

Appellate Case No. G050864

**In the Court of Appeal of the State of
California
Fourth Appellate District, Division Three**

CLERK OF APPEAL-4TH DIST DIV 3
FILED

DELAWARE TETRA TECHNOLOGIES, INC.,

AUG 12 2015

Plaintiff and Appellant,

Deputy Clerk _____

v.

SANTA MARGARITA WATER DISTRICT, ET AL.,

Defendants and Respondents

COUNTY OF SAN BERNARDINO, ET AL.,

Real Parties In Interest

APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT STATE OF CALIFORNIA, COUNTY OF ORANGE ON
SEPTEMBER 29, 2014
Hon. Gail A. Andler, Judge Presiding
Orange County Superior Court Case No. 30-2012-00576715

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS
CURIAE BRIEF OF AMERICAN GROUND WATER TRUST AND
PROPERTY AND ENVIRONMENT RESEARCH CENTER
SUBMITTED IN SUPPORT OF RESPONDENTS**

RICHARDS, WATSON & GERSHON

A Professional Corporation

JAMES L. MARKMAN (SBN 43536)

B. TILDEN KIM (SBN 143937)

PATRICK D. SKAHAN (SBN 286140)

355 South Grand Avenue, 40th Floor

Los Angeles, California 90071-3101

Telephone: (213) 626-8484

Facsimile: (213) 626-0078

Attorneys for Proposed Amici Curiae

AMERICAN GROUND WATER TRUST &

PROPERTY AND ENVIRONMENT RESEARCH CENTER

Appellate Case No. G050864

**In the Court of Appeal of the State of
California
Fourth Appellate District, Division Three**

DELAWARE TETRA TECHNOLOGIES, INC.,
Plaintiff and Appellant,

v.

SANTA MARGARITA WATER DISTRICT, ET AL.,
Defendants and Respondents

COUNTY OF SAN BERNARDINO, ET AL.,
Real Parties In Interest

APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT STATE OF CALIFORNIA, COUNTY OF ORANGE ON
SEPTEMBER 29, 2014
Hon. Gail A. Andler, Judge Presiding
Orange County Superior Court Case No. 30-2012-00576715

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS
CURIAE BRIEF OF AMERICAN GROUND WATER TRUST AND
PROPERTY AND ENVIRONMENT RESEARCH CENTER
SUBMITTED IN SUPPORT OF RESPONDENTS**

RICHARDS, WATSON & GERSHON
A Professional Corporation
JAMES L. MARKMAN (SBN 43536)
B. TILDEN KIM (SBN 143937)
PATRICK D. SKAHAN (SBN 286140)
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-3101
Telephone: (213) 626-8484
Facsimile: (213) 626-0078

Attorneys for Proposed Amici Curiae
**AMERICAN GROUND WATER TRUST &
PROPERTY AND ENVIRONMENT RESEARCH CENTER**

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Three		Court of Appeal Case Number: G050864
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Patrick D. Skahan (286140) Richards, Watson & Gershon 355 South Grand Avenue, 40th Floor Los Angeles, CA 90071-3101 TELEPHONE NO.: (213) 626-8484 FAX NO. (Optional): (213) 626-0078 E-MAIL ADDRESS (Optional): pskahan@rwglaw.com ATTORNEY FOR (Name): American Ground Water Trust		Superior Court Case Number: 30-2012-00576715
APPELLANT/PETITIONER: Delaware Tetra Technologies, Inc. RESPONDENT/REAL PARTY IN INTEREST: Santa Margarita Water District, and County of San Bernardino		FOR COURT USE ONLY
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.		

1. This form is being submitted on behalf of the following party (name): American Ground Water Trust

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
--	-------------------------------

- (1)
(2)
(3)
(4)
(5)

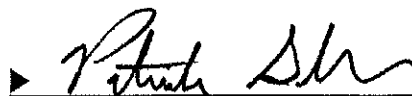
☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 12, 2015

Patrick D. Skahan

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

Page 1 of 1

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Three		Court of Appeal Case Number: G050864
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Patrick D. Skahan (286140) Richards, Watson & Gershon 355 South Grand Avenue, 40th Floor Los Angeles, CA 90071-3101 TELEPHONE NO.: (213) 626-8484 FAX NO. (Optional): (213) 626-0078 E-MAIL ADDRESS (Optional): pskahan@rwglaw.com ATTORNEY FOR (Name): Property and Environment Research Center		Superior Court Case Number: 30-2012-00576715
APPELLANT/PETITIONER: Delaware Tetra Technologies, Inc. RESPONDENT/REAL PARTY IN INTEREST: Santa Margarita Water District, and County of San Bernardino		FOR COURT USE ONLY
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.		

1. This form is being submitted on behalf of the following party (name): Property and Environment Research Center

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	


☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 12, 2015

Patrick D. Skahan

(TYPE OR PRINT NAME)


 (SIGNATURE OF PARTY OR ATTORNEY)

Page 1 of 1

TABLE OF CONTENTS

	<u>Page</u>
I. APPLICATION TO FILE AMICUS CURIAE BRIEF	1
II. IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
A. THE AMERICAN GROUND WATER TRUST (AGWT)..	1
B. THE PROPERTY AND ENVIRONMENT RESEARCH CENTER (PERC)	2
III. INTRODUCTION AND STATEMENT OF FACTS (EXISTING WATER USE CONDITIONS AND WATER USE CONDITIONS TO BE GENERATED BY THE IMPLEMENTATION OF THE CADIZ PROJECT)	3
IV. ARGUMENT	7
A. MANAGED WATER PRODUCTION RESULTING IN CHANGES IN GROUNDWATER ELEVATION IS NOT PROHIBITED IF THAT PRODUCTION WILL NOT DEplete THE BASIN, PARTICULARLY WHEN THAT PRODUCTION MASSIVELY INCREASES THE MAXIMUM BENEFICIAL USE OF WATER.....	7
B. THE PRODUCTION OF WATER FROM THE SYLMAR BASIN IN EXCESS OF SAFE YIELD APPROVED IN <i>CITY OF LOS ANGELES V. CITY OF SAN FERNANDO</i> WAS NOT STATED TO BE A CONSTRAINT PRECLUDING PRODUCTION IN EXCESS OF AVAILABLE SUPPLY FOR OTHER MANAGEMENT PURPOSES WHICH MAXIMIZE BENEFICIAL WATER USE	11
C. THE PROJECT AVOIDS THE WASTE OF SUBSTANTIAL AMOUNTS OF GROUNDWATER IN ACCORDANCE WITH CALIFORNIA CONSTITUTION, ARTICLE X, SECTION 2	14
D. THE PRODUCTION OF WATER IN EXCESS OF THE AMOUNT OF SUPPLY WITHOUT THE EXISTENCE OF TEMPORARY SURPLUS IN ORDER TO MANAGE THE BENEFICIAL SUPPLY OF WATER HAS OCCURRED IN COURT MANAGED BASINS FOR DECADES	16
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

Page(s)

Cases

<i>City of Barstow v. Mojave Water Agency</i> (2000) 32 Cal.4th 1224	18, 19
<i>City of Los Angeles v. City of San Fernando</i> (1975) 14 Cal.3d 199.....	<i>passim</i>
<i>City of Pasadena v. City of Alhambra</i> (1949) 33 Cal.2d 908.....	7, 10
<i>Joslyn v. Marin Municipal Water District</i> (1967) 67 Cal.2d 132.....	14, 15

Statutes

California Rules of Court, Rule 8.200, subdivision (c)	1
California Constitution, Article X, Section 2.....	3, 6, 14, 19

I. APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, Rule 8.200, subdivision (c), the American Ground Water Trust (AGWT) and the Property and Environment Research Center (PERC), request leave to file the attached amicus curiae brief, in support of Respondents. Both AGWT and PERC are familiar with the issues involved in this appeal concerning the application of California water law to groundwater basin management and the mandate to maximize the beneficial use of water. Amici believe that the attached brief will aid the Court in its consideration of the same.

Pursuant to California Rules of Court, Rule 8.200, subdivision (c), AGWT and PERC affirm that no counsel for any party to the appeal authored this brief in whole or in part, and no counsel or party to the appeal made any monetary contribution intended to fund the preparation or submission of this brief, and no person other than AGWT and PERC or its counsel made any monetary contribution to the preparation or submission of this brief. Counsel for AGWT and PERC are retained on a pro bono basis in this matter.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

A. THE AMERICAN GROUND WATER TRUST (AGWT).

Amicus curiae AGWT is a 501(c)(3) non-profit organization dedicated to communicating the environmental and economic value of groundwater to the public and increasing awareness, promoting efficient and effective groundwater management, demonstrating groundwater science and technology solutions, and facilitating stakeholder participation in water resource decisions. AGWT encourages stakeholders in practical

ways to develop, manage and protect groundwater resources so that sustainable economic and environmental benefits can be reached.

AGWT hosts aquifer programs, workshops and conferences regarding water resource management. Since 1999 AGWT has convened over 240 conferences and workshops that address groundwater issues, and has organized over 70 groundwater institutes for training teachers and educators on water science and water resources. AGWT is composed of seven directors, elected for three year terms, who volunteer their time and expertise and receive no payment or expenses for their work for the organization. AGWT's mission is to solidify science as the basis for water policy and to maximize the sustainable use and protection of groundwater. As such, the Cadiz Valley Water Conservation, Recovery and Storage Project is of great practical importance to AGWT.

B. THE PROPERTY AND ENVIRONMENT RESEARCH CENTER (PERC).

Amicus curiae PERC is a 501(c)(3) non-profit organization dedicated to improving environmental quality through property rights and markets, and founded on the principle that individual liberty, secure property rights, and free markets are essential to the conservation of environmental resources.

PERC conducts research on natural resource issues, including private conservation, wildlife habitat management, fisheries preservation, environmental entrepreneurship, public lands management, and water marketing. In addition, PERC sponsors fellows who participate in a wide range of publications, and whose research appears in peer-reviewed journals and in online forums and academic papers. PERC publishes

reports, case studies, and articles regarding water storage rights, water banking, and water markets in the Western United States, and in the Colorado River Watershed. PERC is familiar with the Cadiz Valley Water Conservation, Recovery, and Storage Project, and published a case study on the project in December 2013.

III. INTRODUCTION AND STATEMENT OF FACTS (EXISTING WATER USE CONDITIONS AND WATER USE CONDITIONS TO BE GENERATED BY THE IMPLEMENTATION OF THE CADIZ PROJECT)

For reasons magnified by the present California drought, the core principles of both California water law and California water policy are to promote the maximum use of available water for beneficial purposes and to avoid any waste of that water. These principles are articulated as follows in California Constitution, Article X, Section 2:

“It is hereby declared that because of conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent to which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”

In this matter, the point of departure of any legal analysis is the application of the above-stated constitutional principles to (a) the use or waste of water resources presently occurring in the vicinity of the Cadiz Valley Water Conservation, Recovery and Storage Project ("the Project" hereinafter), the subject of this lawsuit, and (b) the use of water resources which will be generated by the implementation of the Project. The Project concerns water occurring in the Bristol and Cadiz watersheds located in the eastern portion of the Mojave Desert within San Bernardino County.

The present water use in the area of the Project, including that of Cadiz, includes agricultural, mining, military, recreational and railroad uses. Notably, at present, approximately 500 acre feet of water is used each year by Appellant Delaware Tetra Technologies, Inc. to mine salt. (AR: 114:534a:43968, 44010.)¹ This mining is achieved by that company digging into the surface of the desert (dry lake) thereby exposing a pit of saline water, allowing that water to evaporate and then harvesting the salt which remains. (AR: 114:534a, 44010; AR: 113:534:43924.) Most disturbing is that under present circumstances and hydrologic conditions, there is a loss (waste) of approximately 32,000 acre feet per year of water which flows into and through the groundwater aquifer system, ultimately

¹ Citations to the Administrative Record are in the form of: AR: [volume]: [tab]: [page].

reaching the lowest watershed elevation located at Bristol and Cadiz dry lakes and then evaporates without first being used beneficially. (AR: 113:534:43552-43553, 43618-43620; AR: 114:534a:44003.) That amount of loss is roughly equivalent to the total average amount of annual supply sustaining the subject groundwater system. (AR: 113:534:43627.)

In sharp contrast to the present minimal and wasteful application of water in the Project location, water use as a result of implementing the Project will be maximized through hydrologic basin management. That management includes extracting and putting to beneficial use, water originating in the Fenner and northern portions of the Bristol watershed which otherwise would migrate through the groundwater aquifer system to and evaporate in the dry lakes. In addition, water production would occur in an amount necessary to lower the water table and modify the flow gradient of groundwater to allow the production of natural recharge water which otherwise would disappear without use in the dry lakes. (AR: 113:534:43628 - 43631.) A resulting 50,000 acre feet per year of water would newly be made available by Real Parties in Interest, Santa Margarita Water District, Fenner Valley Mutual Water Company, Cadiz, Inc. for beneficial use by municipal and industrial water users in areas served by water service entities participating in the Project (e.g., Santa Margarita Water District). (AR: 113:534:43632-43633, 43639.) No evidence was presented to indicate that any groundwater basin would be depleted by the

Project. To the contrary, drawdown at the wells is strictly limited and the Project projects that aquifer system elevations can return to the present levels in the future. (AR: 114:534a:44006, 44012.)

Clearly, the beneficial water use presently occurring is slight, much of which validly may be characterized as wasteful. In contrast, Project water generation and beneficial use would conform to the mandates to maximize the beneficial use of water and eliminate the waste of water articulated in California Constitution, Article X, Section 2. Accordingly, the Project simply cannot be characterized as violating California Water Law.

Appellants never squarely confront the controlling application of Article X, Section 2, to this litigation. Instead, they assert incorrectly that notwithstanding the constitutional mandate to maximize the beneficial use of water, California case law driven concepts of "safe yield" and "overdraft" preclude basin elevation drawdown as a general principle.

Appellants assert that the circumstances specifically examined in one case, *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, provide the sole basis for legally producing water to an extent that basin elevations are lowered. More specifically, Appellants claim that only the existence of a "temporary surplus," as defined and noted in *City of San Fernando, id.*, provides a legal basis to produce more water from a groundwater basin than is naturally supplied, thereby lowering elevations, and that a "temporary

surplus” only exists when the relatively high elevation of a basin causes the basin to reject water supplies that could be captured by lowering elevations to create storage space in the basin alluvium. Appellants’ assertions attempt to convert our Supreme Court’s approval of one creative basin management technique employed to maximize supplies into a constraint precluding the implementation of other management strategies which also maximize water use and do not deplete basin supplies. Those assertions are examined and exposed as meritless in the following sections of this brief.

IV. ARGUMENT

A. **MANAGED WATER PRODUCTION RESULTING IN CHANGES IN GROUNDWATER ELEVATION IS NOT PROHIBITED IF THAT PRODUCTION WILL NOT DEplete THE BASIN, PARTICULARLY WHEN THAT PRODUCTION MASSIVELY INCREASES THE MAXIMUM BENEFICIAL USE OF WATER.**

Almost all of the legal principles which rebut Appellants’ restrictive view of basin management through the lowering of elevations are articulated in *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, still a leading case governing the use of groundwater in California. The first sentence of that opinion states that the *Pasadena* case was a suit meant to determine Raymond Basin groundwater rights “...and to enjoin an annual overdraft in order to prevent eventual depletion of the supply....” [Emphasis added.] *Id.* at 916. In this seminal case, no management method to increase supplies was discussed and, therefore, litigation resulted

in all water producers being ordered to reduce annual production by approximately 1/3 of their historical amount. This was done in order to arrest declining elevations which ultimately would deplete basin supplies thereby eliminating the basin as a water-bearing resource. In that regard, the California Supreme Court made the following pertinent statements at page 922:

“The water pumped from the ground in the Western Unit has exceeded the safe yield thereof in every year since 1913-14 (commencing October 1) except during the years 1934-35 and 1936-37. The safe yield of the Unit was found to be 18,000 acre feet per year but the average annual draft was 24,000 acre feet, resulting in the average annual overdraft of 6,000 feet....The total of the unadjusted rights for the Western Unit was found to be 25,608 acre feet per year, and water pumped by nonparties to the action was 340 acre feet per year.”

At page 924, the Supreme Court noted the trial court's authority to enjoin production “...for the purpose of protecting the supply and preventing a permanent undue lowering of the water table. [citations]” And, at page 929, the Supreme Court very specifically articulated the basis for injunctive relief precluding basin water production in excess of safe yield which lowers elevations as follows:

“Each taking of water in excess of the safe yield, whether by subsequent appropriators or by increased use by prior appropriators, was wrongful and was an injury to the then existing owners of water rights, because the overdraft, from its very beginning, operated progressively to reduce the total available supply. Although no owner was immediately prevented from taking the water he needed, the report demonstrates that a continuation of the overdraft would eventually result in such a depletion of the supply stored in the underground basin that it would become inadequate. The injury thus did not involve an immediate disability to obtain water, but, rather, it consisted of the continual lowering of the level and gradual reducing of the total amount of stored water, the accumulated effect of which, after a period of years, would be to render the supply insufficient to meet the needs of the rightful owners.

“The proper time to act in preserving the supply is when the overdraft commences, and the aid of the courts would come too late and be entirely inadequate if, as appellant seems to suggest, those who possess water rights could not commence legal proceedings until the supply was so greatly depleted that it actually became difficult or

impossible to obtain water.... [T]he owners of water... clearly were entitled to obtain injunctive relief to terminate all takings in excess of the surplus as soon as it became apparent from the lowering of the well levels that the underground basin would be depleted if the excessive pumping were continued." [Emphasis added.]

Clearly, the threatened depletion of the basin is the basis for limiting production. This principle is in harmony with the constitutional principle of maximizing the beneficial use of water and avoiding waste. If a basin is depleted, its existence as a water source ends and the total amount of water available for beneficial use over time ultimately is diminished.

In the case at bar, overproduction which lowers elevations provides an immediate increase in water available for beneficial use and prevents the discharge of present and future water supplies in the dry lakes to be lost to evaporation and thereby wasted. The principles articulated in *City of Pasadena v. City of Alhambra*, *supra*, apply to preclude overdrafting a basin to a state of depletion, but do not apply to the operation of the Project which will create a massive amount of additional basin water available for beneficial use without depleting or otherwise harming the subject groundwater aquifer system.

B. THE PRODUCTION OF WATER FROM THE SYLMAR BASIN IN EXCESS OF SAFE YIELD APPROVED IN *CITY OF LOS ANGELES V. CITY OF SAN FERNANDO* WAS NOT STATED TO BE A CONSTRAINT PRECLUDING PRODUCTION IN EXCESS OF AVAILABLE SUPPLY FOR OTHER MANAGEMENT PURPOSES WHICH MAXIMIZE BENEFICIAL WATER USE.

In *City of Los Angeles v. City of San Fernando, supra*, the California Supreme Court approved production of water from the Sylmar Basin in excess of the available supply in order to lower the elevation of the groundwater table to in turn allow the capture of water which otherwise would flow by the basin and be wasted. The circumstances were explained at pages 278-279 as follows:

“The referee’s report as well as other evidence showed that when ground basin levels were relatively high, and storage space correspondingly diminished, waste occurred. Ground basin levels tended to vary in accordance with wide fluctuations in precipitation. Thus if a rising level of extractions were halted at the point of safe yield based on the 29-year average, ensuing heightening of ground water levels during years of higher-than-average precipitation would cause waste. Since this waste would constitute a loss of basin water in addition to the safe yield extractions, it would eventually create enough additional storage space to stop further similar

waste, but the wasted water itself would be lost to any beneficial use. On the other hand, a withdrawal of water from the basin over and above its safe yield in the amount necessary to create the storage space sufficient to prevent the waste would result in a net addition to the beneficially used supply....if a ground basin's lack of storage space will cause a limitation of extractions to safe yield to result in a probable waste of water, the amount of water which if withdrawn would create the storage space necessary to avoid the waste and not adversely affect the basin's safe yield is a temporary surplus available for appropriation to beneficial use.

Accordingly, overdraft occurs only if extractions from the basin exceed its safe yield plus any such temporary surplus."

The legal principles established by the Supreme Court in its discussion of the Sylmar Basin included the conclusion that a basin is deemed to be in a state of surplus if the amount of water being extracted from the basin is less than the maximum that could be withdrawn without causing adverse effects to the basin's long term supply. *Id.* at 277. In addition, overdraft was stated to occur only when the surplus ends. *Id.* at 278. And, finally, an "undesirable result, refers to a gradual lowering of water levels to ultimate depletion." *Id.* at 278. These are general principles. When applied to the instant case, the principles support the

Project which would substantially increase the amount of basin water available for municipal and industrial use from virtually nothing to 50,000 acre feet per year without lowering aquifer system elevations to a level which would deplete any basin. In short, the Project would maximize the beneficial use of water in accordance with a constitutional mandate and without violating any groundwater law principle established in case law. The Court also is requested to particularly note that during the course of the Supreme Court's discussion of the Sylmar Basin in *City of Los Angeles v. City of San Fernando* at pages 277-280, the Supreme Court never suggests that those particular circumstances are the only set of facts which allow production which lowers groundwater elevations. The Sylmar management plan is an example of a solution, not a constraint against the application of other solutions.

The phrase "temporary surplus" may be applied to both *City of Los Angeles* and the case at bar. The temporary surplus in *City of Los Angeles* allowed the withdrawal of groundwater to make space to induce surface water percolation to add to basin supplies rather than losing that surface water to the ocean via the Los Angeles River. Here, it may be said that there is a temporary surplus demanding drawdown to avoid losing water to the dry lakes.

**C. THE PROJECT AVOIDS THE WASTE OF
SUBSTANTIAL AMOUNTS OF GROUNDWATER IN
ACCORDANCE WITH CALIFORNIA
CONSTITUTION, ARTICLE X, SECTION 2.**

At present, approximately 32,000 acre feet per year of groundwater, an amount equal to the annual supply to the subject basins, is needlessly lost to evaporation in dry lakes and thereby wasted. The Project would convert wasted water into water beneficially used by families and businesses. Accordingly, the Project inarguably conforms to the constitutional directives discussed herein.

Further, if the validity of Appellant Delaware Tetra Technologies, Inc.'s continued use of 500 acre feet per year in its salt mining operations were challenged instead of being accommodated by the Project, that application of water would most likely be deemed to be an unconstitutional waste of water. As noted above, mining occurs when a hole is dug out of the desert surface so that saline water may migrate into the hole, evaporate, and leave behind salt to harvest. This operation is uncannily similar to one held by the California Supreme Court to constitute an unreasonable use of water in *Joslyn v. Marin Municipal Water District* (1967) 67 Cal.2d 132. In *Joslyn*, a water district constructed a dam across a creek in order to provide water to its ratepayers, thereby diminishing the flow of water to and resulting deposit of suspension rock, sand and gravel on Plaintiff's land riparian to the creek. Plaintiff's intent was to harvest those materials for

economic benefit. Plaintiff sued the district for damages and lost on account of the Supreme Court's conclusion that Plaintiff's claim was based on an unreasonable use of water rather than a beneficial riparian use of the water. The Court held that the right to waste water did not exist and that what is a reasonable use is determined according to the particular circumstances being examined. *Id.* at 139. Most instructively, the Court found no public purpose served by the use of the full stream flow to transport rock, sand and gravel for mining from riparian land, making the following pertinent statement at pages 140-141:

“On the other hand, unlike the unanimous policy pronouncements relative to the use and conservation of natural waters, we are aware of none relative to the supply and availability of sand, gravel and rock in commercial quantities. Plaintiffs do not urge that the general welfare or public interest requires that particular or exceptional measures be employed to insure that such natural resources be made generally available and should therefore be carefully conserved.

“Is it ‘reasonable,’ then, that the riches of our streams, which we are charged with conserving in the great public interest, are to be dissipated in the amassing of mere sand and gravel which for aught that appears subserves no public

policy? We cannot deem such a use to be in accord with the constitutional mandate that our limited water resources be but only to those beneficial uses 'to the fullest extent of which they are capable,' that 'waste or unreasonable use' be prevented, and that conservation be exercised 'in the interest of the people for the public welfare.' We are satisfied that in the instant case the use of such waters as an agent to expose or to carry and deposit sand, gravel and rock, is as a matter of law unreasonable within the meaning of the constitutional amendment. [citations omitted.]”

It is not difficult to foresee such a judicial statement being made applicable to the salt mining operation under discussion.

D. THE PRODUCTION OF WATER IN EXCESS OF THE AMOUNT OF SUPPLY WITHOUT THE EXISTENCE OF TEMPORARY SURPLUS IN ORDER TO MANAGE THE BENEFICIAL SUPPLY OF WATER HAS OCCURRED IN COURT MANAGED BASINS FOR DECADES.

Amici would appreciate the Court considering examples of Court-approved groundwater production in excess of supply in basins managed by virtue of Court adjudications. Those management structures are not based on the narrow circumstance of available storage space causing supplies to flow past the basin. One example of such basin management is occurring

in Chino Basin and is referenced in the Project Environmental Impact Report as follows:

“In recognition of these considerations, the Chino Basin Watermaster is presently implementing a groundwater management program that will remove 400,000 AF from the groundwater basin to lower water levels and reduce discharges to the Santa Ana River to de minimus quantities. As is the case with the Project here, the objective was to establish a hydraulic barrier by modifying water levels. The program was approved by the San Bernardino Superior Court in December of 2007. [Fn. 209 Chino Basin Municipal Water District v. City of Chino et al., San Bernardino County Superior Court Case No. RCV 51010, Order Concerning Motion for Approval of Peace II Documents, December 21, 2007.]” (AR: 114:534a:44002.)

Chino Basin’s overproduction to lower elevations and prevent groundwater from being lost through spillage into the Santa Ana River system and thereby lost for beneficial use in the Chino Basin area is analogous to groundwater elevation reduction and control which is part of the Project. However, in this case, lowering elevations to avoid water migrating to dry lakes is necessary to avoid the loss of a beneficial use of the water at any location.

In *City of Barstow v. Mojave Water Agency* (2000) 32 Cal.4th 1224 at 1235, the California Supreme Court describes a physical solution imposed on the Mojave River Basin as follows:

“Regionally, the physical solution requires each subarea within the basin to provide a specific quantity of water to the adjoining downstream subarea. The solution places no limits on the amount of water a party can withdraw. Instead, each party is allotted a certain quantity of water – a ‘free production allowance’ based on its prior use – which it can use at no cost. When a party uses water in excess of its free production allowance, it is charged a fee to purchase ‘replacement’ water for that subarea.

“The physical solution also sets a ‘base annual production’ amount of each party, determined by the producer’s maximum annual production for the five-year period from 1986 to 1990. The solution defines a producer’s base annual production right as ‘the relative right of each producer to the free production allowance within a given subarea, as a percentage of the aggregate of all producers’ base annual production in the subarea.’ The higher the base annual production right, the more water a producer can sell

under transfer provisions and produce free of a replacement assessment.”

In *City of Barstow*, current production is not limited to match current supply. But, to the extent any party’s production exceeds its stated allocation, a fee is charged to be used ultimately to replace the water which is produced in excess of the party’s water right. Accordingly, while basin elevations may be temporarily lowered by the overproduction described above from time to time, chronic overproduction resulting in gradual lowering of the groundwater tables to the point of depletion is avoided by the purchase of replacement water. This management structure allows for lowered elevations to accommodate current demands, thereby maximizing beneficial use of water while avoiding depletion of the resource.

The two physical solutions discussed above include an example of water production intended to lower groundwater elevations to prevent spillage and a management technique allowing production in excess of water rights to maximize beneficial use which meets existing market demands while providing a financing device to protect the basin against depletion. These approaches implement Article X, Section 2 of the California Constitution, as does implementation of the Project under discussion, and none of these approaches violates any provision of California Water Law. The “temporary surplus” constraint which Appellant claims is inherent in the section of *City of Los Angeles v. City of*

San Fernando, supra, which concerns overproduction in the Sylmar Basin simply does not exist. That discussion describes one of many methods of managing groundwater to generate the maximum beneficial use without a suggestion that that is the only method available under California law to do so.

Courts have approved and are mandated to continue to approve and utilize a variety of basin management structures which maximize the beneficial use of groundwater while avoiding basin depletion. The Project is one such mandated management structure, and an important one which puts an additional 50,000 acre feet per year to beneficial use for municipal and industrial purposes.

V. CONCLUSION

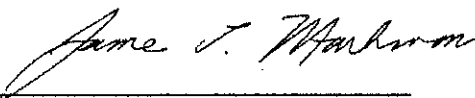
Amici share the goal of encouraging both private and public efforts to protect groundwater resources while maximizing the beneficial use of those resources. The Project being examined by the Court is a joint private and public undertaking which provides that resource protection and makes available for beneficial use an enormous amount of water now being uselessly evaporated in desert dry lakes.

Amici respectfully ask the Court to approve and support the Project
and sustain the Judgment entered by the trial court.

August 12, 2015

RICHARDS, WATSON & GERSHON,
A Professional Corporation
JAMES L. MARKMAN
B. TILDEN KIM
PATRICK D. SKAHAN

By:



James L. Markman
Attorneys for Amici Curiae
American Ground Water Trust and
Property and Environment Research
Center

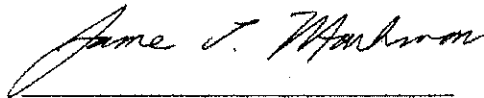
Certification of Word Count

(California Rules of Court, Appellate Rule 8.204)

Pursuant to California Rules of Court, Rule 8.204, counsel for Amici Curiae hereby certifies that the Application to file Amicus Brief, and Amicus Brief contains 4,395 words, as counted by the MS Word program used to generate the application.

August 12, 2015

Respectfully submitted,



RICHARDS, WATSON & GERSHON
JAMES L. MARKMAN
B. TILDEN KIM
PATRICK SKAHAN
Attorneys for Amici Curiae
American Ground Water Trust and
Property And Environment Research Center

PROOF OF SERVICE

Delaware Tetra Technologies, Inc. v. Santa Margarita Water District, et al.

Orange County Superior Court Case No. 30-2012-00576715

Court of Appeal Case Number: G050864

I, Audrey J. Powell, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within action. My business address is 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101. On August 12, 2015, I served the within document(s) described as:

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS
CURIAE BRIEF OF AMERICAN GROUND WATER TRUST AND
PROPERTY AND ENVIRONMENT RESEARCH CENTER
SUBMITTED IN SUPPORT OF RESPONDENTS**

on the interested parties in this action as stated on the attached mailing list.

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, 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 foregoing is true and correct.

Executed on August 12, 2015, at Los Angeles, California.


Audrey J. Powell

Delaware Tetra Technologies, Inc. v. Santa Margarita Water District, et al.

County of San Bernardino, et al.

CIV No. G050864

Service List

Robert S. Bower Alan B. Fenstermacher RUTAN & TUCKER LLP 611 Anton Boulevard, Suite 1400 Costa Mesa, CA 92626-1931	<i>Attorneys for Plaintiff and Appellant, DELAWARE TETRA TECHNOLOGIES, INC.</i> 1 copy
Christian L. Marsh Downey Brand LLP 455 Market Street, Suite 1420 San Francisco, CA 94105	<i>Attorneys for Defendants and Respondents, COUNTY OF SAN BERNARDINO and COUNTY OF SAN BERNARDINO BOARD OF SUPERVISORS</i> 1 copy
Michelle Ouellette BEST BEST & KRIEGER LLP 3390 University Avenue, 5th Floor Riverside, CA 92501	<i>Attorneys for Respondent on Appeal, SANTA MARGARITA WATER DISTRICT</i> 1 copy
Diane C. De Felice BROWNSTEIN HYATT FARBER SCHRECK, LLP 2049 Century Park East, Suite 3550 Los Angeles, CA 90067	<i>Attorneys for Respondents on Appeal, CADIZ, INC. and FENNER VALLEY MUTUAL WATER COMPANY</i> 1 copy
M. Lois Bobak WOODRUFF SPRADLIN & SMART 555 Anton Boulevard, Suite 1200 Costa Mesa, CA 92626	<i>Attorneys for Respondents on Appeal, CADIZ, INC. and FENNER VALLEY MUTUAL WATER COMPANY</i> 1 copy

Superior Court of California County of Orange- Civil Complex Center The Hon. Gail A. Andler- Dept. CX101 751 West Santa Ana Boulevard Santa Ana, CA 92701	1 copy
Supreme Court of California 350 McAllister Street San Francisco, CA 94102	4 copies