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Class Counsel for the Willis Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

This Pleading Relates to Included Action:
REBECCA LEE WILLIS and DAVID ESTRADA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; CITY OF LANCASTER; CITY OF PALMDALE; PALMDALE WATER DISTRICT; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; QUARTZ HILL WATER DISTRICT; ANTELOPE VALLEY WATER CO.; ROSAMOND COMMUNITY SERVICE DISTRICT; PHELAN PINON HILLS COMMUNITY SERVICE DISTRICT; and DOES 1 through 1,000;

Defendants.

RELATED CASE TO JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

REPLY BRIEF BY WILLIS CLASS TO THE JOINT OPPOSITION OF OVERLIERS TO SECOND SUPPLEMENTAL MOTION FOR AWARD OF ATTORNEYS FEES, COSTS, AND INCENTIVE AWARD

Date: April 1, 2016
Time: 1:30 p.m.
Dept.: 1
Place: San Jose Superior Court
191 N. First Street
San Jose, CA 95113
Judge: Hon. Jack Komar

I. INTRODUCTION

The parties listed in their filed Joint Opposition (the "Overliers") oppose the Willis Class' motion for Attorneys' fees, costs, and incentive award (the "Motion"). The Overliers oppose the Motion on several procedural grounds, none of which have merit, and unpersuasively argue that the Willis Class is not a "prevailing party" under one element of CCP section 1021.5. Overliers do not challenge the other elements required under Section 1021.5, such as whether the litigation conferred a significant benefit on the public, the necessity of private enforcement, and whether the litigation enforced an important public right.

The Overliers also do not take issue with a number of factual points raised in the Motion. For example, the Overliers do not contest that they actively participated in the Phase 6 Trial and took an adversarial position against the Willis Class, cross-examined Willis Class expert witness, cross-examined Willis Class members, jointly collaborated with the PWS to defeat the claims of the Willis Class, and sought the entry of a proposed physical solution which undisputedly modified the water rights of the Willis Class. (Declaration of R. Kalfayan at ¶14). While the Overliers maintain that they do not have real party in interest standing in the prescription case, they do not dispute that they had a direct interest in the issues and outcome of the Phase 6 Trial. Finally, the Overliers do not dispute Class Counsel's lodestar, hours, or rate as reasonable.

After a fourteen (14) day contested trial, the result of which was a permanent allocation of water rights worth over one billion dollars, Overliers now ask the Court for immunity from an award of attorneys' fees to class counsel. But, for the following reasons, it would be fair and equitable to apportion an award of attorneys' fees and costs upon those parties who received a fixed, free, and permanent production right on Exhibit 3 and 4 of the Final Judgment which include the Overliers.

II. THE WILLIS CLASS IS A PREVAILING PARTY

The Overliers contend that Class Counsel did not affect the final judgment and physical solution, and point to the many motions and briefs filed by Class Counsel that were denied by the Court to argue that the Willis Class was "unsuccessful." However, the Overliers' exclusive

emphasis on the *outcome* of the proceedings is misplaced; it is the *process* that determines a party's entitlement to fees under CCP section 1021.5.

Courts take a broad view of what constitutes "success" under CCP section 1021.5. (*Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685.[1] Whether a party is "successful" depends upon the surrounding circumstances and a pragmatic assessment of the gains achieved by a particular action. [*Ebbets Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2010) 187 Cal.App.4th 376, 382]. The appropriate benchmarks in determining the successful party are: (1) the situation immediately prior to filing the suit; (2) the situation after conclusion of the action; and, (3) the role, if, any, played by the litigation in effecting any changes between the two. [*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1290-92]. Here, the benchmark conditions in the basin were dramatically improved once a final judgment and physical solution was entered by the Court. This could not have occurred in the absence of the class' participation in the litigation after the entry of the Willis Class Judgment.

The Willis Class's entitlement to fees under Section 1021.5 arises from its *mandatory* active participation in the Phase 6 trial. Obviously, the Court could not have adjudicated the rights of the Willis Class without the participation of Class Counsel and its enforcement actions under the Willis Class Judgment. For example, only by virtue of the Willis Class's participation was the court able to quantify and to allocate the native safe yield to the stipulating parties (including the Wood Class). Without the Willis Class, the Court could not have made the constitutionally required reasonable and beneficial use determinations as to the stipulating parties. Similarly, the Court could not have adjudicated and modified the rights of the Willis Class to the native safe yield without the participation of Class. Finally, the Court could not have satisfied the requirements of the McCarran Amendment without the participation of the Class.

In any event, the Willis Class has achieved particularized success in the litigation. First, the Class' overlying rights are preserved in the Final Judgment, although they must be exercised in

[1] The Willis Class has fully addressed the successful party argument in the companion reply brief to the opposition by the Public Water Suppliers ("PWS") but those arguments are summarized again in this brief. The Reply to the PWS opposition is incorporated by reference herein to this Reply to the Overliers' Joint Opposition.

accordance with the Physical Solution. (Exhibit 11 to the NOL at 16:22-23.) Second, as a party with overlying rights to the native safe yield, the Willis Class benefits from the protection of the Basin provided by the Judgment and Physical Solution. Third, the Class avoided claims of prescription. The Court found prescription against those parties who defaulted or failed to appear at trial; by contrast, no such prescription was found against the Willis Class. (Id at 4:7-28 to 9:1-2). Fourth, the Class preserved their right to pump. Court recognized that while the Physical Solution does not allocate water to the Class, it does "preserve their ability to pump." (Id at 26: 16-17). Fifth, the Court found that Willis Class members who seek new pumping for domestic use can avoid paying a replacement water assessment altogether if the Watermaster, in his discretion, determines that the particular Willis Class members' water use will not harm the Basin or other groundwater users. (Id at 27:12-17.) Sixth, the Court found that a replacement water assessment on Willis Class members would average $26 per month and concluded that this "replacement water assessment is not an unreasonable burden upon any Willis Class member who may someday install a well for domestic use." (Id at 27:5-11.) All of these benefits to the Willis Class arise from the Physical Solution and Final Judgment and the necessary participation of counsel for that class in the litigation.

Overliers finally argue that the Willis Class cannot claim success because the Class has filed a notice of appeal. But filing an appeal does not equate with being "unsuccessful" or preclude a partially prevailing party from collecting its fees under Section 1021.5. No case holds to the contrary. Since the involvement of the Willis Class was essential to the process and incorporated in part in the Court's Judgment, the Class is a "prevailing party" under Section 1021.5.

III. WILLIS CLASS PARTICIPATION AFTER THE ENTRY OF THE WILLIS CLASS JUDGEMENT WAS REQUIRED

The participation of the Willis Class in the litigation was indisputably necessary for the Court to enter the Judgment and Physical Solution. The Overliers nonetheless argue that the efforts of Class Counsel were generally unnecessary and counterproductive. This argument, however, is in conflict with the Court's Statement of Decision and its rulings over the past two years. The Court repeatedly advised Class Counsel that: (1) the Willis Class Judgment only bound the PWS and the

Willis Class; (2) a physical solution trial involving all the parties was necessary to determine the groundwater rights of the Willis Class; and, (3) the settlement between the PWS and the Willis Class had no impact on the Court's duty to impose a physical solution that protects the Basin. "As the Court has already recognized, the [Willis] Stipulation--which was only between the Willis Class and the Public Water Suppliers--did not and cannot establish a water rights determination binding upon all the parties in these proceedings." (Exhibit 11 at 25:2-28 and Exhibits 27 and 28).

The Court further found the Willis Class entitled to have its rights determined at trial and cited precedent demonstrating that its participation was necessary:

> The Willis Class members are property owners in the Basin who have never exercised their overlying rights. Because the Willis Class objected to the Physical Solution, it is entitled to have its rights tried as if there were no stipulated physical solution. (*Pasadena*, supra, 33 Cal.2d at p. 924 ["Since the stipulation made by the other parties as to the reduction in pumping by each is not binding upon appellant, it is necessary to determine appellant's rights in relation to the other producers in the same manner as if there had been no agreement. (Id at 14:7-13).

The Phase 6 trial accordingly concluded with the Court's adjudication of all parties' respective groundwater rights in the Basin. (Id at 2:4-8.) The Phase 6 Trial was a comprehensive adjudication of all such rights, including the groundwater rights of the Willis Class. (Id at 2:8-11.) After consideration of all the parties' respective groundwater rights and in recognition of those rights, the Court approved the Final Judgment and Physical Solution. (Id at 2:11-15.)

The Class participation was similarly necessary under the McCarran Amendment. In order to affect jurisdiction over the United States under that statute, a comprehensive or general adjudication must involve all claims to water from a given source. (Id at 2:19-24.) So without the Willis Class, the United States could not be bound, which would have been fatal to the Final Judgment and Physical Solution.

Contrary to the arguments made by the Overliers, the Willis Class could not sit on the sidelines after the entry of the Willis Class Judgment and refuse to actively defend the rights of the Class. The Phase 6 proceedings concerned the groundwater rights of all parties, vis-à-vis one another. The active participation of the Class in the proceedings was mandatory. Counsel for the Willis Class is accordingly entitled to recover its fees from those parties who received a fixed, free,

and permanent production right on Exhibit 3 and 4 of the Final Judgment which include the Overliers.

IV. THE OVERLIERS ARE OPPOSING PARTIES TO THE WILLIS CLASS

Overliers argue that they cannot be liable for fees and costs because they are not "opposing parties" under CCP Section 1021.5 and because the Willis Class never brought suit against them. It is true the Willis Class did not file any claims against the Overliers, or vice-versa. However, the Phase 6 trial involved an allocation of the native safe yield, determined whether pumpers' uses were reasonable and beneficial, and adjudicated all parties' groundwater rights. With a limited native supply insufficient to supply all needs, all parties were by necessity adverse to one another, since they were competing for a portion of the limited supply. An acre foot of water allocated to one party by definition denies another party that same acre foot. It was a zero sum game. Through the Stipulation for Entry of Judgment and Physical Solution, the stipulating parties agreed to allocate the entire native safe yield to themselves and modified the prejudgment rights of the Willis Class to the native safe yield. Thus, in the Phase 6 Trial, all the stipulating parties were adverse to the Willis Class.

Overliers were not only doctrinally adverse to the Willis Class, but also practically adverse as well. The Overliers cross-examined Willis Class expert witness, cross-examined Willis Class members, and jointly collaborated with the PWS throughout the Phase 6 Trial.

The Overliers assert that the February 19, 2010 Consolidation Order bars the relief requested by the Willis Class. But the Consolidation Order was issued years before the Overliers stipulated to entry of the Judgment and Physical Solution on March 4, 2015. As discussed above, once the March 4, 2015 Stipulation was filed, all stipulating parties were adverse to the Willis Class since they sought an entry of a judgment that would allocate the entire native safe yield to themselves and deprive the Willis Class of its preexisting water rights. Overliers were thus parties against whom attorneys' fees may be awarded under Section 1021.5.

The Overliers cite *Weck v. Los Angeles County Flood Control Dist*. (1948) 89 Cal.App.2d 278 and *Golf W.. v. Life Inv'rs, Inc.* (1986) 223 Cal.Rptr. 539 for the proposition that just because

they are parties to a consolidated case, they do not necessarily become a single party for the purposes of a cost award. But both of these cases are distinguishable from the present case, particularly given the Court's Statement of Decision. In *Weck*, the consolidation occurred "only for the purpose of saving time and expense and did not convert the separate action into a single action for any other purpose. Separate appeals were taken, from separate judgments, and each appellant was to be regarded as a party to his own appeal" (*Weck* at 281). By contrast, here, as the Court made clear in its Statement of Decision: "All actions were coordinated and consolidated for all purposes" (Exhibit 11 at 1:21-22).[2] Similarly, while the consolidation in *Golf West* was entered merely to promote judicial economy, here, consolidation was doctrinally compelled, since only a comprehensive adjudication would validly allocate the native safe yield or be permissible under the McCarren Amendment. It is not mere consolidation that made a cost award permissible against the Overliers, but rather the inherently and directly adverse position of the parties in this zero-sum comprehensive allocation of the water rights in the Basin.

Overliers were initially part of this consolidated case because the PWS sued them. Once the Overliers entered into the Stipulation to Enter the Judgment and Physical Solution, all of the stipulating parties were aligned against the Willis Class, including the formerly adverse (to each other) PWS and Overliers. Under these circumstances, it is both equitable and permissible to impose the costs of this action all of the parties listed on Exhibit 3 and 4 of the Final Judgment parties who received a fixed, free, and permanent production right on which include the Overliers.

Overliers also argue that they are not opposing parties because they are not real parties in interest in the Willis Class Action. But Overliers are opposing parties with a direct interest in the comprehensive adjudication and in this consolidated-for-all-purposes action.[3] In *Connerly v. State*

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[2] The Willis Class reserves all arguments regarding this passage and is merely quoting the Court for use here.

[3] The Overliers quote from the "Response to Los Angeles County Waterworks District No. 40's Brief re Equitable Apportionment of Willis Class Fee Award" filed on March 15, 2011 – to assert that the Willis Class is now taking a different position in its motion for attorneys' fees regarding the Overliers' responsibility for Willis Class fees and costs. The previously filed acknowledgement by the Willis Class that the PWS were the only parties directly adverse to the Willis Class was made in the context of the circumstances which existed prior to filing of Stipulation on March 4, 2015 and prior to the-Phase 6 Trial. As explained above, the circumstances after March 4, 2015 were starkly different than those which existed before March 4, 2015 and therefore any previous acknowledgement is no longer relevant or effective.

Personnel Bd., 37 Cal.4th 1169 (2006), the Court said that a "real party in interest" is generally defined "as any person or entity whose interest will be directly affected by the proceeding… it may be the person or entity in whose favor the acts complained of operate or anyone having a direct interest in the result, or the real adverse party…in whose favor the act complained of has been done." *Id.* at 1178. (internal quotations omitted). There must be a "special interest to be served or some particular right to be protected over and above the interest held in common with the public at large" for fees and costs to be charged against an entity. *Id.*

Active participation coupled with a direct interest gives rise to liability for an award of attorneys' fees. Both exist here. Overliers were active against the Willis Class and had an interest in both the participation of that Class in these proceedings and in the allocation of the entire native safe yield to the stipulating parties. That is all that is required for a party to be a real party in interest against whom a fee award may be entered under Section 1021.5

Overliers cite *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151 ("*Mejia*") for the proposition that a "court may only award attorney fees to a successful party against one or more "opposing parties," where "opposing party" is defined as a person "by or against whom a suit is brought" (Id. at 160). However, the Court of Appeal goes further than just defining the term "opposing parties" in this way and explains that not just the party "by or against whom a suit is brought" can be liable for fees under Section 1021.5. A real party in interest can also be an opposing party liable for fees under 1021.5, if "[the] real party in interest…has a direct interest in the litigation, more than merely an ideological or policy interest, and actively participates in the litigation…" (Id at 161). That standard is clearly satisfied here.

As the Court made clear in its Statement of Decision: "All actions were coordinated and consolidated for all purposes" (Exhibit 11 at 1:21-22). Overliers not only benefit directly from the Judgment and Physical Solution by receiving a permanent allocation of groundwater, they were also integral in its negotiation, drafting, and development. Further, following the entry of the Willis Class Judgment, the Overliers actively participated in the litigation and had a direct interest in

preserving their agreement to modify the Class' rights to the native safe yield. That participation satisfies the requirements of Section 1021.5.

V. THE NOTICE GIVEN BY THE WILLIS CLASS IS SUFFICIENT

The Overliers argue the Willis Class' Motion does not provide them with sufficient notice that an award of fees is sought from them specifically. To the contrary, the Motion itself expressly identifies the Overliers as parties to the Motion. On page 4 lines 12 to 14 of the Motion, it states: "This case continues to satisfy the criteria for an award of fees under Section 1021.5 of the California Code of Civil Procedure and such an award should be entered against the PWS and/or the *overlying landowners who received a pumping allocation in the final judgment*." (Emphasis added). Like this Motion, the overlying landowners who received a pumping allocation are well known to everyone in this adjudication. They are named on Exhibit 4 of the Final Judgment.

In any event, it is undisputed that the Overliers have been aware of this Motion since January 22, 2016, and in fact, had ample time to oppose the request. The filing of their opposition belies their "lack of notice" argument. (A Joint Opposition was filed on March 15, 2016.)

VI. THE FINAL JUDGMENT DOES NOT BAR WILLIS FROM RELIEF

Overliers argue that Paragraph 20.11 of the Final Judgment bars a fee award against them. Paragraph 20.11 states: "Except subject to any existing court orders, each Party shall bear its own costs and attorney's fees arising from the Action." But the determination of the fee and costs award is still very much in the Courts power. Under Section 1021.5, once the elements for awarding a fee have been met, awarding those fees is no longer discretionary upon the Court. *See Serrano v. Unruh*, 32 Cal.3d 621, 633 (1982) (fees should be awarded except where "special circumstances would render such an award unjust."). Not only does Paragraph 20.11 not overrule this precedent (nor could it), but it would be subject to redetermination in any event. The Willis Class never waived any entitlement to a fee award under Section 1021.5, and has properly asserted it herein.

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VII. THE OVERLIERS MISSTATE THE RECORD

Overliers argue that the Willis Class misunderstands the Judgment and Physical Solution, and contend that the Stipulating Parties established their production rights in the Phase IV "prove-up". But the Phase IV trial only established the amount of pumping that occurred during a fixed time period. The Phase VI "prove-up" trial, not the Phase IV trial, dealt with groundwater rights, reasonable and beneficial uses, and permanent allocations of groundwater. (Moreover, contrary to the Overliers' assertions, several stipulating parties received no reduction to their past pumping whatsoever.) Finally, under the Final Judgment, the Stipulating Parties have their production rights protected from a future determination of unreasonableness or non-beneficial use, and in that way, have "obtained" a "benefit or right which they did not already have…"

VIII. THE WILLIS CLASS MOTION DOES NOT NECESSITATE THE FILING OF A MEMORANDUM OF COSTS

Overliers argue that Cal. Rules Ct., Rule 2.1700(a)(1) is binding on the Willis Class and therefore the expenses requested by this motion should be denied for failure to file a Memorandum of Costs. The Court specially set the Motion for Fees and Incentive Award by minute order. (Exhibit 35 to the NOL). The request for costs does not necessitate a memorandum of costs. The Willis Class followed the same or similar procedures with respect to its last successful fee and cost motion. The Court has already approved fees and costs to Willis Class Counsel without a Memorandum of Costs being filed. The Willis Class has properly requested the relief sought herein.

IX. CONCLUSION

It is fair and equitable to apportion the fees and costs of Class Counsel to the Public Water Suppliers and the Overlier parties who received a fixed and free production allocation under the Judgment and Physical Solution.

Dated: March 25, 2016

Respectfully submitted,
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