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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

City of San Buenaventura,

Plaintiff, Cross-Defendant and Appellant,

vs.

United Water Conservation District, et al.,

Defendants, Cross-Complainants and Appellants

BRIEF OF COUNTY OF KERN AS AMICUS CURIAE

Appeal from Judgment of the Superior Court of the State of California
County of Santa Barbara, Case Nos. VENCI 00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

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BRIEF OF COUNTY OF KERN AS AMICUS CURIAE

INTRODUCTION: INTERESTS OF AMICUS CURIAE COUNTY OF KERN.

At the conclusion of the 2014 legislative session, California enacted three measures that together form the Sustainable Groundwater Management Act (SGMA). (2014 Stats, ch. 346, SB 1168 (Pavley); ch. 347, AB1739 (Dickinson); ch. 348, SB 1319 (Pavley). This act, enacted in the midst of the State's most extended drought, represents California's precedential effort to establish a statewide system of groundwater management that will promptly require implementation of plans to reduce extractions to sustainable levels in basins with serious overdraft conditions. (2014 Stats., ch 346, § 1, subd. (a); 2014 Stats., ch. 347, § 1, subd. (a).)

As explained in the Assembly Committee analysis accompanying the legislation,

> California is the last State in the Union without an enforceable set of statewide groundwater management standards. The purpose of this bill [SB 1168], together with AB 1739 and the Administration's proposal, is to help develop a comprehensive set of sustainable groundwater management statutes that empower local agencies that currently lack sustainable management to plot a 20-year path towards predictable groundwater supplies. This will facilitate coordinated use of groundwater and surface water supplies together ("conjunctive use") and create legal certainty regarding rights to store and withdraw groundwater, thus increasing overall local water supply reliability.
>
> Catastrophic Impacts from a Lack of Statewide Standards
>
> In some parts of California the lack of sustainable groundwater management has become an economic and environmental catastrophe. A headlong rush to pump a finite resource has crashed into a brick wall of harsh realities including dropping groundwater levels that are leaving wells spitting sand and farms and communities stranded; land subsidence that buckles

> infrastructure, cracks irrigation canals, and deposits threatening levels of sediment into flood control structures; and disappearing streams where the pull of subsurface pumping has deprived both senior water rights holders and wildlife of crucial surface flows.

(Assembly Comm. on Water, Parks & Wildlife Bill Analysis, SB 1168 (June 23, 2014) 4; http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1151-1200/sb_1168_cfa_20140623_111021_asm_comm.html.)

SGMA provides that in critically-overdrafted basins, a qualified local agency or combination of qualified local agencies shall by June 30, 2017 form groundwater sustainability agencies (GSAs) (Wat. Code, § 10723 et seq.), with duties by 2020 to prepare and enforce groundwater sustainability plans (GSPs) (Wat. Code, § 10720.7.). The GSAs are empowered to regulate the extraction of groundwater, and to levy fees necessary to prepare and enforce the regulatory program. (Wat. Code, § 10730(a).) In a separate provision, GSAs are empowered to levy fees for water service and supply. (See Wat. Code, § 10730.2.)

Counties are the local units of general governance in California. (Cal. Const., art. XI, § 7.) Their constitutionally-based police powers include long-recognized authority to regulate groundwater. (*Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166.) SGMA declares the Legislature's intent that "recognizes and preserves" that county police power. (2014 Stats., ch 346, § 1, subd. (b)(5)); 2014 Stats., ch. 347, § 1, subd. (b)(5).) SGMA thus anticipates a central role for California counties in SGMA implementation. Every California county, by virtue of its land-use regulatory authority, is qualified to act as or participate in a GSA. (Wat. Code, § 10721(m).) In the absence of any other agency asserting authority, and in the absence of opting out, the county in which a basin is located is presumed to be the GSA. (Wat. Code, § 10724.)

The County of Kern includes within its boundaries vast and challenged groundwater resources. The entire southern San Joaquin Valley west of the Sierra, and Indian Wells Valley east of the Sierra, form two of the State's 21 basins designated as high priority in critical conditions of overdraft. (http://www.water.ca.gov/groundwater/sgm/pdfs/StatewideMap_DraftCOD List_Aug2015.pdf.) Particularly in the San Joaquin Valley, the high-priority basin is overlain by a number of local water agencies and districts. In order to carry out the mandates of SGMA and bring about the sustainable use of the groundwater resources that have enabled Kern County's agricultural and urban economy to thrive, the County of Kern as a GSA or GSA member anticipates that it will play a key role.

Funding the cost of preparing and enforcing groundwater management plans forms perhaps the greatest challenge facing the County of Kern and other GSA-qualified agencies within the county. Up-front capital investments will be needed to produce the hydrologic, institutional, and legal assessments without which comprehensive local groundwater regulation will not succeed. These investments will be required years in advance of a regulatory program that produces concrete benefits and protections to Kern County groundwater basins and users. If generating the fees to fund the establishment and enforcement of a GSA's sustainability plan required a prefatory plebiscite within the regulated area, SGMA might well emerge stillborn from voters' reluctance to approve that which they have not seen or experienced. Likewise, forbidding GSAs to secure fees for these regulatory plans before they could somehow proportionally attribute and limit costs to specific parcels could needlessly derail SGMA implementation in an avoidable morass of litigation challenges. The recent experience of the Pajaro Valley Water Management Agency, detailed in section III.B of this brief, testifies to the delay and expense

endured by that agency while attempting to address the Legislature's goal of eliminating severe overdraft and seawater intrusion.

The issues presented for review test the application of Propositions 218's and 26's provisions to district groundwater pumping charges, and the ratio of municipal and industrial to agricultural charges mandated under Water Code provision section 75594. Of course these charges were not imposed under SGMA. Nonetheless, the principal parties City of San Buenaventura (City) and United Water Conservation District (United or District) drew analogies to SGMA in the Court of Appeal, which influenced the appellate opinion preceding this Court's grant of review. (See *City of San Buenaventura v. United Water Conservation Dist.*, formerly (2015) 235 Cal.App.4th 228, 252.) In light of the influence that this Court's resolution of the principal parties' disputes will likely produce on SGMA's nascent implementation, the County of Kern writes to ensure the Court's awareness of the legislatively-authorized fee structure in California's landmark groundwater law.

This Court' decision to address the applicability of Propositions 218 and 26 to groundwater regulation comes at the very time that counties and other water agencies are commencing their SGMA compliance. The County of Kern maintains that resolution of the dispute among the present parties enables the Court to provide timely and unambiguous direction that will enable SGMA agencies to fulfill their responsibilities without further delay.

I. SGMA AUTHORIZES GROUNDWATER SUSTAINABILITY AGENCIES TO LEVY TWO TYPES OF ASSESSMENTS.

In enacting SGMA, the Legislature intended "[t]o provide local groundwater agencies with the authority and the technical and financial assistance necessary to sustainably manage groundwater." (Wat. Code, § 10720.1(d).) For counties and other local entities developing and implementing sustainability plans, SGMA's fee-setting and other financial provisions will prove indispensable "to provide for the sustainable management of groundwater basins" and "to enhance local management of groundwater consistent with rights to use and store groundwater and Section 2 of Article X of the California Constitution." (Wat. Code, § 10720.1(a), (b).)

More specifically, the ability of locally-formed Groundwater Sustainability Agencies (GSAs) to set SGMA fees in short order is vital to fulfill SGMA's underlying legislative objectives to forthwith avoid or minimize subsidence, improve data collection, increase groundwater storage, protect water quality, and remove impediments to recharge. (Wat. Code, § 10270.1(e)-(f).)

The financial authority of GSAs is set forth in chapter 8 of SGMA. (Wat. Code, §§ 10730, *et seq.*) Chapter 8 confers authority on GSAs to adopt fees to fund costs of its locally developed groundwater sustainability program, using broad language covering all the GSA's activities needed to prepare, adopt and implement its groundwater sustainability plan for the covered basin or sub-basin. (Wat. Code, § 10730(a).) Chapter 8 also separately provides GSAs with the authority to adopt groundwater extraction fees related to property acquisition, water supply, and water distribution. (Wat. Code, § 10730.2.) .)

The final Assembly Floor Analysis of SGMA's financing package enacting those two provisions, 2014 Statutes, chapter 347 (AB 1739), explains the distinctions, developed in the subparagraphs below, between

sections 10730(a) and 10730.2. AB 1739 will

> Provide a GSA with financial authorities to impose regulatory fees to fund the preparation, adoption, and amendment of a GSP[;] and authorities, consistent with the California Constitution, to fund acquisition of lands, water supply, water treatment, and other activities to implement the GSP.

(Assembly Floor Analysis, AB 1739 (Aug.23, 2014) 2, available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1701-1750/ab_1739_cfa_20140828_205448_asm_floor.html.)

The distinction between the two types of fees can be traced to the Governor's Office of Planning and Research (OPR) memorandum entitled *Draft Sustainable Groundwater Management 5.22.14* (May 22, 2014), at http://opr.ca.gov/docs/Draft_Groundwater_Management_Language.pdf. The text that ultimately became section 10730(a) is entitled "Regulatory Fee Authority To Be Utilized Consistent with Prop 26." The text that ultimately became section 10730.2 is headed "Fee Authority for Water Service-Related Fees Pursuant to Prop 218." (*Op. cit.*, Draft Bill Language - Groundwater Management, at pp. 11-12.) A copy of these cited pages is appended to this brief.

A. Section 10730(a): To Prepare and Implement Regulatory Groundwater Management Plans.

Water Code section 10730(a) authorizes GSAs to impose fees (including fees on groundwater extraction) to fund the "costs of a groundwater sustainability program including, but not limited to, preparation, adopting and amendment of a groundwater sustainability plan, and investigations, inspections, compliance assistance, enforcement, and program administration, including a prudent reserve." Section 10730(a) contains a limited exception for *de minimis* extractors, but does not specify a duty to comply with Proposition 218.

B. Section 10730.2: To Fund Acquisition and Provision of Water Supply.

Water Code section 10730.2 separately confers authority on a GSA to establish water service fees following adoption of its sustainability plan. (GSAs can impose certain supply and service fees even earlier in areas where a groundwater management plan was adopted before January 1, 2015.) After the GSA has adopted its sustainability plan, it "may impose fees on the extraction of groundwater from the basin to fund costs of groundwater management, including, but not limited to, the costs of the following: ... (2) Acquisition of lands or other property, facilities, and services; (3) Supply, production, treatment, or distribution of water." In contrast to section 10730(a) and its reference to regulatory activities, section 10730.2 describes not the regulation of groundwater, but purchases and sales to secure or protect the resource, and to distribute it to users.

Also unlike section 10730(a), section 10730.2 includes an express obligation to comply with portions of Proposition 218. Fees enacted under section 10730.2 "shall be adopted in accordance with subdivisions (a) and (b) of Section 6 of Article XIII D of the California Constitution." The cited sections refer to the notice and protest provisions of Proposition 218 for "property related" fees and charges. The following section of this brief expands on the logical premise that fees adopted under section 10730(a) in a GSA's regulatory capacity do not invoke the need to comply with Proposition 218.

II. ASSESSMENTS NECESSARY TO FUND PREPARATION AND IMPLEMENTATION OF A GROUNDWATER MANAGEMENT PLAN ARE NOT PROPERTY-RELATED FOR PURPOSES OF PROPOSITION 218.

A. The Principal Parties Agree that SGMA Fees To Fund Preparation and Implementation of a Groundwater Management Plan Will Not Be Subject to Proposition 218.

As stated in the introduction, the Court's analysis of Propositions 218's and 26's relationship to United's groundwater charges may profoundly affect the ability of Kern and all other local entities anticipating service as GSAs or GSA members, to exercise their SGMA chapter 8 authority to fund implementation of SGMA's sustainability requirements. Once formed, GSAs in critically over-drafted basins such as those within Kern County will only have until January 31, 2020 to implement lawful sustainability plans. (Wat. Code, § 10720.7(a)(1).)

Following the Court of Appeal's order requesting supplemental briefing on the "applicability, if any" of SGMA to the present action, both appellants and respondents submitted supplemental letter briefs briefly addressing SGMA's fee provisions. (See City and District supplemental letter briefs, filed in Court of Appeal Sep. 26, 2014.) Although the parties' letter briefs disagreed about which of their respective positions on the District's extraction fees and rate ratios benefits more from examination of SGMA's fee provisions, both the City and District expressed broad agreement on an important starting point. Both parties concurred that Proposition 218 compliance is not automatically required whenever GSAs impose groundwater fees under SGMA. Instead, Water Code section 10730(a) creates a category of "regulatory fees" intended to fall outside Proposition 218 and receive review under Proposition 26 instead. (See District supplemental brief, p. 5; City supplemental brief, pp. 9, 11.)

In this Court, the City's opening brief reiterates the distinction of regulatory fees under Water Code section 10730 from section 10730.2 fees to fund "supply, production, treatment, or distribution of water," noting that the latter "must comply with Proposition 218." (City opening brief, p. 40.) The City also anticipates in its reply brief that a "yet-to-be-designated Sustainable Groundwater Management Agency" will have authority over groundwater management and regulation, which it contrasts with the "service" of obtaining and delivering water. (City reply brief, p. 20.)

The City also recognized in its letter brief that the language on GSP-related regulatory fees in section 10730(a) is "consistent with Proposition 26's exemption for regulatory fees." (City supplemental brief, p. 9.) That exemption covers "[a] charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof." (*Id.* at p. 9 (quoting Cal. Const., art. XIIIC, § 1, subd. (e)(3).) Notwithstanding the principal parties' agreement that SGMA confers authority for regulatory fees outside Proposition 218, however, the Court must remain sensitive to the implications of its decision on SGMA's future. Two of the amici curiae before the Court -- like the Court of Appeal in the first *Pajaro Valley* decision -- demonstrate the potential misinterpretation at large in the State, which Kern asks the Court to anticipate and preempt.[1]

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[1] Amicus Jack Cohen, identified as a Proposition 218 drafter, argues that SGMA, as construed by the Court of Appeal, would create a "regulatory exception for many groundwater extraction charges from the property-related fee provisions." Cohen brief, pp. 13-14. That argument is derivative of a false premise discussed and discredited below: that SGMA regulatory fees qualify as "property-related" under Proposition 218. See sections IIC and IID, *infra*. Amicus City of Signal Hill argues that *both* of SGMA's GSA fee provisions

As discussed in the sections to follow, recent case law highlights the risks of misapplying Proposition 218 out of context to regulatory fees properly subject to review under Proposition 26, such as those SGMA authorizes under Water Code section 10730(a).

B. SGMA's Fee Provisions Are Grounded in a Constitutionally Sound Distinction Between Regulatory and Water Service Fees.

Read in context, Water Code section 10730(a), which focuses on regulated activities and program costs covering all aspects of a GSA's sustainability plan from design through enforcement, is fully consistent with the traditional test for regulatory fees. (See, e.g. *California Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 131 ("a regulatory fee is charged to cover the reasonable cost of a service or program connected to a particular activity."), 132 ("fee payers have some control both over when, and if, they pay any fee, i.e., when or if they elect to engage in a regulated activity"); *California Assn. of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945 ("Fees charged for the associated costs of regulatory activities are not special taxes if the 'fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." (quoting *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 876).)

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in chapter 8 (Water Code, §§ 10730(a) and 10730.2) "expressly make those fees subject to" Proposition 218. Signal Hill brief, p. 31. That argument mistakenly elides the two separate provisions, assuming that section 10730.2's Proposition 218 compliance also applies to section 10730(a). *Pajaro Valley* is discussed in section II.D, *infra*.

As set forth in the introduction (pages 5-6, *supra*), separately from authorizing fees for the "acquisition of lands, water supply, water treatment, and other activities to implement" the sustainability plan, the Legislature found it necessary to provide a GSA with "financial authorities to impose *regulatory fees* to fund the preparation, adoption and amendment" of a groundwater sustainability plan. (Assembly Floor Analysis, AB 1739 (Aug.23, 2014), *supra* page 6, at p. 2 (emphasis added).) The Governor's Office of Planning and Research, in providing the initial draft from which sections 10730(a) and 10730.2 were produced, confirmed that in addition to authorizing the new groundwater agencies' ability to assess water service fees, the Legislature would empower local agencies to move beyond existing earlier constraints on local cost recovery, and establish fees covering the regulatory costs of groundwater plan preparation and implementation. OPR's memo defines the expected source of constitutional review for each provision, with section 10730(a) fees reviewable under Proposition 26 and section 10730.2 fees under Proposition 218 (See *Draft Sustainable Groundwater Management 5.22.14* (May 22, 2014), *supra* page 6, and appended to this brief.)

C. This Court's Proposition 218 Jurisprudence Confirms that Plan-Preparation Fees Do Not Qualify as "Property-Related."

Of course the Legislature's and Governor's Office's expectations will not prevail if they fail to honor the underlying constitutional standards embraced in Propositions 218 and 26. The County thus turns to examine the principal cases that shape the contours of a "property-related" fee.

Intended to close a perceived loophole in Proposition 13 for "special assessments," Proposition 218 limits the methods available to local governments to raise revenue from property owners, and applies when fees are "*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. XIIID, § 2, subd. (e) (emphasis added); see generally *Howard Jarvis Taxpayers Association v. City of Fresno* (2005) 127 Cal.App.4th 914, 918-928 (requiring rates proportional to service provided to each parcel).) Property-related fees and charges subject to Proposition 218 compliance must be tied to specific parcels, including all of the following:

> The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(Cal. Const., art. XIIID, § (6)(1).)

As a practical matter, an agency supplying water to consumers (be they a city utility or individual household) can perform that type of analysis as part of its fee proposal and Proposition 218 notice to opt out. An agency seeking to regulate groundwater pumping into the future, however, cannot possibly in advance of its management plan identify the owners who elect to pump and therefore be provided Proposition 218 notice. The agency has no way of knowing on which parcels groundwater will be extracted and under what conditions.

As a jurisprudential matter, leading decisions of this Court consistently decline to apply Proposition 218's property-related standards to fees resembling those authorized in Water Code 10730(a).

- In *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, this Court rejected application of Proposition 218 to a city ordinance imposing an annual housing inspection fee on landlords, noting that doing so would ignore the plain meaning of the term "as an incident of property ownership," that "it applies only to exactions levied *solely* by virtue of property ownership." (*Id.* at p. 841 (emphasis added.)[2]

- In *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, this Court held that connection fees charged to owners for new water service connections did not qualify as an "incident of property ownership" subject to Proposition 218 compliance. The Court identified practical difficulties that made it effectively impossible to prospectively identify the specific parcels to be affected and to apply section XIIID's requirements, including the "opportunity for a majority protest weighted according to the proportional financial obligation of the affected property." (*Id.* at 419.) These fees, like those to develop and implement SGMA's regulatory program, are not imposed on identifiable parcels, and cannot practicably be apportioned prospectively among individual parcels. Although "supplying water" can be considered a property-related service once connections are already established, the Court rejected the notion that all water service charges are subject to article XIIID restrictions. Fees for new connections were grounded in owners' voluntary decisions to apply, unlike

[2] Examining the text and history of Proposition 218, including contemporaneous ballot arguments for and against, *Apartment Association* concluded that they "all focus on exactions, whether they are called taxes, fees, or charges, that are directly associated with property ownership." *Id.* at p. 839. Noting that the word "incident" has "meant many things" from Lord Coke's 1641 treatise to the present, Justice Mosk cautioned against a non-literal reading of the term "incident of property ownership." *Id.* at p. 841 & fn. 2.

fees for ongoing water service that required "nothing other than normal operation and use" of the property. (*Id.* at p. 427.)

- *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, held that article XIIIC's initiative power applies to water charges coming under article XIIID, but that this provision did not grant local voters a right to withhold their approval of future adjustments to water delivery charges. Interpreting *Richmond*, the Court suggested that a "water delivery charge" can qualify as "property-related" services under article XIIID "whether the charge is imposed based upon consumption or is imposed as a fixed monthly fee." (*Id.* at p. 227.) *Bighorn* did not rule or suggest, however, that fees for planning and implementation of groundwater regulatory programs, such as those SGMA authorizes in Water Code section 10730(a), could fit within this water-delivery-focused analysis. As in *Apartment Association*, which funded a program addressing substandard housing, these fees are not imposed on the mere ownership of property, but instead on the voluntary decision to extract. Misapplication of Proposition 218 to impede funding for groundwater regulatory programs would disable local agency action to transition from groundwater overdraft toward groundwater sustainability.

D. The Source of Proposition 218 Confusion -- the *Pajaro I* Court of Appeal's Conclusion that Groundwater Extraction Is Related Solely To Land Ownership -- Deserves Re-Examination and Disapproval.

Notwithstanding this Court's consistent authority just described, the Courts of Appeal (save for that in the present case) have complicated and confused the Proposition 218 jurisprudence based on a fundamental flaw that caused the Court of Appeal in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364 [*Pajaro I*] to discard the analysis that

the County of Kern advances here. (See *id.* at pp. 1385-1386.) That flaw, set forth at pages 1391 to 1392 of the opinion, concludes that because groundwater extraction is "intimately" and "closely connected" to land ownership, a groundwater extraction fee is "property related." The City in this appeal relies on the *Pajaro I* Court (City Reply Brief, pp. 25 *et seq.*); the District and Court of Appeal in this case reject that reliance (District Answer Brief, pp. 33 *et seq.*). The County of Kern joins the District in urging this Court's disapproval of the cited passage in *Pajaro I.*

"Intimate" and "close connection" do not equate to such an identity of prerogative to merit the tag "property-related." The building owner in *Apartment Association* could argue that his building ownership was intimately or closely connected with his expectation for a Proposition 218 plebiscite on the inspection fee, but it was not ownership, but operating as a landlord that prompted the fee. In respect of groundwater extraction in California, land ownership alone does not give rise to a reasonable expectation of no restraint by regulation, nor does the fact of ownership alone give rise to unlimited extraction that would vitiate a fee assessment. Even the authority on which the *Pajaro I* Court relied (150 Cal.App.4th at p. 1391, citing *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1237 fn. 7) qualifies the landowner's prerogative that extraction -- whether as overlying owner or appropriator -- be "reasonable." (Accord, Cal. Const., art. X, § 2.) And just as a land-use ordinance -- that is, a "regulatory" one -- disables a landowner's "property-related" argument that Proposition 218 should apply before a municipality can impose reasonable exactions on use of its land, so does the State's and its subdivisions' authority over groundwater use vitiate a claim that land ownership alone grants an ability to extract. (See *In re Maas* (1933) 219 Cal. 422; *Baldwin v. County of Tehama, supra,* 31 Cal.App.4th 166; see

generally Rossmann and Steel, *Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights* (1983) 33 Hastings L. J. 903.)

In any event, the groundwater augmentation fees addressed in *Pajaro I* only arose in the context of fees tied to *water delivery* and *water service*, not implementation of a regulatory program. (150 Cal.App.4th at pp. 1387-91.) Indeed, the water agency in that case "all but concede[d]" that the charge at issue was not truly regulatory. (*Id.* at p. 1390 fn. 17.) Furthermore, the Court recognized that *Bighorn*'s discussion of property-based fees still arose only in the context of a fee that meets the traditional "incidental-to-ownership test," not one that was truly regulatory. (See *id.* at p. 1392.)

E. Potential Abuses in Formulating Assessments Will Be Avoided by a Groundwater Regulator's Duty to Justify the Fairness Exemption from Proposition 26.

As introduced above, the Legislature in enacting SGMA expressly and appropriately anticipated that unlike water service fees, groundwater regulatory fees in SGMA would receive constitutional review under Proposition 26, which expressly covers regulatory fees through a specific exemption. Proposition 26 requires, without applying the proportional or per-parcel cost standards that apply under proposition 218 to property-related fees, that any California fee be subject if challenged to an evaluation of its "reasonable cost." (See, e.g., *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 438.)

To support application of the exemption for regulatory fees and charges in Proposition 26's article XIII(e)(3), groundwater regulatory agencies will need to defend their charges as reasonable and fairly apportioned. (See article XIIIC, § 1 (e)(charges must not exceed "reasonable costs to the local government of providing the service or product").) This

constraint will discipline the section 10730(a) fee structures that future GSAs establish, and in cases where such discipline is lacking, provide for judicial voiding of unreasonable fees.

III. TO AVOID DELAY AND WASTE IN STATEWIDE GROUNDWATER REGULATION, THE COURT IS ASKED TO ADJUDICATE THE PARTIES' DISPUTE WITH FORCEFUL CLARITY.

A. Time Cannot Be Wasted in Stabilizing and Protecting California's Groundwater Resource.

In enacting SGMA, the Legislature responded to "Catastrophic Impact from a Lack of Statewide Standards," described by its principal water policy committee as follows:

> In some parts of California the lack of sustainable groundwater management has become an economic and environmental catastrophe. A headlong rush to pump a finite resource has crashed into a brick wall of harsh realities including dropping groundwater levels that are leaving wells spitting sand and farms and communities stranded; land subsidence that buckles infrastructure, cracks irrigation canals, and deposits threatening levels of sediment into flood control structures; and disappearing streams where the pull of subsurface pumping has deprived both senior water rights holders and wildlife of crucial surface flows.

(Assembly Comm. on Water, Parks & Wildlife Bill Analysis, SB 1168 (June 23, 2014), *supra* pp. 1-2, at p. 4.)

Toward the Legislature's ends, groundwater management agencies are expected to be established in little more than one year's time, and will then in critically-overdrafted basins have only three years to produce groundwater sustainability plans. Given the complex hydrologic and political realities of the most at-risk groundwater basins, these time frames are short. They allow little room for waste or delay, where the impacts of excess groundwater extraction over four drought years demand correction.

B. Clarity Is Needed To Avoid Endless Litigation Over the Application of Proposition 218 to the State's Groundwater Regulation.

The Court's timely grant of review in this appeal will not only resolve the instant dispute between the City and District. The number of briefs of amici curiae submitted to date, and their consistent reference to SGMA, evidence the potential of the Court's opinion to influence the implementation of SGMA statewide.

The Court is requested to remove as much doubt as possible that has been created by the Proposition 218 litigation to date. The experience in the Pajaro Valley Water Management Agency bespeaks the need for clarity. The Legislature empowered that agency *in 1984* to address then-critical conditions of overdraft and sea-water intrusion. (1984 Stats., ch. 257.) The subsequent enactment of Proposition 218 spawned at least three proceedings that yielded published appellate decisions. (*Pajaro I*, supra; *Eiskamp v. Pajaro Valley Water Management Agency* (2012) 203 Cal.App.4th 97; *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586.) Rather than being forced to devote resources to such litigation, the County of Kern prefers and needs to invest in the substantive task working with local entities to establish groundwater sustainability agencies and create plans that lead to actual groundwater sustainability.

CONCLUSION.

The County of Kern expresses hope that as it proceeds to participate in the implementation of SGMA between now and year 2020, it and other entities within the County will benefit from this Court's clear direction in establishing the fees necessary to bring sustainability to groundwater

extraction: fees adopted pursuant to Water Code section 10730(a) are not subject to the provisions of Proposition 218.

Dated: 1 December 2015

Respectfully submitted,

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By

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CERTIFICATE OF BRIEF FORMAT COMPLIANCE

Counsel for amicus curiae County of Kern hereby certifies that pursuant to rule 8.520(c) of the California Rules of Court, the foregoing amicus curiae brief of the County of Kern is produced using 13-point type and contains approximately 5,036 words, including footnotes, but excluding front matter and certificates, as calculated by Microsoft Word.

Dated: December 1, 2015

Antonio Rossmann

Attorney for the County of Kern

Appendix

Governor's Office of Planning and Research, *Draft Sustainable Groundwater Management 5.22.14* (May 22, 2014) (page 1 of text, and pages 11-12 of draft bill language -- groundwater management)

Sustainable Groundwater Management

I. Introduction and Background

This document is the first draft of the Administration's groundwater management proposal. At this early stage, the proposal—and accompanying legislative language—is intended to help foster the ongoing discussion about the best way to ensure local, sustainable management of our groundwater resources. These discussions will **extend beyond the budget in June**. The administration will continue working with the Legislature and all stakeholders.

It is critical that this proposal, as well as the topic of groundwater, is viewed in a larger context. There is broad agreement that the state's water management system is unsustainable. The system is unable to reliably meet human, economic, and ecological needs; too exposed to wet and dry climate cycles and natural disasters; and inadequate to handle the additional pressures of climate change and future population growth. Solutions are complex and expensive, and they require the cooperation and sustained commitment of all Californians working together.

To address these issues, the administration released the California Water Action Plan in January 2014. The Plan has three broad, long-term objectives: more reliable water supplies, the restoration of important species and habitat, and a more resilient, sustainably managed water resources system—including water supply, water quality, flood protection, and the environment—that can better withstand inevitable and unforeseen pressures in the coming decades. The Plan sets forth specific actions to take in the next five years that address urgent needs and provide the foundation for sustainable management of California's water resources.

As the Plan explains, the state must improve its groundwater management through supply side and demand side measures. Groundwater accounts for more than one third of the water used annually by cities and farms, much more in dry years when surface water is scarce. Some of California's groundwater basins are sustainably managed, but, unfortunately, many are not. The problem has persisted for decades. We rely on local groundwater agencies to manage the resources, but many do not have the tools, resources, and authorities to do the job. Pumping more than is recharged lowers groundwater levels, which makes extracting groundwater more expensive and energy intensive. Excessive groundwater pumping can cause irreversible land subsidence, which damages infrastructure and reduces the capacity of aquifers to store water.

This proposal is founded on the principal that groundwater resources are best managed at the local level and that every region is unique. This proposal gives local entities the tools and authorities needed to manage groundwater resources sustainably. It provides guidance and technical assistance to local agencies. It includes a state backstop, by which the State Water Resources Control Board can adopt a temporary plan when local agencies have been unable or have been unwilling to correct major problems. The backstop is

REGULATORY FEE AUTHORITY TO BE UTILIZED CONSISTENT WITH PROP 26

SEC. L12. Section 10754.3 is added to the Water Code, to read:

10754.3. (a) In addition to the powers granted to the local agency under any other law, the local agency may impose fees on groundwater extraction or other activities regulated by a groundwater management plan adopted pursuant to this part including, but are not limited to, costs incurred in connection with investigations, technical assistance, inspections, planning, implementing groundwater management plans, mitigating the effect of activities affecting groundwater, and enforcement. Recoverable costs do not include costs recovered under Section 10754.5.

(b) Fees imposed under this section shall be set to recover the estimated costs set forth in subdivision (a), taking into account the amounts recovered from other sources. If the fees collected exceed the actual costs for the period for which the fees were imposed, the fees may be held in reserve for future costs, and shall not be used for general revenue purposes. The local agency shall adjust the fees as necessary to assure that program revenues do not exceed program costs, including maintenance of a prudent reserve as determined to be necessary by the local agency, over the long term.

(c) The fees shall allocate costs among fee payers in a manner that bears a fair or reasonable relationship to fee payers' burdens on, or benefits received from, the local agency's activities. Factors that may be considered in establishing a fair and reasonable allocation among fee payers include, but are not limited to, the contribution of their activities on the need for groundwater management, the local agency's costs related to monitoring or oversight of their activities, and the policies of Sections 100, 106.3, and 113.

(d) (1) Except as provided in paragraphs (2) and (3), a local agency is not authorized to impose fees under this section unless the local agency has adopted a groundwater management plan that meets all requirements of Section 10753.7 for a qualifying groundwater management plan.

(2) A local public agency may impose fees under this section to recover costs incurred in connection with preparing and adopting a groundwater management plan that meets all requirements of Section 10753.7 for a qualifying groundwater management plan.

(3) In an action seeking to invalidate a fee imposed under this section or for refund of a fee, the court shall not invalidate the fee or order a refund based on a failure to comply with subparagraph (A) of paragraph (1) of subdivision (a) of Section 10753.7.

FEE AUTHORITY FOR WATER SERVICE-RELATED FEES PURSUANT TO PROP 218

SEC. L13. Section 10754.4 is added to the Water Code, to read:

10754.4. (a) In addition to the powers granted to the local agency under any other law, a local agency that adopts a groundwater management plan that meets all requirements of Section 10753.7 for a qualifying groundwater management plan may impose fees on the extraction of groundwater to recover costs of groundwater management, including, but are not limited to, costs for acquisition of replenishment water or deliveries in lieu of groundwater extractions, land acquisition costs, costs for construction and operation of facilities, technical assistance, and related administrative costs. Recoverable costs do

not include any costs for which fees are recovered under Section 10754, 10754.2, or 10754.3.

(b) Fees imposed under this section shall be adopted and implemented in accordance with Subdivisions (a) and (b) of Section 6 of Article XIIID of the California Constitution.

(c) In an action seeking to invalidate a fee imposed under this section or for refund of a fee, the court shall not invalidate the fee or order a refund based on a failure to comply with subparagraph (A) of paragraph (1) of subdivision (a) of Section 10753.7.

NOTICE OF FEES AND AUTHORITY TO COLLECT

SEC. L14. Section 10754.5 is added to the Water Code, to read:

10754.5. (a) Except as otherwise provided by the local agency when it imposes the fee, a fee imposed under this part is due within 30 days after the fee payer is notified of the fee imposed.

(b) A local agency may exercise the authority set forth in Sections 75615 and 75616 and Article 5 (commencing with Section 75630) of Chapter 3 of Part 9 of Division 21 to collect delinquent fees.

RECOGNIZE NEW CATEGORY OF BASINS DESIGNATED IN LONG-TERM OVERDRAFT

SEC. L15. Section 10755.4 of the Water Code is amended to read:

10755.4. Except in those groundwater basins that are ***designated basins or are*** subject to critical conditions of groundwater overdraft, as identified in the department's Bulletin 118–80, revised on December 24, 1982, the requirements of a groundwater management plan that is implemented pursuant to this part do not apply to the extraction of groundwater by means of a groundwater extraction facility that is used to provide water for domestic purposes to a single-unit residence and, if applicable, any dwelling unit authorized to be constructed pursuant to Section 65852.1 or 65852.2 of the Government Code.

LAFCO AND GROUNDWATER DISTRICT GOVERNANCE

[placeholder, in case language is needed]

LAND USE

LIMITATIONS ON EXTRACTIONS IN HIGH OR MEDIUM PRIORITY BASINS AFTER 2020 IF GROUNDWATER MANAGEMENT PLANS NOT IN PLACE

SEC. LU1. Section 53087.7 is added to the Government Code, to read:

[PLACEHOLDER – For basins designated high or medium priority by DWR there would be automatic limitations on extractions if a sustainable groundwater management plan is not in place by 2020. The intent is to avoid making the situation worse and to encourage

PROOF OF SERVICE

I, **Tiffany Poovaiah**, hereby declare under penalty of perjury as follows:

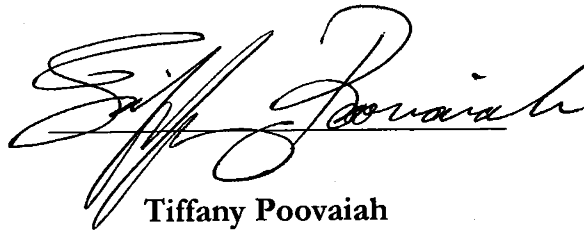
I am over the age of 18 years and am not a party to the within action. My business address is 2014 Shattuck Avenue, Berkeley, California 94704.

On **December 2, 2015**, I served the following documents:

BRIEF OF COUNTY OF KERN AS AMICUS CURIAE

by first class mail postage prepaid at Berkeley, California, by depositing in a sealed envelope a copy to each of the persons listed below.

Executed on **December 2, 2015**, at Berkeley, California.



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