Civil No. H038264
[Superior Court Case No. CV 168936, consolidated with CV 169080]

In the Court of Appeal, State of California
SIXTH APPELLATE DISTRICT

_____

Joseph P. Pendry, et al.,
Plaintiffs and Respondents
vs.
The Pajaro Valley Water Management Agency,
Defendant and Respondent.

_____

Appeal from the Superior Court of the State of California
for the County of Santa Cruz
Honorable Timothy Volkmann, Judge Presiding

_____

APPLICATION OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE AN *AMICI CURIAE* BRIEF ON BEHALF OF RESPONDENTS; *AMICI CURIAE* BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e)(3), as counsel for *amici curiae* Association of California Water Agencies ("ACWA") and California State Association of Counties ("CSAC"), I hereby certify that neither *amici curiae* are "parties" in this case.

Additionally, no party or counsel for a party in this appeal authored any part of the attached *amici curiae* brief or made any monetary contribution to fund the preparation of the brief. No person or entity other than ACWA and CSAC and their attorneys made any monetary contribution to fund the preparation of the brief. Thus, I know of no entity or person that must be disclosed in this case under California Rule of Court 8.208(e), subdivisions (1) or (2).

Dated: February 4, 2013

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APPLICATION FOR LEAVE

TO FILE AMICI CURIAE BRIEF

To the Honorable Conrad L. Rushing, Presiding Justice:

Pursuant to California Rules of Court, Rule 8.200(c)(1), the Association of California Water Agencies and the California State Association of Counties respectfully request leave to file the accompanying brief of *amici curiae* in support of Respondent Pajaro Valley Water Management Agency ("PVWMA").

Amicus Curiae, the Association of California Water Agencies ("ACWA"), is the largest statewide coalition of public water agencies in the State, and in the Country. Its nearly 450 public agency members are collectively responsible for 90% of the water delivered to residents, cities, other public agencies, farms and businesses in California. ACWA is advised by its Legal Affairs Committee, which is comprised of __ members, including attorneys, from all regions of the State. The Committee monitors litigation of concern to its members, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

Amicus Curiae, the California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

ACWA and CSAC, and their constituent members, have a substantial interest in the outcome of this case because it involves the interpretation of Article XIII D of the California Constitution (added to the California Constitution by passage of Proposition 218 in 1996). The California Supreme Court in *Bighorn-Desert View Water Agency v. Virgil*[1] ("*Bighorn*") and this Court in *Pajaro Valley Water Management Agency v. Amrheim*[2] ("*Amrheim*") long settled the applicability of Article XIII D, Section 6, (referred to herein simply as "Proposition 218") to fees imposed by government agencies upon the extraction of groundwater. The interpretation of the procedural requirements of Proposition 218, however, has been, and continues to be, the subject of substantial ongoing litigation involving a host of California water agencies, counties, cities and groundwater rights owners.

This volume of litigation, including but not limited to the pending appeal, means ACWA and CSAC members are left vulnerable to costly litigation and uncertainty as to the scope of their members' obligations and rights. Specifically, ACWA's members include both agencies subject to Proposition 218 and groundwater rights owners (public and private) with an interest in enforcing their rights under Proposition 218.

Additionally, the Counties have an interest in ensuring uninterrupted delivery of water to their residents. Indeed, it is the established policy of the State of California that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." (Water Code, § 106.3.)

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[1] *Bighorn-Desert View Water Agency v. Virgil* (2006) 39 Cal.4th 205.
[2] *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364

Of the several questions presented by this case, four questions are of particular significance to ACWA and CSAC members.

First, ACWA and CSAC members have an interest in addressing whether PVWMA complied with the procedural requirements of Proposition 218 when it provided notice of the protest hearing to all parcel owners (well owners) of record. ACWA and CSAC submit that Proposition 218 clearly supports the one-notice-per-parcel and one-protest-per-parcel procedure and the best protects the interests of those directly subject to a properly related fee, as intended by the voters.

Second, ACWA and CSAC members have an interest in addressing whether the PVMWA fee was exempt from the election requirement of Section 6(c) as a charge for "water" service. As this Court held in *Armheim*, no distinction exists between charges or fees for groundwater extraction and charges for delivered water sufficient to apply different restrictions for purposes of Article XIII D (Proposition 218). If a groundwater fee is subject to Proposition 218, *because* there is no significant distinction between the fee and a charge for delivered water, then there is no reasonable basis for distinguishing between the fees for purposes of the election exemption. ACWA and CSAC members have an interest in uniformity of the application of Proposition 218 to fees for water service.

Third, if the Court determines elections are applicable to groundwater pumping fees under section 6 (c) of Article XIII D, then ACWA and CSAC members have an interest in addressing whether weighted voting is permissible for such elections. The plain language of the last sentence of section 6 (c) provides that weighted votes are permitted in a post-adoption election similar to the weighted votes required for assessments. If the Court concludes that election requirements apply to

fees for groundwater pumping, there exists no support for denying an agency's right to choose a weighted vote election. Proposition 218 limits the exercise of an agency's discretion to the method in which to conduct elections. Thus, ACWA and CSAC members have an interest in ensuring their members have the right to exercise that discretion in a way that best fits the circumstances of the fee and the interests of those subject to the fee.

Last, ACWA and CSAC members have an interest in addressing whether the Political Reform Act mandates *or merely authorizes* setting aside a decision of a legislative body in the event a conflict of interest existed on the part of a decision maker. Government Code section 91003, subdivision (b), supports only one conclusion: a court is authorized to exercise discretion to set aside the decision, but is not mandated to do so by the Political Reform Act. It is the interest of ACWA and CSAC public agency members, as public agencies, to ensure the finality of their decisions and to ensure that the public is not made to suffer when an elected official acts alone in violating his or her duties. The Political Reform Act clearly provides courts with discretion to evaluate the circumstances of the violation and order a suitable remedy.

Amici Curiae ACWA and CSAC believe their perspectives in this matter is worthy of the Court's consideration and that additional briefing will assist the Court in deciding this matter, and therefore hereby requests leave to file the *amici curiae* brief attached hereto.

No party or counsel for a party in this appeal authored any part of the attached *amici curiae* brief or made any monetary contribution to fund the preparation of the brief. The undersigned counsel has authored this brief *pro bono* on behalf of the *amici curiae* and, therefore, no additional

disclosures are applicable under California Rule of Court 8.200, subdivision (c)(3).

Dated: February 4, 2013

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TOA TOC & RE-START PAGE NUMBER

I. PRELIMINARY STATEMENT

Amicus Curiae, the Association of California Water Agencies ("ACWA"), is the largest statewide coalition of public water agencies in the State, and in the Country. Its nearly 450 public agency members are collectively responsible for 90% of the water delivered to residents, other public agencies, farms and businesses in California. *Amicus Curiae*, the California State Association of Counties ("CSAC") is a non-profit corporation made up of the 58 California counties. Counties play a key role in ensuring the dependability of water resources for the public health and safety.[3]

Whether groundwater pumping fees can be adopted in a uniform manner and whether those subject to such fees can exercise their rights vis-à-vis a uniform and predictable procedure is of great importance to ACWA and CSAC members.

Although the California Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* ("*Bighorn*") (2006) 39 Cal.4th 205 and this Court in *Pajaro Valley Water Management Agency v. AmRhein* ("*AmRhein*") (2007) 150 Cal.App.4th 1364 have long settled the applicability of article XIII D, Section 6,[4] (referred to herein simply as "Proposition 218") to fees imposed by government agencies upon the extraction of groundwater, litigation continues over the procedures public agencies must follow when adopting

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[3]*See, Amici Curiae's* Motion for Judicial Notice in Support of Amicus Curiae Brief ("MJN"), Ex. A, California Groundwater Bulletin 118 (Oct. 2003) pp. 38-39, (explaining that many counties have adopted Basin Management Objectives through ordinances designed to prevent groundwater basin depletion, groundwater quality degradation, and land subsidence, one of the many ways in which Counties are involved in groundwater management).

[4]All references to articles and sections are to the California Constitution, unless otherwise noted.

such a fee. This volume of litigation, including but not limited to the pending appeal, means ACWA and CSAC members are left vulnerable to costly litigation and uncertainty as to the scope of their obligations and as to their rights as owners of groundwater rights. Specifically, ACWA's members include both agencies subject to Proposition 218 and groundwater rights owners (public and private) with an interest in enforcing their rights under Proposition 218.

Of the several questions presented by this case, four are of particular significance to *amici curiae*. Each is answered by the plain language of the provision of Proposition 218 at issue. Thus, *amici curiae* respectfully request that the Court apply the measure as its plain meaning provides, as the public agencies they represent have acted reasonably in relying upon that plain language.

First, *amici curiae* have an interest in addressing whether PVWMA complied with the procedural requirements of Proposition 218 when it provided notice of the protest hearing to all parcel owners (well owners) of record. ACWA and CSAC submit that Proposition 218 clearly supports the one-notice-per-parcel and one-protest-per-parcel approach to the adoption of property related fees. This "one-per-parcel" procedure best protects the interests of those directly subject to the fee, as the voters who adopted Proposition 218 intended.

Second, *amici curiae* have an interest in addressing whether the PVMWA fee was exempt from the election requirement of Section 6(c) as a charge for "water" service. As this Court held in *AmRhein*, no distinction exists between charges or fees for groundwater extraction and charges for delivered water sufficient to apply different restrictions under Article XIII D (Proposition 218). If a groundwater fee is subject to Proposition 218, *because* there is no significant distinction between the fee and a charge for delivered water, then there is no reasonable basis to distinguish the fees for

purposes of the election exemption of Section 6(c). *Amici curiae* have an interest in uniformity of the application of Proposition 218 to ensure that groundwater rights holders and agencies imposing groundwater pumping fees have the flexibility envisioned by the voters. No basis exists for disregarding that intent.

Third, ACWA members have an interest in addressing whether weighted voting is permissible for Section 6(c) elections, in the event the Court concludes that such elections apply to groundwater pumping fees. The plain language of the last sentence of Section 6(c) provides that weighted votes are permitted in a post-adoption election "similar to" the weighted votes required by Section 4(e) for assessments. If the Court concludes that election requirements apply to groundwater pumping fees, there exists no support for deviating from the procedures spelled out by the plain language of Proposition 218. The *amici curiae* have an interest in ensuring that, where Proposition 218 allows some flexibility to best address the circumstances of the fee being imposed, their public member agencies – as agencies imposing fees and as agencies subject to certain fees – also have the ability to ensure the votes properly reflect the interests directly affected.

Last, *amici curiae* have an interest in addressing whether the Political Reform Act mandates *or merely authorizes* setting aside a decision of a legislative body in the event of a conflict of interest on behalf of a decision maker. Government Code section 91003, subdivision (b), does not mandate interference with a public agency decision without regard for the impact on the public interest. It is the interest of ACWA and CSAC members to ensure finality of their members' legislative decisions, especially decisions on which the public relies for the provision of water service. The Political Reform Act clearly provides courts with discretion to evaluate the circumstances of the violation and order a suitable remedy.

The Legislature did not intend for a draconian measure when the circumstances do not warrant one to remedy a violation by a single elected official not subject to control by the legislative body of which he or she is a member.

II. TO REQUIRE GOVERNMENT AGENCIES TO INVESTIGATE WHO EVENTUALLY PAYS A FEE THROUGH A "PASS-THROUGH" FOR PURPOSES OF PROPOSITION 218 NOTICE IS TO ADD REQUIREMENTS TO PROPOSITION 218 AND TO VITIATE PROPERTY OWNER'S RIGHTS

Proposition 218, titled "The Right to Vote on Taxes Act," gives those subject to a property related fee that right. ACWA and CSAC do not interpret that to mean that those "subject to the fee" may be any person who eventually indirectly pays some portion of a fee as a "pass-through" component of other charges, as Appellant argues. (Appellant's Opening Brief ["AOB"] at 21-23.) Proposition 218 does not require agencies to undertake that kind of investigation to provide notice of a proposed fee and right to protest. (Cal. Const., art. XIII D, § 6, subd. (a)(1).) Article XIII D, Section 6, seeks to protect the rights of record owners of land who are subject to a fee. In the case of groundwater production fees, "record owners of parcels of land" refers to owners of wells and the land they sit upon.

Proposition 218 makes clear that its procedures apply for the purpose of protecting property owners subject to a proposed fee, and tenants, but only when directly liable for the fee. (Cal. Const., art. XIII D, § 6, subd. (a)(1).) Section (6), subdivision (a)(1) requires that "[t]he agency shall provide written notice by mail of the proposed fee or charge <u>to the record owner</u> of each identified parcel upon which the fee or charge is proposed for imposition." (*Id*.)

The Proposition 218 Omnibus Implementation Act, codified at Government Code § 53750, *et seq.*, allows a public agency to save time and money by including a notice in a bill, or by any other mailing to the address to which the agency normally sends bills. (Gov. Code § 53755, subds. (a)(1) and (a)(2).) The discretion involved is only one of when and how to send notice, but not to whom to send it. Indeed, the Legislature provided that, to preserve any right to enforce a lien against the property, "the agency shall also mail notice to the record owner's address shown on the last equalized assessment roll if that address is different than the billing or service address." (*Id.* at subd. (3).)

To conclude (as Appellants do) from the plain language of Article XIII D, § 6, subdivision (a)(1), that notice should have been sent to tenants who are not "directly" liable for the fee and to residents to whom the fee is eventually "passed through" by way of a retail water bill contradicts the stated purpose of The Right to Vote on Taxes Act. That interpretation would require that an agency follow an uncertain trail to determine who may eventually *in*directly pay a fee and would impose an undue burden upon the agency imposing the fee.

For example, Appellant proposes that a district such as PVWMA must bypass a municipal water provider that owns and operates wells, and instead track down its customers to provide notice, because they indirectly pay the fee as a "pass-through". (AOB at 23.) Appellant does not explain how an agency is to track all those who may pay some portion of a groundwater production fee in some sort of "pass-through". (*See id.*) Additionally, bypassing property owners in that manner vitiates property owners' rights to vote clearly provided to them in Proposition 218.

III. GROUNDWATER PRODUCTION FEES, LIKE PVWMA'S AUGMENTATION CHARGE, ARE WATER CHARGES EXPRESSLY EXEMPT FROM THE ELECTION REQUIREMENT AT SECTION 6(c)

A. Groundwater Production Charges, Like the Water Delivery Charge in *Bighorn*, Are Water Service Charges For All Purposes of Article XIII D, Section 6

In *AmRhein*, this Court explained that the California Supreme Court's application of Proposition 218 to charges for water delivery service "compels" the application of Proposition 218 to fees imposed upon groundwater production. (*AmRhein*, *supra*, 150 Cal.App.4th at 1370, citing *Bighorn*, *supra*, 39 Cal.4th 205.) Indeed, this Court held that it had "failed to identify any distinction sufficient to justify a different result" than the result in *Bighorn*. (*Id.* at 1388-1389.) Thus, if there is no significant distinction between a fee for groundwater production and a charge for water delivery service for purposes of applying Proposition 218, then there is no reasonable basis to distinguish the charges for purposes of its procedural requirements. In for a penny, in for a pound.

B. No Reasonable Basis Exists to Distinguish Groundwater Production Services from Water Delivery Services for the Limited Purposes of Section (6)(c)

Section (6), subdivision (c) exempts from its post-adoption election requirement "fees or charges for sewer, water, and refuse collection services." (Cal. Const., art. XIII D, §6, subd.(c) [emphasis added].) Thus, groundwater production fees imposed to fund services to groundwater producers is exempt from the election

requirement for the same reasons charges for water delivery service is exempt.

The California Supreme Court and this Court applied Proposition 218 to charges for water delivery service and fees for groundwater pumping, *because* they are charged for the *service* the agency provides to the property and property owner. Indeed, each of the substantive limitations at Section (6), subdivision (b) of article XIII D refers to the application of Proposition 218 to a "service":

> **Requirements for Existing, New, or Increased Fees and Charges.** A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property relate service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question …

(Cal. Const., art. XIII D, §6, subd.(b) [emphasis added].)

Thus, there could have been no intent by the voters to apply a different meaning to "service" in the very next subsection. This is an application of the common rule of statutory construction *in pari materia*. (*E.g.*, *Lexin v. Superior Court* (2010) 47 Cal. 4th 1050 [construing conflict of interest statutes]; *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal. App. 4th 13 [construing rent control legislation].)

Unlike in *Bighorn*, where the context of article XIII D supported a narrower interpretation of "fees" or "charges" than in article XIII C, the context of the use of the word "services" within article XIII D provides no reason to distinguish its meaning in this case. (*See Bighorn, supra,* 39 Cal.4th at 215-216.) There is no language that even suggests use of the word "service" in two consecutive subdivisions of Section 6 of Article XIII D could reflect the voter's intent to use different meanings in each. (*See,* art. XIII D, §6, subds. (b) and (c).) Thus, to say that the word "service" at Subdivision (6)(c) does not refer to the groundwater management services provided for the benefit of groundwater producers is also to say that the substantive limitations of Subdivision (6)(b) are inapplicable to the same, when this Court has already concluded to the contrary. (*AmRhein, supra,* 150 Cal.App.4th at 1393.)

Accordingly, the Legislature had no need to define "water service" in the Proposition 218 Omnibus Implementation Act. It could define "water" alone. (Gov. Code § 53750, subd. (m).) "Water" means any system of public improvements [not necessarily pipes] intended to provide for the production, storage, supply, treatment, or distribution of water." (*Id.*) The fact that the

word "services" is added after water at subdivision (c) does not change that definition, since "service" is used uniformly throughout article XIII D.

Appellant's argument that pipes are required to constitute a "water service" under Proposition 218 ignores the functions typically funded by groundwater production fees. (AOB at 8-9.) The "service" various types of groundwater public agencies provide involves "management [in the form of] planned and coordinated monitoring, operation, and administration of a groundwater basin or portion of a groundwater basin with the goal of long-term sustainability of the resource." (*See*, MJN, Ex. A, California Groundwater Bulletin 118 (Oct. 2003) at 32.)

As the Department of Water Resources explains, special district agencies like PVWMA impose groundwater pumping fees to manage groundwater basins through various activities that do not always include piping alternative supplies to groundwater pumpers. (*Id.* at 32-35.) Nevertheless, as this Court held in *AmRhein*, the groundwater management PVWMA provides is a "service" to property owners (the well owners) and fees imposed to fund that service are therefore subject to Proposition 218.

Moreover, a comparison of domestic water service to storm drainage services is not helpful to the question before the Court. (AOB at 7-10, citing *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351.) In *Salinas*, the question was whether the storm sewer services might be considered part of "water service." (*Id.* at 1359.)[5] Here, however, Appellants argue

[5] *Amici* note that the PVWMA makes a cogent argument in its Respondent's Brief in the related *Griffith* appeal that *HJTA v. City of Salinas* bears revisiting in light of *Greene v. Marin County Flood Control & Water Cons. Dist.* (2010) 49 Cal.4th

that PVWMA does not provide *any* service to them at all, because PVWMA does not have pipes connecting to Appellants' properties. Thus, whether PVWMA provides *any* service to Appellants is a question of whether PVWMA properly allocated the fee to them, not whether the election requirement applies.

IV. IF ELECTIONS ARE REQUIRED FOR GROUNDWATER PRODUCTION FEES, PROPOSITION 218 PERMITS WEIGHTED VOTING

Appellants argue that PVWMA did not comply with Section (6)(c)'s "majority vote" election requirement, Section (6)(c) does not purportedly permit weighted voting. (AOB at 10-15.) However, Section (6)(c) does not define "majority vote." (Cal. Const., art. XIII D, § 6, subd. (c).) Instead, Section 6(c) states plainly that "[a]n agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision," which refers to weighted voting required for assessments at article XIII D, section 4, subd. (e). (*Id.*) Thus, weighted voting is clearly permitted by Proposition 218.

In *Greene v. Marin Co. Flood Control & Water Conservation Dist.*, the California Supreme Court refrained from deciding whether "procedures similar to those for increases in assessments in the conduct of elections" referred to in Section (6)(c) include weighted voting procedures required in Section (4)(e). (*Greene v. Marin Co. Flood Control & Water Conservation Dist.* (2010) 49 Cal. 4th 277, 293.) The language of Proposition 218 itself, however, does not suggest otherwise. Proposition 218

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277. Respondents Brief, Griffith v. Pajaro Valley Water Management Agency, Case No. H038087, at pp. 17-18.

leaves it to local agencies to determine whether such procedure best protect the interests of those directly subject to the fee. (Cal. Const., art. XIII D., § 6, subd. (c).) Additionally, since *Greene*, the Court of Appeal has answered the question in *Golden Hill Neighborhood Assn., Inc. v. City of San Diego*, concluding that weighted voting is allowed for purposes of Section 6(c) elections. (*Golden Hill Neighborhood Assn., Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416.)

Appellant's argument that there is no "workable methodology" for weighted voting relating to groundwater production fees is unsupported by the nature of groundwater production. (AOB at pp. 10-15.) The nature of groundwater production makes weighted voting feasible and more accurately implements the intent of voters that the right to vote be made available to those "upon which the fee or charge is proposed for imposition." (*See*, Cal. Const., art. XIII D, §6, subd. (a)(1).)

Groundwater production requires significant investment by producers, including millions of dollars in the costs to drill and maintain wells, the costs of the land upon which wells sit, and the power and other costs to operate wells. Thus, once groundwater production has been established, production is generally consistent, reflecting rational decisions to benefit from substantial sunk investment. Additionally, in the case of groundwater basins in which groundwater production rights have been adjudicated, the production rights serve as reasonable bases for weighted protests. (*See*, MJN, Ex. A, California Groundwater Bulletin 118 (Oct. 2003) at 40.)

V. THE LEGISLATURE DID NOT INTEND TO PUNISH PUBLIC AGENCIES FOR CONFLICT INTEREST VIOLATIONS OF INDIVIDUAL BOARD MEMBERS

A court may set aside an official legislative action pursuant to the Political Reform Act, if (1) a violation of the conflict of interest statutes is shown, and (2) the official action might not otherwise have been taken or approved. (Gov. Code § 91003.) There is nothing in Government Code section 91003 that requires invalidation of a legislative action, nor is there anything that precludes a court from considering the effect of such invalidation on the public.

Unlike the mandatory language of Proposition 218 requiring invalidation of a fee for non-compliance, Government Code section 91003 has no such language. Thus, the Legislature did not intend for a draconian measure when the circumstances do not warrant one to remedy a violation of an elected official acting on his or her own. This is especially true in the context of decisions relating to public water services upon which so many rely.

The Political Reform Act provides other remedies which do not punish the public for a single individual's action. (Gov. Code §§ 91000 [criminal misdemeanor], 91003.5 [discipline by agency], 91005 and 91005.5 [civil liability].) Here, if the lower court had found a conflict of interest existed on the part of one of the directors when PVWMA adopted Resolution 2010-04, it could have exercised its discretion to apply a suitable remedy. The record show, however, that the lower court found no such conflict below.

Dated: February 4, 2013

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