

IN THE COURT OF APPEAL OF CALIFORNIA  
IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION THREE

O.W.L. FOUNDATION, KATHLEEN  
HAYNIE, JOAN MCLAIN, AND  
CRAIG ROTH

Plaintiffs/Petitioners/ Respondents,

v.

CITY OF ROHNERT PARK, AND  
CITY COUNCIL FOR THE CITY OF  
ROHNERT PARK

Defendants/Respondents/Appellants,

UNIVERSITY DISTRICT LLC, AND  
VAST OAK PROPERTIES L.P.

Real Parties in Interest/Appellants.

No. A 114809  
Sonoma Superior Court  
No. SCV 236309

On Appeal from the Superior Court of California, County of Sonoma

Judge: Honorable Knoel Owen

**APPLICATION BY THE ASSOCIATION OF  
CALIFORNIA WATER AGENCIES TO FILE AMICUS  
CURIAE BRIEF & AMICUS CURIAE BRIEF  
IN SUPPORT OF PLAINTIFF AND APPELLANT CITY  
OF ROHNERT PARK**

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## **APPLICATION TO FILE *AMICUS CURIAE* BRIEF**

To the Honorable William R. McGuinness, Presiding Justice:

The Association of California Water Agencies (“ACWA”) requests leave to file an *amicus curiae* brief on the appeal of this case in support of the position of Appellants City of Rohnert Park and City Council for the City of Rohnert Park.

ACWA is a voluntary non-profit, nonpartisan, statewide organization composed of public agencies that provide water services to the citizens of California. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner. In fulfilling its role, ACWA identifies issues of concern to the water industry and the public it services; accumulates and communicates the best available scientific and technical information to the public and policy makers; facilitates consensus building; develops reasonable goals and objectives for water resources management; advocates sound legislation; promotes local service agencies and municipalities as the most efficient means of providing water service; and fosters cooperation among all interest groups concerned with stewardship of the State's water resources.

The Water Code provisions at issue in this litigation, Sections 10910

*et seq.*<sup>1</sup> (hereafter, “WSA Law”), require an assessment of the availability of water supplies to support certain development projects. The WSA Law assigns the burden of preparing the “Water Supply Assessment” (hereafter “WSA” or “assessment”) to the “public water system” that will supply drinking water to the project.<sup>2</sup> Almost all public water systems are operated by local public entities, including districts and municipalities.<sup>3</sup> While some cities and counties act as public water systems for the residents within their boundaries, California is peppered by special districts that provide water services, including but not limited to irrigation districts under Water Code § 20500 *et seq.*, County Water Districts under Water Code § 30000 *et seq.*, California Water Districts under Water Code § 34000 *et seq.*, and Reclamation Districts under Water Code § 50000 *et seq.* These and other special districts, along with many municipalities, make up the approximately 440 public water service members of ACWA that are responsible for more than 90% of the water delivered in the State. As “public water suppliers” delivering water for the citizens of California and responsible for preparing water supply assessments under the Water Code, ACWA and its

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<sup>1</sup> All further statutory references are to the Water Code unless otherwise indicated.

<sup>2</sup> A public water system is any system with 3,000 or more service connections for providing drinking water to the public. (§ 10912.)

<sup>3</sup> *E.g.*, California Water Education Foundation, A Briefing on California Water Issues, available at [http://www.water-ed.org/cabriefing.asp#ENHANCING%20URBAN %20SUPPLIES](http://www.water-ed.org/cabriefing.asp#ENHANCING%20URBAN%20SUPPLIES)) [as of April 3, 2007].

members have a direct interest in judicial interpretation of the WSA Law.

More than twenty types of special districts organized under the general law of California have authority over groundwater, many of which are members of ACWA. Reflecting these interests, ACWA has a standing Groundwater Committee that regularly tracks, investigates, and makes recommendations regarding groundwater laws and management. As groundwater managers, ACWA through its member agencies is uniquely situated to provide this Court with insight regarding the practical and policy implications of the competing interpretations of the WSA Law at issue in this case.

## I. INTRODUCTION

This case involves the interpretation of Water Code standards by which public water suppliers measure the sufficiency of a water supply to serve existing and new development over a 20-year time frame. There is no dispute that an assessment of groundwater supply must be thorough, reasonable, and grounded in reality, as that is evident in the letter and spirit of the WSA Law. Rather, ACWA is concerned about statements made by the trial court—and, in some instances, the Respondents—which appear to interpret the Water Code to necessarily require that the assessment identify all existing pumpers within a groundwater basin or subbasin, their historic pumping, and their projected future pumping. To the casual observer, such an approach may appear simple, straightforward, and useful—to those experienced in the nuances of groundwater, however, this “individual-pumper” approach is none of these things.

The Appellants' and Real Parties' briefs amply demonstrate that the individual-pumper approach identified in the trial court decision is neither required by law nor necessarily practical. In this *amicus curiae* brief, ACWA provides a broader perspective on the practicalities and application of those standards, with reference to the level of information now available regarding the 515<sup>4</sup> California groundwater systems currently recognized by the California Department of Water Resources ("DWR"). As discussed herein, for many different reasons, courts and water agencies alike are moving away from meticulous documentation of individual pumping records and detailed use projections, moving instead toward more practical approaches to the study of groundwater, focusing on targeted information needed for effective decision making, and avoiding excessive analysis. Finally, this brief discusses the ability (or inability) of public water suppliers to collect data regarding past and current pumping from individuals inside and outside of their jurisdictions, make long-term predictions about future pumping by those individuals, and finance extensive data collection and analytical efforts in the context of the WSA Law.

## II. BACKGROUND

ACWA is concerned about certain portions of the trial court's

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<sup>4</sup> DWR, Bulletin 118 Update 2003 at 106, available at [http://www.dpla2.water.ca.gov/publications/groundwater/bulletin118/Bulletin118\\_Entire.pdf](http://www.dpla2.water.ca.gov/publications/groundwater/bulletin118/Bulletin118_Entire.pdf) [as of April 2, 2007]. The number of groundwater systems fluctuates; the systems are continually redefined based on new data, modeling and fresh technical insight. (*Id.* at 15, 89–90.)

statement of decision that imply an onerous standard under which a WSA must identify the amount of water currently being pumped from every individual well in a groundwater basin, and then project the amount of water likely to be used from each such well over the next 20 years:

The Water Code . . . seems to require a determination of the amount of water being used and expected to be used by *everyone* who uses the same water supply.

(Joint Appendix, 2:486-487 (emphasis added).) According to this view, an assessment would have to quantify the amount of water used by all pumpers within a basin, and make projections regarding future use by all pumpers.<sup>5</sup> (*Id.* at 21.)

The Appellants and Real Parties' briefs have aptly described why this approach misreads the WSA Law. (*E.g.*, App. Opening Br. at pp. 12-19; Real Parties Opening Br. at pp. 25 to 30.) They explain the WSA Law expressly

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<sup>5</sup> Although Respondents ostensibly distance themselves from a rule that would always require obtaining data about every pumper in a basin or subbasin, they argue the water supplier must obtain information about water supply sufficiency on a basinwide level. They also imply that an individual pumper analysis would be necessary in "smaller" basins. (*See* Respondents' Brief at 34 ("One way [to determine whether a basin is in overdraft] is to determine . . . the actual levels of production by all users in the basin. However, if the groundwater basin is large . . . that endeavor may be too time-consuming for a WSA . . .").) As set forth in this brief, the individual-pumper approach can present substantial problems in any given basin or subbasin regardless of size; and there may be more efficient options for assessing reliability even in small basins. In every instance, suppliers are the appropriate entities to determine the methodology for assessing supply.

requires pumper-specific data only for the water supplier, and covering only for the last five years and projected pumping for the next twenty. (§ 10910(f)(2)–(5).) This “detailed” description and analysis is to be based on information that is “reasonably available.” (*Id.* § 10910(f)(3)–(4).) Under the terms of section 10910(f)(5), the additional obligation to analyze the sufficiency of the groundwater source is even more flexible and deferential than the analysis of the supplier’s own past and projected future pumping. Unlike subsections (f)(3) and (f)(4), subsection (f)(5) does not require a “detailed” analysis; nor does it specify particular types of records to be used. Instead, subsection (f)(5) gives the supplier relative latitude in analyzing the sufficiency of the groundwater supply to serve a single project, consistent with the need for technical expertise and concomitant exercise of discretion in determining the appropriate methodology for making the sufficiency determination. (*E.g., Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230, 232 (courts must defer to agency to respect Legislature’s delegation decisions and the agency’s technical expertise).)

In addition to misreading the WSA Law, the individual-pumper approach also ignores the reality that, in many groundwater basins across the State, the level of information needed to complete a user-by-user pumping history and future projected use analysis throughout an entire basin or subbasin simply does not exist. Indeed, the Legislature’s decision not to impose specific analytical requirements in section 10910(f)(5) implies a deference to the water supplier that is particularly warranted given that information about individual groundwater

basins across the State varies dramatically, and in many cases is minimal. Moreover, the individual-pumper approach also suffers because it ignores the fact that extensive data and projections cannot realistically be developed on such a grand scale in the context of a WSA. As described below, this approach ignores the reality that, consistently, the goal of courts and agencies alike is to find a way to assess groundwater supplies in a manner that avoids the cost, time, and political and legal complications of developing extensive user-by-user data points and basinwide projections. Rather than identify individual pumping, suppliers instead routinely use more sophisticated methods that account for local conditions and practicalities, water levels, storage capacities, recharge, and other indicators of supply availability.

Put simply, why use a chainsaw when a scalpel works better?

### **III. ARGUMENT**

#### **A. Comprehensive Groundwater Data Is Unavailable for Many California Basins.**

A mandate that a supplier identify existing pumping by all users in the relevant basin or subbasin, and then project the future groundwater use by each one of those users, could only work if the necessary data were available. In most basins, however, such data simply does not exist. As indicated by DWR:

Much of the basic water supply and demand data are limited in availability, quality, transparency, and documentation. An example is groundwater data, where there is insufficient data available

statewide and insufficient staff resources to conduct a

comprehensive assessment of future groundwater conditions.

(California Water Plan Update 2005 at 255.<sup>6</sup>) The simple fact is that “California does not have a comprehensive monitoring network for evaluating the . . . quantity and quality of groundwater.” (Bulletin 118 Update 2003 at 15–16 (“Bulletin 118”).<sup>7</sup>)

Within these limitations, the greatest repository of groundwater information in the State is likely DWR.<sup>8</sup> Since 1975, DWR has prepared Bulletin 118, a compilation of statewide groundwater data, water budgets, delineations of hydrogeologic units, and analysis about the nature and condition of California’s groundwater basins and subbasins. (*Id.* at 15–16.) DWR has comprehensively updated the analysis twice, most recently in 2003 after the California Legislature’s

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<sup>6</sup> The relevant part of the California Water Plan Update 2005 is available at <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol1/v1complete.pdf> [as of March 23, 2007].

<sup>7</sup> Bulletin 118 is available at [http://www.dpla2.water.ca.gov/publications/groundwater/bulletin118/Bulletin118\\_Entire.pdf](http://www.dpla2.water.ca.gov/publications/groundwater/bulletin118/Bulletin118_Entire.pdf) [as of April 5, 2007].

<sup>8</sup> The United States Geological Survey (“USGS”) also collects and manages vast quantities of data about California groundwater in coordination with Federal, State, and local agencies. (USGS, Availability of Ground-Water Data for California, Water Year 2005, available at <http://pubs.usgs.gov/fs/2006/3089/pdf/fs2006-3089.pdf> [as of March 25, 2007].) But like DWR, USGS recognizes there is insufficient data available to document conditions and extraction in the majority of California groundwater basins. (*See, e.g., id.*) Of the 58 counties in California, the USGS maintains no groundwater level data for 38 of them. (*Id.*)

direction to update:

the inventory of groundwater basins contained in Bulletin 118-80, which includes . . . the review and summary of boundaries and hydrographic features, hydrogeologic units, yield data, water budgets, well protection characteristics, and water quality and active monitoring data; development of a water budget for each groundwater basin . . . .

(Budget Act of 1999, Ch. 50, Stats. 1999 (SB 160); *see also* Water Code § 12924 (requiring DWR to investigate and identify the State's groundwater basins).) This 2003 update represents the most significant resource for groundwater analysis and planning statewide, and provides an overview of the existing state of monitoring data for California water basins, subbasins, and other groundwater source areas.

Bulletin 118 shows that far from having comprehensive groundwater and pumping data for most groundwater basins in the State, such information is sorely lacking. As an overview, DWR ranks basins and subbasins on the basis of how much data is available to characterize water inflow, outflow, and the corresponding changes in storage. (Bulletin 118 at 95, 110.) The rankings range from "A" to "C":

Type A – indicates one of the following: (1) a groundwater budget exists for the basin or enough components from separate studies could be combined to give a general indication of the basin's groundwater budget, (2) a groundwater model exists for the basin

that can be used to calculate a groundwater budget, or (3) actual groundwater extraction data exist for the basin.

Type B – indicates that a use-based estimate of groundwater extraction is calculated for the basin. The use-based estimate is determined by calculating the overall use from California Department of Water Resources land use and urban water use surveys. Known surface water supplies are then subtracted from the total demand leaving the rest of the use to be met by groundwater extraction.

Type C – indicates that there are *not enough data to provide either an estimate of the basin's groundwater budget or groundwater extraction from the basin.*

(*Id.* at 110 (emphasis added).)

Of the 515 distinct groundwater systems identified by DWR, **269 are ranked “C,”** meaning that for more than half of California’s basins and subbasins there is insufficient data to even *estimate* the quantity of groundwater being extracted from the basin. (*Id.* at 106, 127–208.) Another 135 groundwater systems are ranked “B,” meaning sufficient data is available for a use-based estimate. (*Id.*) Less than a quarter of basins and subbasins have been sufficiently documented to warrant a ranking of “A.” (*Id.*)

DWR does maintain a database of additional, limited groundwater information, but not of the type that would be useful in determining the pumping

of everyone in a basin or subbasin. For example, DWR maintains a handful of monitoring wells in some parts of some basins and subbasins.<sup>9</sup> But even for areas with monitoring wells, the information kept by DWR does not document pumping by individual users; rather, the information simply shows groundwater level readings, typically taken twice a year.<sup>10</sup> (*Id.*)

DWR is also the repository for well completion report data, though this information is confidential. (§ 13752.) Governmental agencies may access this information upon request, though private water suppliers, such as mutual water companies and California Public Utility Commission–regulated corporations, which may still be considered public water systems under the WSA Law, may not. (*Id.*) But the data, again, would not be useful for determining the extraction of all users in a basin or subbasin. Other than construction-related information, the reports merely state the groundwater elevation at the time a well is drilled and provide the results of a test to show the capacity of the well. Importantly, the reports do not state how much the well owner actually planned to pump, is pumping, or needs to pump. And since there is no legal requirement that

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<sup>9</sup> See <http://wdl.water.ca.gov/gw> [as of April 2, 2007].

<sup>10</sup> For some wells, data has been recorded once or more a year, for a period of years. ([http://wdl.water.ca.gov/gw/hyd/rpt\\_basin\\_data1thru3\\_CF.cfm](http://wdl.water.ca.gov/gw/hyd/rpt_basin_data1thru3_CF.cfm), South Coast Hydrologic Region, San Jacinto Subbasin, 03S02W07P001S [as of April 2, 2007].) For other wells, there is a single data point taken decades ago. (*Id.*, South Coast Hydrologic Region, Coahuila Valley, 07S02E15R001S.) For some basins and subbasins, there are no wells. (*Id.*, South Coast Hydrologic Region, Elsinore Subbasin.)

the reports be updated, there is no way to tell how much water has been pumped.<sup>11</sup>

In only 4 of California's 58 counties are well owners required to report pumping, and then only when their pumping exceeds 25 acre-feet per year. (§§ 4999–5009.) In all other counties, groundwater pumpers are often reluctant to provide their pumping data for fear of how it will be used. (California Water Plan Update 2005 at 4-5 (“there is often a reluctance of individuals who own groundwater monitoring or supply wells to provide information or allow access to collect additional information.”).)<sup>12</sup> Even with landowner support, a monitoring program takes substantial time and money to implement,<sup>13</sup> and data would have to be collected for years to support the detailed finding required by the trial court in this case.

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<sup>11</sup> See DWR Well Completion Report form, available at [http://www.dpla2.water.ca.gov/publications/groundwater/dwr188\\_prd.pdf](http://www.dpla2.water.ca.gov/publications/groundwater/dwr188_prd.pdf) [as of March 30, 2007].

<sup>12</sup> The relevant portion of the California Water Plan Update 2005 is available at <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol2/v2ch04.pdf> [as of April 5, 2007].

<sup>13</sup> Drilling monitoring wells requires many different types of permits and approvals, from local, state, and sometimes federal agencies; and requires impact analysis pursuant to CEQA and/or NEPA. See, e.g., *Allegretti & Co. v. County of Imperial* (2007) 138 Cal.App.4th 1261, 1268 (*Allegretti*) (upholding export limit in conditional use permit for groundwater well); *Communications Relay Corp. v. County of Los Angeles* (2005) 130 Cal.App.4th 162 (affirming county's refusal to issue groundwater well permit); Pub. Res. Code § 21080 (stating CEQA applies to discretionary projects undertaken by public agencies).

**B. There Are Significant Problems with Estimating Future Pumping in WSAs.**

The foregoing demonstrates the problems with identifying *existing* pumping on a user-by-user basis. *Future* pumping projections on a user-by-user basis present a separate and even more challenging problem. First, future projections are inherently theoretical, as they cannot accurately account for changes in land use, crop rotations, fallowing, and water conservation. Second, and perhaps more importantly, future pumping projections are of intense interest to those whose pumping is projected. At the same time, a WSA that relies on an individual-pumper methodology will need to make significant assumptions as to whether it is foreseeable that a current use will continue, given the particular water rights, property ownership, uses, and other circumstances surrounding water use.

These are obviously extremely sensitive issues on a political level, and will likely render a WSA subject to needless legal challenges on collateral issues by a far broader group than would otherwise become involved the WSA process—including entities that object to the projections about their future pumping. Certainly, if the WSA Law had commanded water suppliers to shoulder these substantial pressures and informational burdens in a WSA process, then the suppliers would have to cope—though there would be substantial consequences, as outlined in the Appellant's, Real Party's, and *amicus curiae* briefs, in addition to the burden's arguably rising to the level of an unfunded mandate in violation of

California Constitution, Article XII B, section 6. But the WSA Law simply does not, by its terms or any logical reading, contemplate that suppliers will take on this herculean task in the 90-120 day window of the project-specific WSA process.

Ultimately, aside from the plain language of the WSA Law, perhaps the most compelling reason to avoid taking on this battle is that it is simply not necessary in order to effectively assess the reliability of supply. As explained below, suppliers have many effective tools for aggregating use and/or or predicting supply availability that do not involve user-by-user data/projections. One approach, for example, is to develop “management areas,” working with other nearby jurisdictions to prioritize certain conditions and manage the area to achieve them. More specifically, regional groundwater elevation targets will be set based on locally important hydrogeological factors, such as susceptibility to ground subsidence, risk of contamination, or potential loss of long-term storage. Sometimes, groundwater problems can be alleviated by scheduling pumping to avoid localized drawdown. In this way, suppliers and managers can ensure there is sufficient water available to satisfy beneficial uses while avoiding both unacceptable results and the need to generate vast pumping data, which for many groundwater systems may be imprecise, difficult to measure, and of limited utility for future pumping predictions.

By confining their analyses to areas that are practically meaningful for determining supply sufficiency, suppliers can avoid unnecessary conflict with

landowners, target their resources toward developing a record about the area that most affects supply, and efficiently assemble a sensible record without requiring a user-by-user analysis that is both unnecessary and of limited utility.

**C. Water Suppliers Are the Appropriate Entities to Identify the Geographical Boundaries of a Supply Assessment.**

The groundwater basins and subbasins delineated in Bulletin 118 do not necessarily provide sensible boundaries for evaluating the sufficiency of supply. The purpose of a section 10910(f)(5) finding is to determine whether there will be enough groundwater available to supply a proposed project in a single location. But some groundwater basins are enormous and, in some cases, so large that it strains credulity to assume that pumping at one end of a basin could realistically be said to affect pumping at the other. The San Joaquin Valley Hydrologic Region, for example, is approximately 15,200 square miles, and includes only *two* complete groundwater basins and part of a third. (Bulletin 118 at 169.) Despite this size, DWR has further subdivided the region into only 11 total basins and subbasins, one of which alone comprises 770,000 acres. (*Id.* at 173.) One of the basins in this Hydrologic Region is the San Joaquin Valley Groundwater Basin, which extends into another hydrologic region and itself comprises approximately 14,160 square miles. (*Id.* at 169, 177.) DWR divided this massive basin into 16 subbasins, but did so “by dividing [it] *based primarily*

on political boundaries.” (*Id.* at 15 (emphasis added).)<sup>14</sup>

DWR’s use of political boundaries to define subbasins is not limited to the San Joaquin Valley Groundwater Basin. For the 1980 Bulletin 118 update, the Legislature exhorted DWR to consider “political boundary lines whenever practical.” (§ 12924.) Bulletin 118 even identifies one of the seven different categories of groundwater basins as “[p]olitical boundaries or management area boundaries.” (Bulletin 118 at 88; *see also id.* at 90 (“subbasin boundaries could be based on a political boundary, such as a county line or a water agency service area”).) According to DWR, this type of “subbasin” is “[u]sually not related to hydrogeologic boundaries [but is rather f]ormed for convenience . . . .” (*Id.*) It should be noted that DWR did “primarily” define the boundaries using geologic contacts and hydrogeologic divides “where possible.” (*Id.* at 246.) “If this was not possible, political or institutional boundaries were used.” (*Id.*) The use of political boundaries for basin delineation raises questions about the relationship between these kinds of basins and water supply assessments.

DWR also expressly recognizes that the boundaries of basins and subbasins should be adjusted from time to time based on new data or improved understanding. (*Id.* at 15, 89, 90, 106 (noting that because basins and subbasins are typically developed based on institutional boundaries rather than physical

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<sup>14</sup> DWR divided the San Joaquin Valley Groundwater Basin based primarily on political boundaries for the 1980 update. (Bulletin 118 at 15.) Although Bulletin 118 was updated for 2003, DWR did not change the boundaries of these subbasins. (*See id.* at 170 (characterizing changes from Bulletin 118-80).)

data, their definitions are inherently flexible and should be refined through detailed local study).)

Moreover, the most common method by which local agencies obtain and share data and manage groundwater production and recharge is on the basis of management areas within and across basins and subbasins. Management areas are established based on practical and political realities as well as hydrological factors. Glenn County, for example, established a broad management area with smaller subareas to reflect, among other things, locations with similar hydrology and the boundaries of irrigation districts.<sup>15</sup> The California Water Plan Update 2005 discusses the propriety of using the watershed as an appropriate area for managing surface and groundwater interactions.<sup>16</sup>

In short, reliance on DWR's politically defined, continually changing basin and subbasin delineations as the *only* allowable boundary for analyzing the sufficiency of a water supply will sometimes conflict with the very hydrological realities that should drive the analysis. The local water supplier must have the discretion to make technical and practical determinations about the appropriate geographical area to support a WSA.

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<sup>15</sup> See DWR, Basin Management Objective (BMO) at A-3 to A-4, available at [http://www.countyofglenn.net/Water\\_Advisory\\_Committee/Appendix\\_A.pdf](http://www.countyofglenn.net/Water_Advisory_Committee/Appendix_A.pdf) [as of April 5, 2007].

<sup>16</sup> The relevant portion of the California Water Plan Update is available at <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol2/v2ch25.pdf> [as of April 5, 2007].

The comprehensive analysis conducted in the City of Rohnert Park's WSA is precisely the kind of detailed, data-driven local study that cannot be performed on the geographic scale under which DWR approaches groundwater issues. Moreover, new data may also clarify when even a properly delineated basin or subbasin is not the best area for determining the sufficiency of a groundwater supply. Indeed, in just one of example of many similar situations across the state, the Sixth Appellate District recently recognized that two wells, located in two discrete areas of a single subbasin, had entirely distinct implications for the water supply available for a development project. Specifically, the Court recognized that the water supply potential of wells located within a northern portion of a hydrologic "subarea" – itself a defined segment of a larger subbasin – was entirely different from the water supply potential of wells in a southern portion of the very same subarea:

The Pajaro sub-basin is subdivided into three sub-areas: Pajaro, Springfield Terrace, and Highlands North. The Salinas sub-basin is divided into two sub-areas: Highlands South and Granite Ridge.

The geographic delineation of sub-areas is based on both jurisdictional considerations and geological characteristics. . . .

. . . The initial study acknowledges a current annual overdraft of 700 acre-feet in the [Granite Ridge] sub-area. However, . . . the Project is located in the southern part of the [Granite Ridge] sub-area.

Moreover, drilling logs for the wells that will supply the Project and

testimony before the Planning Commission and Board established that the Project is situated over more alluvial soil, sand, and clay than a thick layer of impermeable granite shelf. Furthermore, unlike the hard-rock, low-yield wells in the northern part of the [Granite Ridge] sub-area, pump tests on the Project's wells revealed much higher yields, stabilized water levels during pump tests, and relatively fast water-level recovery after the testing. Given the particular location of the Project and pump tests, the CGA Report opined that there was sufficient water for the Project.

*(Landwatch Monterey County v. County of Monterey (2007) 147 Cal.App.4th 1001, 1006, 1018 (holding that analysis prepared by County demonstrated sufficient water supply for development despite allegations of overdraft by petitioner community organization.)* The hydrology involved in the *Landwatch* case is indicative of the fact that basins and subbasins are highly complex systems that vary dramatically based on, among other things, stratigraphy, soil types, lateral barriers, cracks and crevices, and percolation rates. As the Court of Appeal recognized in *Landwatch*, these differences exist both across basins and within basins, and also across and within subbasins. Any generalization regarding the type of hydrologic unit that should be analyzed in a WSA is inherently inaccurate when applied to a specific location; there is no general type of hydrology unit that can be definitively said to be the generic and automatic best one for evaluating sufficiency. The best unit must be based on local conditions, and a one-type-fits-

all approach will inherently sacrifice accuracy for uniformity.

**D. Courts and Agencies Avoid Engaging in Time-Consuming and Resource-Intensive Data Collection and Extraction Projections on a Pumper-by-Pumper Basis.**

As described in the examples below, even when an entire basin must be studied in a groundwater adjudication—which one might expect would require detailed individual use data—courts and agencies alike seek to avoid the above-identified problems of cost, time, and political and legal volatility associated with identifying individuals' water use.<sup>17</sup> As described briefly below, courts and agencies rely on more sophisticated methods of assessing the condition of the basins and ensuring reliability into the future. It is simply not necessary to generate vast amounts of basinwide pumping data, which are imprecise, and predictions about the future, which are theoretical, in order to assess relevant factors even when basinwide supply and demand are at issue.

**1. Seaside Basin**

The recent Seaside Basin adjudication shows that even in a relatively small subbasin where the viability of future supply is in play, courts do

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<sup>17</sup> While the California Supreme Court has held that, when resolving water rights priorities to a groundwater basin, a trial court must consider the water rights of each individual water pumper who is named in the case and who does not stipulate to a judgment imposing a physical solution, *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250–51, the Court's reasoning was based on the need to respect prior water rights, not on whether the science was adequate to understand and manage a basin without records from all individual-pumpers within the basin.

not find it necessary or advisable to document the pumping of all users. The Seaside Basin is a fairly small coastal subbasin, consisting of about 25,900 acres in the Salinas Valley in Monterey County. (Bulletin 118 at 143.) The Basin underlies several urban areas, including the Cities of Monterey and Seaside. (*California American Water v. City of Seaside*, Final Decision, Monterey County Superior Court, Case No. M66343<sup>18</sup> (“Final Decision”) at 2.)<sup>19</sup> Average annual pumping has exceeded recharge in the Basin for years. (*Id.* at 8–9.)

In August 2003, California American Water filed suit against all other major groundwater pumpers in the Seaside Basin, alleging that overpumping was lowering groundwater levels, reducing water quality, and exposing the subbasin to risk of seawater intrusion and land subsidence. (*Id.* at 6.) The Court did not conduct a factual hearing to determine the actual quantity of water pumped by the parties over time. (*See id.*) Instead, the Court adopted a physical solution to the problems of the Basin by decreeing the safe yield, requiring a reduction in pumping over time, and setting up a watermaster to monitor and manage the Basin, report on progress, and secure additional water to augment underground supplies. (*Id.* at 11–45.) The decision in the Seaside adjudication

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<sup>18</sup> The unpublished, trial court decisions discussed here are not offered as precedent (as this case does not involve an adjudication) but rather to demonstrate a trend in approaches to assessing the status of a groundwater basin to meet future beneficial uses.

<sup>19</sup> A copy of the Final Decision is available at [http://www.mpwmd.dst.ca.us/seasidebasin/Adjudication\\_Decision\\_April\\_06/AdjudicationDecision.pdf](http://www.mpwmd.dst.ca.us/seasidebasin/Adjudication_Decision_April_06/AdjudicationDecision.pdf) [as of March 25, 2007].

constitutes a practical, reasonable physical solution for addressing the sufficiency of the groundwater supply, without requiring a detailed accounting of all pumping. By contrast, in the present case, under the trial court's interpretation of Water Code section 10910(f)(5), a water supplier would have to engage in the expansive data collection that the court in the Seaside adjudication deemed unnecessary and inadvisable.

**2. The San Bernardino Basin Area – the *Orange County* and *Western* Judgments.**

The *Orange County* and *Western* Judgments are companion judgments that together provide an aggregate physical solution to ensuring equitable maintenance of the safe yield of the Santa Ana River and an associated groundwater basin, the San Bernardino Basin Area. The *Orange County* Judgment originally involved in excess of 4,000 individual parties and associated water supplies and water rights covering over 2,000 square miles, but the Court dismissed the majority of parties, recognizing that confirmation of existing pumping and projections of future pumping were arduous tasks that were “neither necessary nor helpful” to ensure that every user received a reliable supply:

It is apparent to the parties and to the Court that development of a physical solution based upon a formula for inter-basin allocation of obligations and rights is in the best interests of all of the parties and is in furtherance of the water policy of the State. For purposes of such a physical solution, it is neither necessary nor helpful to define

individual rights of all claimants within the watershed. . . .  
[s]ufficient information and data of a general nature are known to  
formulate a reasonable and just allocation . . . [and] will allow the  
public agencies and water users within each such major hydrologic  
subarea to proceed with orderly water resource planning and  
development.

(*Orange County Water District v. City of Chino*, Case No. 117628 (Apr. 17, 1969)  
Recital (d) (emphasis added).)<sup>20</sup> Likewise, in the companion *Western* Judgment,  
the court dismissed all but a small handful of parties who were identified as  
instrumental in implementing the physical solution designed to maintain the  
reliability of groundwater supply within the San Bernardino Basin Area over the  
long-term. (*Western Municipal Water District et al. v. East San Bernardino  
County Water District*, Case No. 78426 (Apr. 17, 1969).)<sup>21</sup>

### **3. The Salinas Valley**

The Salinas Valley is a largely agricultural, but increasingly urban  
area in Monterey and San Luis Obispo counties whose residents rely primarily on

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<sup>20</sup> A discussion of the *Orange County* Judgment is in California State Water Resources Control Board Order WR 2000-12 § 4.0 (Court Judgments Addressing Water Rights on the Santa Ana River), which is available at <http://www.waterrights.ca.gov/Decisions/wro2000-12.htm> [as of April 5, 2007].

<sup>21</sup> A discussion of the *Western* Judgment is in California State Water Resources Control Board Order WR 2000-12 § 4.0 (Court Judgments Addressing Water Rights on the Santa Ana River), which is available at <http://www.waterrights.ca.gov/Decisions/wro2000-12.htm> [as of April 5, 2007].

groundwater for municipal uses and irrigation. In some areas of the Valley, coastal wells began seeing increasing amounts of seawater intrusion early in the 20th century. In approximately 1977, the State Water Resources Control Board (“SWRCB”) began to consider requests that the Valley undergo adjudication of groundwater pumping rights in order to manage the threat of seawater intrusion. The SWRCB, however, declined to impose adjudication, recognizing the enormous costs and ultimate futility of such a procedure. Seeking to adopt a more efficient and ultimately more effective approach to basin management, the SWRCB chose to defer to local development of a physical solution to seawater intrusion, including conjunctive management of surface water and underground supplies through reservoir storage, surface water deliveries in-lieu of pumping, and similar efforts.<sup>22</sup>

These examples demonstrate that the individual-pumper approach is simply unnecessary to assess the condition of a basin and ensure reliability of supply.

#### **4. The Trend in Basin Management and Adjudications Away from Individual-Pumper Data Is Unmistakable.**

As demonstrated in the examples above, courts and agencies prefer local “physical solution” approaches to groundwater management for many

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<sup>22</sup> See Draft Environmental Impact Report / Environmental Impact Statement for the Salinas Valley Water Project (June 2001), Description of Alternatives to the Proposed Action, available at [http://www.mcwra.co.monterey.ca.us/SVWP/DEIR\\_EIS\\_2001/index.htm](http://www.mcwra.co.monterey.ca.us/SVWP/DEIR_EIS_2001/index.htm) [as of March 28, 2007].

reasons. They recognize that, in many instances, collecting individualized pumping data is inordinately complicated and expensive, has relatively little meaning for determining how best to manage groundwater, and is therefore an inefficient investment of scarce public resources. Instead, courts and agencies focus on practical solutions that allow effective investment of limited public resources for maximum benefit, and which can be accomplished without individual-pumper data.<sup>23</sup>

A plain reading of the WSA Law cannot lead one to the conclusion that the groundwater data and collection and analysis requirements for a WSA were intended to reverse the trend of courts and agencies toward practical approaches to understanding groundwater use. The WSA Law simply does not, by its terms, call for basin- or subbasin-wide data. The same factors that have steadily moved courts and agencies away from an individual-pumper approach in adjudications also apply to a supplier's choice of methodology for groundwater analysis in a WSA; the complexities of groundwater systems render the cost, time, and political and legal volatility of the individual-pumper approach relatively ineffective in assessing long-term reliability. Where, as in this case, the supplier's decision to use a more sophisticated approach to assessing the sufficiency of

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<sup>23</sup> These approaches include, for example, conjunctive management and recharge programs. Conjunctive management is the coordinated operation of surface water storage and use with groundwater storage and use. Groundwater recharge is the movement of water into de-watered aquifer space. (Bulletin 118 at 215, 219.)

groundwater supply avoids these issues and amply fulfills the purposes of the WSA Law, that choice is entitled to deference.

**E. Water Suppliers Throughout California Will Be Unreasonably Burdened to Meet the Analytical Demands Required by the Trial Court.**

The majority of public water systems are not equipped to provide the detailed analysis sought in this case. As outlined below, these public agencies simply do not have the budget or staffing to compile an exhaustive analysis, do not have the time to prepare such an analysis once it is requested, and legal constraints often prevent them from obtaining the information. Where such analysis is unnecessary to understanding supply reliability, the courts should not interpret the WSA Law to require it.

**1. Water Suppliers Face Legal and Budgetary Constraints that Hinder Preparation of Individual-Pumper Analyses.**

The last 30 years have seen a two-step erosion in the financial resources available to special districts. First, with the passage of Proposition 13 (Cal. Const., Art. XIII A) in 1978, the real estate tax on a parcel of residential property was limited to 1% of its assessed value, until such time as the property is resold. Prior to resale, the assessed value may only be increased by a maximum of 2% per year. Some of the biggest losers under Proposition 13 were local governments relying on property tax revenues for general activities, including public schools, libraries, city services, and special districts. (Regarding

Proposition 13 generally, see *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208.)

The second volley of this one-two punch was the passage of Proposition 218 (Cal. Const., Art. XIII C&D), which greatly increased the difficulty agencies face in generating funds from local sources, including assessments, fees and special taxes. Most importantly here, where Proposition 218 applies to the levy of assessments, fees, and charges, it requires a fairly exacting demonstration by the local water agency that charges do not exceed the cost-of-service and are proportional to the benefit received. (Cal. Const., Art. XIII D; *see also* Article XIII D, § 6(b)(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”); *Richmond v. Shasta Community Serv. Dist.* (2004) 32 Cal.4th 409, 415.) Other provisions of law also impose cost-of-service and proportionality requirements.<sup>24</sup> Under these laws, local water agencies cannot charge their ratepayers for the cost of preparing a WSA for an individual developer; public agencies have a fiduciary responsibility to ensure that money paid by their constituents has a measurable nexus, with varying degrees of

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<sup>24</sup> *See, e.g.*, Water Code § 36578 (in lieu of assessment, water districts may impose fee “schedule [that] shall reflect the proportional benefits bestowed on the property assessed by the operation of the district”); *id.* § 43006 (“tolls and charges [for a water storage district’s water deliveries] shall be proportional, as nearly as practicable, to the services rendered”); *id.* § 51231 (in levying assessments, reclamation districts shall “apportion the sum according to the benefits that will accrue to each parcel”).

specificity, to the benefits received or the burdens imposed by the customers.

Thus, local agencies may not be able to raise funds that can be used to develop the kinds of data and analysis required to understand the individual pumping demands on groundwater basins and subbasins, and projections into the future, that would be required under the individual-pumper approach. While some public agency suppliers have limited access to general tax funds, or occasionally obtain state grants to perform the type of analysis that underlies a WSA, the majority of this analytical work required under the WSA Law must be primarily funded by the developer, in the context of a single development project (and subject to the time limitations noted below). This, in turn, has its own implications including, among others, requiring a single developer to assume the cost and time burden of developing detailed information that has never before been deemed practically obtainable in most groundwater basins, thereby delaying development projects and the benefits they provide to local communities.

Indeed, it has been noted by courts in similar circumstances that such hindrance and delay may be among the goals of those who insist that—no matter how reasonable and thorough a resource analysis is—it is simply not good enough until substantial additional time, money and paper are poured into it. (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 6 (noting that “[a] project opponent can ‘win’ even though it ‘loses’” because the time and cost of litigation “make[] the project less commercially desirable, perhaps even to the point where a developer will abandon it or drastically scale it down.”).)

**2. Water Suppliers Cannot Reasonably Prepare Individual-Pumper Analyses Within the Statutory Timeframe.**

Ninety to 120 days is simply insufficient to generate the type of analytical assessment required by the trial court. Water Code section 10910 clearly requires that the public water supplier provide the requested WSA within 90 days. (Section 10910(g)(1).) As amply briefed by the Appellants, that WSA would have to contain extensive data and far-reaching analysis to be in compliance with the trial court's order. The sole statutory exception for completing the analysis in 90 days consists of a 30 day extension when so requested by the public water supplier to the city or county. Section 10910(g)(2). Indeed, the absolute nature of the 120 day deadline is underscored by the statutory grant of a cause of action to the city or county and against the public water supplier for failure to meet the deadline. (*See* Section 10910(g)(3).)

This extremely aggressive timeline can be contrasted against the time it would take to perform the analytical work required by the trial court. While some small groundwater basins may be managed by a single entity and all demands upon that basin are fully documented, for most basins, as explained above, there is insufficient data available for a public water supplier to use in meeting the standards inherent in the trial court's interpretation of the WSA Law. Moreover, the decades over which information has been gathered, for the specific basins discussed above, is illustrative of the challenges of gathering such data and performing such analyses in 90 or 120 days.

**3. Many Water Suppliers Lack the Means to Obtain the Information Necessary to Prepare Individual-Pumper Analyses.**

Public water systems are almost always entities of limited authority.<sup>25</sup> Special districts are limited to the powers granted to them under State law, and they do not have and cannot exercise general police powers. Indeed, in some cases their authorities have been interpreted so narrowly as to allow their otherwise exclusive efforts in groundwater management to be supplanted by subdivisions of the State with police power. (*See e.g., Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166.) It is in this context that we must consider the ability of a public water system to perform the detailed analytical work required by the trial court.

By way of example, ACWA represents numerous California Water Districts in the San Joaquin Valley created under Water Code section 34000 *et seq.* Many of these districts are, or have the potential to be, public water systems. While these districts have the legal authority to acquire and maintain works for the distribution of water (section 35401), enter into contracts for water (section

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<sup>25</sup> Some public water systems are cities and counties and therefore will have the ability to exercise police powers. However, even as to these entities, the confidentiality of pumping information under State law would hamper these entities' efforts to develop comprehensive information on the functioning of groundwater basin. While Water Code section 13752 makes well drilling logs available to governmental agencies for certain purposes, those logs do not contain any information regarding the quantity of water that is or can be pumped. *See e.g.,* Water Code section 13751(b)(1)(A) - (G), identifying the information required in such logs.

35403), enter onto lands of the district (section 35404), convey property and execute agreements (sections 35405 and 35406), and levy and collect assessments (section 35410.1), the districts are not granted the authority to subpoena records to determine who is pumping groundwater, how much water is being pumped, and from where it is being pumped. The districts do not have the authority to avoid Proposition 218 and collect assessments from all landowners or water users in the district to fund a comprehensive study of the underlying groundwater basin. Likewise, the districts do not have the authority to demand information from adjacent districts that may overlie the same groundwater subbasin or basin. In short, the districts do not necessarily have the necessary legal tools to perform the detailed analytical work required by the trial court.

#### **IV. CONCLUSION**

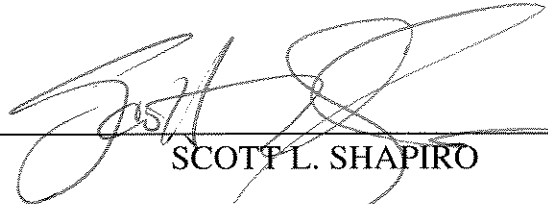
The Appellants' and Real Parties' briefs amply demonstrate that the individual-pumper approach identified in the trial court decision is not required in the present case. As explained in this brief, that approach also runs counter to modern techniques for assessing groundwater sufficiency in California. Even in groundwater adjudications—where one might expect individual pumping to be very relevant—courts are tending to avoid the onerous task of documenting individual pumping. This trend away from individual-pumper methodology is not only sensible from a cost and time management perspective, it is also demanded by the very limited data that has been collected on many of California's groundwater basins. That limited data, coupled with water suppliers' limited

funding and authority to obtain data, compels a conclusion that individual-pumper data and analyses are not feasible over much of California and *could not have been expected* by the Legislature when it passed the WSA law. *Amicus ACWA* respectfully requests that this Court reverse the trial court decision, and uphold the methodology used in the WSA at issue in this case as a sensible and appropriate approach that complies with the WSA Law.

DATED: April 6, 2007

DOWNEY BRAND LLP

By:



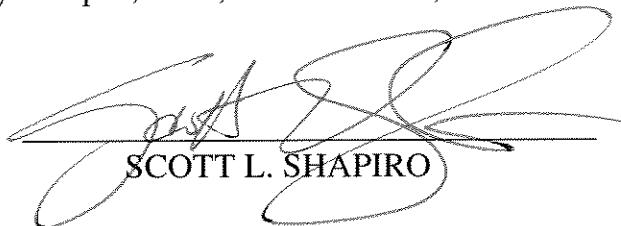
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## CERTIFICATE OF WORD COUNT

I, Scott L. Shapiro, do hereby certify that this *amicus curiae* brief contains 8,785 words. I used the word count function of my word-processing software to derive this number.

Executed this sixth day of April, 2007, at Sacramento, California.



SCOTT L. SHAPIRO

841929.4

**PROOF OF SERVICE**

I am over 18 years of age, not a party to this action and employed in the County of Sacramento, California at 555 Capitol Mall, 10<sup>th</sup> Floor, Sacramento, California 95814.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

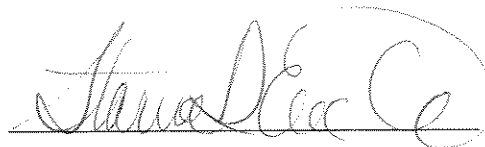
On April 6, 2007, I served a copy of the following documents:

**APPLICATION BY THE ASSOCIATION OF  
CALIFORNIA WATER AGENCIES TO FILE  
AMICUS CURIAE BRIEF & AMICUS CURIAE BRIEF**

- X by mail on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Downey Brand LLP, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

**SEE ATTACHED LIST**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 6, 2007.



Starna D. Erickson

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