**COURT OF APPEAL, STATE OF CALIFORNIA**
**FIFTH APPELLATE DISTRICT**
**F075451**

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**ANTELOPE VALLEY GROUNDWATER CASES**

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Appeal from the Superior Court of Los Angeles
Superior Court No. JCCP4408
Hon. Jack Komar

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# APPELLANTS' OPENING BRIEF

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IN THE

# Court of Appeal of the State of California

**IN AND FOR THE**

# Fifth Appellate District

| | |
|---|---|
| Coordination Proceeding<br>Special Title (Rule 3.550(c))<br><br>ANTELOPE VALLEY GROUNDWATER CASES* | F075451<br><br>(JCCP No. 4408) |

**BY THE COURT:**

The application of appellants Rebecca Lee Willis and David Estrada for leave to file an oversize opening brief is GRANTED. The brief remains due for filing on August 21, 2019.

Peña

PEÑA, Acting P.J.

*Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.* (L.A. Super. Ct. No. BC325201); *Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.* (Kern Super. Ct. No. S-1500-CV254348); *Wm. Bolthouse Farms, Inc. v. City of Lancaster* (Riverside Super. Ct. No. RIC353840); *Diamond Farming Co. v. City of Lancaster* (Riverside Super. Ct. No. RIC344436); *Diamond Farming Co. v. Palmdale Water Dist.* (Riverside Super. Ct. No. RIC344668); *Willis v. Los Angeles County Waterworks District No. 40* (L.A. Super. Ct. No. BC364553); *Wood v. Los Angeles County Waterworks District No. 40* (L.A. Super. Ct. No. BC391869).

IN THE

# Court of Appeal of the State of California

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**BY THE COURT:**

A request was filed on February 21, 2019, by Rebecca Lee Willis and David Estrada on behalf of themselves and others similarly situated (the Willis Class) for leave to file with Phelan Piñon Hills Community Services District (Phelan)—in addition to their full Joint Appendix filed on behalf of the Willis Class and Phelan—a condensed version of the Joint Appendix excerpted to contain only the most pertinent pleadings, exhibits and materials cited in support of their briefs and/or relating to their specific issues on appeal, and to file such condensed Appendix as a supplement to and in conjunction with their respective appellate briefs.

For good cause shown, the court will grant the request and permit such condensed Appendix to be filed as a supplement to any appellate brief on condition that the appellate brief which such condensed Appendix accompanies includes citations to both the relevant pages of the condensed Appendix and parallel citations to the corresponding pages contained in the full Joint Appendix.

Peña

PEÑA, Acting P.J.

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*_Los Angeles County Waterworks District No. 40 v. Diamond Farming Co._ (L.A. Super. Ct. No. BC325201); _Los Angeles County Waterworks District No. 40 v. Diamond Farming Co._ (Kern Super. Ct. No. S-1500-CV254348); _Wm. Bolthouse Farms, Inc. v. City of Lancaster_ (Riverside Super. Ct. No. RIC353840); _Diamond Farming Co. v. City of Lancaster_ (Riverside Super. Ct. No. RIC344436); _Diamond Farming Co. v. Palmdale Water Dist._ (Riverside Super. Ct. No. RIC344668); _Willis v. Los Angeles County Waterworks District No. 40_ (L.A. Super. Ct. No. BC364553); _Wood v. Los Angeles County Water Works District No. 40_ (L.A. Super. Ct. No. BC391869).

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

On behalf of Appellants REBECCA LEE WILLIS and DAVID ESTRADA, on behalf of themselves and others similarly situated, I certify that the persons or entities listed below have either (1) an ownership interest of ten percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2):

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

Dated: August 22, 2019

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GREGORY L. JAMES

By: *s/ Ralph B. Kalfayan*

Attorneys for Appellants, REBECCA LEE WILLIS and DAVID ESTRADA, on behalf of themselves and others similarly situated

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## INTRODUCTION

As overlying landowners, members of the Appellant Willis Class (the "Willis Class") have vested appurtenant rights to reasonable and beneficial use of groundwater beneath their Antelope Valley property. The Willis Class – roughly 18,000 members owning approximately 60% of the land overlying the groundwater in Antelope Valley – have never pumped groundwater from beneath their properties because they have not yet developed their land. For decades, farmers, water appropriators ("Purveyors"[1]), and others pumped the basin into severe overdraft. When recent ongoing drought conditions threatened their ability to continue pumping in the same large quantities, Purveyors forced all those with groundwater rights (including all overlying landowners such as Appellants) into years of litigation to resolve claims of prescription, reduce pumping to a safe yield, and adopt a plan (a so-called "Physical Solution") for the reasonable and beneficial use of the groundwater in the future.

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[1] In their initial pleadings, these outside appropriators of water from the Antelope Valley referred to themselves as "Purveyors." (2JA1473) In later pleadings, these appropriators were often referred to as "Public Water Suppliers." To simplify the vernacular, these parties will be collectively designated in the brief as "Purveyors."

The Willis Class was formed in response to the prescription claims asserted by Purveyors. The purpose of the Class was to defeat the Purveyors' claims and preserve the Willis Class members' "correlative" rights[2] to draw their fair percentage of the "native safe yield"[3] (hereinafter, "native supply")—and thereby protect the value of their properties and the ability to develop the land in the future. After a few years of litigation, Purveyors (the only parties who were actually averse to the Willis Class) settled with the Class. The settlement agreement guaranteed the litigation goals set by the Willis Class. Among other things, Purveyors:

> (1) Recognized the correlative rights of the Willis Class members to draw from the native supply in the future without payment of a replacement water assessment;
>
> (2) Waived any prescriptive use claims[4] they had against the Willis Class based on the parties' past pumping histories; and

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[2] Under the correlative rights doctrine, "as between the owners of land overlying strata of percolating waters, the rights of each to the water are limited, in correlation with those of others to his reasonable use thereof when water is insufficient to meet needs of all." (*Central & West Basin Replenishment Dist. v. Southern California Water Co*. (2003) 109 Cal.App.4th 891,905 ("*Southern California Wter Co."*.)

[3] The "native safe yield" is defined as the amount of native groundwater that may safely be extracted annually.

[4] Prescription is an "artificial creature of law" for the continued use groundwater based on open and notorious misuse of the groundwater over a long period of time. (*Southern California Water Co., supra,* 109 Cal.App.4th at 906.)

> (3) Pledged not to exercise their rights in any way which would "diminish the Willis Class Members' Overlying Right below a correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield" (9JA9258¶2a) and otherwise to "cooperate and coordinate their efforts" (9JA9264¶B) in a manner consistent with the terms of the Willis Class Settlement.

The settlement between the Willis Class and Purveyors was approved by the trial court and reduced to a binding judgment in 2011. (1EXCPT484-489; 3EXCPT1671-1676) (14JA16905-16910; 173JA153931-153936.)

Nearly four years later, Purveyors entered a Stipulated Proposed Physical Solution (the "Physical Solution") with most of the remaining parties. Contrary to the terms of the court-approved Willis Settlement, the Physical Solution gave the Willis Class no right to the basin's native supply. Among other things, the Physical Solution diminished the rights of the Willis Class to draw only imported water (the reliability of which is uncertain), surrender any return flow rights to the imported water, and pay a replacement water assessment fee for any water drawn from the aquifer.

When the Willis Class vehemently objected, the trial court significantly curtailed the Willis Class's ability to present their case challenging the inconsistencies between the 2011 Judgment and the

2015 Physical Solution and evidence/witness testimony as to alternative Physical Solutions. (3EXCPT2095)(176JA157201.)

Then, despite the glaring inconsistencies, the court adopted Purveyors' proposed Physical Solution ***verbatim*** as its own—concluding, without explanation, that it was "consistent" with the Willis Settlement.

In its appeal from the final judgment (the "2015 Judgment") entered based on the Physical Solution as adopted by the court, the Willis Class asserts the following claims of reversible error:

> **First,** the 2015 Judgment and Physical Solution violate the California Constitution, Article 10 Section 2, and California's groundwater law which protect the correlative water rights of the Willis Class from elimination or subordination.
>
> **Second,** the 2015 Judgment is inconsistent with, and therefore precluded by, the 2011 Judgment approving the Willis Class Settlement Agreement.
>
> **Third,** by refusing to consider and admit evidence and easily-applied alternative Physical Solutions, the trial court breached its duty to "thoroughly investigate" all possible reasonable Physical Solutions and adopt "a workable solution that maximizes the reasonable beneficial use of available waters to all parties."
>
> **Fourth,** the trial court violated the Willis Class's due process rights by adopting *verbatim* the Physical Solution, adversely affecting the Willis Class's vested correlative water rights without affording them fair notice or a meaningful opportunity to be heard.

The Physical Solution not only offends the principles of "reasonable and beneficial use" required by the California Constitution, it is also palpably unfair and discriminatory to the Willis Class. Ironically, while the Willis Class (as the only non-pumping parties in this litigation) played *no* role in severely over-drafting the Antelope Valley aquifer, it is the only party that lost its right to draw from the native supply. Clearly, some resolution of the overdraft situation is necessary, but *this* resolution is unconstitutional, irresponsible and inequitable.

Requiring the Willis Class members to comply with a costly, burdensome, and all-but-impossible application process and then (in the unlikely event the application is granted) pay a replacement water assessment fee for any water drawn from the aquifer, the Physical Solution strips Willis Class members of their correlative water right to use the native supply of groundwater beneath their land, estimated to be worth over $1.2 billion, and improperly gave those rights to stipulating landowners and appropriators who have gobbled up and overtaxed the Antelope Valley's precious limited resource.

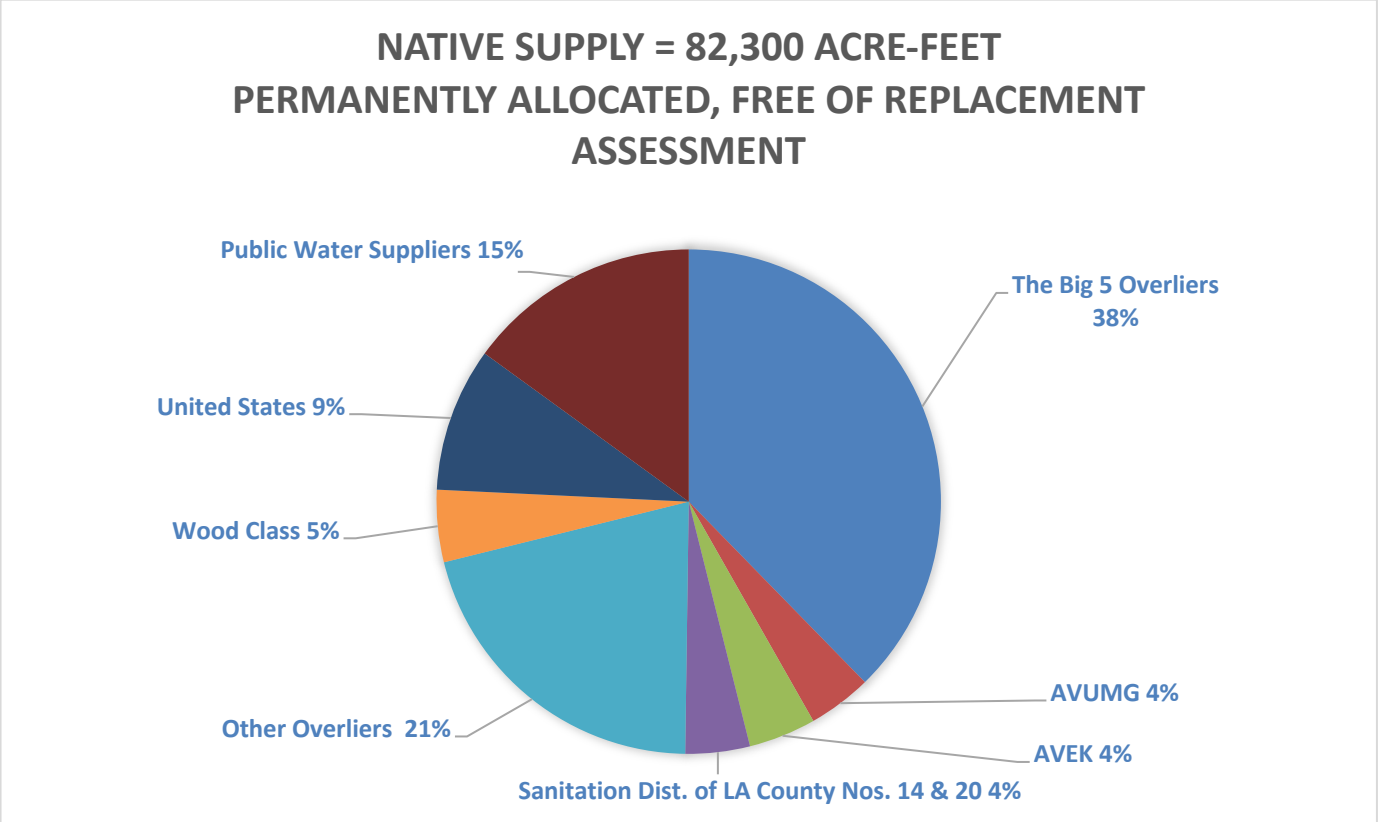
The trial court's 2015 Judgment adopting the Physical Solution should be reversed and the matter remanded for further proceedings

consistent with (1) the "reasonable and beneficial use" concepts required by the California Constitution and California's groundwater law, (2) the court's previous 2011 judgment based on the Willis Class's Settlement Agreement, and (3) the principles of equity and fairness embodied in the equitable remedy of a physical solution.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### A. The Parties

The parties may be divided into eight groups based on their common interests. The production right provided to each party free of replacement assessment under the Physical Solution is illustrated in the following pie chart:



### 1. Willis Class – Overlying Dormant Landowners

The Willis Class includes approximately 18,000 members who collectively own about 65,000 parcels equaling 60 percent of the adjudication area. (6-Willis-4; 2JA3551:14-15.) Upon certification, the Class was defined as: "All private (i.e., non-governmental) persons and entities that own real property within the Basin, as adjudicated, that are not presently pumping water on their property and did not do so at any time during the five years preceding January 18, 2006." (1EXCPT114:20-24)(2JA1994:20-24.)

Originally, Rebecca Lee Willis served as the class representative. Ms. Willis owned ten acres within the basin on which she intended to build a home and landscape nursery once she retired. (1EXCPT101¶15) (2JA1963¶15.) Ms. Willis' land was not within the service area of any water district, and therefore her right to use groundwater beneath her property was critical. (*Ibid.)* "Without the right to use the water below her property, her land [was] virtually worthless and her dreams of building a home and nursery [could not] be accomplished." (1EXCPT101:17-20)(2JA1963:17-20.)

In or about May 2012, Ms. Willis sold the property and moved out of California. (1EXCPT588:11 and 15)(124JA122387:11 and 15.)

The Willis Class moved to substitute the Archdiocese of Los Angeles and David Estrada as its new class representatives. (1EXCPT579-586)(124JA122378-122385.) To avoid any prejudice associated with naming the Archdiocese as a representative party, the court only permitted Mr. Estrada to serve in that capacity. (41RT22602:9-12, 22603:14-17, 22608:26-22609:4; 42RT23249:24-23250:4.)

Mr. Estrada works for the Archdiocese of Los Angeles, and approximately three of the five parcels of land he owns are within the adjudication area. (6-Willis-7.) He plans to develop the property in the future as a concert venue or housing development. (49RT26520:8-26521:3.) His property is not connected to a water source, and his only recourse to follow through with his development plans is by installing a well to use groundwater. (49RT26520:8-13.)

As previewed above, the Physical Solution allocated no part of the native supply to the Willis Class. (3EXCPT2113:22-23)(176JA157472:22-23.)

### 2. Wood Class – Overlying Pumping Landowners

The smaller Wood Class, which includes just over 3,000 class members, is defined as "[a]ll private (i.e., non-governmental) [p]ersons and entities that own real property within the Basin, as adjudicated, and

that have been pumping less than 25 acre-feet per [y]ear on their property during any [y]ear from 1946 to the present." (3EXCPT2153:15-18.)(176JA157533:15-18.) Class representative, Richard Wood, owns and resides on approximately ten acres in the adjudication area. (43RT24132:20-21.)

The Physical Solution allocated 1.2 acre-feet of groundwater per year to the Wood Class, but also provided that members may produce up to three acre-feet per year free of any replacement assessment. (176JA157537¶5.1.3.) The free and permanent production right to Wood Class members is set at 3,806.4 acre-feet per year, but will likely be greater if all members use up to three acre-feet of water. (*Ibid*. [allocating to each of the 3,172 Small Pumper Class up to three acre-feet per year].) Finally, in recognition of his service as a class representative, the Physical Solution gave Mr. Wood up to five acre-feet of water per year for reasonable and beneficial use on his property, free of any replacement assessment. (3EXCPT2157:17-20.)(176JA157539:17-20.)

### 3. United States – An Overlying Landowner

The United States is a large overlying landowner within the basin, operating Edwards Air Force Base on 265,986 acres.

(3EXCPT1563:10.)(133JA131552:10.) The United States has a "Federal Reserved Water Right" to use water beneath government land. State courts have authority to adjudicate that right under the McCarran Amendment, which operates to waive federal sovereign immunity as long as the groundwater adjudication is "comprehensive" of all rights in a given water source. (43 U.S.C. §666(a)(2006); see also *Dugan v. Rank* (1963) 372 U.S. 609, 618-619; *Arizona v. San Carlos Apache Tribe* (1983) 463 U.S. 545, 564.)

The 2015 Judgment and Physical Solution allocated to the Edwards Air Force Base 7,600 acre-feet of water per year from the native supply (even though, on average, the base uses only about 1,350 acre-feet annually). (3EXCPT2159¶5.1.4; 2EXCPT185¶C.) (176JA157539¶5.1.4; 8JA8697¶C.) Further, any portion unused by the government is allocated to appropriators as consideration for the payment of the Wood Class attorneys' fees. (2EXCPT667-668¶13; 3EXCPT2160:4-8)(128JA125757-125758¶13; 176JA157540:4-8.) That 6,250 acre-feet per year could have been allocated to the Willis Class under an alternative solution.

### 4. The Big 5 – Overlying Landowners

Five groups of landowners extract most of the basin's annual native supply. (1EXCPT541-542.)(79JA75215-75216.). They are Bolthouse Properties, LLC ("Bolthouse"), Diamond Farming Company ("Diamond"), the Antelope Valley Groundwater Agreement Association ("AGWA"), US Borax, and Tejon Ranch. These entities use most of the water they produce for farming, principally alfalfa and carrots, and mining operations. (1EXCPT27-28; 128¶¶2-3; 534:19-20.)(1JA1441-1442; 2JA3446¶¶2-3; 76JA70927:19-20; 77JA73111-73113.)

The Physical Solution allocated to these five producers no less than 31,013 acre-feet of water per year from the native supply, free of replacement assessment. Moreover, the allocation is permanent, and allows these producers to transfer and carry over their production rights if they choose. (3EXCPT2156¶¶5.1.1; 5.1.1.3; 3EXCPT2235.) (176JA157536¶¶5.1.1; 5.1.1.3; 176JA157615.)

### 5. The Mutual Water Companies – Overlying Landowners

The "mutual water companies" that participated in the adjudication were formed to secure water for their shareholder members in exchange for shares of common stock.

(3EXCPT2148.)(176JA157528.) They typically own, operate and maintain infrastructure for the production, storage, distribution, and delivery of water, solely to their shareholders. (3EXCPT2148:15-17.) (176JA157528:15-17.)

The Physical Solution allocated 15,543 acre-feet of the native supply per year to these entities, free of replacement assessment. (3EXCPT2233-2236.)(176JA157613-157616.)

**6. Public Overlying Landowners**

The Antelope Valley-East Kern Water Agency ("AVEK") is a state water contractor. It imports water that originates outside of the basin from the State Water Project. (1EXCPT387:2-9.)(13JA14429:2-9.)

The Physical Solution allocated 3,550 acre-feet of the native supply to AVEK annually. (3EXCPT2233.)(176JA157613.) In addition, AVEK received the right to the "return flow" – water that returns to the basin after use – from water it imported if purchased by anyone who did not receive an allocation in the Physical Solution. (3EXCPT2165-2166¶5.2.)(176JA157545-157546¶5.2.)

The County Sanitation Districts of Los Angeles County Nos. 14 and 20 are public entities that own property overlying the basin. (See,

Cross-Comp. of County Sanitation Dist. Nos. 14 and 20 of Los Angeles County, filed December 27, 2006.) The Physical Solution allocated to these Districts 3,400 acre-feet of the basin's native supply. (3EXCPT2233.)(176JA157613.)

Several additional public entities, including the State of California, own overlying land and historically pumped a modest amount of water. The Physical Solution allocated to this group of landowners just over 207 acre-feet of the native supply. (3EXCPT2160:18-21.)(176JA157540:18-21.)

**7. Purveyors – the Appropriators**

The Purveyors extract groundwater from the basin for sale outside to their customers within the adjudication area. (1EXCPT64-65¶¶2-10.)(2JA1864-1865¶¶2-10.)

The Physical Solution permanently allocated to the Purveyors 12,345 acre-feet of water per year from the native supply free of replacement assessment and 40,000 acre-feet under drought provisions. (3EXCPT2163¶5.1.6)(3EXCPT2232.)(176JA157543¶5.1.6)(176JA157612.) They also received any unused federal reserved rights. (3EXCPT2160:4-8.)(176JA157540:4-8.) Thus, the Purveyors

collectively received over 23% of the native supply under the Physical Solution.

### B. The Pleadings, Coordination, and Consolidation

This litigation commenced on October 29, 1999, during one of California's recent droughts, when Diamond Farming filed a quiet title complaint in the Kern County Superior Court against the Purveyors, and another lawsuit in the Los Angeles County Superior Court against the City of Palmdale, among others, alleging defendants were using more than their fair share of the available native supply. (1EXCPT31.)(1JA1445.) A similar complaint was filed by Bolthouse. (*Ibid*.)

The Los Angeles County Waterworks District No. 40 ("District 40"), a Purveyor, then initiated a general groundwater adjudication on or about November 29, 2004 by filing complaints in Los Angeles and Kern County Superior Courts. (3EXCPT1590¶B.)(134JA132400¶B.)

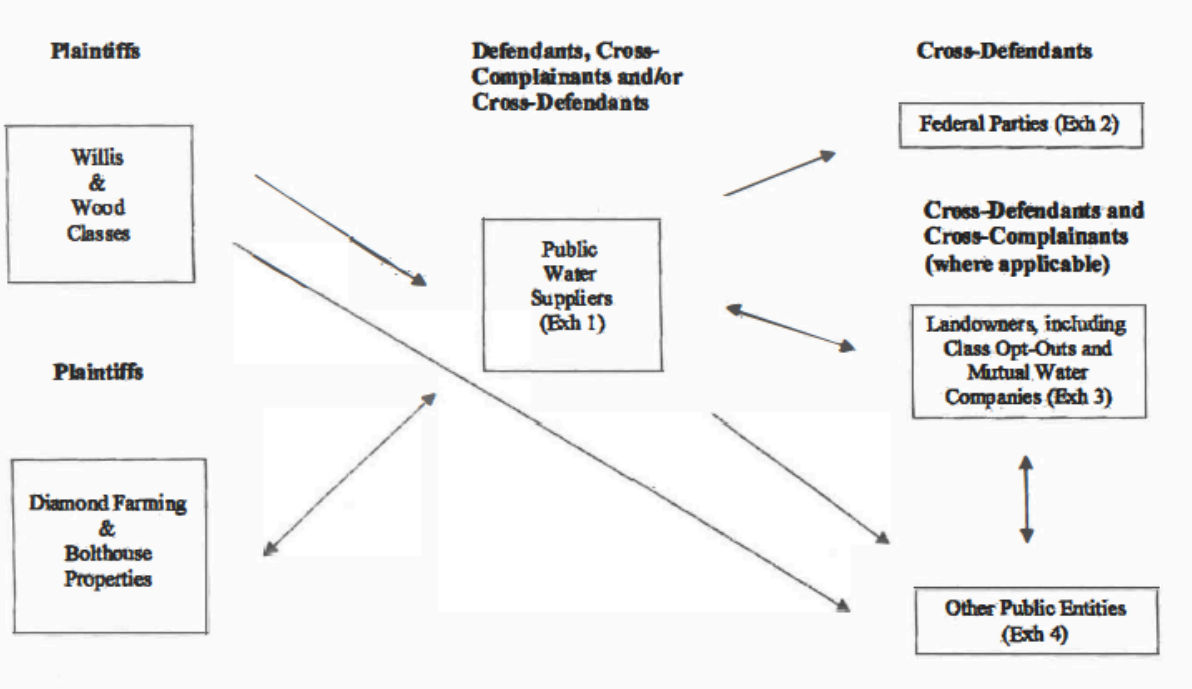
In their First Amended Cross-Complaint, Purveyors repleaded the case as a class action. (1EXCPT1868¶13.)(2JA1868¶13.) The United States was named as a necessary party, and the action was pled to comprehensively adjudicate the rights of all claimants to the use of groundwater in the basin. (1EXCPT69¶¶15-19.)(2JA1869¶¶15-19.)

The Purveyors alleged "[a]n adjudication is necessary to protect and conserve the limited water supply that is vital to the public health, safety and welfare of all persons and entities that depend upon water from the [Purveyors]." (1EXCPT64:9-11.)(2JA1864:9-11.)

The Purveyors asked the court to protect not only their own right to pump groundwater, but also to curb the loss of supply, prevent degradation of water quality, stop land subsidence, and avoid higher costs to the public. (1EXCPT64:11-15.)(2JA1864:11-15.)

The Purveyors requested counsel be retained to represent the Willis Class of overlying landowners. (1EXCPT64¶1.)(2JA1864¶1.) Class counsel approved by the court ultimately brought a case on behalf of the class of dormant overlying landowners in the basin to counter the Purveyors' prescriptive claims. (2JA1919; 1977:22-1978:26.)

The following flow chart illustrates which parties asserted affirmative claims, and against whom:




All of these actions together were deemed complex to be coordinated and assigned to one judge, Judge Komar of the Superior Court, County of Santa Clara, for disposition. (1EXCPT93-94.)(1JA1425-1434; 2JA1914-1915.) In 2010, the court entered a consolidation order. (1EXCPT156-163.)(6JA5987-5994.) Notably, the Consolidation Order did not "preclude any parties from settling any or all claims between or among them, as long as any such settlement expressly provides for the Court to retain jurisdiction over the settling parties for purposes of entering a judgment resolving all claims to the

rights to withdraw groundwater from the Antelope Valley Groundwater Basin as well as the creation of a physical solution if such is required upon a proper finding by the Court." (1EXCPT160:20-25.)(6JA5991:20-25.) The Consolidation Order further provided "[u]pon appropriate motion and the opportunity for all parties in interest to be heard, the Court may enter a final judgment approving any settlements, including the *Willis* and *Wood* class settlements, that finally determine all cognizable claims for relief among the settling parties for purposes of incorporating and merging the settlements into a comprehensive single judgment containing such a declaration of water rights and a physical solution." (1EXCPT160:25-161:1.)(6JA5991:25-5992:1 (original italics); *see also* (1EXCPT161:3-4.)6JA5992:3-4 ["Complete consolidation shall not preclude or impair any class' right to seek the entry of a final judgment after settlement"].) Furthermore, the court specifically consolidated claims for declaratory relief, noting "[a]ll other causes of action could only result in remedies involving the parties who were parties to the causes of action. Costs and fees could only be assessed for or against parties who were involved in particular action." (1EXCPT159:11-14.)(6JA5990:11-14.)

Only two sets of pleadings are necessary and relevant to the Court's consideration of this appeal: (1) the Purveyors' First Amended Class Action Cross-Complaint against the Willis Class and others; and (2) the Willis Class' Second Amended Class Action Complaint for damages and equitable remedies, solely against the Purveyors. No pleading asserted any claim by a landowner against any other landowner, including the Willis Class.

### C. Phases of Trial

The trial court divided the Antelope Valley adjudication into six phases. Phase One was held October 10-12, 2006 to determine the geographical boundaries of the basin for adjudication purposes. (1EXCPT85-90.)(2JA1889-1894.) The trial court attached a map outlining the basin – as well as a "Jurisdictional Boundary Description" – to the order determining that issue. (1EXCPT91-92.)(2JA1895-1896.)

During Phase Two, which extended eight days from October 6-November 5, 2008, the court considered whether certain areas within the basin should be treated separately based on hydrologic analysis (i.e., whether the aquifer is one basin or several different basins). (1EXCPT124:1-13.)(2JA2729:1-13.) The court ultimately concluded

all areas within the basin were hydrologically connected and therefore included within the adjudication area. (1EXCPT125:10-12.)(2JA2730:10-12.)

Phase Three commenced on January 4, 2011 to determine whether "the [B]asin [was] in a condition of overdraft" and to determine the Basin's total "Safe yield" (defined as the annual maximum amount of water, both naturally occurring and any temporary surplus, that may be extracted to sustain equilibrium of the aquifer and not cause long-term depletion). (1EXCPT462:10-13; 463:207.)(14JA16377:10-13; 16378:2-7.) At the end of this phase, the court determined the aquifer was indeed in a state of overdraft that would worsen without mechanisms to control pumping, largely due to population growth. (1EXCPT464:25-465:11.)(14JA16379:25-16380:11.) Although pumping from the aquifer ranged between 130,000 and 150,000 acre-feet of water per year, the trial court set a total safe yield of 110,000, finding that amount would "preserve the rights of all parties …." (1EXCPT466:24-26; 468:27-469:2.)(14JA16381:24-26; 16383:27-16384:2.) The 110,000 figure was comprised of an estimated 82,300 acre-feet of native supply, along with a projected 28,200 acre-feet of return flow from use of imported water. (1EXCPT511.)(68JA62489.)

From May 28 through May 30, 2013, the trial court heard Phase Four, and made findings regarding the quantity of water used by every party that had extracted water during the years 2011 and 2012. (*See* 1EXCPT492-499; 538-543.)(*See* 17JA22509-22516; 79JA75212-75217.) These findings were largely based on declarations requested by and submitted to the court. (1EXCPT492-499.)(17JA22509-22516.) While parties were asked to submit claims of reasonable and beneficial uses of water pumped, the court made no "determination as to the reasonableness of that type of use … or … of a water right" was made. (1EXCPT505:5-17.)(36JA37723:5-17.) Indeed, discovery was limited solely to quantity of use. (1EXCPT530.)(73JA67776.)

On February 10, 2014, Phase Five commenced to determine the "Federal Reserved Water Right," the amount of water reserved for the United States for use on federally owned land. (*Cappaert v. United States* (1976) 426 U.S. 128, 142.) The court allocated the United States 7,600 acre-feet per year. (176JA157539-157540¶5.1.4.)[5]

[5] A sixth phase of trial took place later. (*See* discussion at section H, *infra*.)

### D. The Antelope Valley Accord (the "Waldo Accord")

In 2010, prior to the "overdraft" and "total safe yield" determinations in Phase Three, the parties attended multiple mediation sessions in an attempt to arrive at a physical solution. The mediation resulted in a resolution dubbed the "Antelope Valley Accord," also called the "Waldo Accord." (1EXCPT181-288.)(8JA8693-8800.) Nearly all parties to the adjudication agreed to the proposal, including the federal government, most Purveyors, the Wood Class, the Willis Class, and almost all other landowners. (1EXCPT177:20-178:2.)(8JA8689:20-2690:2.) The proposal allocated groundwater rights to current pumpers based on each party's average pumping rate from 2006 through 2010. (1EXCPT184¶III.A.)(8JA8696¶III.A.) The Waldo Accord illustrates one approach for how the rights of the Willis Class may be incorporated into a physical solution.

The Waldo Accord allocated to the Willis Class a right to use the native supply when they begin pumping in the future. (1EXCPT187-188¶5.a.)(8JA8699-8700¶5.a.) Specifically, to accommodate any Willis Class pumping in the future and share the burden of pumping within the safe yield, pumping would be reduced "pro rata (based on

pumping rights) by appropriators and overlies, but not members of the A.V. United Mutual Group, the Small Pumpers Class, or Edwards Air Force Base." (*Id*. at¶7.a.) Willis Class members would be entitled to receive their portion of "the Class reserved right … [as soon as they began] to make actual reasonable beneficial use of groundwater, " about 0.1 acre-feet per year, per acre. (*Id*. at¶5.a.) Willis Class members would also receive one additional acre-foot of water per year for any single-family residence on their land. (*Id*. at¶5.b.)

Ultimately, District 40 (one of the Purveyors) refused to participate in the Waldo Accord on the basis that the native supply was set too high. (14RT5706:12-21.) But for District 40's conduct, the proposal would have been submitted to the court for approval and the litigation would, in all likelihood, have been resolved equitably back in 2010.[6]

### E. The Willis Class Settlement and 2011 Judgment

On July 13, 2010, the Purveyors and the Willis Class entered into a Stipulation of Settlement (the "Willis Settlement") that resolved all claims by and among them. (3EXCPT2296.)(176JA157676). The

[6] As explained further below, the trial court did not consider the Waldo Accord as an alternative to the Physical Solution ultimately adopted.

Class then moved for preliminary approval, (1EXCPT326-335.)(9JA9294-9303) and trial court granted the motion and ordered that Class members be notified of the settlement. (9RT6630:25-6632:20; 1EXCPT336-339; 9JA9816-9819.) The Purveyors sent a Notice of Proposed Willis Class Action Settlement and Settlement Hearing ("Willis Settlement Notice") to Willis Class members. (1EXCPT390-408.)(13JA15269-15287.) Among other topics, the Notice explained that (1) the Class could pump groundwater on their property; (2) the Class had a right to produce groundwater from the native supply (up to 85 percent) correlatively with other overlying landowners free of replacement assessment; and (3) all parties had the right to recapture return flows from imported water. (9JA10293-10298.) A staggering number of Class members – 18,389 – responded to the Notice. (1EXCPT151:14-15.)(2JA3551:14-15.)

After the Class received notice, its counsel sought final approval of the Willis Settlement. (1EXCPT341:11-17.)(10JA12210:11-17.) On May 12, 2011, the trial court entered a Final Judgment Approving Willis Class Action Settlement (the "2011 Willis Class Judgment"). The trial court found the Willis Settlement was "fair, reasonable, and in the best interests of the [Willis] Class." (1EXCPT424¶14.)(13JA15602¶14.)

The court required the Willis Class complaint be dismissed with prejudice and required the parties to carry out the settlement according to its terms. (13JA15602:¶¶14-15.) It also confirmed the trial court retained jurisdiction over the parties "for purposes of incorporating and merging [the] Judgment into a physical solution or other Judgment that may ultimately be entered" in the adjudication. (13JA15604:4-7.)

Notably, the trial court recognized the benefits the 2011 Willis Class Judgment achieved for Class members: "By eliminating the [Purveyors'] prescription claims and maintaining correlative rights to portions of the Basin's native yield, the Willis Class members achieved a large part of their ultimate goal – to protect their right to use groundwater in the future and to maintain the value of their properties." (13JA15487:1-4.) The court reiterated that the Willis Class was "successful in achieving a significant benefit by preventing the [Purveyors] from proceeding on their prescription claims and by maintaining certain correlative rights to the reasonable and beneficial use of water underlying their land." (13JA15487:15-18.) Indeed, the trial court found all stakeholders in the adjudication benefitted from the participation of the Willis Class because "the reasonable and beneficial use of the water [would] be preserved for all under the California

Constitution." (13JA15488:1-5; 15487:18-23 ["By virtue of the Willis Class Action (and the Woods Class Action), the Court is able to adjudicate the claims of virtually all groundwater users in the entire Antelope Valley[,] which adheres to the benefit of every resident and property owner in the adjudication area. Without virtually all users as part of the adjudication, the Court could not have complied with the McCarran Amendment which was necessary to maintain jurisdiction over the federal government … "].)

The following six terms within the 2011 Willis Class Judgment are critical to this appeal:

### 1. The Purveyors Waived any Claims of Prescription Against the Willis Class.

As to the Willis Class only,[7] the Purveyors waived all claims of prescription: "This Stipulation shall neither be construed to recognize prescriptive rights nor to limit the Settling Defendants' prescriptive claims vis-à-vis the Basin or any non-settling parties, but rather as an agreement to fairly allocate the Settling Parties' respective rights to use

[7] As to the basin's active pumpers, the Purveyors retained the right to pursue claims of prescription: "The Willis Class Members acknowledge that the Settling Defendants may at trial prove prescriptive rights against all groundwater pumping in the Basin during a prior prescriptive period." (10JA12248:18-20.)

the Basin's water." (10JA122484:3-6; *see also* 10JA12252-12253¶¶VII.A-B [the 2011 Willis Class Judgment included a full release of all claims and a Civil Code section 1542 waiver].) This was confirmed during Phase Six of trial, when Willis Class counsel sought confirmation that "there are no claims of prescription as against the Willis Class . . . ." (45RT25004:2-8.) The court responded: "The Court's well aware of that . . . so that it goes without saying that the only prescription sought here cannot be against the Willis Class." (*Id*. at 25004:12-15.) Also, the 2011 Willis Class Judgment included a full release of all claims and a Civil Code 1542 waiver (10JA12252-12253¶¶VII.A-B.)

**2. The Agreement Recognized the Rights of the Willis Class Members to a "Fair and Proportionate Share" of the Native Supply, Free of any Replacement Assessment.**

In the Agreement, the Purveyors recognized the Willis Class members' superior **correlative rights** to the basin's groundwater and corresponding right to draw from the basin's native supply free of replacement assessment. (10JA12247:26-28.) Under the terms of the Agreement, the Purveyors agreed the Willis Class members had "an **Overlying Right** to a correlative share of 85% of the Federally

Adjusted Native Safe Yield for reasonable and beneficial uses on their overlying land free of any Replacement Assessment." (10JA12248:11-13.)

The 2011 Willis Class Judgment defined "**correlative rights**" as "the principle of California law, articulated in *Katz v. Walkinshaw* (1903) 141 Cal. 116 and subsequent cases, that Overlying Owners may make reasonable and beneficial use of water in a Basin and that, if the supply of water is insufficient for all reasonable and beneficial needs, each Overlying Owner is entitled to a fair and just proportion of the water available to the Overlying Owners." (10JA12243-12244¶D.) An "**overlying right**" was further defined as "the appurtenant right of an Overlying Owner to use groundwater from the [Native Supply] for overlying reasonable and beneficial use." (10JA12245¶L, emphasis added.)

### 3. The Purveyors Agreed not to Interfere with Willis Class Members' Right to Pump from the Native Supply.

One of the most important and essential terms of the 2011 Willis Class Judgment was the Purveyors' explicit promise that they would "not take any positions or enter into any agreements that [were] inconsistent with the exercise of the Willis Class Members' Overlying

Right to produce and use their correlative share of 85% of the Basin's" native supply (176JA157684:13-16) and to "cooperate and coordinate their efforts . . . so as to obtain entry of judgment and/or adoption" of a Physical Solution "consistent with the terms" of the 2011 Judgment. (10JA12249:28-12250:4; 12254:13-16.)

#### 4. The Purveyors Agreed the Willis Class had a Right to Return Flows from Imported Water Free of any Replacement Assessment.

The Purveyors agreed the Willis Class would maintain "the right to recapture Return Flows from Imported Water that they put to reasonable and beneficial use in the Basin, consistent with California law." (10JA12249¶4.a.) That is, the Willis Class (actually both parties) would not be "subject to any Replacement Assessment for their production of an amount equal to Return Flows from Imported Water that they put to reasonable and beneficial use in the Basin." (*Ibid*.)

#### 5. Merger, Consistency, and Incorporation of the 2011 Willis Class Judgment and any Future Physical Solution.

All settling parties recognized further trial proceedings might be necessary to resolve the disputes among other parties. (10JA12254:13-20.) The Agreement confirmed their expectation that (1) the 2011 Willis Class Judgment would "become part of a Physical Solution entered by

the Court to manage the Basin," and (2) the court would "retain jurisdiction [over] the coordinated action" after the Settlement. (10JA12249-12250¶B.) With that in mind, both parties agreed "to be part of such a Physical Solution to the extent it is consistent with the terms" of the 2011 Willis Class Judgment and to comply with all future "Court-administered rules and regulations" to the extent they were "consistent with California and Federal Law and terms of this Stipulation." (*Ibid*.)

Thus, the agreement recognized the future adoption of a physical solution was expected and, in fact, desirable given the severe overdraft the Antelope Valley aquifer was in. The parties and the court (by its approval of the settlement and entry of a judgment based thereon) compromised and agreed that any physical solution proposed by the Purveyors and/or adopted by the trial court would be consistent with the terms of the 2011 Willis Settlement.[8] This term incorporated into the 2011 Judgment was essential to the Willis Class's consent to the settlement and the court's final approval of the deal between the Class

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[8] The 2011 Willis Class Judgment was amended twice to include attorneys' fees and to correct the definition of the class; the Second Amended Final Judgment Approving the Willis Class Action Settlement was entered September 22, 2011 and was recorded in the Kern and Los Angeles County Recorder's offices.

and the Purveyors. (10JA12250:2-4; 13JA15604:4-7; 173JA153934:23-26.)

### F. Post Willis Class Judgment – Years 2011 To 2014

Although no longer an active party in the litigation after the settlement, the Willis Class continued to monitor the case. (127JA 124863¶7.) About two years later, in 2013, the Purveyors began settlement negotiations with the remaining parties. (128JA125725¶4.) Willis Class counsel repeatedly asked to participate in the discussion to ensure any proposed physical solution was consistent with the 2011 Willis Class Settlement, as required by the 2011 Judgment. (127JA124864¶7.) Willis Class counsel was rebuffed by the Purveyors' attorney who declared the Willis Class's participation was "unnecessary." (127JA124864¶7.)

The following year, the Willis Class received, for the first time, a draft of the Physical Solution. (127JA124822:8-124823:4.) By then, the mediating parties had finalized their proposed allocations of the native supply, which provided the Willis Class with no share at all. (*Ibid*.) Instead of allocating the Willis Class landowners a right to the native supply, as called for in the Willis Class Judgment, the Physical Solution required any Willis Class member who may seek to pump

water in the future to comply with twelve burdensome (both procedurally and financially) steps as part of the "New Production Application Procedure." (176JA157572-157573¶18.5.13.1.) Even after satisfying those twelve steps, no Willis Class member is guaranteed the right to pump water, even for domestic use, as the Watermaster retains discretionary authority to allow the proposed new production. (176JA157571¶18.5.13.) The Willis Class wrote the Purveyors to outline the deficiencies in the Physical Solution and to offer alternatives that would satisfy the Purveyors' objectives, as well as their promises to the Willis Class. (*Ibid*.) The Willis Class received no response. (*Ibid*.) A couple of months later, Willis Class counsel met with counsel for District 40 and they agreed to participate in further discussions to resolve the Willis Class's concerns. (*Ibid*.) The following month, Willis Class counsel attended a telephonic mediation session among all parties. (*Ibid*.) Counsel for the other parties, however, abruptly asked Willis Class counsel to leave the call on the basis that the mediation was confidential and privileged.[9] (*Ibid*.)

[9] The Willis Class filed numerous case management conference statements with the court regarding the status of the Willis Class before the Physical Solution was filed. (*See e.g.,* 15JA19485-19486; 124JA121263-121267; 124JA121926-121928; 127JA124820-124832.)

Shortly afterward, the Purveyors and the other overlying landowners reached a settlement (the "2015 Settlement" or "Purveyors' Settlement") that included their proposed Physical Solution. (176JA157743:17-19.) While the document was out for signature and approval by the various boards, the stipulating parties to the 2015 Settlement and Physical Solution ("Stipulating Parties") submitted a proposed schedule for a prove-up and/or trial. (127JA123889.) Over the Willis Class's objection, the court adopted the Stipulating Parties' proposed schedule and Case Management Order. (125JA123128:20-123129:2, 123889.) The order required the non-stipulating parties to (1) oppose the prove-up of the Physical Solution, (2) assert claims or rights to produce groundwater, (3) disclose witnesses and exhibits related to any objection to the Physical Solution, (4) conduct discovery relative to any objections to the Physical Solution, and, (5) oppose the approval of the Purveyors' Settlement. (127JA1238891¶6; 128JA125524¶6; 130JA127653¶6.)

### G. The Stipulation for Entry of the 2015 Judgment and Physical Solution

The Physical Solution was presented to the trial court by way of a Stipulation for Entry of Judgment ("2015 Stipulation"), to which the Willis Class was not a party or signatory.

(2EXCPT1146)(129JA126256.) The 2015 Settlement included an ultimatum (the "Dynamite Provision") to the court—adopt the Physical Solution verbatim[10] or the deal is off:

> "The Provisions of the Judgment are related, dependent and not severable. Each and every term of the Judgment is material to the Stipulating Parties' agreement. *If the Court does not approve the Judgment as presented*, *or if an appellate court overturns or remands* the Judgment entered by the trial court, then *this stipulation is void ab initio*…"

(2EXCPT1019:21-24)(129JA126129:21-24, emphasis added.)

The Dynamite Provision left no room for the Willis Class to negotiate revisions to the Physical Solution which would make it consistent with the covenants made by the Purveyors in the 2011 Judgment. (*Ibid.*) The provision put pressure on the trial judge to ignore the inconsistencies between the Physical Solution and the court's previous judgment for the sake of expediency. (*Ibid.*)

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[10] Decisions adopted verbatim by the court are viewed "with a more critical eye to insure the trial court has adequately performed its judicial function." (See *Photo Electronics Corp. v. England* (9thCir. 1978) 581 F.2d 772, 777 *Shlensky v. Dorsey* (3dCir. 1978) 574 F.2d 131, 149; *Flowers v. Crouch-Walker Corp.*(7thCir. 1977) 552 F.2d 1277, 1284; *In re Las Colinas, Inc.* (1stCir. 1970) 426 F.2d 1005, 1010 [the more "a court's eventual decision reflects no independent work on its part, the more careful we are obliged to be in our review"].)

The 2015 Settlement also contained accommodations among the Stipulating Parties resulting in groundwater allocations that would have never passed constitutional muster in a court of law (the "backroom provisions"). 2EXCPT1020:16-18; 1021-1022,¶¶12-13; )(129JA126130:16-18; 129JA126131-126132¶¶12-13; 177JA158737:1-7.) These carefully-crafted trade-offs included water allocations in exchange for payment of the Wood Class' attorneys' fees and costs; rights to transfer water allocations and to carry them over into future years to certain Stipulating Parties; and a duty to defend the judgment against the non-stipulating parties, particularly the Willis Class. (129JA126130:13-21; 126131:26-126132:4.)

The Wood Class moved for preliminary approval of the 2015 Settlement and the Physical Solution (1EXCPT620-629; 2EXCPT634-1014)(128JA125696-125705; 128JA125724-126104). Prior to ruling on the motion, the trial court tried to placate the Willis Class with statements, such as:

> I haven't seen it [the Physical Solution]. I don't much care at this point with regard to your argument what's in it because you're not a party to it, and you're not bound by it.…[T]hose parties … can, as between themselves, allocate water, but the total amount of water that was in the aquifer is going to be allocated by Court order, by judgment, and it's not going to be bound by any agreement between parties among themselves.

(42RT23236:16-24.) Nevertheless, when it came time to rule on the motion, the court grated preliminarily approval and, in effect, also preliminarily approved the Physical Solution despite the major inconsistencies between it and the 2011 Willis Class Judgment and inconsistencies with California law. (2EXCPT1490)(130JA127632.)

### H. The Willis Class's Response to the 2015 Settlement and Physical Solution

Over the course of the next few months, the Willis Class challenged the 2015 Settlement and the Physical Solution in a series of motions arguing: (1) the Purveyors had breached the 2011 Willis Class Judgment and outlining the conflicts between the proposed Physical Solution and the prior Settlement Agreement ((3EXCPT1532-1538)(132JA130521-130527); and (2) the process used by the court to evaluate and approve the Physical Solution violated the Willis Class's due process rights (3EXCPT1541-1556)(132JA130623-130638).[11] On each of these motions, the trial court either ruled against the Willis Class

[11] The motions are set forth in full at 3EXCPT1531-1540; 3EXCPT1629-1644; 3EXCPT1669-1670. (132JA130520-130529; 138JA134965-134980; 141JA137726-137727.)

or deferred ruling on the motion without prejudice. (3EXCPT1580,¶1)(133JA131700¶)(43RT24445:4-7)(3EXCPT1667-1668)(139JA136235-136236)(42RT23813:19-23817:9.)

The Willis Class asked for a court-appointed expert to assess the Physical Solution and to present alternatives arguing an expert was necessary to evaluate (a) the present and future reasonable and beneficial uses of the groundwater extracted by the Stipulating Parties; (b) the cost and reasonableness of the new pumping requirements of the Physical Solution; (c) availability of alternative sources of water; and (d) the effect of the Physical Solution on the value of property owned by Willis Class members. (2EXCPT1338-1354; 1343:25-1344:15)(129JA126466-126482; 129JA126471:25-126472:15.) The Court denied the request. (2EXCPT1490)(130JA127632) In contrast, the court appointed an expert for the Wood Class, and every other significant Stipulating Party had retained one. (2EXCPT1344:16-24)(129JA126472:16-24.) These experts favored the Stipulating Parties' position vis-à-vis the Physical Solution. They, of course, could not adequately represent the interests of the Willis Class and/or present the opposing view. (*Ibid*.)

The Willis Class then moved for an opportunity to at least submit alternative physical solutions recognizing the Class's correlative right to share in the native supply. (2EXCPT1491-1501; 3EXCPT1705-1769; 3EXCPT1773-2046)(131JA127835-127845; 174JA 154829-154893; 174JA155346-155619.) In its motion, the Willis Class acknowledged the current overdraft situation and the limited nature of Antelope Valley's precious resource given the low rainfall in California. (2EXCPT1492:20-23)(131JA127836:20-23.) Since the Class was not currently pumping, the Willis Class argued the circumstances did not justify forever stripping its correlative water right. Instead, the Willis Class presented four alternative physical solutions similar to those adopted by courts in prior California groundwater adjudications. (2EXCPT1491-1501)(131JA127835-127845.) In addition, the Willis Class proposed the court consider adopting a Physical Solution based on the Waldo Accord that was previously agreed to by all but one of the parties. (2EXCPT1497:3-21)(131JA127841:3-21.) The trial court refused to consider the Willis Class's proffered alternatives. (3EXCPT2095)(176JA157201.)

Finally, the Willis Class pointed out a conflict of interest caused by the proposed Physical Solution. (3EXCPT1612-

1628)(137JA134586-134602.) When the Physical Solution was finally revealed, several members of the Woods Class came forward as owners of both pumping and non-pumping parcels. An investigation revealed that a total of about 2,400 members of the pumpers (Wood Class) were also non-pumpers (i.e., members of the Willis Class). When Willis Class counsel was asked by some of these "dual class members" what they should do, he realized he could not properly represent those individuals because their interests as pumpers conflicted with interests of the non-pumping Willis Class. (3EXCPT1624:27-1626:3)(137JA134598:27-134600:3.)Rather than confront the conflict, the court ordered Willis Class counsel to proceed by representing "dual class members"—but only as to their non-pumping parcel, while other counsel represented the same class member as to his or her pumping parcel. (44 RT24744:21-24745:12).[12]

The Willis Class also filed a series of opposition briefs challenging the preliminary approval of the 2015 Settlement and the

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[12] The trial court's order conflicts with the class definition in the complaint, as well as California law requiring a party to be a "legally cognizable entity." (*Tanner v. Estate of Best* (1940) 40 Cal.App.2d 442, 445 ["In order for a civil action to be prosecuted, there must be some existing entity aimed at by the processes of the law, and against whom the court's judgment will operate"].)

Physical Solution. The Class argued they (a) conflicted with the 2011 Willis Class Judgment; (b) prejudiced the Willis Class as a non-stipulating party; (c) violated the Willis Class members' due process rights; (d) violated the California constitution, the Water Code and common law; (e) imposed insurmountable burdens on Willis Class members; and, (f) discriminated against the Willis Class in treating its members differently than other overlying landowners. (2EXCPT1355-1373)(130JA126865-126883.)

Given the trial court's intransigence, the Willis Class filed a "Schedule of Objections and Inconsistencies to the Physical Solution," listing all of the inconsistencies and flaws in the key provisions. (2EXCPT1466-1482)(130JA126995-127011.) The Willis Class's opposition to the 2015 Settlement and Physical Solution likewise included a separate statement of objections reiterating its concerns with problematic provisions. (2EXCPT1502-1520)(131JA127969-127987.) Finally, the Willis Class opposed the Wood Class's motion for final approval of the 2015 Settlement, explaining that it improperly purported to bind non-stipulating parties with no notice to absent class members. (3EXCPT1656-1666)(138JA135244-135254.) As explained

below, the court ultimately overruled all objections asserted by the Willis Class.

## I. Trial – Phase Six

The trial court—having rejected all attempts by the Willis Class to call out the inconsistencies between the 2011 Judgment and the Purveyors' proposed Physical Solution—commenced Phase Six of trial. The trial court characterized this phase as a "fairness hearing" to prove up, and approve, the 2015 Settlement and accompanying Physical Solution. (43RT24101:16-19.)

Willis Class counsel had no choice but to prepare for trial. He deposed all of the Stipulating Parties' experts and hired experts at his own expense. (1AA241:3-18.)

### 1. The trial court admits the unrelated declarations of the Stipulating Parties from Phase Four and precludes the Willis Class from cross-examining the declarants.

At the hearing, in lieu of live testimony, the trial judge allowed the Stipulating Parties to meet their burden of proving the pumping levels set forth in the Physical Solution are "reasonable and beneficial" pursuant to California Constitution, article X, section 2 by presenting the parties' written declarations from Phase Four. (45RT25112:13-17.)

The court also ruled that because the declarations were previously admitted without objection, Willis Class counsel would not be permitted to cross-examine the parties on the content of their declarations. (47RT 25678:13-26; 45RT25123:14-15.) The Willis Class objected, pointing out that Phase Four was limited to the parties' historical pumping *amounts*, not reasonable or beneficial use. (45RT25123:17-20.) The court held that because the Class had settled prior to Phase Four and was not a pumping party, it had no reason or right to cross-examine declarations during Phase Four. (*Id*.) As detailed herein, the court's denial of the Class's right to cross-examine witnesses violated due process. (45RT25122:28-25126:2.) The trial court overruled the Willis Class's objections and admitted the untested Phase Four declarations as evidence of reasonable and beneficial use of each Stipulating Party. (45RT 25125:10-25, 25129:23-25130:1.)

**2. The Willis Class's court-curtailed presentation.**

In the face of that ruling, the Willis Class did its best to oppose the Physical Solution.

The Willis Class proffered three reports prepared by Dr. Rodney Smith[13] (6-Willis12; 6-Willis14; 6-Willis16) as well as his testimony on the value of the permanent allocation of an acre-foot of water, the inconsistencies between the two judgments from an economic perspective, the total effective percent of the native supply allocated to the Purveyors under the Physical Solution, and three alternative models of allocation: a Pro-Rata Model, the Waldo Accord Model, and a Quantification Model - allocations that would include the Willis Class. (49RT26534:28-26535:4.) The court deemed his testimony irrelevant and refused to consider any of his opinions. (49RT26542:5-26543:6.)

The Willis Class called expert witness Stephan D. Roach, MAI, SRA, AI-GRS, to testify about the "negative material impact" on the Willis Class members' real estate values resulting from the proposed Physical Solution and its "extremely rigorous" and "expensive" by-permission-only twelve-step application procedure. (6-Willis-19,

[13] Rodney T. Smith, Ph.D. is an expert on the economics, finance and the politics of water resources. (49 RT26528:13-15.) Dr. Smith has over 35 years of experience in the acquisition of water rights throughout the western U.S. and in the sale and leasing of water rights and water supplies. (Ex. 6-Willis-10.) For this litigation, Dr. Smith prepared three reports which were marketed as exhibits during the hearing, but excluded by the trial court in response to Purveyors' objections. (49 RT 26926:25-26927:8; 49 RT 26927:20-26; 49 RT 26928:8-14.)

pp.14-15)(3EXCPT1693-1694)(173JA154507-8)(49RT26548:20-2, 26550:28-26551:12; 49RT26549:10-265550:1.) The court initially intended to exclude this testimony, but eventually relinquished only ten minutes for questioning by Class counsel. (49RT 26549:10-26550:1, 26550:28-26551:24, 26552:5-26553:17.) Given the time limitation, Class counsel could only question Roach on his conclusion that the Physical Solution "greatly diminished the potential economic uses [and] therefore … the value of the properties." (3EXCPT1693)(173JA154507; 49RT 26567:27-26568:14.)

As a percipient witness, Willis Class representative David Estrada testified about the need to preserve his own and the Class's groundwater rights and ability to pump water in the future. (49RT26523:15-26524:3.) Kamran Kamalyan, another Willis Class member, testified that his right to water was important to him because without it, "[he] can't run [his] business" because he "can't get water hauled in." (48RT25913:6-14.) Lloyd Lewis testified he opted out of purchasing a parcel in Antelope Valley because he investigated the process for obtaining a permit to drill a well (under the onerous terms of the Physical Solution) and discovered the obstacles to obtaining

water drastically decreased the value of the land. (48RT26215:15-26216:26.)

### 3. The evidence presented by the Stipulating Parties.

To justify the water allocations in the Physical Solution, the Wood Class proffered the testimony of Richard Wood, among others, who estimated his water use at "between 3, 3.5, 4, 4.5" acre-feet of water per year (calculated not by installing a water meter, but rather estimated by the electricity used to operate his water pump. (48RT24140:20-27, 24144:26-24145:8.)

Timothy Thompson, the Wood Class's court-appointed expert, estimated the Wood Class members' water usage from 2011-2012 was approximately 1.2 [acre-feet per year] per household" based on self-reported surveys of 104 randomly-chosen Wood Class parcels, Google Earth images of each parcel, electrical usage bills, and tax assessor reports. (43RT24163:22-27, 24175:7-10, 24175:23-25, 24177:21-25, 24194:24-24195:1.)

The Purveyors called Dr. Dennis Williams who opined on direct exam that the Physical Solution would correct the overdraft in the basin, but conceded on cross-examination that he neglected to consider any potential changes to the native supply over the next 17 years. (46RT

25336:22-25337:4, 25643:6-13, 25642:4-6 ["The Court: The native safe yield is a variable and it varies from year to year depending upon the particular atmospheric conditions including rain fall, snow, etcetera, so that *it's basically a number that can change in a particular year*…", emphasis added].)

Robert Beeby, another expert called by the Purveyors, testified the allocations of the native supply in the Physical Solution "ma[d]e sense" to him. (46RT25401:1-6.) On cross-examination, Willis Class counsel questioned whether Beeby's "beneficial and reasonable" use analysis compared each pumpers uses to all other parties uses, but the court cut off that line of questioning. (46RT25439:23-25440:9, 25431:18-28, 25440:10-25443:5.)

Charles Binder, an AVEK expert witness opined primarily on the proper interpretation of the Physical Solution (49RT 26807:23-27; 26808:21-26809:2), was asked questions by Willis Class counsel about the provisions he presumably[14] relied on to form his opinions, such as the new 12-step application process and transferability provisions.

[14] The Stipulating Parties' objections to Willis Class counsel's inquiry into the factual basis for Binder's opinions were sustained by the court. (49RT 26839:22-26841:4; 26841:26-26842:28; 26844:26-26845:15.)

(49RT26835:27-26860:24.) In response to repeated objections from the Stipulating Parties and despite offers of proof from Willis Class counsel, the court refused to allow Binder to answer any substantive cross-examination questions within his expertise regarding the Physical Solution. (49RT26835:25-26860:24.)

At the end of Phase Six, the trial court announced a tentative decision approving the Physical Solution and overruling all of the Willis Class's objections to the 2015 Settlement. (50RT27566:6-21.)

### J. The Statement of Decision and Resulting Judgment

The court issued a written Statement of Decision not only approving the Physical Solution based on the Stipulating Parties' "prove-up," but also adopting the proposed Physical Solution as its own solution. (3EXCPT2101:11-15)(176JA157460:11-15.)

In support of its decision, the court found:

- The Willis Class had "no present reasonable beneficial use; their future groundwater needs [were] speculative; [and] substantial evidence show[ed] that the Basin's groundwater supply [had] been insufficient for decades." (3EXCPT2114:10-12)(176JA157473:10-12.)
- The Willis Class members' unexercised rights gave rise to "unacceptable" uncertainty that inhibited planning necessary to resolve the overdraft conditions in the basin. (3EXCPT2114:13-16)(176JA157473:13-16.)

- The Physical Solution was "consistent" with the 2011 Willis Class Judgment based on the Notice provided to the class members, which acknowledged the stipulation would become part of a comprehensive physical solution. (3EXCPT2125:27-2126:4)(176JA157484:27-157485:4.)

- The Physical Solution recognized the Willis Class' rights to a correlative share of native supply (3EXCPT2124:25-26)(176JA157483:25-26), BUT the Physical Solution did not improperly extinguish Class members' rights to water because it afforded them the option to either prove their entitlement to a fair share of the native supply to the court or apply to the Watermaster as a new pumper. (3EXCPT2125:21-25)(176JA157484:21-25.)

- The replacement assessment required by the Physical Solution was reasonable and did not unduly burden the Class. (3EXCPT2126:10-11)(176JA157485:10-11.)

- The Physical Solution did not violate Willis Class members' due process rights. (3EXCPT2126:19-20)(176JA157485:19-20.) And in the end, the court concluded that the court-approved notice of the Willis Class settlement adequately notified class members that they would be subject to a physical solution in the future. (3EXCPT2126:25-27)(176JA157485:25-27.)

Despite finding "the [Stipulating Parties'] reasonable and beneficial use pumping alone exceeded the native safe yield while public water supplier pumping was taking place," the court nonetheless found the Stipulating Parties established their rights to continue extracting water from the native supply. (3EXCPT2057:5-2058:20)(175JA156041:5-156042:20.)Interestingly, the court used the fact of the Stipulating Parties' excessive pumping beyond the safe yield

as the reason why "the unexercised overlying rights of the Willis Class are not entitled to an allocation in the Physical Solution." (*Id*.)

On December 28, 2015, the trial court reduced the Physical Solution to a final judgment (the "2015 Judgment") incorporating the Wood Class Settlement and Physical Solution. (3EXCPT2128-2356) (176JA 157508-157736.)[15]

## APPEALABILITY

The 2015 Judgment is a final judgment made appealable by Code of Civil Procedure section 904.1(a)(1). (*Justus v. Atchison* (1977) 19 Cal.3d 564, 567-568 [disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171].)

The Judgment was entered on December 28, 2015. A Notice of Entry of Judgment was served by District 40 on December 28, 2015. The Willis Class's Notice of Appeal was timely filed on February 22, 2016, within 60 days of Notice of Entry of Judgment. 3EXCPT2128-

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[15] The trial court then denied a motion for additional attorneys' fees filed by the attorneys representing the Willis Class based on their substantial work in attempting to protect their clients' interests. (4EXCPT2927-2930)(179JA162059-162062.) That order forms the basis of the Willis Class's second appeal subject to a separate briefing schedule.

2132; 4EXCPT2724-2725(176JA157508-157512; 177JA159423-159424.)

## STANDARD OF REVIEW

When a trial court exercises its equitable powers to approve a physical solution and enter judgment, review of that judgment is under the abuse of discretion standard of review. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1256 ("*Barstow"*).) However, "[t]he abuse of discretion standard is based on the assumption the trial court actually exercised the discretion vested in it by law. If the record demonstrates otherwise, the appellate court will reverse and remand for the required exercise of discretion." (*Pratt v. Ferguson* (2016) 3 Cal.App.5th 102, 114.)

A stipulated judgment is a contract to which the court applies the same legal principles applicable to contacts generally. (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1585.) The interpretation of a stipulated judgment is therefore a question of law subject to de novo review. (*In re Marriage of Smith* (2007) 148 Cal.App.4th 1115, 1120.) Likewise, the interpretation of a settlement agreement and the application of the doctrine of res are reviewed de

novo. (*Crosby v. HLC Properties, Ltd*. (2014) 223 Cal.App.4th 597 602-604.)

## LEGAL DISCUSSION

## I. CALIFORNIA LAW GOVERNING THE GROUND-WATER RIGHTS OF OVERLYING LANDOWNERS AND USER PRIORITIES.

Water rights are property rights that allow the holder to take and use water depending on the precise nature of the right. The rights to water in an underground basin, as here, are typically classified as "overlying," "appropriative," or "prescriptive." (*Barstow, supra,* 23 Cal.4th at 1240.) A right to extract groundwater is obtained by owning land overlying an aquifer or by "appropriating" water. (*Southern California Water Co., supra,* 109 Cal.App.4th at 905.)

### A. The Overlying Landowners' Correlative First-Priority Water Rights.

An overlying landowner (or "overlier") shares a correlative first priority right (defined at footnote 1, *supra*) to pump native water beneath his land along with all of the other overlying landowners above the aquifer. (*Barstow, supra,* 23 Cal.4th at 1241.) This *shared* or *common* (correlative) right allows overliers to extract groundwater from the aquifer (within the safe yield) for the "reasonable and beneficial use" of their property. (*Katz v. Walkinshaw, supra,* at 136.)

Thus, if the native supply is insufficient to meet the needs of all overliers, then each is limited to a proportionate share of the total amount available based on reasonable need. (*Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1000-1002 ("*Tehachapi-Cummings*").)

This type of water right vests automatically at the time the land is purchased and is not predicated on actual use—i.e., it exists regardless of whether the landowner actually pumps water.[16] (*United States v. State Water Resource Control Bd*. (1986) 182 Cal.App.3d 82, 101.) Key to correlative water rights is that all overliers have an "equal right" to water. (*Katz v. Walkinshaw, supra*.) While all overliers have priority over *other* claimants, no overlier's right to draw water is superior to that of any other overlier. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 279("*Santa Maria*").)

Furthermore, an overlying right consists of a present right to use water for existing *and prospective* uses. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368 ("*Peabody*").) Thus, an unexercised overlier's

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[16] The parties agreed in the Waldo Accord that overlying landowners "hold inchoate, *equal rights with other landowners to pump available groundwater* and put it to reasonable beneficial use on their land." (1EXCPT181, emphasis added)(8JA 8693.)

right to use (pump) water is protected as against appropriative use now and in the future. (*Ibid.;* see also *Burr v. Maclay Rancho Water Co*. (1908) 154 Cal. 428, 436-437.)

### B. Purveyors' Second-Tier Appropriative Water Privilege.

By contrast, an appropriative use of water is a privilege afforded those who do not own overlying land, or who seek to use the groundwater on property that does not overlie the aquifer that is the source of the groundwater.[17] (*Amador County v. State Bd. of Equalization* (1966) 240 Cal.App.2d 205, 217 ["an appropriative water right is a usufructuary right"—i.e., the privilege to enjoy water which is vested in another], citing *San Bernardino Val. Municipal Water Dist. v. Meeks & Daley Water Co*. (1964) 226 Cal.App.2d 216.)

When there is excess or surplus water, "[a]ny water not needed for the reasonable beneficial use of those having prior rights [i.e., overlying landowners] … may rightly be appropriated … for non-overlying use, such as devotion to public use or exportation beyond the

[17] The California Supreme Court has held that the supply of water as part of a municipal water system is not an overlying groundwater right, even where the lands supplied with water overlie the groundwater basin. *City of Pasadena v. City of Alhambra* (1949) 33 Cal. 2d 908, 927. Thus the Purveyors are appropriative groundwater right holders.

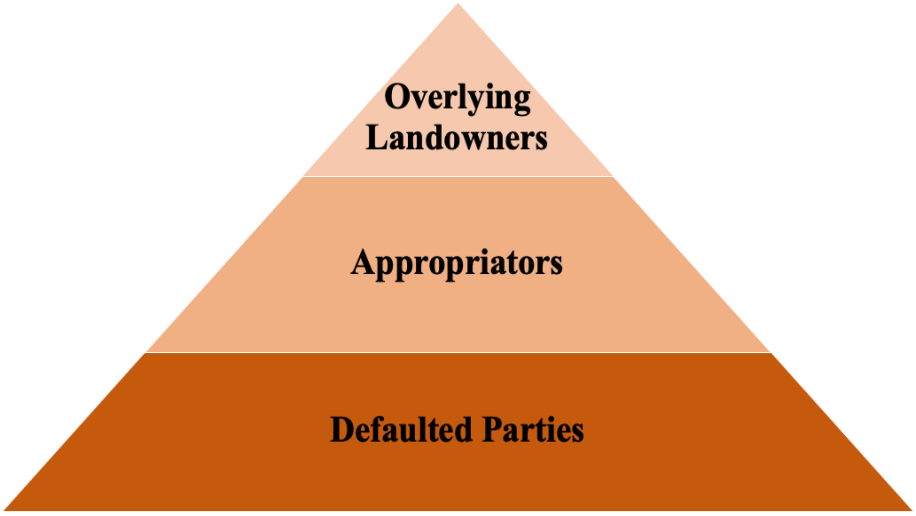
basin or watershed." (*Barstow, supra,* 23 Cal.4th at 1241.) In a state of overdraft, however, the right of overliers is "superior to that of other persons who lack legal priority" *i.e.*, those with appropriative rights. (*Id.* at 1240-1241 ["the rights of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner"].)

Critically here, overliers need not exercise their rights to preserve priority over appropriative users. (*Barstow, supra,* 23 Cal.4th at 1243.)

> Because the court cannot fix or absolutely ascertain the quantity of water required for future use at any given time, *a trial court should declare prospective uses paramount to the appropriator's rights*, so the appropriator cannot gain prescriptive rights in the use. Until the paramount right holder needs it, the appropriator may continue to take water."
>
> (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 525 ("*Tulare*").)

The following chart shows the priority of water rights under California law:

**Priority of Water Rights to Native Supply Under California Law**



### C. The Reasonable and Beneficial Use Doctrine.

Fundamental to California water law, per both the constitution and common law, is that all uses of water must be "reasonable" and "beneficial." Article X, Section 2 of the California Constitution requires "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented." This applies to all water rights whether riparian, overlying, or appropriative. (*Barstow*, *supra*, 23 Cal.4th at 1241-42.) Principally, the reasonable and beneficial use doctrine emphasizes no one can have a protectable interest in the unreasonable use of water. (*Id*. at 1242.)

California's public policy regarding reasonable and beneficial use protects both actual ***and prospective*** reasonable beneficial uses. (*Hillside Memorial Park and Mortuary v. Golden State Water Co*. (2011) 205 Cal.App.4th 534, 539.[18]) While a trial court has equitable authority to allocate water among competing interests, the court may "neither change priorities among the water rights holder nor eliminate

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[18] Review granted and opinion superseded. *Hillside Memorial Park and Mortuary v. Golden State Water Co.* (2011) 134 Cal.Rptr.3d 541. Later, review dismissed, matter remanded and opinion ordered republished. *Hillside Memorial Park and Mortuary v. Golden State Water Co.* (2012) 143 Cal.Rptr.3d 838.)

vested rights in applying the solution ***without first considering them in relation to the reasonable use doctrine***." (*Barstow*, *supra*, at 1249-50, emphasis added.)

Determining what constitutes a reasonable use of water involves considering the following four concepts of the doctrine. First, it is *utilitarian* as it encourages efficient, economically and socially beneficial uses of water resources. Second, it is *situational* because evaluating individual reasonable use involves not only a water right holder's own uses but also competing demands on the water source. Third, it is *dynamic* because what is considered reasonable use may change over time as the economy, technology, demographics, ecological conditions, and societal needs evolve. Fourth, it is *fragile* as all uses of water are interdependent and variable as needs for water fluctuate.

### D. The Court Adjudication Process for Resolving Disputes Over Water Rights.

Where a dispute arises between claimants of a right to extract water from an underground basin, the parties may submit their dispute to a court to adjudicate and allocate that right in accordance with California's unique laws governing water rights. (*Barstow, supra,* at 1233.) Here, the parties submitted their dispute to the court by way of

a series of complaints and cross-complaints seeking declaratory/injunctive relief and/or to quiet title to the water. (1EXCPT31; 1EXCPT64,¶1; 3EXCPT1590,¶B)(1JA1445; 134JA132400¶B; 2JA 1864¶1.) The normal principles of due process apply to proceedings where, as here, the court is asked to equitably allocate present and future groundwater rights of overliers and appropriators. (*Orange County Water Dist. v. City of Colton* (1964) 226 Cal.App.2d 642, 649 ("*City of Colton*"); *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 89("*Wright*").) Without notice and a fair hearing in which all interested parties are heard, a court has no jurisdiction to issue a binding judgment. (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 368.)

Once all parties claiming an interest in the water are before the court, all affected parties must be given the opportunity to meaningfully participate in the proceeding. (*Thor v. Superior Court* (199) 35 Cal.4th 725, 734, fn. 4 ("*Thor*"); *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549; *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212("*Today's Fresh Start, Inc*.".) The goal of the proceedings is to enforce established rules of ownership and priority in a manner consistent with the beneficial use" requirements of

California Constitution, article X, section 2 and the Legislature's salutary policies for the protection of the State's scarce water resources. (*Barstow, supra,* at 1249-50.) Physical Solution

Often the resolution of the parties' dispute over water rights is accomplished by way of a "physical solution." (*Barstow, supra,* 23 Cal.4th at 1233, fn. 1.) A physical solution is an equitable remedy, either agreed-upon or judicially imposed and is used to "alleviate overdrafts and the consequential depletion of water resources in a particular area" and resolve conflicting claims "in a manner that advances the constitutional rule of reasonable and beneficial use of the state's water supply." (*Santa Maria, supra,* 211 Cal.App.4th at 287-288.) The purpose of a physical solution is to "prevent waste and unreasonable water use and to maximize the beneficial use of this state's limited resource." (*California American Water v. City of Seaside* (2010) 183 Cal.App.4th at 480; *Santa Maria, supra,* 211 Cal.App.4th 266, 287.)

Courts making water allocations must adequately consider and reflect the priority of water rights in the basin. (*Barstow, supra*, 23 Cal.4th at 1248.) "Overlying rights take priority over appropriative rights in that if the amounts of water devoted to overlying uses were to consume all the basin's native supply, the overlying rights would

supersede any appropriative claims by any party to the basin's native groundwater. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 293 ("*City of San Fernando*"), fn. 100 [citing *Corona Foothill Lemon Co. v. Lillibridge* (1937) 8 Cal.2d 522, 530-531].)

While a physical solution may modify existing water use practices, whether negotiated or devised by the court, it must protect senior water right holders, prevent the destruction of such rights, and may not be imposed by the court if doing so would cause substantial injury or material expense to those with superior water rights. (*Peabody, supra*, 2 Cal.2d at 351; *Santa Maria, supra*, 211 Cal.App.4th at 288; *Barstow, supra*, 23 Cal.4th at 1250.) An "equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use." (*Barstow*, *supra*, 23 Cal.4th at 1243 [court may not impose a physical solution that subordinates the rights of overlying landowners or imposes a fee on the future exercise of those rights absent due process and a finding of unreasonable use].)

The California Supreme Court in *Barstow* also provided trial courts more specific guidance for achieving legally viable physical solutions:

> First, the doctrine of correlative rights is the governing rule for overlying uses of groundwater. (*Barstow,*

> *supra,* 23 Cal.4th at 1241.) "[I]n disputes among overlying landowners, all have equal rights. If the supply of water is insufficient for all needs, each user is entitled to a fair share and just proportion of the water." (Arthur L. Littleworth & Eric L. Garner, California Water (2nd ed. 2007) at p. 75.
>
> Second, there are no senior overlying users who gain priority by being the first to pump groundwater. (*Tehachapi-Cummings, supra,* 49 Cal.App.3d at 1001.)
>
> Third, the substantial enjoyment of a priority right must be protected. (*Peabody, supra,* 2 Cal.3d at 383-84.)
>
> Fourth, in applying the reasonable use doctrine, the physical solution may not change priorities or eliminate vested rights. (*Barstow, supra,* 23 Cal.4th at 1250.) "Although it is clear that a trial court may impose a Physical Solution to achieve a practical allocation of water to competing interest, the solution's general purpose cannot simply ignore the property rights of the parties asserting them." (*Ibid*.)
>
> Fifth, any physical solution must be fair to all parties who have vested overlying water rights. (*Id*.)
>
> Sixth, the physical solution may not unreasonably burden a party. (*Id*.)

Beyond respecting priorities, the apportionment of rights in a physical solution "calls for the exercise of an informed judgment [based] on a consideration of many factors." (*Barstow, supra,* 23 Cal.4th at 1246.) The relevant factors include (among other things):

- The "physical and climatic conditions…" (*Barstow, supra,* 23 Cal.4th at 1246; *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140, fn. omitted

["what is a reasonable use of water depends on … the ever-increasing need for the conservation of water in this state, an inescapable reality of life"]("*Joslin*").)

- "[T]he consumptive use of water…" (*Barstow, supra* at 1246; *Tulare, supra,* 3 Cal.2d at 524-525 [whether, considering all the needs of those in the particular water field, current users are putting the waters to reasonable beneficial uses]

- "[T]he character and rate of return flows…" (*Barstow, supra* at 1246.)

- "[T]he extent of established uses…" (*Ibid*.)

- "[T]he availability of storage water…" (*Ibid*.)

- "[T]he practical effect of wasteful uses on [other users], the damage to [current users] as compared to the benefits to [non-users] if a limitation is imposed…." (*Ibid*.)

A court apportioning water rights must weigh all factors that create equities in favor of one party or the other. (*Colorado v. Kansas* (1943) 320 U.S. 383, 392.) "[I]t is … 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." (*City of Lodi v. East Bay Mun. Utility Dist*. (1936) 7 Cal.2d 316, 341("*City of Lodi*").) The trial court must "thoroughly investigate" the possibilities of a reasonable physical solution. (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560-561.) Weighing of these

factors allows the court to adopt a workable solution that maximizes the reasonable beneficial use of available waters to all parties. (*Montecito Valley Co. v. Santa Barbara* (1904) 144 Cal. 578, 592.) A physical solution is a practical way of carrying out the mandate of California Constitution, article X, section 2, to prevent waste and to ensure all water resources are utilized to the fullest extent. (*City of Lodi, supra,* 7 Cal.2d at 341.)

The goal is to adopt an equitable solution that does not "unreasonably burden[] any party." (*Barstow, supra,* 23 Cal.4th at 1243-1251; see also *City of Pasadena, supra,* 33 Cal.2d at 916, 933.) Toward this goal, trial courts are encouraged to be creative in devising physical solutions to complex water problems to ensure a fair result consistent with the constitution's reasonable-use mandate. (*Tulare, supra,* 3 Cal.2d at 574; *Santa Maria, supra*, 211 Cal.App.4th at 288.) A "common sense approach to water rights litigation" is desirable. (Harold E. Rogers and Alan H. Nichols (1967) Water for California, at p. 548.)

## II. THE PHYSICAL SOLUTION INCORPORATED IN THE TRIAL COURT'S JUDGMENT VIOLATES CALIFORNIA GROUNDWATER PRIORITY LAW AND ARTICLE X, SECTION 2 OF THE STATE'S CONSTITUTION.

The physical solution incorporated in the 2015 Judgment violates longstanding principles of California law outlined above.

### A. The Stipulating Party's Physical Solution Adopted by the Trial Court Ignores Well-Established Water Right Priorities.

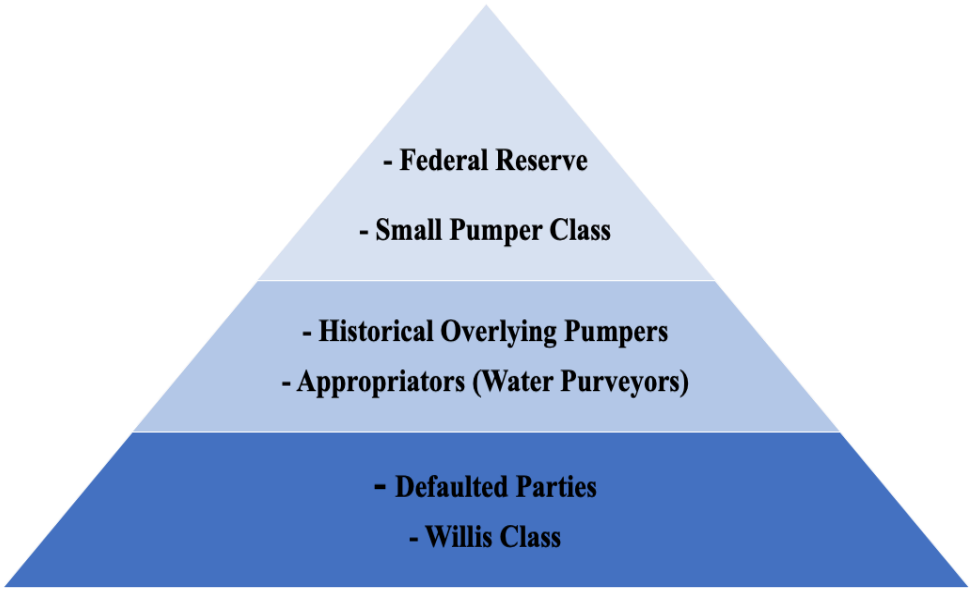
While a physical solution may modify existing water use practices, it must still protect superior water right holders, prevent destruction of their rights, and avoid causing them substantial injury. (*Peabody, supra*, 2 Cal.2d 351; *Santa Maria, supra*, 211 Cal.App.4th at 288; *Barstow, supra*, 23 Cal.4th at 1250.)

Contrary to these dictates, the Physical Solution adopted by the court in this case permanently allocates *all* of the native supply to appropriators and currently-pumping landowners. (3EXCPT2151:16-17)(176JA157531:16-17.)[19] In fact, the Physical Solution reversed the

[19] Specifically, the 2015 Judgment identified the only parties having any production right to the native supply, clarifying that all production rights allocated comprised the entire native supply. (3EXCPT2150,¶3.5.21; 2152:6)(176JA 157530¶3.5.21; 176JA157532:6 ["the total of the Production Rights decreed in this Judgment equals the Native Safe Yield"].) To that end, the Physical Solution defined a "Production Right" as "the amount of Native Safe

water rights hierarchy mandated by California law by giving actively pumping overliers and Purveyors priority over the Willis Class's overlying landowner water rights. (176JA157535:23-26.) The Physical Solution inappropriately re-prioritizes the parties' production rights as follows:

**Priority of Water Rights to Native Supply Under the Physical Solution**




The most obvious problem with the Physical Solution adopted by the court is that it gives Purveyors (who are appropriators) rights to the native supply that are superior to the Willis Class (who are overliers). Overlying rights always take priority over appropriative

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Yield that may be Produced each Year free of any Replacement Water Assessment and Replacement obligation." (3EXCPT2152:4-5)(176JA157532:4-5.)

rights in the basin's native supply. (*Ibid.*; *City of San Fernando, supra,* 14 Cal.3d at 293, fn. 100.) Where (as here) the basin is in overdraft, an overlying landowner's right supersede any appropriative claims by any party to the basin's groundwater. (*Corona Foothill Lemon Co., supra,* 8 Cal.2d at 530-531.)

Furthermore, the Physical Solution gives priority to other overliers above the Willis Class based on their previous pumping activity (even minimal pumping). Under California law, an overliers' right exists regardless of whether the owner is currently pumping. (*Peabody, supra,* 2 Cal.2d at 368.) All overliers have a *shared* or *common* (correlative) right among each other to extract groundwater from the aquifer (within the safe yield) for the "reasonable and beneficial use" of their property. (*Katz v. Walkinshaw, supra,* at 136.) Importantly, overliers have equal rights; no owner has priority over another. (*Santa Maria, supra,* 211 Cal.App.4th at 279; *Katz, supra* [overlying landowners "have an equal right, in cases where the supply is insufficient for all, … to be settled by giving to each a fair and just proportion"].) Thus, if the native supply is insufficient to meet the needs of all overliers, then each is entitled to a proportionate share of

the available water based upon reasonable need. (*Tehachapi-Cummings, supra,* 49 Cal.App.3d at 1000-1002.)

The 2015 Physical Solution therefore violates the "guiding principle" – a practical allocation of water to competing interests without ignoring the priority rights of the parties asserting them (*Barstow*, *supra*, 23 Cal.4th at 1250; *City of San Fernando*, *supra*, 14 Cal.3d at 290) in two respects: (1) it gives the Purveyors priority over the Willis Class's superior overlying water right; and (2) instead of treating all overlying landowners equally as required by law, the Physical Solution permanently transfers the Willis Class's overlying water rights to other overliers based on an impermissible factor—i.e., the Willis Class members are not currently pumping.[20]

As noted above, while a trial court has equitable authority to allocate water among competing interests, the court cannot change priorities among the water rights holders or eliminate vested rights in applying the solution. (*Barstow*, *supra*, at 1249-50.) Thus, the Physical

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[20] The Willis Class agreed not to object to Purveyors' reasonable use of up to 15% of the native supply, or 11,205 acre-feet. However, Purveyors have manipulated the numbers to allow themselves over 23% of the native safe yield, or 12,345 acre-feet, under the Physical Solution. In addition, Purveyors have gobbled up any unused federal reserve rights, as discussed at section IV.B.7vi., at p. 96 herein. (3EXCPT2171)(176JA157551.)

Solution adopted by the court violates these rules of water rights priority mandated by California law.

### B. The Physical Solution Adopted by the Trial Court Improperly Permits the Permanent Elimination of the Willis Class's Vested Water Rights.

As noted above, California's public policy regarding reasonable and beneficial use protects both actual ***and prospective*** reasonable beneficial uses. (*Hillside Memorial Park, supra,* 205 Cal.App.4th at 539; *Peabody, supra,* 2 Cal.2d at 368 [overlying landowner's right includes the use of the groundwater in the future].) Recognizing that an overlier's need may change from year to year, California law mandates that calculating the annual correlative share of water that may be pumped based on determining each owner's reasonable and beneficial need at that time.[21] (*Tehachapi-Cummings, supra* at 1000.)

The Physical Solution at issue here simply ignores and eliminates the Willis Class's correlative right to pump water in the future. Despite previously recognizing the Willis Class's prospective water rights in the

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[21] Based on these principles, all of the parties in this case (except one) previously agreed the Willis Class had "equal rights" with other landowners to pump available groundwater ***in the future*** in both the 2010 Waldo Accord (1EXCPT181)(8JA8693) and, as to the Purveyors, in the 2011 Willis Class Settlement/Judgment. (3EXCPT2296:14-17)(176JA157676:14-17.)

Waldo Accord and the 2011 Willis Class Judgment, the Stipulating Parties agreed to the Physical Solution ***permanently*** allocating the entire native supply to themselves. 3EXCPT2151:16-17; 2150:19-20; 2152:6; 2190:9-22)(176JA157531:16-17; 157530:19-20; 157532:6; 157570:9-22.)[22] The allocation cannot be changed even if the safe yield is increased and even if a Stipulating Party stops pumping water in the future as they are allowed to transfer their production rights to a third party if they so choose. (3EXCPT2156,¶5.1.1;5.1.3.; 2235)(176JA157536¶¶5.1.1; 5.1.1.3; 176JA157615.)

The Physical Solution is in conflict with the principles of California water law because it permanently eliminates the right of Willis Class members to use the natural water supply located beneath their land. (*City of Pasadena, supra,* 33 Cal.2d at 925; *Tehachapi-Cummings, supra,* 49 Cal.App.3d at 1001.)

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[22] Although an increase in the total native supply may be approved after seventeen years, any increase may only be allocated to parties already receiving an allocation under the 2015 Judgment. (3EXCPT2491:24-27)(176JA157890:24-27) The Physical Solution contains no provision for modifying allocations to the Willis Class if the native water supply increases in the future. (*Id*.)

## III. THE JUDGMENT AND PHYSICAL SOLUTION VIOLATE THE CONSTITUTIONAL PRINCIPLES OF REASONABLE AND BENEFICIAL USE.

As discussed above, all uses of water must be "reasonable" and "beneficial." (California Constitution, article X, Section 2.) Given the nature of the State's water resources, the Constitution requires water be put to beneficial use to the fullest extent possible and its waste or unreasonable use be prevented. (*Barstow*, *supra*, 23 Cal.4th at 1241-42.) The rationale behind this doctrine is that no one has a protectable interest in the unreasonable use of water. (*Id*. at 1242.)

The Physical Solution at issue here violates the foregoing principles in five ways: (1) it allocates the entire native supply on a permanent basis; (2) it bestows upon the Stipulating Parties the right to transfer (sell) and carryover any allocated amount; (3) it is not based on an adequate evaluation of the reasonableness of each individual's existing use; (4) it awards water rights as an incentive award; and (5) it is based on the premature and unsupported assumption that any and all future pumping by the Willis Class members will be unreasonable.

### A. Permanent Allocations of Water Rights Violate the Reasonable and Beneficial Use Doctrine.

While the exercise of a water right may be deemed reasonable when first recognized, and exercised reasonably for many years, it may

become unreasonable in the future. (*Barstow, supra*, 23 Cal.4th at 1243; *Tulare, supra,* 3 Cal.2d at 567.) Accordingly, courts have held "reasonable and beneficial use" determinations must constantly be re-evaluated. (*Joslin, supra,* 67 Cal.2d at 143.) More recently, in *Barstow, supra*, the Court reiterated that while "water right priority has long been the central principle in California water law... the corollary of this rule is that an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use." (23 Cal.4th at 1243).

Here, Paragraphs 5.1.1 through 5.1.10 of the Physical Solution allocate *all* of the Production Rights (i.e., all of the native supply) to the Stipulating Parties. (3EXCPT2152:2-6; 2155:20-2165) (176JA157532:6; 157535:20-157545:15.) The 2015 Judgment leaves no room for the Watermaster or the court to re-evaluate the Stipulating Parties' reasonable and beneficial use over time.

Although Section 6.5 reserves jurisdiction for the court, upon motion of a party, to interpret, enforce, administer or carry out the Judgment, there is no provision allowing the court to amend and modify its terms if an allocated water use were to become unreasonable in the future. (3EXCPT2168:26-27; 2169:1-5)(176JA 157548:26-27;

157549:1-5.) The absence of authority in the Physical Solution for the trial court to determine whether a future use of water is unreasonable is inconsistent with the finding in *Santa Maria, supra,* 211 Cal.App.4th at 288 that:

> [I]f a physical solution be ascertainable, the court has the power to make and should make reasonable regulations for the use of the water by the respective parties, provided they be adequate to protect the one having the paramount right in the substantial enjoyment thereof and to prevent its ultimate destruction, and in this connection the court has the power to and should reserve unto itself the right to change and modify its orders and decree as occasion may demand, either on its own motion or on motion of any party." (Quoting *Peabody, supra*, 2 Cal.2d at 383-384.)

In fact, Paragraph 18.5.9 provides that the amount of the native supply will remain unchanged for 17 years. In the seventeenth year, the Watermaster *may* recommend to the court (and the court *may* approve) an increase or reduction in the native supply. (3EXCPT2190:9-11)(176JA157570:9-11.)[23] However, Paragraph 18.5.10 states *any increase will inure only to the benefit of the current Production Rights holders* (the Stipulating Parties). (3EXCPT2190:23-27)(176JA157570:23-27.) This permanent allocation prevents the

[23] Notably, a reduction is implemented over seven years, while an increase is immediately divided pro-rata. (*Id*.)

Willis Class members from ever being able to pump from the native supply.

Further, the Physical Solution provides no restrictions on how Production Rights are used in the future. The Stipulating Parties who were allocated water in the Physical Solution are required only to report the *amount* of their annual production to the Watermaster. (3EXCPT2191,¶18.5.12)(176JA 157571¶18.5.12.) They are not required to report any other changes to their water usage. (*Ibid*.) Likewise, the Watermaster, in his annual report to the court, is not required to include the type of *use* each producer is making of the extracted water. (3EXCPT2195-2196,¶18.5.18)(176JA157575-157576 ¶18.5.18.) Therefore, any Stipulating Party may dramatically change its current uses and/or transfer (sell) its allotment to a third-party who puts the water to a wholly different use without reporting the change to the Watermaster or the court. This loophole clearly undermines the Constitutional mandate that the State's water supply be reasonably used in the most beneficial and efficient manner.

Finally, under Paragraph 9.3.4, the Watermaster Engineer only has the authority to curtail production rights to avoid or mitigate a material injury to the aquifer(3EXCPT2176:11-15)(176JA157556:11-

15.) Even then, however, the violating pumper does not lose any portion of its permanently allocated Production Right. (*Id.*) The Watermaster must make free "substitute water" available to the offending party. (*Id.*) Surely, this is not what the courts and legislature had in mind when adopting the "reasonable and beneficial use" doctrine.

In summary, the permanent allocation of the native supply especially with the absence of authority in the Physical Solution for the Watermaster Engineer, the Watermaster or the trial court to determine whether a future use of water by a Production Right holder has become unreasonable or non-beneficial violates the California Constitution's reasonable and beneficial use doctrine.

### B. The Transfer and Carry Over Rights Bestowed on the Stipulating Parties by the 2015 Physical Solution Violate the "Reasonable and Beneficial Use" Doctrine.

The Wood Class 2015 Stipulation recognized the accompanying Physical Solution included provisions which were unenforceable under the law and "only available by stipulation"—including "the right to transfer Production Rights and the right to Carry Over rights from year to year." (2EXCPT1020:16-21)(129126130:16-21.) Indeed, the Production Right Carry Over and Transfer provisions of the Physical

Solution are inconsistent with the reasonable and beneficial use doctrine.

### 1. Transfers

The Physical Solution's grant of the right to transfer all or any portion of an allocated right to the native supply (3EXCPT2157,¶5.1.3; 2182:12-16)(176JA157537¶5.1.3; 157562:12-16) allows Stipulating Parties to perpetually maintain their allocated water rights to the exclusion of the Willis Class.

Normally, one would expect that if a Stipulating Party ceased production or otherwise stopped using its allotment of water, any unused portion would be made available to any Willis Class members who, as an overlier, decided to start pumping. The transfer provision permanently prevents that scenario, however, by allowing a Stipulating Party to simply transfer his production rights (permanently, temporarily, fully or partially) to a party with a water right inferior to the Willis Class landowners, or even to a usurper with no water rights at all. Since there is no limitation on the nature of the transferee's water use, the Physical Solution allows an end-run around the "reasonable and beneficial use" protections required by California law. (*Barstow, supra*, 23 Cal.4th at 1243; see also, *Tulare, supra,* 3 Cal.2d at 567.)

### 2. Carry Overs

Paragraph 15.3 of the Physical Solution allows Stipulating Parties to carryover any unused portion of their annual water production right for up to ten years. (3EXCPT2181:25-27)(176JA157561:25-27.) Again, if a Stipulating Party fails to pump his entire allocation in a given year, that water is not made available to any Willis Class member who has developed a need for his/her water. (3EXCPT2200:15-19)(176JA157580:15-19.) In effect, the Physical Solution's carryover provisions allow Stipulating Parties to fallow their land, carryover any unproduced portion of their Production Right, and even to sell and transfer the carried-over water rights to the native supply.

In contrast, if a member of the Willis Class wants to begin pumping water, he/she must follow the burdensome and expensive New Production Application Procedure. Even if the application is granted, the Wills Class member must then pay at exorbitant rates the replacement assessment for outside water, while the Stipulating Parties may sell their carried-over rights to the highest bidder.

Ironically, the Purveyors and the court justified their exclusion of the Willis Class from any water production allotments in the Physical Solution, as follows: "[W]e do not allocate water in a Physical Solution

to people who do not use groundwater." (50RT27103:9-18.) Yet, the carryover provisions protect the ability of Stipulating Parties to "not use groundwater" for up to ten years. This is not only hypocritical; it also ignores the mandate of the reasonable and beneficial use doctrine – that water resources of the State be put to beneficial use to the fullest extent of which they are capable.

### 3. The Trial Court adopted the Physical Solution without an adequate "reasonable and beneficial use" inquiry.

As noted above, California Constitution, article X, section 2 requires courts to consider reasonableness of use, methods of diversion, other competing demands, and other beneficial uses when allocating water rights. All water users have the burden of demonstrating reasonable and beneficial use as a prerequisite to enlisting the aid of the court in securing production rights. (*Tulare, supra,* 3 Cal.2d at 535; *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 705.) In *Joslin, supra*, the Court observed: "A reasonable use of water depends on the circumstances of each case; such an inquiry cannot be resolved *in vacuo* isolated from state-wide considerations of transcendent importance." (67 Cal.2d at 140.)

Here, the trial court inquiry was insufficient; the Stipulating Parties did not present evidence to demonstrate their proposed Physical Solution satisfied the "reasonable and beneficial use" requirement. For example, Stipulating Parties proffered declarations concerning the amount of water use that were admitted into evidence during the Phase Four proceeding. Phase Four, however, did not address whether any of the parties' uses were in fact reasonable and beneficial. It was limited to the issue of the parties' historical pumping ***amounts*** for the years 2011 and 2012 for which the court requested and received declarations from all active pumpers. (1EXCPT530)(73JA67776.)

Over objections from Willis Class counsel, the trial court blanketly admitted into evidence all Phase Four declarations in support of the Stipulating Parties' claims that their uses were "reasonable and beneficial." (47RT25674:13-25.) After reviewing a few of the declarations, the court stated the "usage of water … for crops,[24] [and] household use … is reasonable and beneficial to the land." (*Id*. 45RT25113:12-18.)

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[24] As Stipulating Parties' expert Beeby admitted, not all uses of water are equal; some crops use an unreasonable amount of water. (46RT 25406:6-25407:1.)

The court then shifted the burden to the Willis Class to review the more than 100 declarations at issue to determine whether "there's a basis for challenging the use of their water on the land that they're using." (*Id.* at 25112:17-20.) The problem, of course, was that the trial court declared that it would not "require under any circumstances... that all of the parties who submitted those declarations two years ago come in with their witnesses, to subject themselves to cross-examination." (45RT25112:13-17.) In the absence of any further inquiry into the circumstances and veracity of the declarations, the court summarily found all the Stipulating Parties' use reasonable and beneficial. (47RT25671:11-15673:26.)

The court also relied on the testimony of Stipulating Parties' reasonable use expert, Beeby. (*Id*.) However, Beeby did not conduct an individualized inquiry of every pumper's use, their methods of use, their use in the context of an over-drafted basin, and their use relative to other overlying landowners. (46RT25431:25-28 ["in terms of specific evaluation of each individual landowner's acreage claim or pumped water claim, *I did not individually look at those*"] emphasis added.)

Instead, Beeby's opinion was primarily that the Physical Solution's allocations of the native supply "made sense to [him]." (46RT25401:1-6.) After "look[ing] at the maximum acreages, … preproduction right, … overlying groundwater right, and … historical production," Beeby testified "there was nothing that jumped out at [him] as not making sense." (46RT25431:15-28, emphasis added.) In other words, Beeby merely looked at the ***amounts*** of water historically pumped by the Stipulating Parties, as disclosed in the Phase Four declarations, to determine whether such use was reasonable. He did not in fact look at each party's use relative to all other users, the methods of irrigation, or the efficiency of the use (i.e., whether it was reasonable to grow water-guzzling alfalfa in an over-drafted basin in the desert). (46RT25431:25-28.) This circumvents the constitutional mandate that individual determinations be made that *all* uses of water are put to reasonable and beneficial use. (*Joslin*, *supra*, 67 Cal.2d at 143 ["the mere fact that a use may be beneficial to a riparian's lands is not sufficient if the use is not also reasonable"].)

#### 4. The Trial Court Improperly Allocated Water to Wood Class Representative.

For his services as a class representative for the Small Pumper class, the trial court awarded Richard Wood a production right of up to

five acre-feet per year on a permanent basis free of any Replacement Water Assessment fee. (3EXCPT2157:17-20)(176JA15737:17-20.)

Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. (2 McLaughlin on Class Actions § 6:28 (9th ed. 2012). Because the awards are often taken from the class's recovery, courts are required to carefully scrutinize the awards to avoid improprieties. (*Radcliffe v. Experian Information Solutions Inc.* (9thCir. 2013) 715 F.3d 1157, 1163.)

Here, the incentive award payable to Mr. Wood on a yearly-basis in extra free groundwater is inappropriate because it further depletes the already severely limited native supply of Antelope Valley groundwater.[25] Since the Physical Solution distributed *all* of the available native supply, the apportioning of the supply is a zero-sum game in which any extra annual assessment for Mr. Wood must necessarily be taken from other claimants (including the Willis Class members).

The incentive award also violates several principles of water law, namely: (1) the principle that all groundwater rights are usufructuary,

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[25] Since Mr. Wood has shown no need for the extra water (43RT24137-24138), it will likely be extracted and sold for a substantial profit.

conferring only the right to use the water and confer no right of ownership; (2) all groundwater is subject to the rule of reasonableness, ownership of water relieves its owner of the obligation to use the water reasonably and beneficially relative to all other overlying correlative water right holders; and (3) it would confer a super-priority to Mr. Wood over all other landowners. (*Barstow, supra,* at 1243.)

Here, the Willis Class has no objection to a monetary incentive award for Mr. Wood. However, paying an incentive fee in precious groundwater makes no sense and harms the Willis Class who received zero portion of the native supply. In any event, Mr. Wood testified he lives alone in a 1,200 square-foot residence. (43RT24132:20-21, 24137:26-24138:2.) His use is primarily domestic. (*Id*. at 24138:25-27.) The other Small Pumpers in the Class received the right to extract 1.2 and up to three acre-feet per year. (3EXCPT2457,¶5.1.3)(176JA157537¶5.1.3.) There is no reason for the court to treat Mr. Wood differently.

### 5. The Trial Court Adoption of the Physical Solution Was Based on the Unfounded and Unreasonable Assumption Any Future Use by the Willis Class Would Be Per Se Unreasonable.

The Willis Class proffered testimony from members concerning their intent to develop their properties for residential use and commercial enterprises. (49RT26520:8-26521:3; 48RT25908:21-25909:1.) The court found such testimony to be speculative and irrelevant. (3EXCPT2114:11)(176JA157473:11.) The court precluded Willis Class counsel from presenting any further testimony on the subject. The court then blanketly determined all future use by any of the more than 18,000 Willis Class landowners to be *per se* unreasonable and permanently precluded them from pumping from the native supply. (3EXCPT2114)(176JA157473:23-26.) The only justification the court provided was the "landowners' reasonable and beneficial use pumping alone exceeded the native safe yield while [Purveyors'] pumping was taking place." (3EXCPT2113:20-23)(176JA157472:20-23.)

### 6. The Court Declined to Consider Any Alternative Physical Solutions.

The court has an affirmative duty to admit alternative physical solutions. (*City of Lodi, supra,* 7 Cal.2d at 341 [finding that "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…"].)

As noted above, the Willis Class proffered several alternative solutions to the overdraft situation which would have allowed current users to continue producing from the native supply until a Willis Class landowner opted to exercise his or her groundwater right. (2EXCPT1491-1501; 3EXCPT1705-1769; 3EXCPT1773:2046) (131JA 127835-127845; 174JA154829-154893, 155346-155619.) Willis Class counsel also retained and offered a water economist to review and opine on alternative solutions at trial. The trial court refused to admit any of his opinions into evidence. (3EXCPT2095)(176JA157201.) In the end, the court ignored these reasonable alternatives and declared all future use by any Class member unreasonable. (3EXCPT2114:23-26)(176JA157473:23-26.) The trial court's repeated refusal to consider any of these alternative solutions is an abrogation of the duties required by the Supreme Court in *City of Lodi*.

Any one of these alternatives would have diminished the Willis Class' correlative rights, but each would have nonetheless protected its right to pump from the native supply in the future. The following is a

summary of four alternative solutions submitted by the Willis Class for the court's consideration:

### i. *The Tulare Plan*

The Willis Class offered the pro-rata "Tulare Plan" as an alternative solution, which is based on the physical solution adopted in the *Tulare* case and echoed in *Santa Maria*. (2EXCPT1494:18-1495:28)(131JA127838:18-127839:28.)

Under the Tulare Plan, the available native supply is prorated among overlying landowners in proportion to their developed acreage and type of water use. (6-Willis-12, p.7; 49RT26926:25-26927:10.) Where the developed acreage and type of use exceed the available water (i.e., an overdraft situation), permitted groundwater pumping by ***all*** overlying landowners would be proportionately cutback. Thus, under this alternative physical solution, all overlying landowners are treated equally, without discriminating against any one class of persons. (*Id.*)

Under this plan, all allocations are flexible and adjustable. Accordingly, the pumper's use would be evaluated each year to ensure water continues to be put to reasonable and beneficial uses in light of then-current circumstances. This also would allow accommodation of

new pumpers. The Tulare Plan allocates unused Federal rights to overlying landowners, not appropriators.

### ii. *The Antelope Valley Accord Model*

The Antelope Valley Accord Model is the Waldo Accord which was agreed upon by nearly all parties to the Antelope Valley adjudication (except District 40). (14RT5706:12-21.) Under this model, the Willis Class would be allocated a defined and limited portion of the native supply free of replacement water assessments, based on the acreage owned by each Class member. The Willis Class, as dormant correlative rights holders, could access their groundwater rights when they develop lands for the reasonable and beneficial use of the pumped groundwater. (1EXCPT187,¶III(G)(3))(8JA8699¶III(G)(3).) Proportionate reduction to this group of overlying owners would be implemented at the time Willis Class members exercise their overlying rights. Such reduction would be "borne pro rata (based on pumping rights) by appropriators and overliers, but not members of the A.V. United Mutual Group, the Small Pumper Class, or Edwards Air Force Base." (1EXCPT188,¶III(G)(7))(8JA8700¶III(G)(7).)

### iii. *The Quantification Model*

The Quantification Model would place a cap on the amount of groundwater rights the entire Willis Class may receive for any and all future use. (6-Willis-12,p11.) Recognizing the need for water conservation during overdraft conditions, this model's cap on the Willis Class groundwater rights serves as a partial extinguishment of those rights. (*Id*. at p.12.) Active overlying owners (i.e. those identified in Exhibit 4 to the Physical Solution) would be provided a minimum level of groundwater rights while also providing the Willis Class a limited pool of groundwater for future use to a defined and certain amount. (*Ibid*.) Once the Willis Class used those rights, no more rights to the native supply would be available for other Willis Class members who would then be subject to the Replacement Water Assessments. (*Ibid*.)

Under this model, any reserved but unused Willis Class groundwater rights could be leased to allay any future replacement water assessments charged to Willis Class members who seek to exercise their rights after the limited pool is exhausted. (*Ibid*.) While the timing of any future Willis Class development would remain uncertain, at least the amount of total water earmarked for the Willis Class, and all other pumping parties, would be *certain*.

### 7. Other Shortcomings of the Court's Physical Solution.

#### i. The new water production application process is a "poison pill."

The 2015 Judgment defines New Production as "Any Production of Groundwater from the Basin not of right under this Judgment, as of the date of Judgment." (3EXCPT2150)(176JA157530¶3.5.20.) As the Willis Class did not receive an allocated right in the Physical Solution, each Class member is subject to the New Production Application Procedure. (3EXCPT1651)(138JA135100.)

For any such New Production, one must satisfy twelve procedural and financial obligations per the New Production Application Procedure.[26] (3EXCPT2191-2193,¶18.5.13)(176JA157571-157573¶18.5.13.) These steps include: (1) Payment of a fee for application review, investigation, reporting and hearing, and any costs incurred by the engineer; (2) Written summaries describing quantity, source, and manner and place of use; (3) Maps depicting the location of the new production; (4) Copy of well permits,

[26] Class expert Roach described the New Production Application Procedure as rigorous, demanding, expensive, and noting the process could remove any economic possibility of utilizing the property. (173JA154507.)

well log reports, testing results, pump and meter specifications; (5) Written confirmation of land use entitlements; (6) Written confirmation of CEQA requirements; (7) An approved water conversation plan; (8) An economic impact report; (9) A physical impact report; (10) A statement of no material injury; (11) An agreement to pay applicable replacement water assessment; and, (12) Any other information the Watermaster Engineer may require. (3EXCPT2192-2193,¶15.5.13.1)(176JA 157572-157573¶15.5.13.1.) Additionally, the Willis Class must also prove the reasonableness of its proposed extraction and use of the groundwater "in the context of all other users of Groundwater in the Basin, at the time of the application, including whether all of the Native Safe Yield is then currently being used reasonably and beneficially." (3EXCPT2191,¶18.5.13)(176JA157571¶18.5.13.)

Even if a Willis Class member fulfills all required obligations, there is no guarantee that his/her application will be granted, even for domestic uses.[27] (3EXCPT2174,¶9.2.2; 2191,¶18.5.13)(176JA157554¶9.2.2, 157571¶18.5.13.) And, if the

[27] As noted above, imported water is scarce and the market for such water is highly competitive. (49RT26612:12-27.) It is an unreliable source of water. (*Id*.)

proposed pumping is allowed by the Watermaster, the Willis Class members must pay the replacement water assessment for the privilege of extracting *any* water. (3EXCPT2174,¶9.2.1.)(176JA157554¶9.2.1.)

> This differential treatment of the Willis Class represents a "poison pill" for the development of the Willis Class lands… For example, land use approvals cannot be obtained without designation of a water supply. Yet the Proposed Physical Solution requires obtaining land use approval prior to receiving approval of a groundwater source from the Water Master. Further, it would [] not be prudent for a developer to initiate environmental reviews of a project before securing a water supply… These requirements are unprecedented for adjudicated water basins in California (138JA135100.)

The "poison pill" described by Willis Class expert Smith creates a Catch-22 situation for Willis Class members where it may be impossible for them to develop their land at any point in the future. In effect, the Willis Class's water rights have been extinguished.

#### ii. The inherent bias of the Watermaster Board.

The Watermaster is a five-person board with a guaranteed seat for AVEK, two Purveyors, and two large pumping landowners. (3EXCPT2184,¶18.1.1)(176JA157564¶18.1.1.) No small landowner (pumper or non-pumper) may serve on the Watermaster board.

The role of the Watermaster board is to, *inter alia*, evaluate new pumping applications, levy assessments on all producers, and maintain the water balance of the basin. (3EXCPT2186,¶18.4.)(176JA157566¶18.4.) The fact that no Willis Class member can serve on the board is directly averse to the interests of the Willis Class and is clearly problematic and unfair.

**iii. Unfair water assessment provisions.**

*If* a member of the Willis Class happens to be granted pumping rights, the replacement water fee that will be charged is unknown and cannot be determined based on the information contained in the Judgment. (3EXCPT1693-1694)(173JA154507-154508.)

**iv. No rights to imported water return flow.**

As noted above, if the Willis Class is granted any water rights, except for potential domestic us, the right is only the opportunity to pay for the purchase of imported water. Normally, the "return flow" (the water which filters back into the aquifer after use[28]) may be pumped by the importer free of a Replacement Assessment.

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[28] Return flow can be significant. Every acre foot of water that is *purchased* and *used* generates 34% return flow for agricultural use and 39% for municipal and industrial use. (3EXCPT2165,¶5.2.1.)(176JA157545¶5.2.1.)

(3EXCPT2149,¶3.5.16.)(176JA157529¶3.5.16.) Under the 2015 Judgment, Willis Class members have no rights to return flows on imported water purchased. (176JA157545-157546¶5.2.2, 157629-157630.) This provision conflicts with two previous trial court findings:

- The Willis Class Judgment specifically preserves the Willis Class's the right to recapture return flows they put to reasonable and beneficial use free of replacement assessment. (176JA157685¶IV.D.4.)
- In the trial court's ruling on AVEK's summary judgment motion, it determined that in the Antelope Valley, "water users who have imported the water into the Basin and who have augmented the water in the aquifer through use are entitled rights to the amount of water augmenting the aquifer." (89JA84705:8-16 ["[t]he return flow [right] results from *use* of imported water, not just importation"].)

**v. Unfair allocation of the unused federal reserve right.**

Historically, on average the United States, utilizes approximately 1,250 acre-feet per year of water from the native supply. (138JA135098.) In 2011 and 2012, the United States utilized only 1,246 and 1,450 acre-feet, respectively. *(Ibid.)*

Under the 2015 Judgment, the United States was allocated 7,600 acre-feet per year. (176JA157540¶5.1.4.1.) Therefore, in any given year, nearly 6,000 acre-feet of the federal government allocation will go unused.

The Physical Solution gives rights to any unused water or overallocation to the Purveyors. Therefore, any portion of this annual allocation not used by the United States inures to the benefit of appropriators, rather than the higher-priority overlying landowners, including the members of the Willis Class. Furthermore, since the Federal Reserve Water Right is not subject to the rampdown provisions of the Physical Solution (requiring a wait and see mode for all unused water production), the Purveyors were able to immediately start drawing on the federal government's unused water right after entry of the 2015 Judgment. (176JA157551.)

#### vi. Unequal treatment between the Willis and Wood Class.

The Willis and the Wood Classes are both comprised of overlying landowners. The only difference is that Wood Class members have exercised their water rights in the past and the Willis Class has not. As overlying landowners, the Willis Class and Wood Class members both have a correlative right to share in the native supply. Nevertheless, the Physical Solution adopted by the court treats these two classes differently on the premise that the Willis Class' non-use of groundwater somehow justifies the disparate treatment.

The Physical Solution allocates 1.2 acre-feet of the native supply to each Wood Class member free of any replacement assessments. (176JA157537¶5.1.3.) In addition, each Wood Class member may extract up to and including three acre-feet, also free of replacement assessments. (*Id*.) The Physical Solution recognizes the hierarchy of water use types under Water Code section 106 by prioritizing the Wood Class' right to use water for domestic purposes. (176JA157535). Indeed, section 3.5.2 expressly places the domestic and household use of the Small Pumper Class as the first priority in the basin. (176JA157535:22-26.) Furthermore, the Physical Solution anticipates any potential ***unknown*** Wood Class members' water use to be "very low" and "de minimis."

In stark contrast, the similarly-situated Willis Class not only receives no groundwater from the native supply, they must apply for water through an arduous and burdensome process and pay a replacement water assessment fee if their application is granted. In contrast and contrary to the dictates of the Water Code, the Physical Solution extinguishes the Willis Class's water rights, or at least, reduces the Class's right to pump water for domestic and human uses to below the allocated rights of all other users in the basin, even appropriators.

The disparate treatment of Willis and Wood Class members is unjust, prejudicial and inequitable.

**vii. Unfair "drought provision."**

The Physical Solution also contains a "drought provision," which allows the Purveyors to utilize an additional benefit of 40,000 acre-feet free of any replacement assessment fee. (176JA157552¶8.4.3.) The sole reason given for the bestowal of this extraordinary benefit on the Purveyors was to compensate the Purveyors for their payment of Wood Class counsels' attorneys fees. (129JA126131¶12.)

The "drought provision" is contrary to the principles of law outlined above. It allows Purveyors to circumvent water rights priorities by moving Purveyors above landowners during drought periods when the landowners are most in need of their superior water rights. Overlying rights always take priority over appropriative rights in the basin's native supply. (*City of San Fernando, supra,* 14 Cal.3d at 293, fn. 100.) This is especially true during a drought, when overliers' rights supersede any appropriative claims by any party to the basin's groundwater. (*Corona Foothill Lemon Co,. supra,* 8 Cal.2d at 530-531.)

The unique "drought provision" also smacks of collusion between Purveyors and Wood Class counsel. In reviewing a class action

settlement, the trial court must investigate "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117-1118.) Certainly, the court was obligated to investigate and scrutinize a deal provision that acknowledges a major appropriator's payment of opposing class counsel's attorney fees in return for the latter's signature on a settlement agreement that releases the class's otherwise ironclad stranglehold on the rights to 40,000 acre-feet of water per year from an aquifer with an annual safe yield of only 110,000 acre-feet of water per year. (129JA126130:16-17; 129JA126131-126132¶¶12-13; 177JA158737:1-7.)

Even if this type of connivance is legal, the benefit of 40,000 acre-feet is clearly excessive. (*Rancho Santa Margarita, supra,* 11 Cal.2d at 561 [provisions must be "a fair, just and equitable"].) The payment to Wood Class's counsel under the guise of a "drought provision," for his cooperation in the Purveyors' scheme to gobble up water rights in Antelope Valley is offensive and violates of the letter and spirit of article X, section 2.

## IV. THE 2015 JUDGMENT IS INCONSISTENT WITH, AND THEREFORE PRECLUDED BY THE 2011 JUDGMENT APPROVING THE WILLIS CLASS SETTLEMENT AGREEMENT.

The stated purpose of this action was to bring disparate groups of claimants to the Antelope Valley aquifer together into one adjudication to settle once and for all the question of what water rights each litigant owned. (3EXCPT2100:10-15)(176JA157459:10-15.)

The 2011 Judgment defined and guaranteed the Willis Class's rights to access and use water from the native supply *in the future, free of replacement assessment.* (1EXCPT364:10-16: 3EXCPT2256:23-25)(10JA12248:10-16; 176JA157636:23-25.) The Purveyors explicitly agreed they would not enter into any future agreements or take any position inconsistent with the Willis Class' right to share in the native supply. (1EXCPT364:13-16)(10JA12248:13-16.) In the agreement, both the Willis Class and Purveyors acknowledged and agreed that a Physical Solution would be entered into the future which would be ***consistent*** with the terms of the 2011 Judgment (*i.e.,* that recognized and preserved the Willis Class' overlying right to pump free water from the native supply in the future). (1EXCPT365:28-366:4)(10JA12249:28-12250:4.)

Notably, the 2011 Judgment was never opposed or contested by any other party before it was entered by the trial court; nor was the 2011 Judgment ever challenged on appeal.[29] The time to challenge the 2011 Judgment has long since passed. Thus, the 2011 Judgment is and, at all times relevant to the subsequent proceedings between the Purveyors and the non-settling parties was, final and binding on the trial court and the Purveyors. (*People v. Burns* (2011) 198 Cal. App.4th 726, 731.)

Despite the promises and conditions contained in the 2011 Judgment, neither the Purveyors nor the court "cooperated and coordinated their efforts" in the later proceedings "so as to obtain entry of judgment and/or adoption" of a Physical Solution "consistent with the terms" of 2011 Judgment. To the contrary, the 2015 Judgment and Physical Solution (1) allocates no portion of the native supply to the Willis Class landowners; (2) requires Willis Class members to seek and (if even possible) obtain approval from the Watermaster (with interests starkly adverse to the Willis Class) to pump *any* groundwater only after enduring a burdensome and expensive discretionary process; (3) even

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[29] In multiparty actions, a judgment that leaves no issue remaining to be determined as to one of the parties is considered final as to that party and thus appealable. (*Justus v. Atchison, supra,* 19 Cal.3d at 567-568.)

if such approval is granted, it restricts all pumping to imported replacement water, rather than from the native supply, for which a replacement assessment must be paid, perhaps even for simple domestic use of water; (4) precludes the Willis Class from rights to the return flow resulting from the imported water they are required to purchase; (5) provides no portion of any unused Federal Reserve Water Right for the Willis Class, instead allocating all such unused water to the non-overlying Purveyors; and (6) allocates to the Purveyors a far greater portion of native supply than the agreed-upon 15 percent. Thus, the 2015 Judgment is undeniably inconsistent with, and precluded by, the 2011 Judgment.

### A. The 2011 Judgment was Res Judicata in All Subsequent Phases of the Litigation.

A court retains jurisdiction to enforce a settlement agreement where, as here, the agreement itself or the terms thereof are incorporated into the court's judgment. (*Schoshinski v. City of Los Angeles* (2017) 9 Cal.App.5th 780, 794 [court has continuing jurisdiction to enforce the judgment, which incorporates the stipulated settlement].) Even in the absence of an express reservation, a court may in limited circumstances assert ancillary jurisdiction to enforce such a settlement agreement if doing so would be "(1) to permit disposition by

a single court of claims that are, in varying respects and degrees, factually interdependent;" or "(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." (*Kokkonen v. Guardian life Insurance Co. of America* (1994) 511 U.S. 375, 379–80, citations omitted.)

Here, Judge Komar's jurisdiction continued under ***both*** the general rule and the ancillary circumstances corollary. The 2011 Willis Class Judgment recognized the determining water rights to the native supply of water in the aquifer is a zero-sum puzzle that required additional litigation to fully resolve. To protect the Willis Class's interests, the 2011 Judgment mandated consistency between its portion of the puzzle and the portions to be resolved in the future.

Issues determined in earlier phases of a bifurcated trial were therefore binding in all subsequent phases of that trial. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 487; *Rodehaver v. Mankel* (1936) 16 Cal.App.2d 597, 601 [trial court bound by previous determination that party is not a partner].) Any other rule would allow for the possibility of inconsistent judgments and/or create unnecessary duplication of court proceedings.

(Code Civ. Proc. § 598; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 888.)

This rule is especially applicable in class action proceedings where "the settlement or dismissal of [the] action requires court approval." (*Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579.) As the supervisor in a class action, the court has a special responsibility to exercise judicial control over any settlements or compromises. (*Shelton v. Pargo, Inc*. (4thCir. 1978) 582 F.2d 1298, 1306.) The court is an active participant in the resolution of the parties' dispute. (*Amoco Oil Co. v. Dingwell* (D. Maine 1988) 690 F.Supp. 78, 85 [the court takes a more active role in approving proposed class action settlements]; *Ross v. Lockheed Martin Corp.* (D.C.D.C. 2017) 267 F.Supp.3d 174, 193 [in its "supervisory role, the court must scrutinize any proposed settlement agreement"].) The court's review of any settlement proposal must be "exacting and thorough." (*Ross, supra,* 267 F.Supp.3d at 193.)

In reviewing and approving a settlement, the court has the duty to protect the interests/rights of class members and control the integrity of the settlement approval process. (*Hanlon v. Chrysler Corp*. (9th Cir. 1998) 150 F.3d 1011, 1025.) In fact, the court acts as a fiduciary in its

evaluation of the proposed settlement with the duty to ensure that the settlement is fair, not a product of collusion, and class members' interests are adequately protected. (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 [as a fiduciary, the trial court's duty is to have before it sufficient information to determine if the settlement was "fair, adequate, and reasonable"]; *Stewart v. General Motors Corp.* (7th Cir. 1985) 756 F.2d 1285, 1293.) The court in the class-action settlement process acts as the guardian of the class members. (*Norman v. McKee* (9th Cir. 1970) 431 F.2d 769, 774.)

Because of the court's special role in the settlement of class action lawsuits, court approval of a proposed settlement gives the resulting judgment preclusive *res judicata* effect. (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577.) A court-approved settlement of a class claim is binding on all parties to the case. (*Langton v. Hogan* (1st Cir.1995) 71 F.3d 930, 935; *Bishop-Bristol etc. v. Massachusetts Mutual Life Ins. Co*. (D.Mass.2019) 2019 WL 1501581 at *6 [despite the non-parties' skepticism about the merit of previous court-approved class action settlement agreement, it is binding on all

parties]) The stipulated judgment is not subject to collateral attack. (*Langton, supra*.)

In *City of Bangor v. Citizens Communications Co.* (1st Cir. 2008) 532 F.3d 70, for example, the court approved a settlement allocating a portion of the responsibility for the cleanup of a contaminated river among the settling parties. (*Id.* at 80-82.) Several years later, two non-settling parties sought to "overturn" the court-approved agreement. (*Id.* at 76.) The district court declined, and the reviewing court affirmed, finding the settlement agreement binding on all parties to the litigation. (*Id.* at 87.) "[A] global resolution might have been … preferable," but "there is a need to suitably reward early settlements, particularly cost-effective ones." (*Id.* at 87, 98.)

Here, Purveyors and the Willis Class clearly manifested their intent to make the 2011 Willis Settlement binding in any future Physical Solution by imposing an obligation on Purveyors to "not take any positions or enter into any agreements that are inconsistent with the exercise of the Willis Class Members' Overlying Right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield" (1EXCPT364:13-16)(10JA12248:13-16) and to "cooperate and coordinate their efforts … so as to obtain entry of

judgment and/or adoption" of a Physical Solution "consistent with the terms" of the 2011 Judgment. (1EXCPT365:28-366:4; 370:13-16)(10JA12249:28-12250:4; 12254:13-16.) These obligations were binding in all subsequent phases of the trial. (*Arntz Contracting, supra* at 487; *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664 [when the parties manifest an intent to be bound by its terms, previous stipulated judgment is binding in subsequent proceedings].) Purveyors and the trial court were foreclosed by the 2011 Judgment from modifying or eliminating those rights in the subsequently adopted Physical Solution.

### B. Purveyors Were Bound to the 2011 Judgment by Equitable Estoppel.

Purveyors are also estopped from pursuing the 2015 Judgment and Physical Solution by their promises in the 2011 court-approved Willis Settlement. The Willis Class may invoke equitable estoppel to prevent Purveyors from changing positions if (1) their interests were adverse in the earlier proceedings; (2) the Class detrimentally relied on Purveyors' prior position; and (3) the Class is now prejudiced by Purveyors' change in position. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

Here, the interests of the Willis Class and Purveyors were adverse at the time of the 2011 Judgment. The Class relied on Purveyors' promises in settling the dispute and forgoing any claims to the native supply until such time as their properties are developed or a need for the water arises. Purveyors' change in position has obviously prejudiced the Willis Class in that Purveyors have taken and prevailed on "positions [and] enter[ed] into [] agreements that are inconsistent with the exercise of the Willis Class Members' Overlying Right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield." (1EXCPT364:13-16)(10JA12248:13-16.) Contrary to their promise, the Physical Solution proposed by Purveyors and adopted by the court, "diminish[ed] the Willis Class Members' Overlying Right below a correlative 85% of the [native supply]." (1EXCPT364:23-25)(10JA12248:23-25.)

Purveyors are therefore estopped by the 2011 Judgment from reaping any benefit from the 2015 Judgment and Physical Solution.

### C. Purveyors Were Also Bound by the 2011 Judgment by Judicial Estoppel.

Judicial estoppel "prevents a party from 'asserting a position in a legal proceeding … contrary to a position previously taken in the same or some earlier proceeding." (*Daar & Newman v. VRL*

*International* (2005) 129 Cal.App.4th 482, 490-491.) The dual purposes for applying this doctrine are "to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies." (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.) Unlike equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on "the integrity of the judicial process." (*Id.* at 182-183.) Judicial estoppel does not require a final judgment, but the party to be estopped must (in a judicial or quasi-judicial proceeding) have been "successful" in convincing the court to accept it prior contrary position as true. (*Id*.)

The doctrine of judicial estoppel applies when the estopped party's "success" in the first proceeding resulted from a settlement. (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1477; *Kale v. Obuchowski* (7th Cir.1993) 985 F.2d 360, 362 [inducing an opponent to settle is "success" for purposes of applying judicial estoppel].) "The pivotal issue is whether … the party succeeded in the first position or that the position was a basis or important to the settlement." (*Levin, supra,* 140 Cal.App.4th at 1477; *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir.1996) 94 F.3d 597, 605.)

Here, the recognition and preservation of the Willis Class members' "rights to produce groundwater from the Basin's Federally Adjusted Native Safe Yield" and "correlative[ly] share [in] 85% of the Federally Adjusted Native Safe Yield for reasonable and beneficial uses on their overlying land" (1EXCPT364:11-13)(10JA12248:11-13) were obviously an **important basis** for the 2011 Judgment. As described by expert Roach, "the finalization of the proposed Physical Solution would result in a material adverse impact on the market value of the Willis Class properties." (49RT26554:7-10)(3EXCPT1693)(173JA154507.)

### D. The 2015 Judgment is Inconsistent With the Trial Court's 2011 Judgment.

There are primarily four inconsistencies between the 2015 Judgment and the 2011 Judgment: (1) No right to pump water from the native supply; (2) No correlative right to share 85% of the native supply with other landowners; (3) Must pay Replacement Assessment fee for all water pumped; and (4) No right to the Imported Water Return Flows. While there are other inconsistencies between the two judgments, these four are the most damaging to the Willis Class landowners' constitutional right to a correlative share of the native supply of water that exists in the aquifer below their land.

### 1. Under the 2015 Judgment, the Willis Class was deprived of its previously-recognized and protected right to pump water from the native supply.

In its Statement of Decision, the court explicitly declared "the Willis Class [is] not entitled to an allocation in the Physical Solution" (3JA2113:22-23)(176JA157472:22-23), and then allocated all of the rights to the native supply to the Stipulating Parties. (3EXCPT2155,¶5.1) (176JA 157535,¶ 5.1.) Thus, the court determined the Willis Class was not entitled to a right to pump any portion of water from the native supply.

Not only does this provision ignore California's established water priorities, it is also inconsistent with the 2011 Judgment. The Purveyors and the Willis Class specifically agreed that "each have rights to produce groundwater from the [native supply]." (1EXCPT363:26-28)(10JA12247:26-28.) The Class sought to protect their right as overlying landowners to share in the native supply of water. Yet, the Physical Solution did just the opposite – it extinguished the Willis Class landowners' right to pump from the native supply. Instead, the Class, if it can get the Watermaster's approval, is limited to pump from the imported water in the aquifer and can *never* pump from the native supply.

### 2. The 2015 Judgment deprives the Willis Class of its previously-recognized and protected correlative right to share in 85 percent of the native supply.

As detailed *infra*, all overlying landowners have a correlative right to pump from the native supply superior to that of Purveyors. The Willis Class's "Overlying Right to a correlative share of 85% of the [native supply]" is protected by the 2011 Judgment. (1EXCPT364:11-13; 1EXCPT426:4-7; 3EXCPT1674:23-26) (10JA12248:11-13; 13JA15604:4-7; 173JA153934:23-26.) By depriving the Willis Class of the ability to pump *any* water from the native supply and allocating all of it to other landowners and Purveyors, the 2015 Judgment violates the 2011 accord by stripping the Willis Class of its correlative water rights and relegating the Class members to positions in the hierarchy below the appropriators and other landowners.

### 3. The 2015 Judgment imposes a replacement water assessment fee upon the Willis Class for all water pumped.

Under the 2015 Judgment, if a Willis Class member, through the New Production Application Procedure, receives permission from the Watermaster to pump water, he/she must pay replacement water assessments for all water pumped. (3EXCPT2192:1-2)(176JA157572:1-2). This is directly contrary to a key term of the

Willis Settlement that the Willis Class's pumping would "not be subject to any Replacement Assessment." (10JA12248:11-13 ["free of any Replacement Assessment"].) This is true even for any domestic uses the Willis Class puts the water to. (3EXCPT2193:21-24)(176JA157573:21-24 [placing discretionary authority in the Watermaster to decide whether to waive the Replacement Water Assessment for "domestic use for one single-family household"].)

Normally, replacement assessments are imposed only on those who pump more than their correlative share of water. (1EXCPT361:18-21; 3EXCPT2153:1-7)(10JA12245:18-21; 176JA157533:1-7.) This provision requires an assessment fee for ***all*** water pumped by the Willis Class. Not only is this contrary to the 2011 Judgment, it is also contrary to California jurisprudence which codifies domestic uses as the highest priority for water use. (California Water Code §106.)

The risks associated with the permissive application process and uncertainly regarding the amount of the replacement water assessment fee adversely affected the value of the Willis Class's properties. (49RT26555:20-26556:4 ["completely swamped any value"], 22-25 ["huge impact on market value"], 26557:4-9 ["fatal to any utility or to those properties at all"].)

#### 4. The 2015 Judgment denies the Willis Class of its previously-recognized and protected right to the return flow from imported water.

The 2011 Judgment provides that the Willis Class has "the right to recapture Return Flows from Imported Water that [is] put to reasonable and beneficial use in the Basin." (1EXCPT365,¶4)(10JA12249¶4.) The 2015 Judgment only gives the right to return flows from imported water to the Stipulating Parties. (3EXCPT2165-2166,¶¶5.2.1-5.2.2)(176JA157545-157546¶¶5.2.1-5.2.2.) Since the Willis Class is not a Stipulating Party, its right to any return flow resulting from use of imported water the Class purchased belongs to AVEK under the Physical Solution. (*Ibid*.) Since the Physical Solution limits the Willis Class landowner to imported water under the New Production Application process, this provision is also inconsistent with the terms of the 2011 Judgment.

## V. THE TRIAL COURT'S JUSTIFICATIONS FOR ELIMINATING THE WILLIS CLASS'S WATER RIGHTS ARE WITHOUT MERIT.

The court offered several excuses for its denial of *any* allocation of the native supply to the Willis Class:

### A. The "New Production Application Procedure" is NOT an Acceptable Substitute for the Class's Vested Water Rights.

**First,** the trial court (at the urging of the Stipulating Parties) assumed the exclusion of the Willis Class from the native supply allocations in the Physical Solution is acceptable under California law because any Willis Class member seeking to pump water in the future may follow the "New Production Application Procedure." (3EXCPT2191-2193,¶18.5.13)(176JA 157571-157573,¶18.5.13.) **It is not.**

The New Production Application Procedure only allows the applicant to seek permission to pump groundwater and to pay a replacement assessment to purchase an amount of imported water equal to the amount allowed to be pumped. (3EXCPT2153,¶¶3.5.39-3.5.41)(176JA157533¶¶3.5.39-3.5.41.) A member of the Willis Class applying for this discretionary right to purchase merely "stands in line" with other applicants for a limited supply of imported water – not the native water supply.[30] (*Id*.)

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[30] Again, as discussed in footnote 27, *supra*, there is no guarantee imported water will even be the available. (49RT26612:12-27.)

Moreover, if approved under the New Production Application Procedure, subject to a limited exception for domestic use, the Willis Class must pay a replacement assessment on *any* future pumping. (176JA157572:1-2.) The Stipulating Parties allocated production rights under the Physical Solution pay no replacement assessment unless their annual production exceeds their allocation. (3EXCPT2173:7-11)(176JA157553:7-11.) A court may not impose a Physical Solution that subordinates the rights of overlying landowners or imposes a fee on the future exercise of those rights absent due process and a finding of unreasonable use. (*Barstow*, *supra*, 23 Cal.4th at 1243.)

As explained by expert Roach, the provision in the Physical Solution allowing the Willis Class access to water through the New Production Application process only adds to the problem. (49RT26555-57.) The fact that "the vast majority of [the Willis Class's] properties are fairly small, means that the cost of complying and the risks associated with [the permissive application process], in many cases, completely swamped any value" in the properties. (49RT26555:20-26556:4, 22-25 [the "huge impact on market value … is a serious problem"], 49RT26554:7-10; 3EXCPT1693;173JA154507.) The added uncertainly regarding the amount of the replacement water assessment

fee "is potentially fatal to any utility or to those properties at all." (49RT26557:4-9.)

### B. The Class's Vested Water Rights are NOT Forfeited Just Because the Current Native Supply is Insufficient to Satisfy the Appropriators' Needs.

The trial court suggests extinguishing of the Willis Class's unexploited waters rights is permissible because there is not enough water to satisfy the needs of the current users. As the court put it, "the [pumping] landowners' reasonable and beneficial use pumping alone exceeded the native safe yield while [Purveyors'] pumping was taking place." (3EXCPT2113:20-23)(176JA157472:20-23.) It is the underlined portion of the trial court's explanation that is problematic.

As explained by the California Supreme Court, where (as here) the basin is in overdraft, the reasonable and beneficial use of overlying landowners is paramount, and the rights of appropriators (such as the Purveyors who are already pumping) "must yield to overlying owners." (*Barstow, supra,* 23 Cal.4th at 1241.) The question, therefore, is not whether there is enough native supply while pumping by Purveyors is "taking place." Rather, the question is whether there is any surplus after the overlying landowners have pumped (or, in the case of the Willis Class, *not* pumped) their correlative shares of the native supply. If, and

only if, there is a surplus are appropriators (such as Purveyors) permitted to appropriate. (*Barstow, supra,* at 1241 [only "water not needed … may rightly be appropriated … for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed"].[31])

### C. The Class's Vested Rights Should NOT Be Displaced Simply Because "Their Future Needs Are Speculative," "Uncertain," or "Cannot Be Quantified."

The court defended its allocation of water rights by noting "the Willis Class['s] overlying rights cannot be quantified because they have no present reasonable beneficial use; their future groundwater needs are speculative; … and unexercised overlying rights create an unacceptable measure of uncertainty and risk of harm to the public." (3EXCPT2441:10-15)(176JA 157473:10-15.) Again, the trial court's reasoning is faulty.

The vested rights of overliers cannot be displaced because the landowners' exercise of those rights in the future "cannot be quantified," "their future … needs are speculative," or create "uncertain[ty]" for other users. (*Tulare, supra,* 3 Cal.2d at 525 [vested

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[31] *Barstow, supra,* at 1240-1241 ["the rights of an appropriator… [are] limited to the amount of the surplus"].)

rights are not lost just "[b]ecause the court ***cannot fix or absolutely ascertain the quantity of water required for future use***"]; *Wright,* supra*,* 174 Cal.App.3d at 84 ["correlative rights of overlying landowners, like riparian rights, did not depend upon use and were not lost by disuse"]; *Burr v. Maclay Rancho Water Co*. (1908) 154 Cal. 428, 435-436 [overlying rights, even if not currently used, are protected as against appropriative use].)

The appropriate solution is to set "a base figure" for the appropriators' use "until overlying landowners' uses necessitated a reduction." (See *Wright, supra,* 174 Cal.App.3d at 93; *Katz v. Walkinshaw, supra,* 141 Cal. at 136 ["leave for future … the question as to the priority of rights between … owners who begin the use of the waters at different times"]; *Tulare, supra,* 3 Cal.2d at ["court should declare prospective uses paramount to the appropriator's rights" and allow "the appropriator …[to] continue to take water"… "[u]ntil the paramount right holder needs it"].)[32]

In the proceedings below, Purveyors and the trial court cited *Long Valley,* to support the Physical Solution's *permanent*

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[32] Instead of eliminating the Willis Class members' rights altogether, the trial court should have considered alternatives proposed by Class counsel, described further below, in section II.b.3, *infra*.

"subordination"[33] of the Willis Class's unused water rights in favor of the current water users. ((1979) 25 Cal.3d 339) (50RT27461:23-26.)

In *Long Valley, supra,* a property owner (Ramelli) who was using water from a local stream system on only a portion of his property sought an allocation of the riparian (surface) water based *not just* on his current water usage, *but also* the water usage he had planned for the rest of his property in the future. The State Water Resources Control (State Water Board) awarded Ramelli various amounts of water only for the acres on which he was currently exercising his riparian rights; it extinguished entirely his claim as a riparian landowner to the future use of water with respect to the remaining acres. (*Id.* at 346.)

On appeal, the Court found the State Water Board had acted within the authority delegated to it by the State Legislature in "defining and otherwise limiting [Ramelli's] future riparian rights." (*Id.* at 351.)

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[33] The problem with Purveyors' argument and the trial court's justification of the Physical Solution is that they assume the term "subordination," as used in the opinions they cite, includes a permanent transfer of the right to pump water in the future. In the water rights context, subordination is the substitution of a claimant with a lesser water right for a landowner with a superior water right *while the landowner is not pumping water*. Subordination of water rights is an *interim* right used to maximize the reasonable and beneficial use of a limited resource. Subordination therefore cannot, by definition, be permanent and/or so inflexible as to effectively (as in this case) extinguish or eliminate the underlying vested water right.

However, the Court balked at finding the Board was authorized "to extinguish altogether Ramelli's claim to the future use of waters in the Long Valley stream system." (*Id.* at 358 [citing *Tulare, supra*].)

In *Wright*, the Court of Appeal reversed a trial court decision applying *Long Valley* to eradicate the unexercised rights of overlying landowners by subordinating them below all active producers, including overlying users and appropriators. (174 Cal.App.3d at 82.) The court concluded that even though the constitution "applies to groundwater as well as stream water and courts have enjoyed concurrent jurisdiction with the Board to enforce it, *absent a statutory scheme for comprehensive determination of all groundwater rights,* the application of *Long Valley* to a private adjudication would allow prospective rights of overlying landowners to be subject to the vagaries of an individual plaintiff's pleading without adequate due process protections." (*Id.* at 89, emphasis added.)

In *Barstow, supra,* the Supreme Court approved the *Wright* court's refusal to apply *Long Valley* in the absence of a comprehensive legislative scheme applicable to groundwater adjudications. (23 Cal.4th at 1249, fn. 13.) The *Barstow* Court also clarified that while a trial court "may impose a Physical Solution to achieve a practical allocation of

water to competing interests, the [Physical] Solution's general purpose cannot simply ignore the priority rights of the parties asserting them. In ordering a Physical Solution, therefore, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine." (*Id.* at 1250.) In other words, the *Barstow* Court confirmed unexercised water rights cannot be extinguished and clarified that any limitation on future use of a heretofore unexercised water right must be based on an adequate showing of the circumstances and proposed quantity of water usage to determine whether the future use was "reasonable" under constitutional standards. (*Id*.) In the absence of due process and an adequate showing of the circumstances and quantity of the landowner's future usage, a permanent subordination of a landowner's future exercise of his water rights would also be inappropriate. (*Id*. at 1248-1249.)

The Willis Class submits the *Barstow* decision forecloses the application of *Long Valley* here. In this case, the question is not whether the court had the power to simply "reduce" or "limit" the Willis Class's future overlying water rights. Rather, the question is whether the court was authorized to eliminate and/or permanently subordinate, if not

extinguish, the Willis Class overlying water rights. The trial court's affirmative reply was based on an improper interpretation and application of the *Long Valley* decision.

### D. Contrary to the Trial Court's Claim, the Physical Solution Adopted in the 2015 Judgment Does Not Allocate Production Rights Equally.

In its decision, the trial court proclaimed the Physical Solution treats all the vested water rights with "equal priority." (3EXCPT2155:21-26)(176JA157535:21-26.) No; the Physical Solution (which was simply an agreement between the appropriators and pumping parties who benefitted most from eliminating the Willis Class's water rights) did not allocate production rights equally. (*California Teachers Association v. Governing Board of Rialto Unified School District* (1996) 14 Cal.4th 627, 656 [simply asserting something is "clear" does not make it so].)

As discussed in Section IIIb7(vi), *supra*, although the Willis Class and Wood Class members have the same vested correlative rights to share in the native supply, the Physical Solution treats these two classes differently on the premise that the Willis Class' non-use of groundwater somehow justifies the disparate treatment. After the court adopted the Physical Solution, the Willis Class, unlike any other party,

no longer has any present or future ability to pump from the native supply. (176JA157472:22-23.) To obtain any water, Willis Class members must seek permission to use imported water and pay a replacement assessment. (3EXCPT2191-2193¶18.5.13)(176JA157571-157573, ¶18.5.13.)

The Physical Solution plainly treats the Willis Class differently than other overlying landowners. The trial court erred in claiming otherwise. (See *Barstow, supra,* 23 Cal.4th at 1248 ("[w]e have never endorsed a pure equitable apportionment that completely disregards overlying owners' existing legal rights").

### E. New Legislation Enacted During This Litigation Does NOT Authorize the Conditions Imposed on the Willis Class by the Physical Solution.

Citing to Assembly Bill 1390, the trial court also tried to justify the Physical Solution by noting "[t]he Legislature has now recognized that unexercised overlying rights holders may have conditions imposed upon them by a physical solution. (3EXCPT2114:22-2115:3)(176JA157473:22-157474:3, citation omitted.) The trial court is incorrect.

Assembly Bill 1390 was enacted during the 2014-2015 legislative session and did not become effective until January 1, 2016 -

after the 2015 Judgment at issue here was entered. (Assemb. Bill 1390, 2014-2015 Reg. Sess., ch. 672.)[34] The statute expressly states it does not apply to this adjudication. Specifically, Code of Civil Procedure section 833(a) provides that "this chapter applies to actions that would comprehensibly determine rights to extract groundwater in a basin, whether based on appropriation, overlying right, or other basis of right." But the chapter "does not apply" to any "adjudicated area"; and the Legislature provided that "the Antelope Valley basin at issue in the Antelope Valley Groundwater Cases (Judicial Council Coordination Proceeding Number 4408) shall be treated as an adjudicated basin." (Civ. Proc. Code, §833, subd.(b), amended by AB 1390; Water Code, §10720.8, subd.(b), amended by SB 1168.) As a result, the trial court erred in concluding new legislation authorized conditions imposed on the Willis Class by the Physical Solution.

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[34] The Legislative history of CCP §830, is available at:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1390.)

### F. The Elimination of the Class's Vested Water Rights is NOT Fair in Comparison to the "Sacrifices" Allegedly Made by Other Parties.

The court next suggested eliminating of the Willis Class's water rights was appropriate because Stipulating Parties agreed to a decrease in their annual allotments of water. To the court, it was therefore "only fair" that the Willis Class should lose their ability to pump in the future as well. (3EXCPT2114:22-26)(176JA157473:22-26.) There are several problems with the trial court's reasoning. First, the practical elimination of the Willis Class's right to pump water in the future is disproportionate and draconian compared to the burden placed by the court on the Stipulating Parties. The California Supreme Court in *Barstow, supra,* stated Physical Solutions must be fair to all parties who have vested overlying water rights; the solution imposed by the court may not unreasonably burden any one party. (23 Cal.4th at 1250.) To the extent the right to pump must be curtailed, any reduction must be divided proportionately among the overlying landowners. (*Katz v. Walkinshaw, supra,* at 136.) Where the available native supply is in overdraft, the "physical solution must preserve water right priorities." (*Barstow*, *supra*, 23 Cal.4th at 1243 [court may not subordinate rights of overlying landowners or impose a fee on the future exercise of those

rights].) The Physical Solution may not change priorities or eliminate vested rights. (*Id.* at 1250.) And, no matter what, the overliers' "***substantial*** enjoyment" of their rights must be protected. (*Peabody, supra,* 2 Cal.3d at 383-84.)

Second, the trial court's balancing of the burden fails to account for the causes of the overdraft situation. The past wasteful practices of the Stipulating Parties—not the Willis Class—are responsible for the drain on the Antelope Valley aquifer. Those past practices must be considered by the court in imposing the burden of the overdraft in an equitable manner. (*Barstow, supra* at 1246 ["the consumptive use of water" and "the practical effect of wasteful uses"]; *Tulare, supra,* 3 Cal.2d 489, 524-525.)

### G. Contrary to Purveyors' Assertion, the Willis Class Did NOT Agree to be Bound by "Any" Physical Solution in the 2011 Judgment.

In the court below, Purveyors repeatedly claimed the Willis Class agreed in the 2011 Judgment to be bound by "any" future Physical Solution. In fact, Purveyors recited this claim so often and so vigorously that the trial court wrongly assumed the Willis Class had no standing to contest Purveyors' proposed Physical Solution because they

previously agreed to be bound by "any" Physical Solution.[35] (3EXCPT2126:25-2127:6; 4EXCPT¶2)(176JA157485:25-157486:6; 179JA162060¶2.) Since this erroneous assumption has infiltrated every action taken by the Purveyors since entry of the 2011 Judgment (and may have played a role in the trial court's handling of the 2015 Settlement and proposed Physical Solution), the falsity of Purveyors' claim must be addressed.

The Willis Class agreed to be part of the anticipated Physical Solution entered by the court after resolution of the remaining disputes in the coordinated actions **only** "to the extent that it is ***consistent*** with the terms of this Stipulation and to be subject to Court-administered rules and regulations consistent with California and Federal law and the terms of this Stipulation." (1EXCPT365:28-366:4, emphasis added)(10JA12249:28-12250:4.) In settling their claims, the Purveyors and the Willis Class expressly acknowledged their "Stipulation will become part of a Physical Solution entered by the Court" in the future. (*Ibid.*) Purveyors "agree[d] to cooperate and coordinate their efforts in

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[35] The Willis Class obviously did have standing because the settling parties in the 2011 Judgment expressly agreed that their "Stipulation will become part of a Physical Solution entered by the Court. (1EXCPT365:28-366:4)(10JA12249:28-12250:4.)

any [future] trial or hearing so as to obtain entry of judgment ***consistent*** with the terms of [its Settlement with the Willis Class]." (1EXCPT370:13-16, emphasis added)(10JA12254:13-16.) The Purveyors further promised not to exercise their rights in any way that would "diminish the Willis Class Members' Overlying Right below a correlative 85% of the Basin's Federally Adjusted Native Safe Yield." (1EXCPT370:13-16, emphasis added.)(10JA12254:13-16.) The Purveyors also promised not to "take any positions or enter into any agreements that are inconsistent with the exercise of the Willis Class Members' Overlying Right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield." (1EXCPT364:22-25)(10JA12248:22-25.) They pledged that any Physical Solution they subsequently proposed would be consistent with California and Federal law (as well as all Court-administered rules and regulations) pertaining to the allocation of water rights and (again) with the terms of its Settlement with the Willis Class. (1EXCPT365:28-366:4)(10JA12249:28-12250:4.)

The 2011 Judgment could not be clearer. In fact, the court lauded Willis Class counsel for eliminating Purveyors' claims of prescription and protecting the Willis Class landowners' correlative rights to the

pump from the native supply in the future. (1EXCPT413:1-5; 15-18)(13JA15487:1-5; 15-18.)

In an attempt evade the clear language of the 2011 Judgment, Purveyors have dug out language from a non-binding communication between the Willis Class counsel and Willis Class members which attached the actual Willis Settlement and loosely summarized some of its terms as follows:

> "The Court is required to independently determine the Basin's safe yield and other pertinent aspects of the Basin after hearing the relevant evidence, and the Settling Parties will be bound by the Court's findings in that regard. In addition, the Parties will be required to comply with the terms of any Physical Solution that may be imposed by the Court to protect the Basin, and the Court will not be bound by the Settling Parties' agreements in that regard. Willis and Class Counsel believe that the Court will have the benefit of adequate relevant information to make fully informed decisions and that further participation by the Class may not be necessary. To the extent issues arise that affect the Class's rights, Class counsel will act to protect the Class' interests."

(9JA10296-10297¶9.) The court's reliance on the Notice to the Willis Class, rather than the actual language of the 2011 Judgment, is both peculiar[36] and wrong. The notion that the wording of the 2011

[36] The trial court's conclusion that the Willis Class agreed to any Physical Solution directly conflicts with the court's Statement of

Judgment should take precedence over a class notice that purports to summarize the judgment is *so* self-evident that Willis Class counsel cannot find a case directly on point. There are, however, numerous examples of cases so holding in analogous situations.

In *People v. Mitchell* (2001) 26 Cal.4th 181, the Court held the wording of an abstract of judgment summarizing a judgment does not control if it is different from the actual judgment. (*Id.* at 185; see also *U.S. v. Miller* (4th Cir. 1989) 869 F.2d 595 at *1 [discrepancy between the judgment order and docket sheet].)

In *Arce-Mendez v. Eagle Produce Partnership, Inc.* (D.Az. 2009) 2009 WL 811451, the court criticized defendants' attempt to sidestep an issue by quoting an inaccurate summary of a Judgment from the court's electronic filing docket rather than the actual Judgment. (*Id.* at *3.)

In any event, questions about consistency between the notice to the class and the settlement agreement itself (as approved by the court) may be considered on appeal because the operative facts—the terms of

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Decision, stating "the Willis Class objected to the Physical Solution [and therefore ]… is entitled to have its rights tried as if there were no stipulated Physical Solution." (176JA157472:8-9; see also 41RT22641:10-22642:8.)

the court-approved Willis Settlement and the content of the notice—are undisputed. (*Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 646.) Assuming *arguendo* there is any ambiguity in the Notice, the actual terms of the 2011 Judgment should prevail. Moreover, as reflected in the court's Statement of Decision, "[b]ecause the Willis Class objected to the Physical Solution, it is entitled to have its rights tried as if there were no stipulated physical solution." (3EXCPT2113:8-9)(176JA157472:8-9.) The Class did not agree to be bound by any Physical Solution.

### H. The Zero Allocation to the Class in the Physical Solution is Not Consistent with the Previous 2011 Willis Class Settlement or Judgment.

The Stipulating Parties may also argue that at the time of the Willis Settlement, the Willis Class was not pumping any portion of the native supply and their share of the native supply was zero under the Judgment. Therefore, the Physical Solution is consistent with the Willis Judgment. However, this analysis would render the Willis Class Settlement meaningless.

The Class did not agree to a zero allocation of the native supply. In fact, the Willis Class Settlement expressly provides to the contrary. ((1EXCPT360:1-2)(10JA12244:1-2) ["each Overlying Owner is

entitled to a fair and just proportion of the water available to the Overlying Owners"]; (1EXCPT361:1-2)(10JA12245:1-2) ["Pumping of the Settling Parties' share of Native Safe Yield is not subject to any Replacement Assessment"]; (1EXCPT12247:26-28)(10JA12247:26-28) ["The Settling Parties agree that the Settling Defendants and the Willis Class Members each have rights to produce groundwater from the Basin's Federally Adjusted Native Safe Yield"].)

In awarding attorneys' fees to Willis Class Counsel as the "prevailing party," the trial court correctly found that the Willis Settlement conferred "substantial benefits" on the Willis Class:

> By eliminating the [Purveyors'] prescription claims and maintaining correlative rights to portions of the Basin's native yield, the Willis Class Members achieved a large part of their ultimate goal - to protect their right to use groundwater in the future and to maintain the value of their properties. Under these circumstances, they must be considered "successful parties" for purposes of CCP §1021.5.

(3EXCPT1746:1-5)(13JA15487:1-5.) The Willis Settlement, the 2011 Judgment, and the Court's Order Awarding Attorneys' Fees would all be rendered absolutely meaningless if the Willis Class's "share" of the native supply could be zero under the Physical Solution adopted by the court. Such an absurd interpretation of these legally enforceable documents makes a mockery of the judicial system.

## VI. THE TRIAL COURT VIOLATED THE WILLIS CLASS'S DUE PROCESS RIGHTS BY ADOPTING A PHYSICAL SOLUTION ADVERSELY IMPACTING THEIR CORRELATIVE WATER RIGHTS WITH-OUT FAIR NOTICE AND/OR A MEANINGFUL OPPORTUNITY TO BE HEARD.

The due process clauses of the United States and California Constitutions mandate that no citizen may be "deprived of any significant property interest" without previous notice and an opportunity for a fair and full hearing. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549.) These constitutional guarantees apply to proceedings where, as here, the court is asked to equitably allocate present and future subterranean water rights of overlying landowners. (*City of Colton*.*supra*,226 Cal.App.2d at 649; *Wright, supra,* 174 Cal.App.3d at 89.) Without notice ***and*** a fair hearing in which all interested parties are heard, a court has no jurisdiction to issue a binding judgment. (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal. App.3d 354, 368.)

The 2015 Judgment extinguishes the correlative groundwater rights of the Willis Class even though, as the Stipulating Parties and the trial court acknowledge, no party has ever filed an adverse pleading against the Willis Class or any of its landowners in these coordinated proceedings. Once the Physical Solution was filed and Willis Class

counsel realized their water rights were in danger, the Willis Class participated for the sole purpose of protecting their water rights. Indeed, the court recognized the fact that the Willis Class was obligated to appear and oppose the Physical Solution and the Wood Class stipulation. (41RT 22641:10-22642:8.)

The Supreme Court specifically cautioned against depriving a landowner of due process when creating and adopting a Physical Solution. (*Barstow, supra,* 23 Cal.4th at 1249, fn. 13 ["a trial court could apply the *Long Valley* riparian right principles to reduce a landowner's future overlying water right use below a current but unreasonable or wasteful usage, *as long as* the trial court provided the owners with the same notice or due process protections afforded the riparian owners under the Water Code"].) In fact, Water Code §1200 *et seq.*, establishes a robust system for notice and due process as to surface water riparian rights. That system was ignored by the trial court in this case with regard to the Willis Class's future overlying water rights.

## A. The Willis Class was Deprived of Their Correlative Water Rights Without Fair and Proper Notice.

### 1. The absence of a pleading against the Willis Class violates due process.

The cornerstone of both the Due Process Clause of the U.S. Constitution and Article I, Section 7 of the California Constitution is the requirement of an accusatory pleading against the defendant before he or she may be deprived of property. Only when such a pleading exists may the court enter a judgment granting the requested relief against such a party. (*People ex rel. Dept of Transportation v. Superior Court*, (1992) 5 Cal.App.4th 1480, 1485.) "[N]otice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" is an "elementary and fundamental requirement of due process." (*Milliken v. Meyer* (1940) 311 U.S. 457, 464.)

In the underlying action, the only complaint to which the Willis Class was a party was the Willis Class action, in which (1) the Willis Class was a plaintiff, not a defendant; and (2) only Purveyors were adverse parties. No party has ever filed a complaint against the Willis Class, as defendants, seeking a reduction of their water rights.

The Supreme Court has expressly (and unanimously) held that a party not actually made a defendant to an accusatory pleading cannot thereafter be deemed a defendant thereto, no matter how convenient and efficient such a process might be. (*Nelson v. Adams USA, Inc.* (2000) 529 U.S. 460, 465 ["Due process does not countenance such swift passage from pleading to judgment in the pleader's favor"].) Because the Willis Class was not a defendant named in the accusatory pleadings filed by the Stipulating Parties, the Due Process Clause precludes entry of a judgment (like the 2015 Judgment and Physical Solution) that purports to bind the Willis Class and deprive these landowners of their water rights. (*Britz, Inc. v. Dow Chemical Co.* (1999) 73 Cal.App.4th 177, 181.)[37]

[37] Purveyors have argued the Willis Class's rights were not completely extinguished and therefore notice was not required. (132JA130842:9-11.) Even assuming *arguendo* the Willis Class's rights were not completely extinguished, their property rights were certainly limited and modified by the terms of the Physical Solution. (3EXCPT1693)(173JA154507 [the Physical Solution "would greatly diminish the potential economic uses and therefore materially impact the values of the properties"].) Due process (including notice and an adversary pleading) is required anytime a citizen is denied "any significant property interest." (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 542; *Connecticut v. Doehr* (1991) 501 U.S. 1, 12 [due process applies equally to "temporary or partial impairments to property rights"].)

### 2. The absence of adequate notice to the Willis Class violates due process.

Wholly apart from a lack of an adversary pleading, the 2015 Judgment violated constitutional due process by failing to provide the required notice of relief awarded by the Physical Solution. (*Johnson v. Alma Investment Co.* (1975) 47 Cal.App.3d 155, 159-62 [due process requires the best practicable notice].) Constitutionally sufficient notice must be both understandable to the average person and clearly advise the defendant of the requested relief at issue. (*Julen v. Larson* (1972) 25 Cal.App.3d 325, 327-28.)

Here, only two notices were sent to the Willis Class members. Both were sent early in the litigation process; neither informed the Class that their water rights may be extinguished in the future.

The first was on December 17, 2008, seven years prior to the adoption of the Physical Solution. The Willis Class was notified that a class action had been filed to resolve a dispute over their water rights vis-à-vis the Purveyors. (3EXCPT1558-1560)(132JA130660-130662.) The Willis Class was told (1) their class representative was arguing their water rights were superior to those of Purveyors, and (2) Purveyors were claiming superiority as a result of their historical pumping. (*Id*.)

The only potential adverse consequence of the litigation listed in this court-approved notice was that the Class's water rights be "cut back" to allow use by Purveyors. (*Id*.)

The second notice came in December 2010, five years before the adoption of the Physical Solution. That Notice of Proposed Willis Class Action Settlement ("Willis Settlement Notice") disclosed to the Class that (1) their claims against the Purveyors had been resolved; (2) they may pump on their property (9JA10298, No. 17); (3) both they and the Purveyors "have rights to produce groundwater from the [native supply]" (9JA10295¶4.d); and (4) they would be bound by a later Physical Solution ordered by the court. (9JA10293-10298.)

Thus, the Willis Class was *never* given notice that their right to pump water from the native supply could or would later be extinguished by the Physical Solution ultimately adopted by the Court. Rather, the Willis Class' right to pump groundwater from the native supply was to be merged and incorporated into the Physical Solution. As the Willis Class was not provided proper notice, the 2015 Judgment violated due process.

### 3. The *inter se* nature of water rights does not obviate the need for due process.

Actions involving conflicting water rights sometimes embrace adjudication of rights of defendants *inter se* and rights of each party as against every other party. (*City of Pasadena, supra*, 33 Cal.2d at 919.)

The *inter se* nature of the groundwater adjudication here did not authorize the entry of the 2015 Judgment in the absence of an adversary pleading against, or notice of such pleadings to, the Willis Class. The U.S. Supreme Court has expressly and repeatedly held the requirements of the Due Process Clause do not vary in *in rem* or other *inter se* actions. (*Robinson v. Hanrahan* (1972) 409 U.S. 38, 38; *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 312-13 [adequate notice still required in *inter se* proceedings].)

Further, the fact that some notice was previously given to the Willis Class does not obviate the requirement of additional notice when, as here, a later proposed judgment would affect or implicate rights under an existing judgment. In *Griffin v. Griffin* (1946) 327 U.S. 220, respondent argued a prior judgment giving petitioner notice that additional proceedings in the future might affect his rights, satisfied the constitutional minimum under the Due Process Clause. The United States Supreme Court rejected the argument, noting although the prior

judgment "gave petitioner notice *at the time of its entry* that further proceedings might be taken, . . . we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook to substantially affect his rights…." (*Id.* at 228.)

What was true in *Griffin* is equally true here. Like the petitioner in *Griffin*, although the Willis Class was notified that they would be subject to a Physical Solution, due process required further individualized notice of the time and place of the Physical Solution proceedings because the Physical Solution sought to deprive the Willis Class of its right to pump.[38]

**4. The denial of any meaningful role in Phase VI of the litigation violated due process.**

**i. The trial court barred the Willis Class from presenting relevant evidence.**

On September 29, 2015, the trial court issued the following order:

> "The motion to limit the Willis Class' challenge to alleged inconsistencies in the settlement agreement is heard and argued. The court will sustain the objection to production of witnesses to testify as to

[38] Nothing in this case prevented the Stipulating Parties from filing a pleading against the Willis Class, notifying the Class of its rights, and permitting those landowners to fully defend themselves.

> alternative proposals." (3EXCPT2095.)(176JA157201.)

By this order, the trial court precluded the Willis Class from presenting *any* evidence on the reasonableness of Purveyors' proposed Physical Solution and/or any alternative physical solution proposals.

At the hearing, the trial court excluded as irrelevant any of Dr. Smith's reports and opinions about, among other things, the inconsistencies between the two judgments from an economic perspective, and three alternative models of allocation that would include the Willis Class. (49RT26534:28-26535:4, 26542:5-26543:6.)

A trial court's erroneous denial of a party's right to present testimony and other evidence relating to the underlying claim deprives the offering party of a fair hearing. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1345; *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677 [expert]; *Tun v. Gonzales* (8th Cir.2007) 485 F.3d 1014, 1026 [party's due process rights were violated by exclusion of expert's report and testimony].)

The trial court also severely limited the testimony of the Willis Class' expert appraiser, Roach, to only ten minutes. It is also "an abuse of the trial court's discretion to exclude probative, non-cumulative evidence simply because its introduction will" run afoul of court-

imposed time limits. (*MCI Communications Corp. v. American Tel. and Tel. Co.* (7th Cir. 1983) 708 F.2d 1081, 1171; *Wilson v. Kopp* (1952) 114 Cal.App.2d 198, 208.) The problem is the extreme "difficulty" for a trial court to determine *in advance* what limitation should be imposed upon counsel without their input and consent. (*People v. Green* (1893) 99 Cal.564, 567.)

**ii. The trial court restricted the Willis Class's cross-examination of key witnesses.**

The United States Supreme Court has consistently held the opportunity to be heard "at a meaningful time and in a meaningful manner" is required before an individual is deprived of a property interest. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333; *Today's Fresh Start, Inc.,supra,* 57 Cal.4th at 212; *Thor, supra,* (1993) 5 Cal.4th at 734, fn. 4 [affected party entitled to meaningful participation in the proceeding].)

The right to cross-examine witnesses, in particular, is a basic element of a fair trial. (*Ogden Entertainment Services v. Workers' Compensation Board* (2014) 233 Cal.App.4th 970, 982 ("*Ogden*").) In *Ogden*, the court held that when a party is completely denied the

fundamental right to cross-examine key witnesses for the adverse party, there has not been a fair hearing. (*Id*. at 984.)

Here, there were, at least, two occasions on which the Willis Class was unreasonably precluded from cross-examining important witnesses at the hearing on the Physical Solution.

First, the trial court denied Willis Class counsel the opportunity to cross-examine the Stipulating Parties as to their future reasonable and beneficial uses in the future, rights that would last in perpetuity. The trial court ruled that the Phase Four declarations, along with the testimony of expert Beeby, were sufficient to establish reasonable and beneficial use of all stipulating parties. (47RT25674:13-25.) This is contrary to the court's statements at the time, that any historical pumping number determined as a result of Phase Four was merely an informative number and no substantive rights were being determined. (36JA37723:13-16 ["…will not include any determination as to the reasonableness of that type of use…or any determination of a water right"].) In fact, the court specified:

> "Phase IV Trial is only for the purpose of determining groundwater pumping during 2011 and 2012. The Phase IV Trial ***shall not result in any determination of any water right, or the reasonableness of any party's water use*** or manner of applying water to the use Phase IV would not

> have any bearing on any future physical solution and there would be no determination of the reasonable and beneficial use of the groundwater pumped." (1EXCPT530.)(73JA67776, emphasis added.)[39]
>
> * * * *
>
> "The phase four trial will not preclude any party from introducing in a later trial phase evidence to support its claimed water rights, including, without limitation, evidence of water use in years other than 2011 and 2012." (38RT19947:5-22.)

Despite these statements, the court denied the Willis Class its opportunity to cross-examine the Stipulating Parties on their reasonable and beneficial uses during Phase Six because "everybody had the opportunity to appear and present evidence with regard to" the declarations and stipulations presented during Phase Four. (42RT 23818:17-23.) In response to the Willis Class's objections, the court stated it was "not going to require, under any circumstances …, that all

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[39] During Phase Four, the court also stated: "***Those are decisions that I don't think have to be made during this phase*** which will lead up to telling us what the current pumping is, and what the claim of right to pump might be by certain parties who are designated as appropriators as opposed to overlying owners…" (38RT19611:5-11 emphasis added.) This sentiment was repeated several times: "I don't think that we're making a determination of pumping as of right. What we're doing is determining how much is being pumped…And, obviously, at some point…there's going to be a determination made of what is a reasonable use for beneficial purposes on the land. (38RT19940:19-7.) "The phase four trial shall not result in any determination of any water right or the reasonableness of any party's water use, or manner of applying water to the use." (38RT19947:5-22.)

parties who have submitted those declarations two years ago come in with their witnesses, to subject themselves to cross-examination …" (47RT25112:13-19.) Without any cross-examination, the court then determined, contrary to its previous statements, "the numbers that were presented [in Phase Four] demonstrate a reasonable and beneficial use of water." (47RT25674:20-21.)

By precluding the Willis Class from cross-examining information presented during Phase Four of trial, in which the Class was not required to participate, the court denied the Class a fair trial, which ultimately resulted in a loss of the Willis Class members' overlying water rights.

Second, as set forth above, Willis Class counsel was precluded from cross-examining AVEK's expert, Binder, about the factual bases for his opinion, or even which about the provisions of the Physical Solution on which he supposedly relied to form his opinions. (49RT26835:27-26860:24.) The trial court erred in prohibiting the Willis Class's cross-examination of the Purveyors' expert witness on the reasonableness of the proposed Physical Solution. "All parties must be … given opportunity to cross-examine witnesses … and to offer evidence in explanation or rebuttal. In no other way can a party

maintain its rights or make its defense." (*Massachusetts Etc. Inc. Co. v. Ind. Acc. Com.* (1946) 74 Cal.App.2d 911, 914.) If "a party is completely denied the fundamental right to cross-examine the adverse party, there has not been a fair hearing." (*Ogden, supra* at 982.)

### B. The Trial Court's Failure to Exercise Its Duty to Investigate and Consider Alternative Physical Solutions Deprived the Willis Class a Fair Hearing.

As noted above, in the apportionment of water rights, all the factors that create equities in favor of one party or the other must be weighed. (*Colorado v. Kansas, supra,* 320 U.S. at 392.) The trial court must "thoroughly investigate" the possibilities of reasonable physical solution. (*Rancho Santa Margarita, supra,* 11 Cal.2d at 560-561.)

Here, the trial court did not exercise its equitable powers to approve a physical solution and enter judgment. The court did not weigh all the factors which create equities in favor of the Purveyors over overlying landowners; it did not "thoroughly investigate" all possible reasonable physical solutions; it did not admit evidence relating to possible physical solutions or suggest its own physical solution. Clearly, the court was not creative in devising a physical solution to the complex water problems at issue to ensure a fair result consistent with the constitution's reasonable-use mandate. It did not

weigh the applicable criteria to adopt a practical solution that maximizes the reasonable beneficial use of available waters to all parties.

Instead, the court adopted wholesale the proposed physical solution devised by the Purveyors. In fact, it had no choice because the Purveyors' Physical Solution was presented on a take-it-or-leave-it basis. (3EXCPT1019¶4)(129JA126129¶4 ["If the Court does not approve the Judgment as presented… this Stipulation is *void ab initio*…"].) This "Dynamite Provision" prohibited the court from making *any* change in the proposal on penalty of its withdrawal.

The court's failure to fulfill its duty *to independently* evaluate the evidence presented "requires reversal" because it results in "a denial of a fair hearing and a deprivation of fundamental procedural rights." (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392; *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1090-1091.)

### C. The Willis Class Was Prejudiced by the Due Process Violations.

#### 1. The denial of the Willis Class' right to a fair hearing is per se prejudicial.

Where (as here) the shortcomings in the trial court proceedings infringe on the litigants' right to fair hearing, appellant is not required to specifically demonstrate prejudice. (See *In re Enrique G.* (2006) 140 Cal.App.4th 676, 685.) Such errors are presumptively prejudicial and thus "reversible per se." (*Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 292-293.)

The erroneous denial of a party's right to present evidence is reversible *per se*. (*Marriage of Carlsson, supra,* at 291; *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1114-16 [rejection of essential expert witness testimony].) Likewise, it is reversible error per se to deny or unduly restrict a party's right to cross-examine witnesses. (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd*. (1984) 153 Cal.App.3d 965, 971.)

As noted above, the court's failure to fulfill its duty to independently evaluate the evidence presented "requires reversal." (*Fletcher, supra,* at 392.) In general, when a court fails to discharge its

duty to inquire into and carefully evaluate an issue, the error is prejudicial *per se*. (See *People v. Turner* (1986) 42 Cal.3d 711, 728.)

**2. A result more favorable to the Willis Class would have been reached in the absence of the trial court's errors.**

Even absent *per se* error, a judgment will be reversed if this Court, after examining the entire case, concludes it "is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1161.) A "reasonable probability" in this context does not mean "more likely than not," but merely a reasonable chance – i.e., "probability sufficient to undermine confidence in the outcome." (*College Hosp., Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; People v. Watson (1956) 46 Cal.2d 818, 837; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.)

Here, counsel for the Willis Class made an offer of proof each time he was precluded from presenting evidence, expert testimony, alternative physical solutions and/or prevented from cross-examining witnesses proffered by the Purveyors. For example, the court rejected the Willis Class's request to present the reports and testimony of Smith

regarding the economic impact of the Purveyors' proposed Physical Solution. At the hearing, Willis Class counsel marked the reports as exhibits (3EXCPT1772:3-11)(176JA155156:3-11) summarized the expert's testimony as follows: (a) evaluate the reasonable and beneficial uses of the Basin's groundwater by each of the Stipulating Parties, present and future; (b) determine the extent of future unexercised water rights of the Willis Class on a permanent vested basis should the Court preliminarily approve the Wood Class Settlement and permanently allocate the groundwater in the Basin; (c) evaluate the cost and reasonableness of requirements imposed by the Purveyors in the SPPS for new pumping; (d) evaluate the availability of water supplies from alternative sources other than the Native Safe Yield to accommodate new pumping per the SPPS; (e) opine on the diminution of the value of real property owned by the Willis Class if the Court preliminarily approves the Wood Class Settlement; (f) opine on the reasonableness of allocating the unused Federal government's water allocation to the Purveyors instead of allocating the water rights to the overlying landowners; (g) consider the domestic use priority of the parties under Water Code Section 106; (h) evaluate export and in lieu water rights of the parties under the SPPS; (i) evaluate the metering and reporting

requirements for all parties in the Basin; (j) consider the reasonableness and impact of the drought provisions in the SPPS; (k) evaluate the reasonableness in imposing a replacement water assessment on Willis Class members only; and (l) evaluate the cost of the Physical Solution and fairly distribute its burden on all parties. (3EXCPT1343:25-1344:15)(129JA126471:25-126472:15; *see also* 49RT26542:5-12.)

The trial court also severely limited the testimony of the Willis Class' expert appraiser, Roach, to only ten minutes. Unfettered by the court's unreasonable time limitation, Roach would have testified on the significant negative impact of the Purveyors' proposed Physical Solution on the market value of the Willis Class members' properties. (49RT26548:20-2; 26550:28-26551:12.) The imposition of time limits is a factor that goes to the fairness of the trial. (*Monotype Corp. PLC v. International Typeface Corp.* (9th Cir. 1994) 43 F.3d 443, 450.) The hourglass method employed by the court turns the "trial into a relay race." (*McKnight v. General Motors Corp.* (7th Cir. 1990) 908 F.2d 104,115.) Where counsel's questioning is limited to a short time, points of importance many be omitted in order to give more attention to others deemed of greater importance… [o]r the elaboration of essential points deemed important may be prevented in order to make all the points

desired." (*People v. Fernandez* (1906) 4 Cal.App. 314, 323 [disapproved on other grounds *People v. Burton* (1962) 55 Cal.2d 328, 352].)

Here, the court severely limited and precluded Willis Class counsel from important areas of inquiry during cross-examination of Stipulating Parties' experts. For example, when Class counsel inquired into whether the Stipulating Parties' expert, Beeby, had evaluated "one party's use relative to another party's use" in regard to reasonable use the court sustained the Stipulating Parties' objections. (46RT25438:13-22; 25439:23-25441:2, 25443:1-3.) Similarly, when Class counsel asked Binder whether the allocations were made on a permanent basis and whether this is important to his expert opinion, the court sustained the objections. (49RT 26839:14-27.)

In response, Willis Class counsel explained:

> [W]e … intend to establish that this expert did not apply his expertise in a true analysis of the underlying uses of the 140 stipulating parties, that he applied his expertise to Tapia and spent many hours and used many technical devices to determine that the water usage was not – did not comport with the reported water usage of Tapia. And he did not use any of those skills and expertise as to the 140 parties and therefore, the weight of the evidence of – from this expert, although he's very qualified, it should not be great at all, if any weight should be given to his opinion with respect to those parties on Exhibit 4. That is our offer of proof."

(46RT 25439:26-25440:9.)

The court's refusal to allow the Willis Class to cross-examine the Purveyors' expert is prejudicial because Judge Komar relied on Beeby's testimony that the Phase Four Declarations of water usage were beneficial and reasonable uses. (*Ogden, supra,* 233 Cal.App.4th at 984-985 [prejudice arise where an expert witness's testimony is critical to the outcome of the case].)

Finally, as to the court's refusal to consider the Willis Class's four suggested alternative solutions, the trial court is required "to admit evidence relating to possible Physical Solutions, and if none is satisfactory to it to suggest on its own motion such physical solution." (*City of Lodi, supra*, 7 Cal.2d at 341.) Without evidence and proposals from *all* interested parties, the trial court cannot fulfill its obligation to "thoroughly investigate the possibility of some such Physical Solution." (*Rancho Santa Margarita v. Vail, supra,* 11 Cal.2d at 560-561.) The court cannot ensure that its solution does not "unreasonably burden any party." (*Barstow, supra,* 23 Cal.4th at 1243-1251.) Even a cursory review of the evidence, exhibits and cross-examination proffered by the Willis Class reveals that the exclusion of the materials had a significant impact on the outcome of the case. (*Morrow v.*

*Superior Court* (1994) 30 Cal.App.4th 1252, 1258 [there is "demonstrable prejudice" the court conducts "a one-sided evidentiary hearing" and "the side that was presented hardly inspires confidence"].)

At the very least, the matter must be remanded to the trial court for a new hearing because no one can say whether the appellant would have obtained a more favorable result had the court exercised its discretion. (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1246.)

## CONCLUSION

The 2015 Judgment and Physical Solution adopted by the trial court in this case violates California groundwater law and article X, section 2 of the State's Constitution—including constitutional principles of reasonable and beneficial use. Further, the 2015 Judgment and Physical Solution are inconsistent with, and therefore precluded by the 2011 Willis Class Settlement and Judgment under *res judicata* principles and basic contract law. Finally, the trial court handled its review and adoption of the Stipulated Proposed Physical Solution in a manner that violated the Willis Class's Due Process rights.

In previous cases resulting in the disapproval of a Physical Solution, in whole or in part, the reviewing courts sometimes

considered modifying or correcting the Solution adopted by the court without any further trial-level proceedings. However, in this case, the Stipulating Parties' dynamite provision mandates: "If the [trial] court does not approve the Judgment as presented, or if an appellate court overturns or remands the Judgment entered by the trial court, then this stipulation is void *ab initio*…" (2EXCPT1019:21-24) (129JA126129:21-24.)

The Judgment should therefore be reversed, and the Physical Solution rejected in its entirety. The matter should be remanded to the trial court with directions to adopt a Physical Solution consistent with California groundwater law and article X, section 2 of the State's Constitution relating to reasonable and beneficial use. Any Physical Solution proposed, considered and/or adopted must be consistent with the provisions and promises agreed-upon by the Willis Class and Purveyors in the 2011 Willis Class Settlement and Judgment.

Dated: August 22, 2019

Respectfully submitted,

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GREGORY L. JAMES

By: *s/ Ralph B. Kalfayan*

Attorneys for Appellants, REBECCA LEE WILLIS and DAVID ESTRADA, on behalf of themselves and others similarly situated

## CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court, the Opening Brief of APPELLANTS REBECCA LEE WILLIS and DAVID ESTRADA, on behalf of themselves and others similarly situated contains 28,645 words, not including the tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

*s/ Ralph B. Kalfayan*
Ralph B. Kalfayan

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 2262 Carmel Valley Road, Suite 200, Del Mar, California 90214.

On August 21, 2019, I served true copies of the following document(s) described as **APPELLANTS' OPENING BRIEF** on the interested parties in this action as follows:

**BY TRUEFILING (EFS):** I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling portal operated by ImageSoft, Inc. Participants in the case who are registered EFS users will be served by the TrueFiling EFS system. Participants in the case who are not registered TrueFiling EFS users will be served by mail or by other means permitted by the court rules.

**BY ELECTRONIC SERVICE:** By posting the document(s) to the Antelope Valley Watermaster website in regard to Antelope Valley Groundwater matter with e-service to all parties listed on the websites Service List. Electronic service and electronic posting completed through www.avwatermaster.org via Glotrans.

**BY FEDERAL EXPRESS:** I served a true and correct copy by Federal Express or other overnight delivery service, for the delivery on the next business day. Each copy was enclosed in an envelope or package designed by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown below.

**Honorable Jack Komar**

c/o Rowena Walker
Complex Civil Case Coordinator
Superior Court of California, County of Santa Clara
191 N. 1st Street, Departments 1 and 5
San Jose, CA 95113

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

Executed on August 21, 2019, at Del Mar, California.

*s/ Ralph B. Kalfayan*

Ralph B. Kalfayan