Case No. _____ **IMMEDIATE STAY REQUESTED**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

Defendant, Cross-Complainant and Petitioner,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

Respondent.

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40;
[Please see next page for additional Real Parties in Interest]

Real Parties in Interest

VERIFIED PETITION FOR WRIT OF MANDATE, WRIT OF PROHIBITION, OR OTHER APPROPRIATE RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

On Appeal From the Superior Court for the State of California,
County of Los Angeles, Case No. JCCP 4408, Hon. Jack Komar
(213) 633-0601 / (408) 882-2286

ALESHIRE & WYNDER, LLP
*Wesley A. Miliband, State Bar No. 241283
wmiliband@awattorneys.com
Miles P. Hogan, State Bar No. 287345
mhogan@awattorneys.com
18881 Von Karman Avenue, Suite 1700
Irvine, California 92612
Telephone: (949) 223.1170
Facsimile: (949) 223.1180

Attorneys for Petitioner
PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

Additional Real Parties in Interest:

BOLTHOUSE PROPERTIES, LLC; WM. BOLTHOUSE FARMS, INC.; ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION; CITY OF LANCASTER; ROSAMOND COMMUNITY SERVICES DISTRICT; CITY OF LOS ANGELES; LOS ANGELES WORLD AIRPORTS; COUNTY SANITATION DISTRICTS OF LOS ANGELES COUNTY NOS. 14 AND 20; LANDINV, INC.; BRUCE BURROWS; 300 A 40 H, LLC; LITTLE ROCK SAND AND GRAVEL, INC.; THE GEORGE AND CHARLENE LANE FAMILY TRUST; THE FRANK AND YVONNE LANE 1993 FAMILY TRUST; MONTE VISTA BUILDING SITES, INC.; A.V. MATERIALS, INC.; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; NORTH EDWARDS WATER DISTRICT; DESERT LAKE COMMUNITY SERVICES DISTRICT; LLANO DEL RIO WATER CO.; LLANO WATER CO.; BIG ROCK MUTUAL WATER CO.; PALMDALE WATER DISTRICT; STATE OF CALIFORNIA; STATE OF CALIFORNIA 50TH DISTRICT AGRICULTURAL ASSOCIATION; TEJON RANCHCORP; TEJON RANCH COMPANY; GRANITE CONSTRUCTION COMPANY; and, UNITED STATES OF AMERICA

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* *Wesley A. Miliband (SBN 241283) / Miles P. Hogan (SBN 287345) ALESHIRE & WYNDER, LLP 18881 Von Karman Ave., Ste. 1700 Irvine, CA 92612 TELEPHONE NO.: (949) 223-1170 FAX NO. *(Optional):* (949) 223-1180 E-MAIL ADDRESS *(Optional):* wmiliband@awattorneys.com ATTORNEY FOR *(Name):* Petitioner, Phelan Piñon Hills Community Services District	Superior Court Case Number: *FOR COURT USE ONLY*
APPELLANT/PETITIONER: PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT RESPONDENT/REAL PARTY IN INTEREST: SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Phelan Piñon Hills Community Services District

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

b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1) Phelan Piñon Hills Community Services District	Petitioner / Defendant / Cross-Complainant
(2) Superior Court for the State of California, County of Los Angeles	Respondent
(3) Los Angeles County Waterworks District No. 40	Real Party in Interest / Plaintiff
(4) Bolthouse Properties, LLC	Real Party in Interest/ Defendant
(5) Wm. Bolthouse Farms, Inc.	Real Party in Interest / Cross-Defendant

☒ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 23, 2015

Wesley A. Miliband
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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ATTACHMENT 2

	Full name of interested entity of person	Nature of interest *(Explain):*
(6)	Antelope Valley Groundwater Agreement Association	Real Party in Interest / Defendant / Cross-Complainant
(7)	City of Lancaster	Real Party in Interest / Defendant
(8)	Rosamond Community Services District	Real Party in Interest / Defendant
(9)	City of Los Angeles	Real Party in Interest / Defendant / Cross-Defendant
(10)	Los Angeles World Airports	Real Party in Interest / Defendant / Cross-Defendant
(11)	County Sanitation Districts of Los Angeles County Nos. 14 and 20	Real Party in Interest / Cross-Defendant
(12)	Landinv, Inc.	Real Party in Interest / Cross-Defendant
(13)	Bruce Burrows	Real Party in Interest / Cross-Defendant
(14)	300 A 40 H, LLC	Real Party in Interest / Cross-Defendant
(15)	Little Rock Sand and Gravel, Inc.	Real Party in Interest / Cross-Defendant
(16)	The George and Charlene Lane Family Trust	Real Party in Interest / Cross-Defendant
(17)	The Frank and Yvonne Lane 1993 Family Trust	Real Party in Interest / Cross-Defendant
(18)	Monte Vista Building Sites, Inc.	Real Party in Interest / Cross-Defendant
(19)	A.V. Materials, Inc.	Real Party in Interest / Cross-Defendant

ATTACHMENT 2 (cont.)

(20)	Littlerock Creek Irrigation District	Real Party in Interest / Cross-Complainants
(21)	Palm Ranch Irrigation District	Real Party in Interest / Cross-Complainants
(22)	North Edwards Water District	Real Party in Interest / Cross-Complainants
(23)	Desert Lake Community Services District	Real Party in Interest / Cross-Complainants
(24)	Llano Del Rio Water Co.	Real Party in Interest / Cross-Complainants
(25)	Llano Water Co.	Real Party in Interest / Cross-Complainants
(26)	Big Rock Mutual Water Co.	Real Party in Interest / Cross-Complainants
(27)	Palmdale Water District	Real Party in Interest / Defendant / Cross-Complainant
(28)	State of California	Real Party in Interest / Defendant
(29)	State of California 50th District Agricultural Association	Real Party in Interest / Defendant
(30)	Tejon Ranchcorp	Real Party in Interest / Defendant
(31)	Tejon Ranch Company	Real Party in Interest / Defendant
(32)	Granite Construction Company	Real Party in Interest / Cross-Defendant
(33)	United States Of America	Real Party in Interest / Plaintiff / Defendant

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INTRODUCTION

Petitioner is a public water supplier seeking to establish in a pending groundwater adjudication rights to a groundwater well located just within Los Angeles County, with this groundwater well supplying approximately one-third of Petitioner's water supply for distribution to customers located within Petitioner's service area immediately adjacent to the Los Angeles County/San Bernardino County line.

The underlying groundwater adjudication is located in a massive 1,000 square-mile area commonly known as the Antelope Valley, with the action commonly referred to as the Antelope Valley Groundwater Cases. Parties consist of public water suppliers, other governmental agencies including those among the State government and the federal government by way of Edwards Air Force Base, and landowners – large and small – with agricultural, development, and other interests. The action has proceeded over the past decade with many phases of trial, in which fierce litigation has ensued.

This Petition arises from Respondent Court's February 3, 2015 Statement of Decision regarding critical legal questions involving Petitioner's claimed appropriative water right and native groundwater return flow right, as well as various events including other parties filing on March 4, 2015 a proposed stipulated judgment and proposed physical solution, with the latter seeking to allocate 99.8% of the water supply and to bind *all* parties for long-term management of the groundwater basin at issue in the underlying action, including against Petitioner by denying any rights by instead requiring Petitioner to pay for all groundwater pumped from its well.

To deny Petitioner's request for writ relief – and to wait to appeal a final judgment – would result in potential approval of a basin-wide, party-wide "physical solution" through many more contested proceedings that upon appeal should be "undone" to correct for the errors and injustices Petitioner continues to suffer. Consequently, resources of Respondent Court, the parties,

and Petitioner are best conserved by addressing Petitioner's issues prior to final judgment.

Petitioner respectfully requests the Court's intervention.

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[Please see next page for additional Real Parties in Interest]

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ALESHIRE & WYNDER, LLP
*Wesley A. Miliband, State Bar No. 241283
wmiliband@awattorneys.com
Miles P. Hogan, State Bar No. 287345
mhogan@awattorneys.com
18881 Von Karman Avenue, Suite 1700
Irvine, California 92612
Telephone: (949) 223.1170
Facsimile: (949) 223.1180

Attorneys for Petitioner
PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

Additional Real Parties in Interest:

BOLTHOUSE PROPERTIES, LLC; WM. BOLTHOUSE FARMS, INC.; ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION; CITY OF LANCASTER; ROSAMOND COMMUNITY SERVICES DISTRICT; CITY OF LOS ANGELES; LOS ANGELES WORLD AIRPORTS; COUNTY SANITATION DISTRICTS OF LOS ANGELES COUNTY NOS. 14 AND 20; LANDINV, INC.; BRUCE BURROWS; 300 A 40 H, LLC; LITTLE ROCK SAND AND GRAVEL, INC.; THE GEORGE AND CHARLENE LANE FAMILY TRUST; THE FRANK AND YVONNE LANE 1993 FAMILY TRUST; MONTE VISTA BUILDING SITES, INC.; A.V. MATERIALS, INC.; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; NORTH EDWARDS WATER DISTRICT; DESERT LAKE COMMUNITY SERVICES DISTRICT; LLANO DEL RIO WATER CO.; LLANO WATER CO.; BIG ROCK MUTUAL WATER CO.; PALMDALE WATER DISTRICT; STATE OF CALIFORNIA; STATE OF CALIFORNIA 50TH DISTRICT AGRICULTURAL ASSOCIATION; TEJON RANCHCORP; TEJON RANCH COMPANY; GRANITE CONSTRUCTION COMPANY; and, UNITED STATES OF AMERICA

PETITION

Petitioner (Cross-Complainant and Cross-Defendant) Phelan Piñon Hills Community Services District petitions this Court for a writ of mandate and a writ of prohibition directed to the Superior Court of the State of California for the County of Los Angeles ("Respondent Court"), in the case entitled, *Antelope Valley Groundwater Cases*, a coordinated proceeding with special title, pending in Los Angeles Superior Court Case No. Judicial Council Coordination Proceeding No. 4408, in which Petitioner is a cross-complainant and a cross-defendant in said action now pending in Respondent Court, and by this verified petition, Petitioner alleges:

Petitioner's Background

1. Petitioner, Phelan Piñon Hills Community Services District ("Petitioner" or "Phelan Piñon Hills"), is a public agency formed as a community services district during February 2008, having succeeded to the Special Districts Department of San Bernardino County for providing, among other things, water to serve to the Phelan and Piñon Hills communities located within San Bernardino County. (Appendix, Vol. 14, Tab. 148, p. 3350 (facts 1 and 2) and 3353 (fact 20).)

2. Petitioner is a public agency organized as a community services district and operating pursuant to California Government Code section 61000 *et seq.* (*Ibid.* at p. 3352 (fact 17).)

3. Petitioner's entire service area is within San Bernardino County and outside the Antelope Valley Area of Adjudication. (*Id*; *see also an illustration of the area at,* Appendix, Vol. 11, Tab. 138, p. 2774.)

4. Part of Petitioner's service area lies over a portion of the Antelope Valley Groundwater Basin as described and illustrated in Department of Water Resources Bulletin 118 (2003). (Appendix, Vol. 14,

Tab. 148, p. 3356 (fact 18); *see also an illustration,* Appendix, Vol. 11, Tab. 138, p. 2774.)

5. As of October 2014, Petitioner provides municipal water service to more than 21,576 residents through approximately 6,778 service connections, within Petitioner's existing service area. (Appendix, Vol. 14, Tab. 148, p. 3353 (fact 27).)

6. Petitioner provides water for municipal use to which groundwater produced by all of Petitioner's wells is applied with the groundwater used almost exclusively – approximately 97% – for domestic purposes, with some unknown amount of groundwater used for emergency fire protection including support to or within Los Angeles County as needed. (*Id.* at p. 3355 (fact 36).)

7. Very little – approximately 3% – of water produced by Petitioner is used for commercial purposes. (*Id.* (fact 38).)

8. All of Petitioner's water service facilities, including groundwater production wells that are serving Petitioner's residents and customers were constructed by or at the direction of San Bernardino County, and operated by San Bernardino County up until San Bernardino LAFCO approved the reorganization and San Bernardino County transitioned everything to Petitioner approximately six (6) months following San Bernardino LAFCO's approval. (*Ibid.* at p. 3353 (fact 24).)

Petitioner's Well 14

9. The parcel location of Well 14 was transacted prior to Petitioner's formation and done by and between Los Angeles County and San Bernardino County, with the latter engaging in a public process including pursuant to the California Environmental Quality Act ("CEQA") for the construction of a well on the parcel, with the well later becoming what is known as Petitioner's "Well 14." (*Ibid.* at pp. 3350-3352 (facts 4-15).)

10. Well 14 is the only one of Petitioner's wells located within the Antelope Valley Adjudication Area as previously defined by the Court in the Antelope Valley Groundwater Cases, which for purposes of Petitioner's case is "drawn" at the Los Angeles County/San Bernardino County line, with Well 14 located outside the boundary of the *Mojave Basin Area Adjudication.* (*Ibid.* at p. 3353 (facts 23 and 25, respectively).)

11. Shortly after Well 14 came online, Well 14 was not able to operate at its full capacity due to difficulty with the pump installed by or at the direction of San Bernardino County, resulting in the pump being replaced toward the end of calendar year 2008, then allowing Well 14 to become fully operational part way into calendar year 2009. (*Ibid.* at p. 3354 (fact 31).)

12. Well 14 water was first delivered by Petitioner to customers on January 2006, and since then, Well 14 water is distributed through Petitioner's water system for delivery to customers. (*Id.* (fact 30).)

13. Well 14's groundwater production is as follows, by calendar year:

2004 and earlier: none;

2005 (beginning in September): 1.11 acre feet ("af");

2006: 164.15 af;

2007: 20.95 af;

2008: 493.27 af;

2009: 558.65 af;

2010: 1,110.45 af;

2011: 1,053.14 af;

2012: 1,035.26 af; and

2013: 1,028.02.

(*Id.* (fact 29).)

14. The use of water for outdoor irrigation within Petitioner's service area is limited given that many water customers within San Bernardino

County service area have natural desert landscape for which outdoor irrigation is not used. (*Ibid.* at p. 3355 (fact 43); *see also an illustration,* Appendix, Vol. 12, Tab. 138, pp. 2883-2888.)

15. There is no sewer system in Petitioner's service area - it is 100 percent septic disposal through individual septic systems. (Appendix, Vol. 14, Tab 148, p. 3356 (fact 47).)

16. Petitioner distributes water to customers in that portion of Petitioner's service area that lies over a portion of the Antelope Valley Groundwater Basin as described and illustrated in Department of Water Resources Bulletin 118 (2003). (*Id.* (fact 49).)

17. All of Petitioner's groundwater production wells – including Well 14 – pump into a collective distribution system that is interconnected with pipelines, reservoirs, and booster pumps, and the water are distributed to Petitioner's customers through its distribution system. (*Ibid.* at p. 3353 (fact 28).)

The Underlying Action

18. The underlying action is a complex action to adjudicate groundwater and related rights, having commenced a decade ago, with consolidation of multiple lawsuits taking place on February 19, 2010, with all parties seeking to establish rights to groundwater in the Antelope Valley Groundwater Basin. (Appendix, Vol. 2, Tab 27.)

19. Prior to Petitioner's request to intervene in this action, neither Petitioner's predecessor-in-interest – the County of San Bernardino – nor any other party had sought to name Petitioner or the County of San Bernardino. (*See e.g.,* Appendix, Vol. 1, Tab. 11, pp. 409-411.)

20. Petitioner filed its cross-complaint on December 31, 2008, which consists of eight causes of action. (*Ibid.* at Tab. 13, pp. 414-434.)

21. Various other parties cross-complained against Petitioner. (*See, e.g., ibid.* at: Tab 14, pp. 435-439; Tab 17, pp. 488-495; Tab 21, pp. 508-515; Tab 25, pp. 580-588; and Tab 26, pp. 589-596.)

The Parties

22. Approximately 140 parties exist in the Antelope Valley Groundwater Cases. (Appendix, Vol. 18, Tab 171.)

23. Shortly after its formation during 2008, Petitioner sought to become a party to the action having learned of the action and discovering it has one well within the area in which groundwater rights were being adjudicated. (Appendix, Vol. 1, Tab 11, pp. 409-411.)

24. Almost immediately thereafter, Petitioner filed its cross-complaint against various parties while many other parties cross-complained or "roed in" Petitioner, with these same parties answering one another's operative complaint. (*See,* Paragraph 21, *supra.*)

25. Two classes were formed early on in the action, with Respondent Court seeking to effectively manage a tremendous number of landowners claiming water rights, with one class dubbed the "non-pumper class" (as large as 65,000 landowners) formally known as Willis Class while the other class is known as the "small-pumper class" and formally referred to as Wood Class. (Appendix, Vol. 1: Tab 7, pp. 371-378 and Tab 9, pp. 389-404, respectively.) These two classes and Petitioner settled their lawsuits through the court-approval process necessary for class actions, with Petitioner's settlement with Willis Class occurring during 2011 and Petitioner's settlement with Wood Class occurring during 2013.

26. Real Parties-in-Interest ("Real Parties") are those who participated in Petitioner's trial during November 4 and 5, 2014, which consist of twelve parties with the most active opponents to Petitioner's case being District 40 and other public water suppliers.

Trial Phases

27. Respondent Court has held multiple phases of trial, with Phase One determining the boundaries of the Antelope Valley Adjudication Area ("Adjudication Area") and Phase Two determining the Adjudication Area has subunits that are generally interconnected. (Appendix: Vol. 1, Tabs 4 and 6; Vol. 15, Tab 165, p. 3517, lines17-26.)

28. Phase Three occurred during 2011 with a focus of determining the overall condition of the groundwater basin's aquifer, which is to say, determinations of the "safe yield" and whether the Basin was in "overdraft, for which the Court found the safe yield to be 110,000 acre feet and that while overdraft exists, "...***the Court is not making historical findings that would be applicable to specific areas of the aquifer or that could be used in a specific way to determine water rights in particular areas of the aquifer.***" (Appendix, Vol. 4, Tab 31, p. 957, lines 16-24 [emphasis added].) Petitioner has relied upon this explicit statement in proceeding with its case, namely that the *overdraft finding does not preclude establishing a particular type of water right.*

29. During the Phase Three trial, Petitioner attempted to offer evidence regarding groundwater conditions within the Southeast area of the Basin where Petitioner's service area is located, however, Respondent Court deferred Petitioner's presentation of evidence specific to the Southeast area to be heard at some later proceeding. (Appendix, Vol. 4. Tab 29, page 827, line 24-page 841.)

30. The Phase Four trial proceeded during 2013, with what started as an ambitious scope of issues to be adjudicated evolved to almost exclusively stipulated proceedings, including Petitioner, as to each party's total groundwater production within the adjudication area during calendar years 2011 and 2012. (Appendix, Vol. 6, Tab 68.)

31. The Phase Five trial commenced during February 2014 for determining the United States of America's "federal reserved right" and "return flow rights" of parties "importing" water or, as Petitioner has done, claimed a "native groundwater return flow right." (Appendix, Vol. 7, Tab 76.)

32. During the Phase Five trial, various parties resurrected settlement discussions, causing trial to be recessed and ultimately taken off calendar in lieu of case management hearings to facilitate either global settlement or further trial proceedings, *which included a stay on all discovery.* (Appendix, Vol. 9, Tab 84.)

Petitioner's Trial Process At Issue In This Petition

33. Petitioner became one of a few parties not included in the settlement effort, with Respondent Court requesting Petitioner to offer a litigation and trial plan for resolving Petitioner's causes of action. (Appendix, Vol. 9: Tabs 85-86.)

34. Petitioner offered a detailed litigation schedule, scope, and plan on August 11, 2014, in which Petitioner proposed for trial Petitioner's Second, Fourth, Sixth, and Eighth Causes of Action, subject to the discovery stay being lifted and trial during early 2015. (Appendix, Vol. 9: Tabs 87-88.)

35. Some Real Parties opposed Petitioner's plan, stating Petitioner's issues are "holding up settlement" and need to be determined "first and whether they [Petitioner] have any water rights. Because if they don't, then they don't have any ability to challenge what the other people's rights are." (Appendix, Volume 9, Tab 89: p. 2159, lines 7-8; p. 2152, lines 20-25; and p. 2208, lines 3-11.) Though, fundamental civil procedure demonstrates Petitioner maintains standing to challenge the settlement and a proposed physical solution given Petitioner is a party to the action with unresolved causes of action.

Respondent Court Deviates from the Code of Civil Procedure Despite Petitioner's Key Claim to Groundwater Being On The Line

36. Respondent Court then deployed a highly unusual and abbreviated methodology for trial preparation that deviated tremendously from the Code of Civil Procedure by the Court ordering Petitioner and those parties challenging Petitioner to stipulate to facts for a trial date set for six weeks later on October 7, 2014. (Appendix, Vol. 9, Tab 90, pp. 2213-2215; *see also,* Volume 9, Tab 89: p. 2138, lines 4-20; p. 2139, lines 8-18; p. 2141, line 12-p.2143, line 28.)

37. Petitioner expressed concern with and objected to Respondent Court's process and trial date, particularly without a clear case management order (whether adopted or modified as submitted by Petitioner, and as previously done in other trial phases), without the discovery stay being lifted for trial preparation (though Petitioner indicated to Respondent Court that it would attempt to work toward a sufficient stipulation with the Real Parties subject to Petitioner's anticipated need for discovery), and with the October 7 trial date rather than Petitioner's request for a trial date only three months later to conduct discovery. (*Id.; see also, Ibid. at* p. 2166, lines 7-9; p. 2176, lines 23-26; p. 2183, lines 6-10; p. 2184, lines 23-27; Appendix, Vol. 9: Tab 94, pp. 2224-2227 and Tab 95, pp. 2228-2257; Appendix, Vol. 10: Tab 119, pp. 2335-2338, Tab 120, pp. 2339-2354, Tab 123, and Tab 128.)

38. Real Party, Palmdale Water District, even expressed doubt that Respondent Court's direction for further meeting-and-conferring would be productive. (Appendix, Volume 9, Tab 89: p. 2153, lines 19-23.)

Respondent Court's Process Failed to First Assess Other Parties' "Reasonable And Beneficial Use" of Water, Which is Required Before Imposing the Burden on Petitioner to Prove Surplus

39. Petitioner specifically articulated the complexity of the "surplus" issue, which relates to the burden of proof on other parties to prove their

"reasonable and beneficial use" of water *before* a party such as Petitioner would bear the burden of proving "surplus." (*Ibid.* at pp. 2177, line 23-2178, line 1.)

40. Respondent Court replied and concluded these complexities are why parties settle their disputes and "It is nonsensical to me that you and the other public water suppliers and landowners have not been able to arrive at a settlement of the case that puts everybody at rest." (*Id.* at p. 2192, lines 7-14.)

41. As of August 29, 2014, the causes of action and issues had not been firmly identified by Respondent Court. (Appendix, Vol. 9: Tab 96, pp. 2258-2261; Tab 95, p. 2235, line 20-27.)

42. As of four weeks later on September 26, 2014, a stipulation of facts had yet to be reached even with the smaller group of Real Parties' legal counsel, thereby necessitating Petitioner's *ex parte* application for a trial continuance, with a hearing set for September 26, 2014. (Appendix, Vol. 10, Tab 120.)

With A Trial Date Rapidly Approaching and Stipulation Yet to be Reached, Petitioner is Forced to Request a Trial Continuance and Request Once Again a Lift of the Discovery Stay, Only for the Result to be a Brief Continuance and for a Deposition to be Taken

43. During the September 26 hearing, some Real Parties opposed Petitioner's request for a three or even two month trial continuance, with Respondent Court initially stating: "But I'm not going to waste everybody's money and time and the Court's time and judicial resources if it's not necessary to do that. So I'm here to tell you now that I'm not going to grant your motion to continue this." (Appendix, Vol. 10, Tab 123, p. 2448, lines 17-19.)

44. After further argument from Petitioner, Respondent Court granted a two-week continuance with the discovery stay lifted for the limited purpose of deposing the opposing expert (though Petitioner also sought

percipient discovery to determine which of the many parties in the case sought to challenge Petitioner and on what basis), with Respondent Court stating: "If you cannot come up with a stipulated set of facts, we're just going to try the case." (*Ibid.* at p. 2457, lines 5-6 and 12-13.)

45. November 4, 2014 was set for trial with the Court indicating Petitioner's Second and Sixth Causes of Action are set for trial. (*Ibid.* at Tab 124, pp. 2474-2479.)

46. Although Petitioner's request for a case management order was denied along with discovery requests, those parties actively engaged in a potential settlement proposed a case management order that was approved November 4, 2014, identifying a process for discovery and "prove-up" or trial for *all* parties' claims, issues, or causes of action yet to be adjudicated, with Petitioner agreeing on October 30, 2014 the type of proposed process is necessary, including for preparation of Petitioner's trial on November 4, 2014 specifically involving the issue of whether Petitioner's Well 14 was pumping "surplus" water, at least during calendar year 2006 when Well 14 water commenced delivery for municipal uses. (*Ibid.* at Tab 128, pp. 2501-2504.)

Petitioner Tried its Case With Undisputed Evidence

47. Pursuant to Respondent Court's September 26, 2014 Minute Order, Petitioner filed and served its trial documents on October 31, 2014. (Appendix, Vol. 9, Tab 129; Vol. 10, Tab 132, and Vol. 11: Tabs 133-Vol. 12, Tab 138.)

48. Real Parties seeking to actively participate in the trial filed trial documents as well, though the historically most actively opposing Real Party – District 40 – and the only Real Party offering exhibits against Petitioner's case-in-chief, failed to file any of its trial exhibits until 11:00 p.m. on November 3, 2014. (Appendix, Vol. 13, Tab 146, p. 3145, line 28 - p. 3146, line 19.)

49. Petitioner objected with Respondent Court wanting to proceed, stating that we are trial lawyers and Los Angeles County Waterworks District No. 40 has hard copies available to Petitioner. (*Id.* at p. 3149, lines 2-28.)

50. Petitioner proceeded with presenting a stipulation of facts to Respondent Court (Appendix, Vol. 14, Tab 148); presenting its General Manager for percipient testimony; and moving into evidence all but five of Petitioner's fifty-one exhibits (Appendix, Vol. 11: Tab 138-Vol. 12, Tab 138). All of Petitioner's exhibits were admitted into evidence except for Petitioner Exhibits 36, 41, 42, 50, and 51. (Appendix, Vol. 14, Tab 160, pp. 3439-3450.)

51. During Petitioner's examination of its General Manager, Respondent Court noted that inquiring into the importance of Petitioner's Well 14 to Petitioner's water supply is like asking a bank robber what he intended to use the money for (Appendix, Vol. 14, Tab 146, p. 3182, lines 3-7), as if to say at minimum that the "end" cannot justify the "means."

The Court Grants the "631.8" Motion, Erroneously Based in part on Respondent Court's Phase Three Decision Finding Overdraft, Thereby Precluding Surplus, Despite that Same Decision saying Overdraft Finding Does Not Make Area-Specific Findings so as to Preclude the Type of Water Right a Party May Seek to Establish

52. Upon Petitioner resting its case-in-chief, Real Parties moved for judgment pursuant to Code of Civil Procedure section 631.8, which Respondent Court granted on the grounds of the Phase Three Statement of Decision's finding that overdraft precludes surplus; Petitioner's Well 14 pumping impacts the Basin, with Petitioner distributing Well 14 water for use within Petitioner's service area; and the Buttes Subunit from which Petitioner's Well 14 pumps is interconnected with the rest of the Basin, with judgment in favor of moving parties. (Appendix, Vol. 14: Tab 147, p. 3307, line 7; Tab 151.)

Statement of Decision Process Was Thorough, yet Flawed with Incompleteness and Legal Conclusions Contrary to Law and Equity

53. Petitioner then prepared – per Respondent Court's invitation – a statement of proposed issues for a statement of decision. (*Id.* at Tab 152.) Real Parties, or at least Real Party District 40, prepared a proposed Statement of Decision. (*Id.* at Tab 153), to which Petitioner replied with objections (*Id.* at Tab 154).

54. On January 21, 2015, Respondent Court provided notice to the parties of a tentative Statement of Decision. (*Id.*) On January 22, 2015, Respondent Court held a hearing regarding the proposed Statement of Decision, during which time Petitioner provided additional reasons to Respondent Court regarding Petitioner's contentions the proposed Statement of Decision. (Appendix, Vol. 15, Tab 161.)

55. On February 3, 2015, Respondent Court executed and gave notice to the parties of its final Statement of Decision entitled, "Partial Statement of Decision for Trial Related to Phelan Piñon Hills Community Services District (2nd and 6th Causes of Action)," hereinafter "2/3/15 Statement of Decision." (Appendix, Vol. 15, Tab 165.)

56. Since entering this action, Petitioner often expressed the rights it sought to establish, from inception with the cross complaint and various case management statements filed through 2012, 2013, and 2014.

57. Petitioner's November 4, 2014 trial became the first time in the long history of this case that a party's water right was adjudicated to a decision.

Real Parties-In-Interest Moving Forward With A Proposed Physical Solution That Seeks To Bind Petitioner

58. On March 4, 2015, the Wood Class filed a motion for preliminary approval of a Proposed Settlement Agreement and Physical Solution ("Proposed Physical Solution"), which purports to *allocate 99.8% of*

the native safe yield of the Basin and seeks to impose on Petitioner a 100% Replacement Water Assessment together with "other costs" and "if" the water is available, rather than recognizing Petitioner with any allocation, production allowance, or right of any sort to the groundwater or recharge. (Appendix, Vol. 16, Tab 169, pp. 3854-3860; Vol. 17, Tab 170, pp. 4057, lines 20-27.)

Authenticity of Exhibits

59. Except for those exhibits attached directly to this Petition, all exhibits accompanying this Petition are true copies of original documents on file with Respondent Court. The exhibits are incorporated herein by reference as though fully set forth in this Petition.

Respondent Court Incorrectly Brought Petitioner To Trial And Incorrectly Ruled On Substantive Issues Thereby Creating Irreparable Injury To Petitioner Without Any Immediate And Adequate Remedy Available At Law Because A Basin-Wide "Physical Solution" Now Pending Before Respondent Court Seeks To Allocate All Of The Groundwater To Settling Parties Only While Imposing Water Replacement Assessments On Petitioner

60. Respondent Court incorrectly brought Petitioner's Second Cause of Action to trial without first making "reasonable and beneficial use" findings, which if done, would have provided the necessary framework to Petitioner with trial preparation and ultimately proving surplus for purposes of establishing the appropriative right. Respondent Court also incorrectly did not recognize Petitioner as having an intervening public use right.

61. Respondent Court incorrectly ruled on Petitioner's Sixth Cause of Action by finding that California precedent precludes Respondent Court from finding a "native groundwater return flow right" may exist, notwithstanding Petitioner's unique circumstances including an inverse condemnation claim by a landowner.

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62. Petitioner is irreparably harmed by the foregoing events and trial outcome in such a way necessitating writ relief because of the pending and Proposed Physical Solution. For Petitioner to wait to appeal a final judgment puts each party's interests and Respondent Court's resources at serious risk of reversal of or modification to the Proposed Physical Solution.

63. Respondent Court is set to commence the approval process of the Proposed Physical Solution with Wood Class Preliminary Approval hearing set for March 26, 2014; Objections from non-settling parties by April 1, 2014; and followed by a discovery and trial process through August 2014. (Appendix, Vol. 16, Tab 169; Vol. 15, Tab 162.)

WHEREFORE, Petitioner prays that:

1. A peremptory writ of mandate issues under the seal of this Court commanding the Respondent Superior Court of the State of California for the County of Los Angeles to vacate its ruling as set forth in the 2/3/15 Statement of Decision and to enter an order in favor of Petitioner or as otherwise deemed appropriate by this Court.

2. A peremptory writ of prohibition issues under the seal of this Court commanding the Respondent Superior Court of the State of California for the County of Los Angeles to refrain from further proceedings regarding potential approval of the Proposed Physical Solution, including a stay on the proceedings set forth in the First Amended Case Management Order (Appendix, Vol. 15, Tab 162).

3. Petitioner recovers the costs incurred herein against the Real Parties-In-Interest.

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4. Petitioner receives such other and further relief as the Court may deem just and proper.

DATED: March 23, 2015

Respectfully submitted,

ALESHIRE & WYNDER, LLP
Attorneys At Law
WESLEY A. MILIBAND
MILES P. HOGAN

By: _____
WESLEY A. MILIBAND
Attorneys for Petitioner PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

VERIFICATION

The undersigned declares that he is the attorney for Petitioner in the within proceedings and action; that he is acquainted with the proceedings and action which have taken place in the underlying action which is the subject of this proceeding; that he has read the foregoing petition for writ of mandate and prohibition; and that the same is true of his own knowledge.

Executed this 23rd day of March 2015 in Irvine, California.

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

WESLEY A. MILIBAND

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION BELOW BY WRITS OF MANDATE AND PROHIBITION BECAUSE OF WATER LAW ISSUES OF FIRST IMPRESSION AND WIDESPREAD IMPORTANCE; TO RESTORE EQUITY AND PROCESS IN DETERMINING THOSE RIGHTS; TO PREVENT FURTHER AND IRREPARABLE HARM WITH POTENTIAL APPROVAL OF A "PHYSICAL SOLUTION" THAT ALLOCATES ALL WATER TO OTHER PARTIES; AND TO PREVENT A WASTE OF JUDICIAL RESOURCES BY COMPLETING THE "PHYSICAL SOLUTION" APPROVAL PROCESS ONLY TO HAVE IT UNDONE IF PETITIONER WERE TO WAIT AND SUCCEED ON APPEAL.

With unique circumstances – legally, procedurally, and factually – writ relief here is appropriate *and* necessary because critical constitutional, statutory, and decisions issues would involving the ever-limited natural resource of groundwater will be addressed and prior to a basin-wide physical solution being approved through a lengthy trial court process that would include additional adversarial proceedings. Also, Petitioner's ability to utilize Well 14 for one-third of its water supply for the benefit of the public it serves is severely threatened by the 2/3/15 Statement of Decision.

A. To Address Issues Of First Impression And Widespread Public Importance Concerning Water Rights Pursuant To California Constitutional Mandates under Article X, Section 2, Decisional Law, and Statutory Law, *With These Issues Appropriate for Writ Review Given the Potential "Physical Solution" Now Pending Before Respondent Court.*

1. For purposes of establishing a water right, whether California Constitution Article X, Section 2 and/or *City of Los Angeles v. City of San*

Fernando (1975) 14 Cal.3d 199 preclude a judicial finding of surplus in a subunit of a groundwater basin where undisputed evidence demonstrates stable and rising groundwater levels in the subunit over a fifty-plus year period, notwithstanding the trial court's earlier finding that overdraft generally exists in the basin as a whole based on the broad parameters of a basin-wide water balance?

1.a. Augmenting this issue one step further, whether surplus may exist as of 2006 due to the trial court's finding of overdraft being based upon a based period of 1951 through 2005?

2. Under what circumstances other than "waste" does *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351 allow a public-agency appropriator to obtain a water right or right to use water as an intervening public user – perhaps called for short, "appropriator for public use"?

2.a. Augmenting this issue one step further, whether "commencement of the action" is determined in a complex action, particularly with various complaints and cross-complaints at issue, by the date when the party seeking to establish its intervening public use (or "appropriator for public use") became a party to the action, and if not, whether the "commencement of the action" date may be based upon when the party became a party to the action if that party did not exist as of the date of some earlier "commencement of the action" date?

3. Whether California Constitution Article X, Section 2 and/or *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 preclude a judicial finding of a right to recapture native groundwater return flow?

4. Whether California Constitution Article X, Section 2 and/or *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 allowing for public and private aquaculturists to obtain a right or credit to fifty percent of water returning to the groundwater basin is applicable to Petitioner's circumstances of similarly contributing to natural recharge to the groundwater

basin – based upon undisputed evidence – particularly when Petitioner uniquely is subject to potential water replacement assessments and/or inverse condemnation liability against which recaptured return flows should logically be credited so as to avoid multiple payments for the same water?

5. Whether Water Code section 71610, which provides for recapture of any water, coupled with Government Code section 61100, which governs Petitioner as a community services district, provide Petitioner with a statutory basis for recapture of groundwater that Petitioner produces and distributes to Petitioner's customers from which a portion of that water returns to the groundwater basin?

6. Whether *Montana v. Wyoming* (2011) 131 S. Ct. 1765 provides a sufficient basis for Petitioner to claim recapture of the return flows from use of the groundwater it produces and distributes to customers from which a portion of that water returns to the groundwater basin?

"[A] writ of mandate should not be denied when the issues presented are of great public importance and must be resolved promptly." (*Corbett v. Sup.Ct. (Bank of America, N.A.)* (2002) 101 Cal.App.4th 649, 657.) The issues presented, *supra*, relate to rights to utilize water resources, making the issues clearly of tremendous public importance. (*Anderson v. Sup.Ct.* (1989) 213 Cal.App.3d 1321, 1328; *Silva v. Sup.Ct. (Heerhartz)* (1993) 14 Cal.App.4th 562, 574.)

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B. To Rectify A Lack Of Due Process And Equity In The Processes Leading Up To And The Outcome Of Petitioner's Trial, Evident From Respondent Court's Wholly Contradictory Positions From Its Phase Three Statement Of Decision About *Not* Precluding The Type Of Water Right That Can Be Later Established Only To Do Exactly That In Its 2/3/15 Statement Of Decision; Denial Of Petitioner's Multiple Requests To Conduct Discovery, Particularly With "Reasonable And Beneficial Use" Not *First* Established By The Other Parties; And Making Findings About Issues Not Set For Trial And Second-Guessing The Legislative Decision Of Petitioner's Predecessor-In-Interest To Purchase A Parcel In Los Angeles County For Drilling A Groundwater Well.

Water rights, including appropriative water rights and groundwater water rights, are considered rights in real property. (*See, San Bernardino v. Riverside* (1921) 186 Cal. 7, 13 [riparian water rights]; *Wright v. Best* (1942) 19 Cal.2d 368, 382 [appropriative water rights]; *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 725 [all water rights, including groundwater water rights].) ***Parties' real property rights are impaired by retroactively applying a finding of overdraft***, thereby effectively eliminating those property rights without a fair hearing on those issues. However, this Court cannot impair a vested property right without due process of law. (*See,* U.S. Const. Amend. XIV, § 1; Cal. Const., art. I, § 7; *see also, Mooney v. Holohan* (1935) 294 U.S. 103 [the guarantee of due process is a restraint on all departments of government, including the judicial].)

The California Supreme Court has established that "the due process safeguards required for protection of an individual's statutory ***interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures*** is a substantive element of one's liberty." (*People v.*

Ramirez (1979) 25 Cal.3d 260, 268 [internal citation omitted; emphasis added].)

Mandate is appropriate where due process rights are infringed. (*See, Bricker v. Super. Ct. (Stunich)* (2005) 133 Cal.App.4th 634, 637-639 [mandate proper where superior court violated petitioner's due process rights by dismissing small claims appeals without proper notice or hearing].)

Also required in a groundwater adjudication is "equity" because the trial court presides as a Court of Equity. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1256.)

In this case, violation of Petitioner's rights to due process and/or equity is established, as follows:

1. Contradiction Between Statements of Decision To Petitioner's Detriment and Prejudice.

In seeking to establish its water right, particularly under its Second Cause of Action, Petitioner has been deprived of due process *and* equity specifically by the retroactive application of "overdraft" and by other parties' not having to *first* establish their water use is "reasonable and beneficial." The Court will make such a determination [regarding reasonable and beneficial use] prior to the entry of final judgment." (Appendix, Vol. 15, Tab 165, p. 3525, lines 20-22).)

Specifically, the blatant and material contradiction of the 2/3/15 Statement of Decision stating Petitioner's efforts to establish surplus were precluded by the Phase Three Statement of Decision finding overdraft exists, notwithstanding the Phase Three Statement of Decision states: "But having heard evidence about the aquifer as a whole, ***the Court is not making historical findings that would be applicable to specific areas of the aquifer or that could be used in a specific way to determine water rights in particular areas of the aquifer.*** (Appendix, Vol. 4, Tab 31, p. 957, lines 16-24 [emphasis added].)

While Petitioner sought to offer evidence during the Phase Three trial about the broader Southeast area (as opposed to the smaller Buttes Subunit area during the November 4, 2014 trial), delay of presenting evidence from Phase Three to a later proceeding may pass muster *but for* Respondent Court's subsequent actions, namely finding *now* that the Phase Three Statement of Decision precludes a favorable outcome for Petitioner. *Respondent Court cannot simply ignore its Phase Three Statement of Decision like it is doing, particularly after Petitioner has reasonably relied upon its findings and decision for establishing its own rights.*

2. ***Denial of Petitioner's Discovery Requests, Including as to Other Parties' "Reasonable and Beneficial Use" of Groundwater, Thereby Placing The Proverbial "Cart Ahead Of The Horse."***

Respondent Court denied Petitioner's many requests during 2014 and in anticipation of trial the opportunity to lift the discovery stay (other than on September 26, 2014 to allow Petitioner to depose District 40's expert) so that Petitioner could undertake discovery, which precluded any opportunity to assess the "reasonable and beneficial use" of another party's water use, relating specifically to the burden on Petitioner of establish surplus which shall precede Petitioner's burden of proving surplus.

As held by the Supreme Court in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 381: "...burden of ***proving surplus*** does ***not come into existence until*** the existing appropriators, or ***overlying owners first*** provide satisfactory evidence that a valid property right has been impaired." (*See also, California Water Law & Policy* (Slater) Sec. 11.04, pp. 11-20 to 11-21 [emphasis added], *citing to, Tulare Irr. Dist. V. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 566-567.)

Here, Petitioner has a clear due process right under the California Civil Discovery Act to conduct discovery reasonably calculated to aid in preparation of its case. The ultimate question of whether "surplus" existed was in dispute

(though Respondent Court never made a factual finding, instead making a legal finding surplus could not exist given the Phase Three Statement of Decision). This is a clear statutory right that was violated by Respondent Court, thereby impinging on Petitioner's procedural due process rights. Consequently, Respondent Court wrongfully deprived Petitioner of an opportunity to plead or present a substantial portion of its cause of action and case. (*Brandt v. Sup.Ct. (Standard Ins. Co.)* (1985) 37 Cal.3d 813, 816; *Vasquez v. Sup.Ct. (Karp)* (1971) 4 Cal.3d 800, 807; *Fatica v. Sup.Ct. (Liljegren)* (2002) 99 Cal.App.4th 350, 351.)

Denial of right to present evidence is reversible error per se. (*Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291; *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677; *see also Fewel v. Fewel* (1943) 23 Cal.2d 431, 433, *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1114-1116 [order striking "essential expert witness testimony" regarding theory of liability held reversible per se].) *Similarly, not being able to gauge the "reasonable and beneficial use" of other parties' water use bears a strikingly similar effect.*

3. Respondent Court decided issues that were not set for trial.

Only Petitioner's Second and Sixth Causes of Action were set for trial, yet Respondent Court made findings on issues not set for trial *and* utilized these findings to support its position on Petitioner's two causes of action.

Though pleaded by Petitioner through its Eighth Cause of Action (Basin Boundaries) – *which was not set for trial* – Respondent Court states in its 2/3/15 Statement of Decision states that: "The Court finds and determines that Petitioner does not have water rights to pump groundwater and export it from the Adjudication Area to an area for use other than on its property where Well 14 is located within the adjudication area [sic]." (Appendix, Vol. 15, Tab 165, p. 3520, lines 19-21.)

Though not an element of Petitioner's Second or Sixth Causes of Action set for trial, Respondent Court stated: "The Court finds that Phelan Pinion Hills' pumping of groundwater from the Antelope Valley Groundwater Basin negatively impacts the Butte sub basin [sic] and the Adjudication Area." (Appendix, Vol. 15, Tab 165, p. 3524, lines 14-16.)

Though pleaded by Petitioner through its Fourth Cause of Action (Declaratory Relief – Municipal Priority) – *which was not set for trial* – Respondent Court stated that Petitioner does not have a "priority" right. (Appendix, Vol. 15, Tab 165, p. 3526, lines 4-5.)

Ultimately, Respondent Court blended issues from other causes of action to Petitioner's detriment and prejudice.

4. Respondent Court Improperly Second-Guessed Two Counties' Legislative Decisions Regarding Acquisition of the Well 14 Parcel, Which Was Publicly Stated To Be Used For A Groundwater Well for Use in San Bernardino County.

Illustrating a subjective view of Respondent Court, the court stated during Petitioner's counsel's direct examination of Petitioner's general manager regarding the public importance of Well 14: "It's a little bit like asking a thief why he stole thousands of dollars, what he was going to use it for, why was it important to him and so on. I don't mean to suggest to you that I have any conclusions about stealing water." (Appendix, Vol. 13, Tab 146, p. 3182, lines 3-7.)

The sale of the Well 14 Parcel from Los Angeles County to Petitioner's predecessor-in-interest (i.e., San Bernardino County) was a legislative set of decisions by the two counties and subject to the protection of the separation of powers doctrine rather than any second-guessing or otherwise criticizing agencies of another branch of government. (*See,* Cal. Const. art. III, § 3.)

C. To Prevent Irreparable And Ongoing Harm Which Would Arise From Waiting To Appeal Final Judgment Because The Proposed Physical Solution, If Approved In The Coming Months, Will Allocate All Of The Groundwater To Settling Parties And Impose Replacement Assessment Fees On Petitioner *If* Water Is Available To Purchase, Thereby Subjecting Petitioner To Significant Harm *And* Exposing Settling Parties' Water Allocations To Change Later If Petitioner Were To Appeal And Prevail.

Appeal from the ultimate judgment is an inadequate remedy when an unnecessary set of litigation and trial will occur, resulting in irreparable harm, justifying the granting of writ relief. (*See, Fisherman's Wharf Bay Cruise Corp. v. Superior Court (Blue & Gold Fleet, Inc.)* (2003) 114 Cal.App.4th 309, 319; *Coulter v. Superior Court (Schwartz & Reynolds and Co.)* (1978) 21 Cal.3d 144, 148; and *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-67 ["Avoiding an unnecessary trial...militate(s) towards writ review."]; *see also,* Code of Civil Procedure section 1103.) Where an erroneous ruling would require a petitioner to undergo *two* trials, the appellate court is more likely to grant writ relief. (*Fisherman's Wharf Bay Cruise Corp. v. Sup.Ct. (Blue & Gold Fleet, Inc.)* (2003) 114 Cal.App.4th 309, 319; *Marron v. Sup.Ct. (Hassanein)* (2003) 108 Cal.App.4th 1049, 1056.)

Some of the Real Parties previously indicated Petitioner's rights needed to be determined before a settlement could be finalized, thereby setting in motion Respondent Court's abbreviated process for Petitioner's trial. With Respondent Court's 2/3/15 Statement of Decision, Real Parties and many other parties are now marching toward a settlement with a Proposed Physical Solution (a document separate from the "settlement") in which Petitioner is excluded as a settling party. However, Petitioner is forced to challenge the Proposed Physical Solution and to litigate unresolved causes of action.

Accordingly, an adequate remedy other than writ relief does not exist.

D. To Prevent Waste Of Judicial Resources.

To conduct a "trial simply to generate an appealable judgment would be a waste of resources and truly inefficient, especially when the appellate court could review the core legal issue on an extraordinary writ [petition]." (*Franchise Tax Board v. Superior Court* (2013) 221 Cal.App.4th 647, 658.)

Here, absent writ relief, Petitioner is forced to challenge the Proposed Physical Solution and to litigate unresolved causes of action.

E. To Correct Substantively Material Errors In Respondent Court's 2/3/15 Statement of Decision, Which Were Asserted To But Unaddressed By Respondent Court.

Petitioner stands upon its December 18, 2014 objections to the proposed statement of decision. (Appendix, Vol. 14, Tabs 152 and 154), with key objections being:

(1) Conflicting Statements of Decisions based significantly on *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, a key water law case rendered by the California Supreme Court, regarding "historical findings" not being made only to later say the prior finding of overdraft is a historical finding precluding surplus. (*See, e.g.,* Appendix, Vol. 14, Tab 154, p. 3401, line 22 through p. 3402, line 2.)

(2) Lack of any discussion of *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, particularly as to other parties' *first* establishing their "reasonable and beneficial use" of water *and* why *Peabody* does not support Petitioner's theory for as an "appropriator for public use," irrespective of surplus water having existed at the time Petitioner's Well 14 commenced pumping during 2006 for municipal purposes. (*See, e.g.,* Appendix, Vol. 14: Tab 154, p. 3402, lines 18-19 and p. 3406, lines 21-23; Tab 152, p. 3380, lines 1-2.)

(3) Deciding or making findings on issues *not set for trial* (i.e., "export," "impact," and "priority"), *yet not rendering a decision on issues set for trial* such as "reasonable and beneficial use" by Petitioner. (*See, e.g.,* Appendix, Vol. 14: Tab 154, p. 3400, lines 26-27, and Tab 147, p. 3276, lines 19-24.)

(4) Finding *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 is stare decisis precluding Petitioner's claim to a native groundwater return flow right. (*See, e.g.,* Appendix, Vol. 15, Tab 165, p. 3523, line 23 - p. 3524, line 2.)

Conflicting trial court interpretations of the law require a resolution of the conflict. (*See, Greyhound Corp. v. Sup.Ct. (Clay)* (1961) 56 Cal.2d 355, 378.)

Here, with the same trial court, are conflicting legal interpretations in different trial phases. On the one hand, Respondent Court applied the law of *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 to formulate its Phase Three Statement of Decision while in the very *next* sentence following citation to *San Fernando*, Respondent Court explicitly stated that it was not making "...***historical findings that would be applicable to specific areas of the aquifer or that could be used in a specific way to determine water rights in particular areas of the aquifer.***" (Appendix, Vol. 4, Tab 31, p. 957, lines 16-24.) On the other hand, Respondent Court stated in its 2/3/15 Statement of Decision, relying in part on *San Fernando, supra,* at pages 278 and 293, that Petitioner "...bears the burden of proof that the water it pumped from the Antelope Valley Adjudication Area is ***surplus*** water, that the aquifer form which it its pumped is not in overdraft, and that its use is reasonable and beneficial." (Appendix, Vol. 15, Tab 165, p. 3521, lines 7-26.)

A statement of decision omitting factual findings necessary to resolution of disputed material issues are inadequate as a matter of law. (*See, Marriage of Hardin* (1995) 38 Cal.App.4th 448, 453, fn.4.)

Also, the 2/3/15 Statement of Decision does not meet the standard because it exceeds the issues set for trial. (Appendix, Vol. 14, Tab 154, p. 3403, lines 13-14; *see, Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, 750-751; *see also,* Appendix, Vol. 14, Tab 150.)

Assuming *arguendo* errors were not asserted by Petitioner to Respondent Court, such an omission is overcome by this writ petition presenting important constitutional issues (*Anderson v. Sup.Ct.* (1989) 213 Cal.App.3d 1321, 1328) and novel issues of substantial public interest with public interest in minimizing delay and material facts are not in dispute (*Brown v. Fair Political Practices Comm'n* (2000) 84 Cal.App.4th 137, 140, fn. 2.)

THE PETITION IS TIMELY AND PROPERLY BEFORE THE COURT

"An appellate court *may* consider a petition for an extraordinary writ at any time..., but has discretion to deny a petition filed after the 60-day period applicable to appeals..." (*Volkswagen of America, Inc. v. Sup.Ct. (Adams)* (2001) 94 Cal.App.4th 695, 701.)

Respondent Court signed its Statement of Decision on February 3, 2015, and the Proposed Physical Solution was served on the parties – including Petitioner – on March 4, 2015. This Petition is filed within sixty days counting from the earliest theoretical date of February 3, and this Petition was prepared with much diligence to collect a lengthy record and to formulate a rather complex petition given various substantive water law and procedural issues. The Petition is timely. (*Cal. West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.app.4th 1170, 1173; *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1505 n.9.)

A TEMPORARY STAY OF RESPONDENT COURT PROCEEDINGS IS NECESSARY AND APPROPRIATE

Petitioner's interests, and those of Respondent Court and other parties not having to "redo" the process upon successful appeal by Petitioner, necessitate a stay because of the Proposed Physical Solution being in motion for Respondent Court's approval over the coming days, weeks, and months – this Physical Solution would apply Basin-wide potentially on ***all*** parties.

A temporary stay of further trial court proceedings pending resolution of this writ is necessary to ensure the effectiveness of writ relief. This Court should issue a stay in order to allow correction of Respondent Court's errors so that Respondent Court's rulings conform to procedural and substantive law, which may in turn posture the parties such that a true "global settlement" is reached.

POINTS AND AUTHORITIES

I. STANDARD OF REVIEW

A. De Novo Review Standard

The procedural and substantive questions raised by Petitioner preceding, during, and subsequent to Respondent Court's Statement of Decision are purely issues of law and can be reviewed by this Court *de novo*.

Whether an issue is one of "law" or "fact" is generally a question of whether its resolution turns on the evidence or application of law. "In theory, a determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles." (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn. 3; *see also, Uniroyal Chem. Co., Inc. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 292.) The meaning of a court order or judgment is a question of law subject to the appellate court's independent review. (*In re Insurance Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429.)

The proper interpretation of constitutional or statutory provisions is a question of law, subject to the court of appeal's independent (de novo) review. (*Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.) Likewise, the application of a statute (or constitutional provision) to undisputed facts is a question of law, reviewed de novo. (*Lozada v. City & County of San Francisco* (2006) 145 Cal.App.4th 1139, 1149.) Due process issues are reviewed de novo. (*Herbst v. Swan* (2002) 102 Cal.App.4th 813, 816.)

De novo review is very appropriate for questions of law because the Court of Appeal is in at least as good a position as the trial court – and likely better position – to decide questions of law. (*See, Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1023-1024 (disapproved on other grounds).) Also, independent review promotes statewide consistency in the

interpretation and application of law, ***particularly important in water law.*** (*Id.*)

Here, the issues presented in this Petition are legal questions, evident from the preceding sections, *supra*, identifying issues of "first impression" and "material errors," including Respondent Court's application of *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 and lack of application of *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351. Respondent Court and Real Parties recognized the "facts are not in dispute," with the dispute over surplus being a legal issue as to whether Respondent Court could find such given its Phase Three Statement of Decision. (Appendix, Vol. 9, Tab 89, p. 2152, lines 6-13; p. 2158, line 8; Vol. 14, Tab 147, p. 3341, lines 12-20, and p. 3316, lines 5-9.)

Ultimately, de novo review is the appropriate standard of review for this Petition.

B. Abuse of Discretion And Substantial Evidence Standard

Even if this Court applies an "abuse of discretion" standard, mandate lies here to correct an abuse in the exercise of discretion by Respondent Court, with judicial discretion subject to being exercised in only one way. (*San Diego Gas & Elec. Co. v. Sup.Ct. (Harris)* (2007) 146 Cal.App.4th 1545, 1549.)

"The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (*Sargon Enterprises, Inc. v. University of Southern Calif.* (2012) 55 Cal.4th 747, 773.) "Judicial discretion" is thought to mean the "absence of arbitrary determination...or whimsical thinking." (*In re Cortez* (1971) 6 Cal.3d 78, 85.) The judgment will be reversed if there was substantial evidence tending to prove all elements of the case and if the state of the law supports the claim. (*Margolin v.*

Shemaria (2000) 85 Cal.App.4th 891, 895.) Thus, to the extent an evidentiary dispute or issue exists with Petitioner's case presented to Respondent Court, the evidence is "substantial."

Respondent Court recognized that Petitioner's expert – Mr. Thomas E. Harder – provided very competent opinions. (Appendix, Vol. 14, p. 3277, lines 1-7.) And no other party offered evidence contrary to the evidence offered and admitted by Petitioner, due to the 631.8 motion for judgment being granted. (*Ibid.* at p. 3319, lines 16-26.) Also, Mr. Harder's testimony and accompanying exhibits are chalked full of substantial evidence of "surplus" at least in 2006 when Well 14 commenced groundwater production for municipal purposes as well as return flow data. (*Ibid.* at pp. 3229, 3233, 3237, 3243, and 3251-3258.)

Accordingly, pursuant to governing legal principles, substantial evidence exists in support of Petitioner's Second and Sixth Causes of Action.

II. WRIT OF MANDATE SHOULD ISSUE TO INSTRUCT RESPONDENT COURT TO CORRECT ITS ERRONEOUS STATEMENT OF DECISION

A. The Law Supports Petitioner's Second Cause Of Action For Declaratory Relief – Appropriative Rights

1. Petitioner's Legal Theories for Establishing Its Appropriative Right.

Petitioner pleaded "...it has an appropriative right to pump water from the Basin" and that "Surplus water is that amount that can be extracted without causing a drop in the water table or subsidence." (Appendix, Vol. 1, Tab 13, p. 428, lines 6-7, and 10-11.)

This Second Cause of Action seeks to establish a right to pump from Well 14, specifically, as an appropriator for public use of surplus water, *or* alternatively, as an appropriator for public intervening use (if the Court determines that surplus did not exist during Well 14's production history).

Surplus or no surplus, the common denominator is that Petitioner provides water as an appropriator for public use.

a. Elements of an Appropriative Right

An "appropriator" is a party that diverts or extracts water for use on nonriparian or nonoverlying land or for nonriparian or non-overlying uses.[1] More specifically, an appropriator *intends to* pump or divert water; *does* pump or divert water;[2] and *applies* that water to *beneficial* use.[3]

"Reasonable" use does not have any single definition, though with California Constitution Article X, Section 2 requirements for utilizing water resources for "beneficial use to the fullest extent of which they are capable," which is "primarily thought to refer to the method, manner, or means of use" and which is "generally thought to be consistent with the custom of similarly situated users."[4]

b. Public Use and Surplus

In *Peabody* v. *Vallejo* (1935) 2 Cal.2d 351, 378-379, the California Supreme Court stated: "There is little doubt that the application of the doctrine [of public use] may be invoked on either ground [estoppel or public policy] when public use has attached prior to the commencement of the action and

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[1] Scott S. Slater, *California Water Law and Policy* (2012) § 1.13, p. 1-19.

[2] Meaning, the exercise of dominion and control by obtaining possession of the water by separating the water from the rest of source of supply. *See,* Scott S. Slater, *California Water Law and Policy* (2012) § 2.10, p. 2-27. "Extraction of water from a well or diversion of water…usually fulfills this requirement." (*Id., citing to, Katz v. Walkinshaw* (1903) 141 Cal. 138, 135; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 20, 30-31.)

[3] Scott S. Slater, *California Water Law and Policy* (2012) § 2.09, p. 2-22; *see also, Turlock Irr. Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1054.

[4] California Constitution, Article X, Section 2; Scott S. Slater, *California Water Law and Policy* (2012) § 1.13, p. 1-23.

depending on the circumstances of the case."[5] No clear line exists in this complex case as to when the "action commenced," but the "public use" of Well 14 is as early as when Petitioner's predecessor purchased from Los Angeles County in 1999 the parcel on which Well 14 is situated, all of which went through various public processes in Los Angeles and San Bernardino Counties.

Under the common law, *intent* is critical – the appropriator must intend to appropriate and then do so.[6] The estoppel basis pronounced by *Peabody* looks to the circumstances involved with factors such as: (i) notice to and knowledge of the overliers; (ii) a lengthy time of the overliers or parties "letting" an appropriator pump the water; and, (iii) detrimental reliance by the appropriator's customers on the water so taken.[7]

In addition, prevalent public policy bases are set forth in various case authorities, in furtherance of *Peabody's* decree of the "public use" doctrine.[8]

As explained in *Peabody,* lack of surplus is what exposes the appropriator to inverse condemnation, however, with such party bearing its

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[5] Hutchins, *supra*, at 492, fn.57.

[6] *Inyo Consolidated Water Co. v. Jess* (1911) 161 Cal. 516, 520 [As work began for a ditch, with the intent thereby to take and use the water, a right was acquired with respect to the water.]

[7] *Peabody* v. *Vallejo* (1935) 2 Cal.2d 351, 378-379.

[8] See, *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 573-574; *Hillside Water Co. v. Los Angeles* (1938) 10 Cal.2d 677, 688; *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 90-94; *City of Vallejo* (1935) 2 Cal.2d 351, 379-380; *Miller & Lux v. San Joaquin Light & Power Corp.* (1937) 8 Cal.2d 427, 436; *Gurnsey v. Northern California Power Co.* (1911) 160 Cal. 699, 711-712.

burden to first prove the validity of its right and that such right has been impaired.[9]

Also, "[p]ublic use of percolating water is a non-overlying use, whether the lands that receive such public service are overlying lands or whether they are located outside of the groundwater area. ***Such public use is therefore an appropriative use of the water.***" (Wells A. Hutchins, *The California Law of Water Rights* (1956), p. 458 [emphasis added].)

Ultimately, the public-use doctrine – whether based on estoppel or public policy – provides an appropriative water right for a public appropriator such as Petitioner – irrespective of whether surplus exists (or existed when the well commenced pumping for municipal purposes).

2. Respondent Court's 2/3/15 Statement of Decision

The Decision states in pertinent part: "While it [Petitioner] is entitled to use the water from Well 14 on its land within the adjudication area, so long as there is no surplus within the Adjudication Area aquifer, it is an appropriator without a right to pump." (Appendix, Vol. 15, Tab 165, p. 3520, lines 23-24.)

The following are two key points highlighting the errors:

(1) "To establish an appropriative right, Phelan Piñon Hills bears the burden of proof to establish that the water it pumped from the Antelope Valley Adjudication Area is ***surplus*** water, that the aquifer from which it is pumped is not in overdraft, and that its use is reasonable and beneficial." (*Ibid.* at p. 3521, lines 7-11 [emphasis in original].)

(2) "This Court has already determined, after considering extensive oral and documentary evidence and hearing arguments, that there is hydraulic connectivity within the entire Adjudication Area, that the

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[9] *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 378-379. *See also, Allen v. California Water & Telephone Co.* (1946) 29 Cal.2d 466, 490.

Adjudication Area has sustained a significant loss of groundwater since 1951, that the Adjudication Area has been in a state of overdraft since at least 2005 and that no surplus water has been available for pumping at least since then. (Statement of Decision, Phase 3 Trial (Jul. 18, 2011) at 5:17-6:4; 5:15-5:22, and 9:4-9:11.)" (Appendix, Vol. 15, Tab 165, p. 3522, lines 1-8.)

The following points correspond to the above points to identify flaws with this Decision:

(1) Respondent Court did not recognize that reasonable and beneficial uses of others *precedes* Petitioner's burden to prove surplus, hence the "cart ahead of the horse" paradigm; the Phase Three Decision does not say there has been overdraft since 2005, but instead the ***overdraft was found to be from 1951 through 2005*** as correctly stated in the 2/3/15 Statement of Decision at p. 4, fn. 1. (*Ibid.* at p. 3518, fn. 1 [emphasis added]), with Petitioner's evidence being for 2006 when its Well 14 commenced pumping for municipal purposes; and, Respondent Court did not make any findings regarding Petitioner's reasonable and beneficial use of water, despite Petitioner's request and the obligation to do so (even as stated within the Decision itself at p. 3521).

(2) Petitioner's evidence demonstrates that not simply "intervals of slight rises" exist in the Buttes Subunit, but instead stable or increases level exist *since 1951*. Respondent Court relies now on its Phase Three Decision at page 9, lines 4 through 11, in which Respondent Court stated then: "The physical condition of the valley is inconsistent with those estimates that there is and has been a surplus of water in the aquifer." The problem with this statement and relying upon it now is that Petitioner was not afforded the opportunity then to present evidence of conditions in the Southeast

area of this large Basin, and the evidence admitted during the November 4, 2014 trial establishes the physical condition of the Buttes Subunit in particular has not sustained subsidence or other telltale signs of overdraft. Moreover, Respondent Court is bound by its language keeping the door open in Phase Three to later establish surplus in a localized area like Petitioner sought with Buttes Subunit. (*See, Arntz Contracting Co. v. St. Paul Fire and Marine Ins.* (1996) 47 Cal.App.4th 472, 487.) Nor was Petitioner trying to prove *current* surplus, but instead that surplus *existed at the time Petitioner's Well 14 commenced production for municipal purposes.*

Ultimately, Petitioner is a public-agency water supplier distributing water for municipal purposes – "public use." Petitioner's Well 14 is approximately one-third of Petitioner's water supply distributed to customers. (Appendix, Vol. 13, Tab 146, p. 3180, lines 1-4.) Respondent Court eventually let the witness respond to the question of whether the witness – as General Manager for Petitioner – focuses to any extent on any particular location of wells within the Petitioner's water system, as follows: ***"Yes, I do. The location of Well 14 is in a known-producing aquifer…Well 14 is a good producing well…It's very efficient…It also has ties into our system with our transmission and distribution lines that come from the Well…It is also immediately downstream of a number of residences that are in the Antelope Valley Basin and the Basin for the adjudication to recapture some of the effluent from the septic systems."*** (*Ibid.* at p. 3184, lines 14-24 [emphasis added].)

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In addition to points discussed, *supra*, Petitioner, to no avail, sought to persuade Respondent Court during the hearing on the tentative/proposed statement of decision, as follows:

(1) *No overdraft finding had been made at the time Well 14 commences pumping or when Petitioner tried to offer evidence during the Phase Three trial.* (Appendix, Vol. 15, Tab 161, p. 3466, lines 16-17.)

(2) *Peabody, supra,* 2 Cal.2d at p. 369 *talks very specifically about how determinations of public use are made on a case-by-case basis, rather than just a matter of water being wasted as Respondent Court opined on November 5, 2014.* (*Ibid.* at p. 3471, lines 14-26.) (*Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024.)

Respondent Court's reply was: "I think that the Supreme Court or the Appellate Court or the legislature is going to have to deal with that issue. The existing law was to the contrary in this case." (Appendix, Vol. 15, Tab 165, p. 3471, line 27 - p. 3742, line 2.)

It is well understood that an indication of overdraft is declining water levels in a groundwater basin. (*See City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908; *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199.) An indication of surplus is not overdraft. (*See City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 277-78, 280.) ***Thus, surplus is established by constant or increasing water levels.***

Referring to the California Constitution, Article X, Section 2 (also known as the "1928 Amendment"), the Supreme Court stated in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242: "The constitutional amendment therefore dictates the basic principles defining water rights: that no one can have a protectible interest in the unreasonable use of water..."

Ultimately, Respondent Court recognizes Petitioner as an "appropriator" (appendix, vol. 15, tab 165, p. 3526, lines 4-5), yet incorrectly concludes surplus did not exist in at least 2006, despite its Phase Three decision's explicit language and without first determining other parties' reasonable and beneficial use of water.

B. The Law Supports Petitioner's Sixth Cause Of Action For Declaratory Relief – Recapture Of Return Flows

1. Petitioner's Theories for Establishing Its Return Flow Right.

This Sixth Cause of Action seeks to establish a right to recapture return flows of the native water produced by and distributed to Petitioner's customers, namely those within the portion of Petitioner's service area that lies over the portion of the Antelope Valley Groundwater Basin. (*See,* Appendix, Vol. 12, Tab 138, pp. 2985, 2995, and 3011.)

This right is particularly critical to limiting the liability of Petitioner to overliers that have sued Petitioner for inverse condemnation, as well as liability to a potential Watermaster for replacement water assessments to the extent surplus does not exist and/or Petitioner's use of Well 14 water is deemed an "export" from the Basin, despite a portion of Petitioner's service area lying over a portion of the Basin. The premise is that Petitioner does not diminish native water to the extent of its production; rather, a significant portion of its production results in recharge to the Basin. *No other party appears to be in the position of Petitioner as it relates to the liabilities described above.*

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The idea of native water return flows is nothing new; normally, native water return flow is factored into calculations of the natural recharge (but did not occur as to Petitioner's water use). Summary of Petitioner's position for the right to recapture return flows is as follows:

(1) Respondent Court presides as a Court of Equity, and given the additional unique nature of this litigation being a groundwater adjudication, Petitioner should receive this right.

(2) Various authorities support Petitioner's cause of action for recapturing return flows from *native groundwater*, as a matter of law, science, and fact. Petitioner's cause of action regarding return flow is *not* claimed as a "water right" but instead a "return flow right" and Petitioner does *not* question an importer's right to return flows resulting from *imported water*.

(3) The "science" establishes several pertinent circumstances, including: (i) the Antelope Valley Groundwater Basin ("Basin") extends east of the Los Angeles/San Bernardino County line;[10] (ii) a portion of Petitioner's service area lies over the Basin; (iii) Petitioner produces groundwater from the Basin, which Petitioner distributes to customers who are almost exclusively residential and unsewered users located within that portion of the service that lies over the Basin; (iv) native groundwater return flow results from Petitioner's production and distribution to these customers; and, (v) this return flow flows toward the Adjudication Area and Well 14, placing Well 14 in a position to recapture the native groundwater that was used by customers in that portion of Petitioner's service area that lies over the Basin.

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[10] Court's Order After Hearing on Jurisdictional Boundaries (Appendix, Vol. 1, Tab 4, p. 354, lines 6-8 ["The court concludes that the alluvial basin as described in California Department of Water Resources Bulletin 118-2003 should be the basic jurisdictional boundary for purposes of this litigation."]

(4) Neither Petitioner's production nor its native groundwater return flow have been factored into the evidence, meaning that part of the natural recharge to the Basin is unaccounted. (Appendix, Vol. 12, Tab 138, p. 2926, line 17 – p. 2927, line 16.)

Ultimately, Petitioner's cause of action for a return flow right serves to be part of the overall water balance with Petitioner an offset against potential future assessments or liabilities, anti-export provisions, or otherwise arising from the anticipated physical solution to be fashioned by the trial court.

Fundamentally, the powers of a court of equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity, a wide play is left to the conscience of the chancellor in formulating his decrees. ... ***It is of the very essence of equity that its powers should be so broad as to be capable of dealing with novel conditions.*** Equity acts in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which ***new primary rights and duties are constantly arising***, and new kinds of wrongs are constantly committed. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 694 [emphasis added; internal citations omitted].)

More specific to water adjudications, "Since the adoption of the 1928 constitution amendment, it is not only within the power but it is also the duty of the trial court to admit evidence relating to possible physical solution..." (City of Lodi v. East Bay Municipal Utility District (1936) 7 Cal.2d 316, 341, citing to, Tulare v. Lindsay-Strathmore (1935) 3 Cal.2d 489, 574 [emphasis added].) "The doctrine of physical solution is a practical way to carry out the mandate of Article X, Section 2, that the state's water resources be put to use 'to the fullest extent of which they are capable'"; "[u]nder the doctrine, as one text states, '[s]olution of water rights problems by use of all available information and expertise is attempted in order that the best possible use is made of the waters in their apportionment among contending parties.'"

(Littleworth & Garner, California Water II (2d ed. 2007) Equitable Apportionment and the Doctrine of Physical Solution, ch. 7, pp. 173-174; see also, at p. 174 [emphasis added].)

Legal authority for this right does exist, albeit out-of-state authority, as discussed in Section D, infra, including from the United States Supreme Court. **Decisions of the United States Supreme Court constitute controlling authority in all California appellate courts.** (See, Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455–456.)

Also, where California law is uncertain, such as here, the decision of a court of last resort of another state, though not binding as authority, is persuasive. (*People ex rel. Morgan v. Hayne* (1890) 83 Cal. 111, 119.) Likewise, the decisions of federal courts are persuasive. (*See, Estate of Sloan* (1963) 222 Cal.App.2d 283, 293; *Silman v. Reghetti* (1935) 7 Cal.App.2d 726, 729; *People v. Herbert's of Los Angeles, Inc.* (1935) 3 Cal.App.2d 482, 484.) As explained, *infra*, the Supreme Court of Washington and the federal District Court for the District of Utah establish that the return flow right sought by Petitioner indeed has a legal basis.

Starting at the top, the United States Supreme Court recently ***re-affirmed*** the "doctrine of recapture" in an inter-state dispute. (*State of Montana* v. *State of Wyoming* (2011) 131 S. Ct. 1765, 1774-1775, and fn. 7 (*"State of Montana"*).) The recaptured water was "runoff and seepage water" from surface water. In looking to other cases, including those explained herein, Justice Thomas explained that an appropriator retains the right to recapture, and in some narrow circumstances, even after the water leaves the appropriator's property. (*State of Montana, supra,* 131 S. Ct. at 1774-1775; *see,* 1 Wiel §§ 38-40, at 37-43 and at fn.7.)

As explained by the Supreme Court for the State of Washington in Department of Ecology v. U.S. Bureau of Reclamation (1992) 118 Wash. 2d

761 ("Department of Ecology"), at p. 770, the test is one of "control and possession":

> We conclude that an appropriator's rights in particular molecules of water do not end while the water remains within the boundaries of the appropriator's property, and that after water has left those boundaries, the termination of the appropriator's rights depends on the "control and possession" test. Accordingly, once an appropriator has discharged water from his or her own property, then the issue becomes whether the appropriator nevertheless retains an intent to recapture that water, whether downstream on another piece of property or otherwise.

Similarly, in *Strawberry Water Users Association* v. *United States* 2006 U.S. Dist. LEXIS 19767 (*"Strawberry"*), in which Utah District Judge Jenkins, after quoting the same from *Department of Ecology*, sagely said:

> The Washington court's synthesis may reflect the broadest current reading of an appropriator's continuing right to return flows available in current Western water law. *Cf. 45 Am. Jur. 2d Irrigation § 33* (1999) ("Generally, escaped water is not subject to recapture where nothing is done to reclaim it before it reaches a stream."). Yet its analysis is grounded entirely upon *state* law, without any suggestion that the Reclamation Act, the specific federal project legislation, or the federal reclamation contracts confer any greater reach upon appropriators of water delivered by federal projects--including the Bureau of Reclamation itself--in recapturing waste, seepage or return flow of project waters. (*Strawberry Water Users Association, supra,* at 63-64 [emphasis in original].)

Thus, *Strawberry* further affirms a native water return flow right, while also demonstrating that the native return flow right is not limited to federal project water.

The learned Mr. Wiel also opined that:

> The point which distinguishes these cases is the intent not to abandon it, but, on the contrary, always intending to reclaim it, and the carrying out of that intent within a reasonable time. The intent to recapture the water must be present at the time it is discharged from control. (Wiel, Samuel C., *Water Rights in the Western States* (1911), Vol. I, § 39, p. 43, *citing to, Shultz* v. *Sweeny* (1886) 19 Nev. 359 [in which the water was clearly let loose to be rid of it].)

Though *State of Montana* involved surface water, the analogous approach in California with respect to the rules for groundwater and surface water is well known.[11] Moreover, as to appropriation, there is no distinction between return flows from native water and return flows from imported water.[12] ***Thus, the surface water at issue in State of Montana does not alter its applicability here to groundwater, particularly given the full force of the Supreme Court and other authorities.***

Further establishing that this Court may rely on these other authorities is looking to California water law history itself. In the landmark decision by

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[11] Scott S. Slater, *California Water Law and Policy* (2012) § 3.01, *citing to, City of Barstow* v. *Mojave Water Agency* (2000) 23 Cal.4th 12243, 1240 ["An overlying right is considered analogous to that of the riparian owner in a surface stream."] Likewise, "[t]he rules applicable to appropriation of percolating ground water are generally those arising under common-law appropriation of surface water and subterranean flow within known and defined channels." [*Id.* at § 2.15.]

[12] *Ibid.* at § 2.08[7], citing *City of Los Angeles* v. *City of San Fernando* (1975) 14 Cal.3d 199. 262-263.

the California Supreme Court in *Los Angeles v. Glendale* (1943) 23 Cal.2d 68 (*"Glendale"*), the high court "referred with approval to cases from other jurisdictions in which the recapture of seepage water after leaving project boundaries was authorized where it had been planned in advance."[13] ***Accordingly, this Court, as done by the California Supreme Court in Glendale, may "refer with approval to cases from other jurisdictions" and in doing so, legal and equitable grounds exist for Petitioner's return flow right.***

In addition, California statutory authority exists for Petitioner's return flow right. Water Code section 71610(a) states that: "Except as provided in subdivision (b), a district may acquire, control, distribute, store, spread, sink, treat, purify, recycle, ***recapture***, and salvage ***any water***, including sewage and storm waters, for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district." (Emphasis added.) Water Code section 71610(a) relates to municipal water districts, which Petitioner is not but pursuant to Government Code section 61100(a), Petitioner may utilize water in the same manner as a municipal water district, by stating: "Supply water for any beneficial uses, in the same manner as a municipal water district, formed pursuant to the Municipal Water District Law of 1911, Division 20 (commencing with Section 71000) of the Water Code." *Accordingly, this pertinent pair of California Water Code statutes stands for the proposition that "any water" (inarguably including return flows resulting from use of native water) can be supplied for beneficial uses, thereby allowing Petitioner to recapture return flows from its customers' use of native water.*

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[13] Hutchins, Wells A., *The California Law of Water Rights* (1956), at p. 388, *citing* at footnote 69 to *Los Angeles* v. *Glendale* (1943) 23 Cal.2d 68, 77-78, in which the subject citations were *Ide* v. *United States* (1924) 263 U.S. 497 and *United States* v. *Haga* (1921) 276 F. 41.

Ultimately, Petitioner has established sufficient grounds for its Sixth Cause of Action, with a strong legal basis for Petitioner to have this return flow right exist.[14] And it seeks to do so with a legal basis and pursuant to well-established principles of California water law to utilize "...water resources of the State be put to beneficial use to the ***fullest*** extent possible of which they are capable..."[15] And, Petitioner respectfully requests this Court recognize a key principle spoken of by the *City of Santa Maria* Court: "Each case must turn of its own facts, & the power of the court extends to working out a fair and just solution." (*City of Santa Maria, et al. v. Richard E. Adam, et al.* (2012) ("*Santa Maria*") 211 Cal.App.4th 266, 288.)

2. *Respondent Court's 2/3/15 Statement of Decision*

Respondent Court's position is that: "The right to return flows is limited to return flows from imported water." (2/3/15 Statement of Decision, p. 9:6.) Making reference to *Santa Maria, supra,* Respondent Court relies on *San Fernando, supra,* as allowing *only* for an imported water return flow right, as well as contending that the doctrine of recapture "as applied in a federal court litigation" is precluded from consideration based upon stare decisis. (2/3/15 Statement of Decision, p. 9:3-10:2.)

a. *San Fernando* and *Santa Maria* Do Not Preclude Petitioner's Return Flow Right.

Santa Maria echoes *San Fernando,* but neither case precluded a native groundwater return flow right, and neither was presented with the circumstance presented here by Petitioner for grounds for a native groundwater return flow right – potential liability based on existing allegations

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[14] Prior briefing on this issue has been filed with Respondent Court during February 2014, including Petitioner's Opposition and Sur-Reply (Appendix, Vol. 7: Tab 77, pp. 1730-1747, and Tab 80, pp. 1797-1798.)

[15] *Ibid.* at p. 1235.

by some landowners of a "takings" and potential liability to a watermaster (or similar authority given new Statewide regulations over groundwater) for replacement or supplemental water assessments arising from Petitioner's service area being located outside of the adjudication area (even though part of the service area lies over part of the Antelope Valley Groundwater Basin).

San Fernando does not preclude a right to recapture returns flows resulting from use of native groundwater; instead, *San Fernando* established a *priority to imported water return flows*. Imported water return flows are the "first right." (*San Fernando, supra,* 14 Cal.3d at p. 261.)

Nothing in *San Fernando* says that there is no right to native water return flows. *San Fernando, supra,* 14 Cal.3d at page 261, makes clear the imported return flow right exists and is one of priority, whereas a native return flow right does not have the same priority because "returns flows from delivered of extracted native water do not add to the ground supply but only lessen the diminution occasioned by the extractions." (*Id.*) This language confirms native returns exist, albeit not as a priority.

Thus, neither *San Fernando* nor *Santa Maria*, nor any other California decision, holds that a native return flow right does not exist; instead, an imported right exists as a matter of priority as the importer's reward for "...the fruits of his expenditures and endeavors in brining into the basin water that would not otherwise be there." (*Id.)*

Accordingly, the United States Supreme Court majority decision is binding here, as such decisions on a federal question is binding on all California state courts.[16] (McLaughlin v. Walnut Properties, Inc. (2004) 119 Cal.App.4th 293, 297.) Even if State of Montana and the other cited

[16] Real Party Bolthouse entities have sued Petitioner regarding "federal question(s). (Appendix, Vol. 1, Tab 4, pp. 449-452 [Third Cause of Action for "Unlawful Takings/42 U.S.C. section 1983.].)

federal authorities are deemed persuasive authority, these authorities are entitled to "great weight." (See, Etcheverry v. Tri-Ag Service, Inc. (2000) 22 Cal.4th 316, 320-321; People v. $8,921 U.S. Currency (1994) 28 Cal.App.4th 1226, 1232, fn.6.)

Lending further support to the right to recapture return flows from the use of native groundwater is the statutory authority arising from California Water Code section 71610, which in conjunction with California Government Code section 61100, as discussed in the preceding section, *supra*.

Even if, assuming *arguendo*, *San Fernando (or Santa Maria)* were to be precedent to preclude a native groundwater return flow right, "intermediate appellate courts may depart from the precedent of older supreme court authority that, although not yet expressly overruled, has dissipated by later developments in California law." (*See, Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1131.)

Case in point is the more recent development of California water law in the California Supreme Court's opinion, *City of Barstow v. Mojave Water Agency* (2000) ("*Mojave*") 23 Cal.4th 1224, wherein the Court stated at p. 1256: "Equity demands that similarly situated parties be treated fairly." As for "return flows," the Hesperia Water District and approximately twenty-five other aquaculture operators who "...returned well over 50 percent of the [ground] water they produced to the basin." (*Id.*) Similarly here, Petitioner is not one of a group of twenty-six, but instead a "group" of one, but nonetheless is entitled to equity as held by *City of Barstow, supra*. Moreover, Petitioner is similarly situated in that approximately fifty percent of Petitioner's Well 14 production returns to and/or toward the Antelope Valley. (*See,* Appendix, Vol. 12, Tab 138, p. 2995 [Mr. Harder's return flow estimate that approximately 426 acre feet of return flow exists (of Petitioner's approximate 1,000 acre feet of production from Well 14.) Notwithstanding the *City of*

Barstow native groundwater return flow users were engaged in aquaculture, Petitioner in this case is subject to water replacement assessments and takings liability, if not other exposures, thus providing a legal and/or equitable basis for enjoying a similar right as recognized for the aquaculturists in *City of Barstow*.

In addition to the Supreme Court's strong voice in *Mojave,* the operative Mojave Judgment lends further insight and assistance regarding return flows being beyond imported water return flow rights. The Mojave Judgment defines "recirculated water" as "Water that is produced but not consumed by the Parties listed in Table B-2 of Exhibit 'B' and then returned either to the Mojave River or to the Groundwater Basin underlying the place of use." (Petition Exhibit A, Mojave Judgment, p. 12 of Judgment, Section II.A.4.cc.)

Ultimately, a statutory basis pursuant to California law exists for establishing Petitioner's return flow right, with no California decision precluding such, and even then, arguendo, federal and state decisional authorities make clear that this body of law may evolve, and should evolve particularly for Petitioner's unique circumstances.

III. WRIT OF PROHIBITION SHOULD ISSUE TO INSTRUCT RESPONDENT COURT TO REFRAIN FROM PROCEEDING WITH POTENTIAL APPROVAL PROPOSED JUDGMENT AND PHYSICAL SOLUTION UNTIL PETITIONER'S PETITION IS RESOLVED BY THIS COURT

Petitioner will continue to suffer grave and escalating harm if a writ of mandate and writ of prohibition do not issue, as Respondent Court has spoken in stark opposition to Petitioner's positions and Respondent Court is readying itself to approve the Proposed Physical Solution on basin-wide, all-party basis.

IV. CONCLUSION

California water law has taken monumental steps over the past 100 years with decisional authorities evolving and passage of statutes (as has occurred with federal authorities), with California's most recent demonstration being the recent passage of the Sustainable Groundwater Management Act to help ensure the limited natural resource of water remains available in sufficient quantity and quality for users of today and tomorrow. To the extent authority is lacking or hindering Petitioner's Second or Sixth Causes of Action, Petitioner respectfully requests this Court take the needed initiative to further evolve this complex body of California law.

DATED: March 23, 2015

Respectfully submitted,

ALESHIRE & WYNDER, LLP
Attorneys At Law
WESLEY A. MILIBAND
MILES P. HOGAN

By: _____
WESLEY A. MILIBAND
Attorneys for Petitioner PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

CERTIFICATE OF WORD COUNT

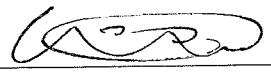
[Cal. Rules of Court, rule 8.204(c)(1)]

The text of this brief consists of 13,823 words as counted by the Windows Word Count Tools feature of Microsoft Word 2010, the word processing program used to prepare this brief.

DATED: March 23, 2015

Respectfully submitted,

ALESHIRE & WYNDER, LLP
Attorneys At Law
WESLEY A. MILIBAND
MILES P. HOGAN

By: 

WESLEY A. MILIBAND
Attorneys for Petitioner PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA 92612.

On March 24, 2015, I served true copies of the following document(s) described as **VERIFIED PETITION FOR WRIT OF MANDATE, WRIT OF PROHIBITION, OR OTHER APPROPRIATE RELIEF AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY HAND DELIVERY: I am familiar with the office practice of Aleshire & Wynder, LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Aleshire & Wynder, LLP personnel responsible for dispatching a messenger courier service or a registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described document(s) and addressed as set forth on the Service List in accordance with the office practice of Aleshire & Wynder, LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

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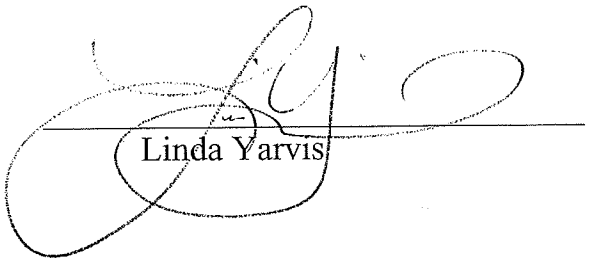
BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the courier service or a registered process server. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents. Said envelope or package will be delivered to the courier service or a registered process server on March 25, 2015 early a.m. delivery. This envelope or package contains separate sealed envelope(s) or packages(s) inside which contain the above-described document(s) and are addressed as set forth on the Service List. Instructions were provided to the messenger courier service or registered process server to serve the sealed addressed envelope(s) or package(s) ***BY HAND ON MARCH 25, 2015.***

BY ELECTRONIC SERVICE: By posting the document(s) listed above to the Santa Clara County Superior Court website in regard to Antelope Valley Groundwater matter pursuant to the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org.

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

Executed on March 24, 2015, at Irvine, California.



Linda Yarvis

SERVICE LIST

Phelan Piñon Hills Community Services District v. Superior Court for the State of California, County of Los Angeles
Case No. _____

Superior Court for the State of California County of Los Angeles Hon. Jack Komar 111 N. Hill Street Los Angeles, CA 90012 Tel: (213) 633-0601	Trial Court, Respondent *(By Hand on 03/24/2015)*
Hon. Jack Komar Santa Clara County Superior Court 161 N. First Street San Jose, CA 95113 Tel: (408) 882-2286	Presiding Judge *(By Electronic Service on 03/24/2015 completed through www.scefiling.org and By Hand on 03/25/2015)*
Eric L. Garner (SBN 130665) Jeffrey V. Dunn (SBN 131926) Wendy Y. Wang (SBN 228923) Best, Best & Krieger LLP 18101 Von Karman Avenue, Suite 1000 Irvine, CA 92612 Tel: 949/263-2600 Fax: 949/260-0972 Email: eric.garner@bbklaw.com jvdunn@bbklaw.com	*Attorneys for Real Party in Interest / Plaintiff,* Los Angeles County Waterworks District No. 40 *(By Hand on 03/24/2015 and By Electronic Service on 03/24/2015 completed through www.scefiling.org)*
Richard G. Zimmer (SBN 107263) T. Mark Smith (SBN 162370) Clifford & Brown Bank of America Building 1430 Truxtun Avenue, Suite 900 Bakersfield, CA 93301-5230 Tel: 661/322-6023 Fax: 661/322-3508 Email: rzimmer@clifford-brownlaw.com msmith@clifford-brownlaw.com	*Attorneys for Real Party in Interest / Defendant,* Bolthouse Properties, LLC, and *Real Party in Interest / Cross-Defendant,* Wm. Bolthouse Farms, Inc. *(By Electronic Service on 03/24/2015 completed through www.scefiling.org and By Hand on 03/25/2015)*

Michael T. Fife (SBN 203025) Bradley J. Herrema (SBN 228976) Brownstein Hyatt Farber Schreck, LLP 1020 State Street Santa Barbara, CA 93101 Tel: 805/963-7000 Fax: 805/965-4333 Email: mfife@bhfs.com bherrema@bhfs.com	*Attorneys for Real Parties in Interest / Defendant / Cross-Complainant,* Antelope Valley Groundwater Agreement Association *(By Electronic Service on 03/24/2015 completed through www.scefiling.org and By Hand on 03/25/2015)*
Douglas J. Evertz (SBN 123066) Murphy & Evertz LLP 650 Town Center Drive, Suite 550 Costa Mesa, CA 92626 Tel: 714/277-1700 Fax: 714/277-1777 Email: devertz@murphyevertz.com	*Attorneys for Real Parties in Interest / Defendants,* City of Lancaster and Rosamond Community Services District *(By Hand on 03/24/2015 and By Electronic Service on 03/24/2015 completed through www.scefiling.org)*
Janet J. Goldsmith (065959) Kronick, Moskovitz, Tiedemann & Girard 400 Capital Mall, 27th Floor Sacramento, CA 95814 Tel: 916/321-4500 Fax: 916/321-4555 Email: jgoldsmith@kmtg.com	*Attorneys for Real Parties in Interest / Defendant / Cross-Defendants,* City of Los Angeles and Los Angeles World Airports *(By Electronic Service on 03/24/2015 completed through www.scefiling.org and By Hand on 03/25/2015)*
Christopher M. Sanders (SBN 195990) Ellison, Schneider & Harris, LLP 2600 Capital Avenue, Suite 400 Sacramento, CA 95816 Tel: 916/447-2166 Fax: 916/447-3512 Email: cms@eslawfirm.com	*Attorneys for Real Party in Interest / Cross-Defendant,* County Sanitation Districts of Los Angeles County Nos. 14 and 20 *(By Electronic Service on 03/24/2015 completed through www.scefiling.org and By Hand on 03/25/2015)*

Theodore A. Chester, Jr. (SBN 105405) Smiland, Chester, Alden, LLP 140 South Lake Avenue, Suite 274 Pasadena, CA 91101 Tel: 213/891-1010 Fax: Not Available Email: tchester@smilandlaw.com	*Attorneys for Real Parties in Interest / Cross-Defendants,* Landinv, Inc.; Bruce Burrows; 300 A 40 H, LLC; Little Rock Sand and Gravel, Inc.; The George and Charlene Lane Family Trust; The Frank and Yvonne Lane 1993 Family Trust; Monte Vista Building Sites, Inc; and, A.V. Materials, Inc. *(By Hand on 03/24/2015 and By Electronic Service on 03/24/2015 completed through www.scefiling.org)*
Wayne K. Lemieux (SBN 43501) W. Keith Lemieux (SBN 161850) Christine Carson (SBN 188603) Lemieux & O'Neill 4165 E. Thousand Oaks Blvd., Suite 350 Westlake Village, CA 91362 Tel: 805/495-4770 Fax: 805/495-2787 Email: wayne@lemieux-oneill.com keith@lemieux-oneill.com Christine@lemieux-oneill.com	*Attorneys for Real Parties in Interest / Cross-Complainants,* Littlerock Creek Irrigation District; Palm Ranch Irrigation District; North Edwards Water District, Desert Lake Community Services District; Llano Del Rio Water Co.; Llano Water Co.; and, Big Rock Mutual Water Co. *(By Hand on 03/24/2015 and By Electronic Service on 03/24/2015 completed through www.scefiling.org)*
Thomas S. Bunn III (SBN 89502) Lagerlof, Senecal, Gosney & Kruse, LLP 301 N. Lake Avenue, 10th Floor Pasadena, CA 91101-5123 Tel: 626/793-9400 Fax: 626/793-5900 Email: tombunn@lagerlof.com	*Attorneys for Real Party in Interest / Defendant / Cross-Complainant,* Palmdale Water District *(By Hand on 03/24/2015 and By Electronic Service on 03/24/2015 completed through www.scefiling.org)*

Marilyn H. Leven (SBN 92800) Noah Golden-Krasner (217556) Deputy Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Tel: 213/897-2614 Fax: 213/897-2802 Email: Marilyn.Levin@doj.ca.gov Noah.Goldenkrasner@doj.ca.gov	*Attorneys for Real Parties in Interest / Defendant,* State of California and State of California 50th District Agricultural Association *(By Hand on 03/24/2015 and By Electronic Service on 03/24/2015 completed through www.scefiling.org)*
Robert G. Kuhs (SBN 160291) Bernard C. Barmann, Jr. (SBN 149890) Kuhs & Parker 1200 Truxtun Avenue, Suite 200 Bakersfield, CA 93303 Tel: 661/322-4004 Fax: 661/322-2906 Email: rgkuhs@kuhsparkerlaw.com bbarmann@kuhsparkerlaw.com	*Attorneys for Real Parties in Interest / Defendant,* Tejon Ranchcorp, Tejon Ranch Company, and *Real Party in Interest / Cross-Defendant,* Granite Construction Company *(By Electronic Service on 03/24/2015 completed through www.scefiling.org and By Hand on 03/25/2015)*
Lee Leininger James Dubois United States Department of Justice Environment & Natural Resources Div. 999 18th St., South Terrace, Suite 370 Denver, CO 80202 Tel: 303/844-1364 Fax: 303/844-1350 Email: lee.leininger@usdoj.gov james.dubois@usdoj.gov	*Attorneys for Real Party in Interest / Plaintiff / Defendant,* United States of America *(By Electronic Service on 03/24/2015 completed through www.scefiling.org and By Hand on 03/25/2015)*