

APPROVED  
 By the Board of Directors of  
 The Metropolitan Water District  
 of Southern California  
 at its meeting held

7-15

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

OCT 13 1998

September 28, 1998

*Dawn Cain*  
 EXECUTIVE SECRETARY

**To:** Board of Directors (Legal and Claims Committee--Action)

**From:** General Counsel  
*W. Gregory Taylor*

**Subject:** Authorizing the General Counsel to Participate as Amicus Curiae in the California Supreme Court's Review of City of Barstow v. Mojave Water Agency

### RECOMMENDATION(S)

It is recommended that the General Counsel be authorized to participate as amicus curiae, either individually or in conjunction with other parties, in the California Supreme Court's review of City of Barstow v. Mojave Water Agency.

### EXECUTIVE SUMMARY

The California Supreme Court has agreed to review the Fourth District Court of Appeal's decision in City of Barstow v. Mojave Water Agency. The case involves an adjudication of rights in the Mojave River groundwater basin. The trial court approved a stipulation agreed to by most of the parties which adopted a "physical solution" providing for an equitable apportionment of the basin's water among the stipulating parties, and after a trial imposed the terms of the stipulation on non-stipulating parties. The non-stipulating parties appealed, arguing that the equitable apportionment impaired their preexisting overlying rights. The appellate court agreed and reversed the trial court. In the course of its opinion, the appellate court used language which could be interpreted to limit the equitable authority of courts or the State Water Resources Control Board to condition allegedly senior water rights consistent with Constitutional public interest and reasonable use and public trust requirements. Indeed, several parties have subsequently asserted that the appellate court opinion limited the State Board's authority to condition earlier priority water rights to help implement its Bay/Delta flow requirements.

The Supreme Court decision to review the case vacates the appellate court decision. However, the same issues will be raised and argued to the Supreme Court, and the authority of the courts (and by implication the State Board) to condition senior water rights where that is necessary to protect the public interest will be among those issues. While Metropolitan has no direct interest in the outcome of the case, the General Counsel believes that Metropolitan has a significant interest in general water rights issues involved and should seek to participate as amicus curiae to assert that interest. The General Counsel has been in contact with other water supply agencies which share Metropolitan's interest to discuss possible joint participation.

## DETAILED REPORT

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The California Supreme Court has agreed to review the decision of the Fourth District Court of Appeal in City of Barstow v. Mojave Water Agency. The case involves the adjudication of rights to pump from the overdrafted Mojave River groundwater basin. Prior to trial before the Superior Court for Riverside County, most of the parties agreed to a stipulation which would impose a "physical solution" on the stipulating parties assigning each party a pumping allowance based on its production over the previous five years, without regard to the party's priority. Any pumping above the party's allowance would be subject to a replacement water assessment. Subsequently, a trial was held with respect to the parties who did not agree to the stipulation. After trial, the court held that "the constitutional mandate of reasonable and beneficial use dictates an equitable apportionment of all rights when a water basin is in overdraft," and therefore imposed the physical solution on the non-stipulating parties.

The non-stipulating parties appealed, asserting that the trial court's judgment had failed to recognize their rights as senior or overlying pumpers. The Fourth District Court of Appeals agreed, holding that a pure equitable apportionment that mechanically requires water users to equally reduce water use without regard to respective priorities and other factors is invalid. In the course of its opinion, the appellate court used language which, if read too broadly, could be interpreted to limit the equitable authority of the courts or the State Water Resources Control Board to condition allegedly senior water rights where that is consistent with the Constitution's public interest and reasonable use and public trust requirements. While we believe such an interpretation would be inconsistent with the modern view of water law in the dry western United States (See eg. prior California appellate court decisions in United States v. SWRCB ("Racanelli") and the Imperial Irrigation District waste of water cases; the California Supreme Court opinion in City of Los Angeles v. San Fernando; and the U.S. Supreme Court opinion in Nebraska v. Wyoming), several parties indeed have asserted that the appellate court opinion limited the State Board's authority to condition allegedly senior water rights in order to implement its Bay/Delta flow requirements.

The Supreme Court's decision to review the case vacates the appellate court's opinion and its potentially misleading language. However, the same issues will be argued to and considered by the Supreme Court in its review of the case. While Metropolitan does not have a direct interest in the ultimate division of the rights to the Mojave River groundwater basin, it does have an interest in the Supreme Court's discussion and resolution of the legal issues involved. This is especially so because of the implications which the decision could have on State Board authority in its present proceedings to address the impacts of other water users on meeting Bay/Delta flow and other needs. The General Counsel therefore recommends that he be authorized to participate before the Supreme Court as amicus curiae to assert and protect Metropolitan's interests. The General Counsel has discussed this case with representatives of other water supply entities which might share Metropolitan's position in the litigation and it is possible that Metropolitan's participation could be as part of a joint brief on behalf of a number of parties.