



MCCORMICK, KIDMAN & BEHRENS, LLP
LAWYERS

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CALIFORNIA SUPREME COURT ASKED TO REVIEW MOJAVE WATER CASE

The Mojave Water Agency ("MWA") has petitioned the California Supreme Court to accept review of a decision by the 4th District Court of Appeal. The Court of Appeal decision partially overturned a decision by Riverside County Superior Court (the case was transferred out of San Bernardino County) Judge E. Michael Kaiser in the Mojave River Basin adjudication (City of Barstow v. Mojave Water Agency). The high court has until about the end of August 1998 to decide whether to accept the case.

A. Water Right Adjudication.

The Mojave Adjudication grew out of a lawsuit originally filed by McCormick, Kidman & Behrens, LLP on behalf of the City of Barstow and the City's water purveyor, the Southern California Water Company. The basis of the original complaint was that unbridled development upstream in the fast growing Victor Valley (the communities of Victorville, Apple Valley, Adelanto and Hesperia) was depleting the natural surface and subterranean flow of the Mojave River and intercepting natural recharge of groundwater aquifers serving the Barstow area water wells. The original complaint asked for an order reducing upstream water production so that natural historical flows would again be available at Barstow. The complaint also sought to compel the MWA to carry out its duty to bring supplemental water to the Mojave Valley.

About a year later the MWA filed a cross-complaint which broadened the case into a general adjudication of the surface and subsurface flows of

the Mojave River and the groundwater in five interconnected basins underlying the Mojave Valley (the "Mojave System"). The cross-complaint sought to determine a fair share amount of water that could be produced by each well owner within the Mojave System. After the cross complaint was filed, but before answers were required, the superior court ordered a "litigation standstill" and ordered the parties to work on a physical solution to the chronic overdraft of the Mojave System.

B. The Physical Solution Developed.

After extensive fact finding by a team of hydrologists, hydro geologists, engineers and other water resource experts, a draft physical solution was proposed. A drafting committee of attorneys and water experts, representing a range of interests from within the Mojave Valley convened to hone the physical solution, taking into consideration numerous asserted special circumstances and developing rules which seemed to fit special cases without conferring unfair advantage or disadvantage on any party. The physical solution used most of the tools of modern water resource management, including water conservation, water recycling, conjunctive use and water marketing. The physical solution also provided for protection of certain environmental values and eventually won the support of the State of California and the Department of Fish and Game.

In broad terms, the physical solution divides the available water supply within each of the five basins, or subareas, among water producers in each subarea proportionately to their highest annual production during the years 1986 through 1990. In the future, those who produce water in excess of their fair share are required to pay an assessment to purchase

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imported water to offset their over-production. Each subarea is assigned an aggregate obligation to provide water to the next downstream subarea and methods are adopted to determine annual inter-basin flows and to allocate the cost of inter-basin make-up water among water right holders. MWA was designated as the initial watermaster and directed to develop supplemental water supplies and to build and to fairly allocate the cost of needed conveyance facilities so that supplemental water can be distributed throughout the Mojave Valley.

C. Stipulation, Trial and Order of Physical Solution.

Ultimately, over ninety percent of water produced from the Mojave System was represented by parties who stipulated to the physical solution. The superior court held a two month trial during which the physical solution was examined and the non-stipulating parties were given the opportunity to prove why their water rights were not adequately recognized and protected by the physical solution. The primary protagonists were (1) the City of Adelanto which claimed that it held prior and paramount water rights and that the physical solution was inadequate, (2) a small group of farmers claiming overlying rights exempt from the physical solution, and (3) the single largest water producer within the Mojave System who claimed that its water rights were understated in the physical solution. The trial court upheld the physical solution and ordered it to be imposed upon the dissenters. After Adelanto ultimately stipulated to the physical solution, the remaining dissenters appealed the trial court's decision to the Fourth District Court of Appeals.

Judge Kaiser's statement of decision, which was reversed in part, is firmly premised upon the California Constitution's prohibition against the unreasonable method of use of water. Overwhelming evidence at trial established that the overdraft of the Mojave System was both long term (since the 1950s) and critical (agricultural production alone exceeds the safe yield by 40%). The evidence also clearly established that very substantial agricultural and municipal and industrial ("M&I") economies had grown predicated on the continuous overdraft of the Mojave System, that the overdraft was well known and that the overlying users had failed to act to protect their rights from prescription by M&I producers. The trial court found that continued overdraft of the Mojave System without participation in the physical solution was an unreasonable method of use of water in violation of the State Constitution. Judge Kaiser, therefore, imposed the physical solution on the parties who dissented at trial.

D. Court of Appeal Opinion.

A three judge panel of the 4th District, Division 2, California Court of Appeals sustained the physical solution as to the stipulating parties, but reversed the trial court decision with respect to the involuntary imposition of the physical solution upon the dissent-

ing agricultural landowners (known as the "Cardozo Group Appellants") who claimed overlying water rights. The trial court's determination of water entitlement for the large water producer (the "Jess Ranch") was also reversed.

The Court of Appeals' decision (the "Opinion") pays scant attention to the extensive trial court record and makes broad water right pronouncements as a matter of law. Most troubling is the Opinion's general elevation of current and future overlying water rights to a paramount status, exempt from physical solution. The Opinion implies, at least, that appropriative type rights, meaning all M&I uses, must be extinguished before overlying water right holders, usually agricultural land uses, can be compelled to reduce usage as part of a physical solution to a critically and chronically overdrafted water system. Another troubling aspect of the Opinion is its treatment of the trial court approved physical solution as essentially a private contract among the stipulating parties at the same time the Opinion seeks to dictate the terms and parties to the contract as respects the Jess Ranch.

E. Petition for Rehearing.

Following issuance of the Opinion, the Southern California Water Company and the City of Barstow, joined by MWA and most of the other M&I water producers from the Mojave System, requested the Court of Appeals to reconsider its opinion. The petition for rehearing was to make a record of the numerous evidentiary errors in the Opinion. The petition was denied before the successful appellants had even filed their opposition to the petition. MWA's decision to petition the California Supreme Court for hearing followed.

F. Water Right Priorities and Reasonable Use.

The history of water right development in California has seen a number of fundamental "sea changes." Early water right law (after the Spanish/Mexican mission and rancho eras) in California was based upon the custom of the mining camps, i.e., the doctrine of prior appropriation, based on "first-in-time, first-in-right". Prior appropriation continues as the exclusive water right system throughout the arid and semi-arid western United States, except in California. Following the gold rush era in California, promotion of agricultural land development led to the ascension of English common law style land ownership-based water right doctrines. Riparian and overlying water rights gained ascendance over appropriative, non-land ownership-based water rights.

This era reached both its high water mark and end with the California Supreme Court decision in *Herminghaus v. Southern California Edison*, which, in 1926, upheld the absolute priority of a downstream riparian's wasteful agricultural water uses against an upstream municipal, power generation water claimant. This decision so outraged Californians that the very next year the California constitution was amended to state that the doctrine of

reasonable and beneficial use, and the prohibitions against waste and unreasonable use, and unreasonable method of use of water applied to land ownership-based water rights. Since then, water right cases have been decided on a situational basis, depending heavily on the particular facts and circumstances of each case. The California Supreme Court has repeatedly urged and empowered the trial courts to seek or impose physical solutions which promote the constitutional imperative. After the 1928 constitutional amendment (now Article X, Section 2), no California Supreme Court case has been decided based upon the absolute priority of land ownership-based water rights. One of the high court's most recent pronouncements on the subject, *In re Waters of Long Valley Creek System*, went farther and declared that the existence of unregulated and unexercised land ownership-based water rights created so much uncertainty as to thwart investment in much needed water development infrastructures in California.

G. Turning Back the Hands of Time.

The Court of Appeals' Opinion in the Mojave case would revert groundwater law back to priority rules long ago abandoned with respect to surface water. No appellate decision since *Herminghaus* has elevated land ownership-based water rights to the level of priority assigned to the Cardozo Group in the Opinion. The Opinion flies in the face of the Supreme Court's *Long Valley* decision and points up the critical need for the Supreme Court to take another groundwater adjudication case to clear up the rules to be applied by trial courts after the Supreme Courts decision in *City of Los Angeles v. City of San Fernando* ("*San Fernando*").

Since wells in a groundwater basin take water from a common pool, each producer impinges on water available to every other producer. When demand has exceeded surplus water available in the basin for more than five years, the classic elements of prescription exist, except that every water producer has prescribed against every other water producer. A proportionate reduction seems eminently sensible and equitable.

The problem with this theory surfaced in the *San Fernando* case where not all of the municipal water producers were in agreement on a *pro tanto* reduction. The Supreme Court found that mutual prescription couldn't work under these circumstances because Civil Code Section 1007 prevents prescription against public agencies and public utilities. Civil Code Section 1007, however, does not prevent public agencies and public utilities from prescribing against private parties. But "one way prescription" would be inequitable and so the *San Fernando* court, *in dicta*, posited that private water producers might be protected in their extant production by the doctrine of "self help." This seems to imply that *unexercised* overlying rights are subject to prescription by both municipal production and actual overlying produc-

tion. Unanswered is whether *exercised* overlying water rights, protected by self help, are subject to or exempt from reduction, along with municipal production, in order to solve the overdraft of a groundwater basin.

The Court of Appeals Opinion in the Mojave case resolved this puzzle in favor of absolute priority for overlying water rights, both exercised and unexercised.

H. Trial Courts Need Clarification for Groundwater Adjudications after San Fernando

In *City of Pasadena v. City of Alhambra* ("*Pasadena*") the Supreme Court validated a trial court determination that employed a proportionate reduction of all water rights based upon past production from a groundwater unit known as the Raymond Basin. The *pro tanto* reduction of water production rights was predicated upon a doctrine denominated "mutual prescription." In *San Fernando*, the Supreme Court stated that mutual prescription was a valid approach in the circumstances of the *Pasadena* case, but stated that a truly equitable apportionment would take many factors into consideration and added famous footnote 61 by way of illustration:

"Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."

The *San Fernando* decision is widely regarded as having invalidated mutual prescription as way to solve overdraft in groundwater basins. Even though the opinion in *San Fernando* clearly states that distinguishing circumstances made mutual prescription valid in *Pasadena*, footnote 61 states that many factors besides proportional water use should be taken into consideration in order to achieve an equitable apportionment of available supply. Taking his cue from footnote 61, Judge Kaiser examined a multitude of factors in the course of validating the physical solution suggested by the stipulating parties at trial in the Mojave case.

Great uncertainty in the law has now been created by the Opinion because of its emphasis on the single factor of water right priority as to overlying water rights in the context of a critically and chronically overdrafted hydrologic system. The opinion ignores many factors suggesting that overlying water rights

should, at minimum, share equally in the physical solution, including the long term and critical nature of the overdraft in the Mojave System, the unprecedented mix of surface and groundwater priority claims asserted because of the hybrid nature of the Mojave System, and the facts that overlying users alone would overdraft the System and that a large M&I economy grew up in reliance upon the System without challenge from overlying water right claimants for more than forty years.

1. Certainty Required to Develop Water Infrastructure for Reasonable and Beneficial Appropriative Uses

The California Supreme Court in *Long Valley* validated a surface water adjudication under statutory authority by the State Water Resources Control Board. The State Board had circumscribed unexercised, inchoate riparian water rights in order to accommodate established riparian and appropriative uses. The *Long Valley* decision explains at considerable length the great uncertainty created if unexercised riparian water rights are given priority to spring forth and displace established appropriative uses. This uncertainty impedes investment in water development facilities needed for appropriation and would frustrate the constitutional mandate to put the waters of California to their optimal reasonable and beneficial use.

Ironically, the Court of Appeals' Opinion in the Mojave case turns *Long Valley* on its head by exempting from physical solution both exercised and unexercised overlying water rights to groundwater

(often said to be analogous to the very riparian rights circumscribed in *Long Valley*) because of the uncertainty attendant to an "equitable apportionment."

Another important question the Supreme Court needs to address is whether the principles announced in *Long Valley* are limited to statutory adjudications by the State Water Resources Control Board. Despite the fact that the courts have co-extensive jurisdiction with the State Board to implement Article X, Section 2 of the California Constitution, a Court of Appeals has held in *Wright v. Goletta* that the principles articulated in *Long Valley* apply only to statutory adjudications by the State Board. The Opinion seems to concur that the uncertainties created by unexercised riparian rights are not equally applicable to overlying rights in groundwater.

Conclusion

The Court of Appeals Opinion leaves the Mojave System physical solution intact as to the stipulating parties but opens the door to unrestricted exercise of inchoate overlying rights by non-stipulating land owners. The Opinion, if left in place, will pose a serious impediment to future attempts to gain management over California's many seriously overdrafted groundwater basins. Groundwater resources are widely acknowledged as a key to California's future water security. The Opinion points up the need for the Supreme Court to accept the case in order to clarify important issues related to adjudication of groundwater basins.

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