

**S284252** Supreme Court Case No. S\_\_\_\_\_

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

MOJAVE PISTACHIOS, LLC, a California  
limited liability company; and PAUL G.  
NUGENT AND MARY E. NUGENT,  
Trustees of the Nugent Family Trust dated  
June 20, 2011,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, COUNTY OF ORANGE,

Respondent.

INDIAN WELLS VALLEY  
GROUNDWATER AUTHORITY, a  
California joint powers authority; THE  
BOARD OF DIRECTORS OF THE INDIAN  
WELLS VALLEY GROUNDWATER  
AUTHORITY, a governing body,

Real Parties in Interest.

After a Published Opinion by the  
Court of Appeal, Fourth Appellate  
District, Division Three, Appellate  
Case No. G062327

Orange County Superior Court -  
Lead Case No. 30-2021-01187589-  
CU-WM-CXC

[Consolidated Case No. 30-2021-  
01188089-CU-WM-CXC; Related  
Case No. 30-2021-01187275-CU-  
OR-CJC]

Hon. William D. Claster  
Department: CX104  
Telephone: (657) 622-5304

**PETITION FOR REVIEW**

**BROWNSTEIN HYATT FARBER SCHRECK, LLP**

\*SCOTT S. SLATER, Bar No. 117317

sslater@bhfs.com

AMY M. STEINFELD, Bar No. 240175

asteinfeld@bhfs.com

ELISABETH L. ESPOSITO, Bar No. 300983

eesposito@bhfs.com

1021 Anacapa Street, 2nd Floor

Santa Barbara, California 93101

Telephone: 805.963.7000/Facsimile: 805.965.4333

Attorneys for Petitioners

## TABLE OF CONTENTS

	<b>Page(s)</b>
I. ISSUES PRESENTED FOR REVIEW .....	7
II. WHY REVIEW SHOULD BE GRANTED .....	7
III. STATEMENT OF THE CASE .....	12
A. Procedural Background and Court of Appeal Opinion .....	12
B. Petition for Rehearing .....	14
C. Statement of Facts .....	14
1. <i>Petitioners have a vested overlying             property right in the native groundwater             they use for agriculture.</i> .....	14
2. <i>SGMA expressly protects and preserves             water rights.</i> .....	14
3. <i>Real Party allocates Petitioners' existing             agricultural use zero native groundwater             based on its determination of "inferior"             water rights.</i> .....	15
4. <i>Petitioners file this action challenging             Real Party's illegal allocation of native             groundwater.</i> .....	18
IV. LEGAL DISCUSSION .....	19
A. Unless the Supreme Court Clarifies What Authority a GSA Has to Determine Groundwater Rights, GSA's Will Have Unrestrained Power to Deprive Targeted Users of Their Vested Rights .....	19
1. <i>Supreme Court review is necessary to             establish the limits of a GSA's authority             under SGMA.</i> .....	19
2. <i>Real Party's water rights determinations             were clearly wrong under California             common law.</i> .....	22

B.	The Supreme Court Must Clarify that the Pay First Rule Does Not Apply to Pre-Payment SGMA Fee Challenges and Does Not Shield Non-Fee Agency Actions from Review .....	24
1.	<i>SGMA and the Pay First Rule</i> .....	24
2.	<i>Petitioners’ relevant claims allege a deprivation of property rights through the illegal allocation of native groundwater, not the Replenishment Fee.</i> .....	26
C.	The Supreme Court Must Clarify the Limits on the Pay First Rule to Prevent Abuse. ....	30
1.	<i>Petitioner has no adequate remedy at law.</i> ....	31
2.	<i>The Pay First Rule doctrine must yield to constitutional claims.</i> .....	33
3.	<i>The Court should clarify that the Pay First Rule does not apply when the government targets a particular group of citizens with unreasonably high fees to prevent those citizens from challenging its illegal conduct.</i> .....	36
V.	CONCLUSION .....	40
	VERIFICATION .....	42
	CERTIFICATE OF WORD COUNT .....	43

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Antelope Valley Groundwater Cases</i>	
(2021) 62 Cal.App.5th 992 .....	22
<i>Ardon v. City of Los Angeles</i>	
(2011) 52 Cal.4th 241.....	27
<i>Baldwin v. State of California</i>	
(1972) 6 Cal.3d 424 .....	27
<i>Calfarm Ins. Co. v. Deukmejian</i>	
(1989) 48 Cal.3d 805 .....	27, 28, 29, 30
<i>Center for Biological Diversity v. County of San Bernardino</i>	
(2016) 247 Cal.App.4th 326.....	9
<i>Chodos v. City of Los Angeles</i>	
(2011) 195 Cal.App.4th 675.....	25
<i>City of Anaheim v. Superior Court</i>	
(2009) 179 Cal.App.4th 825.....	17, 25
<i>City of Barstow v. Mojave Water Agency</i>	
(2000) 23 Cal.4th 1233.....	<i>passim</i>
<i>City of Santa Maria v. Adam</i>	
(2012) 211 Cal.App.4th 266.....	33
<i>County of Los Angeles v. Superior Court</i>	
(2008) 159 Cal.App.4th 353.....	25
<i>Dows v. City of Chicago</i>	
(1870) 78 U.S. 108.....	31, 32
<i>Dugan v. Rank</i>	
(1963) 372 U.S. 609.....	35
<i>Dunker v. Field &amp; Tule Club</i>	
(1907) 6 Cal.App. 524.....	31, 32
<i>Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp.</i>	
(1927) 202 Cal. 56 .....	34

<i>Flying Dutchman Park, Inc. v. City and County of San Francisco</i> (2001) 93 Cal.App.4th 1129 .....	31, 36, 37
<i>Horn v. County of Ventura</i> (1979) 24 Cal.3d 605 .....	21
<i>Hunsaker v. Kersh</i> (Utah S.C. 1999) 991 P.2d 67 .....	31
<i>Internat. Paper Co. v. U.S.</i> (1931) 282 U.S. 399 .....	35
<i>Lungren v. Deukmejian</i> (1988) 45 Cal.3d 727 .....	25
<i>Pa. Coal Co. v. Mahon</i> (1922) 260 U.S. 393 .....	34
<i>People v. Shirokow</i> (1980) 26 Cal.3d 301 .....	10
<i>People’s Advocate, Inc. v. Superior Court</i> (1986) 181 Cal.App.3d 316 .....	30
<i>Reid v. City of San Diego</i> (2018) 24 Cal.App.5th 343 .....	25
<i>Richardson v. Jefferson County, Ala.</i> (1996) 517 U.S. 793 .....	37
<i>San Luis &amp; Delta-Mendota Water Authority v. Locke</i> (E.D. Cal. 2010) 2010 WL 500455 .....	31
<i>Tehachapi-Cummings County Water Dist., v. Armstrong</i> (1975) 49 Cal.App.3d 992 .....	23
<i>U.S. v. Gerlach Live Stock Co.</i> (1950) 339 U.S. 725 .....	35
<i>Water Replenishment Dist. of Southern California v. City of Cerritos</i> (2013) 220 Cal.App.4th 1450 .....	25
<i>Western Oil &amp; Gas Assn. v. State Bd. of Equalization</i> (1987) 44 Cal.3d 208 .....	27, 33, 36, 37

## **Constitutions**

California Constitution, Article X, § 2 .....	23
California Constitution, Article XIII, § 32.....	7, 17, 25

## **Statutes**

### **Code of Civil Procedure**

§ 452.....	38
§ 830 et seq. ....	9

### **Water Code**

§ 106.....	22, 38
§ 10720.1(b) .....	10, 15
§ 10720.5.....	9, 10
§ 10720.5(b) .....	15, 19
§ 10721(v) .....	14
§ 10721(w) .....	15, 16
§ 10723.....	15
§ 10724.....	15
§ 10726.6(c).....	24, 25
§ 10726.6(d) .....	24
§ 10726.6(e) .....	24
§ 10726.8(b) .....	10
§ 10727.2.....	15
§ 10738.....	10

## **Court Rules**

### **California Rules of Court**

Rule 8.500(b)(l).....	7, 25
Rule 8.500(c)(2) .....	14

## **I. ISSUES PRESENTED FOR REVIEW**

This case presents the following novel issues for review:

1. Under the 2014 Sustainable Groundwater Management Act (“SGMA”), may a groundwater sustainability agency (“GSA”) determine law and facts to conclude that an overlying landowners’ correlative water rights are “inferior” to others and allocate them no (zero) groundwater?
2. Does the “pay first, litigate later” rule, California Constitution, article XIII, section 32 (“Pay First Rule”) apply to SGMA fees (or extend to non-fee provisions separately included in the local agency fee ordinance)?
3. If so, does the Pay First Rule immunize local agencies from constitutional takings claims where an agency establishes a usurious fee designed to bar challenge?

## **II. WHY REVIEW SHOULD BE GRANTED**

This Court may review a Court of Appeal decision “[w]hen necessary to secure uniformity of decision or to settle an important question of law.” (Cal. Rules of Court, rule 8.500(b)(1).) This case presents this Court with the opportunity to course correct issues of fundamental constitutional importance to the sustainable management of one of California’s most precious resources—groundwater—which provides roughly half of this State’s water supplies. As the Court of Appeal expressly recognized,

The issues raised in this writ proceeding are of widespread interest and importance . . . [and] may impact thousands of water users throughout the state for years to come. Whether the “pay first” rule applies

in litigation challenging SGMA fees is a novel question, the answer to which could impact groundwater extractors throughout the state; it has yet to be addressed by any appellate decision.

(Exh. A [Opinion], p. 19.)

We request that this Court clarify and provide guidance to lower courts on the following matters of first impression: a) the separation of powers between GSAs acting under SGMA which requires the administration of groundwater to be consistent with common law priorities and the courts' exclusive jurisdiction to determine water rights; and b) the limits of public agency attempts to shield the exercise of their authority from judicial review through the Pay First Rule—including whether this common law doctrine prevents state and federal constitutional claims from proceeding at the demurrer stage.

This case presents this Court with the first opportunity to interpret key provisions of SGMA and to prevent the misuse of SGMA to unlawfully take vested water rights in violation of the California and United States Constitutions. This Court's guidance is necessary to ensure that overlying water rights holders, otherwise entitled to recognition, priority and protection under the holding of this Court in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1233, 1253 ("*Barstow*"), may challenge an administrative action that (1) allocates them zero groundwater; (2) establishes an extortionate fee designed to bar challenge; and (3) bankrupts their businesses as a condition of litigating their claims.



Here, the circumstances weigh in favor of review. GSAs must develop funding mechanisms to implement their SGMA plans. To the extent those funding efforts are predicated on the GSA making a determination of water rights as the basis for the imposition of the fees, constitutionally grounded boundaries are needed to prevent a multiplicity of proceedings in other cases.

First, review is needed to address the powers of a GSA to impose a groundwater allotment based on the GSA's own water rights determination contrary to common law. If an allocation system must be implemented, then the GSA must be clearly obligated to apply the correct legal principles to that allocation regime. (See *Barstow, supra*, 23 Cal.4th.) This is an issue of first impression and of vital importance to the successful implementation of SGMA throughout the state.

When the Legislature enacted SGMA, it confirmed that the judiciary alone has the power to determine water rights and immediately adopted new streamlined adjudication procedures. (Wat. Code, § 10720.5; see Code Civ. Proc., § 830 et seq.) Petitioners, as overlying owners beneficially using groundwater on their land to irrigate pistachios, have a vested right to pump native groundwater from the Indian Wells Valley Groundwater Basin ("Basin") that lies beneath their land, subject only to the requirement that the water be beneficially used. (See *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, 336.) Having shown ownership, extraction, and beneficial use of the groundwater, Petitioners established their overlying rights. (*Barstow, supra*, 23 Cal.4th at 1253-54.) These

rights have been established and governed by hundreds of years of common law directives, and Constitutional and statutory provisions. In recognition of the courts' long-standing exclusive jurisdiction over groundwater rights, the Legislature expressly prohibited GSA's from determining water rights. (Wat. Code, §§ 10720.5, 10720.1(b), 10726.8(b), 10738.) A GSA must not be allowed to attempt to re-allocate groundwater based on principles that do not reflect long-standing principles developed by the courts.

In this case, as a result of the GSA's improper water rights determination, the GSA re-allocated Petitioners' entire correlative share and priority right to native groundwater to others. As this Court has repeatedly noted, all water rights are usufructuary real property rights, with an established priority among competing claimants. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 307-08.) The GSA's actions first established an allocation system entirely inconsistent with the priority system articulated in *Barstow*, and then the GSA further conditioned use through the imposition of a usurious fee.

Second, review is needed because the Court of Appeal drastically expanded the Pay First Rule to prevent judicial challenges to illegal government conduct—in this case, conduct that is distinct and severable from the imposition of the fee. Under California law, Petitioners hold a vested, first priority real property right in the native groundwater that they use for agriculture. Real Party, the local GSA, deprived Petitioners of that vested property right by allotting **100%** of the native

groundwater to other users in violation of state and federal law via an allocation system termed the “Annual Pumping Allocations” by Real Party’s Groundwater Sustainability Plan (“GSP”). Despite the deprivation of property rights through this *ultra vires* allocation of native groundwater, the Court of Appeal determined that the Pay First Rule still applies because even if Petitioners’ legal challenge to the allocation was successful and resulted in access to the native groundwater, the net result would be Petitioners paying less in fees to the GSA. In other words, the Court of Appeal determined that the Pay First Rule prohibits **any** judicial challenge if the illegal government conduct could have some indirect impact on the payment of a fee. This Court’s review is needed because this unprecedented expansion of the Pay First Rule prevents the judicial review of legitimate constitutional claims without furthering the purpose of the doctrine.

Finally, as a matter of first impression, review is needed to clarify that the Pay First Rule does not apply when the government targets a specific group of citizens with illegal conduct, then imposes an unreasonably high fee to intentionally prevent those citizens from challenging the illegal conduct in court. This Court has previously recognized several exceptions to the Pay First Rule when needed to protect due process and other constitutional safeguards. As a natural extension of these prior decisions, this Court should confirm that the government cannot shield itself from judicial scrutiny by intentionally imposing an unreasonably high fee that it knows the taxpayer could never

afford. This exception is particularly important here because the illegal conduct being challenged is the taking of vested real property rights without just compensation that will result in the death of 215,000 mature pistachio trees and the total elimination of all beneficial use of Petitioners' property.

These circumstances weigh in favor of review. The public has an interest in prompt resolution of this dispute because there are over 260 GSAs statewide currently implementing SGMA—developing groundwater management actions and adopting fees to fund those actions. If accomplished without giving proper respect to the real property rights being impacted, a multiplicity of disputes will be triggered. This will further delay the successful management of groundwater resources.

### **III. STATEMENT OF THE CASE**

#### **A. Procedural Background and Court of Appeal Opinion**

On December 11, 2022, Real Party demurred to four of Petitioners' Mojave Pistachios, LLC and Paul G. Nugent and Mary E. Nugent, Trustees of the Nugent Family Trust dated June 20, 2011 ("Petitioners") causes of action—which challenge Real Party's Annual Pumping Allocations and plead Petitioners' constitutional taking claims. Real Party argued the claims fail under the Pay First Rule, which requires taxpayers to pay the disputed tax before challenging it in court. Although Petitioners are challenging the illegal allocation of native groundwater, and not the Replenishment Fee, the trial court sustained the demurrer after concluding that the Pay First Rule prohibited the

claims. (Exh. A, pp. 17-18; 9PA 4059<sup>1</sup>.) Thereafter, Petitioners filed a writ of mandate with the Court of Appeal. (Exh. A, p. 18.)

On February 8, 2024, in a published opinion, the Court of Appeal held that the Pay First Rule prohibits the relevant claims (“Opinion”). (Exh. A.) The Court of Appeal held the doctrine applies because Petitioners’ challenge to the illegal allocation of native groundwater is part of the fee ordinance. In other words, the Court of Appeal expanded the Pay First Rule to include challenges to **any** illegal government conduct that has some indirect impact on the imposition of fees. (*Id.*, pp. 28-33.) With respect to the constitutional taking claims, the Court of Appeal questioned whether the takings clause even applies to appurtenant water rights. (*Id.*, pp. 34-35, fn. 22.) It then held that Petitioners failed to allege a regulatory taking because Petitioners’ only economic harm was the fee (not the GSP), which it had not paid, and that Petitioners failed to allege a physical taking because Petitioners are not physically prevented from extracting water. (*Id.*, p. 35.) The Opinion has deprived Petitioners of an opportunity to plead claims that represent the very essence of their case.

As discussed below, review by this Court is needed because the Court of Appeal committed legal error on these issues of first impression and widespread importance.

---

<sup>1</sup> Volume 9 of Petitioners’ Appendix in Support of Writ Petition, at p. 4059. Subsequent references are formatted similarly.

## **B. Petition for Rehearing**

On February 23, 2024, Petitioners timely filed a Petition for Rehearing in the Court of Appeal challenging numerous **misstatements of fact and law** in the Opinion, which should not be taken as true by this Court (Cal. Rules of Court, rule 8.500(c)(2)). (See 2/23/2024 Petition for Rehearing.) The Petition for Rearing was denied with no explanation or analysis on March 4, 2024. (See 3/4/2024 Order Denying Petition for Rehearing.)

## **C. Statement of Facts**

### ***1. Petitioners have a vested overlying property right in the native groundwater they use for agriculture.***

Petitioners own approximately 1,600 acres of pistachio trees overlying the Basin. (Exh. A, p. 6.) The land was purchased and cultivated with pistachio trees using groundwater as their sole source of supply, which are now mature with a total commercial life expectancy of at least 75 years. (*Id.*, p. 7.) As discussed in more detail below, Petitioners have a vested overlying water right (real property right appurtenant to their overlying land) to pump native groundwater from the Basin for use on this land. (*Ibid.*) Before 2020, Petitioners' overlying use of this native groundwater was not subject to governmental fee or regulation. (*Id.*, p. 13.)

### ***2. SGMA expressly protects and preserves water rights.***

In 2014, California enacted SGMA to bring groundwater in California under “sustainable management” **by 2040**. (Wat. Code,

§§ 10721(v)-(w), 10727.2.) SGMA authorizes the creation of GSAs to develop and create GSPs to accomplish SGMA’s goal of sustainable management. (*Id.*, §§ 10723-10724.)

While SGMA envisions local agency management of basins, the Legislature specifically stated its intent was to “preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater.” (*Id.*, § 10720.1(b).) As such, SGMA expressly prohibits GSAs from determining water rights, which is exclusively reserved to the courts. (*Id.*, §§ 10720.5(b) [“Nothing in [SGMA], or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights.”]; 10726.8(b) [“Nothing in [SGMA] shall be construed as authorizing a local agency to make a binding determination of the water rights of any person or entity, or to impose fees or regulatory requirements on activities outside the boundaries of the local agency.”].)

***3. Real Party allocates Petitioners’ existing agricultural use zero native groundwater based on its determination of “inferior” water rights.***

Real Party Indian Wells Valley Groundwater Authority (“Real Party”) is a California joint powers authority established to serve as the GSA for the Basin, tasked with developing a GSP that describes the framework toward a 20-year management goal as required by SGMA. (Exh. A, p. 9.)

Under SGMA, Real Party was required to manage the Basin via a “sustainable yield,” defined as the “maximum

quantity of water, calculated over a base period representative of long-term conditions in the basin, and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result.” (Wat. Code, § 10721(w).) On July 16, 2020, Real Party adopted the Sustainable Yield Report, finding that the Basin’s entire sustainable yield (7,650 acre feet per year (AFY)) is subject to the United States Navy’s Federal Reserve claim, despite the right’s inchoate status, with the Navy asserting it only needed a maximum of 2,041 AF. (Exh. A, p. 11, fn. 9; 2PA 1140, 1142, 1148–49.) Thus, the balance is available for beneficial use by others.

Real Party determined that the water the Navy did not use would be “transferred” to non-federal entities as a “carryover” extraction. In order to allocate this native groundwater, Real Party determined that certain pumpers have “superior” water rights over Petitioners’ “inferior” water rights. (2PA 916–17; 7PA 3350.) Based on this determination of “superior” and “inferior” water rights, Real Party adopted Ordinance No. 03-20, which allocates **100%** of the native groundwater to public pumpers—including Real Party’s board members—leaving Petitioners with **zero** native groundwater. (Exh. A, p. 12; 2PA 1151–53.) For Petitioners, one of the few parties in the entire Basin that were not included in the Annual Pumping Allocations or provided a temporary “transient pool” allocation, Real Party imposed a historically high “Replenishment Fee” of \$2,130 per AF, most of which would be used to purchase non-native water, which would have to be imported to the Basin by constructing a lengthy



pipeline.<sup>2</sup> (*Ibid.*) Paying for this imported water at such an unreasonably high rate makes Petitioners’ farming operations cost prohibitive, as Real Party is seeking approximately \$10 million in fee payments and penalties for 2021, alone. (1/5/2022 Complaint for Preliminary and Permanent Injunction etc., Orange County Sup. Ct. Case No. 30-2022-01239479.) Similar annual amounts for 2022-2024 are accruing.

Incredibly, Real Party admitted that driving agriculture out of the Basin was its intent. (7PA 3425.) It expressly acknowledged that its zero allocation of native groundwater and historically high Replenishment Fee for imported non-native water would mean “the likely cessation of large-scale agricultural uses in the Basin due to the increased cost for surface water....” (*Ibid.*) In other words, Real Party allocated Petitioners zero native groundwater knowing that it would destroy all economic and beneficial use of Petitioners’ property. As projected in Real Party’s GSP, farming would be eradicated by 2040:

---

<sup>2</sup> The policy behind article XIII, section 32 is to ensure that revenue collection continues during litigation so essential public services “are not unnecessarily interrupted.” (*City of Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825, 827.) Here, no essential services are at issue—Real Party admits it has no real plans to utilize the fee funds—no concrete cost estimates for the future importation of water, no plans to convey that water, and no plans for pipeline construction. (7PA 3460-61, 3476-78.)

Table 3-11 below describes the pumping distribution by water use.

*Table 3-11. Management Scenario 6.2 Pumping Distribution by Water Use.*

Water Use	2020	2040	2070
	20,800 AF	11,200 AF	14,000 AF
Agriculture	40%	0%	0%
Industrial	10%	3%	3%
City/Municipal/Domestic	40%	79%	83%
U.S. Navy	10%	18%	15%

(7PA 3291.)

***4. Petitioners file this action challenging Real Party’s illegal allocation of native groundwater.***

In this case, Petitioners are challenging Real Party’s allocation of native groundwater on several grounds. Relevant here, Petitioners’ fifth cause of action in their Third Amended Complaint (“TAC”) alleges that the Annual Pumping Allocations violated SGMA because they were based on Real Party’s determination of priority water rights, which is expressly prohibited under SGMA (“COA 5”). (6PA 3023-27.) Petitioners further allege that Real Party violated California common law by, among other things, disregarding their first priority overlying water rights when allocating them zero native groundwater. (*Id.*, pp. 3024, 3027.) Petitioners’ ninth, tenth and eleventh causes of action allege that Real Party’s allocation of zero native groundwater constitutes a taking of property rights without just compensation in violation of the United States and California Constitutions (“COAs 9-11”). (*Id.*, pp. 3033-37.)

#### IV. LEGAL DISCUSSION

##### **A. Unless the Supreme Court Clarifies What Authority a GSA Has to Determine Groundwater Rights, GSA's Will Have Unrestrained Power to Deprive Targeted Users of Their Vested Rights**

In reviewing whether the Pay First Rule applies to Petitioners' four causes of actions, it must first be noted that Petitioners' underlying claims arise from Real Party's clear violations of SGMA, established common law, and the California and federal constitutions. Real Party's illegal conduct, which was specifically targeted at agricultural pumpers, underscores the absurdity of allowing agencies like Real Party to intentionally impose irrationally high fees to escape judicial scrutiny under the Pay First Rule. If the Opinion stands, for the next few years GSAs will have free range to target landowners by unlawfully determining water rights within fee ordinances in abject defiance of SGMA and groundwater law—because they can.

##### ***1. Supreme Court review is necessary to establish the limits of a GSA's authority under SGMA.***

As the Court of Appeal correctly recognized, "SGMA specifies that it does not modify rights to use groundwater, and it ***expressly prohibits*** groundwater sustainability plans from determining water rights." (Exh. A, pp. 8-9 [emphasis added]; see also Wat. Code, §§ 10720.5(b); 10726.8(b); 10720.1(b) ["It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible...."].)

*Barstow* rejected a trial court order that failed to honor the common law priority for overlying landowners in an adjudication just as the GSA did here. (*Barstow, supra*, 23 Cal.4th at 1253-54.) The burden to prove prescription falls on a claimant to prove all elements by clear and convincing evidence; that is, it isn't the overlying owners' burden to prove the negative. (*Id.* at 1254 ["No precedent exists for requiring an overlying user to file an action to protect its right to pump groundwater."].)

Instead of following *Barstow*, the GSA determined that overlying owners' rights were diminished by prescription: a uniquely judicial question of law and fact, requiring proof and subject to affirmative defenses. It is undisputed that Real Party improperly determined water rights when adopting the Annual Pumping Allocations. Indeed, the whole basis for Real Party's allocation of native groundwater was its determination of which parties had "superior" and "inferior" water rights. As it expressly stated in its GSP and as pled by Petitioners, Real Party determined that the parties receiving an allocation of native groundwater—including Real Party's Board members—have "superior" water rights to Petitioner:

- "The beneficial uses of other groundwater users, including agricultural and industrial users, will subsequently be evaluated based on ***water rights priorities***...." (2PA 917 [emphasis added]; 6PA 2961, 2966 [TAC].)
- "[T]he City and Kern County ***overlying groundwater production rights are superior*** to all other overlying rights because public entity

rights may not be prescribed against.” (2PA 916 [emphasis added]; 6PA 2961, 2966 [TAC].)

- “The IWVGA recognizes that the safe yield is significantly lower than current pumping and some groundwater pumpers with *inferior rights* will not be granted any Annual Pumping Allocations.” (7PA 3350 [emphasis added]; 6PA 2966-67 [TAC].)

Based on its determination of “superior” and “inferior” water rights, Real Party ordered that farmers would not be allocated *any* native groundwater. (7PA 3453.) Because the Annual Pumping Allocations are expressly based on Real Party’s improper determination of “superior” and “inferior” water rights, Real Party clearly violated SGMA when adopting the Annual Pumping Allocations.

Further, the Opinion ignored the crux of Petitioners’ claim, which is that GSAs are not legally empowered to disregard the directives of SGMA to protect overlying rights and instead allocate no groundwater to a pre-existing agriculture use because it determined Petitioners had lost all their water rights by prescription, without the due process and transparency afforded by an adjudicatory proceeding. This type of governmental action violates due process principles by depriving landowners of a significant property interest without notice, fact finding, or an opportunity to be heard. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Supreme Court review is needed to address the cornerstone legal question here: Whether it is permissible for a GSA to adopt allocations implementing a GSP that are designed to eliminate agriculture and give an overlying owner with an

existing beneficial use a zero allocation of native groundwater.

**2. *Real Party's water rights determinations were clearly wrong under California common law.***

In addition to unlawfully determining water rights, Real Party's priority determinations were also clearly wrong under California common law.<sup>3</sup> Under California law, landowners have "overlying rights to native ground water for reasonable beneficial uses on their overlying land," including "irrigation for agriculture." (*Barstow, supra*, 23 Cal.4th at 1247; Wat. Code, § 106.) This overlying right vests by operation of law through the pumping of water. (*Barstow, supra*, 23 Cal.4th at 1253.)

As a matter of law, overlying users have a *first priority* property right to the native groundwater beneath their property that is used for beneficial purposes. (*Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1022 ["First priority goes to the landowner whose property overlies the groundwater."]; *Barstow, supra*, 23 Cal.4th at 1240 [a landowner "with overlying rights has rights *superior to that of other* persons who lack legal priority."] [emphasis added].) For example, in the event of an overdraft (more groundwater is being used in the basin than can be replenished), "overlying users have *priority* over appropriative users." (*Barstow, supra*, 23 Cal.4th at 1253 [emphasis added].) When the water basin contains multiple

---

<sup>3</sup> Real Party's complete misapplication of established California water law is exactly why SGMA prohibits GSAs from determining water rights.

overlying users accessing the same native groundwater and the supply is insufficient, “each is limited to his *proportionate* fair share of the total amount available based upon his reasonable need.” (*Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1001.) In other words, each overlying user has *equal priority* to the native groundwater needed for its reasonable use. (*Ibid.*) Any effort to allocate native groundwater that fails to recognize and protect an overlying user’s rights is invalid as a matter of law. (*Barstow, supra*, 23 Cal.4th at 1253-54.)

Here, Petitioners’ complaint alleges—and for purposes of a demurrer those allegations must be taken as true—that it has a prior and paramount overlying water right. As such, the Annual Pumping Allocations clearly violate California common law by using the administrative process to give certain users priority they are not entitled to under California law and giving other users **zero** access to the resource. Further, Real Party allocated water among competing claims without any of the procedural protections provided by a court, including an impartial decisionmaker—where property rights are at risk—rather than acting as an entity devoted to maximizing the beneficial use of water from the Basin as is constitutionally required. (Cal. Const., art. X, § 2.)

**B. The Supreme Court Must Clarify that the Pay First Rule Does Not Apply to Pre-Payment SGMA Fee Challenges and Does Not Shield Non-Fee Agency Actions from Review**

The Court of Appeal determined that Petitioners' claim challenging the Annual Pumping Allocations (COA 5) and its constitutional taking claims (COAs 9-11) failed under the Pay First Rule because the Real Party adopted the Annual Pumping Allocations in a SGMA fee ordinance. (Exh. A, pp. 28-36.) This unprecedented expansion of the Pay First Rule requires review by this Court for several reasons.

**1. *SGMA and the Pay First Rule***

Under SGMA, "actions by a [GSA] are subject to judicial review." (Wat. Code, § 10726.6(e).) Water Code section 10726.6(c) expressly provides a limited, 180-day window for a prepayment judicial remedy to challenge a GSA's fee ordinance. (*Id.* ["Any judicial action or proceeding to attack, review, set aside, void, or annul the ordinance or resolution imposing a new, or increasing an existing, fee . . . shall be commenced within 180 days following the adoption of the ordinance or resolution."].) Beyond that 180-day window, SGMA also provides for a post-deprivation judicial remedy in Water Code section 10726.6(d). When challenging a fee imposed by a GSA, a person "may pay a fee . . . under protest and bring an action against the governing body in the superior court to recover any money that the governing body refuses to refund." (*Id.*, subd. (d).) As a matter of first impression, the Court of Appeal determined that Subdivision (d)'s "pay under protest"



language extends the Pay First Rule to all legal challenges of fee ordinances imposed by a GSA. (Exh. A, pp. 31-33.)

This reading of the statute is in tension with federal and state precedent recognizing that: “the [pay first rule] does not apply where . . . the [agency] has specifically provided a prepayment remedy.” (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 357 (“*Reid*”).) The limited 180-day period to challenge the imposition of a SGMA fee ordinance under Section 10726.6(c) is exactly the type of prepayment remedy discussed in *Reid*. Thus, the Court of Appeal erred in reading section 10726.6(c) out of SGMA. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [any interpretation that renders a statutory provision nugatory must be avoided].)

Second, there is a split in authority among divisions of the Court of Appeal on whether the Pay First Rule extends to local agencies. Several Court of Appeal decisions have concluded that it does not extend to local agencies because its plain language states that it only applies to the “State or any officer thereof.” (*City of Anaheim, supra*, 179 Cal.App.4th at 830); *County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 363, fn. 6.) Other Court of Appeal decisions have reached the opposite conclusion. (*Water Replenishment Dist. of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1466-68; *Chodos v. City of Los Angeles* (2011) 195 Cal.App.4th 675, 680.) Given this split in authority, review by this Court is needed to “secure uniformity” on the scope of article XIII, section 32 and whether it applies to a GSA. (Cal. Rules of Court, rule 8.500(b)(l).)

**2. *Petitioners’ relevant claims allege a deprivation of property rights through the illegal allocation of native groundwater, not the Replenishment Fee.***

Whether or not the Pay First Rule applies to all SGMA fee challenges is irrelevant because Petitioners are not challenging the fee. Thus, review by this Court is needed to resolve an issue of first impression on whether SGMA’s permissive “pay under protest” language extends the Pay First Rule to *any* judicial challenge of a GSA’s illegal conduct, even when the plaintiff is not challenging the fee itself.

The TAC challenged illegal conduct by Real Party that was separate from the imposition of a fee. Specifically, the TAC alleges a deprivation of property rights through the *Annual Pumping Allocations*, which allocate *free* native groundwater to certain overlying users. (6PA 3023-27 [TAC].) As discussed above, the TAC alleges that this allocation of groundwater is illegal because: (1) it is based on Real Party’s determination of priority water rights, which is expressly prohibited by SGMA; (2) it violates California common law by disregarding Petitioners’ first priority overlying water rights and disproportionately allocating native groundwater to only a few overlying users; and (3) it violates the takings clause by interfering with Petitioners’ vested overlying water rights without just compensation. (*Id.*, pp. 3023-27, 3033-37.) In other words, the conduct being challenged is the *allocation* of native groundwater, not the imposition of a fee.

Even though the TAC only attacks Real Party's illegal allocation of native groundwater, the Court of Appeal determined that the Pay First Rule still prohibits the claims. (Exh. A, pp. 31-33.) The Court of Appeal reasoned that the Pay First Rule applies because Petitioners' challenge to the illegal allocation of water could ultimately result in Petitioners paying less in fees. (*Id.*, p. 32.) In other words, the Court of Appeal expanded the Pay First Rule to protect **any** illegal government conduct that could have some indirect impact on the collection of a fee. (*Id.*, p. 30.) Review by this Court is needed because this unprecedented expansion of the Pay First Rule directly conflicts with this Court's prior decisions. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 251-52; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213 ("*Western Oil*"); see also *Baldwin v. State of California* (1972) 6 Cal.3d 424, 438 [where a "provision is of constitutional stature, it overrides the statutory immunity under [Gov. Code] section 830.6"].)

This Court has been clear that non-tax portions of a tax ordinance are subject to judicial review, notwithstanding the Pay First Rule, if they are "grammatically, functionally, and volitionally separable." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821 ("*Calfarm*").) Without actually applying this test, the Court of Appeal summarily concluded that the Annual Pumping Allocations are not severable from the Replenishment Fee simply because both appear under the same heading of Ordinance No. 03-20. (Exh. A, p. 33.) But appearing under the same heading is not the test from *Calfarm*. When the *Calfarm*

test is correctly applied, the Annual Pumping Allocations are clearly severable.

A non-tax subdivision is grammatically severable if it “constitutes a distinct and separate provision . . . which can be removed as a whole without affecting the wording of any other provision.” (*Calfarm, supra*, 48 Cal.3d at 822.) In *Calfarm*, this Court held that a provision contained in Proposition 103—an insurance reform measure—illegally precluded rate adjustments that were necessary to the insurers but which were severable from the remainder of the initiative. (*Ibid.*) In reaching this decision, this Court found that the invalid provision was severable from the remainder of the initiative even though the severance changed the way in which rates would be calculated under the remaining provisions (*id.*, pp. 825-26), and despite the removal of the invalid provision potentially costing the state treasury \$125 million (*id.*, pp. 840-41).

Here, the Annual Pumping Allocations and the Replenishment Fee are clearly severable. Section 3 of Ordinance 03-20<sup>4</sup> contains three paragraphs.

---

<sup>4</sup> Ordinance No. 03-20 contains a severability clause stating: “Should any provision of this Ordinance, or its application, be determined . . . [to be] invalid, that determination shall have no effect on any other provision of this Ordinance and to that end, the provisions hereof are severable.” (7PA 3454 [§ 9].)

**Section 3. Basin Replenishment Fee.** Effective January 1, 2021, and unless otherwise expressly prohibited by law, all groundwater extractions from, and within the Basin, with the exception of Federal and De Minimis extractions, shall be subject to measurement and the payment of Basin Replenishment Fee of \$2,130.00 per acre foot, or portion thereof, of groundwater extraction.

Notwithstanding the foregoing, beginning January 1, 2021, the following chart shall be used and provide the listed entities with a pumping allotment that is not subject to the Basin Replenishment Fee.

Pumping Group	Exempted Pumping Allotment
City of Ridgecrest	373
Kern County	18
IWVWD	4,390
Inyokern CSD	102
Small Mutuals	300
Trona Domestic	217
SVM	0
Total	7,650

In coming fiscal years, this chart may be subject to adjusted to account for changes in pumping, consolidation of water providers, and/or other factors deemed necessary and appropriate for adjustment by the Authority.

(2PA 1152.) The first paragraph establishes the Replenishment Fee that applies to “all groundwater extractions.” (*Ibid.*) The second and third paragraphs establish the illegal Annual Pumping Allocations that allow certain users to pump certain amounts of groundwater for free. (*Ibid.*) Deleting the illegal second and third paragraphs would leave the first paragraph entirely intact. In other words, even without the illegal allocations, the first paragraph would work exactly the same with “all groundwater extractions from, and within the Basin, with the exception of Federal and De Minimus extractions,” being “subject to measurement and the payment of Basin Replenishment Fee of \$2,130.00 per acre foot, or portion thereof, of groundwater extraction.” And like in *Calfarm*, where it did not matter that severing the invalid provision changed the way rates would be calculated under the remaining provisions, it does not matter that severing the illegal allocations would subject more users to the Replenishment Fee. (*Calfarm, supra*, 48 Cal.3d at 825-26.)

Because removing the illegal allocations does not “affect[] the *wording* of any other provision,” it is grammatically severable. (*Id.*, p. 822 [emphasis added].)

A subdivision is functionally severable if the remaining portions of the ordinance are “capable of independent application” and “separate enforcement.” (*People’s Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 331-32.) The allocation paragraphs in Ordinance 03-20 are functionally severable because the fee provisions would continue to operate notwithstanding the deletion of the allocations.

Because the Annual Pumping Allocations are severable from the Replenishment Fee in Ordinance No. 03-20, the Pay First Rule does not prohibit the Petitioners’ challenge to the illegal allocations. By concluding otherwise, the Court of Appeal improperly expanded the Pay First Rule to an unprecedented place where any illegal government conduct is shielded from judicial challenge simply because it might have some indirect impact on the collection of a fee. Thus, review by this Court is appropriate.

### **C. The Supreme Court Must Clarify the Limits on the Pay First Rule to Prevent Abuse.**

This Court has recognized several exceptions to the Pay First Rule. As discussed below, even if the doctrine applies to Petitioners’ claims, the Court of Appeal erred by not applying any exceptions and Supreme Court review is needed to establish limits under these and similar facts.

**1. Petitioner has no adequate remedy at law.**

An exception to the Pay First Rule arises when the taxpayer has no adequate remedy at law. (*Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1139-40.) A taxpayer lacks an adequate remedy at law when “enforcement of the tax would ... produce **irreparable injury**, or where the property is real estate, **throw a cloud upon the title** of the complainant. (*Dows v. City of Chicago* (1870) 78 U.S. 108, 109 [emphasis added].) For example, irreparable injury can include “irretrievable resource losses (permanent crops, fallowed lands, destruction of family and entity farming businesses).” (*San Luis & Delta-Mendota Water Authority v. Locke* (E.D. Cal. 2010) 2010 WL 500455, at 6; see also *Hunsaker v. Kersh* (Utah S.C. 1999) 991 P.2d 67, 70 [“Trees, in particular, might take many years to replace. Loss of agricultural, ornamental, and shade value could be fundamentally irreparable”].) An injury is also irreparable when it consists of “a serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed [and] the property [has] some peculiar quality or use such that its pecuniary value . . . will not fairly recompense the owner for the loss of it.” (*Dunker v. Field & Tule Club* (1907) 6 Cal.App. 524, 529–30 [italics omitted].)

Petitioners will have no adequate remedy at law if the Pay First Rule is applied. Indeed, Petitioners will suffer irreparable injury through the loss of all beneficial use of their property, including the death of 215,000 mature pistachio trees. (6PA 3035-

36 [TAC].) This constitutes “a serious change of [and is] destructive to . . . the character in which [Petitioners’ property] has been held and enjoyed.” (*Dunker, supra*, 6 Cal.App. at 529–30.) Moreover, by improperly determining that Petitioners’ first priority overlying rights are “inferior” to other overlying users, Real Party has “thrown a cloud upon the title” of Petitioners’ property. (*Dows, supra*, 78 U.S. at 109.)

Paying under protest and suing for a refund also does not provide Petitioners an adequate remedy for the irreparable harm caused by Real Party’s illegal allocations, both because (1) Real Party intentionally established such an irrationally high fee that Petitioners could never pay it, and (2) because it is highly unlikely that a refund would even be possible. Indeed, Real Party has not even enacted any refund procedures for Petitioners to utilize. (See 2PA 1151-53.) And even if such refund procedures existed, Real Party has failed to provide any evidence that it has sufficient funds to make such a substantial refund or that a refund would restore Petitioners’ overlying water rights. Lastly, on March 13, 2024, Real Party, in a related action pending before the same trial court judge in Orange County Superior Court filed a Motion for Preliminary Injunction to shut down Petitioners’ pumping unless they pay the fee. (3/13/2024 Motion for Preliminary Injunction, Orange County Sup. Ct. Case No. 30-2022-01239479.) Because Petitioners do not have an adequate remedy at law, the Pay First Rule should not apply.



**2.     *The Pay First Rule doctrine must yield to constitutional claims.***

This Court has held that the Pay First Rule “must yield . . . to the requirements of the federal Constitution.” (*Western Oil, supra*, 44 Cal.3d at 213.) This exception applies when “it is clear that under no circumstances can the government prevail.” (*Id.*, p. 214 [cleaned up].) The state and federal takings clause sets an outer limit on government power to impose regulatory fees like those disputed here—such fees cannot be “confiscatory,” i.e., so high as to expropriate the property of those subject to them. The question before the Court is whether an annual fee exceeding \$8,000,000 (\$24,000,000 currently due) constitutes such a confiscatory fee or otherwise violates Petitioners’ rights to due process, to petition for the redress of grievances, and to be free from uncompensated takings.

The Opinion omitted material facts pled by Petitioners demonstrating a protectable water right: Mojave’s ownership of land overlying the Basin and the exercise of its water rights for beneficial use. (6PA 2925:1–8, 2928:21–27 [TAC].) Nothing else is required under common law to prove up a protectable property interest. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 278, 298.) Instead of recognizing Mojave’s properly pled right, the Court, at the demurrer stage, improperly questioned whether Mojave had even established a water right because of the correlative and usufructuary nature of an overlying right, and because Mojave never specified “the quantity of its water right or its priority vis-à-vis other extractors . . . .” (Exh. A, p. 34, fn. 22.) In doing so, the Court ignored decades of case law demonstrating

water rights are uniformly recognized as vested property rights “inhering in and a part and parcel of the abutting lands” (*Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp.* (1927) 202 Cal. 56, 65) and that, “[o]verlying rights are special rights to use groundwater under the owner’s property.” (*Barstow, supra*, 23 Cal.4th at 1237, fn. 7.)

Although the TAC property challenged the Real Party’s Annual Pumping Allocations because they constitute a physical taking for public use without just compensation, the Opinion found otherwise. Under California law, Petitioners have a first priority property right in the native groundwater that they use for agriculture. (*Barstow, supra*, 23 Cal.4th at 1247, 1253-54.) By allocating 100% of the native groundwater to other overlying users—including public pumpers—leaving Petitioners with zero, Real Party engaged in a physical taking of Petitioners’ property rights without just compensation in violation of the takings clause.

The Annual Pumping Allocations also constitute a regulatory taking. As the Supreme Court explained, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” (*Pa. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.) The TAC properly alleges a regulatory taking because the allocation of zero native groundwater has deprived Petitioners of “all economically beneficial use of their water rights” and pistachio trees. (6PA 3034, 3036.) Without access to native groundwater, Petitioners’ farmland is worthless. In fact, Real Party’s GSP expressly acknowledged that it

intended to completely eliminate agriculture from the Basin by intentionally making it cost prohibitive. (PA7 3291, 3425.) Because the Annual Pumping Allocations deprive Petitioners of “all economically beneficial” or productive use of their land, they constitute a regulatory taking without just compensation in violation of the takings clause.

The exception applies here because, as explained above, under no circumstances was Real Party’s allocation of native groundwater legal under the Constitution. The United States Supreme Court has made it clear that interfering with a landowners’ appurtenant water rights without just compensation constitutes a taking in violation of the Fifth Amendment. (*Dugan v. Rank* (1963) 372 U.S. 609, 625 (“*Dugan*”); *Internat. Paper Co. v. U.S.* (1931) 282 U.S. 399, 407 (“*Internat. Paper*”); *U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 754 (“*Gerlach*”).)

The unlawful taking in this case is undeniable. As pled, Petitioners have a vested, first priority overlying property interest in the native groundwater that they use for agriculture. (See § III.C.1, *ante*.) Despite this vested property right, Real Party allocated **zero** native groundwater to Petitioners and reserved the full allocation for public pumpers. Because this allocation unquestionably interferes with Petitioners’ vested appurtenant water rights, “under no circumstances” would Real Party’s actions not constitute an illegal taking under *Dugan*, *Internat. Paper*, and *Gerlach*. It is also fundamentally unfair to require payment of an extortionate and infeasible fee before being able to challenge Real Party’s unfair and corrupt scheme.

Petitioners alleged facts showing that Real Party acted illegally which must be accepted as true on demurrer and which necessitate a different conclusion in law. Under these circumstances, the Pay First Rule “must yield to the requirements of the federal Constitution.” (*Western Oil, supra*, 44 Cal.3d at 209.)

**3.     *The Court should clarify that the Pay First Rule does not apply when the government targets a particular group of citizens with unreasonably high fees to prevent those citizens from challenging its illegal conduct.***

Courts have acknowledged several exceptions to the Pay First Rule when needed to protect due process—such as the “no adequate remedy” exception—and other constitutional safeguards—such as the prohibition on unreasonable searches and seizures. (*Flying Dutchman Park, Inc., supra*, 93 Cal.App.4th at 1139-40; *Western Oil, supra*, 44 Cal.3d at 209.)

Consistent with these prior decisions, this Court should clarify that the Pay First Rule does not apply when the government targets a particular group of citizens with unreasonably high fees to intentionally prevent those citizens from challenging the government’s illegal conduct. Indeed, this would simply be a natural extension of the exceptions that already exist.

First, even if a taxpayer could technically challenge illegal conduct by paying first and seeking a refund, as a ***practical*** matter, the taxpayer lacks an “adequate remedy at law” if the government has intentionally imposed an unreasonably high fee that it knows the taxpayer could never afford. Such intentional

conduct results in the same deprivation of due process rights that the “adequate remedy” exception is intended to prevent. (See *Flying Dutchman Park, Inc.*, *supra*, 93 Cal.App.4th at 1139-40.) Because due process requires a ***practical*** opportunity to contest unlawful government action, an exception to the Pay First Rule should apply under these circumstances. (*Richardson v. Jefferson County, Ala.* (1996) 517 U.S. 793, 803 [“we have previously struck down as a violation of due process a state court’s decision denying an individual taxpayer any ***practicable*** opportunity to contest a tax on federal constitutional grounds”] [emphasis added].)

Second, when the illegal conduct includes the taking of property rights without just compensation, the Pay First Rule should “yield to the requirements of the federal Constitution” and prevent the government from using an intentionally high fee to prevent a challenge to the taking. (*Western Oil*, *supra*, 44 Cal.3d at 209.) Indeed, the government imposing an unreasonably high fee to intentionally prevent a judicial challenge is just further evidence that an unlawful taking has occurred.

The Court of Appeal acknowledged that applying the Pay First Rule in such circumstances would be improper:

In reaching this holding, we are mindful that a rigid application of the “pay first” rule could allow local groundwater sustainability agencies to impose unreasonable fees that target certain users, knowing they would be unable to afford to pay the fees under protest, and that those users could eventually be run out of business.

(Exh. A, p. 30.) However, the Court of Appeal declined to apply

such an exception here because it did not believe that any specific targeting occurred in this case. (See *id.*, pp. 28-31.) In reaching this conclusion, however, the Court of Appeal improperly ignored the allegations of intentional targeting pled in the TAC, which must be accepted as true. (Code Civ. Proc., § 452.)

Specifically, Petitioners alleged in their TAC that Real Party specifically targeted agriculture pumpers with the illegal allocation in an intentional effort to drive those pumpers out of the Basin, then imposed a historically high fee that forecloses any practical opportunity to challenge the illegal allocation under the Pay First Rule:

- “The failure to give agricultural producers a seat at the table, or at least elect IWVGA Board members through a popular vote, was prejudicial to Plaintiffs. For example, the Kern County representative on the IWVGA Board, Supervisor Mick Gleason, a former Navy Captain and Commanding Officer of NAWS, publicly stated ***that his ‘job’ was to protect the Navy and that he believed agriculture has no future in the Indian Wells Valley...***” (6PA 2947:9-13 [emphasis added].)
- “Additionally, notwithstanding Water Code section 106, which declares the use of water for irrigation of agriculture one of this [sic] highest beneficial uses in the state, IWVGA Special Counsel summarized discussions regarding ***‘deprioritiz[ing]’ water use for agricultural production, determining that water use for agriculture ‘should not be considered a reasonable use of water,’ and that the ‘priority goal’ should be ‘serving Navy employees’ . . .***” (6PA 2948:16-20 [emphasis added].)

- “***IWVGA staff expressly acknowledged that implementation of the GSP would lead farmers to cease production.*** For example, at the June 18, 2020 IWVGA Board meeting, IWVGA staff and decision-makers acknowledged that the collective result of the GSP Implementing Actions proposed by the Board ***will result in agricultural producers leaving the Indian Wells Valley en masse.***” (6PA 3004:1-8 [emphasis added].)
- “The Annual Pumping Allocations will have potentially significant environmental impacts associated with widespread fallowing resulting from the ***IWVGA’s strategic elimination of agriculture***, including, but not limited to, impacts on air quality, human health, greenhouse gas emissions, biological resources, aesthetics, and local economies.” (6PA 3026:20-24 [emphasis added].)
- The GSP therefore reflects the fact that the IWVGA ***had already determined and adjudicated that certain groundwater users, including agricultural pumpers, hold ‘inferior rights’ and will not receive any Annual Pumping Allocation....***” (6PA 2960:21-23[emphasis in added].)
- “This action arises from a series of ***coordinated actions*** by . . . the Indian Wells Valley Groundwater Authority . . . that function to eliminate Plaintiffs’ senior paramount rights to use groundwater (their appurtenant overlying groundwater rights). In other words, IWVGA policies, ordinances, and resolutions grant Plaintiffs zero allocation of native groundwater for their existing 1,596 net acre pistachio orchard. As a direct result of this determination and to further compound the property right deprivation of IWVGA’s policies, Plaintiffs’ access to groundwater is now conditioned upon Plaintiffs paying ***the highest annual fee on the production of groundwater in California history*** to fund the IWVGA’s pipe dream of acquiring other water to offset its groundwater use.” (6PA 2925:9-19.)

Indeed, the GSP expressly acknowledged that it intended to completely eliminate agriculture from the Basin by making it cost prohibitive:

Table 3-11 below describes the pumping distribution by water use.

*Table 3-11 Management Scenario 6.2 Pumping Distribution by Water Use.*

Water Use	2020	2040	2070
	20,800 AF	11,200 AF	14,000 AF
Agriculture	40%	0%	0%
Industrial	10%	3%	3%
City/Municipal/Domestic	40%	79%	83%
U.S. Navy	10%	18%	15%

(7PA 3291.)

These allegations on intentional government conduct, which must be accepted as true, provide a valid basis for applying an exception to the Pay First Rule. At a minimum, deciding whether Real Party intentionally imposed the historically high Replenishment Fee to prevent a judicial challenge is a question of fact that should not have been decided through demurrer.

## **V. CONCLUSION**

As acknowledged by the Court of Appeal, this case presents issues of first impression arising under SGMA that dramatically expand the role of a GSA in allocating groundwater contrary to this Court's established rule of priority, and limit the rights of overlying landowners to obtain judicial relief when aggrieved by a GSA.

There is not a single reported opinion in California countenancing an administrative agency's apportionment of groundwater based upon its water right determinations



concerning competing claims. For well over 100 years, apportionment of groundwater has been wielded exclusively by the courts. *Barstow*, and decades of consistent common law precedent, require courts to honor the priority of overlying landowners. The Court of Appeal Opinion would stand all precedent and SGMA legislative intent on its head, while exempting the GSA's action from scrutiny and challenge under the Pay First Rule because the GSA's allocation was coupled with the establishment of a fee so high that it would bankrupt a challenger.

If the Opinion stands, every overlying landowner in California will be at risk—their correlative share of groundwater may be redistributed by a GSA without being accorded the right to defend, rebut and cross-examine adverse claims. As such, the process undertaken by the GSA below and upheld by the Court of Appeal does not simply nibble at the edges of the priority of overlying rights under common law—it swallows them whole. These circumstances provide good cause to grant review under Cal. Rules of Court, rule 8.500(b)(1).

Dated: March 19, 2024

BROWNSTEIN HYATT FARBER SCHRECK,  
LLP



---

SCOTT S. SLATER

AMY M. STEINFELD

ELISABETH L. ESPOSITO

Attorneys for Petitioners

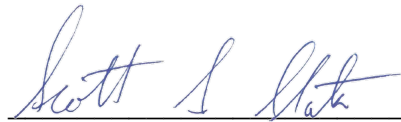
Mojave Pistachios, LLC and Paul G. Nugent and  
Mary E. Nugent, Trustees of the Nugent Family  
Trust dated June 20, 2011

### **VERIFICATION**

I, Scott S. Slater, declare as follows:

I am an attorney duly licensed to practice law in California. I am a shareholder at Brownstein Hyatt Farber Schreck LLP, attorneys of record for Petitioners. I have reviewed and am familiar with the records and files that are the basis of this Petition. I make this declaration because I am more familiar with the particular facts, i.e., the state of the record and the litigation, than are my clients. I certify that the Petition's allegations are true and correct.

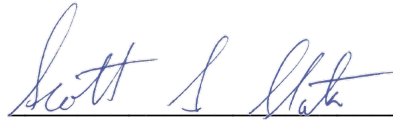
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification is executed on March 19, 2024 at Santa Barbara, California.

  
\_\_\_\_\_  
Scott S. Slater

### **CERTIFICATE OF WORD COUNT**

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this PETITION FOR REVIEW contains 8,373 words, not including the tables of contents and authorities, the caption page, signature blocks, verification, or this Certification page.

Date: March 19, 2024

  
\_\_\_\_\_  
Scott S. Slater

# **EXHIBIT A**

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MOJAVE PISTACHIOS, LLC et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

INDIAN WELLS VALLEY  
GROUNDWATER AUTHORITY et al.,

Real Parties in Interest.

G062327

(Super. Ct. No. 30-2021-01187589)

O P I N I O N

Original proceedings; petition for writ of mandate after the superior court sustained real party in interest's demurrer to petitioners' third amended petition and complaint. William D. Claster, Judge. Requests for judicial notice granted. Petition denied.

Brownstein Hyatt Farber Schreck, Scott S. Slater, Amy M. Steinfeld, and Elisabeth L. Esposito for Petitioners.

Best Best & Krieger, Jeffrey V. Dunn, Eric L. Garner, Wendy Y. Wang, and Sarah Christopher Foley for Searles Valley Minerals, Inc. and California Building Industry Association as Amici Curiae on behalf of Petitioners.

Jason Resnick for Western Growers Association as Amicus Curiae on behalf of Petitioners.

Christian C. Scheuring for California Farm Bureau Federation as Amicus Curiae on behalf of Petitioners.

Egoscue Law Group, Tracy J. Egoscue and Tarren A. Torres for Western Growers Association, California Farm Bureau Federation, Dairy Cares, and American Pistachio Growers as Amici Curiae on behalf of Petitioners.

Allen Matkins and David L. Osias for Elizabeth Cardoza, Clay Daulton, David Gill, Landon Gill, Michele Lasgoity, Monica Lasgoity, Rosemary Lasgoity, Jeff Lefors, Mark Peters, Sally Roberts, Candace Khanna, Rakesh Khanna, Taisto Smith, SWD Investments, Inc., and SWD Investments-Fulton Ranch, Inc. (Madera Landowners) as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Richards, Watson & Gershon, James L. Markman, Kyle H. Brochard, and Jacob C. Metz for Real Parties in Interest.

\* \* \*

Mojave Pistachios, LLC<sup>1</sup> owns about 1,600 acres of land in the Mojave Desert. On that acreage, it has planted a pistachio orchard that it irrigates exclusively

---

<sup>1</sup> The petitioners in this case are Mojave Pistachios, LLC and Paul G. Nugent and Mary E. Nugent as Trustees of the Nugent Family Trust dated June 20, 2011. We refer to them collectively as Mojave.

with groundwater pumped from the underlying water basin. The Department of Water Resources has determined that basin is at risk for overdraft. Mojave currently extracts about 4,000 acre-feet (roughly 1.3 billion gallons) of groundwater per year, but as its trees mature, it anticipates it will need as much as 7,000 acre-feet (about 2.3 billion gallons) per year.<sup>2</sup>

Shortly after Mojave planted its pistachio trees, the California Legislature enacted the Sustainable Groundwater Management Act (Wat. Code,<sup>3</sup> § 10720 et seq.) (SGMA), which requires the creation of groundwater sustainability plans to manage high priority groundwater basins. Acting pursuant to that legislation, the local groundwater sustainability agency, Indian Wells Valley Groundwater Authority (the Authority), determined that, subject to certain exceptions discussed below, all groundwater extractions in the basin where Mojave's orchard is located would be subject to a basin replenishment fee of \$2,130 per acre-foot of groundwater starting in 2021.<sup>4</sup>

Mojave refused to pay the replenishment fee and filed this lawsuit attacking the Authority's groundwater sustainability plan and related implementing actions, including the imposition of the replenishment fee. According to Mojave, through those implementing actions, the Authority violated Mojave's vested common law water right to pump native groundwater from the basin for use on its land and then illegally made that water available to other users.

---

<sup>2</sup> Groundwater is measured in acre-feet. An acre-foot equals a volume of water spread over one acre in area and one foot in depth. One acre-foot is approximately 326,000 gallons.

<sup>3</sup> All further undesignated statutory references are to this code.

<sup>4</sup> As Benjamin Franklin once famously observed, "When the well's dry, we know the worth of water."

A series of demurrers followed. In the most recent round, respondent court sustained the Authority's demurrer to certain causes of action in Mojave's third amended complaint, finding the claims at issue are barred by California's "pay first, litigate later" rule, which, subject to certain exceptions, requires a taxpayer to pay a tax before commencing a court action to challenge the tax's collection. The court also concluded Mojave failed to allege facts sufficient to support its takings causes of action.

Mojave petitioned this court for a writ of mandate overruling respondent court's order sustaining the demurrer. As a matter of first impression, we conclude the well-established "pay first" rule applies to lawsuits challenging fees imposed by a local groundwater sustainability agency under SGMA. Because any alleged economic harm to Mojave stems from the imposition of the replenishment fee, we further conclude the "pay first" rule bars the challenged causes of action.

We recognize the application of the "pay first" rule may at times seem Draconian, and the positions of both parties have arguable merit. On the one hand, we have farmers who have invested significant funds to plant their crops; who claim to have enjoyed the benefits of free groundwater for decades; who may be required to pay millions of dollars in fees annually for what had historically been free; and who are legally barred from litigating the propriety of those fees due to their failure to pay them up front. On the other hand, we have a local water agency that has been assigned the Herculean tasks of creating a groundwater sustainability plan for what the record suggests is an overdrafted basin; fairly allocating a limited amount of groundwater between a number of competing users; and calculating an equitable way to fund the importation of water from other sources.

While we appreciate the arguments made by both sides, we conclude on balance that our Constitution, SGMA, and sound public policy require a water user to pay any outstanding fee imposed under SGMA before commencing a court action to challenge the fee and obtain a refund. We therefore deny the requested writ relief.



## FACTS

### 1. *The Indian Wells Valley Groundwater Basin*

There are hundreds of designated groundwater basins and subbasins throughout California, underlying about 62,000 square miles (42 percent) of the state. The groundwater in these basins is a major part of California's water supply, providing close to 40 percent of the state's supply during wet years and up to 60 percent in dry years.<sup>5</sup>

According to the Department of Water Resources, many of California's groundwater basins are critically overdrafted, meaning "the average annual amount of groundwater extraction exceeds the long-term average annual supply of water to the basin. Effects of overdraft can include seawater intrusion, land subsidence, groundwater depletion, and chronic lowering of groundwater levels."<sup>6</sup>

The Department of Water Resources has concluded the Indian Wells Valley Groundwater Basin (the Basin) is an overdrafted groundwater basin. Located in the northwestern part of the Mojave Desert to the east of the Sierra Nevada Mountains, the Basin extends across roughly 382,000 acres (600 square miles) under portions of Kern County, Inyo County, and San Bernardino County. The Basin does not have any water

---

<sup>5</sup> See Dept. of Water Resources, California's Groundwater (Bulletin 118) Update 2020, p. 103, [https://data.cnra.ca.gov/dataset/3f87088d-a2f9-4a46-a979-1120069db2c6/resource/d2b45d3c-52c0-45ba-b92a-fb3c90c1d4be/download/calgw2020\\_full\\_report.pdf](https://data.cnra.ca.gov/dataset/3f87088d-a2f9-4a46-a979-1120069db2c6/resource/d2b45d3c-52c0-45ba-b92a-fb3c90c1d4be/download/calgw2020_full_report.pdf) [as of Feb. 8, 2024], archived at: <<https://perma.cc/R4HW-BY4N>>, and Dept. of Water Resources, California's Groundwater Update 2020 Fact Sheet, <https://water.ca.gov/programs/groundwater-management/bulletin-118> [as of Feb. 8, 2024], archived at: <<https://perma.cc/54QS-UUC3>>.

<sup>6</sup> See Dept. of Water Resources, Critically Overdrafted Basins, <https://water.ca.gov/programs/groundwater-management/bulletin-118/critically-overdrafted-basins> [as of Feb 8, 2024], archived at: <<https://perma.cc/7GSW-J7XF>>.

importation infrastructure or significant surface water features, so water producers must rely exclusively on groundwater to meet their water demands.

According to the Department of Water Resources, groundwater levels in the Basin have been steadily declining since 1945. The Authority estimates the Basin has total annual outflows of 32,640 acre-feet and total annual inflows of 7,650 acre-feet, meaning the Basin sustains an average loss of groundwater storage of about 25,000 acre-feet per year.

Nearly 80 percent of the Basin is under federal lands. These lands are home to the United States Navy's (the Navy) single largest landholding in the world, Naval Air Weapons Station China Lake. Although the Navy's annual groundwater extractions from the Basin have declined since the 1970's, the Navy continues to extract Basin groundwater for use at the base.

The rest of the Basin is primarily used for residential and agricultural purposes. The farming operations there, including Mojave, use Basin groundwater to irrigate their crops.

## *2. Mojave's Farming Operations and Water Usage*

Mojave owns or leases about 3,200 acres of land spread across over 80 parcels in Kern County, all overlying the Basin. Mojave currently uses much of its land to grow pistachio nuts, but that was not always the case.

According to Mojave, groundwater extractions on its property began in 1975. From 1975 to 1988, about 600 acres were used to grow alfalfa, and groundwater usage ranged from about 1,200 to 4,000 acre-feet per year. The property used no groundwater from 1989 to 2003. In 2004, alfalfa farming resumed on 160 acres, with water usage averaging about 1,000 acre-feet per year from 2004 to 2012.

In 2013, Mojave stopped farming alfalfa and began planting pistachio trees. Mojave had to replant many of its trees in 2014 and 2015. Its initial planting covered about 350 acres; after the replanting, its pistachio orchards now span about 1,600 acres.

Mojave irrigates its pistachio orchards entirely with Basin groundwater, which it pumps from wells on the parcels; it also uses Basin groundwater for dust mitigation. According to Mojave, it has a vested overlying water right to pump that groundwater from the Basin.

Mojave began using groundwater on its pistachio trees in 2013; it used only 325 acre-feet that first year. Mojave's water usage for its pistachio trees increased to 3,700 acre-feet the following year and ranged from about 3,000 to 4,100 acre-feet per year from 2014 to 2019. For most of that time, there was no government-imposed fee on the extraction of groundwater in the Basin, so Mojave's irrigation costs were limited to the cost of well repair, maintenance, and electricity.

Mojave completed its first commercial pistachio harvest in 2020 on about 350 acres. According to Mojave, its trees are expected to reach peak production around 2030 and have a commercial life expectancy of at least 75 years.

As pistachio trees mature, they need more water each year. Mojave estimates that from 2023 to 2029, its annual usage will increase from about 4,160 acre-feet per year to about 5,600 acre-feet per year. It further anticipates that from 2030 to 2080, it will need "at least" 6,000 acre-feet per year of water, and it could require as much as 7,000 acre-feet per year.

### 3. *SGMA*

In September 2014, our Legislature passed SGMA to provide for the sustainable management of California's groundwater basins. The Legislature's stated goals in enacting SGMA include establishing minimum standards for sustainable groundwater management, giving local groundwater authorities the power and support to sustainably manage groundwater, and creating a more efficient and cost-effective groundwater adjudication process that protects water rights, ensures due process, and prevents unnecessary delay. (§ 10720.1.)

SGMA, which took effect in January 2015, required that all basins designated as high or medium priority be managed under a groundwater sustainability plan by January 31, 2020. (§ 10720.7, subd. (a)(1); see §§ 10727-10728.6.) It also authorized the creation of groundwater sustainability agencies to develop and create such plans (§§ 10723-10724), and granted those agencies a number of powers, including the power to perform any act necessary to carry out SGMA’s purposes (§ 10725.2, subd. (a)); to adopt rules and regulations (*id.*, subd. (b)); to conduct investigations (§ 10725.4, subd. (a)); to mandate the use of water-measuring devices (§ 10725.8); to acquire real property, personal property, and water rights (§ 10726.2, subd. (a)); to import water (*id.*, subd. (b)); and to create voluntary fallowing programs for agricultural lands (§ 10726.2, subd. (c)), among other powers.

SGMA also empowered groundwater agencies to impose fees on groundwater extraction to fund the costs of groundwater sustainability programs, groundwater management, investigations, and enforcement. (§§ 10730, subd. (a), 10730.2, subd. (a).) If any owner or operator knowingly fails to pay a fee on time, he or she is liable to the agency for penalties and interest. (§ 10730.6, subd. (b).) The agency may sue the owner or operator to recover any delinquent fees, interest, or penalties (*id.*, subd. (c)) and may order him or her to cease all groundwater extraction until the delinquent fees are paid (*id.*, subd. (e)).

If a person disagrees with fees imposed by the agency, SGMA provides that he or she “may pay” the fee “under protest and bring an action against the governing body in the superior court to recover any money that the governing body refuses to refund.” (§ 10726.6, subd. (d) (section 10726.6(d)).) Any judicial action attacking an ordinance that imposes or increases a fee must be commenced within 180 days of the ordinance’s adoption. (*Id.*, subd. (c).)

SGMA specifies that it does not modify rights to use groundwater, and it expressly prohibits groundwater sustainability plans from determining water rights.

(§ 10720.5, subd. (a), (b).) To that end, the Legislature expressed an intent to enhance local groundwater management in a manner “consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution,” and to “preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater.” (§ 10720.1, subd. (b).)

SGMA allows a claimant to file an adjudication action to determine rights to extract groundwater from a basin, including an action to quiet title regarding those rights, and it requires that any such action be conducted in accordance with Code of Civil Procedure section 830 et seq., which governs groundwater cases. (§§ 10720.5, subd. (c), 10721, subd. (a), 10737-10738.) A court may not enter judgment in such cases unless it “finds that the judgment will not substantially impair the ability of a groundwater sustainability agency . . . to achieve sustainable groundwater management.” (§ 10737.8.)

#### 4. *The Authority and Its Groundwater Sustainability Plan*

The Department of Water Resources designated the Basin as a high-priority basin subject to critical overdraft. The Basin was therefore required under SGMA to adopt a groundwater sustainability plan by 2020.

In 2016, five local agencies—Kern County, Inyo County, San Bernardino County, the Indian Wells Valley Water District, and the City of Ridgecrest—created the Authority as a joint powers authority to serve as the groundwater sustainability agency for the Basin.<sup>7</sup> The Authority spent several years preparing a groundwater sustainability plan as required by SGMA, seeking input from a policy advisory committee and a technical advisory committee. Mojave participated in this process.

The Authority adopted its groundwater sustainability plan in January 2020. In its plan, the Authority determined that the Basin cannot achieve groundwater

---

<sup>7</sup> The Authority also has two associate members—the Navy and the United States Bureau of Land Management.

sustainability through extraction reductions alone; rather, augmentation and overdraft mitigation projects must be developed. To finance those projects, the Authority determined it would need to charge fees to the entities and individuals who will benefit from them.

The Authority then took several steps to implement its groundwater sustainability plan (collectively, the Implementing Actions). Those Implementing Actions are the crux of this case.

a. *The Sustainable Yield Report*

First, in July 2020, the Authority adopted and approved a report on the Basin's sustainable yield—that is, the maximum amount of water that can be withdrawn annually from a groundwater supply without causing chronic lowering or other undesirable results (see § 10721, subd. (w), (x)). According to this document (the Sustainable Yield Report), the Basin's sustainable yield is 7,650 acre-feet per year.<sup>8</sup>

The report explained that the Basin is solely dependent on groundwater; current outflows are about four times the estimated inflows; groundwater levels are dropping by up to 2.5 feet annually; the Basin does not currently have access to imported water; and up to 50 miles of infrastructure must be built in order to import water.

The report further noted that the majority of groundwater extractions in the Basin are by six large producers, one of which is Mojave. According to the report, Mojave estimates its future extraction demands will be about 7,200 acre-feet per year, or roughly 94 percent of the Basin's sustainable yield. Two of the other largest producers each reported historical extractions in excess of the Basin's sustainable yield. Collectively, those six producers' extractions totaled nearly 3.5 times the estimated inflow to the Basin. Thus, concluded the Authority, without changes to the Basin's

---

<sup>8</sup> In its briefing and at oral argument, Mojave contends this is a gross underestimation and lacks factual support.

overdraft condition, its groundwater infrastructure will not be able to produce the needed water by 2065.

The report also discussed the Navy's federal reserve water right interest. Since the Navy had expressly declined to quantify that interest,<sup>9</sup> the Authority estimated the Navy's potential interest by using data the Navy provided on its pumping history and concluded the Navy could make a convincing argument that the Basin's entire sustainable yield was subject to the Navy's federal reserve water right interest. The Authority also determined it cannot regulate the Navy's groundwater usage or charge the Navy for any fees for groundwater production.<sup>10</sup>

The report then concluded that all groundwater extractors in the Basin (excluding the federal government and any de minimis extractors)<sup>11</sup> will be beneficially impacted by overdraft mitigation and augmentation projects and therefore should be responsible for the "significant costs" of those projects. The report observed that the cost of those projects will mean "the likely cessation of large-scale agricultural uses in the Basin due to the increased cost for surface water," but the cost "does not prevent such a use." It added that "the Central Valley is expected to see very significant reductions in crop lands due to import water supply costs," and "Kern County alone is expected to see upwards of 185,000 acres of currently farmed land in the Central Valley to be permanently fallowed" (i.e., left unsown).

---

<sup>9</sup> The Navy maintains its interest is not limited to its current on-base demand of 2,041 acre-feet, and its interest will likely be established, if ever, through litigation.

<sup>10</sup> Under SGMA, the federal government may "voluntarily agree" to participate in a groundwater sustainability plan, but federally reserved water rights to groundwater must be "respected in full." (§ 10720.3, subds. (c), (d).)

<sup>11</sup> SGMA prohibits charging fees to the federal government (§ 10720.3, subds. (a-c)) or de minimis pumpers (§ 10730, subd. (a)).

b. *The Replenishment Fee and Exempted Pumping Allotments*

In August 2020, the Authority adopted Ordinance No. 03-20, which provides that all groundwater extractions (except those by federal and de minimis extractors) will be subject to a Basin replenishment fee of \$2,130 per acre-foot starting in January 2021, to be paid on a monthly basis (the Replenishment Fee).<sup>12</sup> According to the Authority, the Replenishment Fee is necessary to fund the significant costs of bringing in supplemental water (estimated to be at least \$52 million), and also mitigating damage to shallow wells that may be impacted by dropping water levels.

Ordinance No. 03-20 also allocated the Basin's 7,650 acre-feet sustainable yield to several entities (e.g., Kern County, the City of Ridgecrest, and small water companies providing domestic water services), granting to each an annual "Exempted Pumping Allotment" that is not subject to the Replenishment Fee. For example, the City of Ridgecrest received an allotment of 373 acre-feet per year, meaning that the first 373 acre-feet of groundwater it pumps will not be subject to the Replenishment Fee. Neither Mojave nor any other agricultural producers received an Exempted Pumping Allotment.

c. *The Transient Pool and Fallowing Program*

In August 2020, the Authority created a transient pool and fallowing program to facilitate coordinated production reductions among groundwater users and encourage a shift away from overdraft reliance (Transient Pool and Fallowing Program). Under this program, the Authority established a transient pool of 51,000 acre-feet of groundwater and determined that all qualified agricultural pumpers would receive a transient pool allotment based on their reported agricultural uses. Eligible pumpers could then either (1) reject their allotment and continue pumping while paying the Replenishment Fee, (2) accept their allotment and associated mitigation fee, or (3) accept

---

<sup>12</sup> By the court's calculation, this translates to about two-thirds of a cent (\$0.0065) per gallon.



the allotment and negotiate a sale of it to the Authority. Use of the transient pool was voluntary.

Ten agricultural pumpers, including Mojave, were deemed “‘potentially’ qualified” to participate in the program. Three of those pumpers, including Mojave, failed to timely submit a required pumping verification questionnaire, so the Authority determined they were not eligible to participate. The 51,000 acre-feet in the transient pool were thereafter allotted among the seven eligible agricultural pumpers.

5. *Mojave’s Failure to Pay the Replenishment Fee*

The collective effect of the Implementing Actions on Mojave is significant: Mojave, which received neither an allotment from the transient pool nor an Exempted Pumping Allotment, must pay the Replenishment Fee of \$2,130 per acre-foot for any groundwater it extracts from the Basin. Thus, Mojave went from paying no government-imposed fee on the extraction of water as recently as 2017<sup>13</sup> to owing over \$8 million annually in Replenishment Fees.

Claiming it lacks the funds to pay, Mojave has not paid any portion of the Replenishment Fee since Ordinance No. 03-20 took effect in early 2021, although it continues to extract groundwater to irrigate its trees. According to Mojave, if Ordinance No. 03-20 is enforced, it will render Mojave’s farming operations “economically unviable” because the cost of water will exceed its gross revenues.

6. *Relevant Procedural History*

In September 2020, Mojave filed a verified petition for writ of mandate and complaint against the Authority in Kern County Superior Court, challenging the

---

<sup>13</sup> In 2018, the Authority passed an ordinance requiring all groundwater extractors to pay \$30 per acre-foot for all groundwater extracted in the Basin (the Extraction Fee). The Extraction Fee was later increased to \$105 per acre-foot. According to Mojave, it has paid the Extraction Fees in full, with total payments exceeding \$1 million.

Authority's groundwater sustainability plan and related actions. (Case No. BCV-20-102284.) In January 2021, Mojave filed its first amended verified petition for writ of mandamus and complaint (FAC), challenging the Authority's groundwater sustainability plan, the Implementing Actions, and certain post-adoption decisions.

The FAC is 135 pages long and alleges 20 causes of action, including claims for alleged violations of SGMA and the California Constitution, regulatory and physical takings, and due process violations, among others. The crux of Mojave's petition is that the Authority's groundwater sustainability plan illegally deprived Mojave of its vested appurtenant overlying water rights to pump groundwater from the Basin by conditioning Mojave's continued use of groundwater on the payment of the Replenishment Fee.

Mojave's case against the Authority was consolidated with an action filed by Searles Valley Minerals Inc. asserting similar challenges to the Authority's groundwater sustainability plan. (Case No. BCV-20-102285.) The consolidated actions were then transferred by stipulation to the Superior Court of Orange County and assigned new case numbers. (Case Nos. 30-2021-01187589 and 30-2021-01187275.)

Mojave filed a separate action in the Superior Court of Orange County against the Indian Wells Valley Water District, seeking to quiet title to its water rights and a physical solution. (Case No. 30-2021-01187275.) That case has been expanded by cross-complaint into a comprehensive adjudication of water rights in the Basin and has been deemed related to the consolidated cases.

In April 2021, Mojave filed an ex parte application in the present case for a temporary restraining order and an order to show cause why a preliminary injunction should not issue enjoining the Authority from taking any action to implement the Replenishment Fee in Ordinance No. 03-20. Respondent court denied Mojave's application in May 2021. The court reasoned that California's "pay first, litigate later"

rule barred injunctive relief as to the Replenishment Fee because Mojave had not yet paid the fee it seeks to invalidate, and none of the exceptions to the “pay first” rule applied.

In June 2021, Mojave petitioned this court for a writ of mandate as to the ruling. We denied Mojave’s writ petition without prejudice, finding Mojave had not yet experienced irreparable harm because the Authority had not yet filed a civil action to enjoin Mojave’s extractions. (No. G060336.) We noted then that the petition was denied for “prudential reasons, not as a signal regarding the correctness of the challenged order denying a preliminary injunction or the merits of the underlying dispute.”

Around the same time, the Authority held a public hearing on Mojave’s failure to pay the Replenishment Fee. After the hearing, the Authority adopted a resolution ordering Mojave to stop pumping Basin groundwater until its fee payments became current. The Authority also indicated that if Mojave continued to extract water from the Basin without paying the Replenishment Fee, the Authority would initiate court proceedings to enforce its order.

Later that month, the Authority filed a demurrer to Mojave’s FAC, attacking some but not all of the causes of action in the FAC. As to cause of action Nos. 6 (challenging the Replenishment Fee), 14 to 16 (regulatory and physical takings), and 17 and 18 (due process), the Authority argued those claims must be dismissed under the “pay first” rule because Mojave has failed to pay the Replenishment Fee.<sup>14</sup>

Respondent court found the “pay first” rule applied, noting that the challenged causes of action, despite their labels, all fundamentally sought to challenge and impede the collection of the Replenishment Fee. Accordingly, the court sustained the Authority’s demurrer to the sixth cause of action (challenging the Replenishment Fee)

---

<sup>14</sup> The Authority also challenged the thirteenth cause of action on that basis, but Mojave later voluntarily dismissed that cause of action, among others, so we will not discuss it further here.

without leave to amend, and it sustained the demurrer to the fourteenth through eighteenth causes of action (takings and due process claims) with leave to amend.

Weeks later Mojave filed its second amended verified petition for writ of mandamus and complaint (SAC), this time asserting 15 causes of action for violations of SGMA, regulatory and physical takings, and due process violations, among other claims. In light of respondent court's demurrer ruling on the "pay first" rule, Mojave deleted the cause of action challenging the Replenishment Fee; it also removed references to the "Replenishment Fee" from its takings claims. The Authority filed another demurrer.

Meanwhile, in January 2022, the Authority filed a complaint against Mojave in the Superior Court of Orange County, seeking recovery of the delinquent groundwater fees, civil penalties, and preliminary and permanent injunctive relief. (Case No. 30-2022-01239479.) That case is related to the present action, and according to the parties, the Authority's request for injunction is still pending.

Before the hearing on the Authority's demurrer to the SAC in the present action, Mojave sought leave to file a third amended petition and complaint (TAC). In its moving papers, Mojave explained that the amendments in the proposed TAC "make[] clear that this lawsuit is not a challenge to the Replenishment Fee but to the predicate unlawful allocation decision that preceded the imposition of the fee and which violates SGMA and constitutes a taking."

Respondent court took the Authority's demurrer to the SAC off calendar and largely granted Mojave's motion for leave to file its TAC. The TAC asserts 15 causes of action for violations of SGMA, regulatory and physical takings, and due process violations, among other claims.

As relevant here, the fifth cause of action in the TAC challenges the Exempted Pumping Allotments<sup>15</sup> in Ordinance No. 03-20, asserting the Authority

---

<sup>15</sup> Mojave's TAC and briefing refer to these as "Annual Pumping Allocations" rather than use the terminology in Ordinance No. 03-20 ("Exempted

arbitrarily and capriciously granted groundwater pumping allotments to certain users, but not Mojave, in violation of Mojave's common law and constitutional rights to water. According to Mojave, "because [Mojave was] denied any [Exempted] Pumping [Allotments], [Mojave] can no longer rely on [its] prior and paramount overlying right to pump [its] correlative share of the Basin's native yield, and instead must pay the Replenishment Fee." (TAC ¶ 402.) Mojave therefore seeks a writ of mandate compelling the Authority to prevent the implementation of the Exempted Pumping Allotments and to comply with all applicable laws in adopting accurate and legal allotments.

Cause of action Nos. 9 through 11 of the TAC allege the Authority, through the adoption of its groundwater sustainability plan, the Sustainable Yield Report, the Transient Pool and Fallowing Program, and the Exempted Pumping Allotments, has deprived Mojave of all economically beneficial use of its water rights and pistachio trees, and this amounts to a physical and regulatory taking of private property without just compensation in violation of the state and federal constitutions and section 1983 of title 42 of the United States Code.

The Authority filed yet another demurrer to the TAC, challenging the fifth cause of action (challenging the Exempted Pumping Allotments) and the ninth through eleventh causes of action (the takings claims). The Authority argued the fifth cause of action is "nothing more than a further challenge to the calculation of the Replenishment Fee," and is thus still barred by the "pay first" rule. As for the takings claims, the Authority argued the challenged actions (which do not include the Replenishment Fee) imposed no economic burdens on Mojave, nor did they preclude the extraction of groundwater.

---

Pumping Allotments"). We employ the terminology from the ordinance to avoid confusion.

The trial court held a lengthy hearing on the matter in December 2022. After taking the matter under submission, respondent court sustained the Authority's demurrer as to the fifth and eleventh causes of action without leave to amend and as to the ninth and tenth causes of action with leave to amend.<sup>16</sup>

Respondent court found the fifth cause of action's challenge to the Exempted Pumping Allotment was "simply a disguised challenge to the Replenishment Fee itself, meaning it's still barred by the 'pay first, litigate later' rule." As for the regulatory takings claims (the ninth and tenth causes of action), the court reasoned the TAC specifically removed any reference to the Replenishment Fee, and these claims are instead based on the Authority's groundwater sustainability plan, the Sustainable Yield Report, Exempted Pumping Allotments, and Transient Pool and Fallowing Program, none of which, "*without reference to the Replenishment Fee*, [has] an economic effect on Mojave." As for the physical takings claim (the eleventh cause of action), the court reasoned Mojave had not alleged it was in fact physically prevented from extracting water, and thus had not stated a claim.

Mojave petitioned this court for a writ of mandate in February 2023, requesting de novo review of respondent court's ruling on the demurrer. We issued an order to show cause why mandate or other appropriate relief should not be issued; we also invited additional briefing by the parties. We later accepted briefing by several amici curiae, entertained oral argument, and invited supplemental briefing after oral argument.

---

<sup>16</sup> Respondent court acknowledged that the Extraction Fee, which Mojave has paid, is a separate basis for the ninth and tenth causes of action and therefore allowed Mojave to file a further amended petition basing these causes of action on the Extraction Fee explicitly.

## DISCUSSION

### 1. *Writ Review is Appropriate*

“In order to confine the use of mandamus to its proper office, the Supreme Court, in various cases, has stated general criteria for determining the propriety of an extraordinary writ: (1) the issue tendered in the writ petition is of widespread interest [citation] or presents a significant and novel constitutional issue [citation]; (2) the trial court’s order deprived petitioner of an opportunity to present a substantial portion of his cause of action [citations]; (3) conflicting trial court interpretations of the law require a resolution of the conflict [citation]; (4) the trial court’s order is both clearly erroneous as a matter of law and substantially prejudices petitioner’s case [citations]; (5) the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief [citation]; and (6) the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal [citations]. The extent to which these criteria apply depends on the facts and circumstances of the case.” (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274.)

The issues raised in this writ proceeding are of widespread interest and importance. Litigation challenging the actions of groundwater sustainability agencies under SGMA may impact thousands of water users throughout the state for years to come. Whether the “pay first” rule applies in litigation challenging SGMA fees is a novel question, the answer to which could impact groundwater extractors throughout the state; it has yet to be addressed by any appellate decision. Accordingly, writ review is warranted. (See *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 657 [“a writ of mandate *should* not be denied when ‘the issues presented are of great public importance and must be resolved promptly,’” and the “receipt of numerous amicus curiae briefs underscores the importance of this issue”].)

## 2. *Standard of Review*

“When a party seeks writ review of a trial court’s order [on] a demurrer, ‘[t]he “ordinary standards of demurrer review still apply.”’ [Citation.] We independently determine whether the complaint states a cause of action. [Citation.] We reasonably interpret the complaint, ‘reading it as a whole and its parts in their context.’ [Citation.] We deem true “all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] “We also consider matters which may be judicially noticed.”’ (*Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2019) 42 Cal.App.5th 148, 153-154 (*Presbyterian Camp*).)

## 3. *The “Pay First” Rule Generally*

“A taxpayer ordinarily must pay a tax before commencing a court action to challenge the collection of the tax. This rule, commonly known as ‘pay first, litigate later,’ is well established and is based on a public policy reflected in the state Constitution, several statutes, and numerous court opinions.” (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1116 (*So. Cal. Edison*).)

The constitutional source of the “pay first” rule is article XIII, section 32 of the California Constitution: “No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.” (Cal. Const. art. XIII, § 32 (hereafter article XIII, section 32).)<sup>17</sup>

---

<sup>17</sup> Although article XIII, section 32 is often cited in “pay first” jurisprudence, the doctrine existed long before section 32’s predecessor provision was added to the California Constitution in 1910, having received judicial recognition for nearly a century before that. (See *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 495-496 (*Chiatello*) [collecting cases].)



“Read together, these two portions of section 32 establish that the sole legal avenue for resolving tax disputes is a postpayment refund action. A taxpayer may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid.” (*State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638 (*State Board*).)

The “pay first” rule also appears in numerous statutes. Some statutes use language similar to article XIII, section 32 and “prohibit an action to prevent or enjoin the collection of specified taxes imposed by state or local government. (E.g., Rev. & Tax. Code, §§ 4807 [property tax], 6931 [sales and use taxes], 19381 [franchise and income taxes].) Other statutes provide for an action to recover a refund after payment is made. (*Id.*, §§ 5140 [property tax], 6933 [sales and use taxes], 19382 [franchise and income taxes].)” (*So. Cal. Edison, supra*, 112 Cal.App.4th at pp. 1116-1117.) As we discuss below, the rule is also codified in SGMA. (See § 10726.6(d).)<sup>18</sup>

---

<sup>18</sup> Mojave correctly notes the first sentence of article XIII, section 32 refers to actions against the “State,” and there is a split of authority as to whether the “pay first” rule embodied in section 32 applies to local taxes in the absence of a “pay first” statute. A number of courts have applied section 32’s “pay first, litigate later” principle to actions against local governments as a matter of public policy. (See, e.g., *Water Replenishment Dist. of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1466-1468 (*City of Cerritos*); *Chodos v. City of Los Angeles* (2011) 195 Cal.App.4th 675, 680; *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1136-1137 (*Flying Dutchman*).) Other courts, however, have held article XIII, section 32 applies only to actions against the state, as stated in the provision. (See, e.g., *City of Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825, 830 (*City of Anaheim*) [“Article XIII, Section 32 . . . does not bar the [plaintiffs’] actions here [against the city] because courts have limited this constitutional provision to actions against the state or an officer of the state”]; *County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 363 fn. 6 [““Section 32 applies only to actions against the state””].) We agree with the former group that, even in the absence of a statute calling for the application of the “pay first” rule to a given situation, article XIII, section 32 applies to both state and local governments as a matter of public policy. Ultimately, however, this is a moot issue because as discussed below, the “pay first” rule also appears in the text of SGMA. (See § 10726.6(d).)

The “pay first” rule advances an important public policy in that it “ensures that essential public services are not disrupted during the pendency of tax challenges.” (*Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 90.) That is, it “allow[s] revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted.” [Citation.] ‘The fear that persistent interference with the collection of public revenues, for whatever reason, will destroy the effectiveness of government has been expressed in many judicial opinions.’” (*State Board, supra*, 39 Cal.3d at pp. 638-639.) As the United States Supreme Court recognized over 150 years ago, any delay in the collection of taxes “may derange the operations of government, and thereby cause serious detriment to the public.” (*Dows v. City of Chicago* (1870) 78 U.S. 108, 110.) “The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason.” (*Springer v. United States* (1880) 102 U.S. 586, 594.)

Article XIII, section 32’s “pay first” rule is “construed broadly to bar not only injunctions but also a variety of prepayment judicial declarations or findings which would impede the prompt collection of a tax.” (*State Board, supra*, 39 Cal.3d at p. 639.) “It is well established that the applicability of section 32 does not turn on whether the action at issue specifically seeks to prevent or enjoin the collection of a tax. . . . [Citation.] The relevant issue is whether granting the relief sought would have the effect of impeding the collection of a tax.” (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247-248 (*California Logistics*); see *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 280 (*PG&E*) [“a taxpayer may not circumvent restraints on prepayment tax litigation by seeking only declaratory relief”].) In other words, “if the ‘net result of the relief prayed for . . . would be to restrain the collection of the tax allegedly due, the action must be treated as one having that

purpose.” ( *West Hollywood Community Health & Fitness Center v. California Unemployment Ins. Appeals Bd.* (2014) 232 Cal.App.4th 12, 22.)

The “pay first” rule is often invoked at the pleading stage, resulting in an order sustaining a demurrer. (See, e.g., *California Logistics, supra*, 161 Cal.App.4th at p. 245; *Flying Dutchman, supra*, 93 Cal.App.4th at p. 1132.) Indeed, “the public policy supporting extension of the rule is more compelling when there has been no trial of the ultimate issues but only a ruling on a demurrer to a taxpayer’s complaint or on a dispositive pretrial motion.” ( *So. Cal. Edison, supra*, 112 Cal.App.4th at pp. 1119-1120.)

The fact that a petitioner’s lawsuit is based on the alleged illegality of the challenged tax under state law does not excuse compliance with the “pay first” rule. “It has long been established that suits to enjoin the collection of taxes may not be maintained even though the imposition of the tax may be ‘illegal and void.’” ( *Flying Dutchman, supra*, 93 Cal.App.4th at p. 1141; see *Chiatello, supra*, 189 Cal.App.4th at pp. 492-493 [historically, “a tax would be enjoined only in very rare instances where more than a naked claim of illegality was raised[, and] “[a] suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal””].)

Nor does a petitioner’s alleged inability to pay the assessment and the resulting lack of opportunity for judicial review violate the taxpayer’s right to due process. ( *California Logistics, supra*, 161 Cal.App.4th at p. 251; see *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 725–726 [“The due process clause does not guarantee the right to judicial review of tax liability before payment”]; *PG&E, supra*, 27 Cal.3d at p. 282 [historically, “the most severe financial hardship resulting in bankruptcy was judged not to be an irreparable injury sufficient to permit judicial intervention” in violation of “pay first” rule].)

The “pay first” rule comports with due process requirements so long as there is “‘a procedure which, *at some point*, provides the taxpayer a meaningful opportunity to contest the legality of the exaction.’” ( *City of Anaheim, supra*,

179 Cal.App.4th at p. 831, *italics added*.) This “most often takes the form of refund procedure provided for in the applicable statute, and courts have consistently upheld ‘pay first’ requirements in matters involving local taxes where the taxing authority has specifically provided for a refund procedure.” (*Ibid.*; see *McKesson v. Div. of Alcoholic Beverages* (1990) 496 U.S. 18, 51 [federal due process principles simply require “‘a clear and certain remedy,’” such as a “refund of the excess taxes paid by the petitioner”]; *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 358 (*Reid*) [government must provide either a predeprivation process or postdeprivation relief; either is sufficient so long as the remedy is clear and certain].)

There are several recognized exceptions to the “pay first” rule. One arises when the tax ordinance being challenged provides for criminal penalties for failure to pay. (See *Flying Dutchman*, *supra*, 93 Cal.App.4th at pp. 1139-1140 [collecting cases].)

A second exception applies if the party seeking to prevent the tax collection has no adequate remedy at law, in which case the taxpayer may be entitled to equitable relief. (*Flying Dutchman*, *supra*, 93 Cal.App.4th at p. 1138.) However, this exception rarely applies because “[a]ny remedy that allows a taxpayer to challenge a tax already collected, and to press any constitutional claims he or she may have, has been found to constitute “‘a plain, speedy and efficient remedy’” barring equitable relief.” (*Ibid.*; see *Chiatello*, *supra*, 189 Cal.App.4th at p. 493 [“if there was an adequate remedy at law—which almost always meant a refund procedure—the collection of a tax would not be halted by the courts”]; *City of Anaheim*, *supra*, 179 Cal.App.4th at p. 831 [noting “[t]he ‘adequate remedy at law’ most often takes the form of refund procedure provided for in the applicable statute” and collecting cases].)

A third exception appears when the ban on prepayment judicial review violates the federal Constitution. However, this exception is “limited to those situations in which it is clear that “‘under no circumstances” can the government prevail,’” where “‘it is . . . apparent that, under the most liberal view of the law and the facts, the

[government] cannot establish its claim,” or where the government “has no conceivable basis in law or fact for assessing [the] tax.” (*Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 214; see *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 839 (*Calfarm*).)

4. *Applicability of the “Pay First” Rule in Water Cases*

No court has yet determined whether the “pay first” rule applies in cases challenging fees imposed by a groundwater sustainability agency under SGMA. However, two cases have recognized that groundwater assessments imposed in other contexts are subject to the rule.

In *City of Cerritos*, the court applied the “pay first” rule to a city that had stopped paying a water replenishment assessment to the local water replenishment district after another court made an interim order finding the assessment was invalid under Proposition 218. (*City of Cerritos, supra*, 220 Cal.App.4th at pp. 1453-1454.) The court concluded article XIII, section 32 barred the city from using the pending Proposition 218 case to defensively interfere with collection of the assessment, and the city was required to either pay the assessment or stop producing groundwater until there was a final judgment in the Proposition 218 lawsuit. (*City of Cerritos*, at pp. 1464-1470.) Thus, the district was entitled to a preliminary injunction enjoining the city from producing groundwater during the pendency of the Proposition 218 lawsuit unless and until the city paid the delinquent assessment. (*City of Cerritos*, at pp. 1470-1471.)

The “pay first” rule was also applied to water fees in *Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425. That case involved a class action complaint filed on behalf of water customers to preserve their alleged right to continue receiving water at reasonable rates from a historical water delivery system owned and operated by the city. (*Id.* at p. 428.) The trial court sustained the city’s demurrer to causes of action seeking to enjoin the city from continuing a surcharge fee and imposing future rate structures. The court of appeal affirmed, noting that the trial

court had correctly cited *City of Cerritos* for the proposition that “water assessments are subject to the “pay first, litigate later” rule.” (*Id.* at p. 441.)

Neither of these cases involved a challenge to fees imposed by a groundwater sustainability agency under SGMA. More relevant to our analysis, therefore, is the fact that the Legislature included a “pay first” requirement in SGMA.

Specifically, section 10726.6(d) provides: “Any person may pay a fee imposed pursuant to Section 10730, 10730.2, or 10730.4 under protest and bring an action against the governing body in the superior court to recover any money that the governing body refuses to refund. Payments made and actions brought under this section shall be made and brought in the manner provided for the payment of taxes under protest and actions for refund of that payment in Article 2 (commencing with Section 5140) of Chapter 5 of Part 9 of Division 1 of the Revenue and Taxation Code, as applicable.”

California courts have not yet addressed whether this statutory language amounts to a “pay first” requirement. However, in *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198 (*Los Altos*), the court interpreted a nearly identical statutory provision, Health and Safety Code section 5472,<sup>19</sup> and concluded it meant that “payment ‘under protest’ was necessary before pursuing a claim for refund of fees asserted to be invalid.” (*Los Altos*, at pp. 201, 206.) Because the plaintiffs in that case had not paid the challenged sewer assessments before filing their

---

<sup>19</sup> Section 10726.6(d) in SGMA tracks Health and Safety Code section 5472 nearly verbatim. Section 5472 provides: “After fees, rates, tolls, rentals or other charges are fixed pursuant to this article, *any person may pay such fees, rates, tolls, rentals or other charges under protest and bring an action against the city or city and county in the superior court to recover any money which the legislative body refuses to refund. Payments made and actions brought under this section, shall be made and brought in the manner provided for payment of taxes under protest and actions for refund thereof in Article 2, Chapter 5, Part 9, of Division 1 of the Revenue and Taxation Code, insofar as those provisions are applicable.*” (Italics added.) We have italicized the portions of Health and Safety Code section 5472 that also appear in Water Code section 10726.6.

lawsuit, their “action was foreclosed by their failure to follow the prescribed procedures”; the lower court therefore “did not err in sustaining [the city’s] demurrer without leave to amend.” (*Id.* at p. 207.)

In reaching this conclusion, the *Los Altos* court rejected the argument that “the payment-under-protest language of [Health and Safety Code] section 5472—‘any person *may* pay . . . under protest’—[w]as permissive, [rather than] mandatory.” (*Los Altos*, *supra*, 165 Cal.App.4th at p. 206.) “It is the challenge itself that is optional, not the method of raising that challenge. Of course users of sewer services *may* challenge excessive fees if they wish to do so; but the manner in which they assert that challenge is prescribed by the statute.” (*Ibid.*; see also *Padilla v. City of San Jose* (2022) 78 Cal.App.5th 1073, 1080 [relying on *Los Altos* and Health & Saf. Code, § 5472 to conclude “plaintiffs were required to pay [the challenged garbage collection fees] under protest before suing for a refund”].)

We presume the Legislature was aware of Health and Safety Code section 5472 and the 2008 *Los Altos* decision when it enacted Water Code section 10726.6(d) in 2014. Given the two statutes use nearly identical language, we further presume the Legislature intended that the *Los Altos* court’s interpretation of section 5472 should apply to section 10726.6(d). (See *Presbyterian Camp*, *supra*, 42 Cal.App.5th at p. 154 [we presume the Legislature was aware of existing laws and their judicial interpretation when enacting a statute, and that the Legislature intended the same interpretation apply to laws with substantially similar language].)

We therefore conclude that section 10726.6(d) of SGMA requires a person who seeks to challenge a groundwater fee imposed under SGMA to first pay the fee before bringing an action for a refund. And, just as in *Los Altos*, we conclude the fact that section 10726.6(d) uses the words “*may pay* . . . under protest” does not make compliance optional.

5. *Application of the “Pay First” Rule Here*

Having concluded the “pay first” rule, enshrined in the California Constitution (art. XIII, § 32) and included by statute in SGMA (§ 10726.6(d)), applies to lawsuits challenging fees imposed by a local groundwater sustainability agency under SGMA, we must determine the rule’s application here. Mojave has not paid any portion of the Replenishment Fee. Accordingly, any cause of action that attacks the propriety of the Replenishment Fee or attempts to impede its prompt collection cannot proceed, unless an exception to the “pay first” rule applies.

We have considered the recognized exceptions to the “pay first” rule, set out above, and conclude none apply here. Ordinance No. 03-20 does not call for criminal penalties for failure to pay the Replenishment Fee. There is no due process concern from imposing the “pay first” rule because water extractors have an adequate remedy at law in the form of a postpayment refund procedure (see § 10726.6(d)). And given the Basin’s severe overdraft status, as recognized by the Department of Water Resources, and the fact that SGMA expressly authorizes agencies to impose fees, we cannot say the Authority had no conceivable basis in law or fact for assessing the Replenishment Fee such that the ban on prepayment judicial review would violate the federal Constitution.<sup>20</sup>

---

<sup>20</sup> Asserting that “[o]ther exceptions apply,” and citing *Reid, supra*, 24 Cal.App.5th 343 for the proposition that “the ‘pay first, litigate later’ rule does not apply where, as here, the [government] has specifically provided a prepayment remedy” (*id.* at p. 357), Mojave argues the “pay first” rule does not apply because SGMA includes a prepayment remedy in section 10726.6, subdivision (c), which states: “Any judicial action or proceeding to attack, review, set aside, void, or annul the ordinance or resolution imposing a new, or increasing an existing, fee imposed pursuant to Section 10730, 10730.2, or 10730.4 shall be commenced within 180 days following the adoption of the ordinance or resolution.”

We disagree. Mojave is correct when it argues that as long as a government “provides a clear and certain remedy, it may determine to provide predeprivation process instead of postdeprivation relief.” (*Reid, supra*, 24 Cal.App.5th at p. 358.) But that is not what the Legislature did here. Section 10726.6, subdivision (c), is not a prepayment remedy; rather, it is the statute of limitations applicable to any action challenging a



During oral argument, Mojave invited us to create a new exception to the “pay first” rule, such that it would not apply for public policy reasons when a groundwater agency’s sustainability plan acts inconsistently with California water law, such as by improperly determining water rights. We decline to do so. The fact that petitioner’s lawsuit is based on the alleged illegality of the challenged tax does not excuse compliance with the “pay first” rule. (*Flying Dutchman*, *supra*, 93 Cal.App.4th at p. 1141 [“It has long been established that suits to enjoin the collection of taxes may not be maintained even though the imposition of the tax may be ‘illegal and void’”].) Also, creating such an exception here would be problematic because it would require a court to adjudicate the validity of a groundwater agency’s sustainability plan and competing water rights claims at the demurrer stage. That runs contrary to what the Legislature contemplated when it enacted SGMA—namely, that groundwater sustainability plans

---

groundwater fee ordinance, including a fee refund action under section 10726.6(d).

Mojave contends this interpretation is “untenable” because Ordinance No. 03-20 was adopted on August 21, 2020, but the first Replenishment Fee under the ordinance was not due until February 15, 2021 (assuming a user actually extracted groundwater in January 2021); thus, anyone who wanted to challenge the ordinance’s Replenishment Fee would have had to file an action just two days after paying the fee, on February 17, 2021 (180 days after the ordinance’s adoption). Mojave further asserts that farmers who did not pump any groundwater in January would be entirely barred from challenging any aspect of Ordinance No. 03-20, including the Exempted Pumping Allotments, because no fee would be due before February 17, 2021.

We are not persuaded. As we read it, section 10726.6, subdivision (c), required any lawsuit attacking the fee imposed by Ordinance No. 03-20 to be filed by February 17, 2021 (180 days after its adoption). If a party extracted groundwater and owed a Replenishment Fee before filing an action, that party would need to pay the fee in order to file the complaint as stated in section 10726.6(d). Conversely, if the party did not extract groundwater or incur a Replenishment Fee until *after* the February 17, 2021 filing deadline, that party would still need to comply with the filing deadline, and then would also have to pay the Replenishment Fee, once incurred, in order to continue *maintaining* the action.

would first be put into place, and then any dissatisfied persons could bring an adjudication action to determine water rights. (See §§ 10737-10738.)

Creating a new exception here would also undermine the public policies that underlie the “pay first” rule, such as ensuring the continued provision of public services funded by taxes, or in this case, the replenishment fees. It bears noting that for nearly three years, Mojave has extracted thousands of acre-feet of groundwater without paying the Replenishment Fee. If groundwater extractors like Mojave can challenge a fee without first paying it, that could defeat SGMA’s goal of managing overdrafted groundwater basins.

Accordingly, we hold that any cause of action that attacks the propriety of the Replenishment Fee or attempts to impede its prompt collection cannot proceed unless Mojave first pays the outstanding amounts owed. This is true even if the challenged fee allegedly violates SGMA and California water law, and even if Mojave allegedly cannot afford to pay the fee. (See *California Logistics*, *supra*, 161 Cal.App.4th at p. 251 [rejecting due process challenge to “pay first” rule’s application, even though the plaintiff could not afford to pay proposed \$1.2 million assessment]; see also *City of Cerritos*, *supra*, 220 Cal.App.4th at p. 1469 [applying “pay first” rule where outstanding water assessments totaled \$7 million].)

In reaching this holding, we are mindful that a rigid application of the “pay first” rule could allow local groundwater sustainability agencies to impose unreasonable fees that target certain users, knowing they would be unable to afford to pay the fees under protest, and that those users could eventually be run out of business. However, that is not the case before us today, and we decline to resolve the slippery issue of determining when, if ever, a fee or tax would be so extraordinarily high that the “pay first” rule should not apply.<sup>21</sup>

---

<sup>21</sup> The Replenishment Fee of \$2,130 per acre-foot is not grossly out of line with the fees charged by other agencies. The Authority presents evidence, for example,

That brings us to determining how the “pay first” rule applies to the TAC. As noted, when ruling on the Authority’s demurrer to Mojave’s FAC in 2021, respondent court relied on the “pay first” rule to sustain the demurrer to the sixth cause of action (challenging the Replenishment Fee) without leave, and to sustain the demurrer to the fourteenth through eighteenth causes of action (takings and due process claims) with leave. In an attempt to plead itself out of that ruling and minimize any reliance on the unpaid Replenishment Fee, Mojave’s TAC challenges the Exempted Pumping Allotments in the same ordinance, as well as the other Implementing Actions such as the Sustainable Yield Report and the Transient Pool and Fallowing Program. We conclude this amounts to a distinction without a difference.

a. *Cause of Action No. 5*

We first consider Mojave’s fifth cause of action, which challenges the Exempted Pumping Allotments in Ordinance No. 03-20. As noted, Ordinance No. 03-20 provided that all groundwater extractions (except those by federal and de minimis extractors) would be subject to the Replenishment Fee of \$2,130 per acre-foot starting in January 2021. In the subsequent paragraph, Ordinance No. 03-20 specified how the Basin’s 7,650 acre-feet sustainable yield should be divided among certain municipal entities, granting those entities annual Exempted Pumping Allotments in varying amounts that are not subject to the Replenishment Fee.

Mojave did not receive an Exempted Pumping Allotment, so in its fifth cause of action, it alleges the Authority arbitrarily and capriciously granted Exempted Pumping Allotment to certain users, but not Mojave, in violation of Mojave’s common law and constitutional rights to water. According to Mojave, “because [Mojave was] denied any [Exempted] Pumping [Allotments], [Mojave] can no longer rely on [its] prior and paramount overlying right to pump [its] correlative share of the Basin’s native yield,

---

that the Antelope Valley-East Kern Water Agency charges about \$1,700 per acre-foot.

and instead must pay the Replenishment Fee.” (TAC ¶ 402.) Mojave therefore asked respondent court to compel the Authority to prevent the implementation of the Exempted Pumping Allotments and to comply with all applicable laws in adopting accurate and legal allotments.

Mojave insists it is not challenging the Replenishment Fee, but rather the Exempted Pumping Allotments, which are not a tax and therefore not subject to the “pay first” rule. Respondent court was not persuaded; neither are we.

In sustaining the Authority’s demurrer to this cause of action, respondent court determined “this cause of action is simply a disguised challenge to the Replenishment Fee itself.” “The Court does not see how the [Exempted] Pumping [Allotments] cause Mojave any harm other than requiring it to pay a larger Replenishment Fee than extractors who received allocations. This means a challenge to the [Exempted] Pumping [Allotments] is effectively a challenge to the Replenishment Fee itself, which is barred by the ‘pay first, litigate later’ rule.”

We agree. The Replenishment Fee and the Exempted Pumping Allotment provisions appear on the same page and in the same section of Ordinance No. 03-20, all under the heading, “Section 3. Basin Replenishment Fee.” They clearly operate together: the greater an entity’s Exempted Pumping Allotment, the lower its Replenishment Fee will be. Because Mojave did not receive any Exempted Pumping Allotment, it must pay a Replenishment Fee on every acre-foot of groundwater it extracts. If Mojave were to succeed in a legal challenge to the Exempted Pumping Allotment and obtain an order that it should receive a certain portion of the annual sustainable yield, the net result would be a lower Replenishment Fee.

Mojave insists it is challenging the Authority’s illegal determination that Mojave holds “inferior” water rights and should receive no allocation of native groundwater. Again, this is not a meaningful distinction. In our view, challenging the Authority’s determination that Mojave is not entitled to free groundwater and therefore

must pay the Replenishment Fee is ultimately the same thing as challenging the Authority's determination that Mojave must pay the Replenishment Fee.

Citing *Calfarm, supra*, 48 Cal.3d 805, Mojave insists the Exempted Pumping Allotment section of the ordinance is severable from the Replenishment Fee provision and therefore subject to judicial review notwithstanding the "pay first" rule. We cannot agree. To be subject to review, the invalid provision must be, among other things, grammatically severable, in that it "constitutes a distinct and separate provision [that] can be removed as a whole without affecting the wording of any other provision." (*Id.* at p. 822.) In this case, the Replenishment Fee and the Exempted Pumping Allotment chart all appear in the same section of Ordinance No. 03-20, all under the heading, "Section 3. Basin Replenishment Fee."

Accordingly, if Mojave desires to challenge the fact that it did not receive an Exempted Pumping Allotment under Ordinance No. 03-20 in violation of its alleged water rights, it must first pay the Replenishment Fee due under that same ordinance. Respondent court did not err in sustaining the Authority's demurrer on the fifth cause of action.

b. *Cause of Action Nos. 9-11*

That leaves Mojave's takings causes of action. As noted, the ninth through eleventh causes of action of the TAC allege that the Authority, through the adoption of the Exempted Pumping Allotments and other Implementing Actions (excluding the Replenishment Fee), has deprived Mojave of all economically beneficial use of its water rights and pistachio trees, and that this amounts to a physical and regulatory taking of private property without just compensation in violation of the state and federal Constitutions and section 1983 of title 42 of the United States Code. Mojave claims the Authority has taken its vested overlying water right to pump native groundwater from the

Basin for use on its land and made Mojave's water available for public use by others without just compensation.<sup>22</sup>

---

<sup>22</sup> It is unclear to us to what extent Mojave has such a right. As a different panel of this court not long ago observed, "Groundwater belongs to the state, not any person or entity, but may be extracted by those with the right to do so, including those whose land overlies the groundwater source. 'At least since 1928 when the predecessor to article X section 2 of the California Constitution was adopted, there is no private ownership of groundwater. [Citation.] The State of California owns all of the groundwater in California, not as a proprietary owner, but in a manner that empowers it to supervise and regulate water use. [Citation.] Water rights holders have the right to "take and use water," but they do not own the water and cannot waste it. . . . Under the "correlative rights doctrine," "as between the owners of land overlying strata of percolating waters, the rights of each to the water are limited, in correlation with those of others, to his 'reasonable use' thereof when the water is insufficient to meet the needs of all.'"" (*Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, 336; see *Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1023, 1022 ["landowner whose property overlies the groundwater" has "[f]irst priority" to groundwater, subject to usufructuary interests of other overlying landowner, but "when the native supply 'is insufficient, each is limited to his proportionate fair share of the total amount available based upon his reasonable need'"].)

In this case, Mojave claims to have a vested water right to pump native groundwater from the Basin for use on its land, but it has never specified the quantity of its water right or its priority vis-à-vis other extractors, which raises several questions:

- Assuming the Basin's sustainable yield is only 7,650 acre-feet per year, how can multiple extractors each have a viable common law right to most or all of that water?
- Is using the Basin's limited groundwater to irrigate a water-intensive crop like pistachios in the middle of the high desert a "reasonable and beneficial" use of water protected under the California Constitution, particularly considering most of those trees were planted less than 10 years ago? (See Cal. Const., art. X, § 2.)
- Does a vested overlying right to groundwater mean a vested overlying right to *free* groundwater?
- SGMA states that any judgment in an adjudication action for a basin required to have a groundwater sustainability plan must not substantially impair the ability of a groundwater sustainability agency to

Respondent court was not persuaded. As for the regulatory takings claims (the ninth and tenth causes of action), the court reasoned that the TAC specifically removed any reference to the Replenishment Fee, and these claims are instead based on the Authority's groundwater sustainability plan, the Sustainable Yield Report, Exempted Pumping Allotments, and Transient Pool and Fallowing Program, none of which, "*without reference to the Replenishment Fee*, [has] an economic effect on Mojave." As for the physical takings claim (the eleventh cause of action), the court reasoned that Mojave had not alleged it was in fact physically prevented from extracting water, and thus had not stated a claim.

We agree with respondent court's analysis. If Mojave had paid the Replenishment Fee in compliance with the "pay first" rule, it could perhaps state a takings cause of action on the theory that the Replenishment Fee makes Mojave's agricultural operations economically unviable because the fees for extracting groundwater are so high. Perhaps because Mojave has not paid the fee, however, it omitted any reference to the Replenishment Fee from the TAC's takings claims, instead relying on the other Implementing Actions.

As respondent court correctly concluded, this attempt to escape the previous demurrer ruling fails because the only Implementing Action with an economic effect on Mojave is the Replenishment Fee. Since none of the other Implementing Actions physically prevent Mojave from extracting groundwater or interfere

---

achieve sustainable groundwater management. (§ 10737.8.) What impact does that rule have on common law groundwater rights?

We need not, and expressly do not, decide these difficult issues today. Indeed, it would be inappropriate to determine the relative priority of Mojave's water rights in the vacuum of an appellate writ proceeding without other water extractors present. We anticipate these issues will instead be addressed in the related adjudication action; we express no view on the appropriate resolution.

economically with Mojave's ability to extract groundwater, Mojave's TAC fails to state a cause of action for a taking.

### **DISPOSITION**

The petition for writ of mandate is denied. The order to show cause is discharged. The stay imposed by this court is dissolved upon finality of this opinion. The parties shall each bear their own costs in this proceeding.

GOETHALS, J.

WE CONCUR:

MOORE, ACTING P. J.

SANCHEZ, J.



### **PROOF OF SERVICE**

I am a citizen of the United States and employed in Santa Barbara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1021 Anacapa Street, 2nd Floor, Santa Barbara, California 93101. My electronic service address is Meldridge@bhfs.com. On March 19, 2024, I served a copy of the within document(s):

### **PETITION FOR REVIEW**

- X      by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- X      by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

### **SEE ATTACHED SERVICE LIST**

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 in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date 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 March 19, 2024, at Santa Barbara, California.

/s/ Melissa Eldridge  
Melissa Eldridge

## SERVICE LIST

<p><b>BY E-MAIL</b> James L. Markman B. Tilden Kim Kyle H. Brochard Darrelle M. Field Jack Hensley Richards Watson &amp; Gershon 350 South Grand Avenue, 37th Floor Los Angeles, CA 90071 Telephone (213) 626-8484 <a href="mailto:jmarkman@rwglaw.com">jmarkman@rwglaw.com</a> <a href="mailto:TKim@rwglaw.com">TKim@rwglaw.com</a> <a href="mailto:kbrochard@rwglaw.com">kbrochard@rwglaw.com</a> <a href="mailto:jhensley@rwglaw.com">jhensley@rwglaw.com</a></p> <p><i>Attorneys for Respondents / Defendants / Real Parties in Interest Indian Wells Valley Groundwater Authority; Board of Directors of the Indian Wells Valley Groundwater Authority</i></p>	<p><b>BY E-MAIL</b> Phillip Hall Kern County Office of County Counsel 1115 Truxtun Ave., 4th Floor, Bakersfield, CA 93301 Telephone: (661) 868-3826 <a href="mailto:phall@kerncounty.com">phall@kerncounty.com</a></p> <p><i>Attorneys for Respondents / Defendants / Real Parties in Interest Indian Wells Valley Groundwater Authority; Board of Directors of the Indian Wells Valley Groundwater Authority</i></p>
---	---

<p><b>BY E-MAIL</b>  Wayne Keith Lemieux, Jr.  Aleshire &amp; Wynder, LLP  2659 Townsgate Road, Suite 226  Westlake Village, CA 91362-3852  Telephone: (805) 495-4770  <a href="mailto:klemieux@awattorneys.com">klemieux@awattorneys.com</a></p> <p><i>Attorneys for  Respondents / Defendants / Real  Parties in Interest  Indian Wells Valley Groundwater  Authority; Board of Directors of the  Indian Wells Valley Groundwater  Authority</i></p>	<p><b>BY E-MAIL</b>  Eric L. Garner  Jeffrey V. Dunn  Wendy Y. Wang  Sarah Christopher Foley  Daniel L. Richards  Amanda K. Wells  Best &amp; Krieger LLP  18101 Von Karman Avenue,  Irvine, CA 92612  Telephone: (949) 263-2600  <a href="mailto:Eric.Garner@bbklaw.com">Eric.Garner@bbklaw.com</a>  <a href="mailto:Jeffrey.Dunn@bbklaw.com">Jeffrey.Dunn@bbklaw.com</a>  <a href="mailto:Wendy.Wang@bbklaw.com">Wendy.Wang@bbklaw.com</a>  <a href="mailto:Sarah.Foley@bbklaw.com">Sarah.Foley@bbklaw.com</a>  <a href="mailto:Amanda.Wells@bbklaw.com">Amanda.Wells@bbklaw.com</a>  <a href="mailto:katrina.wraight@bbklaw.com">katrina.wraight@bbklaw.com</a></p> <p><i>Attorneys for  Petitioner / Plaintiff / Real Parties  in Interest Searles Valley Mineral,  Inc. in related case</i></p>
<p><b>BY E-MAIL</b>  Derek R. Hoffman  Byrin Romney  Fennemore Dowling Arron  8080 N. Palm Avenue, Third Floor  Fresno, CA 93711  Telephone: (559) 432-4500  <a href="mailto:dhoffman@fennemorelaw.com">dhoffman@fennemorelaw.com</a></p> <p><i>Attorneys for Defendants  Meadowbrook Dairy Real Estate,  LLC, Big Horn Fields, LLC, Brown  Road Fields, LLC, Highway 395  Fields, LLC, The Meadowbrook  Mutual Water Company in related  case</i></p>	<p><b>BY E-MAIL</b>  James A. Worth, Esq.  McMurtrey, Hartsock &amp; Worth  2001 22nd Street, Suite 100  Bakersfield, California 93301  Phone: (661) 322-4417  Fax: (661) 322-8123  <a href="mailto:jim@mhwlegal.com">jim@mhwlegal.com</a></p> <p><i>Attorneys for Real Parties in  Interest Indian Wells Valley  Water District</i></p>

<p><b>BY E-MAIL</b>  John C. Murphy, Esq.  Douglas J. Evertz, Esq.  Emily L. Madueno, Esq.  Murphy &amp; Evertz LLP  650 Town Center Drive, Suite 550  Costa Mesa, California 92626  Phone: (714) 277-1700  Fax: (714) 277-1777  <a href="mailto:jmurphy@murphyevertz.com">jmurphy@murphyevertz.com</a>  <a href="mailto:devertz@murphyevertz.com">devertz@murphyevertz.com</a>  <a href="mailto:emadueno@murphyevertz.com">emadueno@murphyevertz.com</a></p> <p><i>Attorneys for Real Parties in Interest  Indian Wells Valley Water District</i></p>	<p><b>BY FEDERAL EXPRESS:</b>  Judge William Claster, Dept.  CX104  Orange County Superior Court  Civil Complex Center  751 West Santa Ana Blvd.  Santa Ana, CA 92701  Telephone: (657) 622-5303</p>
<p><b>BY FEDERAL EXPRESS:</b>  California Courts of Appeal  4<sup>th</sup> District Court of Appeal  Division Three  601 W. Santa Ana Blvd.  Santa Ana, California 92701  Telephone: (714) 571-2600</p>	