, groundwater *extraction* is not a "property-related service" provided by the local agency; it is not a service at all. Rather, it is a voluntary activity by the pumper. And incurring a pump charge requires more than "normal ownership and use of property" (*Richmond*, *supra*, 32 Cal.4th at p. 427); it requires the pumper to undertake the activity of extracting groundwater from the property. Thus, charges for groundwater extractions are not imposed as an incident of property ownership.

For all these reasons, *Pajaro* misunderstood this Court's applicable authorities and erroneously failed to distinguish between charges for water delivery service and charges for pumping groundwater. These errors lead the court to the mistaken conclusion that pump charges fall within the definition of " 'fee' " or " 'charge' " under article XIII D, section 2, subdivision (e). This Court should disapprove *Pajaro* to the extent it so concluded.

II. PROPOSITION 26 DOES NOT APPLY TO CHARGES IMPOSED ON THE ACTIVITY OF PUMPING GROUNDWATER WHERE, AS HERE, THE CHARGES DO NOT EXCEED THE REASONABLE COSTS OF REGULATING THE ACTIVITY.

As explained above, Proposition 218 added articles XIII C and XIII D to the California Constitution. We addressed article XIII D in Part I above. We now turn to article XIII C, which also brings us to Proposition 26.

While article XIII D governs property-related "fees" and "charges," article XIII C governs all local "taxes." The fact that a pump charge is not a property-related fee or charge governed by article XIII D does not foreclose the possibility that the charge is a tax governed by article XIII C. (See *Bighorn, supra,* 39 Cal.4th at pp. 215-216.)

Proposition 26, adopted by the electorate in 2010, added subdivision (e) to section 1 of article XIII C.[10] Subdivision (e) defines " 'tax' " to mean "any levy, charge, or exaction of any kind imposed by a local government," with seven enumerated exceptions. (Art. XIII C, § 1, subd. (e).) Before a local government may impose a "tax," i.e., a levy, charge, or exaction not falling within one of the seven exceptions, the local government must comply with one of two

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[10] Proposition 26 also amended section 3 of article XIII A. (*Schmeer, supra,* 213 Cal.App.4th at p. 1322.) By its terms, that section applies to levies, charges and exactions imposed by the state Legislature, not to charges imposed by a local agency.

voter-approval requirements, depending on whether the local government proposes to impose a "general tax" or a "special tax." (See art. XIII C, § 2, subds. (b) & (d).)

The critical question then is whether a pump charge is a "tax" as defined in Proposition 26.

Proposition 26 *excepts* from the definition of " 'tax' " any "charge imposed [1] for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and [2] which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." (Art. XIII C, § 1, subd. (e)(1).)

The Court of Appeal succinctly explained why the District's pump charge satisfies the first element of this exception: "Pumpers receive an obvious benefit—they may extract groundwater from a managed basin." (Typed opn. 25.) The court continued:

> The City complains that pumpers are merely exercising their existing property rights and that the District "does not grant the City a right or privilege to use groundwater any more than the County grants a homeowner the right to live in his or her home when collecting the property tax." This analogy is inapt. A pump fee is more like the entrance fee to a state or local park, which is not a tax . . . . Although citizens generally have the right to enter such public land, the government is entitled to charge them a fee for its efforts to maintain the land so that it can be enjoyed by all who use it. . . . Without the District's resource management operations, groundwater would be depleted far faster and overdraft in the District would be far more severe. The District's conservation efforts

thus constitute a specific benefit that accrues directly to those who use groundwater.

(*Ibid.*)

Whether a pump charge satisfies the second element of the subdivision (e)(1) exception to the definition of "tax" depends on whether the total charges collected from all pumpers in a district exceed the district's reasonable costs of granting and regulating the privilege of pumping. So long as the charges imposed are "related to the overall cost of the governmental regulation" and do not generate a surplus that can be spent for other governmental purposes, the charges should pass muster under the subdivision (e)(1) exception. (See *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996-997.)

This inquiry is fact-based and can only be undertaken on a case-by-case basis. The Court of Appeal here independently reviewed the record (typed opn. 12, 27) and concluded "that the District's pump fees do not exceed the reasonable cost of regulating the District's groundwater supply" (typed opn. 27). If this Court accepts that conclusion, then the Court should hold the pump charges are not "taxes" within the meaning of Proposition 26 and thus are not governed by article XIII C.[11]

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[11] The City's petition for review raised two issues questioning the standard of review applied by the Court of Appeal (see PFR 1 [Questions 1. and 2.], 28-35), but this Court declined to grant review on those issues. In its reply brief, the City continues to press these non-issues. (See RBOM 11-16.)

III. IF THE COURT HOLDS THAT THE DISTRICT'S PUMP CHARGES VIOLATE PROPOSITIONS 218 OR 26, THE COURT SHOULD RESERVE THE QUESTION WHETHER THOSE PROPOSITIONS APPLY TO REPLENISHMENT ASSESSMENTS IMPOSED ON PUMPERS IN ADJUDICATED BASINS.

For the reasons discussed in Parts I. and II. above and in the District's answer brief on the merits, the Court should hold that the District's pump charges do not violate either Proposition 218 or Proposition 26. Neither proposition applies to the pump charges.

If, however, the Court decides that Proposition 218 or Proposition 26 applies to the pump charges at issue and that the charges violate either Proposition 218 or Proposition 26, WRD respectfully requests that the Court make clear its decision does not necessarily apply to replenishment assessments levied on operators of water-production facilities in adjudicated groundwater basins.

As the District accurately observes in its brief, "Proposition 218 cases turn on their unique facts." (ABOM 41.)

> Not all Proposition 218 and groundwater fee cases are alike. The nature of the agency, municipality or water district responsible for imposing the charge in a given case may warrant a different analysis and different outcome. The purpose for which the fee is imposed, the conduct on which the fee is imposed, the manner in which the fee is imposed, and whether the costs of service or benefits provided can be allocated by

> the agency on a parcel-by-parcel basis, will all be outcome determinative of any Proposition 218 issue.

(*Ibid.*)

Though both the District and WRD manage groundwater resources, they—and their respective pump charges and replenishment assessments—differ in significant ways.

Most importantly, pumping rights in the two groundwater basins under WRD's management have been adjudicated. The West Coast and Central Basins together form a common underground pool shared by pumpers in both basins. (COS Report, *supra*, pp. 49, 81.) Decades ago, the courts adjudicated the pumping rights of all persons and entities who extract groundwater from those basins.[12] The courts found that various pumpers had pumping rights under the doctrine of mutual prescription.

In contrast, pumping rights in seven of the eight basins falling under the District's authority (all but the Santa Paula Basin) have not been adjudicated. (*List of adjudicated basins and subbasins* (2013) Cal. Dept. of Water Resources <http://goo.gl/yeqqSi> [as of Nov. 13, 2015].)

The total pumping permitted by the Central Basin and West Coast Basin adjudications exceeds the "natural safe yield" determined by the Department of Water Resources. In other words, the adjudications allow pumpers to extract more water from the basins each year than nature returns to the basins through natural

[12] See *ante*, fn. 2.

recharge, a condition known as "overdraft." (COS Report, *supra*, pp. 1, 43; see Wat. Code § 60022 [defining "Annual overdraft"].)

The adjudications thus presuppose and depend on a replenishment program to remedy the overdraft. (COS Report, *supra*, p. 21.) WRD was established specifically to implement and manage that replenishment program, which directly or indirectly benefits all pumpers in both basins. (*Id.* at pp. 1-2, 54, 81.)

To help fund the ongoing replenishment program, WRD's board is authorized to levy a "replenishment assessment" on "the operators of all water-producing facilities in the district." (Wat. Code, §§ 60305, 60325, 60327.1.) The Code establishes procedures for the board to provide notice and to hold a hearing on each year's proposed replenishment assessment. (Wat. Code, §§ 60306-60309.)

If, after the hearing, the WRD board decides a replenishment assessment is necessary, "the board shall levy a replenishment assessment on the production of groundwater from the groundwater supplies within the district during the [following] fiscal year . . . , and the replenishment assessment shall be fixed by the board at a uniform rate per acre-foot of groundwater produced." (Wat. Code, § 60317, subd. (a).)

Whether Proposition 218 applies to replenishment assessments on groundwater production from adjudicated basins is an important question not raised by the present appeal. And to answer that question, the courts may need to answer a number of sub-questions, also not currently before this Court. For example:

1. Are adjudicated water rights "tenancies of real property" within the meaning of Proposition 218? (See art. XIII D, § 2, subd. (g).)

2. Would applying Proposition 218 to replenishment assessments on the exercise of adjudicated water rights conflict with or undermine the mandate of article X, section 2 of the California Constitution, which "requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare"? (Art. X, § 2.)

Significantly, in the Sustainable Groundwater Management Act (Act), signed into law on September 16, 2014, the Legislature implicitly recognized that Proposition 218 may apply differently to unadjudicated and adjudicated basins. The Act establishes a statewide regime for managing groundwater basins. (Wat. Code, § 10720.1.) The Act authorizes an agency that adopts a groundwater sustainability plan under the Act to "impose fees on the extraction of groundwater from the basin to fund costs of groundwater management . . . ." (Wat. Code, § 10730.2, subd. (a).) When adopting such fees, the agency must comply with Proposition 218. (*Id.*, § 10730.2, subd. (c).)

But, recognizing the need to avoid interfering with currently successful groundwater management, the Legislature *exempted* agencies managing adjudicated basins from the statutory mandate

that fees be imposed in compliance with Proposition 218. (See Wat. Code, § 10720.8 [with exceptions not pertinent here, part 2.74, comprising §§ 10720-10736.6, does not apply to twenty-six "adjudicated areas," including the Central and West Coast Basins managed by WRD]; see also Sen. Bill No. 1168 (2013-2014 Reg. Sess.) § 1, subd. (b)(4) [Legislature intended "[t]o respect overlying and other proprietary rights to groundwater"].)

In other words, in the Legislature's view, agencies responsible for managing adjudicated basins need not comply with Proposition 218 when imposing fees on groundwater extraction. A future case may present this Court with an opportunity to decide whether the Court shares the Legislature's view. But the present case, which involves mostly unadjudicated basins, affords no such opportunity.

Aside from the fundamental distinction between adjudicated and unadjudicated basins, appellant District and WRD differ in other respects.

For example, unlike the District's pump charges, which by statute must distinguish between agricultural and non-agricultural uses (Wat. Code, § 75594), WRD's replenishment assessments must be uniform for all pumpers in the district; that is, all pumpers must pay the same amount per acre-foot of extracted water. (See COS Report, *supra*, pp. 81-84.)

Also, unlike appellant District, which may establish zones and impose pump charges in fewer than all zones (Wat. Code, §§ 75590-75591, 75593), WRD must levy any replenishment assessments on all operators of water-producing facilities within the district (Wat. Code, §§ 60317, 60325-60327.1).

Further, WRD and the District were formed under, and are governed by, different enabling acts. The District was created under the Water Conservation District Law of 1931. (Wat. Code § 74000 et seq.) WRD was created under the Water Replenishment District Act. (Wat. Code, § 60000 et seq.). The District and WRD are subject to different statutory schemes and procedures for determining whether to impose pump charges (the District) or replenishment assessments (WRD). (Compare Wat. Code, § 75560-75601 with Wat. Code, §§ 60306-60309.)

The Legislature has found: "Groundwater provides a significant portion of California's water supply. Groundwater accounts for more than one-third of the water used by Californians in an average year and more than one-half of the water used by Californians in a drought year when other sources are unavailable." (Sen. Bill No. 1168 (2013-2014 Reg. Sess.) § 1, subd. (a)(2).)

In light of the historic drought conditions currently confronting our state, it is of paramount importance that WRD and other managers of adjudicated basins not be unnecessarily hamstrung in fulfilling their responsibilities to manage and protect California's tenuous groundwater supply. Proper management of groundwater resources "help[s] protect communities, farms, and the environment against prolonged dry periods and climate change, preserving water supplies for existing and potential beneficial use." (Sen. Bill No. 1168 (2013-2014 Reg. Sess.) § 1, subd. (a)(4).)

Accordingly, WRD respectfully requests that any opinion by this Court holding that Proposition 218 or Proposition 26 applies to the District's pump charges be narrowly crafted, to preserve for

future decision the important question whether those propositions also apply to adjudicated basins.

CONCLUSION

For the reasons discussed above and in the District's answer brief on the merits, this Court should hold that the District's pump charges do not violate Proposition 218 or Proposition 26—because neither proposition applies to the pump charges.

If the court nevertheless holds that the District's pump charges violate either proposition, the Court's opinion should reserve for future decision the question whether those propositions apply to replenishment assessments imposed on pumpers in adjudicated basins.

November 18, 2015

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 6,827 words as counted by the Microsoft Word version 2010 word processing program used to generate the petition.

Dated: November 18, 2015

Mitchell C. Tilner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

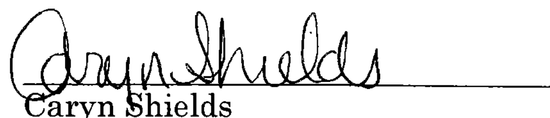
On November 18, 2015, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS; AMICUS CURIAE BRIEF OF WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 18, 2015, at Encino, California.



Caryn Shields

SERVICE LIST

City of San Buenaventura v. United Water Conservation District and Board of Directors of United Water Conservation District
Supreme Court No. S226036

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