COURT OF APPEAL, STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT
F075451

ANTELOPE VALLEY GROUNDWATER CASES

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

APPELLANTS' REPLY TO LANDOWNERS RESPONDENTS' BRIEF

(1 of 3)

(Willis Class Appeal)

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EXPLANATORY PROLOGUE

The Respondents (Landowners, Purveyors, and the United States) filed three separate briefs in response to Appellants' Opening Brief. In an attempt to be efficient, the Class has filed three Reply Briefs addressing each Respondents' arguments, and to the extent the arguments overlap or involve common principles, the Class has incorporated by reference those common responses, as follows.

Reply to Landowners' Brief

1) Standard of Review
2) Violations of California Constitutional and Water Law
3) Conclusion/Disposition

Reply to Purveyors' Brief

1) Violations of California Constitutional and Water Law
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1) The Propriety of the Physical Solutions Award of the Unused Portion of the Government's Federal Reserved Right to Purveyors
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INTRODUCTION

In its Appellants' Opening Brief, the Willis Class asserted the following claims of reversible error:

> **First,** the 2015 Judgment and Physical Solution violate the California Constitutional and groundwater law which protects 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,** the trial court violated the Willis Class's due process rights by denying the Willis Class fair notice and a meaningful opportunity to be heard.
>
> **Fourth,** 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."

In their Respondents' Brief, the seven Landowner Respondents ("Landowners" or "Respondents") do not really address these issues head-on. Instead, they mostly parse words. For example:

> Respondents agree that under California law, the unexercised correlative water rights of an overlying landowner may not be ***extinguished,*** and insist the Willis Class's water rights have not been extinguished in this case. Rather, they argue the Willis

Class's right to pump has merely been (a) "***conditioned***" on the approval of a New Production Application and the payment of a Replacement Water Assessment Fee, (2) "***subordinated*** to protect existing uses" in the drought-ridden Basin, or (3) suffered a "***zero allocation***" at the hands of the trial court.

Similarly, Respondents do not dispute that a ***permanent*** zero allocation of water to the Willis Class would be unlawful, but they insist the Physical Solution which forever exchanges the Willis Class's correlative water rights for a potential ability to ***purchase*** water is only "a ***temporary*** program" to deal with "dry years." Respondents insist things *could* change if the long-standing drought and overdraft conditions in the Basin end in the future.

Respondents next acknowledge that the 2011 Judgment eliminated the Public Water Suppliers' ("Purveyors") ***prescription*** claims to the Basin's Native Safe Yield as against the Willis Class and thus, prevented Purveyors from proceeding on those claims against the Class in this litigation. They also concede that California precedent has repeatedly held that overlying rights are not lost due to non-use. Nevertheless, Respondents argue for affirmance of the Physical Solution in this case which allocates the entirety of the Basin's Native Safe Yield to Respondents based on "***equitable considerations,***" such as "***past groundwater use***" and the Respondents' longstanding "reliance upon the Basin for a sustainable groundwater supply."

Finally, Respondents maintain the Wills Class was not deprived of a ***meaningful opportunity*** to be heard. According to Respondents, the trial court, in its discretion, merely ***severely***

limited the Willis Class's ability to participate and present its evidence. Respondents insist the Willis Class received "adequate notice" because although the Class members were not informed that their water rights would be ***terminated***, the members were told their rights could be ***reduced*** and/or ***conditioned***.

"The law is not a mere game of words." (*City and County of San Francisco v. Muller* (1960) 177 Cal.App.2d 600, 603.) And the application of rules of law to a given factual setting requires "an analysis which transcends simply a recitation of the [applicable] principle and an exercise in semantics." (*See, 7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 904.) The whole purpose of the adoption of a physical solution is, after all, "to do substantial justice." (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* ("*Tulare*") (1935) 3 Cal.2d 489, 574.) In particular, it is the duty of the court to "work out a fair and just solution" (*Rancho Santa Margarita v. Vail* (1938)11 Cal.2d 501, 561), which protects landowners with superior rights and prevents the ultimate destruction of those rights (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 371, 383.)

In the Physical Solution adopted by the trial court, the stipulating parties received what can only be classified as the "golden ticket" to water in the Basin – a permanent right to a fixed amount of water from the

Native Safe Yield which cannot be taken away, even if the use becomes unreasonable in the future, with the ability to sell and/or transfer that right and carryover and amass any unused portion of that allocation. The value of this permanent water right is enormous.[1] By comparison, the Willis Class landowners received a zero-percent allocation of Native Safe Yield. What makes this result particularly galling is the fact it rewards the wrong-doers who over-pumped the Antelope Valley Basin into a severe overdraft in the first place at the cost of an entire class of innocent landowners who have yet to develop their land.

CLARIFICATION OF THE RECORD AND CORRECTION OF RESPONDENTS' FACTUAL MISSTATEMENTS

Landowners' Respondents' Brief ("LORB") contains several misstatements of material fact and red herrings intended to misdirect the Court's attention away from the fatal errors of the trial court's 2015

1 The Basin's total Native Safe Yield is 82,300 acre-feet. (3REPLYEXCT2392:7-8)(176JA157535:7-8.) The trial court noted that in 2015, the cost of purchasing an acre-foot of imported water is $310. (3REPLYEXCT2354:14-15)(176JA157478:14-15.) As all of the Native Safe Yield was permanently allocated, in light of the cost of purchasing a single acre-foot of water, the value of the permanently allocated water is easily in the several billions of dollars.

Judgment and Physical Solution. Thus, clarification of the record is necessary.

A. Respondents Are Few in Number, But They Have Drained the Basin of a Disproportionate Amount of Water.

There are seven Landowner Respondents to the Willis Class appeal of the 2015 Judgment. Primarily large farming companies, these Landowners collectively received 26,755 acre-feet or 32.5 percent of the 82,300 acre-feet Native Safe Yield ("NSY" or "native groundwater") pursuant to the Physical Solution, while the Willis Class (consisting of approximately 18,000 landowners) received zero-percent of the NSY. (3REPLYEXCT2470-2473;2348:22-23)(176JA157613-157616;157472:22-23.) Respondent Bolthouse alone was allocated 9,945 acre-feet of water as a fixed, permanent, transferable, and free production right. (3 REPLYEXCT 2470)(176JA157613.)

B. Willis Class's Groundwater Rights Are Clearly Defined By Law and Prior Judgment.

Landowners erroneously contend that the 2011 Judgment did not define the groundwater rights of the Willis Class. (LORB p. 31.) The 2011 Judgment specifically detailed that the Willis Class landowners "have 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." (3REPLYEXCT 2541:11-13; 2538:1-2 [further confirming "the Settling Parties' [Willis Class and Purveyors] share of Native Safe Yield is not subject to any Replacement Assessment"] (176JA157684:11-13; 157681:1-2.) The 2011 Judgment further defined an overlying right as an overlying landowner's right "to use groundwater from the Native Safe Yield." (3REPLYEXCT2538:3-4)(176JA157681:3-4.) These provisions set clear parameters that defined the Willis Class's groundwater rights as overlying landowners in the Basin.

C. The 2015 Judgment is a Permanent Allocation Which Precludes the Willis Class From Ever Pumping From the NSY.

Respondents further assert that the "Physical Solution expressly allows Willis to obtain Watermaster approval to construct a well and start producing ***native groundwater*** underlying their land for use on their overlying land." (LORB at p. 50, emphasis added.) This is incorrect as the entire NSY has been permanently allocated to the stipulating parties; thus, the Class may never pump from the Basin.

Specifically, Paragraph 3.5.32 confirms that the production rights allocated to the stipulating parties free of replacement assessment equals the entire NSY. (3REPLYEXCT2389:6)(176JA157532:6) Hence, there is no native groundwater left to be allocated.

Paragraph 6.5 confirms that the trial court has no jurisdiction to modify the 2015 Judgment - only interpret, enforce, administer, or carry out its terms. (3REPLYEXCT2405:26-2406:5)(176JA157548:26-157549:5.) Hence, the allocations may not be modified.

Paragraph 18.5.9 confirms that if there was ever in the future an increase or decrease to the NSY, the adjustment must be applied pro-rata to the stipulating parties identified in exhibits 3 and 4 of the Physical Solution. (3REPLYEXCT 2427:9-22)(176JA157570:9-22.) Therefore, under the 2015 Judgment, the stipulating landowners and appropriators have the benefit of any and all adjustments or changes to the NSY free of replacement assessment in perpetuity to the exclusion of the Willis Class members.

D. The New Production Directives (1) Do Not Apply to the Stipulating Parties, and (2) Impose on the Willis Class an Unreasonable and Expensive Twelve-Step Process Which is Far More Onerous Than Simply Providing "Basic Information."

Respondents also misrepresent and trivialize the New Production Application Procedure by claiming that the "application process applies to all persons, not just the Class" and that only "basic information" is required. (LORB at p. 106.)

First, the New Production provisions apply to the Willis Class but not the stipulating parties. (3REPLYEXCT2411:27-2412:2) (176JA 157554:27-157555:2.) Paragraph 3.5.20 defines new production as "Any production of Groundwater from the Basin not right under this judgment, as of the date of the judgment." (3REPLYEXCT:2388:17-18) 176JA157531:17-18.) Therefore, those with production rights, as the stipulating parties, are immune from the New Production provisions. The stipulating parties may also construct new wells and change their point of extraction anywhere on their leased or owned properties without satisfying any of New Production procedures. (3REPLYEXCT 2420:14-22)(176JA157563:14-22.) Respondents and other stipulating parties who received a permanent allocation of water also received the ability to

transfer that production right without any limitations other than it not "cause material injury" and the ability to carryover those rights in the years they choose not to produce groundwater. (3REPLYEXCT2419:12-16["Parties may transfer all or any production of their Production Right to another Party so long as such transfer does not cause Material Injury"])(176JA157562:12-16.) Thus, the 12-steps imposed on the Willis Class via the New Production provisions hardly apply equally to the stipulating parties who received a permanent allocation of the NSY.

In addition, the New Production provisions require far more than "basic information." Specifically, Willis Class landowners are required to fully comply with CEQA, prepare a "water conservation plan" and submit a written statement that the proposed new production "will not cause material injury," both of which must be approved and signed by a "California licensed and registered professional civil engineer." (3 REPLYEXCT 2429:24-26; 2430:1-4 and 9-11) (176JA157572:24-26; 157573:1-4 and 9-11.) Further, the Willis Class must prepare both an economic impact and physical impact analysis. (3REPLYEXCT2430:5-8) (176JA157573:5-8.) There is also a thirteenth open-ended, non-specific requirement for "other pertinent information which the Watermaster

may require." (3 REPLYEXCT 2430:14-15)(176JA 157573:14-15.) These requirements mandate far more than "basic information." Such information is not required by the County of Los Angeles to install a well. (*See*, Los Angeles County Code §11.38.160.) Notably, the Willis Class expert who opined on these burdensome requirements remains unrebutted. (3REPLYEXCT1981[Stephen Roach concluded that "the process available to the [Willis Class] to achieve water rights is extremely rigorous, the cost of which could more than offset the value gain the properties would achieve with water"]) (173JA154507.)

E. The 2015 Judgment Robbed the Willis Class of Their Correlative Water Rights, and the Stipulating Parties Permanently Divided the Spoils.

The 2015 Judgment reflects negotiating trade-offs amongst the stipulating parties. (*See, e.g.* 2REPLYEXCT810:13-21 ["the Stipulating Parties have agreed to provisions in the Physical Solution which are only available by stipulation"], 811:22-25["In consideration for the agreement to pay Small pumper Class attorneys' fees and costs...a drought water management program shall be implemented as provided in Paragraphs 8.3, 8.4, 9.2 and 9.3 of the Judgment"]) (128JA125756:13-21, 125757:22-25.) However, the Willis Class was excluded from the negotiations that

resulted in a stipulation between the Purveyors and the Landowners which relied on approval of the Physical Solution. (*See*, AOB at pp.49-51.)

During those negotiations, Purveyors secured entitlements to the NSY, the unused portion of the federal reserved water right, a substantial portion of the return flow rights from imported water, and free water under drought provisions. (3REPLYEXCT2469; 2402:23-25; 2486-2787; 2408:4-8; 2409:5-10)(176JA157612; 157545:23-25; 157629-157630; 157551:4-8; 157552:5-10.) Respondents received the balance of free production rights of the NSY and pre-ramp down rights for two years plus a ramp down period for an additional five years. (3REPLYEXCT2470-2473;2407:19-21)(176JA157613-157616;157550:19-21.) In contrast, the Willis Class of over 18,000 overlying landowners received a permanent zero-allocation of the NSY. (3REPLYEXCT 2348:22-23.) (176JA157472:22-23.) The 2015 Judgment and Physical Solution did not respect water right priorities of overlying landowners as required under *City of Barstow v. Mojave Water Agency* ("*Barstow*") (2000) 23 Cal.4th 1224, 1250. Instead, it accommodated the economic self-interest of each of the stipulating parties to the detriment of the non-stipulating Willis Class.

STANDARD OF REVIEW

A. Respondents' Zealous Reliance on the "Presumption of Correctness" is Misplaced.

Respondents seek to excuse the problems inherent in the trial court's decision by arguing the age-old adage that "a judgment is presumed correct." (LORB p. 38; Purveyors' Respondents' Brief ("PRB") at p. 60-61.) Respondents' blanket reliance on the presumption of correctness is misplaced in this case. The presumption is not a panacea for all that ails this judgment. The presumption is much more discriminating and systematic than Respondents acknowledge.

1. The presumption only applies to factual findings and has no application to the trial court's determination on legal issues.

Certainly, a court's factual determinations are entitled to the presumption of correctness. (*Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 179; *Graham v. Solem* (8th Cir. 1984) 728 F.2d 1533, 1550, fn. 2.) But the trial court's determinations on purely legal issues (or on mixed questions of fact and law) are not subject to the presumption. (*People v. Aldridge* (1984) 35 Cal.3d 473, 477; *Ahmad v. Redman* (3rd Cir.1986) 782 F.2d 409, 412 [citing *Strickland v. Washington* (1984) 466 U.S. 668, 698].)

2. The presumption only applies to matters on which the record is silent.

The presumption of correctness applies only to a silent record. (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1550.) The presumption does not apply where (as here) the record reflects an error was actually committed. (*See, Johnston v. Southern Pac. Co.* (1907) 150 Cal. 535, 537.) This record leaves no room to presume "correctness." (*Ibid.*; *Gee v. American Realty & Const.* (2002) 99 Cal.App.4th 1412, 1413.)

The presumption also does not apply where the record demonstrates that the trial court failed to exercise its discretion or otherwise perform a function required by law. (*Kemp Bros. Const., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1477; *Gardner v. Superior Court* (1986) 182 Cal. App.3d 335, 338-340.) Here, the record is clear what was and was not done by the trial court. The court (1) erred in the application of California water rights law, (2) failed to fulfill its duty to thoroughly investigate and independently investigate possible physical solutions, (3) failed to exercise any discretion by simply adopting wholesale the physical solution agreed-upon by the settling parties, and depriving the Willis Class of a meaningful opportunity to be heard.

As stated long ago by the court in *Steuri v. Junkin* (1938) 27 Cal. App.2d 758, when the record states what was done, "it will not be presumed that something different was done." (*Id.* at 760.)

B. Respondents' Insistence That All of the Trial Court's Rulings and Decisions Should Be Reviewed Solely Under an Abuse of Discretion Standard is Overly Simplistic.

Respondents cite various cases for the general proposition that "the court's approval of the 2015 Judgment and Physical Solution is reviewed for abuse of discretion." (LORB at p. 37; PRB at p. 51.) Throughout their briefs, Respondents insist the ONLY "question before the Court of Appeal is ... whether the court abused its discretion in entering the 2015 Judgment. (LORB p. 38; PRB at p. 52.) Their analysis of every issue raised by the Willis Class invokes a very deferential standard and predictably concludes the trial court did not abuse its discretion.

Unfortunately, the standard of review in this case is not that easy. "[T]he required deference varies according to the aspect of a trial court's ruling under review." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.)

1. Even where the normal standard of review is abuse of discretion, the *de novo* standard may be necessary for some issues.

In a case as complex as this one, some aspects of the court's decision are reviewed for abuse of discretion, while others are subject to *de novo* review. (*See, Daws v. Superior Court* (2019) 42 Cal.App.5th 81, 86.) Even where the normal standard of review applicable to a trial court's ruling is abuse of discretion, the *de novo* standard may be warranted where the determination of whether the statutory criteria were satisfied amounts to statutory construction and a question of law. (*Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 391.) For example:

- The question of the consistency between the court's 2011 Judgment and the court's 2015 Judgment adopting the Physical Solution is reviewed ***de novo***. (*See, California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2016) 2 Cal.App.5th 1067, 1081 [consistency of local regulations with CEQA are matters of law subject to de novo or independent review].) In the court below, even the Purveyors conceded that the question "whether the two documents are consistent with each other and with California law is itself a question of law." (2 REPLYEXCT1160:26-1161:1)(130JA126815:26-126816:1)

- Whether the trial court properly interpreted and applied California water law in eliminating or divesting the groundwater rights of an entire class of 18,000 class members in the NSY and allocating the NSY on a permanent basis to overlying pumping landowners and appropriators is reviewed *de novo* (*In re Marriage of Spector* (2018) 24 Cal.App.5th 201, 207 [exercise independent *de novo* review of trial court's interpretation and application of statutory and constitutional law.)

- The proper standard of appellate review for the question of whether the Willis Class was afforded due process is reviewed ***de novo***. (*Severson & Werson, P.C. v. Sepehry-Fard* (2019) 37 Cal.App.5th 938, 944 ["procedural due process claims are review *de novo* because 'the ultimate determination of procedural fairness amounts to a question of law'"].)

2. Contrary to Respondents' assumption, the abuse of discretion standard is not a single unified standard.

Even if the abuse of discretion standard is applicable, that is not the end of the story. The California Supreme Court has noted the abuse of discretion standard of review is "not a unified standard." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) Rather, it is a wide ranging standard that vests in the trial court "a zone of autonomy"—from as "broad" to "narrow." (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1222 [Rushing, P.J., concurring]; *Packer v. Superior Court* (2014) 60 Cal.4th 695, 711 ["broad discretion"]; *Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1327 ["narrowly"]; *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1344 ["quite limited"]; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144 [highly sensitive issues that implicate

public policy require "heighten scrutiny" or more "careful review" of the trial court's exercise of discretion].)[2]

At bottom, "the concept of 'discretion' is one of *latitude*." (*Miyamoto, supra,* 176 Cal.App.4th at 1223 (Rushing, concurring).) "[T]he kinds of issues that will fall within a trial court's discretion... are probably best viewed as a family of customs that have grown out of the judicial experience of the ages." (*Id.* at 1223.)

> **First**, the most obvious and familiar example of discretion "is where the court makes a *finding of fact* on conflicting evidence. Ordinarily such a finding is binding on appeal.... [T]here is a sound reason for appellate deference, which is that the trial judge is in the better position to determine the true meaning of conflicting evidence." (*Id.* at 1222.)
>
> **Second**, discretion is afforded to trial courts on questions "dependent on ... a complex and debatable set of competing considerations." (*Id.* at 1223.) Deference is paid to the trial court because "the social cost of questioning it outweighs the

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2 This has led several jurists to complain that the "'abuse of discretion' standard 'is a standard ... which is so amorphous as to mean everything and nothing at the same time ....'" (*Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1022 [disapproved on other grounds in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, fn. 4]; *Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152 ["the concept 'abuse of discretion' is not easily susceptible to precise definition"]; *Miyamoto, supra,* 176 Cal.App.4th at 1222 (Rushing, concurring) ["unfortunate cloud of confusion surrounds the 'abuse of discretion' standard of review...."].) One court opined that the "abuse of discretion standard is itself much abused" by courts and litigants. (*People v. Jackson* (2005) 128 Cal. App4th 1009, 1019.)

private benefit" of having a reviewing court second-guess the decision. (*Id.*)

> The **third** category of discretion is more "properly viewed,... not [as] an exercise of discretion but an application of a rule of law. [A] trial court ha[s] no discretion to decide what the applicable law [is] or to determine its logical effect in light of the facts found. Its legal analysis [is] either correct or incorrect. Since this Court's power to decide questions of law is paramount to that of the trial court, [the reviewing court is] entitled and indeed obliged to reverse any ruling that [it] find[s] rests upon an error of law..." (*Id.* at 1222.)

3. Review under an abuse of discretion standard is not simply a rubber stamp of the trial court's decision.

"[I]n this sense..., trial court discretion is not a sacrosanct concept." (*Hurtado, supra,* 167 Cal.App.3d at 1022.) "Review under an abuse of discretion standard ... is not simply a rubber stamp." (*Bryant v. Ford* (11th Cir.2020) 967 F.3d 1272, 1276.) "[T]he 'abuse of discretion' standard does not give nearly so complete an immunity bath to the trial court's rulings as counsel for appellees would have reviewing courts believe." (*Hurtado, supra,* at 1025 [citing Friendly, "Indiscretion About Discretion" (1982) 31 Emory L.J. 747, 784].)

> "In no case is a discretionary standard a license to commit error. Whether the zone in a given setting be broad or narrow, it never extends to getting the law wrong.... The governing law can therefore never be a question entrusted to trial court discretion. Nor, properly understood, can the application of law to a given set of facts." (*Miyamoto, supra,*176 Cal.App.4th at 1222-1224 (Rushing, concurring.)

4. The test for abuse is <u>not</u> simply whether the trial court "exceeded all bounds of reason."

Respondents also seek to confine the test for abuse of discretion to one simple question "whether the trial court exceeded the bounds of reason?" (LORB at p. 37; PRB at p. 51.) However, at least one court has recognized that this type of "pejorative boilerplate is misleading since it implies that in every case in which a trial court is reversed for an abuse of discretion its action was utterly irrational. Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

For example, "a reasoned decision based on a reasonable, but mistaken, view of the scope of discretion would still be an abuse of judicial discretion, even though it would not exceed the bounds of reason in the ordinary meaning of the phrase." (*Bustos v. Global P.E.T., Inc.* (2017) 19 Cal.App.5th 558, 563.) Likewise, if a trial court makes a decision which on its face is within "the bounds of reason" but fails to adequately consider all of the material facts affecting the equities between the

parties, it has abused its discretion. (*Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 447.)

5. Contrary to Respondents' assumption, a trial court's exercise of its equitable powers is not *always* reviewed under the abuse of discretion standard.

Respondents assert "the court's approval of the 2015 Judgment and Physical Solution is reviewed for abuse of discretion" because it "is an exercise of the court's equitable powers." (LORB p. 37; PRB, p. 51.)

However, the simple fact that the appellate court is reviewing a lower court's exercise of its equitable powers does not *automatically* require the application of the abuse of discretion standard. (*See, Florida v. Georgia* (2018) __ U.S. __; 138 S.Ct. 2502, 2507 [Supreme Court of the United States concludes Special Master applied too strict a standard in fashioning an equitable decree apportioning water in an interstate river basin]; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319 [application of equitable estoppel is ordinarily a question of fact; however, it is properly resolved as a matter of law when only "one inference may **be** reasonably drawn" from the material facts].)

When established California water law is applied to the facts of this case, the Willis Class is entitled to have this Court conclude, under the

de novo standard of review, that they have paramount overlying rights which must be recognized and protected by any physical solution.

LEGAL DISCUSSION OF RESPONDENTS' ARGUMENTS

There are three fundamental issues for resolution in this appeal.

First, whether a trial court may extinguish or subordinate the unexercised overlying water rights of an entire class of landowners from the NSY and permanently allocate the NSY in imposing a physical solution in a groundwater adjudication.

Second, whether the Physical Solution adopted by the court in the 2015 Judgment is consistent with the 2011 Judgment that approved the Willis Class Settlement.

Third, whether the lower court violated the due process rights of the Willis Class members by failing to notify Class members that their water rights in the NSY may be eliminated, precluding Class counsel from introducing alternative physical solutions, cross-examining witnesses, and limiting the testimony of one Willis Class expert while excluding completely the testimony of the other Class expert.

I. THE 2015 JUDGMENT VIOLATES CALIFORNIA WATER LAW PRINCIPLES.

A. The 2015 Judgment Unlawfully Extinguishes the Willis Class Members' *First Priority Correlative* Right in the Native Safe Yield.

Respondents concede that Willis Class members, as all other landowners in the Basin, enjoy an overlying first-priority correlative share in the NSY. (LORB at p. 39, *citing Katz v. Walkinshaw* (1903) 141 Cal.116, 135-136; *Tehachapi-Cummings County Water District v. Armstrong* ("*Tehachapi-Cummings*") (1975) 49 Cal.App.3d 992, 1001; and *Barstow, supra*, 23 Cal.4th at 1240.) However, they argue the Willis Class's correlative share of the NSY should be *zero* and subject to Replacement Water Assessments. (LORB at p. 108; PRB, p. 89-90.) They justify the zero share based on the Class members' speculative future water use, the "reasonable" cost of the replacement water, and the fact that actively-pumping landowners and Purveyors who caused the overdraft were forced to cut their exiting pumping "by more than 50 percent." (LORB at p. 22; PRB, p. 89.)

Respondents' argument and their justifications directly contravene well-established California law. The Physical Solution adopted by the court plainly extinguishes the overlying groundwater rights of the entire

Willis Class to pump from the NSY, materially impairing the value of their properties.[3]

1. California Law Clearly Precludes Extinguishing Unexercised Overlying Water Rights.

Respondents cannot cite precedent to support the trial court's extinguishment of the Willis Class' overlying rights because no court has ever extinguished the unexercised correlative first-priority right of an overlying landowner. (*Tulare, supra,* 3 Cal.2d at 525; 530-531; *In re Waters of Long Valley Creek Stream System* ("*Long Valley*") (1979) 25 Cal.3d 339, 347, 358-359; *Barstow, supra,* 23 Cal.4th at 1250.) Nor has any court determined the mere non-use of an overlying right is per se unreasonable. (*Id.*) The reason is clear – the unexercised groundwater right of a dormant overlying landowner is constitutionally protected. (Cal. Const. Art. X, §2.) The Supreme Court in *Barstow* mandated that the hierarchy of water right priorities cannot be ignored in any physical solution imposed by the trial court. (*Barstow, supra,* 23 Cal.4th at 1250.) While a court has power to impose *reasonable* regulations for water use,

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3 Willis Class's expert Stephen Roach opined that by excluding the ownership of the Class from any inherent water rights, the Physical Solution would have a material negative impact on the value of the Willis Class properties. (3REPLYEXCT1981)(173JA154507.)

the court must protect overlying landowners who have paramount rights, like the Willis Class members. (*Id.* at 1249-1250 [*citing Peabody, supra,* 2 Cal.2d at 383-384].)

Respondents' citation to the California Constitution ignores the portion which preserves and protects the future groundwater right of an overlying landowner. (LORB at p. 41-42). The relevant portion of Article X, section 2, is as follows:

> Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or ***may be made adaptable***, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

(Cal. Const. Art. X, §2.)[4]

The *Tulare* case, the first Supreme Court decision after Article X, section 2 was enacted, made clear that the reasonable and beneficial use

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4 Although the quoted language refers to riparian rights, overlying landowner rights are analogous to riparian rights. (*Tulare, supra,* 3 Cal.2d at 491.)

doctrine protects current and *future prospective rights* of overlying landowners. (*Tulare*, *supra*, 3 Cal.2d at 525 ["The new doctrine not only protects the actual reasonable beneficial uses of the riparians, but ***also the prospective reasonable and beneficial uses*** of the riparian"], emphasis added.) Balancing the need for certainty and the reality that prospective reasonable and beneficial uses cannot be fixed, the Court found "the trial court in its findings and judgments, ***should declare such prospective uses paramount to any right of the appropriator.***" (*Id.*) In doing so, the Court sought to protect such prospective overlying rights to water against potential claims of prescription by appropriators while ensuring water is put to reasonable and beneficial use at all times. (*Id.*) Since overlying landowners' rights are paramount to appropriators' rights, consistent with *Tulare*, it is reasonable for a physical solution to provide that water may be used by others until the overlying landowners' need for water arises at which time the court's continuing jurisdiction would allow quantification and review for reasonable and beneficial use.

Tulare further held that an overlying right is not lost, and cannot be extinguished, due to non-use of that right. (*Id.* at 530-531.) The Court

explicitly struck down a provision of the Water Commission Act that deemed certain landowners lost their riparian right after 10 years of non-use. (*Id.* at 530-531.) In doing so, the Court adamantly noted the Water Commission Act provision "is contrary to the letter and spirit of the 1928 constitutional amendment.... That amendment, while limiting the riparian as against an appropriator, to reasonable beneficial uses ... ***expressly protects the riparian not only as to his present needs, but also as to future or prospective reasonable beneficial needs.***" (*Id.*)

To this day, *Tulare* continues to be cited with approval. (*See, City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 298-299; LORB at p. 52 ["...the Supreme Court's decision in *Tulare*, which the California Supreme Court continues to cite with approval..."], original italics.)

Long Valley, like *Tulare*, held "[t]he rights of a riparian owner are not destroyed or impaired by the fact that he has not yet used the water upon his riparian lands, and therefore that ***the riparian right exists, whether exercised or not.***" (25 Cal.3d at 347, emphasis added.) Contrary to the Respondents' argument, *Long Valley* expressly cautioned against extinguishment. (*Ibid.*)

Furthermore, despite recognizing the State Legislature's intent in granting the State Water Resources Control Board ("Board") sweeping authority to determine the nature and scope of water rights, the *Long Valley* Court cautioned that "this grant does not authorize the Board to place limitations on future riparian rights that would raise serious constitutional questions and thereby create a substantial risk of judicial invalidation, unless the statute reveals a clearly expressed intention." (*Id.* at 350.)

In *Barstow,* the Supreme Court repeated its admonition that the unexercised rights of an overlying landowner may not be extinguished. (*Barstow, supra,* 23 Cal.4th at 1250.) The Court held the judiciary "may neither change priorities among the water rights holders ***nor eliminate vested rights*** in applying the [physical] solution without first considering them in relation to the reasonable use doctrine." (*Id.*, emphasis added.) This finding was made in the context of reducing a *present* unreasonable use of groundwater to a reasonable future use; however, *Barstow* did not find that an unexercised overlying right could be extinguished. *Barstow* only acknowledged the trial court's authority to limit ***currently exercised*** overlying rights to a future production right

based on a finding that continued pumping at existing rates would be unreasonable. Thus, absent a specific and individualized determination of each landowner's use to be unreasonable, overlying landowners maintain correlative first-priority rights both for their current and future reasonable and beneficial uses. In reaching its decision, the Court further observed that Article X, section 2 "carefully preserves riparian and overlying rights" and that the court "never endorsed a pure equitable apportionment that completely disregards overlying owners' existing legal rights." (*Id.* at 1242; 1248).

Tehachapi-Cummings, cited by Respondents, does not allow other landowners to displace or take priority over a property owner's unexercised overlying rights. (LORB at p. 52-53.) In that case, the dispute was exclusively among overlying groundwater right holders. (*Tehachapi-Cummings, supra,* 49 Cal.App.3d at 1001.) The Court of Appeal confirmed that the "proportionate share of each owner is predicated not on his past use over a specified period of time, nor on the time he commenced pumping, but solely on his current reasonable and beneficial need for water." (*Id.*; *see also,* Arthur L. Littleworth & Eric Garner, California Water II (Solano Press 2019), at p. 79 ["There are no

senior overlying users who gain priority by being the first to pump groundwater. Overlying rights are not lost by nonuse"], citations omitted.)

Respondents do not dispute the foregoing analysis regarding protection of future overlying rights. Indeed, they previously asserted that an "overlying usufructuary right to pump and use groundwater" is "flexible based upon the current ***and future needs***" of a pumper. (1 REPLYEXCT350:24-26, emphasis added) (76JA70757:24-26.) Similarly, the trial court agreed California water law cannot be read to extinguish unexercised overlying rights:

> **Ms. Brennan**: ... But first and foremost, I want to state that under the California Supreme Court's ruling in *City of Barstow vs. Mojave*, they specifically said that unexercised groundwater rights cannot be extinguished in a nutshell.
>
> **The Court**: I agree with that. ***That's the law***.

(43RT24407:16-2, emphasis added.)

All overlying landowners have a correlative right in the NSY that must be preserved regardless of any overdraft or cutbacks by other parties. Thus, the future water use of the Willis Class cannot be deemed *per se* unreasonable to circumvent this rule to extinguish their current unexercised overlying right.

2. *Long Valley* Does Not Support "Subordination" of the Willis Class Members' Overlying Groundwater Rights.

Landowners concede the groundwater rights of the Willis Class were "eliminated."[5] (LORB at pp. 45, 108.) Nevertheless, Respondents argue the Class's rights were appropriately "subordinated." (LORB at pp. 58-59; PRB, p. 52.) They maintain subordination is consistent with the Supreme Court's *Long Valley* decision. (*Id.* [relying on *People ex rel. State Water Resources Control Bd. v. Forni* (1979) 54 Cal.App.3d 743 ("*Forni*").])

Respondents' play on words is to no avail. For the following reasons, the *subordination* of the Willis Class's property interests in this case is improper.

First, the 2011 Judgment protected and preserved the Class's interest in the NSY thereby removing any doubt that their groundwater rights may be subordinated or extinguished. (3REPLYEXCT2541:11-13) (176JA157684:11-13.) If that language was not clear enough, the trial court further explained, "[b]y eliminating the Public Water Suppliers' prescription claims and maintaining correlative rights *to portions of the*

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5 Landowners carefully avoid using the term "extinguish."

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." (1REPLYEXCT278:1-4, emphasis added)(13JA15487:1-4.) Thus, the Class's interest in the NSY is unassailable.

Second, even absent the 2011 Judgment, the *Long Valley* decision remains factually distinguishable as it did not authorize extinguishing riparian rights. In *Long Valley*, riparian Ramelli actively diverted water for use on 89 acres and claimed a future right to divert water for use on the remaining 2,884 acres he owned. (*Long Valley, supra,* 25 Cal.3d at 346.) Ultimately, the court reversed the matter because the Board's decision at issue "entirely extinguished Ramelli's riparian claim to the future use of water." (*Id.* at 350.) Critical here, Ramelli, unlike the Willis Class landowners, was already a diverter of water, who sought an *additional* unreasonable amount of water for his remaining 2,884 acres of land. Even if Ramelli could be classified as a "dormant" landowner as to his undeveloped land, *Long Valley* held that his riparian right could not be extinguished. (*Id.* at p. 347 ["The rights of a riparian owner are ***not destroyed or impaired*** by the fact that he has not yet used the

water upon his riparian lands, and therefore that ***the riparian right exists, whether exercised or not***"], emphasis added.)[6]

It should be noted *Long Valley* was a split four to three decision in which the majority's suggested potential subordination of an overlier's future use of groundwater was not unanimously received among the justices. (*Id.* at 360-370.) The three dissenting Justices struggled with the majority decision. Justice Richardson espoused the *Tulare* principles while Justice Richardson allowed quantification of the future unexercised right if it is susceptible to quantification. (*Id.*)

Third, in *Barstow,* the Court later confirmed the long-recognized principle that those who own real property overlying an aquifer have a shared *first priority* right to pump native groundwater within the safe yield as needed to supply reasonable and beneficial uses on their overlying lands. (*Barstow, supra,* at 1240). In addressing *Long Valley*, the Supreme Court cautioned that courts "should have some discretion to

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6 Although the constitutional policies expressed in *Long Valley* regarding promoting certainty, finality and reasonable current and future use were determined in the context of riparian rights, they nonetheless apply to comprehensive groundwater adjudications. (*See, Barstow, supra,* 23 Cal.4th at 1241-1242; *Santa Maria, supra,* 211 Cal.App.4th at 287-288.)

limit the future groundwater use of an ***overlying owner who has exercised the water right*** and to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin." (*Id.* at 1248-1249 n.13, emphasis added.) Like *Long Valley*, *Barstow* at most implied the possibility of subordinating a **current actively pumping** overlier's future right to more water if that overlier's current pumping is unreasonable. Significantly, *Barstow* did not and refused to address the rights of pure dormant overlying landowners like the Willis Class who have never pumped water before.

Fourth, the concept of subordination remains murky at best with no court ever providing a clear definition, let alone a framework, for how a right may be subordinated. "Subordination" is defined as "the act or an instance of moving something (such as a right or claim) to a lower rank, class, or position." (Black's Law Dictionary, p. 1563 (9th ed. 2009).) *Long Valley* describes subordination as a Board's ability to determine that "an unexercised riparian claim loses its priority with respect to all rights currently being exercised" and that the riparian "ha[s] a lower priority than any uses of water it authorizes before the riparian in fact attempts to exercise his right." (*Long Valley*, *supra*, at 358-359.) However,

application of the philosophical concept of subordination to the Willis Class renders their overlying rights extinguished because they can never regain the right to pump from the NSY that has been entirely permanently allocated to others. (*See, infra*, I.E.)

We must assume *arguendo* the Supreme Court in *Long Valley* attempted to distinguish subordination from extinguishment because it found the Board could not extinguish Ramelli's claim to the future use of water. As previously discussed, this concept has never been applied to a landowner who has never pumped, let alone a group of over 18,000 dormant landowners like the Willis Class. However, with respect to the rights of the Willis Class, subordination is a misnomer. The Physical Solution adopted by the trial goes well beyond *subordination* by expressly extinguishing the Willis Class's right to ever benefit from the NSY which is permanently allocated in perpetuity to other parties. (*See, infra*, I.E.)

3. The 2015 Judgment and Physical Solution do not simply place "conditions" on the exercise of Willis Class's groundwater rights.

Respondents improperly cite to *Forni* in support of their argument that the "conditions" placed on the exercise of Willis Class's groundwater

rights is not "an unlawful taking or damaging of 'vested' riparian rights." (LORB at p. 56; PRB, p. 57-58.)

First, unlike here, the water use in *Forni* was deemed unreasonable by the Board. In *Forni*, a senior riparian's diversion of surface water from the Napa River to protect young grape vines was conditioned because it was deemed unreasonable. (*Forni, supra*, 54 Cal.App.3d at 753 ["While correctly arguing that a vested property right cannot be taken without just compensation, respondents ignore the necessity of first establishing the legal existence of a compensable property interest. Such an interest consists in their right to the reasonable use of the flow of water"].) This is consistent with Article X, section 2's mandate that water be put to reasonable and beneficial use.

Second, *Forni* was decided before the Court of Appeal, not the Supreme Court as Respondents misleadingly assert. (LORB at pp. 56-57.)

Third, *Forni* is distinguishable as it involved riparian rights and what the Board deemed reasonable regarding diversion of surface water. (*See, Wright v. Goleta* (1985) 174 Cal.App.3d 74, 87-89 [refusing to apply the comprehensive legislative scheme of surface water and riparian

rights to groundwater].) Therefore, Respondents' reliance on *Forni* is misplaced, misleading and inapplicable to the facts here.

Concerning the characterization of the reasonableness of the Willis Class's rights, the Willis Class never forfeited their water right. Rather, they actively litigated and protected their overlying right to a correlative share of the native groundwater free of replacement assessments. The unexercised groundwater rights of the Willis Class can hardly be deemed *per se* unreasonable. However, that is precisely what the lower court determined despite the testimony of Willis Class members regarding their prospective future use of groundwater, which included domestic use.(3 REPLYEXCT2350:10-13; 1REPLYEXCT33:21-23) (176JA 157474:10-13; 2JA1902:21-23.) No actual individualized findings were made as to the reasonableness of *each* of the 18,000 Willis Class members' future use, instead the court made a blanket finding that all future use by any Class member is *per se* speculative and therefore unreasonable. (*Id.*) Further, the trial court determined that "it would be unreasonable to require present users to further reduce their already severely reduced water use to reserve a supply of water for non-users' speculative future use." (3REPLYEXCT2350:11-13) (176JA 157474:11-

13.) However, as made clear by the Supreme Court in *Tulare, Long Valley and Barstow*, the trial court's finding that all future use by the Willis Class landowners is unreasonable, simply wrong and patently offensive.

4. The Physical Solution's "zero allocation" of water to the Willis Class cannot be used to circumvent the California law prohibiting extinguishment of water rights.

Contrary to the overwhelming body of law, Respondents maintain that the Willis Class members' correlative share of the NSY can be zero. (LORB at p. 108; PRB, p. 89-80.)

They first justify a zero-percent allocation using the "safe harbor" provision in the Willis Class Settlement, which stated the obvious: "If there is a subsequent Court decision whereby the Court determines that the Willis Class Members do ***not*** have Overlying Rights, this Agreement shall not require Settling Defendants to give the Willis Class Members any right to pump from the Native Safe Yield." (3REPLYEXCT 2541:27-2542:2, emphasis added;)(176JA157684:27-157685:2; LORB at p. 46.) Respondents' "safe harbor" justification is irrelevant and inapplicable here because the trial court expressly found the Willis Class *does* have overlying rights. (3REPLYEXCT2360:11-13; 2348; 2349:10)(176JA 157484:11-13; 157472; 157473:10.)

Respondents next claim a zero-percent allocation to the Willis Class is fair because the Replacement Water Assessment for purchasing imported water is reasonable. (LORB at p. 51; PRB, p. 75-76, citing 176JA157485 [Statement of Decision].) This argument also misses the mark. The zero-percent allocation effectively extinguishes the Willis Class's right to share in the NSY, subjecting all future Class pumping to Replacement Assessments for imported water. Moreover, imposing Replacement Assessments on domestic use places an impermissible burden on domestic use pumping in violation of Water Code sections 106 and 106.3. (*See, infra,* I.D.6) A zero-percent allocation is not "fair" or "reasonable." As discussed above, it is not permissible under the California law.

5. The extinguishment of the Class's vested water rights cannot be justified by the overdraft situation in the Basin.

Respondents then argue that because they had to significantly reduce their historic pumping, the Willis Class should bear the burden by losing their overlying rights. (LORB at p. 88 ["[B]ecause of the limited Native Safe Yield and severe reductions imposed on the Settling Parties, it would have been reversible error for the court to allocate any portion

of the limited supply to a Class with no past or present beneficial use for water"]; PRB at p. 89.)

Respondents seek to divert the Court's attention from the reversible error in this case – i.e., the *extinguishment* of the Class' overlying right to pump from the Basin's NSY. In any event, it should be reiterated that the overdraft's deleterious effects on the aquifer, which have persisted since 1951, were caused not by the Willis Class, but excessive pumping of the by other Landowners and Purveyors themselves. (1REPLYEXCT329:15-330:25) (14JA16379:15-16380:25.) The pumping cutbacks imposed on active pumpers were necessary to preserve the aquifer, maintain pumping at a safe yield, and prevent further deterioration of the aquifer. (3REPLYEXCT2353:4-13) (176JA157477:4-13.) Although Landowners and Purveyors were solely responsible for causing the overdraft and, thus, have unclean hands, the Physical Solution awards these parties a permanent right to pump from the NSY free of Replacement Assessment in perpetuity, contrary to the dictates of equity. Having benefited from past pumping that caused the overdraft, and having received permanent rights to future pumping, Respondents are in no position to claim that the required cutbacks justify the

extinguishment of the Willis Class's overlying rights to pump from the NSY.

6. The "self-help doctrine" cannot extinguish the Willis Class members' overlying groundwater right.

In the court below, Landowners conceded that the overlying owners' rights were "correlative" (1REPLYEXCT248:16-17; 249:18-19 [the correlative right is "***indivisible*** and ***shared equally*** by overlying landowners"], emphasis added) (12JA13619:16-17; 13620:18-19.)

On appeal, Landowners have changed their position. They now argue that self-help pumping by other overlying landowners has divested the Willis Class landowners of their overlying rights. (LORB at p. 45.) Without citing any authority, Respondents claim that in the Antelope Valley's over-drafted Basin, Respondents' self-help pumping amounted to prescription of the unexercised overlying rights of the Willis Class landowners. (*Id.*; PRB at p. 89-91.)

No court has ever addressed prescription of an overlying right by another overlier, but the Willis Class submits Respondents' analysis of this issue is incorrect. As detailed above, courts have long recognized that existing overlying uses do not take priority over unexercised overlying rights. (*Tehachapi-Cummings*, supra, 49 Cal.App.3d at 1001.) "There are

no senior overlying users who gain priority by being he first to pump groundwater. Overlying rights are not lost by nonuse." (Arthur L. Littleworth & Eric L. Garner, California Water III (Solano Press 2019), at 75 (footnotes omitted).

Further, the trial court made clear the Willis Class's groundwater rights were "immune from prescription ***by the only party who had such a claim*** – i.e., the [Purveyors]..." (3AA2076, emphasis added.)

A finding in this case that self-help pumping by overlying landowners could extinguish the unexercised correlative overlying rights of other landowners would create a race among dormant landowners to pump water fearing their rights would be lost. This result would further reward the wrongdoers who caused the overdraft in the first place, and offend the constitutional protections preserving future groundwater rights from extinguishment, thereby unfairly impacting the Willis Class member's property values. (3REPLYEXCT1981)(173JA154507.)

B. The Willis Class Members Do Not Seek a "Free Ride" or "Superior Rights" to Those of Their Neighboring Landowners.

In their brief, Respondents grossly mischaracterize the Willis Class' objections to the allocation of the NSY in the Physical Solution as an attempt to seek a "free ride" or "superior right." (LORB at p. 53.)

This is incorrect and misleading. The Willis Class seeks no "free ride" or a right "superior" to that of its fellow Antelope Valley landowners. Nor does the Willis Class dispute the need for a physical solution to address the on-going overdraft of the Basin, and, in fact, has advocated for the need of a "groundwater management plan" from the outset. (3REPLYEXCT2542:22-26 [Willis Class acknowledged the need "to conserve and maximize reasonable and beneficial use," "to create a groundwater management plan," and "appoint a Watermaster to oversee the management of the Basin's water resources"]; 2543:2-7[the Willis Class anticipated "the Physical Solution may require installation of a meter on any groundwater pump by a Willis Class Member"]) (176JA157685:22-26; 176JA157686:2-7.) Nor, as the record clearly indicates, does the Class oppose the temporary use of their unused water rights by other landowners to address the impact of the drought conditions in the Basin. (2REPLYEXCT1427:10-13)(131JA127842:10-13.) In fact, many of the alternative physical solutions proffered by the

Willis Class would do just that. (*See, e.g.* 1REPLYEXCT64,¶III.G.6.) (8JA8700, ¶III.G.6.)

However, the Willis Class strongly objects to the permanent allocations to Respondents and extinguishment of the Class members' overlying rights to pump from the NSY with the substitution of the potential ability to purchase imported water. The Class opposes the replacement of its members' vested constitutionally-protected water rights with the arduous New Production procedure by which the Willis Class (*if* they are permitted to participate at all) *might* be able to *purchase* imported water in a market full of uncertainty and notoriously low on supply.[7] (3REPLYEXCT2411:27-2412:2; 2428:22-2430:25) (176JA157554:27-157555:2; 157571:22-157573:25.)

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[7] A New Production Application may only be approved "on condition of payment of a Replacement Water Assessment." (3REPLYEXCT 2429:1-2)(176JA157572:1-2.) The Replacement Water Assessment is "[t]he amount charged by the Watermaster to pay for all costs incurred by the Watermaster related to Replacement Water." (*Id.* at ¶3.5.41.) Replacement Water is "[w]ater purchased by the Watermaster or otherwise provided to satisfy a Replacement Obligation." (*Id.* at ¶3.5.40.) Replacement Obligation is "[t]he obligation of a Producer to pay for Replacement Water for Production of Groundwater from the Basin in any Year in excess of the sum of such Producer's Production Right and Imported Water Return Flows." (*Id.* at ¶3.5.39.)

Regarding the source of Replacement Water, the trial court found that replacement water will be obtained by purchasing water from the

Landowners—whose correlative water rights are on the same superior plain as those of the Willis Class members—were allocated a permanent right to a fixed amount which may not be taken away, even if the use becomes unreasonable in the future, with the ability to sell and/or transfer that right and carryover any unused portion of the allocation. The Willis Class, by comparison, was allocated zero percent of the NSY and relegated to the New Production application procedure as its members' only means of obtaining water.

- The fact of the matter is that the Willis Class's claim to the groundwater is ***superior*** to that of the appropriating Purveyors of the water. Further, since the Willis Class's water rights are *on par* with those of Landowners, the Class's rights must be treated with the same respect and equal dignity.

- The fact of the matter is that the Willis Class's water rights are vested in the overlying landowners by virtue of their initial purchase of land in the Basin. The water rights exist by virtue of their landownership and are ***free*** in the sense that overlying landowners should not have to repurchase the water they already own as correlative water rights. (3REPLYEXCT2541:11-13[guaranteeing the Class's correlative rights would remain "free of any Replacement Assessment"])(176JA157684:11-13.)

State Water Project—which is unreliable, and that unreliability will only worsen during California's frequent droughts. (3REPLYEXCT 2354:14-21)(176JA157478:14-21.)

C. Paragraph 5.1.10 of the Physical Solution Does Not Apply to the Willis Class, and In Any Event, the Class is Not Required to Present Any Additional Proof of Their Right to the Native Groundwater.

Respondents make the misguided argument that there is no harm here because Paragraph 5.1.10 of the Physical Solution, entitled "Production Rights Claimed by Non-Stipulating Parties," provides the Willis Class an opportunity to prove their right to the native groundwater and if they can do so, grants them a portion of NSY. (LORB at p. 50.)

Not so.

"[T]he Physical Solution provides for the allocation of groundwater to unknown *existing* pumpers that prove their respective entitlement to water rights in the future." (3REPLYEXCT2357:23-2358:2) (176JA157481:23-157482:2.) By definition, the members of the Willis Class are not unknown "existing pumpers." (3REPLYEXCT 2387:21-2388:6) (176JA157530:21-157531:6.) In addition, the trial court's Statement of Decision makes abundantly clear that Paragraph 5.1.10 is ***not*** applicable to any Willis Class landowner: "A member of the [Willis Class] must comply with the New Production Application procedure specified in Paragraph 18.5.13." (3REPLYEXCT2411:27-2412:2) (176JA

157554:27-157555:2.) Therefore, Respondents' contention that Paragraph 5.1.10 provides the Willis Class an opportunity to prove their right to groundwater and grants them an avenue to pump from the NSY is false and misleading.

D. Even if Not Strictly Prohibited by California Law, the Physical Solution's Burdensome New Production Procedures Unreasonably Interfere With the Class's Access to Their Groundwater.

Respondents contend Willis Class members retain their right to pump, albeit by paying a Replacement Assessment for imported water.[8] This is insufficient to satisfy California groundwater law.

1. The Willis Class should not be forced to repurchase its own water.

As noted above, the members of the Willis Class own a correlative share of the Basin's NSY by virtue of their initial purchase of land. The water rights exist via their landownership and should not have to be *repurchased* by the Class members when a need arises in the future.

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8 Landowners' claim the Willis Class may produce "***native*** groundwater underlying their land" is plainly false. (LORB at p. 49-50, emphasis added.) By virtue of their zero allocation of the NSY, which was permanently allocated to the exclusion of the Willis Class, the Willis Class may never access the NSY.

2. The New Production Application process was made intentionally onerous, burdensome, and unreasonably costly.

Beyond paying for water they already own, the Willis Class may only pump (if at all) by undertaking an onerous, burdensome, and unreasonably costly regulatory process. (3REPLYEXCT2411:27-2412:2) (176JA157554:27-157555:2.) The twelve-step requirements create an economic barrier to pumping that unreasonably conditions any future pumping by Class members.[9] These unreasonable steps include: (1) preparing a "water conservation plan; preparing an "economic impact" report; (2) preparing a "physical impact" report; (3) obtaining a signed statement of no material injury by a licensed civil engineer; (4) agreeing to pay Replacement Water Assessment; and (5) providing any undefined and potentially arbitrary "other pertinent information that may be required by the Watermaster Engineer." (3REPLYEXCT2430:1-15) (176JA157573:1-15.) These steps impose a materially unreasonable financial burden on the Willis Class far beyond what is required

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9 Landowners apparently seek to mislead the Court by trivializing the most offensive requirements of the twelve steps. (LORB at p. 106.)

elsewhere. (*See*, Los Angeles County Code §11.38.160 [Well construction permit–Application and issuance conditions].)

Mr. Stephen Roach, an expert appraiser who was only allowed ten minutes of testimony, concluded the New Production Application Procedure "is extremely rigorous, the cost of which could more than offset the value gain the properties would achieve with water" and further confirmed that "[t]his process is also not a guaranteed path towards obtaining water, which could be denied for any number of reasons." (2REPLYEXCT1981)(173JA154507.)

3. The application approval process is biased and discretionary.

Even if Class members satisfy each of the twelve New Production requirements, the Watermaster board (consisting of individuals with interests materially adverse to the Willis Class) is still not required to grant approval to pump. (3REPLYEXCT 2429:1-2; 2431:1-2) (176JA 157572:1-2; 157574:1-2 ["No Party or Person shall commence New Production of Groundwater from the Basin absent recommendation by the Watermaster Engineer and approval by the Watermaster"].) The decision is *solely* within the Watermaster's discretion.

Respondents downplay any bias on the part of the Watermaster by suggesting it is comprised of "a balanced cross section of parties... which remains subject to the court's continuing jurisdiction and oversight." (LORB at p. 103.) However, Respondents fail to cite to any provision of the Physical Solution to support this statement because no such provision requiring a "balanced cross section" exists. In fact, the Physical Solution expressly provides to the contrary – i.e., that no Willis Class member may serve on the Watermaster board and the Willis Class may not even vote on who shall be appointed to the board. (3REPLYEXCT2421:10-23) (176JA157564:10-23.)

Throughout this litigation, Landowners and Purveyors have vehemently opposed, not only, the Willis Class's ability to share in the NSY, but indeed, *any* participation by the Willis Class in the negotiations leading up to the adoption of a Physical Solution. (AOB pp. 49-51; 2REPLYEXCT1527:19-1528:7) (131JA127942:19-127943:7.) Thereafter, in Phase Six, both Landowners and Purveyors objected to the Wills Class's very presence at the hearings (3REPLYEXCT1913-1930; 1931-1936; 1937-1952; 1953-1954)(138JA135291-135308; 135375-135380; 135430-135445; 135665-135666), and when unsuccessful at excluding the

Class altogether, Respondents objected to the Class's presentation of any evidence critical of their proposed Physical Solution. (45RT25077:2-25078:17; 45RT 25437:27-25445:18; 46RT25316-25321; 47RT25702:19-25706:18; 47RT25709:16-27; 49RT26527:15-25; 49RT 26537:8-26541:28; 49RT26548:26-26549:8.) There is no reason to believe the Watermaster board, made up of representatives of Landowners and Purveyors, will not continue to be hostile to the bestowal of water pumping abilities and/or callous to the hardships suffered by members of the Willis Class in the future.

4. The New Pumping Application Procedure is illusory because it wholly depends on the availability of imported water.

Tragically, at the end of the process, even if the Class members are granted discretionary approval by the Watermaster, there is still no guarantee that replacement water will be available for purchase. The Physical Solution requires the Watermaster to purchase imported water to replace that amount used by the Willis Class. (3REPLYEXCT2390:1-7) (176JA157533:1-7.) Any replacement water will have to be obtained by purchasing water from an infamously unreliable source – i.e., State Water Project. (3REPLYEXCT2354:14-21)(176JA157478:14-21.) With

California suffering frequent droughts and higher temperatures, the likelihood of available imported water is very low. (3REPLYEXCT1977 ["there is no guarantee that any imported replacement water would be available in any given year"])(173JA154503.) If the Watermaster is unable to provide imported water into the Basin, the Class members will not be able to develop their land. (3REPLYEXCT1981-1982) (173JA154507-154508.)

5. The application process is discriminately applied.

Perhaps, the most egregious shortcoming of the New Production Application process is the fact it is discriminately applied. For example, the Physical Solution allows Landowners and other stipulating parties to move or transfer their production right anywhere in the Basin without satisfying the application procedure because those rights are not considered a "new production." (3REPLYEXCT2419:12-20, 2420:14-18) (176JA157562:12-20, 157563:14-18.) In other words, Respondents may install new wells on their property, change points of extraction, or acquire new property and install new wells anywhere in the Basin all without satisfying any of the New Production requirements imposed on the Willis Class.

Attempting to justify this disparate treatment, Respondents refer to the discretionary exemption from Replacement Assessments for single-family domestic water use. (LORB at p. 51.) However, the decision to grant this exemption is solely within the Watermaster's discretion and does not obviate the need for a Class member to satisfy each and every step of the New Production Application and have its application approved by the Watermaster. (3REPLYEXCT2430:21-25)(176JA157573:21-25.) Only then may the Watermaster further choose to wave the Replacement Assessment if the use fits into the single-family-household domestic use criteria. (*Id.*)

In contrast, the Wood Class of small pumpers (who did not oppose the Respondents' proposed Physical Solution) is not required to seek an exemption from the Replacement Assessment for domestic use pumping. The Wood Class is authorized by the Physical Solution to produce up to 3-acre-feet of water per a year "per existing household for reasonable and beneficial use on their overlying land" without paying any Replacement Water Assessment. (3REPLYEXCT2394) (176JA 157537:1-5.) Moreover, unlike the treatment of the Willis Class, the Wood Class of small pumpers is granted domestic-use priority under Water Code section 106.

(3REPLYEXCT2392:21-26)(176JA157535:21-26.) The domestic-use priority provisions afforded to the Wood Class were denied to the Willis Class because of its opposition to the Physical Solution. (2REPLYEXCT810:13-21)(128JA125756:13-21.)

6. The New Production application process and Replacement Assessment fee violates the priorities set forth in California Water Code section 106.

With respect to domestic use pumping by the Willis Class, the requirement to comply with the unreasonable 12-step New Production application procedure, the ability of the Watermaster to deny domestic use pumping, and the potential imposition of the Replacement Assessment on domestic use pumping violate California Water Code section 106, which declares California's policy that "the use of water for domestic purposes is the highest use of water." (Cal. Water Code §106.)

E. The 2015 Judgment's Permanent Allocation of the Entire Native Safe Yield Violates the "Reasonable and Beneficial Use" Doctrine.

As detailed in the Appellants' Opening Brief, a permanent allocation of a usufructuary groundwater right violates the principles of the "reasonable and beneficial use" doctrine, which mandates water be "put to beneficial use to the fullest extent of which they are capable" while

preventing unreasonable or waste of water. (Cal. Const. Art. X, §2; *Barstow, supra*, 23 Cal.4th at 1241-1242.)

To ensure the Constitution's mandate, California precedent holds that courts are to retain jurisdiction "to change its decree and orders," including physical solutions. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 937-938 ["The retention of jurisdiction to meet future problems and changing conditions is recognized as an appropriate method of carrying out the policy of the state to utilize all water available"].) *City of Pasadena* held that a "five year limitation upon the power to review the determination of safe yield tends to defeat the purpose of the rule giving the trial court continual supervisory powers in water rights cases." (*Id.* at 937.)

Here, the Physical Solution's permanent allocations of the entirety of the NSY amounts to an unlawful *ownership* of groundwater by the Landowners and Purveyors to the detriment of Willis Class landowners. (*See, People v. Shirokow* (1980) 26 Cal.3d 301, 307 [finding overlying water rights are usufructuary which confers only the legal right to use the water, not the right of private ownership in public water].)

The bestowal of illegal ownership of groundwater upon Landowners and Purveyors was accomplished as follows:

First, ***all*** of the 82,300 acre-feet of the NSY was permanently allocated in the following provisions of the Physical Solution.

- Paragraph 3.4.32: "The total of the Production Rights decreed in this Judgment equals the Native Safe Yield."

- Actively-pumping overliers: 58,322.23 acre-feet. (3REPLYEXCT2393,¶5.1.1; 2470-2473)(176JA157536,¶5.1.1; 157613-157616.)

- Wood Class (Small Pumpers): 3,806.4 acre-feet. (3REPLYEXCT2394,¶5.1.3)(176JA157537,¶5.1.3.)[10]

- United States (Federal Reserved Right): 7,600 acre-feet. (3REPLYEXCT2396,5.1.4)(176JA157539,¶5.1.4.)[11]

- Purveyors (Public Water Suppliers): 12,345 acre-feet. (3REPLYEXCT2400,¶5.1.6; 2469)(176JA 157543,¶5.1.6; 157612.)

- State of California: 207 acre-feet.

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10 While the Wood Class was allocated a minimum of 3,806.4 acre-feet based on an average of 1.2 acre-feet per a class member, each of the 3,172 Wood Class landowners are permitted to pump up to three acre-feet per a year, amounting to a maximum allocation of 9,516 acre-feet free of Replacement Assessments. (3REPLYEXCT2394,¶5.1.3) (176JA 157537,¶5.1.3.)

11 This represents the maximum the United States may pump, not the actual water extracted. That unused portion belongs to the Purveyors identified on Exhibit 3 to the Physical Solution. (3REPLY EXCT2397:4-8)(176JA157540:4-8.)

(3REPLYEXCT2397)(176JA157540.)

Second, the Physical Solution binds the hands of the court with respect to any changes to the safe yield or to the allocations, either to parties or in amount. Specifically, Physical Solution states that no change to the NSY may be made for 17 years. (3REPLYEXCT2427:9-13 ["The Watermaster Engineer shall initiate no recommendation to change Native Safe Yield prior to the end of the seventeenth (17th) year"]) (176JA157570:9-13.) Even then, in the year 2033, the Watermaster Engineer has the *option* to "recommend to the [c]ourt an increase or reduction of the Native Safe Yield." (*Ibid.*) It is only upon the Watermaster Engineer's discretionary recommendation (and *unanimous* approval of five-member Watermaster board) that a proposal to change the NSY ever comes before a court. (3REPLY EXCT2427:13-18 ["The most recent Native Safe Yield shall remain in effect until revised by Court order according to this paragraph"], 2433,¶18.6) (176JA157570:13-18, 157576,¶18.6.) Even worse, any change to the NSY can only be implemented *pro rata* to benefit the Purveyors and actively-pumping landowners identified in Exhibits 3 and 4, respectively, to the Physical Solution. (3REPLYEXCT2428:23-27) (176JA157571:23-27.) In other

words, if more native groundwater is available in the future, the only beneficiaries to the increase are those who caused the overdraft in the first place – the Purveyors and actively-pumping overlying landowners.

The Physical Solution's permanent allocations go well beyond 5-year limitation on the court's review of safe yield in *City of Pasadena* and therefore, should likewise be deemed an impermissible usurpation of the court's continuing jurisdiction. Further, it is of no import that the actively-pumping landowners agreed to halve their production because it was the unrestrained pumping of the Landowners and Purveyors that caused the Basin's overdraft in the first place. Respondents' reduction in their chronic overuse of the groundwater can hardly be deemed unreasonable or a sacrifice. (*Barstow, supra,* 23 Cal.4th at 1241 [as between overlying owners, "each may use only his reasonable share when water is insufficient to meet the needs of all"].)

Third, as discussed in Appellants' Opening Brief, the Physical Solution is devoid of any mechanism to determine whether water is being put to reasonable and beneficial use in the future. (AOB pp.87-91.) Those allocated a part of the NSY are only required to annually report the amount of water pumped, but not how that water was used.

(3REPLYEXCT2428,¶18.5.12)(176JA157571,¶18.5.12.) Nor the Water-master, in its annual report, required to identify what purposes Respondents applied the water to thereby precluding the court from ensuring groundwater is put to "reasonable and beneficial use" at all times. (3REPLYEXCT2432-2433,¶18.5.18) (176JA157575-157576, ¶18.5.18.) Therefore, under this Physical Solution, current pumpers are free to change their use without any review, evading the reasonable and beneficial use mandate. As acknowledged in *Barstow*, "Article X, section 2 provides that no water user has a protectable interest in the unreasonable use of water and all water rights may be limited to reasonable and beneficial use." (*Barstow, supra*, at 1240-1242.) Here, unequivocally, the permanent allocation of the NSY without any future review of the producers' use of water creates a "protectable interest in unreasonable use of water." (*Id.*)

The Willis Class's recitation of these fatal defects of the Physical Solution's permanent allocation of the entire NSY is ignored by the Respondents. "Appellate briefs must provide argument and legal authority for the positions taken." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) A respondent's failure or to address a

contention raised in appellant's opening brief might not be a forfeiture, but the lack of any counter-argument on the issue may certainly be considered "a tacit concession" of the merit of appellant's position. (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1278; *Estate of Neilson* (1962) 57 Cal.2d 733, 746 [silence, evasion, or equivocation in response to a statement may be considered a tacit admission statement is true].)

F. The Legislation Cited by Respondents Was Enacted After the Judgment in this Case and Specifically Excludes This Dispute.

Respondents cite Code of Civil Procedure section 830 to argue that Legislature granted the trial court authority to subordinate Willis Class members' groundwater rights. (LORB at p. 59-60.) It is undisputed that Assembly Bill 1390, which enacted Section 830, specifically states that it does not apply to the Antelope Valley adjudication. Further, Assembly Bill 1390, enacted during the 2014-2015 legislative session, was not an urgency measure and did not become effective until January 1, 2016, *after* the 2015 Judgment was entered. Thus, the Legislature had not granted the trial court authority to condition the unexercised overlying rights of the Willis Class. Generally, a newly enacted statute is applied prospectively unless it is clear from statutory language or extrinsic

sources that the Legislature intended retroactive application. (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1436-37.) The trial court could not have relied on the new law as authority for imposing conditions on the Willis Class landowners' rights. As determined in *Wright* (*supra*, 174 Cal.App.3d at 89), absent a statutory scheme for comprehensive determination of groundwater rights which delegates to a trial court the authority to subordinate groundwater rights, a trial court cannot subordinate such rights.

Respondents further argue that Section 830 reinforces existing law (i.e., *Long Valley*) that provides trial courts authority to subordinate and condition unexercised overlying rights. (LORB at p. 50.) This is unpersuasive because Section 830 expressly cautions that in applying the principles of *Long Valley*, a court "***shall not alter groundwater rights or the law concerning groundwater rights.***" As previously discussed (*supra*, I.A.1), under *Long Valley*, the unexercised rights of the Willis Class cannot be extinguished. (*Long Valley*, *supra*, 25 Cal.3d at 347.)

Fifth, less expensive and less burdensome solutions were available to the trial court which would render subordination unnecessary here. (*Long Valley, supra*, 25 Cal.3d at 358.) The alternative solutions

proffered by the Willis Class capped the groundwater rights of Class members to approximately 15 percent of the NSY, permitted other overlying landowners to pump and utilize the entirety of the Willis Class allocation until Class members elect to pump, and when and if a Willis Class member exercises its right to pump, only certain overlying landowners would either reduce their pumping or pay for that portion of water that was allocated to the Willis Class member. (*See,* Appellants' discussion of alternative physical solutions in its Reply Brief to the United States (Brief 3 of 3), at V.D.)

II. THE 2015 JUDGMENT IS INCONSISTENT WITH THE 2011 JUDGMENT.

A. The Willis' Class Incorporates The Arguments Made in Their Reply to Purveyors' Brief.

Landowners' discussion of the inconsistencies between the 2011 and 2015 Judgments is nearly identical to that of the Purveyors. The Class therefore refers to the counterpoints made in it Reply to the Purveyor Respondents' Brief (Reply Brief 2 of 3), and hereby incorporates that discussion in response to Landowners' arguments on the subject.

The following sections address arguments made exclusively by Landowners.

B. The 2011 Judgment is Binding on the Trial Court and the Other Parties in this Litigation.

Landowners admit the 2015 Judgment and Physical Solution must be consistent with the 2011 Judgment adopted as the result of Willis Class Settlement. (LORB at pp. 74-75, 85-91.) However, Landowners maintain the 2011 Judgment approving the Willis Class Settlement "could not impact the rights of others who were not parties to the Class Settlement" and was not binding on the court or on anyone not a party to the Willis Class Settlement. (LORB at pp. 21, 32, 86.) The Landowners are mistaken.

1. Under the *res judicata* doctrine, the 2011 Judgment binding on all parties to the litigation – regardless of their participation in the settlement on which the Judgment is based.

The 2011 Judgment was binding on the Landowners. While Landowners may not have been parties to the underlying Willis Class Settlement, they clearly had the opportunity to object and, in fact, did so. (1REPLYEXCT204-206; 208-209; 211-215, 217-220, 222-230, 232-233) (9JA9335-9337, 9397-9398, 9377-9381, 9414-9417, 9455-9463, 9511-9512.) *Over Landowners' objections*, the court approved the Willis Class Settlement. (1REPLYEXCT:22-24) (13JA15602:22-24.)

Under settled case law, the 2011 Judgment approving the Willis Class Settlement became *res judicata* and the law of the case once it was entered by the trial court on September 22, 2011. (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577; *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 487-488.) Once the Judgment approving and incorporating settlement was entered by the court, it became binding on all parties to the litigation – regardless of whether they were signatories to the underlying settlement. (*Id.*)[12]

Notably, Landowners' brief does not refute the *res judicata* effect of the 2011 Judgment. This again may be considered "a tacit concession" of the merit of appellant's position. (*Johnwell, supra,* 121 Cal.App.4th at 1278.)

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12 The 2011 Judgment is also binding on the trial court which confirmed final approval of the Willis Class Settlement "as fair, reasonable, and in the best interests of the Class." (1REPLY EXCT289:22-24)(13JA15602:22-24.) The binding 2011 Judgment was not appealed and was recorded in both the Kern County and Los Angeles County recorder's offices. The judgment is therefore final and binding on the trial court as to all issues finally determined therein. (*Rodehaver v. Mankel* (1936) 16 Cal.App.2d 597, 601; *Morrissey v. City and County of San Francisco* (1977) 75 Cal.App.3d 903, 908 [unappealed order is final and binding upon parties and the courts].)

2. By stipulating to the Physical Solution, Landowners ratified the 2011 Judgment which was incorporated and merged into the Physical Solution.

Even absent *res judicata*, however, the Landowners were bound by the Willis Class Settlement because by stipulating to the Physical Solution, they ratified the 2011 Judgment which the trial court deemed incorporated and merged into the Physical Solution. (3REPLYEXCT2359:17-2360:9)(176JA157483:17-157484:9.)

3. The trial court, Landowners and Purveyors also ratified the 2011 Judgment by their words and conduct during the Phase Six proceedings.

Throughout the Phase Six proceedings, Landowners, Purveyors, and the trial court all clearly understood that consistency between the Physical Solution and 2011 Judgment was required.

- The trial court's Statement of Decision dedicates a whole section discussing why the court believes the Physical Solution is consistent with the Willis Class Settlement. (3REPLYEXCT2359:1-2360:9)(176JA157483:1-157484:9.)
- The Physical Solution, itself, includes a statement declaring "[t]his Judgment is consistent with the Non-Pumper Class Stipulation of Settlement and Judgment." (3REPLYEXCT 2393:23-25)(176JA157536:23-25.)
- Throughout the Phase Six proceedings, Landowners agreed, as they do here on appeal, that the Willis Class had a right to appear and argue in Phase Six Trial that the two settlements were inconsistent, "a legal argument significantly.... [T]here's no dispute about that." (46RT25320:9-14.)

If consistency was not required or of no import, as Landowners now argue, then there was no need for the Physical Solution or the Statement of Decision to include findings as to consistency between the Physical Solution and the 2011 Judgment. Certainly, the court and all parties necessarily understood that the 2011 Judgment was legally enforceable and was to be merged and incorporated into the Physical Solution consistent with its terms. (2REPLYEXCT1367:26-28)(131JA128053:26-28.)

4. The *inter se* rule protects, rather than undermines the Willis Class's prior adjudicated rights.

Landowners also argue (inconsistently) that while the 2011 Judgment is not binding on them, the 2015 Judgment and the court's Phase 4 findings regarding historical pumping amounts are binding on the Wills Class because this litigation is *inter se* – *i.e.,* it is binding on all who claim the underlying groundwater rights.

There are several problems with this argument.

First, there is a plethora of case law encouraging class action litigants to settle their claims early to ensure preservation of their rights and avoid a drain on the judicial system. (*See, Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390-391.) Here, the Willis Class did as

the case law instructs. They settled before the other claimants and had the protections they negotiated approved and memorialized in a binding Judgment. Therefore, the *inter se* rule protects the Willis Class's rights. There is no reason to penalize the Class and/or undermine their settlement because they followed the rules.

Second, the Class was expressly directed by the Court not to participate in Phase Four discovery because its members were not pumping (1REPLYEXCT344; 335-342) (33JA34112; 17JA22509-22516) and because Phase Four would "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." (LORB at pp. 70-71; 1REPLYEXCT346:4-6) (73JA67776:4-6.)

Third, the 2011 Judgment and Willis Class Settlement terms expressly state that "the 2015 Judgment ***must*** be consistent with the 2011 Judgment." (LORB at p. 75, emphasis added.) Without the required consistency between the two judgments, the normal *inter se* rules do not apply.

Finally, even if *inter se* rules apply, Landowners cannot have it both ways. An adjudication cannot be *inter se* for the purpose of imposing the Physical Solution on all, yet not *inter se* in regard to the 2011 Judgment.

III. THE WILLIS CLASS WAS NOT AFFORDED DUE PROCESS OF LAW.

Landowners' and Purveyors' discussions of the Due Process issues is nearly identical. Their due process issues are addressed in the counterpoints made in its Reply to the United States Respondent's Brief (Brief 3 of 3), and hereby incorporates that discussion in response to Landowners' arguments on the subject.

IV. ALL OF APPELLANTS' ISSUES ARE RIPE.

The Class refers to the counterpoints made in its Reply to the Purveyor Respondents' Brief (Brief 2 of 3), and hereby incorporates that discussion of ripeness in response to Landowners' arguments on the subject.

CONCLUSION

Depending on the Court's position on the issues raised, the following would be the "normal" dispositions:

If the Court agrees that the 2015 Judgment and Physical Solution violate the California Constitution and groundwater law, the Judgment should be reversed in its entirety.

If the Court finds the 2015 Judgment is inconsistent with the 2011 Judgment approving the Willis Class Settlement Agreement, the Judgment should be reversed and remanded to the trial court to adopt a Physical Solution consistent with the letter and spirit of the 2011 Judgment.

If the Court believes the trial court violated the Willis Class's due process rights, the usual remedy would be to reverse the Judgment and remand the matter to the trial court for fair notice or a meaningful opportunity to be heard.

If the Court finds the trial court breached its duty to "thoroughly investigate" all possible reasonable Physical Solutions, it may reverse the Judgment and remand the matter to the trial court with directions to consider the Class's alternative models and adopt "a workable solution that maximizes the reasonable beneficial use of available waters to all parties."

However, this is an unusual case. It has lingered with the courts for over fifteen years. Everyone involved – the trial court included – have labored long and hard. It is difficult to watch those efforts go to waste. And if the matter is remanded for further proceedings, it is likely whatever decision that might be made will be appealed and back before this Court in a few years.

Sometimes, in these types of cases, the appellate court will, in the interest of expeditious administration of justice, consider making the required findings contrary to, or in addition to those made by the trial court in a bench trial to terminate litigation where the record discloses that remand for further proceedings would serve no useful purpose. (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 813.)

In *Kerr Land & Timber Co. v. Emmerson* (1969) 268 Cal.App.2d 628, for example, the underlying litigation had been pending for eleven years. The parties had been up on appeal three times. The parties and the Court agreed that there was no further evidence to be offered and there was ample evidence in the record upon which the necessary findings could be made. In the interest of all parties, the Court determined "the issue [should] be resolved in this appeal." (*Id.* at 636.)

Likewise, in *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, the Court of Appeal held, "Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination." (*Id.* at 1170.)

Alternatively, the Court could fashion a very specific remand order to give the trial court as much guidance as possible. Contrary to Landowners' suggestion (LORB p. 20), the Willis Class does not necessarily seek to reverse the Physical Solution in its entirety. Instead, the Willis Class seeks a truly equitable Physical Solution that would protect their overlying rights and fulfill the otherwise salutary features necessary to ensure an adequate and sustainable water supply.

Therefore, the Willis Class respectfully requests that the Court of Appeal consider remanding the proceedings back to the trial court with specific directions to do all or part of the following:

> (1) Determine the amount of water the Willis Class will reasonably require in the future;
>
> (2) Quantify and allocate to the Willis Class a portion of the NSY free of Replacement Assessment with rights to recapture return flows from use of Class members' imported water;
>
> (3) Declare the Class has paramount permanent rights to that portion of the NSY allocated to them;
>
> (4) Adopt a physical solution that allows current active pumpers to use and pay for the Class's share until the Class landowners' needs arise, at which time those pumpers' water use will be reduced pro rata to accommodate the Class members;
>
> (5) Create a Willis Class board and vest it with authority to decide future production by its individual members and new pumping application procedures;

(6) Declare that the Class shall be subject to the same administrative and balance assessments with rights to enter into a storage agreement, in lieu production, imported water return flows, carryover provisions, and transfer or lease rights as all other landowners under the Physical Solution.

The foregoing would accomplish the goals of sustainable groundwater management of the Antelope Valley Basin while recognizing and preserving overlying landowner rights of both active pumpers and dormant landowners.

DATED: 10/5/20 THE KALFAYAN LAW FIRM, APC

By: */s/ Ralph B. Kalfayan*
Ralph B. Kalfayan

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the accompanying APPELLANTS' REPLY TO LANDOWNERS' RESPONDENT'S BRIEF (1 of 3) contains 13,947 words (including footnotes) as counted by the Corel Word 11 Program.

DATED: 10/3/20 THE KALFAYAN LAW FIRM, APC

By: */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 92014.

October 5, 2020, I served true copies of the following document(s) described as APPELLANTS' REPLY TO LANDOWNERS RESPONDENTS' BRIEF (1 of 3) (Willis Class Appeal) 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 regarding the Antelope Valley Groundwater matter with e-service to all parties listed on the website 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 October 5, 2020, at Del Mar, California.

s/ Ralph B. Kalfayan
Ralph B. Kalfayan