

CALIFORNIA WATER SERVICE COMPANY, et al., Plaintiffs and Respondents,
versus GOLDEN STATE WATER COMPANY, et al., Defendants and Appellants.

S197767

SUPREME COURT OF CALIFORNIA

2011 CA S. Ct. Briefs 97767; 2011 CA S. Ct. Briefs LEXIS 1614

November 8, 2011

Of a Published Decision by the Court of Appeal. Second Appellate District, Division
Five, No. B225058. (Los Angeles County Superior Court Case No. C5068060).

Petition for Appeal

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COUNSEL: [*1] SEDGWICK LLP, Curtis D. Parvin (State Bar No. 116079), Douglas E. Wance (Bar No.208170), Douglas J. Collodel (State Bar No. 112797), Irvine, CA, Attorneys for Respondent, TESORO REFINING AND MARKETING COMPANY.

INTERESTS: CERTIFICATE OF INTERESTED PARTIES

On behalf of respondent TESORO REFINING AND MARKETING COMPANY, counsel hereby certifies that Tesoro Refining and Marketing Company is a 100% subsidiary of Tesoro Corporation, which is the sole shareholder; Tesoro Corporation is traded on the New York Stock Exchange. On behalf of respondent Tesoro Refining and Marketing Company, counsel further certifies that it is unaware of any other entities or parties who have a financial or other interest in the outcome of this proceeding, as defined in California Rules of Court, Rule 8.208(e)(2)(A) and (B), that the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

DATED: November 7, 2011

Respectfully submitted,

SEDGWICK LLP

By: /s/ [Signature]
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TITLE: 2nd Petition for Review

TEXT: BACKGROUND

50 years ago, the trial court reserved jurisdiction in the original judgment that addressed a specific problem in the West Coast Basin, namely, water *extraction* issues arising from then-existent overdrafting of the naturally occurring groundwater from that basin. The litigants consisted only of those parties claiming water extraction rights at that time. Some 20 years later, in 1980, the trial court amended the original judgment to include "Basin and of in the reserved jurisdiction provision. Recently, several parties filed a motion to amend the judgment to allocate storage rights and implement a complex water *storage* program, even though storage rights had never been adjudicated. The Court of Appeal, relying on the three-word change to the original judgment, found that although jurisdiction did not exist in the original judgment to address water storage issues, the 1980 amendment expanded the trial court's jurisdiction [*2] to allow the trial court to assess the propriety of the proposed allocation and water storage program.

ISSUES PRESENTED

(1) Does the Court of Appeal's published Decision, which opens the door for post-judgment litigation over implementation of a water storage program and allocation of water storage rights - also allowing the privatization of a public resource - impermissibly conflict with this Court's decision in *City of Los Angeles v. City of San Fernando (1975) 14 Cal.3d 199, 257-264*, which held that anyone (extractor or non-extractor alike) may, through their own industry, import, store and recapture water?

(2) May a trial court's jurisdiction be expanded post-judgment, beyond the reservation of jurisdiction delimited in the original judgment?

(3) Under the "physical solution" doctrine, must a trial court entertain a motion to amend a judgment in a water rights case when the moving party has not shown the existence of harm for the court to resolve?

(4) Under the auspices of the "physical solution" doctrine, does a court acquire such broad equitable powers that it may adjudicate future water rights, including the property rights of those who are not parties [*3] to the original litigation?

WHY REVIEW SHOULD BE GRANTED

Undoubtedly, this Court has become inured to claims in petitions for review that the appellate decision, if allowed to stand, will wreak untold havoc in a particular area of the law. Here, these alarms are true, as the Court of Appeal's decision vastly alters the jurisdictional landscape and redefines real property and water right laws.

In a published decision that is without precedent, the Court of Appeal has expanded a trial court's jurisdiction - originally retained to address water extraction issues - to enable only the extractors to advocate for a comprehensive water storage program that will adjudicate and allocate storage space within the entire groundwater basin. Indeed, the Court of Appeal Decision ("Decision") appears boundless in its jurisdictional expansion, seemingly unconstrained by the issue presented in the original litigation so that anything impacting the basin as a whole (such as contamination, surface waters, well drilling and numerous other matters) is now fair game for a motion to amend the "judgment."

First, the Decision allows extractors to devise a water storage plan that favors water extractors [*4] over all others. This directly conflicts with *City of Los Angeles v City of San Fernando* ["*San Fernando*"], *supra*, 14 Cal.3d 199, and *City of L.A. v. City of Glendale* (1943) 23 Cal.2d 68, 76-78. In *San Fernando*, at pages 257 to 264, this Court discussed regulation of storage in a water basin. After discussion of the issues, the Court held:

"Defendants concede that plaintiff should be permitted to reclaim water that it spreads with the intent of recapture but contend that the trial court acted properly in restricting plaintiff's future spreading operations. As a basis for this restriction the trial court found that artificial recharge of ground water supplies 'affects ground water storage capacity, ground water in storage, ground water movement (rate and direction), and ground water levels,' and that artificial recharge must be regulated and controlled 'to protect the public interest and the rights of the parties in the utilization of the underground reservoirs of the ULARA.' Accordingly, the court enjoined artificial recharge except on terms and conditions to be approved by the court which it reserved jurisdiction to determine.

Plaintiff, [*5] being the only party engaged in or contemplating spreading or artificial recharge operations [footnote omitted] objects to these restrictions in the judgment. We think its objections are well taken. Plaintiff is entitled to use the San Fernando basin for temporary storage of its water by means of artificial recharge and subsequent recapture. (Wat. Code, § 7075 (quoted *supra*); *Glendale*, 23 Cal.2d at pp. 76-77.) No necessity is shown for interfering with this right to use the basin for storage, for there does not appear to be any shortage of underground storage space in relation to the demand therefor." (*Id.* at 264.)

In contrast, the Court of Appeal's Decision now allows a party to the original judgment to garner water storage rights over others. Not only does the unwarranted storage plan proposed below provide the opportunity for water extractors here to hoard storage space to the exclusion of those this Court held had a right to store water, it likely would result in increased water costs when the public could not store imported water. Allowing extractors to stockpile the storage space would directly conflict with the decision in *Central and West Basin Water Replenishment Dist. v. Southern California Water Co.* (2003) 109 Cal.App.4th 891, 910-912, 917, [*6] which held water extraction rights are not concomitant with water storage rights.

Second, the Decision, which found such jurisdiction existed, directly conflicts with several decisions, which held that jurisdiction is based on the issues framed by the original pleading and ultimately resolved in the original judgment. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d. 908, 937, *Central and West Basin Water Replenishment Dist. v. Southern California Water Co.*, *supra*, 109 Cal.App.4th at 903, *Orange County Water Dist. v. City of Colton* (1964) 226 Cal.App.2d 642, 648-49, and *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363.) How does the Court of Appeal justify its drastic departure from existing case law? It found jurisdiction could be expanded beyond the original jurisdiction because of an amendment - 20 years later - to the original judgment. But that presupposes that the Court of Appeal correctly viewed the trial court's amendment as jurisdictionally sound - which under these four cases is a false premise.

Third, the Decision held the "physical solution" doctrine n1 [*7] requires the trial court to entertain the motion to amend the judgment. But this holding directly conflicts with *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 326-333, in which this Court required the existence of harm to a resource before a court could intervene and implement an equitable resolution under the physical solution doctrine, and *San Fernando*, *supra*, 14 Cal.3d at 264 (no interference with common law right absent showing of harm). It is also at odds with *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.*, *supra*, 207 Cal.App.3d 363, which required the showing of an unreasonable or wasteful use of the resource before a proponent may seek modification of a physical solution. Here, in contrast, the moving parties sought to amend the judgment to implement their water storage program and allocations despite the existence of ample storage space, i.e., no existing harm justifying a storage program.

n1 Under the California Constitution, article 10, § 2, water must be put to beneficial and reasonable use - when utilized.

[*8]

Fourth, the Decision has a profound and detrimental effect on all those having West Coast Basin *storage* rights. The Court of Appeal's holding encompasses and impacts any person or entity holding water storage rights, even though they likely were not notified in 1980 that their *storage* rights were being re-defined (or even completely divested) by a court that was called upon to adjudicate water *extraction* rights. The Decision, while noting this very issue, again relied on the *modification* of the original judgment to justify its adverse impact on the rights of nonparties. (Opin. at 16.) The due process concerns are manifest, as non-party storage rights holders, who were not involved in the original action and without notice and an opportunity to be heard, will now be impacted by a judgment governing storage rights that some of the parties to this action may agree upon or, in the absence of the parties' agreement, arises from the trial court's new physical solution, which may be implemented under the Court of Appeal's holding despite the absence of a storage "problem" to invoke the physical solution doctrine. This aspect of the Decision conflicts with *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 133, 1250, [*9] which forbids a court from exercising continuing jurisdiction in a manner that ignores vested property rights (such as those of the non-extractors).

Fifth, the Decision's detrimental impact is amplified by the fact that parties and non-parties alike are subjected to a truncated motion process to determine their rights. Also, there are several public agencies possessing the power to store or impact groundwater basins, but they are not involved in the instant litigation; the Decision allows their powers to be usurped or removed. n2 (*Central and West Basin Water Replenishment Dist. v. Southern California Water Co.*, *supra*, 109 Cal.App.4th at 916 (WRD has control over some portion of storage space, consistent with its mandate to replenish waters, but it does not have exclusive control of a storage basin); *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 177-178 (there are three districts created under California law - groundwater replenishment districts, municipal water districts, and water conservation districts - with "limited powers over groundwater;" these districts may impinge on the powers of a city or county, but "we discern no occupation [*10] of the field of groundwater regulation in these enactments").)

n2 Where an existing judgment is in place establishing a physical solution to water rights issues, the public agency has no judgmental controls to exercise. The power to act in these circumstances is reserved to the court.

Sixth, as the Court of Appeal recognized, the issues at bar implicate the California Constitution, article 10, § 2. (Opin. at 4.) This provision sets forth California's public policy of fostering the reasonable and beneficial use of water. It is designed to prevent and limit waste of the resource. Thus, the instant petition manifestly raises issues important to all Californians.

STATEMENT OF THE CASE

A. Overview Of The West Basin Judgment

The West Coast Basin encompasses some 101,000 acres in Los Angeles County. (Appellants' Appendix Vol. 1 ("1App.") at 9; 6App. at 1444, 1559.) On October 24, 1945, California Water Service Company, Palos Verdes Water Company and the City of Torrance filed a complaint seeking [*11] an adjudication of groundwater extraction (not storage) rights. (6App. at 1420-1444; *see also*, *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 721 (reviewing original judgment in instant action).) The litigation was brought because the resource was oversubscribed, and the West Coast Basin could no longer sustain the amount of water being withdrawn. (6App. at

1434-1441; 224 Cal.App.2d at 723) The trial court entered a stipulated judgment on August 22, 1961 (the "original West Basin judgment"). (6App. at 1555-1593; 224 Cal.App.2d at 722.)

The original West Basin judgment gave certain parties groundwater extraction rights ("Adjudicated Rights") that were transferable and based on prescriptive, appropriative and overlying extraction rights. (*See generally, California Water Service Co. v. Edward Sidebotham & Son, supra, 224 Cal.App.2d 715*). It also imposed limitations on pumping rights. (6App. at 1559; 224 Cal.App.2d at 722.) The West Basin judgment contained a provision providing the trial court with continuing, albeit limited, jurisdiction:

"XI

The Court hereby reserves [*12] continuing jurisdiction and upon application of any party hereto having an Adjudicated Right or upon its own motion, may review (1) its determination of the safe yield of the Basin, or, (2) the Adjudicated Rights, in the aggregate, of all of the parties as affected by the abandonment or forfeiture of any such rights, in whole or in part, and by the abandonment or forfeiture of any such rights by any other person or entity, and, in the event material change be found, to adjudge that the Adjudicated Right of each party shall be ratably changed; provided, however, that notice of such review shall be served on all parties hereto having Adjudicated Rights at least thirty (30) days prior thereto. Except as provided herein, and except as rights decreed herein may be abandoned or forfeited in whole or in part, each and every right decreed herein shall be fixed as of the date of the entry hereof.

XII

The Court further reserves jurisdiction so that at any time and from time to time, upon its own motion or upon application of any party hereto having an Adjudicated Right, and upon at least thirty (30) days notice to all such parties, to make such modifications of or such additions to, the [*13] provisions of this judgment, or make such further order or orders as may be necessary or desirable for the adequate enforcement, protection or preservation of the rights of such parties as herein determined." (6App. at 1591-1592.)

A few narrow amendments have been made to the original West Basin judgment. Primarily, the amendments permit additional pumping in connection with groundwater cleanup and address over-pumping during severe droughts. (1App. at 83-94, 15App. at 3740-3748.) They address issues involving carry-over, excess production, drought carry-over, and an exchange pool through a "physical solution." (1App. at 55-63.) Regarding reserved jurisdiction, the 1980 amended judgment contains language identical to paragraph XI of the original judgment, albeit under a under different paragraph heading [PXIV]. (1App. at 77-78.) Inexplicably, however, the 1980 amended judgment added a few words to paragraph XII of the original judgment:

"XV

The Court further reserves jurisdiction so that at any time and from time to time, upon its own motion or upon application of any party hereto having an Adjudicated Right, and upon at least thirty (30) days notice to all such parties, [*14] to make such modifications of or such additions to, the provisions of this judgment, or make such further order or orders as may be necessary or desirable for the adequate enforcement, protection or preservation of the *Basin and of the* rights of such parties as herein determined." (1App. at 78; italics highlight language added to the original judgment.) n3

n3 The other amendments do not reflect any jurisdictional language. (15App. at 3740-3748.)

Neither the original West Basin judgment, nor any of the subsequent amendments, makes any reference to groundwater storage or storage rights.

B. Appellants' Motion To Amend The Judgment

In 2001, there was an unsuccessful motion to amend the judgment in the hydrogeologically linked Central Basin to implement a storage system. That in turn led to an appeal of that ruling, an unsuccessful mediation, and ultimately a motion to amend the Central Basin judgment filed in 2009. (1App. at 113.) The underlying motion, nearly identical, was filed concerning [*15] the West Basin. (1AA at 114.)

Appellants executed a stipulation among nine parties n4, including the Water Replenishment District ("WRD"), agreeing to move the trial court to adopt their proposed amendments to the West Basin judgment. (1AA at 222-241.) In accordance with their stipulation, Appellants filed a lengthy motion to obtain a proposed amended judgment designed to adjudicate the storage rights and implement rules and regulations to establish and control groundwater storage space in the West Coast Basin. (1App. at 95-143.)

n4 The original stipulating parties included seven public agencies and two private purveyors. One of the private purveyors, California Water Service, is not a party to this appeal.

Appellants moved the trial court to amend the West Basin judgment beyond the scope of the jurisdiction reserved under the original, 1961 judgment. In pertinent part, they asked for several extra-jurisdictional items:

. "Declaring the Amount of Space to be Used" [120,000 acre-feet] and authorizing [*16] the use of storage space by the parties to the judgment up to 200% of the party's Allowed Pumping Allocation ("APA") (1App. at 121, 172, 179);

. "Establishing Flexible Areas for Categories of Storage" into: (a) Individual Storage Accounts where each party automatically has the right to store up to 40% of that party's APA; (b) a Community Storage Pool allowing only the parties to the judgment to store water on a first-come first-serve basis, and (c) Regional Storage Projects approved by the Watermaster "to store water for the benefit of the region as a whole" (1App. at 121-122,176-179);

. "Establishing a Basin Operating Reserve" setting aside 49,100 acre-feet of available dewatered space for the WRD (1App. at 122, 173-174);

. Appointing a New "Participative" Watermaster, consisting of "b. A 'Storage Panel' . . . 'empowered to review proposals for Regional Storage and to enforce aspects of the storage program' and C. 'An Administrative Body' to oversee storage projects" (1App. at 122, 204-214);

. "Providing for Future Water Supply Augmentation" approved by the Storage Panel (1App. at 123, 182-184);

. "Allowing Transferability of Stored Water" freely between the [*17] parties to the judgment and permitting water that has been stored, like water rights themselves, to be transferred within certain limitations from the West Coast Basin to the Central Basin (1App. at 123, 185-186); and,

. "Providing for Periodic Review" of the storage program. (1App. at 123.)

C. Tesoro/Hillside's Opposition

Tesoro operates a refinery and related business within the West Coast Basin. (14App. at 3724.) It is a major adjudicated water rights holder, lessor, and pumper of water within the West Coast Basin. Currently, Tesoro holds 5.3% of the Adjudicated Rights within the West Coast Basin under the West Basin judgment. (14App. at 3701-3702.) It joined with Hillside Memorial Park and Mortuary in opposing Appellants' proposed amendments to the West Basin judgment. (15App. at 3849-3850.) Tesoro and Hillside presented numerous reasons why the trial court could not grant Appellants' motion, including the absence of jurisdiction. (7App. at 1704-1733; 15App. at 3896-3915; 22App. at 5777-5784, 5793-5803.)

D. The Trial Court's Ruling

Initially, the trial court considered granting the prayed-for amendments. (22App. at 5629.) Eventually, the trial court denied [*18] the motion "because of the absence of evidence of compliance with the requirements of CEQA." (23App. at 6048-6056.) It observed:

"Approval of the proposed judgment is tantamount to approval of the storage plan, and all the factual findings, both explicit and implicit, in the proposed judgment. The result would be that the salutary provisions of CEQA would be by-passed in all practical respects. Alternatively, this court would be declaring facts that might be inconsistent with the facts as determined following CEQA review.

[P][P]

[] WRD's motion calls for much more than an amended judgment creating [a water storage] governance system. *It lays out, in great detail, the location and dimensions of the underground storage spaces, details how the space is to be used, and by whom, and then declares that the plan will have no negative environmental impact.*" (23App. at 6052-6054; emphasis added.)

E. The Court of Appeal's Decision

The Court of Appeal focused its Decision on two primary issues, the trial court's jurisdiction and the trial court's duty to determine a physical solution. n5 (Opin. at 14, 17.) Preliminarily, the court recognized that the original [*19] judgment "does not contain provisions relating to storage." (Opin. at 6.) Nonetheless, it rejected the assertion that the trial court lacked jurisdiction to amend the judgment because the motion pertained to water storage while the original judgment was limited to water extraction. The Court of Appeal found that the 1980 amendment, which added a few words to the reserved jurisdiction provision, "materially expands the power of the trial court to take necessary steps *to protect and preserve the West Basin* in addition to the rights of the parties." (Opin. at 15.) Then, it reversed the trial court's conclusion that one of the moving parties was obligated to comply with CEQA before proceeding with the motion to amend; the Court of Appeal further held that the trial court had a duty to determine a physical solution. (Opin. at 17, 18.)

n5 The Decision is published. (*Hillside Memorial Park and Mortuary v. Golden State Water Co. (2011) 199 Cal.App.4th 658.*)

Both Tesoro and Hillside sought rehearing. [*20] Tesoro noted that the Court of Appeal did not have a full record from which it could expand the trial court's jurisdiction essentially to perform anything it deemed appropriate for the West Coast Basin. Tesoro also showed how the Decision conflicts with other authority addressing the scope of a

judgment's reserved jurisdiction provision, and why the Court of Appeal was mistaken in its effort to distinguish *City of Colton, supra*, and *Big Bear Mun. Water Dist., supra*. Similarly, it explained how the Decision's physical solution analysis conflicts with *City of Lodi, supra*, and *San Fernando, supra*. Finally, Tesoro asked the Court of Appeal to modify its opinion to require (rather than permit) the trial court to take into account environmental concerns when determining an appropriate physical solution.

The Court of Appeal denied rehearing.

LEGAL DISCUSSION

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER ITS DECISION IN SAN FERNANDO CAN BE CIRCUMVENTED BY AMENDING A JUDGMENT TO IMPLEMENT A WATER STORAGE PROGRAM AND STORAGE ALLOCATION.

In *San Fernando, supra*, 14 Cal.3d 199, [*21] this Court went to great length in discussing water storage rights and defining common law storage rights. As noted *ante*, *San Fernando* addressed whether the city, which imported water and spread it to recharge its underground supply, had a right to recapture the imported water. Others claimed their prescriptive rights superseded the city's right to recapture the imported water. This Court agreed with the city, holding the city had the right to recapture its imported water. In so doing, this Court recognized that "stored water" can only be water brought into a groundwater basin through industry and effort. (*Id.* at 255-256, 261, 264.) Thus, storage involves the importing of "new water," i.e., water which would not otherwise be in a groundwater basin. (*Id.* at 261, 263-264; see also, *City of L.A. v. City of Glendale, supra*, 23 Cal.2d at 72, 76-77.)

Yet the Court of Appeal's Decision enables parties who have extraction rights to purchase native water from the West Coast Basin and "store" it under the Appellants' allocation and storage program. This impermissibly allows the extractors to convert native water into "stored" water, thereby [*22] creating an ownership right and, further, privatize a public resource. (Compare *Central and West Basin Water Replenishment District v. Southern California Water Company, supra*, 109 Cal.App.4th at 905.) By allowing this practice, the Decision violates this Court's holding that only water brought into a groundwater basin through industry and effort can be "stored water." (*San Fernando, supra*, 14 Cal.3d at 255-256, 261, 264.) For all intents and purposes, the Decision eliminates the ability of any person, city or entity to import, store and retrieve water unless that party also happens to have West Coast Basin extraction rights.

This Court should grant review to reinforce what it pronounced in *San Fernando* and clarify the rules governing water storage rights. In so doing, the Court could explain why those operating under a water extraction judgment do not garner greater storage rights than others, particularly when the others have not been notified of a comprehensive water program that could vitiate their common law right to store water.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE PUBLISHED DECISION IN THIS CASE [*23] AND OTHER AUTHORITY ON THE ISSUE OF WHETHER JURISDICTION MAY BE EXPANDED BEYOND THE SCOPE OF THE ORIGINAL JUDGMENT.

The threshold jurisdictional question is whether the original West Basin judgment reserved jurisdiction to adjudicate new non-extraction rights in the future. The trial court could not retain power over matters which never were within its jurisdiction. (7 Witkin, Cal.Proc. (5th ed. 2008) Judgment, § 80; see also, *Orange County Water Dist. v. City of Colton, supra*, 226 Cal.App.2d 642, 648-49, citing *City of Pasadena v. City of Alhambra supra* 33 Cal.2d at 908, 937; *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 672-3 (modification to a judgment going beyond the issues raised in the pleadings is invalid); see also, *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co., supra*, 207 Cal.App.3d at 375-78 (California Constitution, article 10, section 2, does not permit modification of a physical solution in a manner inconsistent with a judgment); *Central and West Basin Water Replenishment Dist. v. Southern California Water Co., supra*, 109 Cal.App.4th at 903.) [*24]

Neither the West Basin judgment nor any of the subsequent amendments makes any reference to the storage of groundwater or the right to use subterranean space for water storage purposes. Indeed, the Court of Appeal's Decision acknowledges this point. (Opin. at 3, 6.) And it recognized that the proposed amendment to the judgment "included a number of substantive changes regarding a *new* storage program . . ." (Opin. at 10; emphasis added.) Nevertheless, it concluded that the trial court had jurisdiction to consider Appellants' proposed water storage program because the original West Basin judgment, without explanation, had been amended to expand jurisdiction. (Opin. at 3, 8, 14, 15.) The Court of Appeal concluded three new words added to the 1980 amended judgment - "Basin and of - "materially expanded" the trial court's equitable powers. (Opin. at 8, 14, 15.)

To reach its conclusion, the Court of Appeal distinguished *City of Cohort*, *supra*, thusly:

"The proposed modification in *City of Colton* would have covered issues not contemplated in the original judgment. ' Further the proposed modification would have imposed terms upon parties who had not participated in the [*25] original proceedings. (*Id.* at pp. 648-650.) Unlike *City of Colton*, the modification of the original judgment in this case expanded the trial court's jurisdiction to reach the issues in the proposed amended judgment." (Opin. at 16.)

But the Court of Appeal's reasoning is truly a distinction without a difference. In *City of Colton*, an effort was made to establish new rights based on the judgment's retention of jurisdiction. (*226 Cal.App.2d. at 644-646.*) That trial court rejected the attempt, finding the purpose of the underlying judgment was only to adjudicate the prescriptive rights existing among the parties - not to adjudicate the proposed overlying rights or rights to use the storage space in the basin (*id. at 648-650*) - and concluded it lacked jurisdiction over the proposed new rights. (*Id. at 650.*) The Court of Appeal affirmed, notwithstanding the judgment's broad jurisdictional language. (*See id. at 644.*) It held the trial court:

". . . *could not reserve* unto itself in th[e] action, the right to adjudicate new and after-acquired rights by any of the parties [t]hereto which were nonexistent [*26] in that party at the time of pleading and trial of the issues, nor could it adjudicate rights of any nature between these litigants and overlying land owners not parties to the action." (*Id. at 646*; emphasis added.)

Notably, the Court of Appeal in *City of Cohort* issued a poignant warning:

"A judgment outside the issues is not a mere irregularity; it is extrajudicial and invalid. Even though the subject matter falls within the category or class over which the court has exclusive jurisdiction, present jurisdiction if not conferred by the pleadings or pretrial proceedings, cannot be conferred by consent, waiver or estoppel. To hold otherwise would be to open a veritable 'Pandora's box' of uncalculated results. Not only do the parties, but also others whose rights or liabilities might be affected by specific litigation between the parties, have a right to know by reference to the records before, or at least at the time of trial, the issues which can be determined in that particular action. Here many overlying rights not before the court would be affected by the granting of appellant's motion. The parties owning these rights are entitled to notice and an [*27] opportunity to resist any such interference with them as appellant proposed here. Their rights cannot legally be subjected to attrition through unlawful extension of the court's power to modify a final judgment which does in fact affect the availability of water to which these rights attach even though the unlawful extension of jurisdiction requested is not resisted, as such, by the other parties to the action." (*226 Cal.App.2d at 649*; citations omitted.)

In the instant action, the Court of Appeal should not have relied on the amended judgment to determine the jurisdictional issue. The 1980 judgment should not have enabled the Court of Appeal to expand jurisdiction beyond what the original 1961 judgment encompassed; the amendment should not provide a new jurisdictional base that is not viable or permissible under the original judgment. By doing so, however, the Court of Appeal's Decision conflicts with *City of Colton*, *supra*, *226 Cal.App.2d. at 644-646, 650*, and *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.*, *supra*, *207 Cal.App.3d at 375-78.*) n6

n6 To distinguish *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.*, *supra*, the Court of Appeal relied on "broad language" set forth in the 1980 amended judgment rather than reading that language in view of the original judgment. (Opin. at 16.) Like its effort to distinguish *City of Colton*, the Court of Appeal mistakenly overlooked the foundation for the language in the 1980 judgment to impermissibly expand jurisdiction here. The Decision cannot be squared with the holdings announced in *City of Colton* and *Big Bear Mun. Water Dist.*

[*28]

This Court should grant review to resolve the irreconcilable conflict in decisions addressing post-judgment jurisdiction, and decide whether *City of Cohort's* warning should ring hollow.

III. THIS COURT SHOULD GRANT REVIEW TO SET THE PARAMETERS GOVERNING WHEN THE PHYSICAL SOLUTION DOCTRINE MAY BE INVOKED.

The Court of Appeal held the trial court has a duty to admit evidence and, if the parties could not agree, suggest a physical solution. (Opin. at 3, 18, citing *City of Lodi v. East Bay Mun. Utility Dist.*, *supra*, 7 Cal.2d at 341.) Certainly, this Court in *City of Lodi* stated "it is not only within the power but it is also the duty of the trial court to admit evidence relating to possible physical solutions, and if none is satisfactory to it to suggest on its own motion such physical solution." (7 Cal.2d at 341.) But it did so only after the parties met the predicate for a physical solution, namely, the existence of a harm to a resource occasioned by a party's utilization of the resource. (See 7 Cal.2d at 326-333.) Indeed, a physical solution is simply a process a court may implement to address a problem. (*City of Lodi*, *supra*, 7 Cal.2d at 339-340.) [*29]

But here, in contrast to *City of Lodi*, Appellants never showed the West Coast Basin was harmed by current storage. Indeed, they affirmatively state that the basin is in no danger of harm because there is ample storage space for everyone to use. n7 A court simply should not have the authority to implement a physical solution without first identifying a problem over which it has jurisdiction. (See *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.*, *supra*, 207 Cal.App.3d at 375-379.) n8

n7 Appellants' motion to amend admits that there currently is adequate storage space in the West Coast Basin. (1App. at 115.)

n8 The court in *Big Bear Municipal Water Dist.* rejected an effort to tether jurisdiction to an existing physical solution. There, the party had "sought to invoke the trial court's continuing jurisdiction under article X, section 2, in order to modify a physical solution which it, the [party] had drafted and agreed to follow, and which it never alleged to constitute an unreasonable or wasteful use of water." (207 Cal.App.3d at 378.)

[*30]

The Court of Appeal's Decision, which imposes a duty on the trial court to effect a physical solution for storage issues, is reached without making the threshold determination that there is a need to protect the resource from a "harm." It mandates a physical solution in a situation where the resource (i.e., storage space) indisputably is unfettered. (See *San Fernando*, *supra*, 14 Cal.3d at 264.) As a result, it conflicts with the line of authority following *City of Lodi* that requires showing of some harm to a resource necessitating judicial intervention.

This Court should grant review to reconcile the conflict between the Court of Appeal's Decision and the line of cases derived from *City of Lodi*, including *San Fernando*, which applied this concept to storage issues. Review would also provide this Court with the opportunity to elucidate when courts may utilize the physical solution doctrine.

IV. THIS COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER A COURT, WHILE IMPLEMENTING A PHYSICAL SOLUTION, MAY DETERMINE FUTURE RIGHTS AND IMPAIR THE RIGHTS OF THOSE WHO WERE NOT PARTIES TO THE ORIGINAL DISPUTE AND SUBJECT TO THE ORIGINAL JUDGMENT.

The Court [*31] of Appeal's decision also fails to account for the numerous parties who are not before the trial court. While a court must apply the principles of California Constitution article 10, section 2, in crafting a physical solution, the solution may not affect vested rights. (*City of Barstow v. Mojave Water Agency*, *supra*, 23 Cal.4th at 1249-1251; U.S. Const., Amend. 14; Cal. Const. Art. 1, §§ 7, 15; *City of Colton*, *supra*, 226 Cal.App.2d at 648-649.) In fact, the *Sidebotham* court recognized this very requirement in reviewing the original West Basin judgment:

"Whether all indispensable parties were before the court is determined by the relief granted. The requirement that indispensable parties be before the court is mandatory. A failure to join indispensable parties necessary to the relief involved constitutes a jurisdictional defect. The judgment finally rendered was an inter se adjudication of the rights of all the parties among themselves. ... In the instant case, the new parties were essential and the court had no jurisdiction to consider the rights of the additional and original parties inter se until 1949 when the amended complaint was filed. [*32] At this time, a new cause of action arose ..." (*Sidebotham*, *supra*, 224 Cal.App.2d at 730-731; citations omitted.)

Here, however, Appellants never provided notice to, nor addressed how their proposed storage plan could be implemented in view of the storage rights of, persons or entities with, for example, overlying, appropriative, prescriptive or even possibly Pueblo rights. (See *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 927.)

Further, the Court of Appeal concluded future rights regarding storage space could be adjudicated. (Opin. at 17.) This conclusion is at odds with *City of Pasadena*, *supra*, 33 Cal.2d at 937, in which this Court held there could be no declaration of future rights in water when the party does not possess a present right. (See also, *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 30-31; *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 525 (prospective uses of a resource cannot be determined until a need arises); *City of Colton*, *supra*, 226 Cal.App.2d 642, 646, 649.)

This Court should grant review to define the proper boundaries [*33] regarding adjudication of future water rights.

CONCLUSION

This Court should grant review to address important issues, which materially affect Californians' water rights. In so doing, it will resolve a conflict between the Courts of Appeal, which have taken vastly different, and irreconcilable, approaches. This Court's intervention is required to settle whether a court can institute a water storage plan and allocation where no harm to the resource exists in the first instance, given this Court's previous pronouncement that anyone has the right to exercise their own industry to acquire, transport, and then store water in a basin.

Review also is needed to unequivocally state what matters may be addressed by a "retained jurisdiction" provision in an underlying water-rights judgment. Guidance is required now to resolve a conflict in the published decisions and thereby prevent trial courts from guessing whether they are constrained by the parameters set forth in the original dispute or whether they may expand their own jurisdiction to address any other water-related matters.

DATED: November 7, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, Tesoro's Petition for Review was produced on a computer, using the word processing program Word 2007, and the Font is 13 point Times New Roman.

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick LLP, 801 South Figueroa Street, 18th Floor, Los Angeles, California 90017-5556. On November 7, 2011, I served the within document(s):

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[SEE OPINION OF THE COURT OF APPEAL IN ORIGINAL]

[SEE ORDER DENYING GEHEARING IN ORIGINAL]