No. S226036

Service on Attorney General required by Rule 8.29(c)(1)

Exempt from Filing Fees Government Code § 6103

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

MAY 29 2015

Frank A. McGuire Clerk

Deputy

City of San Buenaventura
Plaintiff and Respondent / Cross-Appellant.

vs.

United Water Conservation District and Board of Directors of United Water Conservation District
Defendants and Appellants / Cross-Respondents

MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY TO ANSWER TO PETITION FOR REVIEW

of a Published Decision of the
Second Appellate District, Division 6, Case No. B251810

Reversing a 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

*MICHAEL G. COLANTUONO (143551)
MColantuono@chwlaw.us
DAVID J. RUDERMAN (245989)
DRuderman@chwlaw.us
MICHAEL R. COBDEN (262087)
MCobden@chwlaw.us
COLANTUONO, HIGHSMITH & WHATLEY, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071-3137
Telephone: (213) 542-5700
Facsimile: (213) 542-5710

GREGORY G. DIAZ (156318)
GDiaz@cityofventura.net
City Attorney
CITY OF SAN BUENAVENTURA
P.O. Box 99
Ventura, California 93002-0099
Telephone: (805) 654-7818
Facsimile: (805) 641-0253

Attorneys for Respondent and Cross-Appellant City of San Buenaventura

Service on Attorney General required by Rule 8.29(c)(1)

Exempt from Filing Fees Government Code § 6103

No. S226036

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

City of San Buenaventura
Plaintiff and Respondent / Cross-Appellant.

vs.

United Water Conservation District and Board of Directors of United Water Conservation District
Defendants and Appellants / Cross-Respondents

MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY TO ANSWER TO PETITION FOR REVIEW

---

of a Published Decision of the
Second Appellate District, Division 6, Case No. B251810

Reversing a 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

---

*MICHAEL G. COLANTUONO (143551)
MColantuono@chwlaw.us
DAVID J. RUDERMAN (245989)
DRuderman@chwlaw.us
MICHAEL R. COBDEN (262087)
MCobden@chwlaw.us
COLANTUONO, HIGHSMITH & WHATLEY, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071-3137
Telephone: (213) 542-5700
Facsimile: (213) 542-5710

GREGORY G. DIAZ (156318)
GDiaz@cityofventura.net
City Attorney
CITY OF SAN BUENAVENTURA
P.O. Box 99
Ventura, California 93002-0099
Telephone: (805) 654-7818
Facsimile: (805) 641-0253

Attorneys for Respondent and Cross-Appellant City of San Buenaventura

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The City of San Buenaventura ("City") hereby moves this Court to take judicial notice of the documents attached as Exhibits J and K to the Declaration of Jon R. di Cristina under Evidence Code section 452, subdivisions (d) and (h), Evidence Code section 459, and rule 8.252 of the California Rules of Court:

J. Notice of Ruling on Petitions for Writ of Mandate in *Tesoro Refining and Marketing Co. v. Water Replenishment District of Southern California*, Los Angeles Superior Court Case No. BS134239, dated September 14, 2012.

K. Notice of Continuance of Status Conference / Trial Setting Conference in in *Tesoro Refining and Marketing Co. v. Water Replenishment District of Southern California*, Los Angeles Superior Court Case No. BS134239, dated April 16, 2015.

These materials are relevant to rebut an unsupported claim in United Water Conservation District's Answer to the City's Petition for Review that litigation involving the replenishment assessments imposed on groundwater production in the Central and West Basins of Los Angeles County has been settled.

The above-listed materials were not presented to the trial court because they are relevant to the Petition for Review, but were not relevant to the questions before the trial court.

This motion is based on the attached Memorandum of Points and Authorities and Declaration of Jon R. di Cristina along with Exhibits J and K, the records and files of this Court, and the accompanying proposed order granting this motion.

DATED: May 28, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC

MICHAEL G. COLANTUONO
DAVID J. RUDERMAN
MICHAEL R. COBDEN
Attorneys for Respondent and Cross-Appellant
CITY OF SAN BUENAVENTURA

151785.2

MEMORANDUM OF POINTS AND AUTHORITIES

I. GENERAL PRINCIPLES OF JUDICIAL NOTICE

A reviewing court may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code, § 459.) Under subdivision (d) of Evidence Code section 452, the Court may notice "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." A reviewing court may notice facts just as does a trial court. (Evid. Code, § 459, subd. (a).) In the trial court, judicial notice of facts covered by section 452 is mandatory upon request, where the opposing party is permitted to object and the court has enough information about the facts to determine that they come within a category subject to notice. (Evid. Code, § 453, subd. (b).)

"Judicial notice is the recognition and acceptance by the court, for use ... by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882 [citations and quotations omitted].) "The underlying theory of judicial notice is that the matter judicially noticed is a law or fact that is **not reasonably subject to dispute**." (*Ibid.*; see Evid. Code, § 452, subd. (h).)

II. EXHIBITS J AND K ARE NOTICEABLE AND RELEVANT

The City of San Buenaventura ("City") respectfully requests this Court judicially notice Exhibits J and K to the Declaration of Jon di Cristina. As public records, the existence and contents of these exhibits are not reasonably subject to dispute. (Evid. Code, § 452, subd. (h).)

Exhibits J and K are documents duly filed in a California superior court. (Evid. Code, § 452, subd. (d) [court records].) The City offers these two exhibits to rebut a factual claim at page 22 of United Water Conservation District's Answer to the City's Petition for Review. There the District claims litigation involving replenishment assessments imposed on those who produce groundwater in the Central and West Basins of Los Angeles County by the Water Replenishment District of Southern California "with at least a passing similarity to this case ... has settled." Exhibits J and K demonstrate that, to the contrary, challenges to the Water Replenishment District's groundwater charges remain pending.

These documents are therefore relevant to the Petition for Review and properly subject to notice in consideration of that Petition.

III. CONCLUSION

For the reasons discussed above, the City respectfully requests this Court grant the City's motion to notice Exhibits J and K and consider them in support of the City's Petition for Review.

DATED: May 28, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC

MICHAEL G. COLANTUONO
DAVID J. RUDERMAN
MICHAEL R. COBDEN
Attorneys for Respondent and Cross-Appellant
CITY OF SAN BUENAVENTURA

DECLARATION OF JON R. di CRISTINA

[Cal. Rules of Court, rule 8.54(a)(2)]

1. I am an attorney in good standing, licensed to practice before the courts of this state. I am an associate with the firm Colantuono, Highsmith & Whatley, PC, counsel of record for Respondent and Cross-Appellant City of San Buenaventura in this matter.

2. Attached hereto as Exhibit J is a true and correct copy of the Notice of Ruling on Petitions for Writ of Mandate in *Tesoro Refining and Marketing Co. v. Water Replenishment District of Southern California,* Los Angeles Superior Court Case No. BS134239 and *Central Basin Municipal Water District v. Water Replenishment District of Southern California,* Los Angeles Superior Court Case No. B132202, dated September 14, 2012. My firm represents the City of Pico Rivera in a related case. Our co-counsel for Pico Rivera, the firm of Alvarez-Glasman & Colvin, was served with this document when the Notice of Ruling was filed according to the proof of service. An attorney from the Alvarez-Glasman & Colvin firm forwarded it via e-mail to another attorney at my firm, David Ruderman, after our firm associated as co-counsel for the City of Pico Rivera in 2013. The Notice of Ruling was then placed in our electronic files, where it is kept in the ordinary course of business. I obtained this document from our electronic files on May 21, 2015.

3. Attached hereto as Exhibit K is a true and correct copy of the Notice of Continuance of Status Conference / Trial Setting

Conference in in *Tesoro Refining and Marketing Co. v. Water Replenishment District of Southern California*, Los Angeles Superior Court Case No. BS134239, dated April 16, 2015. My firm represents the City of Pico Rivera in a related case, and counsel for the Water Replenishment District electronically served us with this document when it was filed. I obtained this document from our electronic files on May 21, 2015.

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

Executed May 27, 2015 in Penn Valley, California.

JON R. di CRISTINA

[Proposed]

ORDER TAKING JUDICIAL NOTICE

Good cause appearing, IT IS HEREBY ORDERED that Respondent and Cross-Appellant City of San Buenaventura's Motion for Judicial Notice is GRANTED.

IT IS ORDERED that this Court shall take judicial notice of the following:

J. Notice of Ruling on Petitions for Writ of Mandate in *Tesoro Refining and Marketing Co. v. Water Replenishment District of Southern California,* Los Angeles Superior Court Case No. BS134239, dated September 14, 2012.

K. Notice of Continuance of Status Conference / Trial Setting Conference in in *Tesoro Refining and Marketing Co. v. Water Replenishment District of Southern California,* Los Angeles Superior Court Case No. BS134239, dated April 16, 2015.

DATED: ______________ By:________________________________

Chief Justice Tani Cantil-Sakauye

EXHIBIT J

EDWARD J. CASEY (State Bar No. 119571)
NEAL P. MAGUIRE (State Bar No. 234531)
ALSTON + BIRD LLP
333 South Hope Street, Sixteenth Floor
Los Angeles, CA 90071
Telephone: (213) 576-1000
Facsimile: (213) 576-1100
E-mail: ed.casey@alston.com
neal.maguire@alston.com

JOHN W. HARRIS (State Bar No. 66130)
GISELLE VINAS DHALLIN (State Bar No. 256089)
ADAM KARGMAN (State Bar No. 212109)
HARRIS & ASSOCIATES
865 South Figueroa Street, Suite 2750
Los Angeles, CA 90017
Telephone: (213) 489-9833
Facsimile: (213) 489-3761
Email: john@jwharrislaw.com

Attorneys for Respondent and Defendant
WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA

[EXEMPT FROM FILING FEE GOV'T CODE §6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL BASIN MUNICIPAL WATER DISTRICT, a public agency, Plaintiff and Petitioner, v. WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA, a public agency, Defendant and Respondent.	**Case No: BS132202** [Assigned to the Honorable James C. Chalfant – Department 85] **NOTICE OF RULING ON PETITIONS FOR WRIT OF MANDATE** Action Filed: May 20, 2011
TESORO REFINING AND MARKETING COMPANY, a Delaware Corporation, Plaintiff, v. WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA, a public agency, Defendant.	**Case No.: BS134239** Action Filed: October 11, 2011 Trial Date: September 6, 2012 Time: 9:30 a.m. Dept.: 85 (Related to Cases Nos. BS128136, BC464772, BC464773, VC060496, VC060498, VC060499, VC060592)

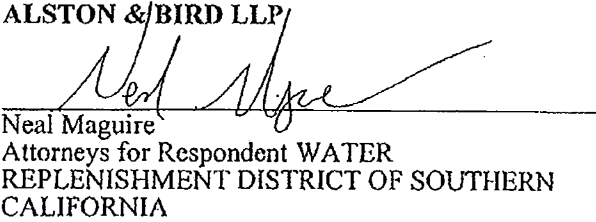
TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on September 6, 2012, Petitioners Central Basin Municipal Water District and Tesoro Refining and Marketing Company's petitions for writ of mandate came on regularly for hearing in the above-entitled Court before the Honorable James C. Chalfant. Curtis Parvin, Ryan Ortuno, Debra Deem, and Jason Goldstein appeared for Petitioners Central Basin Municipal Water District and Tesoro Refining and Marketing Company. Edward Casey and John Harris appeared for Respondent Water Replenishment District of Southern California.

Upon reviewing the moving and opposing papers submitted to the Court and after hearing oral argument, the Court granted the petitions for writ of mandate. The Court modified its tentative ruling and adopted that modified tentative ruling. Attached hereto as Exhibit "A" is a copy of that decision. Attached hereto as Exhibit "B" is a copy of the Court's Minute Order.

DATED: September 14, 2012

ALSTON & BIRD LLP



Neal Maguire
Attorneys for Respondent WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA

EXHIBIT A

Modified

57

Central Basin Municipal Water District v. Water Replenishment District of Southern California
BS 132202

Tentative Decision on Petition for Writ of Mandate: granted

FILED
Superior Court of California
County of Los Angeles

SEP 06 2012

John A. Clarke, Executive Officer/Clerk
By A. Fajardo, Deputy
ANNETTE FAJARDO

Petitioners Central Basin Municipal Water District ("Central Basin")and Tesoro Refining and Marketing Company ("Tesoro") apply for a writ of mandate directing Respondent Water Replenishment District of Southern California ("WRD") to vacate the Replenishment Assessments ("RAs") imposed by WRD over the past six years (2006-07 through 2011-2012), and to comply with Article XIII D of the California Constitution before imposing any RA. The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.[1]

A. Statement of the Case

Petitioner Central District filed its Petition/Complaint (hereinafter, "Petition") on May 20, 2011. Petitioner Tesoro filed its Petition in a related action (LASC Case No. BS 134239) on October 7, 2011. The two petitions were subsequently related~~, and consolidated under Central Basin's earlier-filed, lower-numbered case~~.

---

[1]Petitioners ask the court to judicially notice (1) the opening brief in City of Cerritos et al. v. Water Replenishment District of Southern California, ("Cerritos") LASC Case No BS128136, (2) the court's April 25, 2011 ruling in Cerritos, (3) a reporter's transcript from Cerritos, (4) the court's May 25, 2012 ruling on the CCP section 1094 motion for judgment in Cerritos, (5) portions of the court file in Water Replenishment District of Southern California v. City of Bellflower, LASC Case No. VC060498, (6) portions of the court file in Water Replenishment District of Southern California v. City of Cerritos, LASC Case No. VC060498, (7) portions of the court file in Water Replenishment District of Southern California v. City of Downey, LASC Case No. VC060546, (8) portions of the court file in Water Replenishment District of Southern California v. City of Pico Rivera, LASC Case No. VC060592, and (9) portions of the court file in Water Replenishment District of Southern California v. City of Signal Hill, LASC Case No. VC060496.

Records from a court file are subject to judicial notice. Ev. Code §452(d). However, the records must be relevant, and only their existence, not the truth of their contents, may be judicially noticed. *See* Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548, 1551. The request is granted for the existence of all of the above documents in a court file, except the reporter's transcript. A reporter's transcript is not part of a court file, and is not subject to judicial notice. The request to judicially notice the transcript is denied.

WRD asks the court to judicially notice (1) portions of the second amended judgment in Central and West Basin Water Replenishment District v. Adams, LASC Case No. 786656; (2) an April 25, 2011 transcript of proceedings in the Cerritos case, (3) a stipulation in intervention in Adams, and (4) a July 1959 report prepared by the State Department of Water Resources. The request is granted for the judgment and stipulation (Ev. Code §452(d), granted for the 1959 report (Ev. Code §452(c)), and denied for the reporter's transcript.

1. Central Basin

Central Basin's Petition alleges in pertinent part as follows. Central Basin is a municipal water district, duly organized and existing under the laws of the State of California. Petitioner's district boundaries cover the majority of the Central Basin (sometimes the "Basin"), and it provides water to more than two million people as both a wholesale and retail provider. Central Basin also holds adjudicated pumping rights within the Central Basin.

Pursuant to Water Code section 71751, Central Basin has the right to commence an action involving or affecting the ownership or use of water or water rights within its boundaries, used or useful for any purpose of the district, or a common benefit to lands within the district or inhabitants of the district. Furthermore, pursuant to Water Code section 71757, Central Basin has the power to commence an action, in its own name or as a class representative of the inhabitants, property owners, taxpayers, water producers or water users within the district, in order to prevent any interference with water or water rights used or useful to the lands, inhabitants, owners, operators, or producers within the district, or to prevent the diminution of the quantity or quality of the water supply of the district or the basin.

Pursuant to such authority, Central Basin brings this action on its own behalf and on behalf of all of those affected by Respondent WRD's improperly levied RAs. The parties represented by Central Basin include extraction rights holders who own and maintain wells, extract water from the Basin, and pay all taxes, fees, or charges imposed by WRD, regardless of whether the water is used by them or others. Central Basin also brings this action on behalf of the public, which is directly and indirectly impacted by the taxes, fees, or charges imposed by WRD.

WRD is a public agency located in the County of Los Angeles ("County"). WRD was created by a special ballot vote in 1959 pursuant to the Water Replenishment Act (Water Code §60000, *et seq.*) (the "WRD Act"), for the sole purpose of replenishing the underground water basins within its district boundaries. In 1990, the Legislature amended WRD's Act to add "clean-up" activities to WRD's authorized functions. Water Code §60224. WRD does not hold adjudicated extraction rights in either the Central Basin or the West Coast Basin.

Central Basin is the lead responsible water agency serving the majority of the Central Basin. Central Basin's service area encompasses approximately 82% of the adjudicated pumping rights in the Central Basin. The extraction rights holders pump in excess of 180,000 acre-feet of water annually from the ground water within the Central Basin. The court established these water rights pursuant to a judgment implemented more than 40 years ago in Central and West Basin Replenishment District v. Adams, et al., Los Angeles Superior Court Case No. C786686 (the "Central Basin Judgment"). Central Basin has no extraction rights with respect to the West Coast Basin, and its representation does not extend to any rights held with respect to the West Coast Basin. The court separately adjudicated West Coast Basin pumping rights, also over 40 years ago.

The WRD Act, independent of the Central Basin Judgment, charges WRD with replenishment and cleanup of the Central Basin and the West Coast Basin. The law requires that if WRD elects to levy an RA, it must adopt a resolution setting the RA for the succeeding fiscal year no later than the second Tuesday in May. At all times relevant to this action, WRD adopted and levied an RA on the Central Basin water extraction rights holders as follows: (a) On May 4,

VEN000005

2007, WRD adopted Resolution No. 07-794 setting the RA for fiscal year July 1, 2007 to June 30, 2008 "to be levied upon the production of groundwater from the groundwater supplies within [WRD's] District" at $149 per acre-foot; (b) On May 2, 2008, WRD adopted Resolution No. 08-827 setting the RA for fiscal year July 1, 2008 to June 30, 2009 "to be levied upon the production of groundwater from the groundwater supplies within [WRD's] District" at $153 per acre-foot; (c) On May 1, 2009, WRD adopted Resolution No. 09-852 setting the RA for fiscal year July 1, 2009 to June 30, 2010 "to be levied upon the production of groundwater from the groundwater supplies within [WRD's] District" at $181.85 per acre-foot; (d) On May 11, 2010, WRD adopted Resolution No. 10-881 setting the RA for fiscal year July 1, 2010 to June. 30, 2011 "to be levied upon the production of groundwater from the groundwater supplies within [WRD's] District" at $205 per acre-foot; (e) On May 6, 2011, WRD adopted Resolution No. 11-901, setting the RA for fiscal year July 1, 2011 to June 30, 2012 "to be levied upon the production of groundwater from the groundwater supplies within [WRD'S] District" at $244 per acre-foot.

Fees and charges imposed upon the extraction of ground water are property related fees subject to Article XIII D. Therefore, WRD must comply with the requirements of Article XIII D prior to adopting the RA on the extraction of groundwater in the Central and West Coast Basins.

WRD has never followed the procedures required by Article XIII D before adopting and levying its RA. Each RA levied by WRD pursuant to the above Resolutions violates constitutional and statutory mandates. Among the violations are the failure (1) of WRD's Survey Engineering Report ("ESR") and its Annual Budgets to make any reference to the requirements of Article XIII D; (2) to provide the requisite notice and related procedural requirements of Article XIII D when enacting the RA; (3) of the WRD to consider various factors in setting the RA, such as establishing different classes or rates for different types of pumpers or for different uses of the water extracted; and (4) of WRD to recognize and consider the different costs incurred in the Central and West Coast Basins. Accordingly, WRD has exceeded and continues to exceed it authority by illegally assessing and collecting RA funds from the Central Basin Group.

Article XIII D further prohibits a public agency from adopting a property related fee unless it meets all of the following requirements: (a) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service; (b) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed; (c) 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 attributable to the parcel. (d) No fee or charge may be imposed for a service unless that serviced is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential for future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4; and (e) No fee or .charge may be imposed for general governmental services. Cal. Const., Art. XIII D, Section 6, subd.(b)(1) - (5).

WRD has never performed a cost benefit, or any other type, of analysis to ensure compliance with this constitutional mandate prior to adopting its RA, particularly as to ensuring proportionate distribution of the fees or charges to users based on the cost of providing WRD's services to those users. WRD imposes a uniform RA without regard for Article XIII D's

requirements. WRD's violation of its statutory requirements also results in violations of Article XIII D's substantive requirements.

In 2006, HF&H Consultants conducted a study on behalf of the Southeast Water Coalition, which concluded that the costs WRD incurred in providing services to West Coast Basin pumpers were approximately 300% higher than the costs WRD incurred in the Central Basin. The higher costs incurred by WRD in the West Coast Basin are largely due to: (a) Replenishment of water in the West Coast Basin through injection wells, which costs significantly more than the replenishment of water in the Central Basin through spreading grounds; (b) Significantly higher costs in groundwater cleanup and projects and programs in the West Coast Basin than in the Central Basin; and (c) Administration costs related to the replenishment through injection wells and groundwater cleanup and projects required in the West Coast Basin.

Even though WRD incurs in the West Coast Basin approximately three times the costs it incurs in the Central Basin, WRD has at all times relevant to this action assessed a uniform RA on groundwater pumpers in the Central and West Coast Basins that is not based on the costs WRD incurs in providing services to the pumpers in each Basin.

The assessment and collection of WRD's RA on a uniform basis throughout WRD's service area has resulted in an overcharge on Central Basin pumpers of approximately 300%. The overcharge on the Central Basin pumpers amounts to tens of millions of dollars per year.

In 2009, HF&H Consultants updated the conclusions of its 2006 Study. The results were consistent with the 2006 Study and showed that in the 2009-2010 fiscal year, Central Basin pumpers overpaid WRD by approximately $20 million. Therefore, WRD's levy and collection of funds pursuant to Resolutions 06-771, 07-794, 08-827, and 09-852 violates Article XIII D.

Under the current uniform RA, WRD continues to overcharge the Central Basin pumpers in violation of Article XIII D. WRD reports that it estimates approximately a 50% increase of the RA within five years, significantly increasing the Central Basin pumpers' subsidy of the West Coast Basin costs in a short period. Thus, the current RA adopted pursuant to Resolution 10-881 also continues WRD's violation of Article XIII D.

WRD has maintained excess reserve funds in violation of the Act's limit on reserves since at least May 2007. Rather than apply all excess reserves towards the reduction of the RA or towards the purchase of water, as mandated by the Act, WRD has carried over funds year after year. Therefore, WRD has levied funds from the Central Basin Group even though it already maintained funds statutorily mandated for use for the same purposes as the RA levy. Such unnecessary and excessive levying violates Article XIII D.

WRD may only levy an RA for the purposes authorized by the WRDAct. To the extent WRD uses RA funds for any purpose other than those specifically authorized it violates Article XIII D. WRD has levied RA funds for purposes other than those authorized by the Act since at least May 2007. Such unauthorized purposes include, but are not limited to: (a) Advocacy and lobbying; (b) Contributions to political organizations; (c) Sponsorship of financial conferences; (d) Sponsorship of music and arts festivals; (e) Sponsorship of environmental conferences, (f) Purchase of promotional items; (g) Elementary school education programs; (h) Water conservation programs that are duplicative of Central Basin's and the pumpers' programs; and (i) Union dues.

Within the last four years, while amassing the illegal reserve fund referenced above and performing activities and providing funds for purposes outside of its mandate, WRD has failed to maintain appropriate water levels within the Central Basin, allowing the basin's water level to drop to its lowest levels since the 1970s. Rather than using its sizeable reserve and eliminating the improper funding outside its mandate, WRD improperly sought to declare a water emergency under the Central Basin Judgment in order to shift the burden to others. Essentially, WRD's approach constitutes a default on its obligations to those within the Central Basin, including those represented herein by Central Basin, which continues to pay an illegal assessment based on services that WRD fails to provide.

WRD has also levied the RA since at least May 2007 for the purpose of funding general government services available to the public at large in substantially the same manner as they are available to the pumpers, in violation of Article XIII D. Such general-purpose services include, but are not limited to: (a) Water conservation programs that are duplicative of Central Basin's and the pumpers' programs; (b) Eco-gardener class available to the public; (c) Elementary school education programs; (d) Sponsorships of financial conferences; (e) Sponsorship of Middle School music and arts festivals; (f) Sponsorship of environmental conferences; (g) Camping equipment for Boy Scouts; (h) Primavera Fest sponsorship and (i) Community organizations.

Those represented by Central Basin have collectively paid WRD at least $80 million pursuant to the unconstitutional RA since May 2007. WRD's failure to comply with Article XIII D results in charges on them disproportional to the costs associated with WRD's services, and thereby indirectly but disproportionately affect the residents and businesses within the Central Basin area. WRD's excessive and inequitable charges constitute an illegal tax, levy or assessment in violation of Article XIII D.

WRD is not a general-purpose government agency. WRD can act only to meet its purposes of replenishment and clean up of the Central and West Coast Basins. Accordingly, the WRD Act authorizes WRD to levy an RA for limited and specific purposes and requires that the RA benefit all persons or real property and improvements within the district, directly or indirectly. WRD has exceeded this authority at all times relevant to this action.

Part 6, Chapter 3 of the WRD Act provides specific guidance for the calculation of the RA. It provides that WRD may charge pumpers an RA on the extraction of water on a per-acrefoot basis, but only in the amount necessary for WRD to: (a) purchase replenishment water available during the current fiscal year, (b) obtain funds to place in reserve for future purchase of replenishment water, to the extent the full amount of water needed is not currently available, (c) engage in certain groundwater cleanup activities, and (d) undertake capital projects related to WRD's replenishment or groundwater cleanup duties.

Since at least May 2007, WRD has collected and spent RA funds for purposes not authorized by the Act. Examples of WRD's unauthorized expenditures of RA funds include, but are not limited to: (a) Advocacy and lobbying, (b) Contributions to political organizations, (c) Sponsorships of financial conferences, (d) Sponsorship of music and arts festivals, (e) Sponsorship of environmental conferences, (f) Purchase of promotional items, (g) Elementary school education programs, (h) Water conservation programs that are duplicative of the pumpers' programs, and (i) Union dues.

Such expenses may be beneficial to the community as a whole, but are not legal expenses

VEN000008

for a special district with strictly limited collection and spending authorization. Moreover, such expenses are duplicative of services provided by public agencies that, unlike WRD, have express authority to provide them.

WRD continues to allow the water levels within the Central Basin to subside, and has not used its best efforts to maintain those water levels and satisfy its primary obligation of replenishing the Basin. Cumulatively and individually, WRD's statutory violations have resulted in RAs that have been and are higher than legally permitted since at least May 2007.

Pursuant to Water Code section 60231, WRD has the obligation to investigate and determine whether any portion of its powers or duties can be accomplished by an existing agency to avoid duplication and to accomplish its goals more economically. WRD has failed to consider alternatives for projects, improvements and activities capable of performance by other agencies, which other agencies can perform the projects, improvements or activities at a more economical cost, or in a fashion that is more directly related in terms of cost and efficacy to the benefits provided.

WRD has undertaken projects, improvements and activities which overlap with or were already undertaken by other agencies, which other agencies could perform and were already performing the projects, improvements or activities at a more economical cost, or in a fashion that is more directly related in terms of cost and efficacy to the benefits provided. As a result of WRD's conduct, RAs that have been and are higher than legally permitted since at least March 2007.

In 1999, the Legislature amended the Act to add provisions limiting the amount of reserve funds WRD may carry and mandating that WRD apply excess reserves for the direct benefit of the pumpers. Pursuant to section 60290, added to the Act in 2000, WRD may not maintain reserves exceeding $10 million, subject to adjustment for the percentage change in the blended cost of water from district supply sources on an annual basis. WRD reports that the current adjusted amount is $11.6 million. WRD may exempt only the "unexpended balances" of capital improvement projects under construction when calculating the amount it holds in reserves. However, WRD must apply all other reserves over the $10 million, or the adjusted amount, towards an RA rate reduction or towards the purchase of water the following year on an annual basis pursuant to section 60328.1. Thus, WRD must apply all excess reserves for the direct benefit of the pumpers.

WRD maintains over $51 million in reserve funds in disregard of the Act's limitations. Similarly, WRD maintained reserves over the statutory limit when it adopted the RA for fiscal years 2007-08, 2008-2009, 2009-10 and 2010-11, and failed to apply them as required. WRD's failure to apply all excess reserves for the benefit of the pumpers resulted in higher RAs than authorized by the Act.

The Act also provides that WRD must allocate at least 80% of its authorized reserves towards the purchase of water. Therefore, WRD may reserve $8 to $10 million for water purchases. WRD reports that it has reserved $16 million for water purchases and increased the 2010-2011 RA to collect at least another $30 million for additional water purchases. At the same time, WRD has repeatedly reported that imported replenishment water is unavailable and that future water availability is questionable. WRD's excessive accumulation over the allowed amount violates the Act and is unnecessary given WRD's own representations that water is

unavailable for purchase.

Water Code sections 60350-52 provide that upon determination of the "natural safe yield" of the groundwater supplies within the Basin, WRD must, within three years, recognize said determination by exempting from the RA the amount of water pumped by any adjudicated rights holder that does not exceed its/his/her proportionate share of the natural safe yield. The RA may only be assessed against the adjudicated rights holders to the extent that any of them pump in excess of the natural safe yield.

WRD has established, by conduct or formal decision, the natural safe yield of the Basin, but has failed to implement the RA procedures required by statute, and in fact continue to charge those represented by Central Basin for every acre foot of water extracted from the basin, whether or not within the proportion attributable to the natural safe yield. WRD's failure is attributable to its desire to maintain a uniform RA, to the express detriment of those adjudicated rights holders who pump some, but not all, of their adjudicated rights on an annual basis. WRD's failure creates a disincentive for the Central Basin Group to conserve water by pumping solely within the proportion attributed to the natural safe yield, and causes them to incur assessments that they should not be charged and to subsidize others, all to the benefit of WRD.

The assessment and collection of WRD's RA on a uniform basis throughout WRD's service area has resulted in an overcharge on Central Basin pumpers of approximately 300%. The overcharge on the Central Basin pumpers amounts to tens of millions of dollars per year.

In 2009, HF&H Consultants updated the conclusions of its 2006 Study. The results were consistent with the 2006 Study and showed that in the 2009-10 fiscal year, the Central Basin pumpers overpaid WRD by approximately $20 million. Therefore, WRD's levy and collection of funds pursuant to Resolutions 06-771, 07-794, 08-827, and 09-852 violates Article XIII D.

Under the current uniform RA, WRD continues to overcharge the Central Basin pumpers in violation of Article XIII D. WRD reports that it estimates approximately a 50% increase of the RA within five years, significantly increasing the Central Basin pumpers"subsidy of the West Coast Basin costs in a short period. Thus, the current RA adopted pursuant to Resolution 10-881 also continues WRD's violation of Article XIII D.

Water extraction rights holders within the Central Basin have opposed the new RA at every hearing in which WRD adopted one since May 2007. At each hearing, WRD refused to consider the objections. On April 25, 2011, the superior court rendered a decision in Cerritos, finding that WRD imposed the RA illegally and unconstitutionally in each of the previous four years, based on the same points and issues asserted herein, and declared that a writ would issue commanding WRD to vacate the RAs and ordering it to comply with the provisions of Article III D before imposing a new RA. Notwithstanding, WRD's Board again refused to address any of the legal and other issues raised. Therefore, it would therefore be a futile act for Central Basin, or any other water rights holders it represents, to raise the same issues again to WRD.

The assessments improperly and illegally charged to those represented by Central Basin indirectly affect the inhabitants, local businesses, property owners, taxpayers, and water users overlying the Central Basin, including the residents and businesses. The cities overlying the Central Basin which are within Central Basin's district include the Cities of Artesia, Bell, Bell Gardens, Bellflower, Carson, Cerritos, Commerce, Commerce, Cudahy, Downey, East Los Angeles, Florence-Graham, Hawaiian Gardens, Huntington Park, La Habra Heights, Lakewood,

La Mirada, Lynwood, Montebello, Monterey Park, Norwalk, Paramount, Pico Rivera, Santa Fe Springs, Signal Hill, South Gate, Vernon, Walnut Park, Willowbrook and Whittier. The Central Basin groundwater accounts for approximately 65% of the total water use by all Central Basin constituents, Therefore, in light of their great reliance on the Central Basin water and the economic disparity between them and the West Coast Basin constituents, WRD's overcharge is inequitable and significant.

If successful, this action will enforce the right of those represented by Central Basin to use water from the Central Basin without subjection to illegal and excessive payments to WRD, which effectively subsidize WRD's services in the West Coast Basin. If this action succeeds, Central Basin will also recover millions of dollars in overpayments.

The Petition's first cause of action is for mandamus compelling WRD to comply with Art. XIII D. The second cause of action is for declaratory relief, alleging a controversy over whether WRD must follow the requirements of Art. XIII D in levying Ras. The third cause of action is for damages as the RAs have been collected in violation of Art. XIII D. The fourth cause of action is for damages for RAs levied in an amount greater than permitted by the Water Code. The fifth cause of action is for declaratory relief, alleging a controversy concerning WRD's unauthorized expenditure under the Water Code of funds obtained through the RAs. The sixth cause of action is for damages for WRD's failure to determine a natural safe yield for the Central Basin and not charge an RA within a pumper's proportionate rights attributable to the natural safe yield. The seventh cause of action is for declaratory relief with respect to the safe yield issue.[2]

2. <u>Tesoro</u>

Tesoro's Petition makes allegations similar to Central Basin's. In additional pertinent part, it alleges that Tesoro has owned, held and leased adjudicated pumping rights within the West Coast Basin since on or before May 10, 2007. Tesoro owns and maintain wells, extracts water from the West Coast Basin, and pays all taxes, fees, assessments or charges imposed by WRD for water extracted from the West Coast Basin. Tesoro has no extraction rights with respect to the Central Basin. Tesoro's ability to exercise extraction rights within the West Coast Basin without subjection to illegal assessment is vital to it as a local business, employer, property owner, taxpayer, water producer and water user. WRD has charged and Tesoro has paid the RA each year since October of 2007.

The Petition's first cause of action seeks mandamus, contending that the RA is a property related fee under Article XIII D. The second cause of action is for declaratory relief, contending that the RA is subject to Article XIII D. The third cause of action is for damages for the unlawful collection of the RA since at least 2007. The fourth cause of action is for damages from the collection of RAs without authorization in the WRD Act. The fifth cause of action is for declaratory relief with respect to WRD's unauthorized expenditures from RAs. The sixth cause of action is for damages due to WRD's failure to ascertain a natural safe yield for the West Coast Basin. The seventh cause of action is for declaratory relief with respect to a safe yield

---

[2]The court will decide the first and second causes of action only. All other causes of action will be transferred to a trial court.

determination.[3]

B. Standard of Review

There are three general categories of agency decisions challenged by mandamus: (1) quasi-adjudicative decisions in which the agency exercised its discretion and which are challenged by administrative mandamus under CCP section 1094.5 for, (2) quasi-legislative decisions challenged by traditional mandamus under CCP section 1085, and (3) ministerial or informal administrative actions also challenged by traditional mandamus. *See* Western States Petroleum Assn. v. Superior Court, (1995) 9 Cal.4th 571-76. An agency decision is quasi-adjudicative where it concerns the agency's application of discretion in the determination of facts after a hearing is required. *See* Neighborhood Action Group v. County of Calaveras, (1984) 156 Cal.App.3d 1176, 1186. In contrast, quasi-legislative actions generally concern the adoption of a "broad, generally applicable rule of conduct on the basis of general public policy." Saleeby v. State Bar, (1985) 39 Cal.3d 547.

WRD's imposition of RAs is a quasi-legislative act. A traditional writ of mandate is a method of challenging an agency's quasi-legislative act. The Sherwin-Williams Co. v. South Coast Air Quality Management District, (2001) 86 Cal.App.4th 1258, 1267. The agency action has a strong presumption of validity, and the burden is on the party challenging it. Western States Petroleum Assn. v. State Dept. of Health Services, (2002) 99 Cal.App.4th 999, 1007. The court's review is limited to an examination of the proceedings before the agency to determine whether the agency action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether it did not follow the procedure and give the notices required by law. Id. at 1018. The courts exercise this deferential standard "out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." California Hotel & Motel Assn. v. Industrial Welfare Commission, (1979) 25 Cal.3d 200, 212. The court does not weigh evidence or substitute its judgment for that of the agency, for to do so would frustrate legislative mandate. Shapell Industries, Inc. v. Governing Board, (1991)1 Cal.App.4th 218, 230.

C. Governing Law

1. The WRD Act

WRD has the plenary and broad authority to do any act necessary to replenish groundwater within its boundaries. Water Code §§ 60220, 60232. For purposes of replenishing groundwater, WRD may manage and control water for the beneficial use of persons or property within the district. Water Code §60221(e). Certain procedural requirements are imposed before a property-related fee can be enacted. In the case of a water service fee which is property-related, there must be notice to the owners of affected parcels and a public hearing. A majority of property owners effectively can veto the increase if they submit written protests. Water Code §60317. A vote of the public is not required for water fees. Id.

---

[3]The court will decide the first and second causes of action only, which concern Art. XIII D compliance. All other causes of action will be transferred to a trial court.

An RA is defined in the WRD Act as a fee on the "production of groundwater" which is paid by "producers of that groundwater." Water Code §60317. The fee is not imposed directly on owners of real property. Nor is the assessment based on identifiable parcels of real property. Rather, as expressed in the Water Code, the assessment is made on the business or activity of pumping water out of the ground. *See* ibid.

2. The Propositions

a. Prop 13

Under California law, locally imposed taxes are subject to a voter approval requirement. Proposition 13 ("Prop 13") was the genesis of voter approval requirements for locally-imposed special taxes. Cal. Const.,[4] Art. XIII A, §4. Adopted thirty four years ago in 1978, Prop 13 amended the State Constitution to restrict property tax increases. Prop 13 also gave local voters greater control over special taxes in order to prevent local governments from replacing lost property tax revenues by raising such taxes.

b. Prop 62

Local governments in subsequent years sought to circumvent the restrictions on imposing or increasing local taxes contained in Prop 13.

In response, voters adopted in 1986 Proposition 62 ("Prop 62"), a statutory initiative which sought to require local special taxes to be approved by two-thirds of local voters, and local general taxes to be approved by a majority of local voters. Santa Clara County Local Transportation Authority v. Guardino, (1995) 11 Cal.4th 220, 247-48 (upholding constitutionality of Prop 62).

c. Prop 218

Proposition 218, passed in 1996, was one of several voter-enacted limitations on the power of State and local governments to increase real property taxes. The California Supreme Court has emphasized that, when understood in this historical context, Proposition 218's purpose was to limit taxes on real property. *See* Apartment Assn. of Los Angeles County, Inc. v City of Los Angeles, ("Apartment Association.") (2001) 24 Cal.4th 830, 838-39; *see also* Howard Jarvis Taxpayers' Assn. v. City of L.A., (2000) 85 Cal.App.4th 79, 82-83 (Prop 218 extended the voter approval requirements for the enactment of a local tax to cities operating under a "home rule" charter, and also imposed voter approval requirements for property-related fees, charges, and assessments).

Codified in Arts. XIII C and D of the California Constitution, Proposition 218 imposed procedural requirements on local governments or agencies before they could increase certain taxes, assessments, and property-related fees. Article XIII D, with which this case is concerned, governs "any levy . . . 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.

Article XIII D imposes procedural requirement the levying of a charge or fee. It requires

---

[4]All further references to an "Article" are to the California Constitution.

that prior to adopting a property-related fee an agency must comply with certain procedural requirements. The agency must identify all parcels upon which it will be imposed, and conduct a public hearing. The hearing must be preceded by written notice to affected owners setting forth, among other things, a "calculat[ion]" of "[t]he amount of the fee or charge proposed to be imposed upon each parcel ... ." Art. XIII D, §6(a)(2). If a majority of affected owners file written protests at the public hearing, "the agency shall not impose the fee or charge." Id. Moreover, unless the charge is for sewer, water or refuse collection services, the property-related fee or charge may not be imposed or increased "unless it is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge, or at the option of the agency, a two-thirds vote of the electorate residing in the affected area." Art. XIII D, §6(c).

Article XIII D further prohibits a public agency from adopting a property-related fee unless it meets all of the following requirements: (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service; (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed; (3) 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 attributable to the parcel; (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4; and (5) No fee or charge may be imposed for general governmental services. Art. XIII D, §6(b) (1)-(5).

The Ballot Argument in support of Prop 218 stated that its provisions were intended to "guarantee" Californians the "right to vote on local tax increases—even when they are called something else, like 'assessments' or "fees'." These restrictions were required because local politicians sought to exploit an apparent loophole in the law "that allow[ed] them to raise taxes without voter approval by calling taxes 'assessments' and 'fees'."

The burden is on the agency imposing the fee to demonstrate compliance with Art. XIIID's requirements. Art.XIII D, §6(b)(5).

d. Prop 26

Prop 218 did not explicitly define what constituted a "tax" and was subject to the measure's local voter approval requirements. Disagreements ensued regarding the difference between regulatory fees and taxes.

In Sinclair Paints v. SBE, ("Sinclair") (1997) 15 Cal.4th 866, the California Supreme Court addressed this issue. The Legislature had enacted a mitigation fee requiring paint manufacturers to pay a regulatory charge to both deter and offset the impact of their activity upon the environment. The court found that if regulation is the primary purpose of a fee, the mere fact that revenue is also obtained does not transform the imposition into a tax. The Sinclair decision had the effect of making it significantly easier for state and local government to impose a fee for the regulation of a service which may result in incidental revenue to the government.

In November 2010, Proposition 26 ("Prop 26") was enacted by initiative to amend Articles XIIIC, and XIIID to address "hidden taxes" and to overturn the Sinclair case. Prop 26

VEN000014

overturned the Sinclair case by requiring with respect to Legislature-imposed fees that any change in state statute which results "in any taxpayer paying a higher tax" must be enacted with two-thirds approval of the Legislature. With regard to fees imposed by local government, Prop 26 amends Article XIIIC (Prop 218) to broaden the definition of "tax""as used in this article," to mean "any levy, charge, or exaction of any kind imposed by a local government" unless the charge qualifies for one of seven exceptions. Art. XIIIC §1(e).

3. Pertinent Case Law

There are four pertinent appellate cases, three from the California Supreme Court, which address the application of Article XIII D: (1) Apartment Association, *supra*, 24 Cal.4th at 830; (2) Richmond v. Shasta Community Services District, ("Richmond") (2004) 32 Cal.4th 409; (3) Bighorn-Dester View Water Agency v. Verjil, ("Bighorn") (2006) 39 Cal. 4th 205; and Pajaro, *supra*, 150 Cal.App.4th at 1364.

In Apartment Association, the Supreme Court considered whether an ordinance that required the owners of all residential rental properties to pay an inspection fee was subject to Art. XIII D. The court noted that Article XIII D, section 1 provides that it applies to all assessments, fees and charges, and a "fee" or "charge" is defined in section 2(e) to mean 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. The term "property-related service" was further defined as meaning "a public service having a direct relationship to property ownership." Art. XIII D, §2(h). The court summarized Article XIII D as applying to "any levy...upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." 24 Cal.4th at 836.

The Apartment Association court concluded that Article XIII D's language means that a levy may not be imposed on a property owner as a property owner unless its constitutional requirements are met. The inspection fee at issue is in the nature of a fee for a business license than a charge against property. It is imposed only on landowners who engage in the residential rental business, and only while they operate that business. Id. at 840. Article XIII D does not apply to fees imposed on an incident of property ownership, but rather on a parcel or person as an incident of property ownership. This subtle distinction meant a great difference. An apartment rental business is an incident of owning the apartments, and Article XIII D imposes strictures on taxes, assessments, fees, and charges when they burden landowners as landowners. Id. at 842. Since Article XIII D applies only to exactions levied solely by virtue of property ownership, and since the city's inspection fee is only indirectly related to property ownership because the landowner must also be a landlord, Article XIII D does not apply to limit the fee. Id. at 843.

Apartment Association may be summarized as holding that a fee is not property-related when it is levied on an activity or a business, and not on property owners as an incident of their property ownership.

In Richmond, the California Supreme Court considered whether a water service connection fee was subject to Article XIII D. A water district imposed the charge as a condition of making a new connection to the water system, and it consisted of a capacity charge for future improvements to the water system, a fire suppression charge for fire-fighting equipment, and the cost of installing the water service connection. *See* 32 Cal.4th at 415. The court disposed of the

VEN000015

issue of whether the capacity component of the connection fee was an assessment by noting that Article XIII D defines an "assessment" as a levy or charge upon real property that confers a special benefit on the property, and therefore can only apply to identifiable parcels of real property. Because Article XIII D required identification of all parcels so benefitted and notice to the parcel owners, and because of the inherent impossibility of identifying in advance those parcels whose owners would apply for a new connection, the capacity charge did not constitute an assessment as defined in Article XIII D. Id. at 418-19.

The court turned to the issue whether the fire suppression component of the service connection fee was a fee or charge under Article XIII D. The court concluded that the fire suppression charge was prohibited if it satisfied the definition of a fee or charge. Id. at 426. It did not because it was not imposed "upon a parcel or a person as an incident of property ownership." Ibid. Among other reasons, the court relied on the fact that the fee was imposed on persons who voluntarily apply for a water service connection, not a parcel of real estate. Id. The court went on to consider water service fees in general, stating: "[W]e agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that all water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.'" Id. at 426-27. (Emphasis in original.) Thus, a fee for ongoing water service through an existing connection is imposed as an incident of property ownership because it requires nothing other than normal ownership and use of property; a fee for a new connection is not imposed as an incident of property ownership because it results from the owner's voluntary decision to apply for the connection. Id. at 427. Any doubt is removed by the fact that Article XIII D imposed on fees and charges the same requirement that are imposed for assessments; the property must be identified and the property owner notified. Yet, it is impossible for the district to know in advance which property owners would be applying for new connections in order to notify them. Id. at 428.

As pertinent to this case, Richmond may be summarized as holding that the fire suppression charge in a water connection fee is not a property-related fee or charge under Article XIII D because it is the result of a voluntary decision by a property owner to apply for a new connection; the fee is not the result of mere ownership and use of property as a fee for ongoing water service would be.

The court revisited the "incident to property ownership" question in Bighorn, *supra*, 39 Cal.4th at 205. In that case, the court considered a proposed initiative to rescind local domestic water delivery charges and other fixed monthly fees imposed by a water agency which provided domestic water service to consumers. The court was actually considering the prohibition of Article XIII C, which states that the initiative power cannot be limited when an initiative proposes to reduce or repeal a local tax, assessment, fee or charge. While the definitions of fees and charges in Article XIII C may not be congruent with those in Article XIII D, the court relied on Richmond's analysis of those terms in Article XIII D to conclude that a public agency's charges for ongoing water delivery are fees and charges within the meaning of both provisions. Id. 216. In so concluding, the court declined to distinguish between water delivery charges that were consumption-based and those that are a flat fee. The court stated that "once a property

owner or resident has paid the connection charges and 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." Id. at 227.

Bighorn may be summarized as holding that domestic water delivery through a pipeline is a property-related service for purposes of a fee or charge under Article XIII D.

In Pajaro, the court evaluated a groundwater augmentation fee charged by a water management agency to operators of wells within its jurisdiction. 150 Cal.App.4th at 1369. The court originally issued an opinion deciding that Article XIII D did not apply, relying on Apartment Association and Richmond to conclude that the augmentation fee was not a charge under Article XIII D because it was incurred through the voluntary action of pumping groundwater, the agency could not calculate in advance the amount to be charged on a given well if it was a consumption fee, not a flat fee, and the charge burdens those on whom it is imposed not as landowners but as well extractors. Id. at 1385-86, 1388. The court granted rehearing to consider the effect of the Supreme Court's decision in Bighorn. The court felt compelled by Bighorn to abandon its previous rationale and conclude that the augmentation fee is a fee or charge imposed as an incident of property ownership and subject to the constitutional protections of Article XIII D. 150 Cal.App.4th at 1369, 1386. The court noted that Bighorn quoted Richmond as stating that domestic water delivery through a pipeline is a property-related service within the meaning of Article XIII D's definition of a charge or fee. Id. at 1388 (Citation omitted.)

The Pajaro court concluded that the only question Bighorn left for it to consider was wether a charge on groundwater extraction differed materially from a charge on delivered water. Id. at 1389. The court noted that Bighorn did not mention Apartment Association and its capacity-based rationale. Therefore, a possibility exists that Bighorn would permit the conclusion that a charge for delivery of water for irrigation or other non-residential purpose would not be incidental to the ownership of property, at least to the extent it is charge for consumption of a public service for purposes or in quantities exceeding what is required for basic (residential) use of the property. Ibid. The Pajaro court concluded that it need not decide whether this consumption exception is viable because the majority of users were residential or domestic users charged based on estimated or presumptive use. Ibid.

The Pajaro court expressly disavowed its previous capacity conclusion that one who incurred the augmentation charge did so as a water user, not a landowner, because the conclusion cannot be reconciled with Bighorn's holding that water delivery fees to an existing user are within Article XIII D as an incident of property ownership. Id. at 1391. Indeed, the Pajaro court noted that the charge was in some ways more intimately connected with property because it was a fee for extraction rather than merely for water delivery. It further concluded that the fact that no summary creation of a lien existed for failure to pay the augmentation charge was not determinative of the outcome. Id. at 1393.

Pajaro can be summarized as holding that a groundwater augmentation fee charged by a water management agency to operators of wells is imposed as an incident of property ownership and subject to the restrictions of Article XIII D.

D. Statement of Facts

The facts are undisputed; the parties disagree only on the conclusions following from the some of the following facts.

1. The Basins

The Central and West Coast Basins are two subterranean aquifer systems in Southeastern Los Angeles County. The Central Basin underlies a 277 square mile area encompassing approximately 27 cities. The West Coast Basin underlies a 160 square mile area encompassing 20 incorporated cities and several unincorporated areas. The two basins are distinct, separated by geophysical features such as the Newport-Inglewood Uplift, as determined by the California Department of Water Resources and two separate courts over 40 years ago.

2. WRD

Hundreds of well owners pump water from the Central Basin and the West Coast Basin. Groundwater has been a major source of water for the inhabitants of the basins preceding the formation of WRD. Due to population growth in the 1940's and 1950's, the two basins experienced an "overdraft" condition in which groundwater extractions greatly exceeded the rate of natural replenishment.

WRD was formed in 1959 pursuant to the WRD Act (Water Code §60000 *et seq.*), enacted in 1955. WRD was created for the purpose of replenishing each basin. In 1959, WRD was given the statutory authority to impose a replenishment assessment upon owners of groundwater producing facilities for every acre-foot groundwater pumped.

3. The Groundwater Lawsuits

In the meantime, the competing landowners in each basin separately filed quiet title lawsuits to adjudicate their respective rights to groundwater. The parties agreed to a stipulated judgment in the West Basin case in 1961(AR 2249-86) and in the Central Basin case in 1965 (AR 2054-2118).[5] The trial courts also entered Findings of Fact and Conclusions of Law. AR 1963-2053; AR 2206-48.

The two judgments, as amended, remain in effect today. The judgments and findings in both cases noted (1) the overdraft condition of groundwater in the basins, (2) indicated that the plaintiff district was contracting for water necessary to establish a fresh water barrier with the sea, (3) without a previous order combined with the effect of WRD's artificial replenishment program, the effects of the overdraft would continue and become more severe, (4) the listed parties had water rights, (5) all prior extractions by the parties were prescriptive in nature,[6] (7)

---

[5]Those original proceedings are discussed in two appellate opinions: Cal. Water Service Co. v. Edward Sidebotham & Son, Inc., ("Sidebotham") (1964) 224 Cal.App.2d 715 (West Basin case), and Central and West Basin Water Replenishment District v. So. Cal. Water Co., ("Central Basin") (2003) 109 Cal.App.4th 891 (Central Basin case).

[6]"All extractions by any party and any predecessor in interest of any party of ground water from Central Basin since 1942 and prior to the

VEN000018

without an injunction the parties would continue to claim the right to extract whatever groundwater they needed, and (8) it was necessary that the parties extraction of groundwater be controlled as set forth in the appendix. *See, e.g.,* AR 1969-73.

~~The adjudications established the natural safe yield for the basins.~~ Central Basin, *supra*, 109 Cal.App.4th at 899. Each party's annual pumping allocation was described and each party was enjoined from overpumping. Ibid. A declarant from the City of Downey described the judgments as "'inter se' adjudications; all of the water available for appropriation has been allocated in fixed amounts to each party to the Judgment based upon prescriptive rights." AR 2289.

3. The Current GroundWater Extraction Rights Holders

Today, there are more than 140 adjudicated water extraction rights holders in the Central Basin. The West Coast Basin has approximately 60 such adjudicated rights holders. The parties in each basin include well owners (*e.g.*, cities and school districts), private water purveyors, private entities (corporations, corporations, cemeteries, golf courses, and churches), and various individuals.

Tesoro is one of the largest adjudicated water rights holders in the West Coast Basin. Its wells are on its own property. It uses the water it pumps; it does not sell or lease its water.

Central Basin is a municipal water district, organized and existing under Water Code section 71000 *et seq.* The district overlies the majority of the Central Basin, and provides water to more than 2 million people as both a wholesale and retail provider. It also holds adjudicated pumping rights within the Central Basin.

4. WRD's Imposition of a RA

Under the WRD Act, WRD has three authorized revenue sources and a RA is one of them.[7] WRD may impose a replenishment assessment upon the owners of groundwater producing facilities for "the production of groundwater from the groundwater supplies within the District" only to the extent required to purchase water for replenishment and to fund clean-up of

---

> commencement of this action have been actual, open, notorious, adverse, hostile and under a claim of right, which claim of right was continuously and uninterruptedly asserted by each such party or predecessor to be and was adverse to any and all claims of each and all of the other parties and their respective predecessors." AR 1971-72.

[7]WRD also may impose a water charge "for the sale or exchange of water for replenishment purposes only as will result in revenues which will pay, insofar as practicable, the operating expenses of the district." Water Code §§ 60245-46. If the water charge is "inadequate to meet the obligations and expenses," WRD may "cause a tax to be levied" upon real property within the district. Water Code §§ 60250-57.

the basins.[8] Water Code §§ 60305-29.

In order to adopt an annual RA, WRD must conduct an engineering survey, determine the state of groundwater supplies within the district, and estimate the total production of groundwater for both the current year and the following year before adopting an RA. Water Code §60315. Once the technical data has been compiled, the WRD must hold a public hearing. WRD typically holds numerous public meetings and hearings before it sets the annual RA

The WRD Board then can set an RA. WRD imposes each RA on a per acre-foot basis for groundwater produced during a one year period, beginning on July 1 and ending the following year on June 30. Water Code §60317. If WRD does not adopt a new RA, the RA adopted the preceding year lapses in its entirety. Id. The WRD Board must adopt a resolution setting an RA for the upcoming fiscal year by the second Tuesday of May. Water Code §§ 60315, 60317.

WRD imposes RAs upon all "groundwater producing facilities" (*i.e.*, wells) with its boundaries. Water Code §60317. Each well in the district has a well number designated by the State of California that identifies its location. Each groundwater producer is required to register its facility with WRD. *See* Water Code §60336.

WRD imposes and collects the RAs on groundwater use from each of the wells based on the monthly production reports that each groundwater producer must submit to WRD detailing: (1) each well's total groundwater production, and (2) a general description or number locating the well. *See* Water Code §60326.1.

WRD incurs significantly greater costs to replenish and clean-up the West Coast Basin as compared to the Central Basin. For example, WRD replenishes the Central Basin primarily by spreading water at the Montebello Forebay grounds and by injecting water into the Alamitos Basrier to prevent seawater intrusion. It replenishes the West Coast Basin primarily by injecting water into the Dominquez Gap and West Coast Basin Barriers, which is far more expensive than spreading water.

5. <u>The RAs at Issue</u>

Petitioners challenge WRDs RAs from Water Year 2006-07 through Water Year 2011-12. WRD did not comply with the procedural requirements of Article XIII D for any of the years in question.

In adopting the RA for 2011-12 on May 6, 2011, WRD had the opinion of counsel that Article XIII D did not apply. The WRD Board included the following in its resolution:

> "The Replenishment Assessment will be imposed on persons and entities that extract groundwater from the Central Basin and West Coast Basin. Extraction of groundwater from those Basins is governed by court judgments entered in 1962 and 1965 pursuant to groundwater adjudication lawsuits. Those judgments granted certain parties the right to pump water based on prescriptive water rights and not based on any aspect of ownership of land overlying either Basin. Accordingly, since the pumping rights granted

[8]The Legislature amended the WRD Act in 1990 to authorize WRD to cleanup contaminated water in the Basins. Water Code §60224.

VEN000020

by the Judgments were based on prescriptive water rights, the parties do not pump the groundwater pursuant to any tenancy or fee interest in the overlying land or any rights that attach as a result of a tenancy or fee interest in overlying land." (AR 008).

For each of the affected years, WRD held hearings relating to the RAs after 10 to 15 days notice by publication in a local newspaper. *See* Water Code §60306. These notices advised of a hearing to determine "whether and to what extent the estimated costs [of WRD] for the ensuing year shall be paid for by a replenishment assessment." Id. WRD extended "an invitation to all interested parties to attend and be heard in support of or opposition to the proposed assessment." Id. (emphasis added).

For each affected year, WRD adopted the RA on a uniform per acre-foot pumped basis throughout the two basins. The adopting resolutions use no other factor or condition for the imposition of the RAs. WRD did not evaluate or set different classes or rates for different types of pumpers or users of the water extracted. Nor did it recognize the different costs incurred to replenish water in the Central versus West Coast Basins. Rather, WRD declared that the RA funds would "benefit, directly or indirectly, all of the persons or real property and improvements within the district." *See* Water Code §60317.

E. **Analysis**

Petitioners Central Basin and Tesoro challenge WRD's RAs from 2006-07 through 2010-11 on behalf of all adjudicated water extraction right holders in the Central Basin, not just the cities affected by this court's decision in Cerritos. They also challenge the most recently issued 2011-12 RA.

1. **Standing**

Petitioner Water Basin and WRD separately brief the issue of Water Basin's standing.[9]

Water Code section 71751 gives Central Basin with the right to commence on its own behalf an action involving or affecting the ownership or use of water or water rights within its boundaries.[10]

Water Code section 71757 provides Central Basin with the right to commence on its own behalf or as a representative action for water users in the district, an action to prevent any interference with water or water rights or to prevent the diminution of the quantity or quality of

---

[9]WRD does not challenge Petitioner Tesoro's standing.

[10]Section 71751 provides: "A district may commence, maintain, intervene in, and compromise, in the name of the district, any action or proceeding involving or affecting the ownership or use of water or water rights within the district, used or useful for any purpose of the district, or a common benefit to lands within the district or inhabitants of the district."

the water supply of the district.[11]

Central Basin contends that it has standing to bring this action under sections 71751 and 71757, both on its own behalf and on behalf of all of those affected by Respondent WRD's RAs. The parties represented by Central Basin include well owners who extract water from wells on their property and pay all taxes, fees, or charges imposed by WRD. Central Basin also contends that it may bring this action on behalf of the public pursuant to the necessity and public interest exceptions to the beneficial interest requirement that exists for standing. *See* People ex rel Dept. of Conservation v. el Dorado County, (2005) 36 Cal.4th 971 ("beneficial interest" requirement is synonymous with standing).

WRD challenges Central Basin's standing. It notes that Central Basin does not produce groundwater from the Basin and has not paid an RA for the years in question. It contends that section 71757 permits Central Basin to bring a representative action where a respondent interferes with water or water rights, such as where the quality or quantity of water is threatened. However, the statute does not permit Central Basin to sue where the only threat of interference is indirect -- the increased cost of groundwater from the RA potentially could affect the quantity of groundwater available. WRD Standing Br. at 2. WRD concludes that Central Basin should be permitted to bring such a lawsuit only where it has evidence that the RA in fact adversely affects the amount of groundwater produced. WRD Standing Br. at 3.

This argument is untenable. The plain language of section 71757 permits Central Basin to file a representative lawsuit to prevent interference with water rights. A RA is a fee on the "production of groundwater" which is paid by "producers of that groundwater." Water Code §60317. An RA interferes with the right to produce groundwater -- the more one produces, the greater the RA. That this interference is financial in nature and not tangible is irrelevant. Section 71757 is not limited to tangible interference with water rights. Central Basin has both a statutory and equitable right to protect the rights of groundwater producers within its boundaries. *See also* Coachella Valley County Water District v. Stevens, (1928) 206 Cal. 400, 411 (district has statutory and equitable power to proceed in representative capacity to protect the rights of all landowners and water users in the district).

The RAs also involve or affect "the use of water rights" under section 71751. While the RA is an assessment, having no bearing on the ownership of water, it does affect the use of groundwater. The RA is based on groundwater production; the more groundwater produced, the greater the RA's amount. It plainly impacts the production, and therefore use, of groundwater.

The court agrees with WRD that the necessity exception to the beneficial interest requirement for mandamus standing does not apply. That exception is limited to entities that serve the purpose of representing a defined community of interest. Tenants Association of Park Santa Anita v. Southers, (1990) 222 Cal.App.3d 1293, 1304 (association had standing to

---

[11]Section 71757 provides in pertinent part: "[A] district shall have the power to commence, maintain, intervene in, defend and compromise, in the name of the district, or as a class representative of the inhabitants, property owners, taxpayers, water producers or water users within the district, or otherwise.... to prevent any interference with water or water rights used or useful to the lands, inhabitants, owners, operators, or producers within the district, or to prevent the diminution of the quantity or quality of the water supply of the district or such basin...."

represent all current and former tenants for claims common to the class). While it might be convenient to address all claims concerning WRD's RAs in one case, Central Basin does not have as its purpose the representation of well owners.

Nor does the public interest exception apply. A beneficial interest is not required where a public right is involved and the petitioner is interested in the enforcement of a public duty, the public interest exception is limited to suit by a citizen. Burrtec Waste Industry, Inc. v. City of Colton, (2002) 97 Cal.App.4th 1133, 1136. The public interest exception may be overcome agency by competing considerations. Sacramento County Fire Protection District v. Sacramento County Assessment Appeals Board, (1999) 75 Cal.App.4th 327, 334 (district had no beneficial interest in assessed value of property, and public interest standing not available because other public entities had standing to challenge property value).

A public agency can have public interest standing. However, it is not clear that the RAs involve any public right; there are approximately 140 landowners and entities which have been assessed with the RAs. This does not seem to qualify as a matter of "public" concern. Assuming that a public right is involved, WRD's RAs may be challenged by individual wellowners, and is the subject of WRD's pending validation action. There is no need to permit Central Basin to make a public interest challenge to the RA.

In sum, Central Basin has standing pursuant to section 71757 to file a representative lawsuit to protect groundwater rights holders from the financial interference of the RAs. Central Basin also has standing on its own behalf pursuant to section 71751 because this action involves or affects the use of water within Central Basin's boundaries.

2. Exhaustion of Administrative Remedies

WRD contends that both Central Basin and Tesoro failed to exhaust their administrative remedies by raising their objections concerning Article XIII D in the public hearing on the 2011-12 RA. Nor was there any such objection by Petitioners for the 2010-11 RA. Opp. at 13.

Exhaustion is not required for a quasi-legislative action. *See* Lindelli v. Town of San Anselmo, (2003) 111 Cal.App.4th 1099, 1105. The exhaustion doctrine cannot be invoked without an existing administrative procedure that might serve these dispute resolution and record-building functions. It "does not apply in those situations where no specific administrative remedies are available to the plaintiff." Ibid. (Citation omitted.) The opportunity to participate in a public hearing prior to a legislative action does not constitute an administrative remedy subject to exhaustion. Ibid.

WRD attempts to distinguish Lindelli on the ground that a RA is not a quasi-legislative act, but rather a quasi-adjudicative act evaluated under CCP section 1094.5. Opp. at 14. WRD points out that the WRD Act requires a public hearing (Water Code §60306), which may be presided over by the WRD Board or a "hearing officer" (Water Code §§ 60307-08), and all evidence relevant to the engineering survey and report and the WRD Board's determination that such a replenishment assessment shall be levied may be introduced." (Ibid.) WRD must make factual findings for 18 factors to adopt an RA. (Water Code §§ 60315-16).

The nature of WRD's RA public hearing does not convert it into a quasi-adjudicative matter. An agency decision is quasi-adjudicative where it concerns the agency's application of discretion in the determination of facts after a hearing is required. *See* Neighborhood Action

VEN000023

Group v. County of Calaveras, (1984) 156 Cal.App.3d 1176, 1186. In contrast, quasi-legislative actions generally concern the adoption of a "broad, generally applicable rule of conduct on the basis of general public policy." Saleeby v. State Bar, (1985) 39 Cal.3d 547. While the difference may sometimes be difficult to determine, rate-setting is peculiarly a legislative function. Brydon v. East Bay Municipal Utility District, (1994) 24 Cal.App.4th 178, 196.

Additionally, Petitioners challenge the constitutionality of WRD's imposition of an RA, allegedly in compliance with Water Code section 60317, but not Article XIII D. When an action challenges the constitutionality of an action pursuant to a statute under which an agency functions, no exhaustion is required. *Cf.* McCarthy v. Madigan, (1967) 67 Cal.2d 536, 544. An agency can hardly be expected to conclude that its actions are unconstitutional when it complies with its authorizing statute. There is no need to exhaust administrative remedies in such a circumstance.

Last, it is not true that exhaustion requires Petitioners themselves to argue that the RAs are unconstitutional. They may rely on the fact that at least one water extraction rights holder did so. Pumpers within the Central Basin expressed their opposition to WRD at every hearing adopting the RA at least since May 2007, albeit not based on Article XIII D until the RA for fiscal year 2010-11. *See* Opp. at 2, n.1. With respect to the 2011-2012 water year, water extraction rights holders submitted letters to WRD in May 2011 objecting on constitutional grounds to the RA. Representatives of these extraction rights holders also appeared at the May 6, 2011 hearing to protest the RA. AR 64-96.

"The exhaustion doctrine contemplates that the real issues in controversy be presented to the administrative body, which must be given the opportunity to apply its special expertise to correct any errors and reach a final decision, thereby saving the already overworked courts from intervening into an administrative dispute unless absolutely necessary." Farmers Ins. Exchange v. Superior Court, (1992) 2 Cal.4th 377, 391. The purpose of the exhaustion requirement is satisfied where WRD's failure to comply with Article XIII D was raised at the RA hearing by some water rights holder. That objection gave WRD the opportunity to consider the issue without being clogged by "me too" objections intended only to preserve a right to mandamus.[12]

In sum, Petitioners were not required to exhaust administrative remedies by objecting at WRD's RA hearings, and may rely on the objections raised by others.

3. This Court in Cerritos Decided that Article XIII D Applies to the RA

WRD acknowledges that this court in Cerritos determined that WRD's RA is indistinguishable from the groundwater augmentation fee in Pajaro. Both are levied on the extraction of groundwater without any other criteria. The groundwater extraction rights are governed by judgments quieting title as between all landowners who claimed such rights. The pertinent cities pay the RA because they exercise a property right, the right to extract groundwater, that is "intimately connected" to property ownership just as the augmentation fee

[12]The court need not decide Petitioners' argument that their objection to the RAs would have been futile, except to note that this exception is very limited in nature. *See* Coachella Valley Mosquito & Vector Control District v. California Public Employment Relations Board, (2005) 35 Cal.4th 1072, 1080.

was in Pajaro.

In Cerritos, WRD likened its RA to the apartment inspection fee which the Apartment Association court found was not "property related." *See* Apartment Assn., *supra*, 24 Cal.4th at 842. WRD contended that, like the inspection fees, the RA is not imposed "by virtue of property ownership" but because of the pumpers' decision to pump water for retail delivery.

However, the Pajaro court explained that a capacity-based rationale does not apply to water extraction. Indeed, Bighorn did not even mention Apartment Association in concluding that domestic water delivery through a pipeline is a property-related service for purposes of a fee or charge under Article XIII D. The fee for such delivery, whether imposed as a flat fee or based on consumption, is a fee or charge under Article XIII D. A well owner's decision to pump water may be voluntary, but the voluntary nature of water extraction does not affect the conclusion that it is intimately connected to property ownership. The well owner is putting the well to its intended use, and, unlike the landlord in Apartment Association, is not being charged for a business that is merely related to property ownership. *See* Apartment Association, *supra*, 24 Cal.4th at 838 (the mere fact that a fee touches on business activities is not enough, by itself, to remove it from Article XIII D's scope). A water extraction fee is clearly within the scope of Article XIII D, with the sole possibility set forth in Pajaro that an exception may apply for pumping that is so excessive that it is not incidental to the ownership of property. Such an exception did not apply to WRD's RAs.

The court also rejected WRD's suggestion that the cities in Cerritos paid the RAs because of their decision to be retailers of water, akin to the landlords in Apartment Association, who chose to engage in the business of renting their property. The analogy was not apt. Simply stated, the cities were not being charged the RA because they were selling water, but because they were pumping it. What the cities do with the water once they have extracted it had no bearing on their obligation to pay the RA.

WRD further argued that the RA was not property-related because it was not imposed on identifiable parcels of property. The court found this argument to be weak. The RA was imposed on all groundwater-producing facilities. Each well had a well number designated by the State, which identified its location. WRD imposed and collected the RA on groundwater use from each of the wells based on monthly production reports that each groundwater producer submitted to the WRD. Thus, the property in question could easily be identified and located.[13]

The court found one possible critical difference from Pajaro's holding that a fee imposed on groundwater extraction is imposed as an incident of property ownership. *See* id. at 1393. In Pajaro, the property owners were extracting water from their own lands with their own wells. The cities alleged that they own wells, which they use to pump water. Extraction of water is an activity "intimately connected with property ownership" (150 Cal.App.4th at 1391) only if one owns the property from which the water is being extracted.

WRD contended that the cities had no evidence that they actually own the property from

[13]WRD also noted that no summary lien procedure exists to support the property-related nature of the RA as in Richmond and Bighorn. However, Pajaro expressly states that the non-existence of a lien for failure to pay the augmentation charge was not determinative of the outcome. 150 Cal.App.4th at 1393.

which they were extracting water. WRD pointed out that Richmond relied on the fact that Article XIII D requires an identification of the parcel for purposes of a fee so that the owner may be notified and have voting rights. WRD argued that, although wells are identifiable, the well may not be owned or used by the property owner on which it sits.

The court concluded that proof of property ownership was unnecessary to the issue of whether a fee or charge is subject to Article XIII D. Water extraction rights are based on property ownership. Pajaro, *supra*, 150 Cal.App.4th at 1391. Section 2(g) of Article XIII D provides that property ownership "shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." The cities' adjudicated pumping rights were tenancies within the meaning of Article XIII D.

Thus, this court in Cerritos concluded that WRD's RAs were imposed as an incident of property ownership and subject to the restrictions of Article XIII D.

4. WRD's Distinction That the Water Rights At Issue Are Prescriptive

WRD does not reargue its position in Cerritos. Instead, it argues that the RAs at issue are not subject to Article XIII D because they do not burden landowners as "landowners." Instead, the water extraction rights holders have the right to pump groundwater based on prescriptive water rights, which do not attach to the land, and are not in the "bundle of rights" inherent in owning land. Opp. at 8. The holder of a prescriptive water right may transfer that right without transferring ownership of land. Opp. at 9.

Thus, WRD contends its RAs are distinguishable from Pajaro. While Pajaro did say that a groundwater fee is imposed on the extraction of water, and not its use, the court also concluded that the extraction of water is "intimately connected with property ownership" because of the "overlying groundwater rights" possessed by landowners. Opp. at 9. WRD argues that Pajaro did not address the issue presented in this case -- "whether a charge imposed on the exercise of prescriptive water rights is subject to Prop 218." Ibid.

WRD's argument is not well taken. To understand why, the court must first discuss water rights law. Under well-established law, the State, on behalf of the public, owns the corpus of all groundwater in California. Water Code §102. Public interest requires that groundwater be available for the greatest number of users which supply permits. Sidebotham, 224 Cal.App.2d at 725. Landowners do not possess a property right in the corpus of the groundwater below their land. City of Barstow v. Mojave Water Agency, (2000) 23 Cal.4th 1224, 1237. Thus, a person can acquire only a property right to use groundwater (referred to as a "usufructuary" right). National Audubon Society v. Superior Court, (1983) 33 Cal.3d 419.

Groundwater rights are classified as overlying, appropriative, and prescriptive. An overlying right, is a property owner's right to take water from the ground underneath his or her property for use on that land; it is based on the ownership of land and is appurtenant thereto. 224 Cal.App.2d 725.

Any water not needed for the reasonable beneficial use of those having prior rights is surplus water, and may be appropriated on privately owned land for non-overlying use, such as exportation beyond the basin. Ibid. Where there is a surplus, the appropriation may not be enjoined. However, the overlying user has priority, and an appropriator must yield to the rights of the overlying owner in the event of shortage. Ibid.

If the appropriator has gained prescriptive rights through the taking of non-surplus water, the taking is wrongful. Id. at 725-26. Prescriptive rights are acquired where the taking of water is not surplus, is actual, open and notorious, hostile and adverse to the original owner, is continuous and uninterrupted for the statutory period of five years, and is made under claim of right. Id. at 726.

The distinctions between the water rights of an overlying property owner, an appropriator, and a prescriptive owner do not aid WRD. All of these rights pertain to the right to use groundwater owned by the State. The distinctions bear principally on who shall bear the burden of an overdraft when groundwater supplies fall below that necessary to maintain the water table. *See* City of Pasadena v. City of Alhambra, (1949) 33 Cal.2d 908, 925. They are not relevant to the issue of whether a levy is "incidental to property ownership." Indeed, it is obvious that an overlying right is an interest in real property. It is also true that an "appropriative right constitutes an interest in realty." Wright v. Best, (1942) 19 Cal.2d 368, 382. A prescriptive right to pollute a watercourse (where the pollution does not constitute a public nuisance) also creates an easement which attaches to the land. Ibid.

It is not hard to go one step further and suggest that a prescriptive right to use groundwater also attaches to the land. Indeed, groundwater rights, whatever their nature, are real property rights. Stanislaus Water Co. v. Bachman (1908) 152 Cal. 716, 725. "The right to water must be treated in this state as it has always been treated, as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personalty." Ibid. (Citation omitted.)

But the court does not need to find that prescriptive rights to groundwater are appurtenant to land ownership in order to conclude that Prop 218 applies to the RAs. Article XIII D section 2(e) defines "fee" to include a levy imposed upon a person as an incident of property ownership. "Property ownership" includes tenancies of real property where tenants are directly liable to pay the assessment. Article XIII D, §2(g). Groundwater rights do not float with the water underground, unrelated to any property. It is not possible to extract groundwater without a real property interest of some kind. WRD imposes the RA on well owners/lessors for the activity of groundwater production. The well owners either own the land or lease it, and therefore have a real property interest, in order to pump groundwater. It does not matter what their ownership rights are to use the water; the RAs clearly are imposed on the well user's pumping activity as an incident to their well ownership/lease. The RAs are subject to Article XIII D because they burden well owners as "landowners" or "real property tenancy owners."

Moreover, the legal basis for a well operator's right to extract groundwater has nothing to do with the RAs. As Petitioners argue (Reply at 5), the RAs are levied upon the water extraction rights holders based upon how much groundwater they pump. WRD does not impose the assessment based on a right to extract groundwater, and the RAs do not distinguish between pumpers whose rights are prescriptive and those whose rights are those of an overlying landowner. Nor could an RA lawfully do so under Water Code section 60317, which requires that an RA be based solely on "production of groundwater."

WRD's rationale for the 2011-12 RA is a classic makeweight. WRD's concern in replenishing and maintaining groundwater is the production of groundwater, not who owns the right to produce. WRD's resolution -- that "since the pumping rights granted by the judgments

were based on prescriptive water rights, the parties do not pump the groundwater pursuant to any tenancy or fee interest in the overlying land" -- is simply an excuse. By their terms, and by the declaration of the City of Downey representative, the judgments are "inter se" adjudications, meaning they are a settlement between the parties. They cannot be relied to establish the facts of ownership vis a vis the outside world. Moreover, many of the water extraction rights holders have not only prescriptive rights, but also overlying rights. WRD makes no distinction between them, and could not lawfully do so.

Article XIII D applies to the RAs as an incident to property ownership.

5. <u>WRD Failed to Comply with Article XIII D's Procedures</u>

WRD made no effort to comply with the procedural protections of Article XIII D, including 45 days' mailed notice guaranteeing the right of a majority protest proceeding at which a protest from a majority of fee payers can prevent the imposition of a fee. Article XIII D, §6(a)(2). WRD also failed to perform a proportionality analysis as required by Article XIII D, section 6(b) (1)-(5). WRD has never performed a cost and benefit, or any other type, of analysis to ensure compliance with this constitutional mandate prior to adopting the RA, particularly as to ensuring that the fee is proportionately distributed to users based on the cost of providing WRD's services to those users. Instead, WRD imposed a uniform RA without regard for Article XIII D's requirements.

WRD must comply with Article XIII D. The WRD Act cannot shield WRD from compliance with Article XIII D. As the <u>Bighorn</u> court stated, "the Legislature is bound by the state Constitution." Its "authority in enacting the statutes under which the Agency operates must in this instance yield to constitutional command." 39 Cal.4th at 210.[14]

E. <u>Conclusion</u>

Article XIII D applies to the RAs, which is a property-related fee. It is undisputed that WRD did not comply with Article XIII D in imposing the RAs. Accordingly, Petitioners are entitled to mandamus relief commanding the WRD to vacate the RAs imposed by WRD for the six year period from Water Year 2006-2007 through Water Year 2011-2012, and to comply with the provisions of Article XIII D before imposing any new RA. Petitioners are also entitled to relief on the second cause of action (declaratory relief) with respect to future compliance with Article XIII D. All remaining causes of action in both Petitions, including the damages claims for improperly imposed RAs, and those for improper use of RA funds, are referred to the respective trial courts.

---

[14]Petitioners contend that WRD has misused the funds obtained with RAs for unauthorized purposes, including lobbying, political contributions, sponsorship of events, promotional items, elementary school programs, and water conservation programs. Mot. at 8, 14. WRD correctly observes that the expenditure of funds collected under the RA has nothing to do with Article XIII D, which concerns WRD's right to impose an assessment. The Petitions' allegations concerning the unauthorized expenditure of RA funds are based on alleged violations of the WRD Act, and are not contained in the first two causes of action concerning Article XIII D.

VEN000028

The petitions for writ of mandate and declaratory relief with respect to Article XIII D application and compliance are granted. Central Basin's counsel is ordered to prepare a proposed judgment and writ of mandate, serve it on counsel for all other parties for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for October 9, 2012, at 1:30 p.m.

VEN000029

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/06/12 | DEPT. 85

HONORABLE JAMES C. CHALFANT JUDGE | A. FAJARDO DEPUTY CLERK

HONORABLE JUDGE PRO TEM | ELECTRONIC RECORDING MONITOR

#6

J. DE LUNA, C.A. Deputy Sheriff | E. VIRGOE, CSR #11732 Reporter

9:30 am BS132202

CENTRAL BASIN MUNICIPAL WATER

VS

VS

WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA R/T B134

Plaintiff Counsel: DEBRA HEALY DEEM [X]
PAUL RYAN ORTUNO [X]
JASON E. GOLDSTEIN [X]

Defendant Counsel: CURTIS D. PARVIN [X]
JOHN W. HARRIS [X]
EDWARD J. CASEY [X]

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE

The matter is called for hearing.
The Administrative Record is admitted in evidence.

Counsel read the Court's Tentative Decision.

After argument, the Court rules in accordance with his Tentative which is modified, adopted and filed this date.

The Petition for Writ of Mandate is granted.

This case is now transferred back to Department 57, Judge Ralph W. Dau, for all further proceedings.

The Administrative Record is ordered returned to Counsel for the Petitioner. Counsel is to arrange for pick up of the Record within the next ten(10) days.

Counsel for the Petitioner is to give notice.

MINUTES ENTERED
09/06/12
COUNTY CLERK

PROOF OF SERVICE

I, Therese King, declare:

I am employed in the County of Los Angeles, State of California. My business address is Alston & Bird LLP, 333 South Hope Street, 16th Floor, Los Angeles, CA 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On September 17, 2012, I served the document(s) described as **NOTICE OF RULING ON PETITIONS FOR WRIT OF MANDATE** on the interested parties in this action by enclosing the document(s) in a sealed envelope addressed to the parties as listed as follows:

SEE ATTACHED SERVICE LIST

☒ BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at Alston & Bird LLP, 333 South Hope Street, 16th Floor, Los Angeles, CA 90071 with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at Alston & Bird LLP, 333 South Hope Street, 16th Floor, Los Angeles, CA 90071.

☐ UPS NEXT DAY AIR: I deposited such envelope in a facility regularly maintained by UPS with delivery fees fully provided for or delivered the envelope to a courier or driver of UPS authorized to receive documents at Alston & Bird LLP, 333 South Hope Street, 16th Floor, Los Angeles, CA 90071 with delivery fees fully provided for.

☐ BY FACSIMILE: I telecopied a copy of said document(s) to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.

☐ BY ELECTRONIC MAIL TRANSMISSION WITH ATTACHMENT: On this date, I transmitted the above-mentioned document by electronic mail transmission with attachment to the parties at the electronic mail transmission address set forth on the attached service list.

☒ [State] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ [Federal] I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 17, 2012, at Los Angeles, California.

THERESE KING

SERVICE LIST

David J. Aleshire, Esq. Patricia Quilizapa, Esq. Wesley A. Miliband, Esq. Aleshire & Wynder, LLP 18881 Von Karman Avenue Suite 1700 Irvine, CA 92612	Attorneys for City of Cerritos, City of Downey, City of Signal Hill, City of Bellflower and City of Lynwood Telephone: (949) 223-1170 Facsimile: (949) 223-1180 Email: pquilizapa@awattorneys.com
Curtis D. Parvin, Esq. Eric B. Strongin, Esq. Sedgwick LLP 3 Park Plaza, 17th Floor Irvine, CA 92614	Attorneys for Central Basin Municipal Water District Telephone: (949) 852-8200 Facsimile: (949) 852-8282 Email: curtis.parvin@sedgwicklaw.com eric.strongin@sedgwicklaw.com
Douglas E. Wance, Esq. Buchalter Nemer 18400 Von Karman Suite 800 Irvine, CA 92612-0514	Attorneys for Tesoro Refining and Marketing Co. Telephone: (949) 760-1121 Facsimile: (949) 720-0182 Email: dwance@buchalter.com
A. David Youssefyeh, Esq. Liza Youssefyeh, Esq. A/D/Y Law Group, P.C. 1875 Century Park East Suite 1460 Los Angeles, CA 90067	Attorneys for Maywood Mutual Water Company No. 1 Telephone: (310) 772-2872 Facsimile: (310) 772-0020
Robert J. Roche, Esq. Stephen G. Mason, Esq. Denise A. Martinez, Esq. Newell, Campbell & Roche LLP 520 South Grand Avenue, Suite 390 Los Angeles, CA 90071	Attorneys for Bellflower Unified School District Telephone: (213) 622-9444 Facsimile: (213) 622-3634 Email: rroche@ncrlaw.com smason@ncrlaw.com dmartinez@ncrlaw.com

John W. Harris, Esq.
Adam Kargman, Esq.
Harris & Associates
865 South Figueroa Street, Suite 2750
Los Angeles, CA 90017

Co-Counsel for Water Replenishment District of Southern California

Telephone: (213) 489-9833
Facsimile: (213) 489-3761
Email: john@jwharrislaw.com
adam@jwharrislaw.com

Teresa Chen
Alvarez-Glasman & Colvin
13181 Crossroads Pkwy. North
Suite 400 - West Tower
City of Industry, CA 91746

Counsel for Cities of Montebello, Pico Rivera and Bell Gardens

Telephone: (562) 699-5500
Facsimile: (562) 692.2244
Email: tchen@agclawfirm.com

EXHIBIT K

LATHAM & WATKINS LLP
Paul N. Singarella (State Bar No. 155393)
Daniel P. Brunton (State Bar No. 218615)
650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Telephone: (714) 540-1235
Facsimile: (714) 755-8290
Email: paul.singarella@lw.com
daniel.brunton@lw.com

Attorneys for Respondent and Defendant
WATER REPLENISHMENT DISTRICT
OF SOUTHERN CALIFORNIA

[EXEMPT FROM FILING FEE GOVERNMENT CODE §6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

TESORO REFINING AND MARKETING COMPANY, a Delaware Corporation,

Petitioner and Plaintiff,

v.

WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA, a public agency,

Respondent and Defendant.

Case No.: BS134239
(Consolidated with Case No. BS239830)
(Related to Case No.: BS128136)

[Assigned to Hon. Michael P. Linfield, Dept. 34]

NOTICE OF CONTINUANCE OF STATUS CONFERENCE/ TRIAL SETTING CONFERENCE

Status Conference
Date: June 16, 2015
Time: 8:30 a.m.
Place: Dept. 34

Complaint Filed: October 7, 2011
Trial Date: vacated

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to the joint request of the Parties and confirmation by the Court's clerk via teleconference, the Status Conference/Trial Setting Conference in the above-captioned matter currently scheduled for April 17, 2015, at 8:30 a.m., in Department 34 of the above-entitled Court, has been continued to June 16, 2015, at 8:30 a.m., in Department 34.

Counsel for Water Replenishment District of Southern California was directed by the Court to give notice of this ruling.

Dated: April 16, 2015

LATHAM & WATKINS LLP

By:

Kirk A. Wilkinson
Attorneys for Defendant/Respondent
WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA

1 **PROOF OF SERVICE**

2 I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 650 Town Center Drive, 20th Floor, Costa Mesa, CA 92626-1925. My email address is *yvonne.vidal@lw.com*.

5 On **April 16, 2015**, I served the following document described as:

6 **NOTICE OF CONTINUANCE OF STATUS CONFERENCE/TRIAL SETTING CONFERENCE**

7 by serving a true copy of the above-described document in the following two manners below:

8 **BY U.S. MAIL**

9 I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

14 **BY ELECTRONIC MAIL**

The above-described document was transmitted via electronic mail to the following parties on April 16, 2015 at approximately 1:20 p.m.

16 Michael L. Meeks, Esq.
Douglas E. Wance, Esq.
Buchalter Nemer, APLC
18400 Von Karman Avenue, Suite 800
Irvine, CA 92612-0514
Email: mmeeks@buchalter.com
dwance@buchalter.com
slamarr@buchalter.com
mdeol@buchalter.com

Attorneys for Plaintiff and Petitioner Tesoro Refining and Marketing Company LLC

22 Patricia J. Quilizapa, Esq.
Lindsay M. Tabaian, Esq.
Miles P. Hogan, Esq.
Aleshire & Wynder, LLP
18881 Von Karman Ave, Suite 1700
Irvine, CA 92612
Email: pquilizapa@awattorneys.com
ltabaian@awattorneys.com
mhogan@awattorneys.com

Attorneys for City of Bellflower, City of Cerritos, City of Downey, City of Signal Hill

27
28

Michael G. Colantuono, Esq.
David J. Ruderman, Esq.
Len P. Aslanian, Esq.
Colantuono, Highsmith & Whatley, PC
300 South Grand Avenue, Suite 2700
Los Angeles, CA 90071-3137
Email: mcolantuono@chwlaw.us
druderman@chwlaw.us
laslanian@chwlaw.us

Attorneys for City of Pico Rivera

Richard H. Lam, Esq.
Teresa Chen, Esq.
Alvarez-Glasman & Colvin
13181 Crossroads Pkwy. North
Suite 400 - West Tower
City of Industry, CA 91746
Email: rlam@agclawfirm.com
tchen@agclawfirm.com

Attorneys for City of Pico Rivera

David A. Garcia, Esq.
Tafoya & Garcia, LLP
316 W. 2nd Street, Suite 1000
Los Angeles, CA 90012
Email: david@tafoyagarcia.com

Attorneys for City of Lynwood

Todd O. Litfin, Esq.
Jeremy N. Jungreis, Esq.
Megan K. Garibaldi, Esq.
Rutan & Tucker, LLP
611 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
Email: tlitfin@rutan.com
jjungreis@rutan.com
mgaribaldi@rutan.com

Attorneys for City of Huntington Park

The party on whom this electronic mail has been served has agreed in writing to such form of service pursuant to agreement.

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 16, 2015**, at Costa Mesa, California.

Yvonne Vidal

PROOF OF SERVICE

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. S226036
Court of Appeal, Second Appellate District, Division 6,
Case No. B251810

I, Georgia K. Gray, declare:

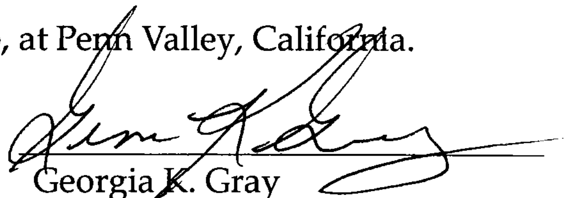
I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 94946. On May 28, 2015, I served the document described as **MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

X **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Penn Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on May 28, 2015, at Penn Valley, California.



Georgia K. Gray

151785.2

SERVICE LIST

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. S226036
Court of Appeal, Second Appellate District, Division 6,
Case No. B251810

Anthony H. Trembley Jane E. Usher Cheryl A. Orr Musick, Peeler & Garrett LLP 2801 Townsgate Road, Suite 200 Westlake Village, CA 91361 Phone: (805) 418-3100 Fax: (805) 418-3101 E-mail: A.Trembley@mpglaw.com; J.Usher@mpglaw.com; C.Orr@mpglaw.com; Y.Dubeau@mpglaw.com *Attorneys for Defendant and Appellant United Water Conservation District and Board of Directors of United Water Conservation District*	Dennis LaRochelle Susan L. McCarthy John M. Mathews Arnold LaRochelle Mathews Vanconas & Zirbel, LLP 300 Esplanade Drive, Suite 2100 Oxnard, CA 93036 Phone: (805) 988-9886 Fax: (805) 988-1937 E-mail: dlarochelle@atozlaw.com; jmathews@atozlaw.com *Attorneys for Intervener Pleasant Valley County Water District*
Office of the Attorney General 1300 I Street Sacramento, CA 95814-2919	Nancy McDonough Chris Scheuring Associate Counsel California Farm Bureau 2300 River Plaza Drive Sacramento, CA 95833 Phone: (916) 561-5500 Fax: (916) 561-5699 E-mail: cscheuring@cfbf.com; dchasteen@cfbf.com *Attorneys for California Farm Bureau Federation and Farm*

	Bureau of Ventura County, Amicus Curiae for Appellant
Paul N. Singarella Latham & Watkins 650 Town Center Drive 20th Floor Costa Mesa, CA 92626 *Attorneys for Water Replenishment District of Southern California, Amicus Curiae*	Patricia J. Quilizapa Alshire & Wynder, LLP 18881 Von Karman Avenue Suite 1700 Irvine, CA 92612 *Attorneys for Cerritos, City of Downey and City of Signal Hill, Amicus Curiae*
Clerk of the Court Santa Barbara Superior Court 1100 Anacapa Street Santa Barbara, CA 93121-1107	Clerk of the Court Court of Appeal Second District, Division 6 200 East Santa Clara Street Ventura, CA 93001