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September 7, 2017

Hon. Chief Justice Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: **Amicus Curiae Letter in Support of Petition for Review of *San Diego County Water Authority v. Metropolitan Water District*, Case No. S243500**

Honorable Chief Justice and Associate Justices:

Pursuant to rule 8.500(g) of the California Rules of Court, the Otay Water District ("Otay") respectfully urges this Court to grant review of the opinion of the First District Court of Appeal in *San Diego County Water Authority v. Metropolitan Water District*, Cal. Sup. Ct. Case No. S243500 (the "Opinion"). The Opinion effectively concludes that the Metropolitan Water District is the "owner" of the State Water Project for purposes of applying the California's Wheeling Statute (Cal. Wat. Code §§ 1810-1814), rejecting not only the trial court's contrary factual conclusion, but this Court's contrary legal conclusion in *Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal. 2d 159. Compounding this error, the Opinion goes on to conclude that Metropolitan may include the cost of operating and maintaining the State Water Project when setting fees for wheeling services provided, contrary to statutorily and judicially established cost of service principles applicable to local government fees. Accordingly, the Opinion merits this Court's review both "to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

I. STATEMENT OF INTEREST OF AMICI

The Otay Water District is a local government organized under the provisions of the Municipal Water District Act of 1911 to provide water and sewer service to the communities of eastern Otay Mesa along the international border with Mexico, eastern Chula Vista, Jamul, Spring Valley, Rancho San Diego, and unincorporated areas of El Cajon and La Mesa. The District provides water service to more than 223,000 customers within 125.5 square miles of southeastern San Diego County, California. Lacking its own local water supplies, the District is dependent on imported water, including water that it purchases from the San Diego County Water Authority, which is potentially transferred water from other sources. The District has a keen interest in the proper interpretation and application of California's Wheeling Statute, both as a customer of the San Diego County Water Authority and a California water provider and facility owner. As a California local government, the District has a keen interest in the interpretation of the laws applicable to local government fees, including the provisions of articles XIII C and D of the California Constitution.

II. THE OPINION WARRANTS REVIEW TO CLARIFY AN IMPORTANT ISSUE OF STATUTORY INTERPRETATION -- WHAT DOES IT MEAN TO BE THE OWNER OF A WATER CONVEYANCE SYSTEM UNDER THE WHEELING STATUTE

The California Wheeling Statute (Cal. Wat. Code §§ 1810 – 1814) requires the state and regional or local public agencies to permit use of excess capacity in their water conveyance systems to transport ("wheel") water between a transferor and a transferee if fair compensation is paid for that use. (Cal. Wat. Code § 1810.) The term "fair compensation" means "the reasonable charges incurred by the **owner** of the **conveyance system**, including capital, operation, maintenance, and replacement costs, increased costs from any necessitated purchase of supplemental power, and including reasonable credit

for any offsetting benefits for the use of the conveyance system. (Cal. Wat. Code § 1811 (c), emphasis added.) The public agency "**owning** the water conveyance facility" is charged with responsibility for timely determining the terms and conditions of wheeling, including the amount of "fair compensation" the owner charges. (Cal. Wat. Code § 1812, emphasis added.) Unlike "fair compensation," the Wheeling Statute does not define either "owner" or "conveyance system" (or related terms such as "owning" and "conveyance facility").

Thus, deciding the issues in this case requires careful review of the words of the statute and application of the rules of statutory interpretation. But, the Opinion neither carefully reviews the words of the Wheeling Statute nor applies the rules of statutory interpretation. Indeed, the Opinion effectively concludes that the Metropolitan Water District is the "owner" of the State Water Project for purposes the applying the California's Wheeling Statute without any discussion or application of the rules of statutory construction. Statutory interpretation is a question of law (*Department of Health Care Services v. Office of Administrative Hearings* (2016) 6 Cal.App.5th 120, 140-141.), which this court should review de novo. (*City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 956.)

The Opinion acknowledges that the State Water Project is not a Metropolitan facility – "the state is the owner of the State Water Project and its facilities." (Slip. Op. at p. 22, see also Slip. Op. at p. 23, "Metropolitan has no ownership interest in State Project facilities.") It also acknowledges that Metropolitan is obligated to pay its prorated share of the capital, operation and maintenance costs of the conveyance system as a function of being a customer of the State Water Project. In this regard, Metropolitan is no different than the customer of any public water system. Yet the Opinion, in a dramatic

leap of logic, concludes that because payments made by Metropolitan to the state include conveyance system costs, Metropolitan can treat the State Water Project as if it owns it when setting the price for providing wheeling services. Under the Wheeling Statute a public agency is entitled to fair compensation only if it is the "owner of the conveyance system." The Opinion requires review by this Court to answer the important question of whether Metropolitan is the "owner" of the State Water Project for purposes of the Wheeling Statute by applying the rules of statutory construction, something the Opinion does not do.

III. THE OPINION WARRANTS REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW – DO COST OF SERVICE PRINCIPLES PRECLUDE METROPOLITAN FROM INCLUDING STATE WATER PROJECT COSTS IN ITS FEES FOR USE OF ITS FACILITIES TO WHEEL WATER?

As stated in the Opinion: "The central issue in dispute is one of cost allocation: May the charge Metropolitan imposes for wheeling water purchased from a third party include an amount calculated to recover Metropolitan's allocable transportation costs over the California Aqueduct, part of the State Water Project, or must the charge be limited to costs allocable to transportation costs over those parts of its system that it owns and utilizes in the particular transaction?" (Slip. Op. p. 1.) The Opinion notes, "While there are some differences among the legal standards, we agree that the 'core' issue as determined under the wheeling statutes does, as a practical matter, dictate the conclusion that must be reached under other provisions of law." (Slip. Op. p. 2.) Although the trial court found no reasonable basis to support Metropolitan's contention that the California Aqueduct was part of Metropolitan's conveyance facilities, the Court of Appeal was "unable to understand the basis of the trial court's uncertainty." (Slip. Op. at 22.) The Opinion describes the nature of the payments made by Metropolitan to the state and appears to conclude that because of the labels put on those payments ("transportation"),

Metropolitan and other State Water Project Contractors may use the state system's available capacity to transport non-project water, and that the California Aqueduct is part of Metropolitan's water conveyance system. (Slip. Op. at pp. 23 – 23.)

However, nowhere does the Opinion analyze the actual use of the facilities for the transportation of the Water Authority's wheeled water. The Opinion cites *Central San Joaquin Water Conservation Dist. v. Stockton East Water Dist* (2016) 7 Cal. App. 5th 1041 for the proposition that reasonable systemwide costs are recoverable through a wheeling charge. (Slip. Op. at p. 12.) But, *Stockton East* dealt with a single conveyance system built and owned by Stockton East Water District. (*Central San Joaquin Water Conserv. Dist. v. Stockton East Water Dist.*, 7 Cal App. 5th at 1045.) Further, the Court of Appeal supported the trial court's determination based on the record that Stockton East's "rates are demonstrably unreasonable inasmuch as they run counter to any 'real-world' analysis of competitive pricing." (*Id.* at 1056.) The Opinion's lack of "real world" analysis of whether it is reasonable to include all of Metropolitan's facilities in a wheeling charge is evidenced by its erroneous observation that "a consequence of the trial court's ruling would be that a wheeler, regardless of which aqueduct is used, would pay for Metropolitan's costs incurred in maintaining the Colorado River Aqueduct but not the California Aqueduct." (Slip. Op. at p. 23.) Given the completely different functions and purpose of the Metropolitan's Colorado River Aqueduct (transporting water from the eastern boundary of the state to the Los Angeles Basin) and the state's California Aqueduct (transporting water from the Bay Delta to the Central Valley and Southern California), this conclusion alone deserves review by this Court as to whether it is reasonable to include such functionally separate and distinct facilities for a wheeling transaction that uses only one of them.

Indeed, the Opinion's apparent conclusion that Metropolitan may include, without apportionment, costs of both the Colorado River Aqueduct and the California Aqueduct in a wheeling charge, is at odds with other opinions applying cost of service principles. For example, the Opinion is inconsistent with *Green Valley Landowners Assn. v. City of Vallejo* (2016) 241 Cal. App. 4th 425. In that case, residents of the Green Valley area were arguing for a system-wide rate instead of a particularized rate that the city had adopted. The court rejected the challenger's arguments, supporting the trial court's conclusion that "an apportionment that would place 98 percent of the burden of LWS on City residents while giving them zero services in return is unreasonable." *Id.* at 440. The Opinion however allows Metropolitan to burden a water transfer using only the Colorado River Aqueduct with costs of the State Water Project while providing no State Water Project services in return. The *Green Valley* decision notes with approval that "The trial court . . . . court cited to *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 [163 Cal.Rptr.3d 243] (Griffith) in support of its ruling, concluding that Proposition 218 'prohibits a rate structure as alleged in Plaintiff's complaint that requires one group of customers to essentially subsidize another....'" *Id.* at 439. Even under common law, apportionment must be reasonable, for example, "the nonresidents cannot be made to bear the cost of expansion or modernization properly attributable to in-city users." (*Hansen v. San Buenaventura* (1986) 42 Cal. 3d 1172, 1180.)

Inclusion of system-wide facilities costs is appropriate in when the service being provided is essentially the same for all customers, for example, the general provision of ongoing retail water service. However, when the service being provided is more individualized, such as in the case of a wheeling transaction, inclusion of system-wide costs must be supported based on the facts and circumstances of the particular service.

As explained in *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal. App. 4th 1430, 1443-1444:

> Where charges for a government service or product are to be allocated among only four payors, the only rational method of evaluating their burdens on, or benefits received from, the governmental activity, is individually, payor by payor. And that is particularly appropriate considering the nature of the Proposition 26 exemption in question: charges for a product or service that is (and is required to be) provided "directly to the payor." Under these circumstances, allocation of costs "collectively," when the product is provided directly to each of the four payors, cannot be, and is not, a "fair or reasonable" allocation method. (Art. XIII C, § 1, subd. (e), final par.)

Unfortunately, while the Opinion references *Newhall*, it appears to ignore the *Newhall* rationale. (Slip. Op. at p. 31 – 32.) The Opinion reduces *Newhall*'s holding to the rubric that an agency cannot base the cost of services it does provide on services it does not provide -- "The court concluded that a wholesale water agency 'cannot, consistent with Proposition 26, base its wholesale water rates on the retailers' use of groundwater, because the Agency does not supply groundwater.' (*Id.* at 1441.)." (Slip. Op. at p. 31-32.) From this limited reading of *Newhall*, the Opinion concludes that Metropolitan can charge for the costs associated with the State Water Project because Metropolitan is providing transportation services. ["Here, Metropolitan charges for a service it supplies – water conveyance – and that charge is founded on costs borne by Metropolitan in maintaining the conveyance system." (Slip. Opinion at p. 32.)

The *Newhall* decision involves an extensive analysis of the agency's rates, but summarizes its conclusions by noting:

> First, the rates violate Proposition 26 because the method of allocation does not "bear a fair or reasonable relationship to the payor's burdens on, or benefits received from," the Agency's activity. (Art. XIII C, § 1, subd. (e), final par.) (We will refer to this as the reasonable cost allocation or proportionality requirement.)
>
> Second, to the extent the Agency relies on its groundwater management activities to justify including groundwater use in its rate structure, the benefit to the retailers from those activities is at best indirect. Groundwater management activities are not a "service ... provided directly to the payor that is not provided to those not charged" (art. XIII C, § 1, subd. (e)(2)), but rather activities that benefit the Basin as a whole, including other major groundwater extractors that are not charged for those services.

Newhall County Water Dist. v. Castaic Lake Water Agency, 243 Cal. App. 4th at 1441.

The District, like the parties to the Opinion, does not dispute that the Wheeling Statutes do not preclude inclusion of system-wide costs in a wheeling charge under appropriate circumstances. However, review by this Court is warranted to give clear guidance as those circumstances under both the Wheeling Statute and other statutory cost limitations, and the subsequently enacted Constitutional limitations of Proposition 26.

In the case of Metropolitan's wheeling charge, there are serious questions that require resolution by this Court on review. First, whether the transportation of non-Metropolitan water through the State Water Project is a Metropolitan transportation activity. Second, even assuming such transportation through the State Water Project is a Metropolitan activity, is the transportation of non-Metropolitan water through the Colorado River Aqueduct a transportation activity that involves the State Water Project.

Third, assuming that such later transportation somehow involves the State Water Project, has charging the amount Metropolitan pays to the state for "transportation" been shown to have a fair or reasonable relationship to the payor's burdens on, or benefits received from the State Water Project for the particular wheeling transaction. Furthermore, if it is appropriate to attribute ownership of the State Water Project to Metropolitan, under the circumstances of Metropolitan's unique water system, with its two separate and distinct aqueduct systems, then there is a serious issue of whether the inclusion of the State Water Project costs in a wheeling charge provides benefits to Metropolitan non-wheeling member agencies as a whole in violation of art. XIII C, § 1, subd. (e)(2).

IV. CALIFORNIA WATER POLICY FAVORS GRANT OF REVIEW

It is the declared policy of this state to facilitate the voluntary transfer of water. (Cal. Wat. Code § 109, subd. (a).) At the heart of the dispute between Metropolitan and the Water Authority is the largest agricultural to urban conserved water transfer in history. (See generally, *Quantification Settlement Agreement Cases* (2011) 201 Cal. App. 4th 758.) The Opinion undermines that historic transfer and thwarts other statewide efforts to maximize water use efficiency through voluntary conserved water transfers. The Opinion condones protectionist pricing, encourages continued reliance by Southern California on Bay-Delta exports, and punishes the ratepayers in San Diego County, including Otay Water District ratepayers. All of Metropolitan's member agencies, including the Water Authority, pay for the State Water Project when they purchase Metropolitan water. But Metropolitan forces the Water Authority to pay for the State Water Project again when it uses the Colorado River Aqueduct to wheel the conserved water it receives through the Quantification Settlement Agreements. Essentially, Metropolitan is penalizing the Water Authority for reducing its historic purchases of

Metropolitan water. This is exactly the type of protectionist price setting that was prohibited in *San Luis Coastal Unified School Dist. v. City of Morro Bay* (2000) 81 Cal. App. 4th 1044. The Court should grant review to give careful consideration to these policy objectives.

V. CONCLUSION

This Court can resolve important questions of law and advance statewide water policy by granting review of the Opinion. Accordingly, the Otay Water District respectfully urges this Court to grant review.

Respectfully,

ARTIANO SHINOFF

s/Jeanne Blumenfeld

By: Jeanne Blumenfeld (SBN 157441)
Attorneys for Otay Water District

Enclosure: Proof of Service

PROOF OF SERVICE

I am employed in the City and County of San Diego, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Artiano Shinoff, 2488 Historic Decatur Road, Suite 200, San Diego, CA 92106.

On September 7, 2017, I served the following document(s):

AMICUS CURIAE LETTER

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by GSO OVERNIGHT MAIL, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Artiano Shinoff for correspondence for delivery by GSO. According to that practice, items are retrieved daily by a GSO employee for overnight delivery.

Clerk of the Court for delivery to the
Honorable Curtis Karnow
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Executed on September 7, 2017, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

s/Jenna Campos
Jenna Campos