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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Office of General Counsel

August 14, 1998

Ms. Gala Argent
Managing Editor
California Water Law and Policy Reporter
Post Office Box 1425
Foresthill, California 95631

Dear Ms. Argent:

We enjoyed David R.E. Aladjem's article summarizing the Fourth District Court of Appeal's decision in *Barstow v. Mojave Water Agency* (1998) 64 Cal.App.4th 737, in your July 1998 issue. It was a clear explanation of a case involving an exceedingly arcane area of water law--basin-wide groundwater adjudications. However, we believe that Mr. Aladjem's extrapolation of the decision into a different and equally arcane area of water law--State Water Resources Control Board (State Board) regulation of water rights to implement Bay/Delta environmental requirements--went too far.

As described in the article, *Barstow* involved the adjudication of an overdrafted groundwater basin and turned on the question of whether one could "disregard" existing rights of overlying landowners. The Court of Appeal held that such a proceeding "cannot ignore or eliminate the rights of riparian or overlying property owners" when attempting to allocate water use among competing rights. (64 Cal.App. at 770.) Therefore, a "pure equitable apportionment" that mechanically requires water users to equally reduce water use without regard to respective priorities and other factors is invalid.

Where we would differ with the article is in its thesis that this groundwater adjudication case will have a "major impact on the manner in which the State Water Resources Control Board may allocate the responsibility for providing water to meet flows needed to preserve the Bay-Delta Estuary." (Pp. 201-202 of the article.) The *Barstow* opinion has nothing to do at all with the State Board's authority to regulate water rights to implement Bay/Delta flow requirements. That area of law has, of course, been exhaustively analyzed in *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, a case not discussed in either *Barstow* or the article. There, the Court of Appeal recognized California's existing priority system, but recognized also that "no water rights are inviolable; all water rights are subject to governmental regulation." (182 Cal.App. at 106.) Specifically, the court enunciated a State Board duty to take appropriate action to curtail excess diversions by water users other than the junior water projects in order to implement Bay/Delta flow requirements. (182 Cal.App. at 118 & 120.) Moreover, in

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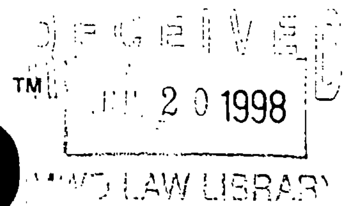

CALIFORNIA WATER™

LAW & POLICY Reporter

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FEATURE ARTICLE

AFFIRMING SECURE PROPERTY RIGHTS IN WATER: *BARSTOW V. MOJAVE WATER AGENCY*

By *David R.E. Aladjem*

The prevailing wisdom—at least in certain portions of the California water community—has been that secure property rights in water are a thing of the past. This view is best articulated in *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal.App.3d 548, 573 (1990), where the court stated:

> All things must end, even in the field of water law. It is time to recognize that this law is in flux and that its evolution has passed beyond traditional concepts of vested and immutable rights.... [T]he concept that water use entitlements are clearly and permanently defined and are neutral and rule-driven is a pretense to be discarded. It is a fundamental truth... that everything is in the process of changing or becoming in water law (internal quotation marks and brackets omitted).

Under this view of water rights, property rights in water are mere instruments of convenience, to be reallocated to higher social priorities without compensation whenever necessary. Courts must:

> recognize this evolutionary process, and urge reception and recognition of same upon those whose work in the practical administration of water distribution makes such change understandably difficult to accept.

The Fourth District Court of Appeal's recent decision in *Barstow v. Mojave Water Agency*, ___Cal.App.4th___, 98 Daily Journal D.A.R. 5717 (June 3, 1998), in marked contrast to the counsel of *Imperial Irrigation District*, strongly affirms the primacy of secure property rights to water resources in California. The *Barstow* decision—in a lengthy and detailed analysis of the last quarter-century of California water rights law—demonstrates that the *Imperial Irrigation District* court's view of water rights is unsupported by any other California appellate decision

Because of this analysis, *Barstow*, if upheld on review, is likely to have a major impact on California water rights law. In particular, *Barstow* will have a major impact on the Bay-Delta water rights hearings that are scheduled to begin this July before the State Water Resources Control Board. *Barstow* directly calls into question whether Flow Alternative 5—the so-called "share the pain" flow alternative—is beyond the authority granted to the State Water Resources Control Board because it ignores the water rights priority system and the protections accorded to areas of origin.

The Physical Solution and the Trial Court Decision

In 1990, the City of Barstow and Southern California Water Company filed an action that alleged that the activities of certain upstream water purveyors were having an adverse impact on the water supply available to serve the residents of Barstow. During the next year one of the defendants, Mojave Water Agency, commenced an adjudication of all rights to water in the Mojave River watershed. Because water

The opinions expressed in attributed articles in *California Water Law & Policy Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *California Water Law & Policy Reporter*.

users in the Mojave River watershed claim almost every type of water right known under California law, the major parties quickly decided that the most sensible course would be to attempt to develop a physical solution that would avoid the need for protracted (and costly) litigation.

The physical solution developed by the parties expressly attempted to avoid the very difficult issues that could arise by attempting to determine the quantity of water that each party to the litigation might be enabled to obtain under traditional California water rights law. In particular, the parties did not attempt to comply with the general principle that the holders of overlying rights to groundwater have rights that are prior to the rights of appropriative users of groundwater. (*See, e.g., Hi-Desert County Water District v. Blue Skies Country Club, Inc.*, 23 Cal.App. 4th 1723, 1730-31 (1994) *quoting Pasadena v. Alhambra*, 33 Cal.2d 908, 926 (1949). Instead, the decision of the drafters of the settlement agreement was "that there would not be a priority system other than an equal priority system." (*Barstow*, 98 Daily Journal D.A.R. at 5719). In the end, the parties developed a physical solution that does not limit the quantity of groundwater that a given water user may pump but does require parties that pump more than a specified amount to pay for the importation of supplemental water supplies.

As with any complicated dispute, several of the parties refused to sign the proposed settlement agreement and proceeded to trial. After a bench trial, the court determined that "the constitutional mandate of reasonable and beneficial use [contained in article X, section 2] dictates an equitable apportionment of all rights when a water basin is in overdraft." (*Id.* at 5718). Based on this ruling, the trial court found that the proposed physical solution "was fair and equitable to nonstipulating farmers." (*Id.*) These farmers appealed, posing the question of whether the trial court "could disregard overlying water rights in order to 'equitably apportion' water rights to all producers in an overdrafted water basin." (*Id.* at 5719).

The Court of Appeal's Decision

The Court of Appeal's decision addresses the claim that the trial court had authority to equitably apportion the waters of the Mojave River system in two steps. First, the court addresses the contention of respondents Mojave Water Agency (which represented all of the parties to the settlement agreement), City of Barstow, and Southern California Water Company that California courts have consistently approved the use of equitable apportionment in cases involving the rights to water in overdrafted groundwater basins. Second, the court addresses the respondents' larger contention that article X, section 2 of the California Constitution permits a trial court to disregard existing water rights in reaching an equitable allocation of water.

Equitable Apportionment and Footnote 61

Respondents based their theory of an equitable apportionment on two of the seminal California Supreme Court cases on groundwater rights: *Pasadena v. Alhambra*, 33 Cal.2d 908 (1949) and *Los Angeles v. San Fernando*, 14 Cal.3d 199 (1975).

The Court of Appeal's opinion quickly disposes of respondents' claim that the *Pasadena* decision in some way supports the notion of equitable apportionment. The Court of Appeal notes that *Pasadena* teaches that: "when there was no surplus water, the riparian and overlying rights would prevail [over those of an appropriator] unless the appropriator had acquired prescriptive rights." (*Barstow*, 98 Daily Journal D.A.R. at 5721). The Court of Appeal's opinion suggests — but does not state — that this recognition of the prior rights of overlying landowners would preclude an equitable apportionment that did not recognize those prior rights. The Court of Appeal then finds that *Pasadena* is irrelevant to respondents' claim because neither respondents or the trial court relied "on the doctrine of prescriptive rights to claim priority." Without the claim of prescriptive rights, *Pasadena* simply does not apply.

Having disposed of *Pasadena*, the Court of Appeal turned its attention to *San Fernando*, and in particular, to footnote 61 of that opinion. Respondents pointed out that, in *San Fernando*, the California Supreme Court had been urged to approve a mutual prescription theory along the lines of the theory it had used in *Pasadena*. The Supreme Court refused that invitation and instead pointed out that the mechanical application of the five year prescriptive period would not "necessarily result in the most equitable apportionment of water according to need. A true equitable apportionment would take into account many more factors." (*Id.* at 5722, *quoting San*

Fernando, 14 Cal.3d at 265). In footnote 61, which follows that sentence, the Supreme Court used the U.S. Supreme Court's decision in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), to illustrate the appropriate use of equitable apportionment. Quoting the U.S. Supreme Court, the California Supreme Court stated that "if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible." (*Barstow*, 98 Daily Journal D.A.R. at 5722, *quoting San Fernando*, 14 Cal.3d at 265-66, fn.61, *quoting Nebraska*, 325 U.S. at 618). The U.S. Supreme Court continued: "Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle." (*Nebraska v. Wyoming*, 325 U.S. at 618). Nonetheless, the U.S. Supreme Court recognized that other factors must be taken into account in developing an equitable apportionment. (*Id.*) Respondents contended that this language in footnote 61 of *San Fernando* "has been consistently interpreted as approval by the California Supreme Court of the use of equitable apportionment as a basis to allocate water among users in an overdraft basin." (*Barstow*, 98 Daily Journal D.A.R. at 5722).

The Court of Appeals, however, disagreed, stating point blank that "the subsequent cases cited by respondents do not support the argument." (*Id.* at 5723). To support this statement, the Court of Appeal carefully considered the reasoning of the cases respondents contended supported their position: *Hi-Desert County Water District v. Blue Skies Country Club, Inc.*, 23 Cal.App.4th 1723 (1994) and *Wright v. Goleta Water District*, 174 Cal.App.3d 74 (1985).

Barstow rejects respondents' claim that *Hi-Desert* supports an equitable apportionment without regard for pre-existing rights. *Hi-Desert* invokes *San Fernando* for two different principles, neither of which supported the respondents' interpretation of *San Fernando*. First, *Hi-Desert* notes that *San Fernando* clarified that overlying users in an overdrafted basin retained their overlying rights by continuing to pump groundwater rather than acquiring new prescriptive rights. (*Barstow*, 98 Daily Journal D.A.R. at 5723). In other words, "overlying users retain priority but lose amounts not pumped." (*Id. quoting Hi-Desert*, 23 Cal.App.4th at 1731-32). Relying on this holding from *San Fernando*, the *Hi-Desert* court found that a court order that interpreted a stipulated judgment so as to ignore the priority of overlying rights represented "an improper redefinition of the rights of the parties." (*Hi-Desert*, 23 Cal.App.4th at 1733). Without an explicit statement, *Barstow* clearly implies that this use of *San Fernando* by the *Hi-Desert* court is inconsistent with respondents' theory of equitable apportionment. Second, *Hi-Desert* recites that *San Fernando* rejected the mechanical application of the doctrine of mutual prescription "because it does not necessarily result in the most equitable apportionment of water according to need." (*Id. quoting Hi-Desert*, 23 Cal.App.4th at 1734, internal quotation marks omitted). In interpreting the footnote accompanying that sentence, respondents contended that imposing proportionate reductions in pumping "is the preferred method of protecting a basin in overdraft." (*Id.*) *Barstow* rejects this claim, pointing out that the case cited in the footnote was succeeded by *San Fernando*, which would require the use of many more factors as a part of an equitable apportionment. (*Id.*) In this very brief treatment, the *Barstow* court finds it unnecessary to point out that, contrary to respondents' contentions, nothing in *Hi-Desert* suggests that the *Hi- Desert* court interpreted *San Fernando* as permitting an equitable apportionment without regard to prior rights. (*See Hi-Desert*, 23 Cal.App.4th at 1734). For these reasons, *Barstow* concludes that *Hi-Desert:*

> does not support respondents' assertion, as neither the Supreme Court nor this court has endorsed a pure equitable apportionment which disregards the existing rights of overlying owners.

(*Barstow*, 98 Daily Journal D.A.R. at 5723).

Wright involved a groundwater adjudication with both overlying users and appropriators where the main question was whether a court could subordinate unexercised overlying rights to appropriative rights to groundwater under the authority of *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (1979). Respondents had urged that the *Barstow* court follow guidelines in *Wright* that suggested that the trial court, on remand, take evidence needed to "arrive at an equitable solution." (*Barstow*, 98 Daily Journal D.A.R. at 5724). *Barstow* points out that these instructions were dicta and so did not represent any part of the decision of the *Wright* court. *Barstow*

also pointed out that the holding of the *Wright* court directed the trial court to consider the dispute in terms of the principles articulated in *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal.2d 489, 524-26 (1935), which preserve the priority of prospective riparian uses over appropriative rights. In light of that decision, *Barstow* opined that "the law is clear that equitable principles underlying physical solutions do not sanction disregard of existing overlying rights." (*Barstow*, 98 Daily Journal D.A.R. at 5724). The *Wright* court "does not read the *City of San Fernando* case as sanctioning an equitable apportionment without consideration of existing water rights. Nor do we." (*Id.* at 5725).

Equitable Apportionment and Article X, Section 2

Having considered the two cases relied upon by respondents in favor of equitable apportionment without regard to prior rights, the *Barstow* court then commenced a review of a number of other recent decisions to determine whether article X, section 2 of the California Constitution would sanction such an equitable apportionment.

The *Barstow* court began its survey of recent California water rights decisions with *Long Valley*. The *Barstow* court noted that the California Supreme Court interpreted article X, section 2 as authorizing the State Water Resources Control Board to make "determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources." (*Barstow*, 98 Daily Journal D.A.R. at 5724-25). Relying on Justice Richardson's concurring and dissenting opinion, *Barstow* implies that this interpretation of article X, section 2, which is consistent with the decision in *Tulare Irrigation District*, does not permit the extinguishment of prior rights (or, presumably, an equitable apportionment that ignores such rights). Instead, relying on *Long Valley's* discussion of *Gin S. Chow v. Santa Barbara*, 217 Cal. 673, 700 (1933), *Barstow* finds that the purpose of article X, section 2 is to prevent "water waste without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners." (*Barstow*, 98 Daily Journal D.A.R. at 5725, internal quotation marks omitted). This formulation does not permit an equitable apportionment that would disregard existing rights.

The *Barstow* court then turns its attention to another adjudication of groundwater rights in an overdrafted basin in considering *Tehachapi-Cummings County Water District v. Armstrong*, 49 Cal.App.3d 992 (1975). In *Tehachapi-Cummings*, all rights were overlying in nature but the trial court applied *Pasadena's* mutual prescription doctrine "to quantify the water rights of the parties on the basis of past use rather than current reasonable and beneficial need." (*Id.* at 1000). The *Barstow* court found that there was no need to invoke the equitable apportionment doctrine in *Tehachapi-Cummings*; instead, the rights of overlying landowners were "correlative and equal to each other. [Citation]. The same principles should have governed the adjudication here." (*Barstow*, 98 Daily Journal D.A.R. at 5725).

Finally, *Barstow* turns its attention to its bête noire: *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal.App.3d 548 (1990), which was decided by another panel of the same Court of Appeal. *Barstow* notes that respondents cite "*Imperial* [*Irrigation District*] for its unusual addendum to the opinion which states that water law is in flux and 'its evolution has passed beyond traditional concepts of vested and immutable rights.' The addendum also refers to 'an evolving process of governmental redefinition of water rights.'" (*Barstow*, 98 Daily Journal D.A.R. at 5725, citations omitted). Relying on *Long Valley's* discussion of the pernicious effects of uncertainty of water rights (*Long Valley*, 25 Cal.3d at 355-357), the *Barstow* panel bluntly responded to these claims, stating: "We disagree [with the conclusions of *Imperial Irrigation District*], for such statements only create the uncertainty which our Supreme Court has cautioned us against." (*Id.*) *Barstow* also reacts to respondents' claim that *Imperial Irrigation District* accurately summarized the changes to California water law created by article X, section 2. *Barstow* notes that "the constitutional provision has not substantively changed since 1928, and we find the more comprehensive statement of the purpose of the 1928 amendment in *In re Waters of Long Valley Creek Stream System* to be dispositive. . . . Thus, to the extent that respondents argue that the constitutional provision allowed the trial court to disregard existing rights, they go too far." (*Id.*, citation omit-

ted). (In light of the strong disagreement with the *Imperial Irrigation District* addendum expressed by the *Barstow* court, it appears that the addendum has, de facto, been overruled).

Having reviewed these (and other) cases, *Barstow* concludes:

> neither the cases cited by respondents nor any other appellate decision following *City of Los Angeles v. City of San Fernando* support respondents' contention that footnote 61 of that opinion has been consistently interpreted as approval by the California Supreme Court of the use of equitable apportionment as a basis to allocate water among users in an overdraft basin. To the contrary, as set forth above, we find that neither the footnote nor article X, section 2, of the California Constitution has been interpreted to allow the trial court to disregard existing water rights in order to fashion an allegedly equitable solution based on prior usage rather than current beneficial use.

(*Barstow*, 98 Daily Journal D.A.R. at 5726).

One can almost sense the panel of the Court of Appeal saying to respondents and its colleagues who wrote *Imperial Irrigation District*: "So there!"

The Implications of *Barstow* for the Bay-Delta Proceedings

The Court of Appeal's decision in *Barstow* will have a major impact on the manner in which the State Water Resources Control Board may allocate the responsibility for providing water to meet flows needed to preserve the Bay-Delta Estuary. As is well-known, the State Board is poised to begin water right hearings that will determine which parties who divert water from the Sacramento-San Joaquin River Delta or upstream tributaries must reduce their diversions in order to meet the flow objectives established by the State Board in its 1995 Water Quality Control Plan for the Bay-Delta Estuary. The State Board is presently considering a number of potential alternatives to meet these flow objectives. The major flow alternatives under consideration include:

- Requiring the state and federal export projects to continue to meet the standards (Flow Alternative 2),

- Using the priority system to meet the standards (Flow Alternatives 3 and 4),

- Requiring all water users to reduce diversions to meet the standards (Flow Alternative 5), and

- Approving the San Joaquin River Agreement to satisfy the San Joaquin basin's portion of Delta outflow and so meet the standards (Flow Alternative 8).

Barstow teaches that Flow Alternative 8, which is the product of a settlement agreement among the state and federal export projects, their contractors, and the water users in the San Joaquin River watershed, will be upheld by the courts because it represents a global settlement of disputes on the San Joaquin River system. (*See Barstow*, 98 Daily Journal D.A.R. at 5731).

More significantly, *Barstow* holds that article X, section 2 of the California Constitution does not permit the State Board "to disregard existing water rights in order to fashion an allegedly equitable solution." (*Id.* at 5726). The State Board developed Flow Alternative 5 in order to respond to many parties' claim that the only fair and equitable way to allocate the burden of meeting the 1995 standards was to "share the pain" of the standards without regard to parties' prior rights to water. Indeed, many of these parties have contended that article X, section 2 *requires* the State Board to adopt some variant of Flow Alternative 5. *Barstow* holds that this type of "equitable" allocation of water in the context of a groundwater adjudication is forbidden; it is only a small step to move from the groundwater context involved in *Barstow* to the surface water context of the Bay-Delta proceedings and conclude that the type of equitable allocation of responsibility contemplated by Flow Alternative 5 is beyond the scope of the authority granted to the State Board. (*See, e.g., Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal.2d 489, 524-26 (1935) (article X, section 2 applies in similar ways to rights to both surface water and groundwater)).

In other words, contrary to the thoughts of many parties to the Bay-Delta proceedings, article X, section 2 of the California Constitution does not permit the State Board to reallocate water rights as part of an "allegedly equitable solution" to the

problems confronting the Bay-Delta Estuary. (*See Barstow*, 98 Daily Journal D.A.R. at 5726). Instead, *Barstow* requires the State Board, in crafting any solution to those problems, to recognize and protect existing water rights. Far from supporting Flow Alternative 5, therefore, article X, section 2 of the California Constitution — as interpreted in *Barstow* — specifically forbids the State Board from adopting that flow alternative.

David R.E. Aladjem is a partner with Downey, Brand, Seymour & Rohwer LLP in Sacramento. He represents individuals, private companies, and public agencies in all areas associated with water resources in California, including water rights and water quality, CEQA/NEPA, and endangered species concerns. Mr. Aladjem is also a member of the Editorial Board of the *California Water Law & Policy Reporter*. The views expressed in this article are solely the views of the author and should not be attributed to Downey, Brand, Seymour & Rohwer LLP or its clients.