



**FILED**

10-20-11  
04:59 PM

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

James and Marie Hughes, Kathleen Palmer,  
Gregory and Michelle Land, Patrick and  
Delores McMillen, Jeffery and Tina Strunc,  
and Michael and Robin Beals,

Complainants

vs.

Big Oak Valley Water District (BOVWD),

Defendant

**C. 11-05-025**  
(Filed May 25, 2011)

**REPLY BRIEF**

JESSE W. BARTON, CSBN 221337  
Gallery & Barton, A Professional Law Corporation  
1112 I Street, Suite 240  
Sacramento, CA 95814  
Telephone: 916-444-2880  
Fax: 916-444-6915  
Email: [jbarton@gallerybartonlaw.com](mailto:jbarton@gallerybartonlaw.com)

Attorney for James and Marie Hughes, Kathleen Palmer, Gregory and Michelle Land,  
Patrick and Delores McMillen, Jeffery and Tina Strunc, and Michael and Robin Beals

October 20, 2011

This Reply Brief is in response to Defendant Big Oak Valley Water District's (BOVWD) Opening Brief dated October 11, 2011. While not entirely consistent with the Opening Brief outline we agreed upon, we will respond to BOVWD's Opening Brief in the format in which it was presented.

## **I. BOVWD's Factual Background Relevant to Scoping Memo**

Although BOVWD's Opening Brief starts with an "Introduction" and "Summary of Argument," we will start with its "Factual Background" section because the introduction and summary only summarize positions that we will address in the body of our reply. We object to the attachment of exhibits to BOVWD's brief because the CPUC did not ask for evidence in the opening brief.

### **a. Background of the Dempsey Ditch**

The thrust of this section is BOVWD is attempting to show that the Dempsey Ditch is, and has been, abandoned. The relevancy of this claim is not addressed by BOVWD. Regardless, BOVWD's assertions are inconsistent with its own actions and are wrong as a matter of fact and as a matter of law.

The assertions are inconsistent with its actions because BOVWD never raised the issue of abandonment until after litigation was instituted against BOVWD.

- BOVWD never asserted the ditch was abandoned when it entered into a contract with my clients that obligated it to deliver water into the ditch.
- BOVWD never asserted the ditch was abandoned when, under the same contract, my clients spent tens of thousands of dollars improving the ditch.
- BOVWD never asserted the ditch was abandoned when BOVWD took \$4,500 from my clients.

- BOVWD never asserted the ditch was abandoned when it delivered water into the ditch for the entire irrigation seasons of 2005 and 2006 and a portion of the season in 2007.
- BOVWD never asserted to my clients prior to the litigation that any portion of the ditch was abandoned.

And most importantly, how, if the ditch is abandoned, does BOVWD continue to deliver water to its own members? Thus, its own actions between 2004 and 2008 irretrievably cripple BOVWD's implication that it cannot deliver water into the ditch because it is "abandoned."

BOVWD is wrong as a matter of fact because the "exhibits" that BOVWD attaches to support its position do nothing but undermine it. For starters, one must note that BOVWD has not arranged its exhibits in a chronological manner. Chronologically arranged, the Exhibits are 1, 3, 4, 5, 2, 6, 7/9, 8, 11, and 10, yet BOVWD's arrangement of these exhibits in a numerical manner on page 3 of its Opening Brief creates the impression that one logically leads to another. This intentional misrepresentation of the facts is consistent with BOVWD's behavior throughout this process.

Allow us to properly frame these exhibits. Exhibit 1 is the original easement for the Ditch. Exhibit 3 has nothing to do with this action. A close look reveals that it shows properties that are not crossed by the Ditch, so why BOVWD attached it is a mystery to us. It certainly does not support BOVWD's statement that "the properties underlying the Ditch were returned to private ownership."

Moving on to Exhibit 4, on April 9, 1982, BOVWD claims that NID states that the ditch is privately owned and that NID has been selling water to one property on the ditch for over ten years. On July 2, 1982, according to BOVWD's Exhibit 5, NID again

refers to the ditch being private. Then in 1986, according to BOVWD's Exhibit 2, the NID Operations Committee said the "ditch," not a portion thereof, was abandoned at the time Beale Air Force Base took over the property, which according to BOVWD's Opening Brief, occurred "shortly after" 1931. Then in 2000, according to BOVWD's Exhibit 6, NID quitclaimed the ditch to BOVWD. The map attached to the quitclaim deed shows the word "abandoned" next to the north portion of the ditch, but shows nearly the entire ditch within BOVWD's boundary. The resolution attached to the quitclaim deed states that NID has not delivered water into the ditch for 50 years at the time of the quitclaim, which directly contradicts what NID wrote in 1982 in Exhibits 4 and 5. Furthermore, the resolution seems to recite the history of the Ditch, but never says it was abandoned (see paragraph 2). In fact, the resolution recites the legal validity and status of the Ditch when it states, in paragraph 3, that the "District is advised that its Dempsey Canal easement is an easement-in-gross which is transferable by deed." If NID considered the Ditch abandoned, how could NID determine the type of easement it was, and declare it was transferable?

The first page of Exhibit 7 appears to be an agenda (we cannot confirm its authenticity) from a meeting between BOVWD and the south ditch group. The portion of the agenda dealing with easements requests two actions. Those who have the "ditch going through your property," were supposed to notify their title company that their property is burdened by the easement (see the bottom of page 2 and the top of page 3 in Exhibit 7 (letter dated February 26, 2004)). This simply acknowledges that the Ditch easement, attached as Exhibit 6, and recorded as DOC-2000-0027868-00 in the Official Records of Nevada County, has failed to appear in some people's title reports. The second action involves those whose properties are served by "coming off someone else,"

who were supposed to obtain private easements for these new facilities. Neither request is evidence of abandonment. Civil Code section 1084 provides, the “transfer of a thing transfers also all its incidents, unless expressly excepted,” and Civil Code section 1104 specifically provides that “[a] transfer of real property passes all easements attached thereto.” Put differently, once an easement has been recorded against a property, it passes without subsequent reference unless the easement is specifically excepted. (See, for example, *Tract Development Service, Inc. v. Kepler* (1988) 199 Cal.App. 3d 1374, 246 Cal.Rptr. 469; *Conaway v. Toogood* (1916) 172 Cal. 706, 158 P. 200).

The second, third, and fourth pages of Exhibit 7 are part of a letter that Wendy Shaake (BOVWD) assisted Dee McMillen in writing. One can tell that someone else composed the letter because the last page of the letter states “Please contact *Dee McMillen* at 530-432-6583 to advise *her* of your decision by April 15, 2004.” (Emphasis added.) If Ms. McMillen wrote the letter by herself, there would be no need to refer to herself in the third person.

Exhibit 8 shows nothing more than NID seeking clear easements for the Ditch, spillways and appurtenances, which again, is not evidence of abandonment, but NID’s desire to ensure access to own and operate the ditch. NID simply asks for recorded easements to the Ditch including surveys to create legal description and plat exhibits. NID apparently did not feel that the 1930 Dempsey grant deed met the current legal form required by NID (even though NID previously owned the easement). If one reads the language of the grant deed (Exhibit 1), and the language of the NID letter asking for grant deeds, it becomes apparent that NID was simply requesting that the easement upon which the Ditch rests reflect NID’s current standard for legal descriptions of easement deeds. Nowhere in the letter does NID state that it thinks the easement is abandoned or

otherwise invalid.

In sum, according to BOVWD, the Ditch was abandoned sometime after 1931, but then revived sometime prior to 1972 when NID began selling water to one resident along the Ditch. The Ditch was then abandoned again sometime between 1972 and 2000, at which time NID stated it hadn't used the Ditch in over 50 years, apparently unaware it had been selling water to at least one person along the Ditch since 1972, and prior to the formation of BOVWD in 1986.

BOVWD attempts to weave a coherent explanation for these factual inconsistencies by arranging the exhibits in a misleading manner, but the dates don't lie, and all they prove is that the ditch had been used by NID between 1972 and 1986. After 1986, BOVWD used the ditch until NID transferred it to BOVWD in 2000, at which time NID essentially affirmed the validity of the ditch by determining its type and transferring it by deed to BOVWD. BOVWD now owned the Ditch and continued to operate it until 2005 when it entered into a contract with my clients to deliver water into the south portion of the ditch in 2005, 2006, and a portion of 2007. Therefore, any and all affirmations about the ditch being "abandoned" are merely convenient distortions of the facts, and in any event, apply to the entire ditch, not just the south portion.

BOVWD is wrong as a matter of law because a written easement cannot be abandoned by mere nonuse. See, for example, *Tract Development Service, Inc. v. Kepler* (1988) 199 Cal.App. 3d 1374, 246 Cal.Rptr. 469 (*Tract*) (easement created by grant is not lost by mere nonuse, but lost only when clear intention to abandon is shown). See also Civil Code § 811(3.), which recognizes this common law principle, providing that a servitude is only extinguished when the easement holder performs acts that are incompatible with its nature or exercise. The incompatible act must create permanent interference with the use of the easement that clearly indicates intent to abandon the easement. (See, *Id.*, *Tract* (trees planted within an easement for a road "may indicate nothing more than the property owners' intent to not use the way as a way until

sometime in the distant future,” and therefore was not clear intent to abandon easement). In this situation, there is no evidence of a clear intent to abandon any portion of the ditch easement. Portions of it had been used since the 1970s and in any case, BOVWD had revived the entire ditch easement when it sold water to the plaintiffs in 2005, 2006, and 2007. See, for example, *Griffin v. Parker* (1932) 124 Cal.App. 701, 13 P.2d 403 (easement to a well was not abandoned when well ceased to produce water, upon restoration of well’s operation, easement was revived).

BOVWD is also wrong as a matter of law because NID, as a public entity, cannot simply “abandon” property. The NID board of directors’ resolution (number 2000-32 at paragraph 4, page 3 of Defendant Exhibit 6) states that the quitclaim is made under section 22500 of the Water Code. This section of the Water Code is contained in the statutory scheme governing Irrigation Districts, under which NID is formed, and states, in pertinent part:

When a board determines by resolution entered upon the minutes that any property of the district is no longer necessary for district purposes, the district may for a valuable consideration sell or lease the property upon terms that appear to the board to be for the best interests of the district.

In other words, to dispose of property, the board of directors of the irrigation district must, by resolution: (a) declare the property is not necessary for district purposes, and (b) sell or lease the property upon fair terms. The requirement that the board “sell or lease” the property for valuable consideration excludes the ability of irrigation districts to abandon their property. One cannot “abandon” property while at the same time sell or lease it upon fair terms.

Section 22437 of the Water Code supports this interpretation. It states that “title to all property acquired by a district is held in trust for its uses and purposes. The district may hold, use, acquire, manage, sell, or lease the property as provided in this division.” There is no provision allowing an irrigation district to abandon property held in trust by the district.

Even assuming that Water Code section 22500 allowed an irrigation district to

abandon its property, which we contend it could not, the intent to abandon would have to come through a resolution adopted by the board and reflected in the minutes as required under section 22500.

NID followed section 22500 of the Water Code in quitclaiming the Ditch easement to Defendant. Therefore, it is reasonable to assume, that if NID did intend to abandon the Ditch, it would have followed the same process and that a resolution showing NID abandoned the Ditch would be found within NID files. Certainly, if such a document existed, BOVWD would have attached it to its Opening Brief. It is clear that BOVWD has performed substantial digging throughout NID's files, as evidenced by these documents that we have never seen before, but again, BOVWD has failed to produce a resolution abandoning the Ditch.

Even after all this work, BOVWD, however, cannot even establish who imprinted the map with the word abandoned, who created the map, or when it was created, let alone produce a resolution adopted by NID declaring the easement abandoned.

b. Background of the South Ditch Restoration Group

BOVWD attempts to say that the South Ditch Group's obligation was to rehabilitate the south ditch and "to deliver water to its members." BOVWD attempts to support this statement with its Exhibit 9, which documents have not been turned over to us during discovery in the superior court action. Again, BOVWD attempts to mislead the CPUC by mischaracterizing the content of its exhibits. The South Ditch Group never had "members" and never charged "membership" fees. Nothing in Exhibit 9 even remotely supports such a statement. Exhibit 9, if we assume the authenticity of any portion, simply shows minutes of a meeting and a careful and transparent accounting of money collected and spent on *repairs* to the south ditch and

*maintenance fees* to maintain the Ditch. We have in our possession checks that were first made out to NID for water, which were rejected, and then made out to BOVWD, which were accepted. Thus, there is no question who was responsible for delivering water into the south ditch to the Hughes Parties.

c. Persons Potentially Impacted by Complainants' Legal Actions

Exhibit 10 is nothing more than a map showing properties that the ditch crosses. It is worth noting that none of these underlying owners (those not already involved in the case) has expressed a problem with the work my clients performed on the Ditch between 2004 and 2008.

d. Substantial Repairs Remain to be Done to the Ditch

In its description of Exhibit 11, BOVWD conveniently omits all of the repairs that NID identified as being necessary for the north portion of the ditch. Please read items 1-15 on pages 1 and 2. If pushed, all Exhibit 11 shows is that BOVWD has done an extremely poor job of owning, operating, and maintaining the Ditch and that BOVWD is in desperate need of oversight from the CPUC.

**II. Legal Standards**

In this section BOVWD attempts to outline the legal standards the CPUC should employ when it reviews BOVWD's Opening Brief. Consistent with its previous behavior, BOVWD mischaracterizes the facts and misstates the law as outlined below.

a. Jurisdiction of the CPUC

BOVWD miscategorizes the jurisdiction of the CPUC by claiming the CPUC already has *exclusive* jurisdiction over this action pursuant to Public Utilities Code section 1759. However, section 1759 only applies after the CPUC has asserted jurisdiction over an entity or matter, not before. In this case, we are asking the CPUC to rule whether BOVWD is a public utility pursuant to section 2707. Once the determination is made, only then would CPUC jurisdiction be exclusive and binding on the superior court under section 1759.

For support, we cite *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4<sup>th</sup> 256, 115 Cal.Rptr.2d 874, in which the court interpreted section 1759 in the following manner:

Thus, when read in context with the entire regulatory scheme, section 1759 must be read to bar superior court jurisdiction that interferes with the PUC's performance of *regulatory duties, duties which by constitutional mandate apply only to regulated utilities.* (*Id.* at 280-281, *italics* in original, underline added.)

As discussed above, this is not a situation where we are discussing a regulated entity; we are attempting to determine if BOVWD is a regulated entity. Until this determination is made, the CPUC has concurrent jurisdiction. See, also, *Ventura County Water District v. Susana Knolls Mutual Water Company* (1970) 7 Cal.App.3d 674, 87 Cal.Rptr. 1.

The claim that “a Plaintiff cannot maintain an action in Superior Court and before the CPUC on the same underlying facts and causes of action” is equally unsupported. The case cited by BOVWD as support for this statement (*Pratt v. Coast Trucking, Inc.*) fails.

In *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 39 Cal. Rptr. 332, the issue was the superior court failing to recognize and follow a previous decision of the CPUC on the same matter before the court. The appellate court held the superior court had no authority to ignore the previous decision of the CPUC. This case had nothing to do with a plaintiff maintaining an action in the superior court at the same time an action was being prosecuted in the CPUC. In fact, the action at the CPUC had already been resolved when the CPUC

encouraged the prevailing party to initiate the action in the superior court to recover sums the CPUC adjudged were due to that party (*Id* at 140-141). Thus, there is no prohibition on actions pending in both the CPUC and a superior court when the jurisdiction is concurrent.

BOVWD asserts that “Public Utilities Code section 2106 is not an automatic ‘Pass Go’ card from the CPUC to the Superior Court,” yet we never asserted that it is, only that there are actions pending in the Superior Court which the CPUC has no authority to resolve.

b. Indispensible Parties

In this section, BOVWD simply quotes Code of Civil Procedure section 389(a).

c. Increasing Burdens on Easements

In this section BOVWD recites some law relating to “existing” easements, when just five pages previous to this statement BOVWD (see page 3 of BOVWD’s Opening Brief) claims the ditch easement has been abandoned. While it is exciting to see how BOVWD uses the same set of facts to present faulty, inconsistent and contradictory legal positions, it is difficult to know precisely what BOVWD is arguing when its statements are made in an offhand manner. Suffice to say that the Hughes Parties are not seeking access to the ditch in this action. The Hughes Parties are seeking that BOVWD be deemed a public utility, to repair the ditch, and sell water to those along it in a responsible and respectful manner. Thus this entire section is inapplicable to the CPUC complaint.

**III. Common Outline Legal Analysis on Scoping Issues.**

a. (1) Are there persons and entities not named in the instant complaint that could be sufficiently enough affected by an adjudication of the complaint on the merits to warrant an amendment of the complaint to name them as parties?

BOVWD claims that, yes, there are persons and entities not named that should be brought into the complaint. BOVWD claims these people can be grouped into three categories: individual persons, five additional parties to the 2005 agreement, and NID. With respect to these “individual persons,” BOVWD claims the Hughes Parties are seeking to “access the properties of adjacent landowners that are not before the CPUC.” Nowhere in our complaint have we requested access to other people’s property. It appears to us that this argument has been cut and pasted from BOVWD’s pleadings in the Superior Court action

There are portions of the ditch that leak, which include the north and south sections. It is, after all, an earthen ditch, not a pipe. However, if the CPUC declares the BOVWD a public utility, BOVWD will be obligated to exercise its easement rights and repair those leaking portions of the ditch. Those people who live along the ditch purchased their property with full knowledge of the existence of the ditch (the earthen ditch is visibly present upon any reasonable inspection) and therefore had actual, not constructive, notice of a ditch running through their property. (See, for example, Civil Code section 1104, and *Cairns v. Haddock* (1922) 60 Cal.App. 83, 212 P. 222). In addition, the Hughes Parties spent tens of thousands of dollars improving the ditch between 2004 and 2008 and none of those who own property through which the ditch crosses protested the operation, maintenance, or repair of the ditch. Thus, the claim that these “individual persons” should become involved is utterly without basis.

The “five additional parties” were addressed in our Opening Brief. These “five additional parties” are not members of BOVWD but were party to the contract between BOVWD and those on the South Ditch. The reason the Court required the joining of these additional parties was due

to the causes of action unique to the Court action. Specifically, in the Court action, the plaintiffs are seeking a variety of forms of relief that make certain parties necessary to the action. For example, breach of contract claims often require that all the parties to that contract be named in the action. While we believe our action falls into one of the exceptions to this general rule, the Court believed that everyone should nevertheless be joined. This special circumstance is not present before the Commission. These parties are not necessary to this action.

With respect to NID, the only clear reason it has been named in the Court action is because of the claims we have alleged directly against NID, namely the 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, and 21<sup>st</sup> causes of action. We are seeking these causes of action against NID because we believe NID, as a public entity, has certain legal obligations to make sure that those it sells water to behave in a responsible, fair, and equitable fashion. However, if the Commission wisely determines that BOVWD is a public utility, the Commission will provide all the oversight that is necessary to correct BOVWD's abuses. Therefore, NID is unnecessary to be joined in the Commission action, as the Commission will provide the oversight we are seeking from NID in the Court case.

BOVWD also argues that NID is a necessary party by citing Water Code section 22255 and NID Rule 5.06.03 and the authority these sections grant NID to cut off water to private facilities with excessive leakage. Neither the section nor the rule support BOVWD's position.

Under authority of Water Code section 22255, NID can cut off water to anyone in its District it believes is violating that section. Just because a special governmental district such as NID could impact the flow of water into the Ditch does not mean that NID is a necessary party. Under this logic, Defendants would have the Hughes Parties join the local meteorologist to ensure adequate rainfall necessary to provide the water needed to flow through the Ditch.

Also, it is doubtful that the CPUC could undermine NID's expertise and order NID to deliver water into the Ditch against NID's assertion of authority under Water Code section

22255. Assuming the CPUC declares BOVWD a public utility, it will require that BOVWD update portions of the ditch to address leakage already identified by NID. If there is disagreement over the effectiveness of the repair, there is nothing preventing communication between the parties to resolve the disagreement. Neither entity lives in a vacuum.

a. (2) If so, should they be notified of the complaint and given an opportunity to become parties here?

We see no reason to involve these parties. BOVWD has failed to identify a single interest that justifies joining these additional parties to this action. The “individual persons” have never expressed an interest in this action or the Superior Court action, and they never protested the operation, maintenance, or repair of the ditch performed from 2004 through 2008. The “five parties to the 2005 Agreement” are not necessary because we are not pursuing a breach of contract action against BOVWD in this complaint.<sup>1</sup> Similarly, we are not suing NID in any capacity in the CPUC complaint. None of these parties need to be joined to this action.

a. (3) If so, what are their names and address, and the nature of their respective interests?

We note that while BOVWD lists the names and addresses for NID and the “five parties to the 2005 Agreement” it is unable to list any of the “individual persons” that it claims will be affected by this action. Clearly, none of these “individual persons” agree with BOVWD either.

---

<sup>1</sup> Two parties of the five, Harris and Stone, have filed answers in the Superior Court action. However their involvement has been limited to filing these answers.

a. (4) This issue includes the question of whether the party status of Big Oak Valley Water District as an unincorporated association is an adequate substitute for the naming of individual members as parties for purposes of a full adjudication and enforceable decision.

As we pointed out in our Opening Brief, we believe that BOVWD is adequate, unless the CPUC has a concern of which we are unaware. BOVWD *appears* to agree, although it cites Corporations Code section 18610 for the proposition that individual members of an unincorporated nonprofit association are not liable for contractual obligations. While debatable if it is even relevant, since we believe this is an inaccurate statement of law, we feel obligated to point it out. Under Corporations Code section 18610, a member of a nonprofit association is liable for a contractual obligation when any one of the following occurs: (1) the member receives a benefit under the contract; (2) the member expressly assumes personal responsibility for the obligation in a signed writing that specifically identifies the obligation assumed; or (3) the member expressly authorizes or ratifies the specific contract, as evidenced by a writing.

Unless BOVWD is a “nonprofit association,” section 18610 does not apply and all members are personally liable. We have alleged that the individual members of BOVWD used the “connection fee” collected from the Hughes Parties for BOVWD’s own uses. These fees therefore constitute a profit. The members also received a benefit from the contract in the form of fire protection and increased property values associated with increased water deliveries to the area.

b. Relative to the Superior Court of Nevada County, which is presiding over Case No. 73754 (Hughes et al. v. Big Oak Valley Water District), does the Commission have exclusive jurisdiction to determine whether Big Oak Valley Water District is a public utility covered by the California Public Utilities Code?

As discussed above, BOVWD's "standard of review" on this subject is wrong on all accounts. The CPUC's authority to decide whether BOVWD is a public utility arises from Public Utilities Code section 2707; however, BOVWD fails to cite the only controlling case construing Public Utilities Code section 2707 (*Ventura County Water District v. Susana Knolls Mutual Water Company* (1970) 7 Cal.App.3d 674, 87 Cal.Rptr. 1).

In that case, the appellate court upheld the superior court's decision to issue a binding ruling on an unregulated public utility because it was clear the decision would only be binding until "assumption of jurisdiction by the commission." (*Id.* at 679.) Thus, the CPUC shares concurrent jurisdiction until it acts, at which point its jurisdiction becomes exclusive.

c. If the Commission shares concurrent jurisdiction with that Superior Court to determine that issue of public utility status, should the Commission exercise that jurisdiction to adjudicate the instant complaint on the merits before there has been a disposition of relevant merits in Case No. 73754?

BOVWD claims that even if the jurisdiction is concurrent, the CPUC should wait until after there has been a disposition of the merits of the superior court case before the CPUC acts. BOVWD argues that issues related to the ditch's status, the outrageous claim that the South Ditch Group is a public utility even though it never delivered water to anyone, the use of water and whether the water was paid for at cost or for compensation, and issues related to NID are relevant to whether the CPUC should exercise its jurisdiction. These issues are nothing more than BOVWD grasping at straws in the hope that one of them will provide justification to delay justice longer and allow BOVWD to drag this process out.

BOVWD closes with the statement that the “CPUC should ‘stay’ the action before it pending outcome of the Court matter.” Unfortunately for BOVWD, this statement is contrary to law because it undermines the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction is specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling. (*Wise v. Pacific Gas and Electric Co.* (2005) 132 Cal.App.4<sup>th</sup> 725, 740, 34 Cal.Rptr.3d 222, citations omitted, quoting *Reiter v. Cooper* (1993) 507 U.S. 258, 268-269 (*Wise*).

In other words, if there is some issue pending in court that would more appropriately be addressed by an administrative agency, the court is required to stay the action until the administrative agency can lend its special expertise and resolve the matter. This is the situation we have before us. The Hughes Parties have an action pending in the superior court that includes issues (whether BOVWD is a public utility) that are within the special competence of the CPUC. Under the doctrine of primary jurisdiction, the court, not the CPUC, is required to stay the action until after the administrative agency has ruled on that issue.

Thus, what BOVWD is asking is specifically proscribed by law. “When [primary jurisdiction is] properly invoked...the doctrine requires that the suit be stayed until the agency resolves the issue, whereupon the lawsuit resumes if the agency’s resolution...has not resolved the issue.” (*Wise, supra* at p. 741, citations omitted, emphasis added, quoting *Marseilles Hydro Power v. Marseilles Land & Water* (7<sup>th</sup> Cir. 2002) 299 F.3d 643, 651.)

Therefore, in this situation it is the superior court that must stay its action, not the CPUC. Once the CPUC has resolved whether or not BOVWD is a public utility, then the superior court action can recommence. We will be asking the superior court to stay that action at our next opportunity.

#### **IV. Conclusion**

BOVWD has failed to justify why any additional parties should be named, and its requested relief, to stay the CPUC hearing, is contrary to law. We appeal to the Commission's sense of justice to exercise its primary and concurrent jurisdiction and resolve BOVWD's public utility status as quickly as possible.

Sincerely,

/s/ Jesse W. Barton

Jesse W. Barton, Attorney for  
James and Marie Hughes, et al.