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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Judicial Council Coordination Proceeding No. 4408

Santa Clara County Superior Court Case No. 1-05-CV-049053

Los Angeles County Superior Court Case No. BC 325201

Assigned to Honorable Jack Komar (Ret.)
Department 17C

LONG VALLEY ROAD, L.P.'S NOTICE OF MOTION AND MOTION FOR LEAVE TO INTERVENE IN JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[Declaration of Bruce E. Pherson, Jr., Declaration of Andrew W. Homer and [Proposed] Order filed concurrently]

Hearing Date: November 1, 2018
Time: 9:00 AM

TO THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OR RECORD:

PLEASE TAKE NOTICE THAT on November 1, 2018 at 9:00 AM or as soon as thereafter as the matter may be heard, non-party Long Valley Road, L.P., a California limited partnership ("LVRP"), will and hereby does move the Court for an order granting it leave to intervene in the December 23, 2015 Judgment and Physical Solution ("Judgment") in the above-captioned Antelope Valley Groundwater Cases ("Adjudication") pursuant to Section 20.9 of the Judgment and Section 387 of the California *Code of Civil Procedure*. This Notice and Motion are based on the attached Memorandum of Points and Authorities and concurrently filed Declaration of Bruce E. Pherson, Jr., on all papers filed and records in this action, and on any evidence received at the hearing.

The grounds for granting of this Motion are as follows:

1. Since 2006, LVRP has been the owner of property that overlies the Antelope Valley Groundwater Basin ("Basin") that is the subject of the Adjudication and Judgment. As an overlying landowner LVRP has a right to pump and beneficially use water from beneath its property, as provided for and limited by Article 5, Section 2 of the California Constitution. CAL. CONST., ART. X, § 2. Since acquiring its property in 2006, LVRP has in each year pumped groundwater in excess of twenty-five acre-feet from beneath its property and beneficially used that groundwater for agricultural purposes on that property.

2. LVRP was not and is not a party to any of the lawsuits that, as coordinated, make up the Adjudication. As such, LVRP is not a "Party," as the term is defined in the Judgment, and is not bound by the Judgment. LVRP was erroneously named as a member of the "Small Pumper Class" for purposes of the underlying action *Wood v. Los Angeles Co. Waterworks Dist. 40, et al.*, (Case No.: BC 391869). While LVRP was erroneously named as a class member and may have been served with related notices of Small Pumper Class certification and settlement, LVRP clearly is not covered by the definition repeatedly used to delineate the Class. As such, any Small Pumper Class notices, decisions, settlements or other related documents or actions are not binding and have no other legal effect on LVRP. *See, e.g.*, Dkt. 11020 at Ex. A, § 3.5.44 (defining Small Pumper Class with requisite element that members pumped less than twenty-five acre feet in any year from 1946 through the date of the Judgment, December 23, 2015).

3. As a significant pumper, agricultural user, and overlying water right holder, LVRP was erroneously *excluded* from the Adjudication and Judgment through no fault of its own. By this Motion LVRP seeks to rectify that error and become a Party to the Judgment, and to quantify and memorialize its right to beneficially use groundwater from beneath its property for agricultural purposes on that property.

4. Pursuant to Section 20.9 of the Judgment, LVRP has consulted with the Watermaster Engineer and sought the stipulation of the Watermaster before bringing this Motion.

5. LVRP's intervention in the Judgment is necessary and appropriate under Section 387 of the California *Code of Civil Procedure* because LVRP owns property that is purportedly subject to the Judgment, and intervention is necessary to protect LVRP's property rights, appurtenant water right, and ability to produce groundwater in accordance with the Judgment. LVRP's interests are not adequately represented by any existing party to the Adjudication or Judgment.

6. Even if the overlying water right held by LVRP or former owners of LVRP's property was arguably impacted by prescriptive use of Basin water during periods of overdraft, LVRP itself has openly and notoriously used Basin water since 2006 during a period of overdraft, so would itself hold a prescriptive right to continue to beneficially using the same volume of groundwater from beneath the its property.

Respectfully Submitted,

DATED: October 9, 2018

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Michael J. O'Connor
Andrew W. Homer

Andrew W. Homer
Attorneys for Defendant
Long Valley Road, L.P.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through this Motion for Leave to Intervene non-party Long Valley Road, L.P., a California limited partnership ("LVRP") seeks to intervene in the in the December 23, 2015 Judgment and Physical Solution ("Judgment") in the above-captioned Antelope Valley Groundwater Cases ("Adjudication") pursuant to Section 20.9 of the Judgment and Section 387 of the California *Code of Civil Procedure*. Currently LVRP is not a party to the Adjudication or the Judgment, but it is the owner of a property that overlies the Antelope Valley Groundwater Basin ("Basin"), holds a Constitutionally protected water right as an overlying landowner, was erroneously listed as a member of the "Small Pumper Class" in the Adjudication, and was erroneously excluded from the Adjudication and the resulting list of parties with Overlying Production Rights[1] that was included in the Judgment. Pursuant to Section 20.9 of the Judgment, LVRP consulted with the Watermaster Engineer and sought the stipulation of the Watermaster before bringing this Motion. This Motion is proper under Section 387 of the California *Code of Civil Procedure*, which requires courts to permit nonparties to intervene where, as here, "[t]he person seeking intervention claims an interest relating to the property … that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties." CAL. CIV. PROC. CODE § 387.

LVRP respectfully moves the Court for an Order granting it leave to intervene in the Judgment. If this Motion is granted, as LVRP believes it must be, LVRP will seek a modification of the Judgment to recognize LVRP's status as a Party with Overlying Production Rights and to quantify LVRP's Production Right.

II. STATEMENT OF FACTS

LVRP is the owner of approximately 135 acres of real property, consisting of five contiguous parcels, located near the intersection of 160th Street East and Palmdale Boulevard in Llano,

[1] Unless otherwise specified, defined terms in this document have the meaning given to them in the Judgment.

California (the "Property"). *See Declaration of Bruce E. Pherson, Jr.* ("Pherson Decl."), ¶ 2. LVRP obtained the property in March 2006 from an entity known as the Palmdale Administrative Trust. See Pherson Decl., ¶¶ 2-3 Ex. A. Between May and July of 2006, LVRP, through its tenant/lessee Boething Treeland Farms, Inc. ("Boething Treeland") and contractor Rottman Drilling Co. ("Rottman Drilling"), completed three new wells on the Property and properly submitted Well Completion Reports to the State of California, Division of Water Resources. Pherson Decl., ¶ 6, Ex. C. Prior to completing these wells, Rottman Drilling obtained the necessary permits from the Los Angeles County Department of Environmental Health on Boething Treeland's behalf. Pherson Decl., ¶ 6, Ex. C. The wells that Boething Treeland refers to as "Well #1" and "Well #3" ("Production Wells") are the primary agricultural wells for the Treeland Antelope Valley operation. Pherson Decl., ¶ 6. The vast majority of groundwater that is pumped through the Production Wells is used to irrigate the plants that Treeland Antelope Valley grows, and the remainder is used for other agricultural purposes such as washing. The well that Boething Treeland refers to as "Well #2" is an auxiliary well, is not used to produce significant amounts of groundwater for irrigation, and is rather for miscellaneous purposes incidental to the Treeland Antelope Valley agricultural operation. Pherson Decl., ¶ 6.

Since completing Well #1 in June 2006, LVRP has continuously operated a wholesale commercial nursery known as "Treeland Antelope Valley" at the Property. Pherson Decl., ¶ 5. As Treeland Antelope Valley is an agricultural operation, LVRP has also pumped significant groundwater for irrigation and other agricultural purposes in each year – and indeed each month – since completing the first of the Production Wells in June 2006. Pherson Decl., ¶¶ 7-9. Specifically, LVRP has produced and beneficially used the following amounts of water from beneath the Property, via the Production Wells[2]:

[2] Water production for the twenty-six month period beginning June 1, 2006 and ending July 31, 2008 is estimated by deducting recorded water production in all months since August 2008 from the cumulative lifetime totals reflected on the Production Wells as of September 30, 2018. Water production for all months beginning in August 2008 and continuing through the present was contemporaneously tracked and recorded by staff at the Treeland Antelope Valley operation. Pherson Decl. ¶¶ 7-9.

YEAR	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
AF	90*	180*	194*	405	335	278	292	247	284	268	325	387	302.1†

***See note 2, *supra*.**
†2018 production is YTD through September 30, 2018.

Pherson Decl., ¶¶ 7-9, Ex. D, Ex. E.

On approximately July 10, 2018,[3] LVRP received a letter from the Watermaster General Counsel ("Watermaster Letter") stating that "[i]t is our understanding that you may be pumping groundwater from the Antelope Valley Adjudicated Basin" and "[i]f you do not have a right to do so under the terms of the Judgment that Watermaster is required by the Court to stop all unauthorized pumping. Pherson Decl., ¶ 10, Ex. F. The Watermaster General Counsel further encouraged LVRP to "immediately comply with Section 20.9 of the Judgment," which the Watermaster described as providing "a process for non-parties to intervene in the Judgment to become a party and then to seek the right to produce groundwater from the Basin." *Id.*

LVRP, through counsel, promptly reached out to the Watermaster General Counsel. *See Declaration of Andrew W. Homer* ("Homer Decl."), ¶ 3. After limited discussion between LVRP's former counsel and the Watermaster, on August 15, 2018 LVRP's existing counsel emailed a response to the Watermaster Letter to the Watermaster General Counsel. Homer Decl. ¶¶ 4-5, Ex. A. In its August 15 email to the Watermaster, LVRP's counsel explained the following facts, each of which it reiterates and incorporates in this Motion and Memorandum:

- Despite being listed as a member of the "Small Pumper Class" in the Judgment, and having purportedly been provided notice of related actions such as class certification and class settlement, LVRP has no record of receiving such notice(s);
- LVRP was at all times (and remains), by the Court's approved definition, not a member of the Small Pumper Class;
- The Judgment Approving Small Pumper Class Action Settlements ("Small Pumper Class Settlement Order") defines the Small Pumper Class as follows: "All private (i.e. non-

[3] The Watermaster Letter is dated on its face with June 9, 2018. The Watermaster confirmed with LVRP's counsel that this is an error, and the Watermaster Letter was actually mailed on July 9, 2018. *Declaration of Andrew W. Homer*, ¶ 7.b.

governmental) persons and entities that own property within the Basin, as adjudicated, and that have been pumping less than 25 acre-feet per year on their property during any year from 1946 to the present";

- The same paragraph refers to the Court's September 2, 2008 class certification order as the source of this definition, so for purposes of establishing whether a person or entity is a member of the class the relevant inquiry appears to be as of September 2, 2008;
- LVRP purchased the Property in 2006, and properly permitted and completed groundwater wells that year;
- Since and including 2006, LVRP has pumped and beneficially used more than twenty-five acre-feet of groundwater at the Property, which is a wholesale nursery that grows and sells hundreds of varieties of trees and shrubs, including drought-tolerant and low water use plants for sale in Southern California;
- As such, LVRP is not a "person or entity that own[s] property within the Basin … and that [has] been pumping less than 25 acre-feet per year on [it's] property during any year from 1946 through [September 2, 2008]" so by definition not a member of the Small Pumper Class;
- This is the case whether LVRP received notice(s) of related actions or not, because had LVRP received such notice(s), it would have reasonably understood it/them to not apply to LVRP because LVRP has never fallen within the class definition;
- LVRP believes that it was improperly excluded from the Judgment, and that as an overlying landowner it is entitled to pump and beneficially use groundwater from beneath the Property, on the Property;
- LVRP also understands that it must follow required procedures to establish and quantify this right within the framework of the Judgment, and wishes to work cooperatively with the Watermaster and other parties subject to the Judgment toward that end.

Id. With the exception of being erroneously listed as a member of the Small Pumper Class, to the best of its knowledge neither LVRP, any of its affiliates, nor its predecessors-in-interest with respect to the Property were named or otherwise included in the Adjudication or Judgment. Pherson Decl., ¶ 13.

The Watermaster General Counsel promptly replied to LVRP's counsel's email on August 16, 2018, requested some additional information, and asked to set a time to discuss. Homer Decl., ¶ 6, Ex. A. After exchanging requested information, the Watermaster General Counsel, Watermaster Engineer, and counsel for LVRP met by telephone on September 4, 2018. Homer Decl., ¶ 7. During this call, LVRP generally confirmed the information it had previously provided and sought input from both the Watermaster General Counsel and the Watermaster Engineer. *Id.* The Watermaster General Counsel confirmed that the Watermaster could not itself address the status of LVRP's water right and associated rights and responsibilities under the Judgment, which are the province of the Court, and that to do so LVRP would need to move to intervene in the Judgment. Homer Decl. ¶ 7. The Watermaster General Counsel also confirmed that this conversation satisfied the requirement in Section 20.9 of the Judgment that LVRP (as a non-party) consult with the Watermaster Engineer and seek the Watermaster's stipulation before moving to intervene. Homer Decl. ¶ 8; *See* Dkt. 11020 at Ex. A, § 20.9.

III. Long Valley Road, L.P. is Entitled to Intervene in the Judgment.

As the owner of the Property, which overlies the Basin, LVRP is an "overlying landowner." Under bedrock principles of California water law, overlying landowner like LVRP have a right to extract and beneficially use as much groundwater as needed from beneath their property, so long as such use is reasonable. The Judgment, which by its own language applies to and governs water use by "Parties," does not apply to LVRP. LVRP was erroneously listed as a member of the "Small Pumper Class" despite not meeting the substantive requirements used to define that Class, and as such may have received related notices. But that error, and LVRP's receipt of any corresponding notices, each of which included a class definition that would have lead LVRP to reasonably conclude *that such notices did not apply to or bind LVRP*, do not have any legal effect. Based on the definition of the Small Pumper Class used in all relevant class documents and Orders issued by the Court, LVRP is clearly not a member because it never pumped less than twenty-five acre-feet in any year that it owned the Property. Conversely, LVRP *is an overlying landowner* that has pumped and beneficially used significantly *more than twenty-five acre-feet* in all years since it owned the Property, and therefore should have been included in the Adjudication as a Party with Overlying

Production Rights.

As discussed in more detail below, LVRP has satisfied the procedural requirements of the Judgment for a non-party seeking intervention, and the relevant statute and cases interpreting it require intervention where – as here – the party seeking it has a real property interest that is impacted by a judgment and no existing party adequately represents that interest on the moving party's behalf.

A. LVRP has a Constitutionally Protected Right to Use Basin Groundwater as an Overlying Landowner.

Under the California Constitution and long-standing, binding precedent, there is no question that overlying landowners have a right to pump and beneficially use water from beneath their properties in whatever amounts they require, so long as the use is "reasonable." CAL. CONST., ART. X, § 2; see *City of Pasadena v. City of Alhambra*, 33 Cal.2d. 908, 925 (Cal. 1949) ("[An overlying right … is the right of the owner of land to take water from the ground underneath for use on his land within the basin … [and] it is now clear that an overlying owner or any other person having right to surface or groundwater may take only such amount as he reasonably needs for beneficial purposes") (citing *Hillside Water Co. v. Los Angeles*, 10 Cal.2d 677, 686 (Cal. 1938); *Katz v. Walkinshaw*, 141 Cal. 116 (Cal. 1903)) (additional citations omitted); *see also City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240 (Cal. 2000) ("*Mojave"*) ("An overlying right … is the owner's right to take water from the ground underneath for use on his land within the basin or watershed."). This right is "based on the ownership of the land; and appurtenant thereto" and allows owners of such property to pump the water they need for both "present *and prospective* reasonable beneficial uses." *Id.* (emphasis added); *see also See City of Santa Maria v. Adam*, 211 Cal.App.4th 266, 298 (Ct. App. 2012) ("the full amount of the overlying right is that required for the landowners' 'present and prospective' reasonable beneficial use upon the land.").

B. The Judgment Does Not Currently Apply to LVRP, Which is Not a Party to the Adjudication and was Erroneously Listed as a Member of the Small Pumper Class.

The Judgment does not currently apply to LVRP, and as such does not restrain LVRP's use of groundwater from the Basin. The Judgment states its own applicability as follows:

This Judgment is entered as a Judgment binding on all Parties served or appearing in this

> Action, including without limitation, those Parties which have stipulated to this Judgment, are subject to prior settlement(s) and judgment(s) of this Court, have defaulted or hereafter stipulate to this Judgment.

Dkt. 11020 at Ex. A, Preamble. The Judgment defines "Parties" as follows:

> Any Person(s) that has (have) been named and served or otherwise properly joined, or has (have) become subject to this Judgment and any prior judgments of this Court in this Action and all their respective heirs, successors-in-interest and assigns.

Dkt. 11020 at Ex. A, § 3.527. The Judgment applies to "Parties," and Parties include those who have been properly named, served and/or joined to the Adjudication, including any of its subsidiary actions. LVRP is not a named party in the Adjudication or any of its underlying actions, and to the best of LVRP's knowledge neither are its predecessor-in-interest as to the Property, the Palmdale Administrative Trust, or any of that Trust's individual trustees or beneficiaries.

LVRP's sole connection to the Adjudication is the fact that it was erroneously listed – at an unknown date, by an unknown person, and based on some unknown (but clearly erroneous) information about LVRP's pumping history – as a member of the Small Pumper Class for purposes of *Wood v. Los Angeles Co. Waterworks Dist. 40, et al.*, (Case No.: BC 391869) ("Small Pumper Class Action"). *See* Dkt. 11020, Ex. C at 6 ("List of Known Small Pumper Class Members…"). As such, LVRP may have been served with related notices such as those discussing class certification and settlement, but each of those notices was more than defective as to LVRP.[4] This is because even if such notices were in fact received by LVRP, or LVRP can be charged with constructive notice of the existence of the Small Pumper Class Action, each notice or any document LVRP could have looked to in order to determine whether it was a member of the Small Pumper Class included a

[4] LVRP is a small, family-owned and operated business. The husband and wife who ran the business during much of the pendency of the Small Pumper Class Action (filed June 3, 2008 and ultimately resolved by the Judgment on December 23, 2015, *see* Dkt. 11020, Ex. C), are now deceased. Pherson Decl., ¶ 11. After conducting a reasonable search, LVRP has not located any records indicating that it was in fact served with Small Pumper Class documents. Pherson Decl., ¶ 12. That said, LVRP has no reason to believe that it was *not served* with any documents that were sent to the address listed on *Exhibit A to Judgment Approving Small Pumper Class Action Settlements: List of Known Pumper Class Members for Final Judgment* (Dkt. 11020, Ex. C at p. 6), which is LVRP's correct, listed address for service of process. However, as discussed below, whether LVRP received actual or even constructive notice of the Small Pumper Class and related events has no legal consequence because LVRP is by definition not a member of the Small Pumper Class.

precise, carefully formulated class definition that would have unambiguously instructed LVRP (and the world) that LVRP was not a member, period. The Small Pumper Class is defined in the Judgment as follows:

> All private (i.e. non-governmental) persons and entities that own property within the Basin, as adjudicated, and that have been pumping less than 25 acre-feet per year on their property during any year from 1946 to the present.

Dkt. 11020 at Ex. C, ¶ F (December 28, 2015). The same paragraph refers to the Court's September 2, 2008 class certification order as the source of this definition, so for purposes of establishing whether a person or entity is a member of the Small Pumper Class the relevant inquiry is whether a "person" that "own[s] property" within the "Basin" pumped less than twenty-five acre-feet of water from beneath its property in any year between 1946 and September 2, 2008. *Id.* LVRP purchased the Property in 2006 and immediately permitted, completed, and began pumping *significantly more than* twenty-five acre-feet from the Production Wells. Pherson Decl., ¶¶ 7-9, Ex. D. It did so in each year from 2006 through the operative date for Small Pumper Class purposes of September 2, 2008, and indeed through the date of this Motion. *Id.*. To the extent LVRP received actual or constructive notice related to the Small Pumper Class Action, it would have reasonably (and correctly) understood that it was not a member of that Class and therefore no action was required by LVRP to preserve its overlying water right.

C. LVRP was Erroneously *Excluded* from the Adjudication and the Judgment, and Should Have Been Granted Overlying Production Rights.

The Judgment ambitiously seeks to cover all uses of groundwater in the Basin, but it is well understood that in groundwater adjudications the finality of the litigation is dependent on the number of groundwater users joined in the action. If significant groundwater users are not joined, they cannot be bound by the judgment. *See Wright v. Goleta Water Dist.*, 174 Cal.App.3d 74, 88-89 (Ct. App. 1985) ("A court has no jurisdiction over an absent party and its judgment cannot bind him … absent a statutory scheme for *comprehensive determination* of all groundwater rights,[5] the application of

[5] The 2014 Sustainable Groundwater Management Act ("SGMA"), which requires – among other things – the formation and designation of Groundwater Sustainability Agencies to manage basins, is not a "statutory scheme for comprehensive determination of all groundwater rights" and does

Long Valley to a private adjudication would allow prospective [water] rights of overlying landowners to be subject to the vagaries of an individual plaintiff's pleading without adequate due process protections.") (discussing *In re. Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (Cal. 1979) (additional citations omitted). In *Wright*, in reversing the trial court's attempt at adjudicating a basin in Santa Barbara County, the Court of Appeal noted that "other overlying landowners owning these present rights to future use are entitled to notice and an opportunity to resist any interference with them." *Id.* (citing *Orange County Water Dist. v. City of Colton*, 226 Cal.App.2d 642, 649 (Ct. App. 1964)). The Supreme Court has also recognized that "no appellate court has endorsed an equitable apportionment [*i.e.*, a physical solution] that disregards existing overlying users' rights." *Mojave*, 23 Cal 4th at 1249.

In keeping with these principles, the terms of the Judgment itself make clear that a significant overlying agricultural user like LVRP should have been joined:

> The Court required that all Persons having or claiming any right, title or interest to the Groundwater within the Basin be notified of the Action. Notice has been given pursuant to the Court's order. All Public Water Suppliers, landowners, Non-Pumper Class and Small Pumper Class members and other Persons having or making claims have been or will be included as Parties to the Action. All named Parties who have not been dismissed have appeared or have been given adequate opportunity to appear.

Dkt. 11020, Ex. A, § 3.2. The Judgment does not describe how such notice was given to LVRP, as an overlying landowner who purchased the Property in 2006 and immediately and openly began preparing to complete and pump from significant agricultural wells, including properly obtaining required permits from the Los Angeles County Department of Environmental Health and filing Well Completion Reports with the State of California's Division of Water Resources. Pherson Decl., ¶ 6, Ex. C. Had any Party to the Adjudication searched the primary repositories of public information about active water wells after July 2006, they would have and should have properly identified LVRP and/or Boething Treeland as an active, overlying agricultural user. As such, LVRP could have and should have been provided notice and an opportunity to participate in the Adjudication but was not,

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not alter water rights with respect to the Basin in any event because it specifically exempts management of the Antelope Valley Groundwater Basin from its main substantive requirements due to the existence of the Judgment. *See* CAL. WATER CODE § 109720.8(a) and (b).

and therefore due process requires that it may not be restrained by the Judgment unless and until it becomes a Party to it.[6]

Like the Parties that were properly joined and granted Overlying Production Rights via the Judgment, LVRP is committed the sustainable management of the Basin, and therefore seeks to intervene in and be bound by the Judgment with the expectation that its Overlying Production Right, priority and any future modifications to its water right and priority will be determined fairly and equitably with due process and in keeping with the formula used to determine the rights of other similar overlying agricultural users.[7]

D. LVRP's Intervention is Necessary and Appropriate.

Because it owns the Property and holds the appurtenant overlying water right, and was not properly included in the Adjudication or the Judgment, LVRP's intervention in the Judgment is necessary and appropriate. *See City of Pasadena* 33 Cal.2d. at 926 ("Overlying owners are entitled to the protection of the courts against any substantial infringement of their rights in water which they reasonably and beneficially need."). Section 387 of the California *Code of Civil Procedure* also makes clear that a court *shall* permit a non-party to intervene in an action or proceeding when that person claims an interest in property that is subject to the action and that interest is not adequately represented by an existing party. CAL CODE CIV. P. § 387. Under Section 387, intervention may be granted at any time, even after judgment has been rendered.[8] *Mallick v. Superior Court*, 89 Cal.App.3d 434, 437(Ct. App. 1979). The intervention statute is designed to promote fairness and

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[6] As discussed above, what LVRP may have been provided is notice(s) related to the Small Pumper Class, which as a person who at all times since owning the Property pumped significantly more than twenty-five acre feet per year, LVRP reasonably would have understood to relate to a class action lawsuit that: (a) LVRP was not a party to; and (b) in no way would impact LVRP's water right.

[7] While this Motion is not the proper vehicle to quantify LVRP's Overlying Production Right, by seeking to intervene in the Judgment LVRP in no way limits or waives its right to assert that it is entitled to an Overlying Production Right greater than the maximum annual amount it has pumped and beneficially used since purchasing the Property in 2006.

[8] Section 20.9 of the Judgment, which establishes the procedure for non-party intervention, also does not include any temporal limitation on such intervention. Dkt. 11020 at Ex. A, § 20.9. Because this procedure is set in the Judgment itself, it necessarily follows that non-parties may intervene after the Judgment was entered.

to ensure maximum involvement by all responsible, interested and affected parties. *Mary R. v. B. & R. Corp.* 149 Cal.App.3d 308, 314 (Ct. App. 1983). The intervention statute "should be liberally construed in favor of intervention." *Lindelli v. Town of San Anselmo* 139 Cal.App.4th 1499, 1505 (Ct. App. 2006).

Here, there is no question that LVRP has owned the Property since 2006 and that the Property overlies the Basin. Pherson Decl. at ¶ 2, Ex. A. LVRP was improperly excluded from the portions of the Adjudication that impacted its rights as a significant agricultural overlying landowner, and was improperly named in a portion of the Adjudication that clearly did not apply to it in the Small Pumper Class Action. *See supra*, sections II.B and II.C. The Watermaster has taken the position that the Judgement applies to LVRP's use of groundwater on the Property, and that if LVRP *does not intervene in the Judgment* that the Watermaster may bring an action to restrain LVRP's use of groundwater at the Property and seek assessment costs for LVRP's past Production, legal fees, etc. Pherson Decl. ¶ 10, Ex. F. LVRP has complied with the procedural requirements under Section 20.9 of the Judgment by consulting with the Watermaster Engineer and seeking the Watermaster's stipulation to its intervention in the Judgment. Homer Decl., ¶ 8; *See* Dkt. 11020 at Ex. A, § 20.9. To the best of LVRP's knowledge, with the exception of being erroneously listed as a member of the Small Pumper Class, neither LVRP, its affiliates, nor its predecessor-in-interest with respect to the Property were named or otherwise included in the Adjudication. Pherson Decl., ¶ 13. As such, LVRP's rights and interests were not adequately represented by an existing party during the Adjudication and are not currently represented by an existing party to the Judgment. LVRP is a responsible, interested and affected party, and fairness, the required liberal construction of the intervention statute, and the permissive nature of Section 20.9 of the Judgment all favor allowing LVRP to intervene in the Judgment.

E. <u>LVRP's Overlying Water Right Was Not Impacted by Prescription.</u>

This Motion is not the proper vehicle to quantify or prioritize LVRP's water right, which to LVRP's knowledge the Court has not heard evidence on. Nonetheless, in responding to this request to intervene by LVRP, other Parties may take the position that the overlying water right appurtenant to the Property was either diminished or dissolved by prescription because non-overlying users

pumped groundwater from the Basin during times that LVRP's predecessor-in-interest to the Property did not, and such pumping was adverse to the overlying right. For purposes of this Motion that is of no moment, because the quantity and quality of LVRP's overlying water right is not properly before the Court. To the best of LVRP's knowledge, there has been no evidence presented to the Court regarding historical pumping at the Property and/or whether former owner(s) were on notice of an overdraft condition if one existed during any periods of non-use, other than the facts that: (a) former owners did complete and use groundwater wells on the Property at presently unknown times, which wells still existed at the time LVRP purchased it (Pherson Decl. at ¶ 6); and (b) the Court did not declare the Basin to be in a state of overdraft until it filed its July 13, 2011 Statement of Decision (Dkt. 4523 at 5) ("The preponderance of the evidence presented establishes that the adjudication are aquifer is in a state of overdraft.").[9] With respect to pumping by former owners of the Property, any party asserting that LVRP's right was impacted by prescription during the period before LVRP's ownership would need to prove, among other things, that the former owners did not engage in "self help" by continuing to pump during periods of adverse use by non-overlying users. *See Hi-Desert County Water Dist. V. Blue Skies Country Club, Inc.*, 23 Cal.App.4th 1723, 1731 (Ct. App. 1994) (citing *City of Pasadena*, 33 Cal.2d at 931-32).[10]

Of equal importance, even if non-overlying users did impact the water right appurtenant to the Property via prescriptive use of Basin water *in the distant past*, at all times since it acquired the Property in 2006 (and indeed during the majority of years that the Adjudication was underway), LVRP openly pumped and beneficially used significant volumes of groundwater from beneath the Property. It necessarily follows that if the overlying water right appurtenant to the Property was previously impacted by prescription, LVRP *re-established* its right via prescription through its

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[9] *See City of Pasedena*, 33 Cal.2d at 930 (for use by non-overlying users to be "adverse" to overlying owners that are not pumping and beneficially using their water right during time of overdraft, there must be evidence sufficient to charge the overlying owners with notice that the basin is in overdraft and that the non-overlying users' "appropriations causing the overdraft were invasions of the rights of the overlying owners.").

[10] *See City of Santa Maria*, 211 Cal.App.4th at 298 ("Landowners may limit prescriptive rights by showing that although they had not sought an injunction during the prescriptive period they exercised self-help by continuing to pump during that time" and "proof of the quantities they pumped during the long ago prescriptive period was unnecessary.")

continuous pumping and beneficial use in all years beginning in 2006. Pherson Decl. at ¶¶ 7-9, Ex. D, Ex. E; *see City of Pasadena*, 33 Cal.2d at 927 ("[P]rescriptive rights to ground water, as well as the rights of an overlying owner, are subject to loss by adverse user.") (citations omitted). In other words, even if there is evidence that a former owner(s) of the Property arguably allowed the appurtenant overlying water right to be impacted by prescription, LVRP's actual, open, notorious, hostile and adverse use of groundwater from beneath the Property since 2006 would satisfy the elements of prescription in order to *reclaim* that overlying right. *Id.* at 296-27.

IV. CONCLUSION

For the foregoing reasons non-party Long Valley Road, L.P. respectfully requests that the Court grant this Motion for Leave to Intervene in the December 23, 2015 Judgment and Physical Solution entered in the Antelope Valley Groundwater Cases pursuant to Section 20.9 of that Judgment and Section 387 of the California *Code of Civil Procedure*. Further, because no procedure is established in the Judgment to recognize, quantify and prioritize an overlooked Overlying Production Right, non-party Long Valley Road, L.P. respectfully requests that the Court order it and the Watermaster to promptly meet and confer regarding the proper procedure for Long Valley Road, L.P. to seek a determination and declaration of its right to Produce Groundwater, as those terms are used in the Judgment, in accordance with the terms and conditions Judgment, and in light of its unique status as a significant overlying landowner and producer of Groundwater that, prior to the issuance of this Order, was not covered by or otherwise included in the Judgment.

DATED: October 9, 2018

KELLEY DRYE & WARREN LLP
Michael J. O'Connor
Andrew W. Homer

Andrew. W Homer
Attorneys for Defendant
Long Valley Road, L.P.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 10100 Santa Monica Boulevard, Twenty-Third Floor, Los Angeles, California 90067-4008.

On October 9, 2018 I served true copies of the following document(s) described as:

- **LONG VALLEY ROAD, L.P.'S NOTICE OF MOTION AND MOTION FOR LEAVE TO INTERVENE IN JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES**
- **DECLARATION OF BRUCE E. PHERSON, JR. IN SUPPORT OF LONG VALLEY ROAD, L.P.'S MOTION TO INTERVENE IN JUDGMENT**
- **DECLARATION OF ANDREW W. HOMER IN SUPPORT OF LONG VALLEY ROAD, L.P.'S MOTION TO INTERVENE IN JUDGMENT**
- **[PROPOSED] ORDER RE: LONG VALLEY ROAD, L.P.'S MOTION TO INTERVENE IN JUDGMENT**

on the interested parties in this action as by placing the true copy:

☒ **BY ANTELOPE VALLEY WATERMASTER'S ELECTRONIC DOCUMENT SERVICE:** I uploaded the document(s) listed above to www.avwatermaster.org, for electronic service on counsel of record listed on the Electronic Service List for Case No. 1-05-CV-049053.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 9, 2018, at Los Angeles, California.

Karen M. Tjaden