JAMES J. BANKS (SBN 119525)
W. DAVID CORRICK (SBN 171827)
BANKS & WATSON
901 F Street, Suite 200
Sacramento, California 95814
Phone: (916) 325-1000
Fax: (916) 325-1004
Email: jbanks@bw-firm.com

WILLIAM J. BRUNICK (SBN 46289)
LELAND P. McELHANEY (SBN 39257)
BRUNICK, McELHANEY & KENNEDY
1839 Commercenter West
San Bernardino, California 92408
Phone: (909) 889-8301
Fax: (909) 388-1889
Email: lmcelhaney@bmklawplc.com

Attorneys for Cross-Defendant/Cross-Complainants,
ANTELOPE VALLEY EAST – KERN WATER AGENCY

Exempt from Filing Fee Pursuant to Gov't. Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Including **Consolidated** Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Los Angeles, Case No. BC 325 201

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Kern, Case No. S-1500-CV-254-348

Wm. Bolthouse Farms, Inc. v. City of Lancaster
Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water Dist.
Superior Court of California, County of Riverside, consolidated actions, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

AND RELATED ACTIONS.

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar
Department 17C

DECLARATION OF LELAND P. McELHANEY IN SUPPORT OF MOTION TO DISQUALIFY BEST BEST & KRIEGER AS LEGAL COUNSEL IN ANTELOPE VALLEY GROUNDWATER CASES

DATE: October 18, 2016
TIME: 10:00 a.m.
DEPT: Room 200
Stanley Mosk Courthouse
Los Angeles, California

Complaint Filed: 9/22/2005
Trial Date:

I, LELAND P. McELHANEY, declare:

1. I am a licensed attorney in good standing in the State of California and a partner in the law firm of Brunick, McElhaney & Kennedy. I make the statements of fact in this declaration of my own knowledge, except as those matters asserted on information and belief, and as to those matters, I believe them to be true. If called upon to testify as a witness in this case, I could and would competently testify to the following:

2. On or about February 28, 2006, my law firm was retained to represent the interests of Antelope Valley East – Kern Water Agency ("AVEK") in the multi-party consolidated legal proceeding which has come to be known as the Antelope Valley Groundwater ("AVG") cases. At that time, Best Best & Krieger ("BB&K") was serving as AVEK's general counsel.

3. Attached hereto as Exhibit A is a true copy of a cross-complaint for declaratory and injunctive relief and the adjudication of water rights filed in the AVG litigation on or about January 18, 2006 by the BB&K litigation team on behalf of the Public Water Suppliers ("PWS"), which includes Los Angeles County Waterworks District 40 ("District 40") and Rosamond Community Services District ("RCSD").

4. Paragraph 26 of Exhibit A hereto states that "certain Public Water Suppliers" purchase from AVEK State Water Project (SWP) water that AVEK imports into the Basin, and that without the PWS, the water would not reach the Basin. Based on that contention, the PWS parties claimed in the sixth cause of action of their cross-complaint that the *sole and exclusive* right to recapture all return flows attributable to SWP water the PWS purchased from AVEK. This position is and was contrary to the position held by AVEK and is in opposition to AVEK's interests.

5. Attached hereto as Exhibit B is a true copy of AVEK's own cross-complaint for declaratory and injunctive relief against a host of cross-defendants, including District 40, RCSD and the other PWS members, which my law firm filed on behalf of AVEK in the AVG litigation on or about August 30, 2006.

6. Attached hereto as Exhibit C is a true copy of AVEK's motion for summary adjudication of all causes of action relating to ownership of return flows I filed in the AVG litigation on or about November 11, 2013.

7. Attached hereto as Exhibit D is a true copy of an opposition to AVEK's summary adjudication motion prepared by the BB&K litigation team and filed on behalf of District 40 and the other PWS litigants on or about December 27, 2013. The opposition sets forth a litany of allegations in support of denying the motion, including the contentions that: (1) AVEK does not have any right to recapture return flows attributable to the SWP water it imports into the Basin; (2) the motion is procedurally defective; (3) the motion lacks legal authority supporting AVEK's return flow claims; and (4) the PWS parties hold return rights under existing law. AVEK's motion for summary adjudication was ultimately denied.

8. A party to the AVG litigation is known collectively as the "Willis Class." Certain water pumping rights were at issue in the Willis Class claims. AVEK was not involved in that aspect of the litigation. After the court approved a settlement on behalf of the Willis Class, its attorneys filed a motion to recover attorneys' fees pursuant to Code of Civil Procedure section 1021.5 against the PWS litigants.

9. On March 9, 2011, the BB&K litigation team filed a brief opposing any award of attorneys' fees to the Willis Class. In the alternative, BB&K attorneys requested that the court "apportion" fees among other AVG litigation parties, including parties such as AVEK who were not parties in the Willis Class pumping claims. A true copy of that opposing brief is attached hereto as Exhibit E.

10. Because of the position taken by District 40 in its opposition to the Willis Class request for attorneys' fees, which was adverse to AVEK's interests, AVEK was required to incur additional attorneys' fees in the preparation and filing of a brief opposing District 40's request to apportion attorneys' fees among non-parties to the Willis Class litigation, and in participating in the hearing on the attorney fee motion. Attached hereto as Exhibit F is a true copy of AVEK's opposition.

11. The court eventually denied District 40's motion to distribute liability for attorneys' fees to non-class action participants, noting that: (1) assessing attorneys' fees against such parties would exceed the scope of the requested relief; and (2) in its consolidation order, the court had already established that "[c]osts and fees could only be assessed for or against parties who were involved in

particular actions." A true copy of the court's order denying District 40's motion is attached hereto as Exhibit G.

12. Due to the complex nature of the AVG litigation, it was segmented into phases. Prior to the commencement of trial in Phase VI of the proceedings, a large number of the remaining parties, including AVEK and District 40, stipulated to a proposed agreement called the Proposed Judgment and Physical Solution ("PJPS").

13. In the PJPS, AVEK agreed to relinquish some of its return flow rights, but retain return flow rights with respect to SWP water it sells to non-stipulating parties.

14. However, AVEK never abandoned its legal position that, as a matter of law, it is entitled to recapture the return flows resulting from all SWP water it imports into the Basin. That position is firmly set forth in AVEK's Phase VI trial brief filed on or about September 22, 2015, a true copy of which is attached hereto as Exhibit H. Ultimately, however, the brief urges the court to approve the PJPS, even though AVEK would thereby relinquish certain return flow rights, because the PJPS would "benefit the Basin and, over time, succeed in bringing the Basin into balance . . ." (Ex. H at 9:18-19.)

15. On or about September 22, 2015, however, the BB&K litigation team also filed a Phase VI trial brief on behalf of District 40 and the other PWS parties. Like AVEK's counsel, the PWS attorneys urged the court to approve the PJPS. However, in their trial brief, the PWS attorneys also took positions antagonistic and hostile toward AVEK and its interests. Specifically, the PWS brief states that the PWS and other persons who use the SWP water AVEK imports have the right to recapture return flows and the PWS reserve the right to further brief additional grounds for their claims to recapture the return flows. A true copy of District 40's Phase VI trial brief is attached hereto as Exhibit I.

16. Attached hereto as Exhibit J is a true copy of my September 24, 2015 email to the BB&K litigation team in which I objected to the PWS trial brief because it undermines a material term of the PJPS pertaining to return flow rights and invites the court to eliminate a material term of the PJPS. Counsel for PWS responded by dismissively stating that their brief "accurately describes the law" and "is consistent with Judge Komar's written opinion."

/ / /

/ / /

17. On or about December 23, 2015, the court issued a statement of decision in which it approved the PJPS. Attached hereto as Exhibit K is a true copy of that statement of decision approving the PJPS.

18. With respect to return flows, the statement of decision states that the court found the right to return flows from SWP water as set forth in paragraph 5.2 and Exhibit 8 of the PJPS to be properly allocated. (Ex. K at 24:10-12.)

19. Not all parties stipulated to the PJPS. For example, the Willis Class challenged certain aspects of the PJPS and argued that it should not be bound thereby. Overruling these challenges, the court indicated that, in its judgment, "to protect the Basin it is necessary that all parties participate and be bound by the groundwater management provisions of the Physical Solution."

20. Non-stipulating parties have filed appeals from the resulting Judgment and Physical Solution (the Judgment). The right to return flows may again be put in issue during the appeals. Indeed, the Willis Class has now adopted the competing position advanced by the BB&K litigation team regarding entitlement to return flow.

21. Further, the Judgment empowers the Water Master to redetermine return flow rights in the future. Given District 40's continuing contention that AVEK is not entitled to recapture the return flows resulting from the SWP water it imports into the Basin, future conflict between AVEK and District 40 relating to this issue is likely, if not inevitable.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 4 th day of August, 2016, at San Bernardino, California.

LELAND P. McELHANEY

EXHIBIT A

ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
MARC S. EHRLICH, Bar No. 198112
JILL N. WILLIS, Bar No. 200121
BEST BEST & KRIEGER LLP
5 Park Plaza, Suite 1500
Irvine, California 92614
Telephone: (949) 263-2600
Telecopier: (949) 260-0972

Attorneys for Cross-Complainant
ROSAMOND COMMUNITY SERVICES DISTRICT AND LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Los Angeles, Case No. BC 325 201

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Kern, Case No. S-1500-CV-254-348

Wm. Bolthouse Farms, Inc. v. City of Lancaster
Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water Dist.
Superior Court of California, County of Riverside, consolidated actions, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding No. 4408

CROSS-COMPLAINT OF MUNICIPAL PURVEYORS FOR DECLARATORY AND INJUNCTIVE RELIEF AND ADJUDICATION OF WATER RIGHTS

ROSAMOND COMMUNITY SERVICES DISTRICT;
LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40;

PALMDALE WATER DISTRICT;
CITY OF LANCASTER;
CITY OF PALMDALE,
LITTLEROCK CREEK IRRIGATION DISTRICT,
PALM RANCH IRRIGATION DISTRICT;
QUARTZ HILL DISTRICT;
CALIFORNIA WATER SERVICE COMPANY,

Cross-Complainants,

v.

DIAMOND FARMING COMPANY;
WM. BOLTHOUSE FARMS, INC.;
BOLTHOUSE PROPERTIES LLC;
ABC WILLIAMS ENTERPRISES LP;
ACEH CAPITAL LLC;
JACQUELINE ACKERMANN;
CENON ADVINCULA;
OLIVA M. ADVINCULA;
MASHALLAH AFSHAR;
ANTONIO U. AGUSTINES;
AIRTRUST SINGAPORE PRIVATE LIMITED;
MARWAN M. ALDAIS;
ALLEN ALEVY;
ALLEN ALEVY AND ALEVY FAMILY TRUST;
GEORGINE J. ARCHER;
GEORGINE J. ARCHER AS TRUSTEE FOR THE GEORGINE J. ARCHER TRUST;
A V MATERIALS, INC.;
GUSS A. BARKS, JR.;
PETER G. BARKS;
ILDEFONSO S. BAYANI;
NILDA V. BAYANI;
BIG WEST CORP;
RANDALL Y. BLAYNEY;
MELODY S. BLOOM;
BOLTHOUSE PROPERTIES, INC.;
DAVID L. BOWERS;
RONALD E. BOWERS;
LEROY DANIEL BRONSTON;
MARILYN BURGESS;
LAVERNE C. BURROUGHS;
LAVERNE C. BURROUGHS, TRUSTEE OF THE BURROUGHS FAMILY IRREVOCABLE TRUST DATED AUGUST 1, 1995;
BRUCE BURROWS;
JOHN & B. CALANDRI 2001 TRUST;

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

CALIFORNIA PORTLAND CEMENT COMPANY;
CALMAT LAND CO.;
MELINDA E. CAMERON;
CASTLE BUTTE DEV CORP;
CATELLUS DEVELOPMENT CORPORATION;
BONG S. CHANG;
JEANNA Y. CHANG;
MOON S. CHANG;
JACOB CHETRIT;
FRANK S. CHIODO;
LEE S. CHIOU;
M S CHUNG;
CITY OF LOS ANGELES;
CAROL K. CLAYPOOL;
CLIFFORD N. CLAYPOOL;
W. F. CLUNEN, JR.;
W. F. CLUNEN, JR. AS TRUSTEE FOR THE P C REV INTER VIVOS TRUST;
CONSOLIDATED ROCK PRODUCTS CO.;
COUNTY SANITATION DISTRICT NO. 14 OF LOS ANGELES COUNTY;
COUNTY SANITATION DISTRICT NO. 20 OF LOS ANGELES COUNTY;
RUTH A. CUMMING;
RUTH A. CUMMING AS TRUSTEE OF THE CUMMING FAMILY TRUST;
CATHARINE M. DAVIS;
MILTON S. DAVIS;
DEL SUR RANCH LLC;
DIAMOND FARMING COMPANY;
SARKIS DJANIBEKYAN;
HONG DONG;
YING X DONG;
DOROTHY DREIER;
GEORGE E. DREIER;
EDWARDS AIR FORCE BASE, CA;
MORTEZA M. FOROUGHI;
MORTEZA M. FOROUGHI AS TRUSTEE OF THE FOROUGHI FAMILY TRUST;
LEWIS FREDRICHSEN;
LEWIS FREDRICHSEN AS TRUSTEE OF THE FRIEDRICHSEN FAMILY TRUST;
JOAN A. FUNK;
EUGENE GABRYCH;
MARIAN GABRYCH;
AURORA P. GABUYA;
RODRIGO L. GABUYA;
GGF LLC;
GENUS LP;
BETTY GLUCKSTEIN;

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

JOSEPH H. GLUCKSTEIN;
FORREST G. GODDE;
FORREST G. GODDE AS TRUSTEE OF THE FORREST G. GODDE TRUST;
LAWRENCE A. GODDE;
LAWRENCE A. GODDE AND GODDE TRUST;
MARIA B. GORRINDO;
MARIA B. GORRINDO AS TRUSTEE FOR THE M. GORRINDO TRUST;
WENDELL G. HANKS;
ANDREAS HAUKE;
MARILYN HAUKE;
HEALY ENTERPRISES, INC.;
WALTER E. HELMICK;
DONNA L. HIGELMIRE;
MICHAEL N. HIGELMIRE;
DAVIS L. AND DIANA D. HINES FAMILY TRUST;
HOOSHPACK DEV INC.;
CHI S. HUANG;
SUCHU T. HUANG;
JOHN HUI;
HYPERICUM INTERESTS LLC;
DARYUSH IRANINEZHAD;
MINOO IRANINEZHAD;
ESFANDIAR KADIVAR;
ESFANDIAR KADIVAR AS TRUSTEE OF THE KADIVAR FAMILY TRUST;
A. DAVID KAGON;
A. DAVID KAGON AS TRUSTEE FOR THE KAGON TRUST;
JACK D. KAHLO;
CHENG LIN KANG;
HERBERT KATZ;
HERBERT KATZ AS TRUSTEE FOR THE KATZ FAMILY TRUST;
MARIANNE KATZ;
LILIAN S. KAUFMAN;
LILIAN S. KAUFMAN AS TRUSTEE FOR THE. KAUFMAN FAMILY TRUST;
KAZUKO YOSHIMATSU;
BARBARA L. KEYS;
BARBARA L. KEYS AS TRUSTEE OF THE BARBARA L. KEYS FAMILY TRUST;
BILLY H. KIM;
ILLY KING;
ILLY KING AS TRUSTEE OF THE ILLY KING FAMILY TRUST;
KOOTENAI PROPERTIES, INC.;
KUTU INVESTMENT CO.;
GAILEN KYLE;
GAILEN KYLE AS TRUSTEE OF THE KYLE TRUST;

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

JAMES W. KYLE;
JAMES W. KYLE AS TRUSTEE OF THE KYLE FAMILY TRUST;
JULIA KYLE;
WANDA E. KYLE;
FARES A. LAHOUD;
EVA LAI;
PAUL LAI;
YING WAH;
LAND BUSINESS CORPORATION;
RICHARD E. LANDFIELD;
RICHARD E. LANDFIELD AS TRUSTEE OF THE RICHARD E. LANDFIELD TRUST;
LAWRENCE CHARLES TRUST;
WILLIAM LEWIS;
MARY LEWIS;
PEI CHI LIN;
MAN C. LO;
SHIUNG RU LO;
LYMAN C. MILES;
LYMAN C. MILES AS TRUSTEE FOR THE MILES FAMILY TRUST;
MALLOY FAMILY PARTNERS LP;
MISSION BELL RANCH DEVELOPMENT;
BARRY S. MUNZ;
KATHLEEN M. MUNZ;
TERRY A. MUNZ;
M.R. NASIR;
SOUAD R. NASIR;
EUGENE B. NEBEKER;
SIMIN C. NEMAN;
HENRY NGO;
FRANK T. NGUYEN;
JUANITA R. NICHOLS;
OLIVER NICHOLS;
OLIVER NICHOLS AS TRUSTEE OF THE NICHOLS FAMILY TRUST;
OWL PROPERTIES, INC.;
PALMDALE HILLS PROPERTY LLC;
NORMAN L. POULSEN;
MARILYN J. PREWOZNIK;
MARILYN J. PREWOZNIK AS TRUSTEE OF THE MARILYN J. PREWOZNIK TRUST;
ELIAS QARMOUT;
VICTORIA RAHIMI;
R AND M RANCH, INC.;
PATRICIA A. RECHT;
VERONIKA REINELT;
REINELT ROSENLOECHER CORP. PSP;
PATRICIA J. RIGGINS;
PATRICIA J. RIGGINS AS TRUSTEE OF

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

THE RIGGINS FAMILY TRUST;
EDGAR C. RITTER;
PAULA E. RITTER;
PAULA E. RITTER AS TRUSTEE OF THE RITTER FAMILY TRUST;
ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES;
ROMO LAKE LOS ANGELES PARTNERSHIP;
ROSEMOUNT EQUITIES LLC SERIES;
ROYAL INVESTORS GROUP;
ROYAL WESTERN PROPERTIES LLC;
OSCAR RUDNICK;
REBECCA RUDNICK;
SANTA MONICA MOUNTAINS CONSERVANCY;
MARYGRACE H. SANTORO;
MARYGRACE H. SANTORO AS TRUSTEE FOR THE MARYGRACE H. SANTORO REV TRUST;
SAN YU ENTERPRISES, INC.;
DANIEL SAPARZADEH;
HELEN STATHATOS;
SAVAS STATHATOS;
SAVAS STATHATOS AS TRUSTEE FOR THE STATHATOS FAMILY TRUST;
SEVEN STAR UNITED LLC;
MARK H. SHAFRON;
ROBERT L. SHAFRON;
KAMRAM S. SHAKIB;
DONNA L. SIMPSON;
GARETH L. SIMPSON;
GARETH L. SIMPSON AS TRUSTEE OF THE SIMPSON FAMILY TRUST;
SOARING VISTA PROPERTIES, INC.;
STATE OF CALIFORNIA;
GEORGE C. STEVENS, JR;.
GEORGE C. STEVENS, JR. AS TRUSTEE OF THE GEORGE C. STEVENS, JR. TRUST;
GEORGE L. STIMSON, JR.;
GEORGE L. STIMSON, JR. AS TRUSTEE OF THE GEORGE L. STIMSON, JR. TRUST;
TEJON RANCHCORP;
MARK E. THOMPSON A P C PROFIT SHARING PLAN;
TIERRA BONITA RANCH COMPANY;
TIONG D. TIU;
BEVERLY J. TOBIAS;
BEVERLY J. TOBIAS AS TRUSTEE OF THE TOBIAS FAMILY TRUST;
JUNG N. TOM;
WILLIAM BOLTHOUSE FARMS, INC.;

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

WILMA D. TRUEBLOOD;
WILMA D. TRUEBLOOD AS TRUSTEE OF THE TRUEBLOOD FAMILY TRUST;
UNISON INVESTMENT CO., LLC;
DELMAR D. VAN DAM;
GERTRUDE J. VAN DAM;
KEITH E. WALES;
E C WHEELER LLC;
ALEX WODCHIS;
ELIZABETH WONG;
MARY WONG;
MIKE M. WU;
MIKE M. WU AS TRUSTEE OF THE WU FAMILY TRUST;
STATE OF CALIFORNIA 50TH DISTRICT AND AGRICULTURAL ASSOCIATION;
THE UNITED STATES OF AMERICA;
U.S. BORAX, INC.; and ROES 1 through 100,000 inclusive,

Cross-Defendants.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

Cross-Complainants Rosamond Community Services District, Los Angeles County Water District No. 40, Palmdale Water District, City of Palmdale, City of Lancaster, Quartz Hill Water District, Little Rock Creek Irrigation District, and California Water Service Company, (collectively, the "Public Water Suppliers") allege:

INTRODUCTION

1. This cross-complaint seeks a judicial determination of rights to all water within the Antelope Valley Groundwater Basin (the "Basin"). An adjudication is necessary to protect and conserve the limited water supply that is vital to the public health, safety and welfare of all persons and entities that depend upon water from the Public Water Suppliers. For these reasons, the Public Water Suppliers file this cross-complaint to promote the general public welfare in the Antelope Valley; protect the Public Water Suppliers' rights to pump groundwater and provide water to the public; protect the Antelope Valley from a loss of the public's water supply; prevent degradation of the quality of the public groundwater supply; stop land subsidence; and avoid higher water costs to the public.

CROSS-COMPLAINANTS

2. Rosamond Community Services District provides water to more than 3,500 residents of Kern County for domestic uses, fire protection, and irrigation. Rosamond has drilled and equipped wells to pump groundwater from the Basin. Rosamond has constructed, maintained and operated a public waterworks system to supply water to the public.

3. Los Angeles County Waterworks District No. 40 is a public agency governed by the Los Angeles County Board of Supervisors. District 40 has been lawfully organized to perform numerous functions, including providing Basin groundwater to the public in a large portion of the Antelope Valley. To this end, District 40 has constructed, maintained and operated a public waterworks system to supply water to the public.

4. Palmdale Water District is an irrigation district organized and operating under Division 11 of the California Water Code. Palmdale Water District extracts groundwater from the Basin for delivery to customers.

5. Quartz Hill Water District is a county water district organized and operating under Division 12 of the California Water Code. Quartz Hill extracts groundwater from the Lancaster Sub-basin of the Antelope Valley Groundwater Basin for delivery to customers.

6. The City of Palmdale is a municipal corporation in the County of Los Angeles. The City of Palmdale receives water from the Basin.

7. The City of Lancaster is a municipal corporation located in the County of Los Angeles, and which produces and receives water for reasonable and beneficial uses, including overlying uses. The City of Lancaster further provides ministerial services to mutual water companies that produce groundwater from the Basin.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

8. Littlerock Creek Irrigation District is a public agency which extracts groundwater from the Basin to serve customers within the Basin.

9. Palm Ranch Irrigation District is a public agency which extracts groundwater from the Basin to serve customers within the Basin.

10. California Water Service Company is a California corporation which extracts groundwater from the Basin to serve customers within the Basin.

CROSS-DEFENDANTS

11. The following persons and/or entities are the owners of, and/or are beneficial interest holders in real property within the geographic boundaries of the Basin. These persons and/or entitles claim overlying rights to extract water from the Basin, whether or not they have heretofore exercised such overlying rights: ABC Williams Enterprises LP, ACEH Capital, LLC, Jacqueline Ackermann, Cenon Advincula, Oliva M. Advincula, Mashallah Afshar, Antonio U. Agustines, Airtrust Singapore Private Limited, Marwan M. Aldais, Allen Alevy, Allen Alevy and Alevy Family Trust, Georgine J. Archer, Georgine J. Archer as Trustee for the Georgine J. Archer Trust, A V Materials, Inc., Guss A. Barks, Jr., Peter G. Barks, Ildefonso S. Bayani, Nilda V. Bayani, Big West Corp, Randall Y. Blayney, Melody S. Bloom, Bolthouse Properties, Inc., David L. Bowers, Ronald E. Bowers, Leroy Daniel Bronston, Marilyn Burgess, Laverne C. Burroughs, Laverne C. Burroughs, Trustee of the Burroughs Family Irrevocable Trust Dated August 1, 1995, Bruce Burrows, John and B. Calandri 2001 Trust, California Portland Cement Company, Calmat Land Co., Melinda E. Cameron, Castle Butte Dev Corp, Catellus Development Corporation, Bong S. Chang, Jeanna Y. Chang, Moon S. Chang, Jacob Chetrit, Frank S. Chiodo, Lee S. Chiou, M S Chung, City of Los Angeles, Carol K. Claypool, Clifford N. Claypool, W. F. Clunen, Jr., W. F. Clunen, Jr. as Trustee for the P C Rev Inter Vivos Trust, Consolidated Rock Products Co., County Sanitation District No. 14 of Los Angeles County, County Sanitation District No. 20 of

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

Los Angeles County, Ruth A. Cumming, Ruth A. Cumming as Trustee of the Cumming Family Trust, Catharine M. Davis, Milton S. Davis, Del Sur Ranch LLC, Diamond Farming Company, Sarkis Djanibekyan, Hong Dong, Ying X Dong, Dorothy Dreier, George E. Dreier, Morteza M. Foroughi, Morteza M. Foroughi as Trustee of the Foroughi Family Trust, Lewis Fredrichsen, Lewis Fredrichsen as Trustee of the Friedrichsen Family Trust, Joan A. Funk, Eugene Gabrych, Marian Gabrych, Aurora P. Gabuya, Rodrigo L. Gabuya, GGF LLC, Genus LP, Betty Gluckstein, Joseph H. Gluckstein, Forrest G. Godde, Forrest G. Godde as Trustee of the Forrest G. Godde Trust, Lawrence A. Godde, Lawrence A. Godde and Godde Trust, Maria B. Gorrindo, Maria B. Gorrindo as Trustee for the M. Gorrindo Trust, Wendell G. Hanks, Andreas Hauke, Marilyn Hauke, Healy Enterprises, Inc., Walter E. Helmick, Donna L. Higelmire, Michael N. Higelmire, Davis L. and Diana D. Hines Family Trust, Hooshpack Dev Inc., Chi S. Huang, Suchu T. Huang, John Hui, Hypericum Interests LLC, Daryush Iraninezhad, Minoo Iraninezhad, Esfandiar Kadivar, Esfandiar Kadivar as Trustee of the Kadivar Family Trust, A. David Kagon, A. David Kagon as Trustee for the Kagon Trust, Jack D. Kahlo, Cheng Lin Kang, Herbert Katz, Herbert Katz as Trustee for the Katz Family Trust, Marianne Katz, Lilian S. Kauffman, Lilian S. Kaufman as Trustee for the Kaufman Family Trust, Kazuko Yoshimatsu, Barbara L. Keys, Barbara L. Keys as Trustee of the Barbara L. Keys Family Trust, Billy H. Kim, Illy King, Illy King as Trustee of the Illy King Family Trust, Kootenai Properties, Inc., Kutu Investment Co., Gailen Kyle, Gailen Kyle as Trustee of the Kyle Trust, James W. Kyle, James W. Kyle as Trustee of the Kyle Family Trust, Julia Kyle, Wanda E. Kyle, Fares A. Lahoud, Eva Lai, Paul Lai, Ying Wah Lam, Land Business Corporation, Richard E. Landfield, Richard E. Landfield as Trustee of the Richard E. Landfield Trust, Lawrence Charles Trust, William Lewis, Mary Lewis, Pei Chi Lin, Man C. Lo, Shiung Ru Lo, Lyman C. Miles, Lyman C. Miles as Trustee for the Miles Family Trust, Malloy Family Partners LP, Mission Bell Ranch Development, Barry S. Munz, Kathleen M. Munz, Terry A. Munz, M.R. Nasir, Souad R. Nasir, Eugene B. Nebeker, Simin C. Neman, Henry Ngo, Frank T. Nguyen, Juanita R. Nichols, Oliver Nichols, Oliver Nichols as Trustee of the Nichols Family Trust, Owl Properties, Inc., Palmdale Hills Property LLC, Norman L. Poulsen, Marilyn J. Prewoznik, Marilyn J. Prewoznik as Trustee of the Marilyn J. Prewoznik

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

Trust, Elias Qarmout, Victoria Rahimi, R and M Ranch, Inc., Patricia A. Recht, Veronika Reinelt, Reinelt Rosenloecher Corp. PSP, Patricia J. Riggins, Patricia J. Riggins as Trustee of the Riggins Family Trust, Edgar C. Ritter, Paula E. Ritter, Paula E. Ritter as Trustee of the Ritter Family Trust, Roman Catholic Archbishop of Los Angeles, Romo Lake Los Angeles Partnership, Rosemount Equities LLC Series, Royal Investors Group, Royal Western Properties LLC, Oscar Rudnick, Rebecca Rudnick, Santa Monica Mountains Conservancy, Marygrace H. Santoro, Marygrace H. Santoro as Trustee for the Marygrace H. Santoro Rev Trust, San Yu Enterprises, Inc., Daniel Saparzadeh, Helen Stathatos, Savas Stathatos, Savas Stathatos as Trustee for the Stathatos Family Trust, Seven Star United LLC, Mark H. Shafron, Robert L. Shafron, Kamram S. Shakib, Donna L. Simpson, Gareth L. Simpson, Gareth L. Simpson as Trustee of the Simpson Family Trust, Soaring Vista Properties, Inc., State of California, George C. Stevens, Jr., George C. Stevens, Jr. as Trustee of the George C. Stevens, Jr. Trust, George L. Stimson, Jr., George L. Stimson, Jr. as Trustee of the George L. Stimson, Jr. Trust, Tejon Ranch, Mark E. Thompson A P C Profit Sharing Plan, Tierra Bonita Ranch Company, Tiong D. Tiu, Beverly J. Tobias, Beverly J. Tobias as Trustee of the Tobias Family Trust, Jung N. Tom, Wilma D. Trueblood, Wilma D. Trueblood as Trustee of the Trueblood Family Trust, Unison Investment Co., LLC, Delmar D. Van Dam, Gertrude J. Van Dam, Keith E. Wales, E C Wheeler LLC, William Bolthouse Farms, Inc., Alex Wodchis, Elizabeth Wong, Mary Wong, Mike M. Wu, Mike M. Wu as Trustee of the Wu Family Trust, State of California 50th District and Agricultural Association, and U.S. Borax, Inc.

12. The Public Water Suppliers are informed and believe, and thereon allege, that cross-defendant Roes 1 through 100,000 are the owners, lessees or other persons or entities holding or claiming to hold ownership or possessory interests in real property within the boundaries of the Basin; extract water from the Basin;claim some right, title or interest to water located within the Basin; or that they have or assert claims adverse to the Public Water Suppliers' rights and claims. The Public Water Suppliers are presently unaware of the true names and capacities of the Roe cross-defendants, and therefore sue those cross-defendants by fictitious

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

names. The Public Water Suppliers will seek leave to amend this cross-complaint to add names and capacities when they are ascertained.

THE UNITED STATES IS A NECESSARY PARTY TO THIS ACTION

13. This is an action to comprehensively adjudicate the rights of all claimants to the use of a source of water located entirely within California, *i.e.*, the Basin, and for the ongoing administration of all such claimants' rights.

14. The Public Water Suppliers are informed and believe, and on that basis allege, that the United States claims rights to the Basin water subject to adjudication in this action by virtue of owning real property overlying the Basin, including Edwards Air Force Base.

15. For the reasons expressed in this cross-complaint, the United States is a necessary party to this action pursuant to the McCarran Amendment, 43 U.S.C. § 666.

16. Under the McCarran Amendment, the United States, as a necessary party to this action, is deemed to have waived any right to plead that the laws of California are not applicable, or that the United States is not subject to such laws by virtue of its sovereignty.

17. Under the McCarran Amendment, the United States, as a necessary party to this action, is subject to the judgments, orders and decrees of this Court.

HISTORY OF THE ANTELOPE VALLEY GROUNDWATER BASIN

18. For over a century, California courts have used the concept of a groundwater basin to resolve groundwater disputes. A groundwater basin is an alluvial aquifer with reasonably well-defined lateral and vertical boundaries.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

19. The Antelope Valley Groundwater Basin is located in an arid valley in the Mojave Desert, about 50 miles northeast of the City of Los Angeles. The Basin encompasses about 940 square miles in both Los Angeles and Kern Counties, and is separated from the northern part of the Antelope Valley by faults and low-lying hills. The Basin is bounded on the south by the San Gabriel Mountains and on the northwest by the Tehachapi Mountains. The Basin generally includes the communities of Lancaster, Palmdale and Rosamond as well as Edwards Air Force Base.

20. Various investigators have studied the Antelope Valley and some have divided the Basin into "sub-basins." According to the Public Water Suppliers' information and belief, to the extent the Antelope Valley is composed of such "sub-basins," they are sufficiently hydrologically connected to justify treating them as a single source of water for purposes of adjudicating the parties' water rights.

21. Before public and private entities began pumping water from the Basin, its natural water recharge balanced with water discharged from the Basin. Its water levels generally remained in a state of long-term equilibrium. In approximately 1915, however, agricultural uses began to pump groundwater and since then, greatly increased agricultural pumping has upset the Basin's groundwater equilibrium causing a continuous decline in the Basin's groundwater storage.

22. Although private agricultural entities temporarily curtailed their pumping activities when groundwater levels were extremely low, agricultural pumping has increased overall during the past decade. During the same time, urbanization of the Antelope Valley has resulted in increased public demand for water.

23. Groundwater pumping in the Basin has never been subject to any limits. This lack of groundwater management caused the Basin to lose an estimated eight million acre feet of water

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

over the past eighty years.

24. Uncontrolled pumping caused repeated instances of land subsidence. It is the sinking of the Earth's surface due to subsurface movement of earth materials and is primarily caused by groundwater pumping. The Public Water Suppliers are informed and believe, and thereupon allege, that portions of the Basin have subsided as much as six feet because of chronically low groundwater levels caused by unlimited pumping. The harmful effects of land subsidence observed in the Basin include loss of groundwater storage space, cracks and fissures on the ground's surface, and damage to real property. Land subsidence problems continue and will continue because of unlimited pumping.

25. The declining groundwater levels, diminished groundwater storage, and land subsidence damage the Basin, injure the public welfare, and threaten communities that depend upon the Basin as a reliable source of water. These damaging effects will continue, and likely worsen until the court establishes a safe yield for the Basin and limits pumping to the safe yield.

PUBLIC WATER SUPPLIERS SUPPLEMENT AND COMMINGLE THEIR SUPPLEMENTAL SUPPLY OF WATER WITH BASIN WATER

26. Due to the shortage of water in the Basin, certain Public Water Suppliers purchase State Water Project water from the Antelope Valley-East Kern Water Agency. State Project water originates in northern California and would not reach the Basin absent the Public Water Suppliers purchases.

27. Public Water Suppliers purchase State Project water each year. They deliver the State Project water to their customers through waterworks systems. The Public Water Suppliers' customers use the State Project water for irrigation, domestic, municipal and industrial uses. After the Public Water Suppliers' customers use the water, some of the imported State Project

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

water commingles with other percolating groundwater in the Basin. In this way, State Project water augments the natural supply of Basin water.

28. Public Water Suppliers depend on the Basin as their source of water. But for the Public Water Suppliers' substantial investment in State Project water, they would need to pump additional groundwater each year. By storing State Project water or other imported water in the Basin, Public Water Suppliers can recover the stored water during times of drought, water supply emergencies, or other water shortages to ensure a safe and reliable supply of water to the public.

THE BASIN HAS BEEN IN A STATE OF OVER-DRAFT FOR OVER FIVE YEARS

29. The Public Water Providers are informed and believe, and upon that basis allege, that the Basin is and has been in an overdraft condition for more than five (5) consecutive years before the filing of this cross-complaint. During these time periods, the total annual demand on the Basin has exceeded the supply of water from natural sources. Consequently, there is and has been a progressive and chronic decline in Basin water levels and the available natural supply is being and has been chronically depleted. Based on the present trends, demand on the Basin will continue to exceed supply. Until limited by order and judgment of the court, potable Basin water will be exhausted and land subsidence will continue.

30. Upon information and belief, the cross-defendants have, and continue to pump, appropriate and divert water from the natural supply of the Basin, and/or claim some interest in the Basin water. The Public Water Suppliers are informed and believe, and upon that basis allege, that cross-defendants' combined extraction of water exceeds the Basin's safe yield.

31. Upon information and belief, each cross-defendant claims a right to take water and threatens to increase its taking of water without regard to the Public Water Suppliers' rights. Cross-defendants' pumping reduces Basin water tables and contributes to the deficiency of the

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

Basin water supply as a whole. The deficiency creates a public water shortage.

32. Cross-defendants' continued and increasing extraction of Basin water has resulted in, and will result in a diminution, reduction and impairment of the Basin's water supply, and land subsidence.

33. Cross-defendants' continued and increasing extraction of Basin water has and will deprive the Public Water Suppliers of their rights to provide water for the public health, welfare and benefit.

THERE IS A DISPUTE AMONG THE PARTIES REGARDING THE EXTENT AND PRIORITY OF THEIR RESPECTIVE WATER RIGHTS

34. The Public Water Suppliers are informed and believe, and thereon allege, there are conflicting claims of rights to the Basin and/or its water.

35. The Public Water Suppliers are informed and believe, and thereon allege, that cross-defendants who own real property in the Basin claim an overlying right to pump Basin water. The overlying right is limited to the native safe yield of the Basin. The Public Water Suppliers allege that, because subsidence is occurring in the Basin, cross-defendants have been pumping, and continue to pump water in amounts greater than the Basin's safe yield.

36. The Public Water Suppliers are informed and believe, and thereon allege, they have appropriative and prescriptive rights to groundwater in the Antelope Valley Basin. The Public Water Suppliers are informed and believe, and thereon allege, they and/or their predecessors-in-interest, have pumped water from the Antelope Valley Basin for more than five years prior to the filing of this cross-complaint.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

37. The Public Water Suppliers have pumped water from, and/or stored water in the Antelope Valley Basin, by reasonable extraction means. They have used the Basin and/or its water for reasonable and beneficial purposes; and they have done so under a claim of right in an actual, open, notorious, exclusive, continuous, uninterrupted, hostile, adverse use and/or manner for a period of time of at least five years and before filing this cross-complaint.

38. To provide water to the public, the Public Water Suppliers have and claim the following rights:

(A) The right to pump groundwater from the Antelope Valley Groundwater Basin in an annual amount equal to the highest volume of groundwater extracted by each of the Public Water Suppliers in any year preceding entry of judgment in this action;

(B) The right to pump or authorize others to extract from the Antelope Valley Groundwater Basin an amount of water equal in quantity to that amount of water previously purchased by each of the Public Water Suppliers from the Antelope Valley-East Kern Water Agency; and which has augmented the supply of water in the Basin in any year preceding entry of judgment in this action.

(C) The right to pump or authorize others to extract from the Antelope Valley Groundwater Basin an amount of water equal in quantity to that amount of water purchased in the future by each of the Public Water Suppliers from the Antelope Valley-East Kern Water Agency which augments the supply of water in the Basin; and

(D) The right to pump or authorize others to extract from the Antelope Valley Basin an amount of water equal in quantity to that volume of water injected into the Basin or placed within the Basin by each of the Public Water Suppliers or on behalf of any of them.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

FIRST CAUSE OF ACTION

(Declaratory Relief – Prescriptive Rights – Against All Cross-Defendants Except the United States And Other Public Entity Cross-Defendants)

39. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

40. For over fifty years, the California Supreme Court has recognized prescriptive water rights. The Public Water Suppliers allege that, for more than five years and before the date of this cross-complaint, they have pumped water from the Basin for reasonable and beneficial purposes, and done so under a claim of right in an actual, open, notorious, exclusive, continuous, hostile and adverse manner. The Public Water Suppliers further allege that each cross-defendant had actual and/or constructive notice of these activities, either of which is sufficient to establish the Public Water Suppliers' prescriptive rights.

41. Public Water Suppliers contend that each cross-defendant's rights to pump water from the Basin are subordinate to the Public Water Suppliers' prescriptive rights and to the general welfare of the citizens, inhabitants and customers within the Public Water Suppliers' respective service areas and/or jurisdictions.

42. An actual controversy has arisen between the Public Water Suppliers and cross-defendants, and each of them. Public Water Suppliers allege, on information and belief, that each cross-defendant disputes the Public Water Suppliers' contentions, as described in the immediately preceding paragraph.

43. Public Water Suppliers seek a judicial determination as to the correctness of their contentions and an *inter se* finding as to the priority and amount of water they and each cross-defendant are entitled to pump from the Basin.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

SECOND CAUSE OF ACTION

(Declaratory Relief – Appropriative Rights – Against All Cross-Dendants)

44. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

45. Public Water Suppliers allege that, in addition or alternatively to their prescriptive rights, they have appropriative rights to pump water from the Basin.

46. Appropriative rights attach to surplus water from the Basin.

47. Surplus water exists when the pumping from the Basin is less than the safe yield. It is the maximum quantity of water which can be withdrawn annually from a groundwater Basin under a given set of conditions without causing an undesirable result. "Undesirable results" generally refer to gradual lowering of the groundwater levels in the Basin, but also includes subsidence.

48. Persons and/or entities with overlying rights to water in the Basin are only entitled to make reasonable and beneficial use of the Basin's native safe yield.

49. An actual controversy has arisen between the Public Water Suppliers and cross-defendants, and each of them. The Public Water Suppliers allege, on information and belief, that all cross-defendants, and each of them, seek to prevent the Public Water Suppliers from pumping surplus water.

50. The Public Water Suppliers seek a judicial determination as to the Basin's safe yield, the quantity of surplus water available, if any, the correlative overlying rights of each cross-defendant to the safe yield and an *inter se* determination of the rights of persons an/or entities

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

with overlying, appropriative and prescriptive rights to pump water from the Basin.

THIRD CAUSE OF ACTION

(Declaratory Relief – Physical Solution – Against All Cross-defendants)

51. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

52. Upon information and belief, the Public Water Suppliers allege that cross-defendants, and each of them, claim an interest or right to Basin water; and further claim they can increase their pumping without regard to the rights of the Public Water Suppliers. Unless restrained by order of the court, cross-defendants will continue to take increasing amounts of water from the Basin, causing great and irreparable damage and injury to the Public Water Suppliers and to the Basin. Money damages cannot compensate for the damage and injury to the Basin.

53. The amount of Basin water available to the Public Water Suppliers has been reduced because cross-defendants have extracted, and continue to extract increasingly large amounts of water from the Basin. Unless the court enjoins and restrains cross-defendants, and each of them, the aforementioned conditions will worsen. Consequently, the Basin's groundwater supply will be further depleted, thus reducing the amount of Basin water available to the public.

54. California law makes it the duty of the trial court to consider a "physical solution" to water rights disputes. A physical solution is a common-sense approach to resolving water rights litigation that seeks to satisfy the reasonable and beneficial needs of all parties through augmenting the water supply or other practical measures. The physical solution is a practical way of fulfilling the mandate of the California Constitution (Article X, section 2) that the water resources of the State be put to use to the fullest extent of which they are capable.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

55. This court must determine, impose and retain continuing jurisdiction in order to enforce a physical solution upon the parties who pump water from the Basin, and thereby prevent irreparable injury to the Basin. Available solutions to the Basin problems may include, but are not limited to, the court appointment of a watermaster, and monetary and metering and assessments upon water extraction from the Basin. Such assessments would pay for the purchase, delivery of supplemental supply of water to the Basin.

FOURTH CAUSE OF ACTION

(For Declaratory Relief – Municipal Priority – Against All Cross-Defendants)

56. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

57. The Public Water Suppliers have rights to pump water from the Basin to meet existing public water needs, and also to take increased amounts of Basin water as necessary to meet future public needs. The Public Water Suppliers' rights to Basin water exist both as a result of the priority and extent of their appropriative and prescriptive rights, and as a matter of law and public policy of the State of California: "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (*Water Code* §106.)

58. *Water Code* Section 106.5 provides: "It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses. . . ."

59. Under *Water Code* sections 106 and 106.5, the Public Water Suppliers have a prior and paramount right to Basin water as against all non-municipal uses.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

60. An actual controversy has arisen between the Public Water Suppliers and cross-defendants. The Public Water Suppliers allege, on information and belief, that cross-defendants dispute the contentions in Paragraphs 1 through 43, inclusive, of this cross-complaint. The Public Water Suppliers are informed and believe, and on that basis allege, that the majority of the cross-defendants pump groundwater from the Basin for agricultural purposes.

61. The Public Water Suppliers seek a judicial determination as to the correctness of their contentions and to the amount of water the parties may pump from the Basin. The Public Water Suppliers also seek a declaration of their right to pump water from the Basin to meet their reasonable present and future needs, and that such rights are prior and paramount to the rights, if any, of cross-defendants to use Basin water for irrigation purposes.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

FIFTH CAUSE OF ACTION

(Declaratory Relief – Storage Of Imported Water – Against All Cross-defendants)

62. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

63. The Public Water Suppliers purchase and use water from the State Water Project. State Project water is not native to the Basin. Importing State Project water decreases the Public Water Suppliers' need to pump water from the Basin. The Public Water Suppliers' purchase and delivery of State Project water is the reason it has been brought to the Basin. The Public Water Suppliers pay a substantial annual cost to import State Project water; this amount is subject to periodic increases.

64. The Public Water Suppliers allege there is underground space available in the Basin for storing imported State Project water.

65. As importers of State Project water, the Public Water Suppliers have the right to store imported State Project water underground in the Basin, and also have the sole right to pump or otherwise use such stored State Project water. The rights of cross-defendants, if any, are limited to the native supply of the Basin and to their own imported water. Cross-defendants' rights, if any, do not extend to water imported into the Basin by the Public Water Suppliers.

66. An actual controversy has arisen between the Public Water Suppliers and cross-defendants. The Public Water Suppliers allege, on information and belief, that cross-defendants dispute their contentions in Paragraphs 1 through 39, of this cross-complaint.

67. The Public Water Suppliers seek a judicial determination as to the correctness of their contentions that they may store imported State Project water in the Basin, recapture such imported State Project water, and that they have the sole right to pump or otherwise use such imported State Project water.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

SIXTH CAUSE OF ACTION

(Declaratory Relief – Recapture Of Return Flows From Imported Water Stored in The Basin – Against All Cross-defendants)

68. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

69. Some of the State Project water typically returns and/or enters the Basin, and will continue to do so. This water is commonly known as "return flows." These return flows further augment the Basin's water supply.

70. The Public Water Suppliers allege there is underground space available in the Basin to store return flows from imported State Project water.

71. The Public Water Suppliers have the sole right to recapture return flows attributable to their State Project water, or such water imported on their behalf. The rights of cross-defendants, if any, are limited to the Basin's native supply and/or to their imported water, and do not extend to groundwater attributable to the Public Water Suppliers' return flows.

72. An actual controversy has arisen between the Public Water Suppliers and cross-defendants. The Public Water Suppliers allege, on information and belief, that cross-defendants dispute their contentions in Paragraphs 1 through 43 of this cross-complaint.

73. The Public Water Suppliers seek a judicial determination as to the correctness of their contentions, and that they have the sole right to recapture return flows in the Basin, both at present and in the future.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

SEVENTH CAUSE OF ACTION

(Unreasonable Use Of Water - Against All Cross-Defendants Except Public Entity Cross-Defendants)

74. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

75. The California Constitution (Article X, Section 2) provides the cardinal principle of California water law, superior to any water rights priorities and requires that water use not be unreasonable or wasteful. The reasonable use of water depends on the facts and circumstances of each case; what may be reasonable in areas of abundant water may be unreasonable in an area of scarcity; and, what is a beneficial use at one time may become a waste of water at a later time.

76. The Public Water Suppliers are informed and believe, and on that basis allege, that some cross-defendants' use of water is unreasonable in the arid Antelope Valley and therefore

constitutes waste, unreasonable use or an unreasonable method of diversion or use within the meaning of the California Constitution (Article X, section 2). Such uses are thereby unlawful.

77. An actual controversy has arisen between the Public Water Suppliers and cross-defendants. The Public Water Suppliers allege, on information and belief, that the cross-defendants dispute their contentions in Paragraphs 1 through 43 of this Cross-Complaint.

78. The Public Water Suppliers seek a judicial declaration that cross-defendants have no right to any unreasonable use, unreasonable methods of use, or waste of water. Cross-defendants' rights, if any, must be determined *inter se* based on the reasonable use of water in the Antelope Valley rather than upon the amount of water actually used.

EIGHTH CAUSE OF ACTION

(Declaratory Relief Re Boundaries Of Basin)

91. The Public Water Suppliers re-allege and incorporate by reference each and all of the preceding paragraphs as though fully set forth herein.

92. An actual controversy has arisen between the Public Water Suppliers and cross-defendants, and each of them, regarding the actual physical dimensions and description of the Basin for purposes of determining the parties rights to water located therein. The Public Water Suppliers allege, on information and belief, that cross-defendants dispute the Public Water Suppliers' contentions, as set forth in Paragraphs 1 through 38, inclusive, of this cross-complaint.

93. The Public Water Suppliers seek a judicial determination as to the correctness of their contentions and an *inter se* finding as to the actual physical dimensions and description of the Basin.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

PRAYER FOR RELIEF

WHEREFORE, the Public Water Suppliers pray for judgment as follows:

1. Judicial declarations consistent with the Public Water Suppliers' contentions in the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action in this cross-complaint;

2. For preliminary and permanent injunctions which prohibit cross-defendants, and each of them, from taking, wasting or failing to conserve water from the Basin in any manner which interferes with the rights of the Public Water Suppliers to take water from or store water in the Basin to meet their reasonable present and future needs;

3. For prejudgment interest as permitted by law;

4. For attorney, appraisal and expert witness fees and costs incurred in this action; and

5. Such other relief as the court deems just and proper.

Dated: January 18, 2006

BEST BEST & KRIEGER LLP

By _____
ERIC L. GARNER
JEFFREY V. DUNN
MARC S. EHRLICH
JILL N. WILLIS
Attorneys for Cross-Complainants
ROSAMOND COMMUNITY SERVICES DISTRICT, ET AL.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

EXHIBIT B

William J. Brunick, Esq. [SB No. 46289]
Steven K. Beckett, Esq. [SB No. 97413]
Steven M. Kennedy, Esq. [SB No. 141061]
BRUNICK, McELHANEY & BECKETT
1839 Commercenter West
P.O. Box 6425
San Bernardino, California 92412-6425
Telephone: (909) 889-8301
Facsimile: (909) 388-1889

Attorneys for ANTELOPE VALLEY-EAST KERN WATER AGENCY

Exempt from filing fee pursuant to Gov't. Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar, Dept. 17

Antelope Valley-East Kern Water Agency,

Cross-Complainant,

vs.

Palmdale Water District; Quartz Hill Water District; Los Angeles County Waterworks District No. 40; Rosamond Community Services District; Diamond Farming Company, a corporation; Wm. Bolthouse Farms, Inc., a corporation; Bolthouse Properties, Inc.; California Water Service Company; City of Lancaster; City of Los Angeles; City of Palmdale; Littlerock Creek Irrigation District; Palm Ranch Irrigation District; Edwards Air Force Base, California; United States Department of The Air Force; ABC Williams Enterprises LP; Airtrust Singapore Private Limited; Marwan M. Aldais; Allen Alevy; Allen Alevy and Alevy Family Trust; A V Materials, Inc.; Guss A. Barks, Jr.; Peter G.

CROSS-COMPLAINT OF ANTELOPE VALLEY-EAST KERN WATER AGENCY FOR DECLARATORY AND INJUNCTIVE RELIEF

Barks; Ildefonso S. Bayani; Nilda V. Bayani; Randall Y. Blayney; Melody S. Bloom; David L. Bowers; Ronald E. Bowers; Bruce Burrows; B.J. Calandri; John Calandri; John Calandri; John Calandri as Trustee of the John and B.J. Calandri 2001 Trust; California Portland Cement Company; Calmat Land Co.; Melinda E. Cameron; Catellus Development Corporation; Bong S. Chang; Jeanna Y. Chang; Moon S. Chang; Jacob Chetrit; Frank S. Chiodo; Lee S. Chiou; M S Chung; Carol K. Claypool; C.C. Thelma Cole; J. Cole; J. Cole as Trustee for the T.J. Cole Trust; Consolidated Rock Products Co.; County Sanitation District No. 14; County Sanitation District No. 20; Ruth A. Cumming; Ruth A. Cumming as Trustee of the Cumming Family Trust; Catharine M. Davis; Milton S. Davis; Del Sur Ranch LLC; Sarkis Djanibekyan; Hong Dong; Ying X Dong; Dorothy Dreier; George E. Dreier; Morteza M. Foroughi; Morteza M. Foroughi as Trustee of the Foroughi Family Trust; Lewis Fredrichsen; Aurora P. Gabuya; Rodrigo L. Gabuya; GGF LLC; Betty Gluckstein; Joseph H. Gluckstein; Morris Gluckstein; Rose Gluckstein; Frank G. Godde; Forrest G. Godde as Trustee of the Forrest G. Godde Trust; Lawrence A. Godde; Lawrence A. Godde and Godde Trust; L. Gorrindo; Maria B. Gorrindo; Maria B. Gorrindo as Trustee for the M. Gorrindo Trust; Roland N. Grubb; Roland N. Grubb and Grubb Family Trust; Andreas Hauke; Marilyn Hauke; Healy Enterprises, Inc.; Walter E. Helmick; Donna L. Higelmire; Michael N. Higelmire; Hines Family Trust; Hooshpack Dev Inc.; Chi S. Huang; Suchu T. Huang; Hypericum Interests LLC; Daryush Iraninezhad; Esfandiar Kadivar; Esfandiar Kadivar as Trustee of the Kadivar Family Trust; A. David Kagon; A. David Kagon as Trustee for the Kagon Trust; Cheng Lin Kang; Herbert Katz; Herbert Katz as Trustee for the Katz Family Trust; Marianne Katz; Lilian S. Kaufman; Lilian S. Kaufman as Trustee for the Lilian S. Kaufman Trust;

Kazuko Yoshimatsu; Billy H. Kim; Kootenai Properties, Inc.; Gailen Kyle; Gailen Kyle as Trustee of the Kyle Trust; James W. Kyle; James W. Kyle as Trustee of the Kyle Family Trust; Julia Kyle; Wanda E. Kyle; Fares A. Lahoud; Ying Wah Lam; Land Business Corporation; Lawrence Charles Trust; Leslie Property; Light Andrew & Youngnam; Man C. Lo; Shiung Ru Lo; Lyman C. Miles; Lyman C. Miles as Trustee for the Miles Family Trust; Malloy Family Partners LP; Mission Bell Ranch Development; Barry S. Munz; Kathleen M. Munz; Terry A. Munz; M.R. Nasir; Eugene B. Nebeker; Simin C. Newman; Henry Ngo; Frank T. Nguyen; Juanita R. Nichols; Oliver Nichols; Oliver Nichols as Trustee of the Nichols Family Trust; Owl Properties, Inc.; Norman L. Poulsen; Elias Qarmout; Victoria Rahimi; R and M Ranch; Veronika Reinelt; Reinelt Rosenloecher Corp. PSP; Patricia J. Riggins; Patricia J. Riggins as Trustee of the Riggins Family Trust; Edgar C. Ritter; Paula E. Ritter; Paula E. Ritter as Trustee of the Ritter Family Trust; Romo Lake Los Angeles Partnership; Rosemount Equities LLC Series; Royal Investors Group; Royal Western Properties LLC; Santa Monica Mountains Conservancy; San Yu Enterprises, Inc.; Daniel Saparzadeh; Helen Stathatos; Savas Stathatos; Savas Stathatos as Trustee for the Stathatos Family Trust; Martin Schwartz; Martin Schwartz as Trustee of the Burroughs IRR Family Trust; Seven Star United LLC; Mark H. Shafron; Robert L. Shafron; Kamram S. Shakib; Donna L. Simpson; Gareth L. Simpson; Gareth L. Simpson as Trustee of the Simpson Family Trust; Soaring Vista Properties, Inc.; Maurice H. Stans; State of California; George C. Stevens, Jr.; George C. Stevens, Jr. as Trustee of the George C. Stevens, Jr. Trust; George L. Stimson, Jr.; George L. Stimson, Jr. as Trustee of the George L. Stimson, Jr. Trust; Tejon Ranchcorp; Tierra Bonita Ranch Company; Tiong D. Tiu; Beverly J. Tobias;

Beverly J. Tobias as Trustee of the Tobias Family Trust; Jung N. Tom; Sheng Tom; Wilma D. Trueblood; Wilma D. Trueblood as Trustee of the Trueblood Family Trust; Unison Investment Co., LLC; Delmar D. Van Dam; Gertrude J. Van Dam; Keith E. Wales; E C Wheeler LLC; WM Bolthouse Farms, Inc.; Alex Wodchis; Elizabeth Wong; Mary Wong; Mike M. Wu; Mike M. Wu as Trustee of the Wu Family Trust; State of California 50th District and Agricultural Association; and Does 1 through 25,000,

Cross-Defendants.

Cross-Complainant ANTELOPE VALLEY-EAST KERN WATER AGENCY alleges:

INTRODUCTION

1. This Cross-Complaint for declaratory and injunctive relief seeks a judicial determination of rights to all water within the Antelope Valley Groundwater Basin (the "Basin"). An adjudication is necessary to protect and conserve the limited water supply that is vital to the public health, safety, and welfare of all persons and entities that depend upon native water from the Basin and supplemental water from Cross-Complainant. For these reasons, Cross-Complainant files this Cross-Complaint to protect the general public welfare in the Antelope Valley and to protect the Antelope Valley from a loss of the public's water supply.

PARTIES

2. Cross-Complainant is self-governing special district duly organized and operating pursuant to the Antelope Valley-East Kern Water Agency Law, California Water Code Appendix Section 98-49 et seq. This action is brought by Cross-Complainant under and pursuant to the powers granted it by the Antelope Valley-East Kern Water Agency Law.

3. The jurisdictional boundaries of Cross-Complainant are located in the Antelope Valley and include a majority of the land mass overlying the Basin. Cross-Complainant is a party to a long-term

contract with the State of California that entitles Cross-Complainant to receive the greatest amount of import water from the State Water Project for delivery and use within the Basin.

3. On information and belief, each party named herein as a Cross-Defendant are persons or entities that own and/or possess a beneficial interest in real property overlying the Basin, and/or extract groundwater from the Basin, and/or claim a right to extract groundwater from the Basin, and/or have or assert claims adverse to Cross-Complainant's rights and interests.

4. Cross-Complainant is informed and believes, and thereon alleges, that Cross-Defendants DOES 1 through 25,000 are the owners, lessees, or other persons or entities holding or claiming to hold ownership or possessory interests in real property within the boundaries of the Basin; extract water from the Basin; claim some right, title or interest to water located within the Basin; or that they have or assert claims adverse to Cross-Complainant's rights and interests. Cross-Complainant is presently unaware of the true names and capacities of these DOE Cross-Defendants, and therefore sues those Cross-Defendants by fictitious names. Cross-Complainant will seek leave to amend this Cross-Complaint to add names and capacities when they are ascertained.

BACKGROUND

5. The Basin is located in the Antelope Valley, a topographically closed basin in the western part of the Mojave Desert, about 50 miles northeast of Los Angeles. Cross-Complainant is informed and believes, and thereon alleges, that the Basin is several hundred square miles in diameter with outer boundaries to be determined according to proof at the time of trial. The Basin has been divided by various researchers into sub-basins; however, according to Cross-Complainant's present information and belief, the sub-basins are sufficiently hydrologically connected as to justify treating them as a single source of groundwater for purposes of determining groundwater rights.

6. Due to the shortage of water in the Basin, certain Cross-Defendants and other public water suppliers purchase State Water Project water from Cross-Complainant. State Project water originates in northern California and would not reach the Basin absent the importation thereof by Cross-Complainant.

7. The parties to whom Cross-Complainant sells State Project water each year deliver said water to their customers through waterworks systems. The retail customers use the State Project water for irrigation, domestic, municipal, and industrial uses. After the water consumers use the water, some

of the imported State Project water commingles with other percolating groundwater in the Basin. In this way, State Project water augments the natural supply of Basin water.

8. All parties herein depend on the Basin as an important source of water. But for Cross-Complainant's importation of State Project water into the Basin, Cross-Defendants would need to pump additional groundwater from the Basin each year. By storing State Project water or other imported water in the Basin, the parties herein can recover the stored water during time of drought, water supply emergencies, or other water shortages to ensure a safe and reliable supply of water to the public.

OVERDRAFT

9. Cross-Complainant is informed and believes, and upon that basis alleges, that the Basin is and has been in an overdraft condition for more than five (5) consecutive years before the filing of this Cross-Complaint. During these time periods, the total annual demand on the Basin has exceeded the supply of water from natural sources. Consequently, there is and has been a progressive and chronic decline in Basin water levels and the available natural supply is being and has been chronically depleted. Based on the present trends, demand on the Basin will continue to exceed supply. Until limited by order and judgment of the court, potable Basin water will be exhausted and land subsidence will continue.

10. Upon information and belief, the Cross-Defendants have, and continue to, pump, appropriate, and divert water from the natural supply of the Basin, and/or claim some interest in the Basin water. Cross-Complainant is informed and believes, and upon that basis alleges, that Cross-Defendants' combined extraction of water exceeds the Basin's safe yield.

11. Upon information and belief, each Cross-Defendant claims a right to take water and threatens to increase its taking of water without regard to Cross-Complainant's rights. Cross-Defendants' pumping reduces Basin water tables and contributes to the deficiency of the Basin water supply as a whole. The deficiency creates a public water shortage.

12. Cross-Complainant is informed and believes, and on the basis of such information and belief alleges, that each Cross-Defendant produces and uses water taken from the available supply within the Basin; that each Cross-Defendant claims rights to produce and use such water in amounts at least equal to their present uses; and that many Cross-Defendants claim the right and threaten to take increasing

quantities of such water. Cross-Complainant is presently unaware of the exact nature or quantity of the right, if any, which each such Cross-Defendant claims.

13. Based upon information and belief, Cross-Complainant alleges that the aggregate amounts of water produced annually from the area of influence by and for the use of Cross-Defendants, under claim of rights, and by all others taking water therefrom and having rights therein, presently exceed the maximum quantity of water which can be produced annually from the available supply within the Basin, without unreasonably depleting and causing the eventual destruction of the groundwater as a source of supply for all those having rights therein.

14. Based upon information and belief, Cross-Complainant alleges that unless the rights, if any, of Cross-Defendants to produce water from the available supply within the Basin are each determined and established, and those without rights are limited as prayed, the available supply will eventually become endangered. New pumpers and those who continue to increase their quantities of production will acquire new rights to greater quantities of water which will reduce the rights of many persons who presently produce water, and eventually will render the available supply inadequate to fulfill all rights.

15. Cross-Defendants' continued and increasing extraction of Basin water has resulted in, and will result in a diminution, reduction and impairment of the Basin's water supply, and land subsidence.

16. Cross-Defendants' continued and increasing extraction of Basin water has and will deprive the Cross-Complainant of its rights to provide water for the public health, welfare, and benefit.

17. Cross-Defendants' methods of water use and storage are unreasonable and wasteful in the arid conditions of the Antelope Valley and thereby violate Article X, Section 2, of the California Constitution.

CONTROVERSY

18. Cross-Complainant is are informed and believes, and thereon alleges, that there are conflicting claims of rights to the Basin and/or its water.

19. Cross-Complainant has a right to store water in the Basin and to extract the stored water for later use.

20. Cross-Complainant's water rights as described above are equal or superior in priority to those of any Cross-Defendant.

FIRST CAUSE OF ACTION

(Declaratory Relief - Water Rights - Against All Cross-Defendants)

21. Cross-Complainant re-alleges and incorporates by reference each and all of the preceding paragraphs as though fully set forth herein.

22. An actual controversy has arisen between Cross-Complainant and each of the Cross-Defendants as to the nature, extent, and priority of each party's right to produce groundwater from and store water in the Basin. Cross-Complainant's contentions are as set forth above. On information and belief, Cross-Defendants dispute these contentions.

23. A controversy also exists concerning physical facts of the Basin such as basin boundaries, degree of separation between sub-basins, and safe yield. Cross-Complainant's contentions are as set forth above. On information and belief, Cross-Defendants dispute these contentions.

SECOND CAUSE OF ACTION

(Declaratory Relief - Physical Solution - Against All Cross-Defendants)

24. Cross-Complainant re-alleges and incorporates by reference each and all of the preceding paragraphs as though fully set forth herein.

25. Upon information and belief, Cross-Complainant alleges that Cross-Defendants, and each of them, claim an interest or right to Basin water, and further claim they can increase their pumping without regard to the rights of Cross-Complainant. Unless restrained by order of the Court, Cross-Defendants will continue to take increasing amounts of water from the Basin, causing great and irreparable damage and injury to Cross-Complainant and to the Basin. Money damages cannot compensate for the damage and injury to the Basin.

26. The amount of Basin water available to Cross-Complainant has been reduced because Cross-Defendants have extracted, and continue to extract, increasingly large amounts of water from the Basin. Unless the court enjoins and restrains Cross-Defendants, and each of them, the aforementioned

conditions will worsen. Consequently, the Basin's groundwater supply will be further depleted, thus reducing the amount of Basin water available to the public.

27. California law makes it the duty of the trial court to consider a "physical solution" to water rights disputes. A physical solution is a common-sense approach to resolving water rights litigation that seeks to satisfy the reasonable and beneficial needs of all parties through augmenting the water supply or other practical measures. The physical solution is a practical way of fulfilling the mandate of the California Constitution (Article X, section 2) that the water resources of the State be put to use to the fullest extend of which they are capable.

28. This court must determine, impose and retain continuing jurisdiction in order to enforce a physical solution upon the parties who pump water from the Basin, and thereby prevent irreparable injury to the Basin. Available solutions to the Basin problems may include, but are not limited to, the court appointment of a Watermaster, and monetary and metering and assessments upon water extraction from the Basin. Such assessments would pay for the purchase of supplemental water from Cross-Complainant for delivery to the Basin.

THIRD CAUSE OF ACTION

(Declaratory Relief - Storage Of Imported Water - Against All Cross-Defendants)

29. Cross-Complainant re-alleges and incorporates by reference each and all of the preceding paragraphs as though fully set forth herein.

30. Cross-Complainant delivers water from the State Water Project. State Project water is not native to the Basin. Importing State Project water decreases the need of Cross-Defendants to pump water from the Basin. Cross-Complainant's status as a contractor with the State of California for the delivery of Sate Project water is the reason it has been brought to the Basin. Cross-Complainant pays a substantial annual cost to import State Project water, and this amount is subject to periodic increases.

31. Cross-Complainant alleges there is underground space available in the Basin for storing imported State Project water.

32. As the primary importer of State Project water into the Basin, Cross-Complainant has the right to store imported State Project water underground in the Basin, and also has the sole right to pump

or otherwise use such stored State Project water. The rights of Cross-Defendants, if any, are limited to the native supply of the Basin and/or to their own imported water. Cross-Defendants' rights, if any, do not extend to water imported into the Basin by Cross-Complainant.

33. An actual controversy has arisen between Cross-Complainant and Cross-Defendants. Cross-Complainant alleges, on information and belief, that Cross-Defendants dispute the contentions contained in this Cross-Complaint.

34. Cross-Complainant seeks a judicial determination as to the correctness of its contentions that it may store imported State Project water in the Basin, recapture such imported State Project water, and that they have the sole right to pump or otherwise use such imported State Project water.

FOURTH CAUSE OF ACTION

(Declaratory Relief - Recapture of Return Flows From Imported Water Stored in the Basin - Against All Cross-Defendants)

35. Cross-Complainant re-alleges and incorporates by reference each and all of the preceding paragraphs as though fully set forth herein.

36. Some of the State Project water typically returns and/or enters the Basin, and will continue to do so. This water is commonly known as "return flows." These return flows further augment the Basin's water supply.

37. Cross-Complainant alleges there is underground space available in the Basin to store return flows from imported State Project water.

38. As the primary importer of supplemental State Project water into the Basin, Cross-Complainant has the sole right to recapture return flows attributable to its State Project water. The rights of Cross-Defendants, if any, are limited to the native supply of the Basin and/or to their own imported water, and do not extend to groundwater attributable to Cross-Complainant's return flows.

39. An actual controversy has arisen between Cross-Complainant and Cross-Defendants. Cross-Complainant alleges, on information and belief, that Cross-Defendants dispute the contentions contained in this Cross-Complaint.

40. Cross-Complainant seeks a judicial determination as to the correctness of its contentions that it has the right to recapture return flows in the Basin, both at present and in the future.

FIFTH CAUSE OF ACTION

(Declaratory Relief - Boundaries of Basin - Against All Cross-Defendants)

41. Cross-Complainant re-alleges and incorporates by reference each and all of the preceding paragraphs as though fully set forth herein.

42. An actual controversy has arisen between Cross-Complainant and Cross-Defendants, and each of them, regarding the actual physical dimensions and description of the Basin for purposes of determining the parties rights to water located therein. Cross-Complainant alleges, on information and belief, that Cross-Defendants dispute Cross-Complainant's contentions as set forth in this Cross-Complaint.

43. Cross-Complainant seeks a judicial determination as the correctness of its contentions and an *inter se* finding as to the actual physical dimensions and description of the Basin.

SIXTH CAUSE OF ACTION

(Injunctive Relief - Against All Cross-Defendants)

44. Cross-Complainant re-alleges and incorporates by reference each and all of the preceding paragraphs as though fully set forth herein.

45. On information and belief, each Cross-Defendant produces or threatens to produce more water from the Basin than it has a right to produce. This production in excess of rights interferes with the rights of Cross-Complainant as set forth herein.

46. On information and belief, the total production of groundwater from the Basin exceeds the safe yield of the Basin, and the Basin is in overdraft.

47. It is necessary and appropriate for the court to exercise and retain continuing jurisdiction to develop and enforce a physical solution that protects, manages, conserves, and adjudicates groundwater supplies in the Basin. Such a physical solution may include restrictions on groundwater production, monetary assessments on groundwater extractions and for the purchase of supplemental water supplies from Cross-Complainant, prohibitions against wasteful and excessive use of water by Cross-Defendants

and their customers in violation of Article X, Section 2 of the California Constitution, mandatory conservation measures, a groundwater monitoring and reporting program assessment of costs to remediate land subsidence and groundwater contamination, and the appointment of a Watermaster to administer and enforce the judgments and order of the court.

48. Unless such a physical solution is ordered, Cross-Complainant will suffer irreparable harm in that the supply of groundwater will become depleted and other undesirable effects such as subsidence will occur.

49. Cross-Complainant lacks an adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Cross-Complainant prays for judgment as follows:

1. For judicial declarations consistent with Cross-Complainant's contentions in the First, Second, Third, Fourth, Fifth, and Sixth Causes of Action in this Cross-Complaint, including but not limited to the following:

a. That each Cross-Defendant be required to set for the nature and extent of its claim in and to the available groundwater supply in the Basin ;

b. That the water rights, if any, of each Cross-Defendant in this action in and to the available supply of groundwater in the Basin be fixed and determined; that if a Cross-Defendant has no right, that such fact be determined; and that Cross-Defendants be enjoined from exceeding their respective rights, except as may be permitted under the terms of any physical solution ordered by this court;

c. That it be adjudged and decreed that the total annual demands upon the available groundwater supply in the Basin exceed the average annual supply thereto, and that there is no surplus water available;

d. That this court reserve continuing jurisdiction to make such adjustments in its decree and judgment, from time to time, as necessary for the preservation of the available groundwater supply in the Basin and the protection of all those having rights therein;

2. For a declaration of the nature, extent, and priority of the parties' rights to produce groundwater from the Basin, and the physical facts of the Basin such as basin boundaries, degree of separation between sub-basins, and safe yield;

3. For a physical solution to the overdraft of the Basin that fully recognizes the rights of Cross-Complainant and that results in the equitable distribution of rights and obligations with respect to the management of groundwater resources in the Basin;

4. For preliminary and permanent injunctions which prohibit Cross-Defendants, and each of them, from taking, wasting, or failing to conserve water form the Basin in any manner which interferes with the rights of the Cross-Complainant to take water from or store water in the Basin to meet its reasonable present and future needs;

5. For attorney, appraisal, and expert witness fees and costs incurred in this action;

6. For costs of suit; and

7. For such other and further relief as the court may deem just and proper.

Dated: August 30, 2006

BRUNICK, McELHANEY & BECKETT

By: *Steven M. Kennedy*
William J. Brunick
Steven K. Beckett
Steven M. Kennedy
Attorneys for ANTELOPE VALLEY-EAST KERN WATER AGENCY

EXHIBIT C

William J. Brunick, Esq. [SB No. 46289]
Leland P. McElhaney, Esq. [SB No. 39257]
BRUNICK, McELHANEY& KENNEDY PLC
1839 Commercenter West
San Bernardino, California 92408-3303

MAILING:
P.O. Box 13130
San Bernardino, California 92423-3130

Telephone: (909) 889-8301
Facsimile: (909) 388-1889
E-Mail: bbrunick@bmblawoffice.com
E-Mail: lmcelhaney@bmblawoffice.com

Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN WATER AGENCY

Exempt from filing fees pursuant to Gov't. Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation, Superior Court of California, County of Los Angeles, Case No. BC325201;

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. vs. City of Lancaster, Diamond Farming Company, a corporation, vs. City of Lancaster, Diamond Farming Company, a corporation vs. Palmdale Water District, Superior Court of California, County of Riverside, Case Nos. RIC 353840, RIC 344436, RIC 344668.

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
The Honorable Jack Komar

NOTICE OF MOTION AND MOTION OF ANTELOPE VALLEY-EAST KERN WATER AGENCY FOR SUMMARY ADJUDICATION OF ALL CAUSES OF ACTION RELATING TO OWNERSHIP OF RETURN FLOWS
[Code Civ. Proc. §437(c)]

Date: January 27, 2014
Time: To be determined
Dept.: To be determined
Judge: Hon. Jack Komar

Trial Date: February 10, 2014 (Phase V)
Time: 9:00 a.m.

TABLE OF CONTENTS

PAGE

I. Introduction. . . . 3

II. Motions for summary adjudication. . . . 4

III. The "importer" of foreign water has the right to recapture and use the resulting return flows. . . . 5

IV. AVEK is an "importer" of foreign water. . . . 6

V. AVEK has manifested its intention to recapture return flows. . . . 7

VI. AVEK has not transferred to anyone its right to return flows 8

VII. Nor has AVEK abandoned or relinquished it right to return flows. . . . 9

VIII. Use by others of AVEK imported water does not negate AVEK's right to the resulting return flows. . . . 9

IX. The decisions relied upon by the Public Water Suppliers are readily distinguishable, and do not support their claim to return flows 10

A. *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199 ("*City of San Fernando*"). . . . 10

1. The relationship between MWD and its "member agencies". . . . 10

2. While AVEK has the requisite "intent" to recapture return flows, MWD never did 12

B. *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266. . . . 13

1. "Water Supply Retention" Agreement. . . . 13

2. To Utilize the acquired SWP "entitlements" of Santa Maria and others similarly situated, a Joint Powers Agency was formed. . . . 14

3. Accordingly, Santa Maria and other similarly situated were acknowledged to be State Water Project "Contractors". . . . 14

4. Additional confirmation of the transfer of SWP rights 15

5. Water Management Agreement confirming status of Santa Maria and SCWC as State Water Project Contractors, with rights to return flows 15

6. Santa Maria Valley Public Water Purveyor Water Management Agreement confirms Santa Maria's status as a SWP Contractor and right to return flows 16

7. The Parties to the litigation stipulated that Santa Maria and others similarly situated have SWP contracts and, accordingly, are "Importers" of State Water Project Water 16

8. Judgment After Trial in *City of Santa Maria*.....16

9. The Court of Appeal's Opinion.....17

X. AVEK and its taxpayers are the only parties which pay the full cost of the imported water 17

XI. Conclusion.....20

TABLE OF AUTHORITIES

Cases:

City of Los Angeles v. City of Glendale
23 Cal.2d 68, 76-78 6,9

City of Los Angeles v. City of San Fernando
14 Cal.3d 199.....5,9,10

City of Santa Maria v. Adam
(2012) 211 Cal.App.4th 266 5,13

Dorris v. Sullivan
(1891) 90 Cal. 279).....9

Haun v. De Vaurs
97 Cal.App.2d 841, 844.....8

Hayes v. Fine
(1891) 91 Cal. 391 9

Stevens v. Oakdale Irr. Dist.
(1939) 13 Cal.2d 343.....7,9,12

Stevinson Water Dist. v. Roduner
36 Cal.2d 264, 267-270 (1950).....8

Writings:

Hutchins, *The California Law of Water Rights*, at 397-400.....8

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 27, 2014, at a time and in a Department to be determined by the Court, or as soon thereafter as the matter may be heard, cross-complainant, the Antelope Valley-East Kern Water Agency ("AVEK") will move, and hereby moves, for summary adjudication of the respective causes of action alleged by various parties specific to the right to recapture and use return flows which result from State Water Project water AVEK imports into the area of adjudication in this Action.

This motion is made pursuant to the provisions of Code of Civil Procedure section 437(c) and is based upon: the supporting declarations and Memorandum of Points and Authorities attached hereto; all pleadings, papers, and records in this action; the Separate Statement of Undisputed Facts and Request for Judicial Notice filed concurrently herewith; any Reply or Supplemental Memoranda or Requests for Judicial Notice which may be filed hereafter in support of the Motion; and on the oral argument presented at the time of the hearing on the Motion.

Dated: November , 2013

BRUNICK, McELHANEY & KENNEDY

By: _____
WILLIAM J. BRUNICK
LELAND P. MCELHANEY
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN
WATER AGENCY

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The California Supreme Court has clearly stated that the person who imports into a groundwater basin water from another watershed is entitled to recapture and use the return flows resulting from the imported foreign water. AVEK is a State Water Contractor contractually entitled to import State Water Project water into the area of adjudication in this action and, by far, is the largest importer of foreign water into the area of adjudication. [Undisputed Facts Nos. 1, 2, 3, 4, 5]. Therefore, as a matter of law, AVEK is entitled to recapture and use the return flows resulting from the foreign water AVEK imports into the area of adjudication.

AVEK's taxpayers in the counties of Kern, Los Angeles and Ventura have directly contributed, and continue to contribute, to the construction of the State Water Project (SWP) facilities which transport and deliver into the area of adjudication foreign water which originates in northern California [Undisputed Facts Nos. 6, 7]. AVEK also contracts directly with, and makes payments directly to, the State of California for the delivery of all SWP water which AVEK imports into the area of adjudication [Undisputed Facts Nos. 2, 8]. AVEK taxpayers have also paid for, and continue to pay for, construction and maintenance of the extensive internal treatment and distribution systems used to deliver the SWP water which AVEK imports and then distributes to its agricultural, industrial and municipal customers, both within and outside the area of adjudication [Undisputed Facts Nos. 16, 17, 18, 19, 20, 21, 22, 23].[1]

AVEK has not assigned or transferred to anyone its right to recapture and use the return flows resulting from the SWP water it imports into the area of adjudication; nor has AVEK done anything that would constitute an abandonment or relinquishment of its right to recapture and use such return flows [Undisputed Facts Nos. 33, 34]. Where, as here, an importer of foreign water has not assigned,

---

1 Before the SWP water imported by AVEK is delivered to any of its municipal or industrial customers (including the Public Water Suppliers [City of Lancaster, City of Palmdale, Littlerock Creek Irrigation District, Los Angeles County Waterworks District No. 40, Palmdale Water District, Palm Ranch Irrigation District, Rosamond Community Services District, and Quartz Hill Water District]), the water is first treated at water treatment facilities which also are constructed and operated by AVEK [Undisputed Facts Nos. 17, 18, 19, 20, 21, 22, 23, 24].

transferred, abandoned or otherwise relinquished its right to return flows, no California court has ever denied the importer's claimed right to recapture and use the resulting return flows.

For the foregoing reasons and as a matter of law, AVEK alone has the right to recapture and use all return flows attributable to the SWP water which AVEK imports into the area of adjudication; none of its customers (including the Public Water Suppliers) have any ownership rights in, or right to recapture or use, such return flows.[2]

II.

MOTIONS FOR SUMMARY ADJUDICATION

In pertinent part, Code of Civil Procedure §437(c), subdivision (f) provides:

> (1) A party may move for summary adjudication as to one or more causes of action within an action . . . if that party contends that the cause of action has no merit or that there is no affirmative defense thereto. . . . A motion for summary adjudication shall be granted only if it completely disposes of a cause of action . . . .
>
> (2) A motion for summary adjudication may be made by itself . . . and shall proceed in all procedural respects as a motion for summary judgment. . . .

Subdivision (b)(1) provides, in part:

> The motion shall be supported by . . . declarations [etc.], and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. . . .

Subdivision (c) provides, in part:

> The motion . . . shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

This motion seeks a final determination "of one or more causes of action," to wit: the Fourth Cause of Action of AVEK's cross-complaint, which alleges that AVEK alone is entitled to recapture and use the return flows resulting from the SWP water it imports into the area of adjudication and then sells to its customers [Undisputed Facts No. 37.]

---

2 Two other State Water Contractors (Palmdale Water District and Littlerock Creek Irrigation District) also import foreign water into the AVAA, although in much smaller quantities; absent contract arrangements to the contrary, the return flows which result therefrom belong to those "importers" as well.

Likewise, the Sixth Cause of Action of the Public Water Suppliers' cross-complaint also claims the exclusive right to use the return flows from the SWP water they purchase from AVEK (see PWS' cross-complaint, ¶¶ 26, 69 and 71). Although AVEK is not named as a cross-defendant in the PWS' cross-complaint, this motion also is dispositive of the PWS' claimed right to a portion of the return flows resulting from AVEK imported water.

Therefore, this motion seeks to establish that: no defense exists as to AVEK's Fourth Cause of Action; the PWS' Sixth Cause of Action relating to the same issue is without merit; no triable issue of material fact exists with respect to either cause of action; and, accordingly, AVEK is entitled to judgment establishing its right to use all return flows resulting from the SWP water it imports into the area of adjudication. All of which is established by the following points:

- The "importer" of foreign water has the right to recapture and use the return flows;
- AVEK is an "importer" of foreign water;
- AVEK has manifested adequately its intention to recapture return flows;
- AVEK has not assigned or transferred to anyone its right to use return flows;
- Nor has AVEK abandoned or relinquished its right to use return flows;
- Use by others of AVEK imported water does not impair or negate AVEK's right to recapture and use the resulting return flows;
- The decisions in *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199 and *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266 are factually distinguishable, and do not support the Public Water Supplier's claim to return flows in this action; and,
- AVEK and its taxpayers are the only parties who have paid the full cost of the State Water Project water imported by AVEK.

III.

THE "IMPORTER" OF FOREIGN WATER HAS THE RIGHT TO RECAPTURE AND USE THE RESULTING RETURN FLOWS

An importer's right to recapture and use return flows has been clearly established and repeatedly affirmed by the California Supreme Court (see *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 76-78; City *of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 257-259, 262-263).

IV.

AVEK IS AN "IMPORTER" OF FOREIGN WATER

In 1959, residents of Kern, Ventura and Los Angeles Counties formed AVEK to contract with the State for the purchase and delivery of SWP water for use in AVEK's service area within the Antelope Valley (California Water Code Appendix 98-1, et seq.) [Undisputed Facts Nos. 1, 2]. AVEK services a land area of 2,400 square miles within the three counties; the adjudicated boundaries in this Action represent 58% of the total land area serviced by AVEK [Undisputed Facts Nos. 10, 11].

The SWP water which AVEK imports into the area of adjudication is pumped from the Sacramento Delta down the 444 mile aqueduct; after crossing the Techachapis, the aqueduct divides into the East and West branches; AVEK receives its imported water through the aqueduct's East branch [Undisputed Facts Nos. 12, 13].[3]

Initial funds for the construction the State Water Project facilities were obtained through a $1.75 billion bond issue, ratified by California voters in 1960 [Undisputed Facts No. 6].

In 1962, AVEK signed a water supply contract with the State (Exhibit 1 to Flory declaration attached hereto) to insure delivery to AVEK of SWP water to supplement the Antelope Valley's groundwater [Undisputed Facts No. 2]. Of the 29 State Water Contractors, AVEK has the third largest water entitlement, which allows AVEK to take an annual maximum entitlement of up to 141,000 AF of State Water Project (SWP) water; however, due to environmental, supply and climate limitations inherent in the SWP, AVEK's contract with the State of California has a delivery reliability factor of only approximately 60% of AVEK's annual entitlement of 141,000 AF [Undisputed Facts Nos. 3, 4].

The bulk of AVEK's SWP imported water is treated and distributed to its customers through the Domestic-Agricultural Water Network (DAWN) Project facilities;[4] the DAWN Project consists of more than 100 miles of distribution pipeline; four water treatment plants; four 8-million gallon storage

---

3 In 2011 and 2012 alone, AVEK imported and delivered to its agricultural, industrial and municipal customers a total of 100,718 AF of State Water Project water [Undisputed Facts No. 14].

4 AVEK also delivers to Antelope Valley farmers untreated irrigation water from the aqueduct and AVEK owned turnouts.

reservoirs near Mojave; one 3-million gallon capacity reservoir at Vincent Hill Summit; and one 1-million gallon reservoir at Godde Hill Summit [Undisputed Facts Nos. 17, 18].

The DAWN Project was financed by a $71 million local bond issue authorized by AVEK voters in 1974, all of which has been repaid by AVEK taxpayers [Undisputed Facts Nos. 19, 20, 21, 22, 23]. The attached AVEK map (Exhibit 2) shows AVEK's existing facilities, and improvements under construction including future water banking improvements [Undisputed Facts No. 24]. From 2011 through 2012, AVEK has spread and banked a total of approximately 36,502 AF, and claims the right to recapture 90% of that amount, or 32,851 AF [Undisputed Facts Nos. 25, 26, 27, 28].

Accordingly, since the inception of the State Water Project, AVEK taxpayers have paid a total of $475,777,218.84 on their property tax bills to insure participation in the California State Water Project and, also, to construct and maintain AVEK's treatment and distribution systems for the delivery of SWP water to AVEK'S municipal, industrial and agricultural customers [Undisputed Facts No. 31].

AVEK alone pays the State for the SWP water AVEK imports into the area of adjudication [Undisputed Facts No. 8]; none of AVEK's customers (including the Public Water Suppliers), have made any payments to the State for the SWP water AVEK has purchased and imported into the area of adjudication [Undisputed Facts No. 9].

The foregoing demonstrates that AVEK is an "importer" of foreign water, to wit: AVEK imports into the area of adjudication the State Water Project water it purchases from the State and then treats and sells to its municipal, industrial and agricultural customers.

V.

AVEK HAS MANIFESTED ITS INTENTION TO RECAPTURE RETURN FLOWS

To preserve its right to return flows, an importer must manifest the "intent" to recapture or otherwise use return flows. Such intent need not be manifested before importation begins (*Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343; *City of San Fernando, supra*, 14 Cal.3d, at 257-260), and is manifested adequately by filing a pleading claiming the right prior to final adjudication of that right.

> . . . the allegation of an intent to recapture the return waters in the present complaint, filed in 1955, was sufficient for purposes of the present case to establish whatever rights would have arisen from the plaintiff's manifestation of such intent before commencing importation in 1915. (*Stevens v. Oakdale Irr. Dist., supra,* 13 Cal.2d 343.)

(*City of San Fernando, supra*, 14 Cal.3d, at 259-260; underscoring added.)

The Fourth Cause of Action of AVEK's 2006 cross-complaint herein alleges:

> "The rights of Cross-Defendants [including the Public Water Suppliers and all other AVEK customers] . . . are limited to the native supply of the Basin and/or their own imported water. Cross-Defendants' rights, if any, do not extend to water imported into the Basin by [AVEK]" (AVEK Cross-Complaint, ¶ 32); "As the primary importer of supplemental State Project water into the Basin, [AVEK] has the sole right to recapture return flows attributable to its State Project water. The rights of Cross-Defendants, if any, are limited to the native supply of the Basin and/or to their own imported water, and do not extend to groundwater attributable to [AVEK's] return flows" (Id., ¶ 38).

[Undisputed Facts No. 37]

Additionally, AVEK owns wells capable of recapturing return flows and, also, spreads water with the express intent of recapturing the resulting return flows. For all of these reasons, AVEK has manifested adequately the required "intent" to recapture return flows.

VI.

AVEK HAS NOT TRANSFERRED TO ANYONE ITS RIGHT TO RETURN FLOWS

A producer of return flow from imported water may dispose of that property right by contract [*Haun v. De Vaurs* 97 Cal.App.2d 841, 844; see, also, Hutchins, *The California Law of Water Rights*, at 397-400, noting of the Supreme Court's decision in *Stevinson Water Dist. v. Roduner*, 36 Cal.2d 264, 267-270 (1950) that "this decision sanctioned the right of the producer of imported water to provide by contract for its recapture"].

Nonetheless, AVEK has not executed any writing conveying its right to recapture or use the return flows resulting from the SWP water it imports into the area of adjudication. To the contrary, AVEK's contracts with its customers do not mention return flows, the ownership thereof, or the right to recapture and use return flows attributable to AVEK imported water.

(A typical AVEK Customer Agreement is attached as Exhibit 1 hereto.)

As noted in *City of L.A. v. City of Glendale*, 23 Cal.2d 68, 78, "Nothing would be gained by requiring plaintiff to change the form of its contracts from a 'sale' of the water to a transfer of the right to its use."

Moreover, the right to return flow is a distinct property right; thus, any conveyance or transfer thereof is subject to the Statute of Frauds (*Hayes v. Fine* (1891) 91 Cal. 391; *Dorris v. Sullivan* (1891) 90 Cal. 279). This means that an intent to convey or transfer the right to return flows must be clearly and unequivocally stated in an appropriate writing, signed by the party conveying or transferring such right. No writing exists, however, wherein AVEK clearly and unequivocally states an intent to convey or transfer its right to return flows; accordingly, AVEK's right to return flows from the State Water Project water it imports has not been conveyed, transferred or lost by contract [Undisputed Facts No. 33].

VII.

NOR HAS AVEK ABANDONED OR RELINQUISHED ITS RIGHT TO RETURN FLOWS

AVEK has not abandoned or otherwise relinquished its right to return flows [Undisputed Facts No. 34].

VIII.

USE BY OTHERS OF AVEK IMPORTED WATER DOES NOT NEGATE AVEK'S RIGHT TO THE RESULTING RETURN FLOWS

In *City of Los Angeles v. City of Glendale*, the Supreme Court succinctly noted:

> The use by others of this water as it flowed to the subterranean basin does not cut off [the importer's] rights. In *Stevens v. Oakdale Irr. Dist.*, 13 Cal.2d 343 . . ., it was recognized that one who brings water into a watershed may retain a prior right to the water after permitting others to use the water . . .

(23 Cal.2d 68, 76-77; see also *City of San Fernando*, *supra*, 14 Cal.3d 199, 257.)

> The fact that the water drawn from a tap into a portable receptacle becomes the customer's disposable personal property [citation omitted] does not impair [the importer's] right to recapture the return flow which is in fact produced by deliveries of its imported water.

(*City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 260; *City of L.A. v. City of Glendale*, 23 Cal.2d 68, 78; underscoring added.)

Therefore, the law is quite clear that "the use by" AVEK's customers of the SWP water AVEK imports into the area of adjudication does not impair or negate, in any way, AVEK's right to control and, if necessary, recapture and use the return flows derived therefrom.

///

IX.

THE DECISIONS RELIED UPON BY THE PUBLIC WATER SUPPLIERS ARE READILY DISTINGUISHABLE, AND DO NOT SUPPORT THEIR CLAIM TO RETURN FLOWS

A. *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199 ("*City of San Fernando*")

Relying on *City of San Fernando*, the Public Water Suppliers contend that AVEK stands, figuratively speaking, in the shoes of the Metropolitan Water District (MWD), and the Public Water Supplies stand in the shoes of the cities of Burbank, Glendale and San Fernando. The Public Water Suppliers' argument is without merit, because in *City of San Fernando*: (1) the relationship between MWD and its "member agencies" (the cities of Burbank, Glendale, Los Angeles and San Fernando) was markedly different than the relationship in this action between AVEK and its customers (including the Public Water Suppliers); and (2) MWD did not intend or claim the right to recapture return flows from water it delivered to its member agencies, and it did not have the means of doing so. For these reasons, MWD did not join and was not made a party to the *City of San Fernando* action; as a result, MWD's right to return flows was not litigated by the parties, nor determined by the Court.[5]

1. The relationship between MWD and its "member agencies"

In the *City of San Fernando*, however, the cities of Burbank, Glendale, Los Angeles and San Fernando were all "member agencies" of MWD; their representatives sat on MWD's Board of Directors; and, accordingly, each member agency was directly involved in MWD's governance and policy decisions -- including determining the rates they paid for MWD water [Undisputed Facts Nos. 38, 39].[6]

Regarding that special relationship, the Superior Court in *City of San Fernando* made the following finding:

> MWD was formed in 1929 of 13 original member agencies, including Los Angeles, Glendale and Burbank. . . . In 1971, San Fernando became a member agency in MWD.

---

5 The relevant time period in *City of San Fernando* was from 1955, when the complaint was filed, until final arguments ended on July 20, 1967 (Remand Procedure Order No. 1, exhibit 14 to Request for Judicial Notice filed concurrently herewith).

6 The Metropolitan Water District Act, Section 133, provides that MWD's Board of Directors [which includes representatives of Burbank, Glendale, Los Angeles and San Fernando] "shall fix the rate or rates at which water shall be sold" to "member agencies."

(Findings of Fact and Conclusions of Law [FFCL], dated January 26, 1979, 22:23-24:1; Exhibit 1 to Request for Judicial Notice ("RJN") filed concurrently herewith.)

MWD's "History and First Annual Report, Commemorative Edition," June 2011 (Exhibit 2 to RJN) notes:

> The powers of [MWD] are vested in a board of directors consisting of at least one representative from each municipality [i.e., each "member agency"]. . . (p. 311)
>
> Each municipality, whose corporate area is included within the District, has a preferential right to purchase from the District for distribution by such municipality . . . the proportion of the water served by the District that, from time to time, shall bear the same ratio to all of the water supply of the District as the total accumulation of amounts paid by such municipality to the District on tax assessments and otherwise, excepting the purchase of water, toward the capital cost and operating expense of the District's works shall bear to the total of such payments received by the District from all of its municipalities.

(Id., p. 312; see, also, the Metropolitan Water District Act, Section 135, Ex. 3 to RJN)

Thus, MWD does not exist separate from its "member agencies; they are inextricably bound together and, in a very real sense, MWD's "member agencies" are the MWD [Undisputed Facts Nos. 38, 39, 40]. The umbilical cords tying MWD to its member agencies undoubtedly explain why in *City of San Fernando*: (1) MWD did not claim a right to return flows; (3) MWD did not then own or operate any wells, or spread or inject water, within the Upper Los Angeles River Area; and (3) MWD did not join, and was not made a party to the proceeding [Undisputed Facts Nos. 43, 44, 45, 46].

In the case at bar, however, AVEK's customers (including the Public Water Suppliers) are **not** "member agencies" of AVEK; their representatives do **not** sit on AVEK's Board of Directors; and they do **not** participate in the determination of the water rates paid for AVEK imported water. AVEK's customers are merely that, i.e., "customers" - nothing more and nothing less! As such, AVEK's customers (including the Public Water Suppliers) have no special claim or right to the return flows resulting from the State Water Project water that AVEK contracts for, and imports into the area of adjudication.

That the Public Water Suppliers are "public entities" does not alter this fact. In *City of San Fernando,* Los Angeles imported water from the Owens River Valley and (like AVEK in the case at bar) delivered imported water **"to public entities"** (14 Cal.3d at 255, fn. 45). Nonetheless, the Court determined that Los Angeles **alone** had the right to return flows from all water it either imported from the Owens River Valley or purchased from MWD. This is consistent with the Court's determination that

"use by others" does not impair the importer's right to recapture return flows (see Point VIII above). Likewise, the Court in *City of L.A. v. City of Glendale,* noted: "Defendants rely upon the fact that their taking of the water constitutes an intervening public use of it. The intervention of a public use, however, does not bar suit by the owner of a water right . . ." (23 Cal.2d at 80).

2. While AVEK has the requisite "intent" to recapture return flows, MWD never did

As noted, MWD never claimed a right to, or manifested an intention to recapture return flows from water MWD delivered to its *member agencies* [Undisputed Facts Nos. 43, 44, 45, 46]. As a result, MWD's circumstances were like those involving the Los Angeles Flood Control District, regarding which the Court noted: "The fact that this water was made available by the Los Angeles Flood Control District **does not determine its ownership. The district makes no claim to the water** . . ." (*City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 73; emphasis added).

So, also, in *City of San Fernando*, MWD lacked the necessary "intent" to establish a right to ownership of return flows, because it never asserted or claimed a right to return flows.

> Waters brought in from a different watershed and reduced to possession are private property during the period of possession. When possession of the actual water, or *corpus*, has been relinquished, or lost by discharge without intent to recapture, property in it ceases. . . .As to this specific flow, discharged without intent to recapture, the abandonment has been complete . . .

(*Stevens v. Oakdale Irr. Dist.* 13 Ca.2d 343, 350, underscoring added; see, also, *City of San Fernando*, *supra*, 14 Cal.3d 199, 257-260 ["plaintiff has formed an intention to recapture the return flows"].)

For the same reason, MWD effectively abandoned whatever right it had to the return flows, because it never had the requisite intent to recapture or reclaim return flows. In *City of San Fernando*, however, the right to recapture and use return flows had to be given to someone! Because MWD never claimed the right to return flows, and effectively abandoned any claim thereto, it was logical to assign that right to MWD's "member agencies" – who intended to use all of the available groundwater and, unlike MWD, had the wells needed to recapture return flows.

In stark contrast to MWD, AVEK has consistently claimed the right to recapture and use return flows attributable to AVEK imported water – that claim and intention is clearly manifested in AVEK's cross-complaint filed in this Action and, also, in AVEK's ownership of wells capable of recapturing return flows [Undisputed Facts Nos. 37, 47]. Unlike MWD, AVEK has never abandoned its right to recapture the return flows from the State Water Project water it imports into the area of adjudication.

For the foregoing reasons, *City of San Fernando* is clearly distinguishable from the case at bar. Moreover, the Supreme Court has repeatedly stated that unless the importer of foreign water expressly assigns, transfers, abandons or otherwise relinquishes its right to return flows, that right belongs to the "importer;" that is true whether the importer's customers are private parties or public entities. No reported California decision has denied an importer's claim to return flow in favor of the importer's customer's claim to such return flows (absent the importer's express assignment, transfer, or abandonment of such right).

The above cited decisions clearly state that the person who actually "imports" water from a foreign watershed is entitled to recapture and use the return flows resulting therefrom – as to the water AVEK imports from the State Water Project, that entity is AVEK.

B. *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266

Like *City of San Fernando*, the facts in *City of Santa Maria* are clearly distinguishable from the case at bar. In *City of Santa Maria,* the State Water Project contractor (Santa Barbara County Flood Control and Water Conservation District) had years earlier "assigned" to City of Santa Maria a portion of the District's SWP "entitlement."As a result, Santa Maria was itself able to direct and order the importation of SWP water. Based on these undisputed facts, the parties to *City of Santa Maria* "stipulated" that Santa Maria and others similarly situated were "importers." These distinguishing facts explain why the Judgment After Trial and the Court of Appeal's Opinion in *City of Santa Maria* both characterize Santa Maria as an "importer," entitled to the return flows resulting from State Water Project water the city of Santa Maria caused to be imported.

1. "WATER SUPPLY RETENTION" AGREEMENT

On or about June 25, 1985, a SWP contractor, the Santa Barbara County Flood Control and Water Conservation District ("the District") entered into a Water Supply Retention Agreement with Santa Maria, giving Santa Maria the right to "retain" a portion of the District's State Water Project "entitlement." In its Resolution No. 82-509, Santa Maria approved the First Amendment to the Water Retention Agreement, which provides:

> [Santa Maria] agrees to pay the DISTRICT the amount required to be paid by the DISTRICT under the State Water Contract to retain annual entitlement and capacity right of 11,300 acre feet **and all rights associated therewith under the State Water Contract** ("Retained Rights") . .

(Third page of Exhibit 5 to Request for Judicial Notice filed concurrently herewith; emphasis added.)

2. TO UTILIZE THE ACQUIRED SWP "ENTITLEMENTS" OF SANTA MARIA AND OTHERS SIMILARLY SITUATED, A JOINT POWERS AGENCY WAS FORMED

Santa Maria's Resolution No. 90-31 dated March 20, 1990, confirms its status as a SWP "contractor" with "retained rights" to State Water Project water, thereby entitled to make "all decisions" relating to its SWP water entitlement through the Santa Barbara Water Purveyors Agency:

> . . . on June 25, 1985, the City of Santa Maria entered into an agreement with the [District] designated "Water Supply Retention Agreement", Model I, 12/11/84, as amended by First, Second & Third Amendments, ("WSRA") and is, pursuant to the WSRA, one of the "Contractors" to which "Retained Rights" were assigned pursuant to the WSRA; and
>
> . . . this entity is a member of the Santa Barbara Water Purveyor's Agency ("SBWPA"), a joint powers agency formed on November 16, 1982 . . .
>
> . . . Article 5(c) of the WSRA provides that the Contractors under the WSRA shall make all decisions relating to the retained rights and shall transmit those decisions to the District, who shall communicate them to the [DWR] . . .
>
> . . .
>
> 1. The Santa Barbara Water Purveyors Agency ["SBWPA"] is hereby acknowledged, ratified, and designated as the entity referred to in Article 5(c) of the WSRA, as the organization through which the making and transmission of all decisions relative to the WSRA shall be made. [Underscoring added.]

(First page of Exhibit 6 to Request for Judicial Notice filed concurrently herewith).

3. ACCORDINGLY, SANTA MARIA AND OTHERS SIMILARLY SITUATED WERE ACKNOWLEDGED TO BE STATE WATER PROJECT "CONTRACTORS"

Santa Maria's January 15, 1991, Resolution No. 91-12, ratified SBWPA's Resolution No. 90-10, "regarding the approval by the State Department of Water Resources of the Assignment of Rights Embodied in the Water Supply Retention Agreements . . ." The SBWPA Resolution attached thereto notes:

> . . . on July 1, 1989, Model I of the [WSRAs], which had previously been entered into by various members and associate members of the [SBWPA] ("Contractors") and [the District], became effective assigning the District's rights under the 1963 State Water Contract . . . between the District and [DWR] to the contractors [including Santa Maria]; and
>
> . . . Article 41 of the Water Supply Contract contemplates formal approval by DWR of the assignment of rights under the contract; and
>
> 1. [T]he Contractors since entering into the WSRAs have exercised their rights under the agreements and have contracted with DWR through the District . . .
>
> . . .
>
> 3. The Contractors [including Santa Maria] hereby agree, pursuant to Article 3 c) of the WSRA, to reimburse the District for all costs and expenses which the District becomes obligated to pay under the Water Supply Contract regarding the Contractors' retained rights . . .

(Pages 2 and 3 of Exhibit 7 to Request for Judicial Notice filed concurrently herewith; emphasis added.)

Therefore, the public water purveyors, which included Santa Maria and other similarly situated, became the assignees and owners of specific SWP "entitlements;" and through the SBWPA joint powers agency, they were each able to direct and order the importation of State Water Project water.

4. ADDITIONAL CONFIRMATION OF THE TRANSFER OF SWP RIGHTS

Santa Maria's September 3, 1991, Resolution No. 91-151, adopting SBWPA's Resolution #91-14 notes:

> . . . in 1983 the District entered into Water Supply Retention Agreements (WSRAs) with certain Water Purveyors (hereinafter the Water Purveyors which executed the WSRA's are referred to as "Contractors") transferring the District's rights under the SWP Contract to the Water Purveyors . . .

(Pages 2 and 3 of Exhibit 8 to Request for Judicial Notice filed concurrently herewith; emphasis added.)

5. WATER MANAGEMENT AGREEMENT CONFIRMING THE STATUS OF SANTA MARIA AND SCWC AS STATE WATER PROJECT CONTRACTORS, WITH RIGHTS TO RETURN FLOWS

The June 15, 2004, Water Management Agreement signed by City of Santa Maria and Southern California Water Company notes:

> E. The City [Santa Maria] and SCWC [Southern California Water Company] also each hold contracts to receive water from the State Water Project ("SWP Entitlement," collectively, and "City SWP Entitlement" or "SCWC SWP Entitlement," individually). Collectively, their contract entitlements total 18,350 acre-feet per year."
>
> F. Both the City and SCWC are legally **entitled to retain and recapture that portion of their respective SWP Entitlement that recharges the Basin after the consumptive use of the SWP Entitlement ("Return Flows")**.
>
> . . .
>
> H. It is to the mutual advantage of the City and Santa Maria to have several alternatives for making use of their SWP Entitlements, Return Flows . . . [All emphasis added.]

(Pages 11 and 12 of Exhibit F to Exhibit 1 to Judgment After Trial [Exhibit 9 to Request for Judicial Notice filed concurrently herewith].)

///

///

///

6. SANTA MARIA VALLEY PUBLIC WATER PURVEYOR WATER MANAGMENT AGREEMENT CONFIRMS SANTA MARIA'S STATUS AS A SWP CONTRACTOR AND RIGHT TO RETURN FLOWS

The June 30, 2005, Santa Maria Valley Public Water Purveyor Management Agreement between City of Santa Maria, City of Guadalupe and Southern California Water Company, provides:

> The Parties also each hold contracts to receive water from the State Water Project ("SWP Entitlement," collectively, and "Santa Maria SWP Entitlement," "Guadalupe SWP Entitlement," or "SCWC SWP Entitlement," individually). Santa Maria's contract is for 17,800 acre feet, SCWC's contract is for 550 acre feet and Guadalupe's contract is for 610 acre feet. Collectively, the SWP Entitlement totals 18,960 acre-feet per year. [Pages 1-2]
>
> 7.3 It is to the mutual advantage of Guadalupe and Santa Maria to have several alternatives for making use of **their SWP Entitlements, Return Flows** and Twitchell Yield . . . [Page 5]
>
> 7.5 . . . Santa Maria shall have a right of first refusal to purchase any SWP Return Flows that Guadalupe elect to sell from its existing SWP Entitlement . . . [Pages 5-6]

(Pages 1, 5 and 6 of Exhibit F to Exhibit 1 to Judgment After Trial [Exhibit 9 to Request for Judicial Notice].)

7. THE PARTIES TO THE LITIGATION STIPULATED THAT SANTA MARIA AND OTHERS SIMILARLY SITUATED HAVE SWP CONTRACTS AND, ACCORDINGLY, ARE "IMPORTERS" OF STATE WATER PROJECT WATER

The stipulating parties in *City of San Fernando* agreed that the public water purveyors, including the City of Santa Maria and others similarly situated, "have SWP contracts," and are "importers."

> At the date of this Stipulation, the Importers are Santa Maria, SCWC, Guadalupe, Pismo Beach and Oceano.
>
> . . .
>
> Santa Maria, SCWC and Guadalupe all have SWP Contracts.

(Page 2, lines 26-28, and page 13, lines 5-6 of Exhibit 1 to Judgment After Trial [Exhibit 9 to Request for Judicial Notice].)

8. JUDGMENT AFTER TRIAL IN *CITY OF SANTA MARIA*

Based upon the referenced assignments of State Water Project water "entitlements," and the parties' aforesaid Stipulation thereto, it is not surprising that the Court's Judgment After Trial in *City of Santa Maria* finds that:

> The City of Santa Maria and Golden State Water Company have a right to use the Basin for temporary storage and subsequent recapture of the Return Flows generated from their importation of State Water Project water. [4:13-15; emphasis added.]

9. THE COURT OF APPEAL'S OPINION

Consistent with all of the foregoing, the Court of Appeal's Opinion in *City of Santa Maria* notes and finds:

> . . . **Most of the case was resolved by an agreement (Stipulation)** among the Santa Maria Valley Water Conservation District (District), local cities and water companies (public water producers), and most of the owners of land overlying the Basin. The **Stipulation . . . allocates** the various components of the groundwater (native groundwater, **return flows of imported water**, and salvaged water) among the stipulating parties.
>
> . . .
>
> The trial court approved the Stipulation and made it part of the final judgment. . . .

[211 Cal.App.4th 266, 276; bold print added.]

For the foregoing reasons, *City of Santa Maria* is readily distinguishable from the case at bar, to wit: AVEK has not assigned or transferred to any of its customers (including the Public Water Suppliers) any portion of AVEK's State Water Project "entitlement" [Undisputed Facts No. 33.] Consequently, the Public Water Suppliers do not own or control any part of AVEK's SWP entitlement; accordingly, they are neither SWP contractors, nor "importers" of State Water Project water.

Notwithstanding these material distinguishing facts, the *City of Santa Maria* decision clearly supports AVEK's claim to ownership of return flows, by confirming that SWP contractors who use their "entitlements" to import water into a Basin are entitled to recapture and use the resulting return flows.

X.

AVEK AND ITS TAXPAYERS ARE THE ONLY PARTIES WHICH PAY THE FULL COST OF THE IMPORTED WATER

The Public Water Suppliers argue they are "importers" because the SWP water they receive from AVEK is imported into the area of adjudication only because they have ordered and paid AVEK for such water; without their ordering and paying for such water, it would not be imported into the area of adjudication. Although this argument has some superficial appeal, closer scrutiny reveals the fallacy of the claim – as the following example and facts demonstrate:

- From the inception of AVEK's participation in the State Water Project, AVEK's taxpayers have paid a total of $475,777,218.84 to insure participation therein, and to construct, maintain and operate the "infrastructure" needed to import, transport, treat and deliver AVEK imported water to its customers [Undisputed Facts No. 48].

- AVEK also has incurred and paid energy and related costs related to the actual transportation of SWP water which total $331,663,051.00 [Undisputed Facts No. 49].
- Accordingly, the total cost incurred and paid by AVEK and its taxpayers to obtain, transport, treat and deliver SWP water to its customers is $807,440,269.84 (i.e., $475,777,218.84 + $331,663,051.00) [Undisputed Facts No. 50].
- From 1972 (when AVEK first began importing SWP water) through 2012, AVEK has imported a total of 1,976,971AF of SWP water [Undisputed Facts No. 51].
- Some loss unavoidably results during the transportation, treatment and delivery stages; as a result, AVEK delivered to its customers during the same time period a total of 1,923,039 AF [Undisputed Facts No. 52].
- Accordingly, the average total cost per acre feet to AVEK and its taxpayers for the water delivered to AVEK customers from 1972 through 2012 is $419.88 per AF (i.e., $807,440.269.84 ÷ 1,923,039) [Undisputed Facts No. 53].
- During the same time period, AVEK has delivered to Waterworks District #40 a total of 808,790 AF [Undisputed Facts No. 54].
- The total cost incurred and paid by AVEK and its taxpayers in procuring and delivering the SWP water that was sold and delivered to Waterworks District #40 is approximately $339,594,745.20 (i.e., 808,790 AF x $419.88 per AF) [Undisputed Facts No. 55].
- Waterworks District #40 has paid a total of only $177,693,610.00 for the aforesaid 808,790 AF of SWP water it purchased and received from AVEK, or $219.70AF (i.e., $177,693,610.00 ÷ 808,790 AF) [Undisputed Facts No. 56].
- Thus, for the water received by it, Waterworks District #40 paid $200.28AF less than the actual cost of the water (i.e., $419.88 - $219.70) or only 52% of the total cost of the water it received (i.e., $177,693,610.00 ÷ $339,594,745.20) [Undisputed Facts No. 57].
- Therefore, AVEK and its taxpayers have subsidized the cost of the water delivered to Waterworks District #40, by paying the additional cost of such water in the amount of $161,901,135.20 (i.e., $339,594,745.20 - $177,693,610.00) [Undisputed Facts No. 58].

- Considered in a slightly different way, Waterworks District #40 received 42% of the total water delivered to AVEK's customers (i.e., 808,790AF ÷ 1,923,039AF), but paid only 22% of the total cost of that water (i.e., $177,693,610 ÷ $807,440,269.84) [Undisputed Fact No. 59].

Waterworks District #40 undoubtedly will argue that it also should be credited with the tax payments made by AVEK's taxpayers who are serviced by Waterworks District #40. However, even considering the contributions made by taxpayers located within the area of the adjudication serviced by Waterworks District #40, the result is the same, to wit: the amount of money paid directly by Waterworks District #40, combined with the payments made by taxpayers located within the area of adjudication serviced by both Waterworks District #40 and AVEK, is still less than the total actual cost of the water AVEK delivered to Waterworks District #40 [Undisputed Fact No. 60].

Confirming this, some of Waterworks District #40's customers are located outside of both AVEK's service area and the area of the adjudication; accordingly, those customers of Waterworks District #40 do **not** pay property taxes which support AVEK's importation of SWP water at all [Undisputed Facts No. 61]. Additionally, many of AVEK's taxpayers are "non-users," i.e., they either take water from wells or leave their properties fallow; as a result, such non-users do not benefit directly from the SWP, although their property taxes significantly subsidize the SWP water purchased by Waterworks District #40 and other AVEK customers [Undisputed Facts No. 62]. These two additional points demonstrates further that Waterworks District #40 and its taxpayers do not pay the full cost of the AVEK imported water they receive.[7]

If AVEK's customers (including Waterworks District #40) were to pay the full cost of the SWP water which AVEK has delivered and sold to them, they might be able to make a credible argument that they should be given the right to recapture the resulting return flows. However, because AVEK's customers (including Waterworks District #40) have paid only a part of the total cost of the AVEK imported SWP water, the return flows resulting therefrom rightly belong to the person(s) which actually

---

7 The same is true of AVEK's agricultural customers, to wit: their payments (including their property tax payments) for the AVEK water they receive do not cover the total cost of the AVEK imported SWP water they receive.

"imported" and paid all costs incurred to import the SWP water. Those persons are AVEK and its taxpayers, including AVEK's "non-user" taxpayers.

Because AVEK and its taxpayers are the only parties which pay the full cost of the State Project Water which AVEK imports into the area of adjudication, for this additional reason they are entitled to control and/or use the resulting return flows.

> The purpose of giving the right to recapture returns from delivered imported water . . . is to credit the importer with the fruits of his expenditures and endeavors in bringing into the basin water that would not otherwise be there.
>
> (*City of San Fernando*, *supra*, 14 Cal.3d 199, at 261.)[8]

XI.

CONCLUSION

For the foregoing reasons, a triable issue of material fact does not exist as to the ownership, and right to recapture and use, the return flows which result from the State Water Project water which AVEK imports into the area of adjudication. Therefore, AVEK respectfully submits that the Court should grant AVEK's motion for summary adjudication of the respective causes of action pled in this action relating to the ownership of return flows, and confirm in its Order granting the motion that AVEK is the only person entitled to recapture and use the return flows from the foreign water AVEK imports into the area of adjudication.

Dated: November 11, 2013

BRUNICK, McELHANEY & KENNEDY

By: _____

WILLIAM J. BRUNICK
LELAND P. McELHANEY
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN WATER AGENCY

---

8 Except when AVEK's allocation of SWP water is insufficient to meet the critical needs of its customers (requiring AVEK to recapture return flows to meet those needs), AVEK's preference is to maintain all return flows in the groundwater, to gradually augment and increase the groundwater supply in the area of adjudication [Undisputed Facts No. 35]. This will benefit AVEK's existing and future customers and taxpayers, both inside and outside the area of adjudication [Undisputed Facts No. 36].

EXHIBIT D

BEST BEST & KRIEGER LLP
ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
WENDY Y. WANG, Bar No. 228923
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612
TELEPHONE: (949) 263-2600
TELECOPIER: (949) 260-0972
Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
JOHN F. KRATTLI, Bar No. 82149
COUNTY COUNSEL
WARREN WELLEN, Bar No. 139152
PRINCIPAL DEPUTY COUNTY COUNSEL
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
TELEPHONE: (213) 974-8407
TELECOPIER: (213) 687-7337
Attorneys for Cross-Complainant LOS ANGELES
COUNTY WATERWORKS DISTRICT NO. 40

[See Next Page For Additional Counsel]

EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

RICHARD WOOD, on behalf of himself and all other similarly situated v. A.V. Materials,

Judicial Council Coordination Proceeding No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

OPPOSITION TO ANTELOPE VALLEY-EAST KERN WATER AGENCY'S MOTION FOR SUMMARY ADJUDICATION

[Filed concurrently with Separate Statement of Disputed Material Facts, Request for Judicial Notice, and Declarations of Jeffrey V. Dunn and Steve A. Perez]

Date: January 27, 2014
Time: To be determined
Dept.: To be determined

Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC509546

Trial Date: February 10, 2014 (Phase V)

RICHARDS WATSON & GERSHON
James L. Markman, Bar No. 43536
Steven Orr, Bar No. 136615
355 S. Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101
(213) 626-8484 (213) 626-0078 fax
Attorneys for City of Palmdale

MURPHY & EVERTZ LLP
Douglas J. Evertz, Bar No. 123066
650 Town Center Drive, Suite 550
Costa Mesa, CA 92626
(714) 277-1700; (714) 277-1777 fax
Attorneys for City of Lancaster and Rosamond Community Services District

LEMIEUX & O'NEILL
Wayne Lemieux, Bar No. 43501
4165 E. Thousand Oaks Blvd., Ste. 350
Westlake Village, CA 91362
(805) 495-4770 (805) 495-2787 fax
Attorneys for Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, and Big Rock Mutual Water Company

CHARLTON WEEKS LLP
Bradley T. Weeks, Bar No. 173745
1007 West Avenue M-14, Suite A
Palmdale, CA 93551
(661) 265-0969 (661) 265-1650 fax
Attorneys for Quartz Hill Water District

CALIFORNIA WATER SERVICE COMPANY
John Tootle, Bar No. 181822
2632 West 237th Street
Torrance, CA 90505
(310) 257-1488; (310) 325-4605-fax

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	AVEK HAS A CONTRACTUAL ENTITLEMENT TO SWP WATER AND NO GROUNDWATER RIGHT TO RETURN FLOWS	2
III.	AVEK'S MOTION IS PROCEDURALLY DEFECTIVE	3
	A. The Motion Should Be Denied Because It Fails To Establish Every Element Of AVEK's Cause of Action Or The Public Water Suppliers' Affirmative Defenses	3
	B. The Motion's Declarations Are Largely Inadmissible Statements	5
	C. The Motion Should Be Denied Because It Includes Untimely And Unauthorized Filings	6
IV.	AVEK SOLD SWP WATER TO PUBLIC WATER SUPPLIERS WITHOUT ANY RESERVATION OF A RETURN FLOW CLAIM BY AVEK	6
	A. AVEK Does Not Retain Any Interest In SWP Water Purchased By The Public Water Suppliers	6
	B. Other Provisions of AVEK's Water Supply Contracts Recognize The Public Water Suppliers' Return Flow Rights	8
V.	UNDER GENERAL PRINCIPLES OF WATER LAW, THE PUBLIC WATER SUPPLIERS HAVE THE RIGHT TO RETURN FLOWS OF STATE WATER PROJECT WATER THAT AVEK WHOLESALES AND DELIVERS	8
	A. Case Law Supports the Public Water Suppliers' Right To Recapture and Use the SWP Water Return Flows	8
	1. The City of Glendale Decision	9
	2. The City of San Fernando Decision	10
	3. The City of Santa Maria Decision	14
	B. Matters Not Considered by the Courts in City of San Fernando and City of Santa Maria Should not Be Considered	15
	C. If the Wholesaler is an "Importer" of SWP Water, DWR is the "Importer"	15
VI.	AVEK FAILS TO DEMONSTRATE INTENT TO RECAPTURE RETURN FLOWS FROM SWP WATER	16
VII.	AVEK'S COSTS ARGUMENTS DO NOT SUPPORT ITS RETURN FLOW CLAIM	18
VIII.	CONCLUSION	21

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF AUTHORITIES

Page

Cases

Achen v. Pepsi-Cola Bottling Co. of Los Angeles,
(1951) 105 Cal.App.2d 113 15

Aguilar v. Atlantic Richfield Co.,
(2001) 25 Cal.4th 826 3

American Enterprise, Inc. v. Van Winkle,
(1952) 39 Cal.2d 210 7

Antelope Valley-East Kern Water Agency v. Local Agency Formation Com.,
(1988) 204 Cal.App.3d 990 19

City of L. A. v. City of Glendale,
supra, 23 Cal.2d at p. 78 ..... *passim*

City of Oceanside v. Superior Court,
(2000) 81 Cal.App.4th 269 5

City of Santa Maria v. Adam,
(2012) 211 Cal.App.4th 266 ..... 1, 9, 14, 15

Gilbert v. Sykes,
(2007) 147 Cal.App.4th 13 5

Goodman v. County of Riverside,
(1983) 140 Cal.App.3d 900 1

Hood v. Superior Court,
(1995) 33 Cal.App.4th 319 ..... 3, 4

Long Beach v. Marshall,
(1938) 11 Cal.2d 609 7

Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District,
(2003) 106 Cal.App.4th 1219 ..... 5, 6

Union Bank v. Superior Court,
(1995) 31 Cal.App.4th 573 3

Statutes

Cal. Law Const. Law § 1108 15

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF AUTHORITIES
(continued)

	Page
Civ. Code § 1105	6
Civ. Code § 1641	8
Code Civ. Proc. § 437c, subd. (b)(1)	5
Code Civ. Proc., § 437c, subd. (d)	5
Code Civ. Proc. § 437c, subd. (f)(1)	4
Code Civ. Proc. § 437c, subds.,(f)(1), (p)(1), (o)	3
Code Civ. Proc. § 437c, subd. (p)	5
Com. Code § 2401	7

Los Angeles County Waterworks District No. 40 ("District No. 40"), City of Palmdale, City of Lancaster, Rosamond Community Services District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, Big Rock Mutual Water Company, Quartz Hill Water District, and California Water Service Company (collectively, "Public Water Suppliers") respectfully submit the following Opposition to Antelope Valley-East Kern Water Agency's ("AVEK") Motion for Summary Adjudication of All Causes of Action Relating to Ownership of Return Flows ("Motion").

I. INTRODUCTION

No court has ever ruled that a State Water Project wholesaler has a groundwater right to the return flows of its retail customers. "Return flows (imported water that is used on the surface which then percolates into the Basin) . . . are derived from State Water Project (SWP) water imported by several of the public water producers." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 280.) AVEK is not a public water producer but a SWP wholesaler. If its Motion is successful, it would likely create a legal havoc within the State Water Project System, a public water supply for tens of millions of Californians.[1]

AVEK's Motion should be denied for each of the following reasons:

- AVEK does not have a groundwater right to SWP water but merely a contractual entitlement to deliver SWP water to Public Water Suppliers and other water users. The Public Water Suppliers uses of SWP water augment the Basin's groundwater supply and thereby create their right to the return flows.
- The Motion is procedurally defective on numerous grounds.
- The Motion lacks legal authority for AVEK's return flow claims.
- AVEK's water delivery contracts disclaim any responsibility for SWP water sold by AVEK to the Public Water Suppliers and therefore any claim to the SWP water.
- Public Water Suppliers have a right to return flows under existing law.

[1] A brief overview of the State Water Project is found in *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 903.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

For each of these reasons, AVEK's Motion should be denied.

II. AVEK HAS A CONTRACTUAL ENTITLEMENT TO SWP WATER AND NO GROUNDWATER RIGHT TO RETURN FLOWS.

AVEK's claims are unprecedented and lack legal support. There are 29 SWP contractors and 250 Central Valley Project ("CVP") contractors that deliver state and federal water from northern California to central and southern California. (Request for Judicial Notice, Exs. 1 & 2.) Despite long-standing and apparent consensus among the wholesale water contractors that they do not have a right to return flows as against their retail user customers - and ignoring the impact to all water suppliers who purchase water from the SWP and CVP contractors - AVEK now claims that it owns return flows to SWP water that it sold to Public Water Suppliers. AVEK makes this claim despite the fact that AVEK never reserved the return flows in its written contracts selling SWP water to the Public Water Suppliers.

A contract entitlements are not a groundwater right. A water right is held by the entity that takes water directly from a body of water, and AVEK does not take the SWP water directly from a body of water. Instead, AVEK has a contract Department of Water Resources ("DWR"), which holds the surface water right, to receive and deliver SWP water to public water suppliers and private property owners. Thus, a contractual entitlement is created by a contract between DWR as an appropriative water right holder, and AVEK as a contracting entity to take delivery of water that DWR diverts by means of its appropriative water right.

SWP and CVP wholesalers, including AVEK, have contracts with DWR and the U.S. Bureau of Reclamation, respectively, which specify the amount of water each wholesaler district is entitled to if full allocations are available. If less than full allocations are available, then the reduced delivery each wholesaler district receives is determined by the terms of the contract and not by any water right. The wholesaler districts generally have contracts with public water suppliers and landowners purchasing SWP water for their respective uses, and it is the purchasers' use that lead to return flows that augment the groundwater basin supply and the return

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

flow right.

It is important to note that SWP water does not augment the Basin's supply unless the Public Water Suppliers and AVEK's other retail user customers buy the SWP water. The Public Water Suppliers use SWP water, and it is that use which augments the Basin's supply. If the PWS and other AVEK retail customers do not use the SWP water, it does not augment the Basin's supply. AVEK, on the other hand, is contractually obligated to DWR regardless of the amount of water SWP delivered.

Stated simply, AVEK has no groundwater right.

III. AVEK'S MOTION IS PROCEDURALLY DEFECTIVE

A. The Motion Should Be Denied Because It Fails To Establish Every Element Of AVEK's Cause of Action Or The Public Water Suppliers' Affirmative Defenses

A plaintiff is entitled to summary adjudication only if it proved each element of the cause of action and that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subds.,(f)(1), (p)(1), (o); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-55; *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 589-90.) The AVEK Motion, however, fails to completely dispose of any cause of action.

The Motion argues that "no defense exists as to AVEK's Fourth Cause of Action; the PWS' Sixth Cause of Action relating to the same issue is without merit; no triable issue of material fact exists with respect to either cause of action; and, accordingly, AVEK is entitled to judgment establishing its right to use all return flows. . . ." (Motion at p. 5.) AVEK's motion, however, fails to establish each and every element of AVEK's Fourth Cause of Action or address any of the fourteen affirmative defenses raised in District No. 40's Answer. (Declaration of Jeffrey V. Dunn ("Dunn Decl."), Ex. B [Answer].) AVEK's Motion is so deficient that it fails to even identify the elements of an alleged AVEK return flow claim.

Additionally, AVEK failed to establish that no triable issue of fact exists regarding:

(1) whether some State Water Project water returns and/or enters the Basin;

(2) whether "there is underground space available in the Basin to store the return flows";

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

and

(3) whether AVEK can have or "has the sole right to recapture return flows attributable to its State Project water." (Dunn Decl., Ex. A at pp. 10-11[AVEK's Cross-Complaint].) The Motion does not reference those facts[2] nor does it even assert the amount of return flows from SWP water to which AVEK alleged it has groundwater rights. As shown by the Public Water Suppliers' accompanying Separate Statement of Disputed Material facts filed concurrently with this opposition and incorporated by reference herein, the Motion's supporting materials facts are not undisputed which requires the Motion to be denied.

Moreover, the Motion asks the Court to determine only one aspect of the return flow cause of action. The request is inappropriate and not permitted under Section 437c, subdivision (f). (Code Civ. Proc. § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."].)[3] In amending Section 437c, subdivision (f), the California Legislature stated that the purpose of subdivision (f) is "to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense." (*Hood, supra,* 33 Cal. App. 4th at p. 323 [quoting Stats. 1990, ch. 1561, § 1].) AVEK's Motion is inconsistent with the Legislature's intent to "promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials." (*Id.* [quoting *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854].) For this reason alone, summary adjudication on either AVEK's Fourth Cause of Action or the Public Water Suppliers' Sixth Cause of Action should be denied.

Even assuming *arguendo* that AVEK sufficiently established each element of the return flow cause of action, which it has failed to do, AVEK as a cross-complainant, would need to establish that there is no defense to its Fourth Cause of Action. (Code Civ. Proc. § 437c, subd. (p)(1).) On or about February 23, 2007, District No. 40 and Rosamond Community Services

[2] Public Water Suppliers note that other parties have indicated that they intend to relitigate other elements of the return flow.

[3] All section references are to the Code of Civil Procedure unless otherwise indicated.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

District filed their answer to all complaints and cross-complaints, including AVEK's Cross-Complaint, in these coordinated actions. (Dunn Decl., Ex. B [Answer].) In their answer, District No. 40 and Rosamond Community Services District allege fourteen affirmative defenses, none addressed by AVEK's Motion. For example, the Tenth and Separate Affirmative Defense alleges that AVEK failed to join indispensable and necessary parties, namely other landowners and water producers within the Basin. Yet, AVEK's Motion fails to address this defense and does not discuss its alleged return flow rights against other landowners. For this reason alone, AVEK's Motion should be denied. (Code Civ. Proc., § 437c, subd. (p)(1).)

B. The Motion's Declarations Are Largely Inadmissible Statements

The moving party has the burden of making a sufficient showing that a plaintiff's claim is without merit; failure to do so must result in denial of the motion. (*City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 273; Code Civ. Proc., § 437c, subd. (p).) To meet this burden, the moving party must support its motion "by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (Code Civ. Proc., § 437c, subd. (b)(1).)

Supporting affidavits or declarations "shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (*Id.* at subd. (d).) Affidavits or declarations not based on personal knowledge, that contain hearsay or impermissible opinions, lack foundation, or are argumentative, speculative or conclusory, are insufficient. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219, 1236, 1238.)

As shown in evidentiary objections concurrently filed, the Motion should be denied because most, if not all, of the declarant testimony is inadmissible. The Motion's accompanying declarations contain hearsay or impermissible opinions, lack foundation, or are argumentative, speculative or conclusory. (See Code Civ. Proc., § 437c, subd. (d); *Gilbert, supra*, 147 Cal.App.4th at 26; *Tuchscher Development Enterprises, Inc., supra*, 106 Cal.App.4th at 1236, 1238.)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

C. The Motion Should Be Denied Because It Includes Untimely And Unauthorized Filings

The Court set November 13, 2013 as the deadline for filing a summary judgment motion. AVEK, however, submitted a procedurally unauthorized "Supplemental Brief" and a self-labeled "Amended Statement of Undisputed Facts" on December 14, 2013 – only thirteen days before the Public Water Suppliers' opposition deadline. (*Id.*) By this opposition, the Public Water Suppliers object to AVEK's procedurally improper and untimely Motion.

IV. AVEK SOLD SWP WATER TO PUBLIC WATER SUPPLIERS WITHOUT ANY RESERVATION OF A RETURN FLOW CLAIM BY AVEK

AVEK admits it exists "for the purpose of providing water received from the State Water Project ("SWP") as a supplemental source of water to retail water purveyors and other water interests within AVEK's Jurisdictional Boundaries *on a wholesale basis*." (Dunn Decl., Ex. C at Appendix B, Resolution R-11-09 [AVEK's 2010 UMWP] [emphasis added].) Consistent with its wholesaler status, AVEK has a contract with DWR for AVEK to receive and then deliver SWP water to Public Water Suppliers and other AVEK customers. (*Id.*; Flory Decl., Ex. 1.)

The Public Water Suppliers have written water purchase contracts with AVEK (collectively, AVEK's "Water Supply Contracts"). The Public Water Suppliers buy SWP water from AVEK pursuant to the Water Supply Contracts. They provide that "'substantial uniformity' in those contracts is 'desirable' and that AVEK will 'attempt to maintain such uniformity' between such contracts." (Dunn Decl., Ex. C at Appendix B, Article 19, Resolution R-11-09 [AVEK's 2010 UMWP].) Many of the Public Water Suppliers, including District No. 40 and Rosamond Community Services District, entered into Water Supply Contracts with AVEK. (E.g., Dunn Decl., Ex. E [Water Service Agreement between AVEK and District No. 40]; Declaration of Steve A. Perez ("Perez Decl."), Ex. A [Water Service Agreement between AVEK and Rosamond Community Services District].)

A. AVEK Does Not Retain Any Interest In SWP Water Purchased By The Public Water Suppliers

It is well established that a selling party relinquishes all rights and interests in the sold property unless the seller expressly reserves an interest. (*E.g.*, Civ. Code §§ 1105 ["A fee simple

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."] and 1084 ["The transfer of a thing transfers also all its incidents, unless expressly excepted"]; *American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 220 ["In the absence of some exception, limitation or reservation, a grant deed is presumed to convey the grantor's entire interest."]; *Long Beach v. Marshall* (1938) 11 Cal.2d 609, 613-14 [a transfer of real property is presumed to be a grant of fee simple title]; Com. Code § 2401 ["Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. . . . Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading . . . [i]f the contract requires delivery at destination, title passes on tender there."].)

Pursuant to the terms of AVEK's Water Supply Contracts, AVEK sells SWP water to the Public Water Suppliers. (*E.g.*, Dunn Decl., Ex. E and Perez Decl., Ex. A [AVEK's Water Service Agreements].)

AVEK admits its Water Supply Contracts do not mention return flows let alone reserve an interest in the SWP water. (Motion at p. 8.) The written agreements' complete silence on return flows is relevant because the Water Supply Contracts reference the Public Water Suppliers' groundwater rights. Article 3a of the Water Supply Contracts provides:

> Because it may be necessary that consumer maintain and operate his own wells to provide for his own system peak demands and as an emergency reserve water supply, ***it is advisable that consumer retain and protect his rights to groundwater***.
>
> ***In the event there is an adjudication of the groundwater basin*** or any of its sub-units, ***the Agency will assist the Consumers***, if the latter so desire, ***in retaining their rights in the groundwater supply***.

(E.g. Dunn Decl., Ex. E [AVEK's Water Service Agreement, Article 3a] [emphasis added].)

The agreements explicit reference to the Public Water Supplier groundwater rights, together with no reference to any AVEK groundwater disposes any notion that that AVEK has

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

return flow rights. AVEK sold SWP water to its Public Water Suppliers customers and that they have complete and undivided interest to the SWP water purchased from AVEK. Stated simply, AVEK has no right to return flows.

B. Other Provisions of AVEK's Water Supply Contracts Recognize The Public Water Suppliers' Return Flow Rights

Civil Code Section 1641 provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Not only do AVEK's Water Supply Contracts lack any reservation of a return flow interest on the part of AVEK, but the Contracts establish return flow rights for the Public Water Suppliers.

For example, the Water Supply Contracts' Article 11 provides that once AVEK delivers the SWP water to the Public Water Suppliers, AVEK shall not be liable "for the control, carriage, handling, ***use***, disposal, distribution or changes occurring in the quality of such water supplied to the Consumer or for claim of damages of any nature . . . ; and the Consumer shall indemnify and hold harmless [AVEK] . . . from any such damages or claims of damages . . . ." (Dunn Decl., Ex. E [AVEK's Water Service Agreement] [emphasis added].) Thus, AVEK disclaims any responsibility and therefore any interest in the use of SWP water purchased by the PWS. By now arguing that it somehow has groundwater rights to return flows, AVEK asks the Court to adopt an absurd interpretation of the Water Supply Contracts that would allow AVEK to claim return flows while being indemnified and held harmless by the Public Water Suppliers for any liability associated with their return flow uses.

V. UNDER GENERAL PRINCIPLES OF WATER LAW, THE PUBLIC WATER SUPPLIERS HAVE THE RIGHT TO RETURN FLOWS OF STATE WATER PROJECT WATER THAT AVEK WHOLESALES AND DELIVERS.

A. Case Law Supports the Public Water Suppliers' Right To Recapture and Use the SWP Water Return Flows

In *City of Glendale* (1943) 23 Cal.2d 68 and *City of San Fernando* (1975) 14 Cal.3d 199, the California Supreme Court established the two basic principles governing return flows. First, the court in both cases held that an importer of water has the right to the return flows of water that the importer spreads into the groundwater basin with the intent of recapturing and using the water later. Second, the court in *City of San Fernando* held that—with respect to water that the

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

importer sells and delivers to a local water district, which the local district then delivers to the ultimate user—the local water district has the right to the return flows. Taken together these cases support the conclusion that the Public Water Suppliers, not AVEK, have the right to return flows of SWP water that AVEK wholesales and delivers to the Public Water Suppliers. Moreover, the California Supreme Court's decisions have recently been upheld by the Court of Appeal in *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 301-303, which held that retail purchasers of SWP water are entitled to return flows attributed to their respective water purchases. Stated simply, retail purchasers like the Public Water Suppliers here, are the "importers" of SWP water. Thus, AVEK's claim that it has the right to the return flows of the latter water supply is contradicted by and inconsistent with these decisions.

1. The *City of Glendale* Decision

In *City of Glendale, supra*, the City of Los Angeles ("Los Angeles") transported water through its own aqueduct from the Owens River in northern California to the San Fernando Valley.[4] Los Angeles spread a portion of this water in gravel pits and spreading grounds "with the object of having it sink beneath the surface to join the other water in the valley and flow with it down the valley until it reached plaintiff's [Los Angeles'] diversion works." (*City of Glendale, supra*, 23 Cal.2d at 76.) Los Angeles sold another portion of the water to the farmers in the San Fernando Valley, with the intent that the waters, after they had been used and seeped into the ground, would then "join[] the normal and spread waters" as they flowed down the valley and would then be available for Los Angeles' use. (*Id.*) As the court noted, Los Angeles sold the water to the farmers because otherwise "the water would have seeped underground in other valleys without reaching a destination where it could be recovered." (*Id.*)

The California Supreme Court concluded that Los Angeles had the right to the return flows of both forms of water, because it was spreading some waters and selling other waters with the specific intent of transporting the waters through the valley and recapturing and using them

[4] Although Los Angeles is a member of, and purchases water from, the Metropolitan Water District of Southern California ("MWD"), the dispute in *City of Glendale* concerned only the water that Los Angeles transported through its aqueduct from the Owens River, and not the water that Los Angeles purchased from MWD.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

later. (*Id.*) The court started that Los Angeles "did not abandon that right when it spread the water for the purpose of economical transportation and storage." (*Id.*) "By availing itself of these natural reservoirs," the court stated, Los Angeles "spared its citizens the cost of financing the construction of additional dams. . . ." (*Id.*) Thus, *City of Glendale* holds that where an importer *transports* water from one location to another for its later use, such as by spreading the water or selling it to the ultimate user with the intent in both cases of recapturing and using the water later, the importer has the right to recapture and use the return flows, and has not "abandoned" the right.

City of Glendale does not support AVEK's claim that it has the right to the return flows of SWP water that AVEK sells to the Public Water Suppliers. It is one thing for an importer to transport water through a groundwater basin with the intent of recapturing and using the water later, as Los Angeles did in *City of Glendale*. It is an entirely different matter for the importer to sell and deliver the water to a local water public water supplier, which then delivers the water through its own distribution system to the ultimate user. In the former instance, the importer has put its own water in an underground bank for its later use; in the latter, the importer has sold and delivered the water to someone else, and cannot claim that the water somehow still belongs in its underground bank. In the former instance, the importer is the "importer" of its own water, but, in the latter, the local water agency has become the "importer," by importing the water through its own distribution system to the ultimate user.

2. The *City of San Fernando* Decision

In *City of San Fernando, supra*, the Cities of Los Angeles, Glendale and Burbank (respectively, "Los Angeles," "Glendale" and "Burbank") respectively claimed the right to the return flows of various waters that were imported into the Upper Los Angeles River Area ("ULARA"), which includes most of the San Fernando Valley. (*City of San Fernando, supra*, 14 Cal.3d at 208-209.) The imported waters fell into three categories: (1) the waters of the Owens River and Mono Lake Basin that Los Angeles diverted and transported through its own aqueduct to its facilities in the ULARA; (2) the waters of the Colorado River that Los Angeles purchased from the Metropolitan Water District of Southern California ("MWD"), which MWD delivered to

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

the ULARA for Los Angeles' use; and (3) the waters of the Colorado River that Glendale and Burbank purchased from MWD, and that MWD delivered to the ULARA for Glendale's and Burbank's use. (*Id.* at 208-210, 255-256.)[5]

The California Supreme Court held, first, that Los Angeles had the right to the return flows of water that it imported from the Owens River and Mono Lake Basin through its own aqueduct to the ULARA, and that Glendale and Burbank did not have the right to these return flows. (*Id.* at 256-260.) The court stated that it had earlier decided this issue in *City of Glendale*, and that Los Angeles had the right to the return flows for the same reason that it was held to have the right in *City of Glendale*. (*Id.*)[6]

Second, and more importantly here, the Supreme Court held that all three cities—Los Angeles, Glendale and Burbank—had the right to return flows of Colorado River water that they had purchased from MWD, and that MWD had delivered to them. (*Id.* at 260-261.) Thus, Los Angeles had the right to return flows of Colorado River water that it purchased from MWD, and Glendale and Burbank had the right to return flows of Colorado River water that they purchased from MWD. *Id.* The court stated:

> Defendants Glendale and Burbank ***each delivers imported MWD water to users within its territory*** in the San Fernando basin and each has been extracting ground water in the same territory before and after the importation. Accordingly, ***each has rights to recapture water attributable to the return flow from such deliveries*** for the same reason that plaintiff [Los Angeles] has this right. These multiple rights necessitate the apportionment of the ground water derived from return flow into the amounts attributable to the important deliveries of each defendant and plaintiff.

(*Id.* at 260-261 [emphasis added].)

---

[5] In addition, of the water that Los Angeles transported from the Owens River and Mono Lake Basin through its aqueduct, Los Angeles spread "relatively small quantities" of this water into the groundwater basin, in order to recharge the basin and "recapture the water thus stored." (*City of San Fernando*, 14 Cal.3d at 256, & n. 48, 262-263.) The California Supreme Court held that Los Angeles had the right to the return flows from this spread water, just as it had held earlier in *City of Glendale*. (*Id.* at 263-264.)

[6] The court held that its earlier adjudication of Glendale's and Burbank's claims to the return flows in *City of Glendale* did not bar Glendale's and Burbank's claims in the instant case—because the earlier decision considered only return flows from agricultural, or "irrigation," use by "farmers," and the instant case involved return flows from non-agricultural uses—but that the same principles that apply in cases involving non-agricultural uses also apply in cases involving agricultural uses. (*City of San Fernando*, 14 Cal.3d at 213, 258-259.)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

The California Supreme Court's decision in *City of San Fernando* is determinative, here. The court held that "each [city] delivers imported MWD water to users within its territory," and "each has rights to recapture water attributable to the return flow from such deliveries" of MWD-imported water. (*Id.*) The court thus held that where MWD, which imports Colorado River water through its own aqueduct, sells and delivers the water to the three cities, which then provide the water to their customers for ultimate use, the return flows of the MWD-imported water belong to the three cities. In the instant case, AVEK stands in the same place as MWD and the Public Water Suppliers stand in the places of the three cities, because AVEK sells and delivers imported SWP water to the Public Water Suppliers, which then provide the water to their customers for ultimate use. Because the California Supreme Court held that the three cities have the right to the return flows of MWD-imported water in *City of San Fernando*, the Public Water Suppliers have the right to the return flows of AVEK-imported water here. *City of San Fernando* thus supports the Public Water Suppliers' argument that the return flows belong to them, and rejects AVEK's argument that the return flows belong to it.

AVEK argues that *City of San Fernando* is distinguishable because the Public Water Suppliers "are merely customers of AVEK," while the three cities in *City of San Fernando* were all "member agencies" of MWD, in that their representatives "were members of MWD's Board of Directors" and thus participated in the governance and policy decisions of MWD. (Motion at p. 11.) AVEK's attempt to distinguish *City of San Fernando* is misplaced, for three main reasons. First, although the three cities in *City of San Fernando* were and are member agencies of MWD, MWD still sells and delivers water to them pursuant to water delivery contracts between MWD and the cities. Thus, the relationship between MWD and the cities, with respect to MWD's sales and delivery of Colorado River water, is an arms-length contractual relationship, and is not one in which MWD is essentially selling and delivering water to itself. AVEK's claim that *City of San Fernando* is distinguishable because the cities are member agencies of MWD is belied by the actual contractual relationship between these entities. The fact that some cities that buy water from MWD may also be member agencies of MWD is of no relevance or consequence in determining the rights and interests of the parties in their contractual relationships.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Second, MWD's relation to the cities are akin to AVEK's relationship to the Public Water Suppliers. For example, MWD's calculation of how much water each of the three cities in *City of San Fernando* are entitled is similar to how AVEK determines how much its SWP water should be delivered to its customers. Each city in *City of San Fernando*:

> has a preferential right to purchase from [MWD] for distribution . . . the proportion of the water served by [MWD] that, from time to time, shall bear the same ratio of all of the water supply of [MWD] as the total accumulation of amounts paid by such municipality to [MWD] on tax assessments and otherwise, excepting the purchase of water, toward the capital cost and operating expense of the District's works shall bear to the total of such payments received by [MWD] from all of its municipalities.

(Motion at p. 11.) In other words, water received by each city shall be reflective of the total amount paid by such city. Similarly, the Antelope Valley-East Kern Water Agency Law ("AVEK Law"), which authorizes, establishes, and empowers AVEK, contains a similar provision. Section 61.1 of AVEK Law provides:

> The ***agency shall whenever practicable, distribute and apportion the water purchased from the State of California*** or water obtained from any other source as equitably as possible ***on the basis of total payment by a district*** or geographical area within the agency regardless of its present status, of taxes, ***in relation that such payment bears to the total taxes and assessments collected from all other areas.***
>
> ***It is the intent of this section to assure each area or district its fair share of water based upon the amounts paid into the agency, as they bear relation to the total amount collected by the agency.***

(Stats. 1959, ch. 2146, p. 5114, Deering's Ann. Wat.–Uncod. Acts (2013) Act 580, § 61.1 [emphasis added].)

Third, nothing in *City of San Fernando* indicates that its analysis of the rights of the three cities was based on the fact that they were member agencies of MWD. The Court did not even mention this fact in its analysis. AVEK goes so far as to attempt to distinguish *City of San Fernando* on grounds that *City of San Fernando* did not even mention, and that were inconsequential in the Court's analysis. Thus, there is no basis for distinguishing *City of San Fernando* on grounds that the three cities that purchased MWD-imported water were members of MWD.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

3. The *City of Santa Maria* Decision

The recent appellate court decision in *City of Santa Maria, supra,* 211 Cal.App.4th 266, 301-302 cites *City of Glendale* and *City of San Fernando* in upholding the right of the City of Santa Maria to return flows. In that case the City was in the same position as the Public Water Suppliers here and there was no consideration that the return flow right should go to the Department of Water Resources or Central Coast Water Authority (who was the State Water Contractor like AVEK is here). Stated simply, retail purchasers like the Public Water Suppliers here, are the "importers" of SWP water.

AVEK spends numerous pages attempting, unsuccessfully, to distinguish *City of Santa Maria* from the present action by improperly referencing contracts and resolutions that allegedly assigned City of Santa Maria's public water suppliers specific entitlements to Santa Barbara County Flood Control and Water Conservation District's SWP contract rights; whereas here the Public Water Suppliers did not enter such agreements with AVEK. (Motion at pp. 13-16.) This is a distinction without a difference.

Like Central Coast Water Authority, the SWP wholesaler in *City of Santa Maria*, AVEK is a SWP wholesaler that delivers SWP water only when a retail water purchaser requests and pays for the SWP water. In fact, AVEK would only schedule water delivery from DWR for the quantity of water on which the Public Water Suppliers have advanced. (Dunn Decl., Ex. F [June 13, 1980 AVEK Letter].) It is only because of the purchase by the retail water purchasers, like District No. 40 here, and the City of Santa Maria in *City of Santa Maria* that SWP water is actually imported. If purchasers, like District No. 40 do not buy and import the SWP water into the Antelope Valley Basin, AVEK would not wholesale purchase the SWP water and the SWP water would not reach the Basin. (Dunn Decl., Ex. F [June 13, 1980 AVEK Letter].)

In recognizing the Public Water Supplier's right to the return flows, *City of Santa Maria* held the return flow right "means that one who brings water into a watershed may retain a prior right to it even after it is used." (*City of Glendale, supra,* 23 Cal.2d at 76–77.) The practical reason for the rule is that the importer should be credited with the "fruits ... of his endeavors in bringing into the basin water that would not otherwise be there." (*City of Santa Maria, supra,* 211

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Cal.App.4th at 301.)

A wholesaler entity, like AVEK or Central Coast Water Authority in *City Santa Maria* only delivers SWP water when a public water supplier retailer or other purchaser pays for it. It is the public water supplier or other purchaser of SWP water who imports the SWP water into the Basin that would not otherwise be there. The actual water importers here, as in *City of Santa Maria* are the public water suppliers and other SWP purchasers because without their purchases, no SWP water would be imported into the Basin.

B. Matters Not Considered by the Courts in *City of San Fernando* and *City of Santa Maria* Should not Be Considered

In its Motion, AVEK improperly attempts to introduce extraneous records and information not stated in the *City of San Fernando* and *City of Santa Maria* decisions, or that does not appear in the records of those cases. (Motion at pp. 10-16.) Introduction of facts not considered by the deciding courts are inappropriate. (8 Witkin Sum. Cal. Law Const. Law § 1108 ["A case is only authority for a point decided, and the ratio decidendi is ordinarily discovered by examining the court's opinion."].) *Ratio decidendi*, or "[t]he principle of the case, is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." (*Achen v. Pepsi-Cola Bottling Co. of Los Angeles* (1951) 105 Cal.App.2d 113, 124.) Facts not treated by the court as material should not be considered as part of the principle of case. (*Id.*) While some courts have reviewed records on appeal and briefs to examine the facts and issues of the prior case, AVEK provided no authority that allows this Court to examine facts that were not sufficiently important or material to be included in either of the *City of San Fernando* and *City of Santa Maria* decisions and, in any event, certainly were not part of the appellate decision. (9 Witkin Cal. Proc. Appeal § 510.) The Public Water Suppliers hereby object to AVEK attempts to rewrite the *City of San Fernando* and *City of Santa Maria* decisions or attempt to introduce information and material here not stated in the decisions.

C. If the Wholesaler is an "Importer" of SWP Water, DWR is the "Importer"

AVEK's contention that it has the right to the return flows because it is the "importer" of the water, is internally inconsistent. DWR is the original "importer" of SWP water under

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

AVEK's contradictory logic, because DWR develops the water, sells it to AVEK, and then transports it to AVEK through its—DWR's—own aqueduct. If, as AVEK argues, the "importer" of water has the right to the return flows irrespective of whether the importer sells and delivers the water to another entity, then DWR has the right to the return flows of the SWP water that it sells and delivers to AVEK, and AVEK does not have this right. AVEK cannot logically claim that—as between DWR and AVEK—AVEK has the right to the return flows even though DWR is the original "importer," but that—as between AVEK and the Public Water Suppliers—AVEK has the right to the return flows because it is the "importer." Although the SWP water would not be available to the Public Water Suppliers if AVEK had not delivered it to them, the SWP water would not be available to AVEK if DWR had not delivered it to AVEK. Thus, AVEK's argument that it has the right to return flows because it is the "importer" suffers from a flawed premise.

In fact, when AVEK sells and delivers SWP water to the Public Water Suppliers, the Public Water Suppliers themselves become the "importers" of the water, because they transport, and thus "import," the water from the places where they receive the water to the places where the water is ultimately used by households, farms, industrial plants, and other such places. Thus, there are numerous "importers" of SWP water, as the water is transported from the rivers of northern California to the ultimate places of use in southern California. AVEK's argument—that it alone is the "importer" and thus entitled to the return flows—improperly focuses on a single, isolated part of the long and complicated chain of distribution and importation of SWP water, rather than focusing on the chain as a whole. By focusing on an isolated part of the chain, AVEK's argument is wholly random and arbitrary.

VI. AVEK FAILS TO DEMONSTRATE INTENT TO RECAPTURE RETURN FLOWS FROM SWP WATER

AVEK asserts that it manifested its intent to recapture SWP water by filing a pleading claiming return flows. AVEK misreads the intent requirement set forth under *City of San Fernando*, which provides:

> The trial court made findings that no party delivered imported waters to others with the intent or purpose of later recapturing it . . .

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

> . It is unnecessary for us to rule on any of these contentions because the parties' respective rights to the return flow derived from delivered imported water in this case do not depend on plaintiff's intent prior to importation. From the beginning of plaintiff's delivery of imported water to users in the San Fernando basin up to the present time, a return flow from such deliveries has augmented the basin's ground supply. ***From an even earlier time up to the present, plaintiff has relied and regularly drawn upon that same basin supply for its municipal water distribution system and has claimed the native waters of the basin under its pueblo right.*** [] All these deliveries of imported water have been inside plaintiff's city limits and all plaintiff's extractions and diversions from the basin have occurred either within the city or in areas long since annexed to the city. ***Since the deliveries and withdrawals were thus "within plaintiff's reservoir" (City of L. A. v. City of Glendale, supra, 23 Cal.2d at p. 78), the allegation of an intent to recapture the return waters in the present complaint, filed in 1955, was sufficient for purposes of the present case to establish whatever rights would have arisen from plaintiff's manifestation of such an intent before commencing importation in 1915.*** (*Stevens v. Oakdale Irr. Dist., supra,* 13 Cal.2d 343 [emphasis added].)

AVEK selectively quotes from only the last sentence to the above paragraph to suggest that the mere filing of a pleading alleging return flows was sufficient to establish intent. (Motion at p. 7.) A complete reading of the *City of San Fernando* decision, however, indicates that an importer ***must*** make a showing of historical pumping of groundwater from the basin for its distribution system before it can rely solely on its pleading to prove intent to recapture return flows.

Here, AVEK has not demonstrated that it has pumped groundwater from the Basin; rather, AVEK simply alleges, without supporting evidence, that it "owns wells capable of recapturing return flows." (Motion at p. 8.) In fact, in an ordinance adopted on June 19, 2007—almost a year after AVEK filed its cross-complaint AVEK admits that it "*does not own or operate any facilities that can produce reclaimed water or native groundwater.*" (Dunn Decl., Ex. C at Appendix B, Ordinance O-07-2 [AVEK's 2010 UMWP] [emphasis added].)

By contrast, the Public Water Suppliers have been pumping groundwater from the Basin prior to the initiation of these coordinated actions, and have manifested their intent to pump by filing their Cross-Complaint, and thereby satisfying the intent requirement under *City of San Fernando.* Moreover, the Public Water Suppliers have asserted their return flow rights in pleadings since the inception of the adjudication proceedings.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

VII. AVEK'S COSTS ARGUMENTS DO NOT SUPPORT ITS RETURN FLOW CLAIM

AVEK dedicated pages to a convoluted and misleading argument that the Public Water Suppliers do not pay for the full costs of SWP water and therefore cannot own the full right and use of SWP water they purchase from AVEK. (Motion at pp. 17-20.) The costs arguments fail for many reasons. First, how much the Public Water Suppliers pay for their SWP water is irrelevant because the sale of SWP water by AVEK to the Public Water Suppliers is governed by the Water Supply Contracts. Article 13 of the Water Supply Contract provides:

> Payment of all charges shall be made at the rates, times and in the manner provided for in the "Rules and Regulations for Distribution of Water, Antelope Valley-East Kern Water Agency" . . . . On or before July 1st of each year, the ***Agency shall adopt by resolution of the Board of Directors the water rate in dollars per acre-foot*** which will be charged for water to be delivered in the next succeeding year.

(Dunn Decl., Ex. E [AVEK's Water Service Agreement] [emphasis added].)

AVEK has unilateral control and authority to set the price of SWP water it sells to the Public Water Suppliers and that rate may bear no relation with the actual costs of SWP water. In fact, AVEK Law ***requires*** AVEK to:

> ***shall fix such rate or rates*** for water in the agency and in each improvement district therein ***as will result in revenues which will pay the operating expenses of the agency, and the improvement district, provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due***. Said rates for 574 water in each improvement district may vary from the rates of the agency and from other improvement districts therein.

(Stats. 1959, ch. 2146, p. 5114, Deering's Ann. Wat.–Uncod. Acts (2013) Act 580, § 77 [emphasis added].)

In other words, rates paid by the Public Water Suppliers, in accordance with their respective Water Supply Contract, not only pays for SWP water, but also for numerous other operating expenses and debts incurred by AVEK. Thus, these rates bear no relation or relevance to whether either AVEK or the Public Water Suppliers are entitled to return flows.

Second, to the extent that the costs are relevant to the return flow causes of action,

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

AVEK's calculation of costs per acre-feet of water are flawed because: (1) instead of calculating costs or amounts paid by AVEK "to insure participation [in SWP], and to construct, maintain and operate the 'infrastructure' needed to import, transport, treat and deliver [SWP] water, AVEK used the amount paid by taxpayers, not AVEK (Motion at 17.); and (2) AVEK's calculation includes costs associated with infrastructure, not water. (Dunn Decl., Ex. G [Aug. 11, 1987 AVEK letter] ["[T]he pricing policy of AVEK requires a water rate for deliveries outside the Agency service area that reflects full recovery of costs, including ***capital for associated capacity in Agency facilities, that are otherwise received from property taxes within the Agency service Area.***"] [emphasis added].) Charges associated with infrastructure should not be included in costs of water because while payments made under AVEK's Water Supply Contract are based on the amount of SWP water received from AVEK, payments from SWP contractors to DWR bear no relation to whether the SWP contractor actually receives water from DWR. (*Antelope Valley-East Kern Water Agency v. Local Agency Formation Com.* ("*Agua Dulce*") (1988) 204 Cal.App.3d 990, 995 ["Payment of obligations is required even if contracting agencies have not yet received any water."] [citing *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 904 fn. 2].) Consequently, even if costs of SWP water are relevant to the return flows causes of action, AVEK's cost methodology is flawed.

Third, AVEK is likely receiving payments from taxpayers located outside of AVEK's jurisdiction. In *Agua Dulce*, *supra*, an association of homeowners sought to detach their property from the territories of AVEK and was granted relief by the Local Agency Formation Commission of Los Angeles County ("LAFCO") from further tax payments and assessments to AVEK. (*Agua Dulce*, 204 Cal.App.3d at 991-92.) AVEK initiated a writ of mandate proceeding to set aside LAFCO's decision, and the Court of Appeal agreed with AVEK that even though the homeowners have detached themselves from AVEK and can never benefit from SWP water delivered to the region by AVEK, they must continue to pay taxes and assessments to AVEK. (*Id.* at 995 [Under AVEK Law "the taxable property shall continue taxable by AVEK for the purpose of paying the bonded indebtedness to the same extent it would have been taxable if exclusion had not occurred."].) Consequently, although the property taxes and assessments may

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

pay for AVEK's indebtedness, infrastructure and/or operational costs, they bear no relation to the actual cost of the SWP water.

Fourth, AVEK's cost calculation ignores payments by Public Water Suppliers' customers for "Capital Facilities Charges" they must pay to AVEK. (See Dunn Decl., Ex. D [list of the current Capital Facilities Charges].) Each Public Water Supplier customer who is not already connected to the AVEK's infrastructure must pay the stated Capital Facilities Charges for the connection.

Fifth, AVEK's cost calculation does not take into consideration of payments made by the Public Water Suppliers for AVEK's infrastructure that are not related to actual purchase of water. Article 5 of the Water Supply Contracts provides:

> Consumer shall make application to Agency for water service connections through which all or a portion of the water to be delivered pursuant to this Agreement shall be delivered to Consumer. Consumer agrees to pay any and all costs incurred by Agency for the design; construction, inspection, operation and maintenance of water service connections) serving Consumer. Application and payment for water service connections shall be in accordance with the procedures set forth in the Rules and Regulations. After the same have been Constructed, Agency shall own the water service corulections and all appurtenances and facilities a part thereof and related thereto.

(Dunn Decl., Ex. E [AVEK's Water Service Agreement].)

Under this provision, the Public Water Suppliers are to pay for water service connections built and owned by AVEK. Nowhere in AVEK's Motion are these payments considered.

///

///

///

///

///

///

///

///

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

VIII. CONCLUSION

For each reasons stated above, AVEK's Motion for Summary Adjudication should be denied.

Dated: December 27, 2013

BEST BEST & KRIEGER LLP

By _____
ERIC L. GARNER
JEFFREY V. DUNN
WENDY Y. WANG
Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

26345.00000\8468059.3

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 5 Park Plaza, Suite 1500, Irvine, California, 92614. On December 27, 2013, I served the within document(s):

OPPOSITION TO ANTELOPE VALLEY-EAST KERN WATER AGENCY'S MOTION FOR SUMMARY ADJUDICATION

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on December 27, 2013, at Irvine, California.

Kerry V. Keefe

EXHIBIT E

BEST BEST & KRIEGER LLP
ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
STEFANIE D. HEDLUND, Bar No. 239787
5 PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614
Telephone: (949) 263-2600
Telecopier: (949) 260-0972

OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
ANDREA ORDIN, Bar No. 38235
COUNTY COUNSEL
WARREN WELLEN, Bar No. 139152
PRINCIPAL DEPUTY COUNTY COUNSEL
500 WEST TEMPLE STREET
LOS ANGELES, California 90012
Telephone: (213) 974-8407
Telecopier: (213) 687-7337

Attorneys for Defendant and Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

RELATED CASE TO JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S BRIEF RE EQUITABLE APPORTIONMENT OF WILLIS CLASS FEE AWARD

DATE: MARCH 22, 2011
TIME: 10:00 A.M.
DEPT: 1
JUDGE: HON. JACK KOMAR

I. INTRODUCTION

Los Angeles County Waterworks District No. 40 ("District 40") opposes Plaintiff's motion for attorney's fees under Code of Civil Procedure ("CCP') section 1021.5 and requests the Court deny Plaintiff's fee request in its entirety for the many reasons set forth in the oppositions filed with the Court. However, in the event that the Court sees fit to award fees, District 40 respectfully requests that the Court significantly reduce Plaintiff's fee award in fair consideration of all parties' interests and, most importantly, the public's interest. Further, the Court should apportion fees to each party that pumps from the Antelope Valley Groundwater Basin ("Basin") based on a pro rata share of their pumping.[1]

This separate brief addresses the equitable apportionment of any Willis Class attorney's fee award. Appellate Courts in California have determined that a party may be ordered to pay fees under section 1021.5 as long as the party as an interest in the outcome of the case and participates in the case. *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151; *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169. Importantly, the party paying fees does not have to be adverse to the party seeking attorney's fees. *Id.* In the present case, as discussed in detail below, each pumping party, whether named as a party or not, has a sufficient interest and sufficiently participated in the action filed by the Willis Class to justify being ordered to pay class counsel fees. Moreover, the Willis Class action judgment eventually will be incorporated into the final judgment and physical solution in this comprehensive adjudication. Thus, each pumping party not only has a certain level of interest in the Willis Class action, but should receive a certain benefits arising from a managed groundwater basin and future certainty regarding their pumping from the Basin.

Many actions taken by pumping parties who are not named as defendants in the class action provide clear evidence that these parties have an interest in the outcome of the Willis Class action. This is reflected in filings made, statements made on the record, and the billing records of class counsel. For example, several large landowner parties strenuously opposed the Court's

[1] Any allocation should exclude the Wood Class members because this Court should minimize the financial burden on small pumpers and the Wood Class Notice specifies that class members will not incur any costs.

approval of the Willis Class settlement on the grounds that they have an interest in the outcome of that case and their interests are not adequately represented in the settlement. While the court properly rejected those arguments on the grounds that the landowners do not have a sufficient interest in the Willis Class action to justify not approving settlement, the landowners do have a sufficient interest in this action to justify allocating responsibility to them for class counsels' attorney's fees.

This is demonstrated by the fact that the landowner pumping parties, despite not being named as parties in the Willis action, have participated in it at every turn, never wasting any opportunity to delay the ultimate outcome of this case or challenge the public water suppliers' rights. Considerable time has been spent by all attorneys in this action, including class counsel, responding to delay tactics and maneuvers undertaken by the landowner pumpers, including appeals and redundant objections and motions. Many landowner pumpers have profited significantly by delaying the outcome of this case in order to pump groundwater without restriction or regard for the health of the Basin. Equity dictates that the landowner pumping parties participate in paying for class counsel fees, if any are awarded by the Court.

II. REAL PARTIES IN INTEREST CAN BE REQUIRED TO PAY ATTORNEYS FEE AWARDS

The pumping landowners (those not named as defendants in the Willis Class Complaint) have a direct interest in and have actively participated in this litigation and are thus "opposing parties" within the meaning of CCP section 1021.5 and therefore are responsible for a portion of the Willis Class attorney's fees.

In *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151 (hereafter *Mejia*) the court found that a real party in interest (a developer in a CEQA mandamus action) was an "opposing party" under CCP section 1021.5 and was therefore responsible for paying attorneys fees. (*Id.* at p. 161.) The *Mejia* court recognized that the term "opposing party" was not defined in section 1021.5 and noted that, although the usual meaning of a party ordinarily means a plaintiff or a defendant, a real party in interest also is regarded as a party to the litigation. (*Id.* at p. 160.)

Mejia thus held that a real party in interest that has a "direct interest in the litigation, more than merely an ideological or policy interest, and actively participates in the litigation is an **opposing party** within the meaning of Code of Civil Procedure section 1021.5." (*Id.* at p. 161.) (Emphasis added.)

One year earlier, in *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169 (hereafter *Connerly*), the California Supreme Court found that a **party's active participation alone** can convert an amicus curiae into a real party in interest that is liable for attorneys fees under CCP section 1021.5. (*Id.* at pp. 1181-1182.) (Emphasis added.)

In determining the propriety of a CCP section 1021.5 attorneys fee award, it is sufficient that the party has some interest in the outcome of the case—no finding of fault or misconduct is required. (See *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 588 ["no finding of fault is required under the statute"].) Thus, in *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino et al.* (1984) 155 Cal.App.3d 738 (hereafter *Audubon*), the Appellate Court held:

> [F]ees granted under the private attorney general theory are not intended to punish those who violate the law but rather to ensure that those who have acted to protect public interest will not be forced to shoulder the cost of litigation. In this case, Gold Mountain was a major party, **actively litigating from the inception of the action in order to protect its interests**. As the real party in interest, it had the most to gain. When a private party is a real party in interest and actively participates in litigation along with the governmental agency, it is fair for that party to bear half the fees.

(*Id.* at 756.) (Emphasis added.)

The circumstances here fit squarely within the holdings of these cases. As in *Mejia*, the pumping landowners have a **direct interest** in the outcome of this Adjudication, specifically as it concerns the future security of their water supply, which will be dramatically affected by the implementation of a physical solution and ensuing Basin-wide management plan. Because of this, the pumping landowners have as much to gain by the outcome of this litigation as any other party. In fact, it was several of the pumping landowners who initiated this litigation.

Although not named as defendants in the Willis Class Complaint, the pumping landowners have actively participated in this litigation. Their position is well documented by a review of the court's pleadings and throughout the Willis Class time entries submitted as part of

their Fee Motion. Notably, as one example, out of approximately 223 phone calls and meetings itemized in Mr. Kalfayan's bills, over 116 of those calls and meetings—more than fifty percent—are with the pumping landowners' attorneys. Additionally, the pumping landowners participated in settlement discussions with the Willis Class, filed several briefs and made arguments regarding many matters concerning the class. Specifically, several of the pumping landowners opposed the class settlement. Under the standards set forth in *Audubon* and *Connerly,* the pumping landowners' participation alone warrants that they be apportioned their fair share contribution of attorney's fees.

III. THE COURT CAN EXERCISE ITS DISCRETION AND APPORTION FEES AMONGST PARTIES

The decision to award attorneys fees is addressed to the sound discretion of the trial court. (*Woodland Hills Residents Association, Inc., et al. v. City Council* (1979) 23 Cal.3d 917, 938; *Sundance v. Municipal Court for the Los Angeles Judicial District of Los Angeles County* (1987) 192 Cal.App.3d 268, 272 (*Sundance*).) In actions involving multiple defendants, courts have apportioned CCP section 1021.5 attorneys fees **equally** among co-defendants, based on the defendants' mere contribution to the dispute that gave rise to the fee request and independent of the degree of liability/responsibility borne on the part of each defendant individually. (See, *e.g.*, *Sundance, supra,* 192 Cal.App.3d at p. 272; see also *Friends of the Trails et al. v. Blasius et al.* (2000) 78 Cal.App.4th 810, 837-38.)

Thus, for example, in *Sundance,* the court apportioned fees equally between a city and a county, even though the fee award largely addressed the city's abusive practices, over and above that of the county's. (*Sundance, supra,* 192 Cal.App.3d at 272.) As the court explained, "the County took an active part in opposing the litigation and thus in generating the expenses [] compensated by the award of attorneys' fees" and thus an equal division of the fee award was appropriate. (*Ibid.*) Here, like in *Sundance*, the pumping landowners played a role in generating the expenses that Willis class counsel now seek to recover. For example, the pumping landowners' role in opposing the Willis Class formation and their contribution in generating the expenses in litigating that issue alone warrants that they be apportioned fees.

Thus, because the allocation of the fee award is in the sound discretion of the Court, District 40 respectfully requests that the pumping landowners be responsible for their share of the costs involved for the reasons set forth above.

IV. IF THE WILLIS CLASS CONFERRED A BENEFIT, WHICH IT DID NOT, THE BENEFIT WAS TO ALL PUMPERS, NOT JUST THE PUBLIC WATER SUPPLIERS

As a large landowner in this Basin, the United States had to be included in this Adjudication. In order to obtain jurisdiction over the United States, it was necessary to comply with the "comprehensiveness" requirement of the McCarran Amendment. (43 U.S.C. § 666; *In re Gen. Adjudication Of All Rights To Use Water In the Gila River Sys. & Source* (1993) 175 Ariz. 382, 393-394) To comply with the comprehensiveness requirement of the McCarran Amendment it was necessary to include the almost 70,000 Willis Class members who own land but have not and do not currently pump water.

The creation of the Willis class was one method to allow this Court to comprehensively adjudicate the Basin. As discussed above, this Adjudication is beneficial to all pumpers because, through a physical solution, the court will manage the Basin and provide certainty as to future pumping from the Basin. Indeed, in *Sundance, supra,* 192 Cal.App.3d at page 272, the cessation of the city's abusive practices was a benefit incurred on the county (the city's co-defendant) and was another reason, apart from the county's contribution to the total fee amount (discussed *supra*), that warranted the county share equally in paying the fee award.

If the Willis Class has conferred a significant benefit, which it has not, the benefit is to all who pump from the Basin and it would be inequitable for the Court to place the burden of attorney's fees solely on the Public Water Suppliers.

///

///

///

///

///

V. CONCLUSION

If the Court awards the Willis Class attorneys fees, which it should not,[2] the Public Water Suppliers respectfully request that the Court exercise its equitable powers and apportion the cost amongst each party who pumps water from the Basin.

Dated: March 9, 2011

BEST BEST & KRIEGER LLP

By: /s/ Original Signed
ERIC L. GARNER
JEFFREY V. DUNN
STEFANIE D. HEDLUND
Attorneys for Defendant and Cross-Complainant
LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40

[2] See the Oppositions filed by the Public Water Suppliers.

PROOF OF SERVICE

I, Stefanie D. Hedlund, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 400 Capitol Mall, Suite 1650, Sacramento, California 95814. On March 9, 2011, I served the within document(s):

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40'S BRIEF RE EQUITABLE APPORTIONMENT OF WILLIS CLASS FEE AWARD

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐	I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on March 9, 2011, at Truckee, California.

/s/ Original Signed
Stefanie Hedlund

26345.0000A\5872322.1

EXHIBIT F

William J. Brunick, Esq. [SB No. 46289]
BRUNICK, McELHANEY, BECKETT, DOLEN & KENNEDY, PLC
1839 Commercenter West
P.O. Box 6425
San Bernardino, California 92412-6425
Telephone: (909) 889-8301
Facsimile: (909) 388-1889

Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN WATER AGENCY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation, Superior Court of California, County of Los Angeles, Case No. BC325201;

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. vs. City of Lancaster, Diamond Farming Company, a corporation, vs. City of Lancaster, Diamond Farming Company, a corporation vs. Palmdale Water District, Superior Court of California, County of Riverside, Case Nos. RIC 353840, RIC 344436, RIC 344668.

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
The Honorable Jack Komar, Dept.17

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S OPPOSITION TO LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40's BRIEF RE EQUITABLE APPORTIONMENT OF WILLIS CLASS FEE AWARD

Date: March 22, 2011
Time: 10:00 a.m.
Dept.: 1
Hon. Judge Jack Komar Presiding

Exempt from filing fee pursuant to Gov't. Code Section 6103

\\\

I.

Antelope Valley-East Kern Water Agency (AVEK) is a wholesale water agency which has a contract with the State of California to import 141,400 acre feet of supplemental water through the California Water Project. This water is for the benefit of all lands within its governmental boundaries which includes the adjudicated basin area. AVEK has also purchased large farms approximating 3,000 acres for use as banking and storage facilities. Combined with AVEK's current overlying pumping and the ability by AVEK to spread supplemental water, this acreage will be used to provide additional water flexibility for the Valley area to implement a physical solution.

II.

Waterworks 40 has requested the Court to apportion fees associated with the *Willis Class* action among parties not involved in that action. AVEK was not named as a defendant by the *Willis Class* and has not participated in any settlement discussions with the *Willis Class.* It is difficult to determine whether this is a motion or merely a pleading which attempts to function as a motion for attorney fees. It is not stated as to which other public entities not involved in the *Willis Class* action are meant to be included. It is unknown whether this is solely the request of Los Angeles County Waterworks District No. 40 or whether the public purveyor group who has been requested to pay the *Willis Class* fees has joined in this pleading.

III.

The *Willis Class* settlement is a detriment to AVEK as to its terms and the monetary request for contribution.

At all times during the proceeding the Court has made clear that any settlement in the *Willis Class* would not be binding on other parties who were not parties to the *Willis* settlement. The pleading filed by Waterworks 40 now states:

> ". . . the *Willis Class* action Judgment will be incorporated into the final Judgment and physical solution in this comprehensive adjudication."

Waterworks 40 has attempted in the guise of settlement to claim 15% of the overlying rights to which AVEK has a claim. Waterworks 40 now intends to incorporate this settlement

into final Judgment. In addition, based upon Waterworks 40's request, AVEK will be exposed to thousands of dollars in attorney fees based on its current pumping. Surely this can not be the intended result envisioned by the Court. The class settlement is an impediment to an effective physical solution in the Valley which must result from this adjudication. Waterworks 40 is asking AVEK to contribute an undetermined amount to finance a stipulation which was not requested and is a detriment to a fair and equitable physical solution.

IV.

As justification for its request, Waterworks 40 states a benefit has been obtained, and parties not identified have attempted to delay resolution of the case. This is not true. In fact, AVEK has circulated among a variety of parties, both landowners and public suppliers, including Waterworks 40, a draft physical solution accepting the safe yield determination which will be made by this Court. AVEK has participated in developing this draft over the past two years with many other parties, and has attempted to discuss any approach which may lead to an acceptable outcome to this adjudication. Certainly AVEK wishes to avoid any delay in effective groundwater management in the basin. AVEK will continue to attempt to achieve agreement and resolution between all parties to the adjudication.

V.

Due to the above, and other briefs filed in opposition pointing out the deficiencies in Waterworks 40's legal argument, the Court should deny Waterworks 40's request as to AVEK's requirement to pay any portion of the *Willis Class* attorney fees.

Dated: March 18, 2011

BRUNICK, McELHANEY, BECKETT, DOLEN & KENNEDY, PLC

By: _____
WILLIAM J. BRUNICK
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN
WATER AGENCY

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}

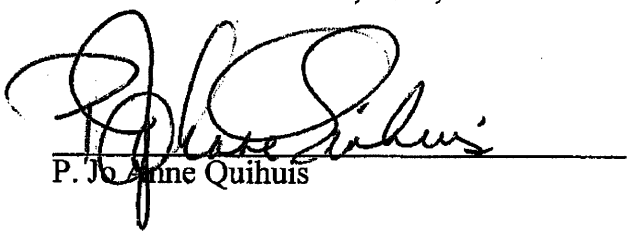
I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California.

On March 18, 2011, I served the foregoing document(s) described as: **ANTELOPE VALLEY-EAST KERN WATER AGENCY'S OPPOSITION TO LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40's BRIEF RE EQUITABLE APPORTIONMENT OF WILLIS CLASS FEE AWARD** on the interested parties in this action served in the following manner:

__XX__ **BY ELECTRONIC SERVICE AS FOLLOWS** by **POSTING** the document(s) listed above to the Santa Clara website in the action of the *Antelope Valley Groundwater Litigation*, Judicial Council Coordination Proceeding No. 4408, Santa Clara Case No. 1-05-CV-049053.

__X__ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 18, 2011, at San Bernardino, California.



P. Jo Anne Quihuis

EXHIBIT G

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

Included Consolidated Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California
County of Los Angeles, Case No. BC 325 201

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348

Wm. Bolthouse Farms, Inc. v. City of Lancaster
Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water Dist.
Superior Court of California, County of Riverside, consolidated actions, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

Rebecca Lee Willis v. Los Angeles County Waterworks District No. 40
Superior Court of California, County of Los Angeles, Case No. BC 364 553

Richard A. Wood v. Los Angeles County Waterworks District No. 40
Superior Court of California, County of Los

Judicial Council Coordination Proceeding No. 4408

Lead Case No. BC 325 201

ORDER AFTER HEARING ON MOTION BY PLAINTIFF REBECCA LEE WILLIS AND THE CLASS FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND CLASS REPRESENTATIVE INCENTIVE AWARD

Hearing Date(s): March 22, 2011
Time: 10:00 a.m.
Location: Central Civil West

Judge: Honorable Jack Komar

Angeles, Case No. BC 391 869

Plaintiff Rebecca Lee Willis and the Class have entered into a stipulation of settlement with defendants Los Angeles County Waterworks District No. 40, City of Palmdale, Palmdale Water District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Quartz Hill Water District, California Water Service Company, Rosamond Community Service District, Phelan Piñon Hills Community Services District, Desert Lake Community Services District, and North Edwards Water District (collectively, the "Settling Defendants").

On November 18, 2010, the Court granted Plaintiff's motion for preliminary approval of class action settlement and on March 1, 2011, the Court granted final approval of the settlement. Plaintiff and the Willis Class now move for an award of attorneys' fees, reimbursement of expenses, and an incentive award for lead plaintiff Rebecca Lee Willis.

On March 22, 2011, at 10:00 a.m., the Court heard oral argument on the motion seeking attorneys' fees pursuant to Code of Civil Procedure § 1021.5 as a prevailing party in its action against the Public Water Suppliers based on the settlement between the parties. The Willis Class asserts that its attorneys have collectively spent approximately 5,293.9 hours of time on the case from late 2006 through December 31, 2010 on a contingency basis and have incurred unreimbursed expenses of over $86,000, of which over $64,000 were out of pocket costs.

The Willis Class's counsel state that the attorneys' collective lodestar, including work spent by counsel and by clerks and paralegals and a consultant, is $2,300,618. The Willis Class requests a multiplier of 1.5, for a total fee request of $3,450,927. The Willis Class acknowledges that certain of its $86,000 in expenses are not recoverable and seeks an award of $65,057.68 in costs. The Willis Class also requests the Court's approval to give plaintiff Rebecca Willis an incentive payment of $10,000, which would come out of the attorneys' fee award.

The various opposing parties assert a myriad of reasons why the motion should be denied in its entirety or the amount awarded significantly reduced, including that the fees are unreasonable, that the settlement does not achieve a significant benefit for the class, that the

class should not be considered a prevailing party since it did not prevail on all causes of action, that the class did not enforce an important public right, and that the public interest was not represented by the Willis Class but rather was represented by the public and other water producers.

The City of Lancaster additionally contends that the motion should be denied in its entirety as it relates to Lancaster because (1) Lancaster does not claim prescriptive rights and dismissed its claim for prescription long ago, and (2) Lancaster has not signed the settlement agreement and therefore the Willis Class cannot be considered a "prevailing party" on any claim involving Lancaster.

Palmdale did not file a written opposition but contended at oral argument that any determination of benefit was premature and the request for fees should be continued to a later date when the final resolution and the benefits to the class became clear.

At the conclusion of the oral argument on the motion, the Court ordered counsel for the Willis Class to file a declaration from Ms. Willis setting forth her participation in the case in justification of an incentive award within thirty days and ordered the matter submitted upon receipt of such declaration.

Therefore, the Willis incentive award declaration having been filed, and good cause appearing, the Court makes the following order.

ORDER

Entitlement to Attorneys' Fees

The Willis Class seeks attorneys' fees pursuant to Code of Civil Procedure § 1021.5. Section 1021.5 is a codification of the private attorney general doctrine adopted by the California Supreme Court in *Serrano v. Priest* (1977) 20 Cal.3d 25 [141 Cal.Rptr. 315, 569 P.2d 1303] (Serrano III). This section allows an award of attorneys' fees to "a successful party" in an action which has resulted in the enforcement of an important right affecting the public interest if: a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the

general public or a large class of persons, the necessity and financial burden of private enforcement make the award appropriate, and such fees should not in the interest of justice be paid out of any recovery. (Code Civ. Proc. § 1021.5; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 317-318 [193 Cal.Rptr. 900, 667 P.2d 704].)

> The fundamental objective of the private attorney general theory is to encourage suits effecting a strong public policy by awarding substantial attorney fees to those whose successful efforts obtain benefits for a broad class of citizens. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933 [154 Cal.Rptr. 503, 593 P.2d 200].) Without a vehicle for award of attorney fees, private actions to enforce important public policies will frequently be infeasible. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142 [185 Cal.Rptr. 232, 649 P.2d 874].)
>
> The decision to award attorney fees rests initially with the trial court: utilizing its traditional equitable discretion, the trial court must "'realistically assess the litigation and determine, from a practical perspective,'" whether the statutory criteria have been met. (*Baggett v. Gates, supra*, 32 Cal.3d 128, 142; *Mandicino v. Maggard* (1989) 210 Cal.App.3d 1413, 1416 [258 Cal.Rptr. 917].)

(*Hull v. Rossi* (1993) 13 Cal. App. 4th 1763, 1766-1767.)

Section 1021.5 states, in relevant part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

The first step in establishing whether the Willis Class is entitled to fees pursuant to Section 1021.5 is a determination of whether the Willis Class is a "successful party."

Although it is true that the Willis Class did not obtain all of the relief they requested in their pleadings, a trial court need not rule in favor of petitioners on every single issue litigated for petitions to be "successful" within the meaning of section 1021.5. (*Hull v. Rossi, supra,* 13

Cal. App. 4th at p. 1768.) By eliminating the Public Water Suppliers' prescription claims and maintaining correlative rights to portions of the Basin's native yield, the Willis Class members achieved a large part of their ultimate goal – to protect their right to use groundwater in the future and to maintain the value of their properties. Under these circumstances, they must be considered "successful parties" for purposes of Code of Civil Procedure § 1021.5.

However, the Willis Class is not a successful party with regard to Lancaster. Lancaster ultimately made no claim on dormant owners' water rights so that it was not acting adversely to the class. Moreover, Lancaster is not a signatory to the settlement. Consequently, the Willis Class has not prevailed in any way against Lancaster at this point in the litigation. Therefore, Lancaster is not responsible for any part of the fees to be paid to the Willis Class.

The next step in the Section 1021.5 analysis is a determination of whether a significant benefit, pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons. There can be no dispute that the Willis Class is a large class of persons as it is made up of approximately 70,000 class members. As for the benefit conferred, although the Willis Class did not recover any monetary payment, it was successful in achieving a significant benefit by preventing the Public Water Suppliers from proceeding on their prescription claims and by maintaining certain correlative rights to the reasonable and beneficial use of water underlying their land. By virtue of the Willis Class Action (and the Woods Class Action), the Court is able to adjudicate the claims of virtually all groundwater users in the entire Antelope Valley which adheres to the benefit of every resident and property owner in the adjudication area. Without virtually all such users as part of the adjudication, the Court could not have complied with the McCarran Amendment which was necessary to maintain jurisdiction over the federal government (purportedly the largest land owner and a very large water user) which was necessary to adjudicate all correlative rights in the basin.

Even without the federal government involvement, without the filing of the class action, it would have been impossible to adjudicate the rights of all persons owning property and water rights within the valley. The impossibility of 70,000 individual claims by land owners to water rights being adjudicated in any other fashion needs little further discussion. The inability of the

judicial system to conduct such adjudication in any other way is beyond argument. The benefit to all class members is clear and the benefit to all others living or owning property in the Antelope Valley is enormous - all water rights will ultimately be established and if necessary (as alleged) the reasonable and beneficial use of the water will be preserved for all under the California Constitution.

The Willis Class has not received any direct pecuniary benefit. The burden on any individual class member to maintain this action would have been significantly higher than any potential benefit to that class member. Only by banding together in a class action were the members of the Willis Class able to litigate this case.

In sum, the Willis Class has met the requirements of Code of Civil Procedure § 1021.5 and is entitled to attorneys' fees.

Amount of Attorneys' Fees

> "The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."

(*Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 48, fn. 23, quoting *City of Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448, 470.)

> [T]he fee setting inquiry in California ordinarily begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. "California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award." [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.

(*Plcm Group v. Drexler* (2000) 22 Cal. 4th 1084, 1095.)

Factors to be considered in adjusting the lodestar figure include:

> (1) The novelty and difficulty of the questions involved, and the skill displayed in presenting them;
>
> (2) The extent to which the nature of the litigation precluded other employment by the attorneys;
>
> (3) The contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award;
>
> (4) The fact that an award against the state would ultimately fall upon the taxpayers;
>
> (5) The fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved;
>
> (6) The fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed; and
>
> (7) The fact that in the court's view the two law firms involved had approximately an equal share in the success of the litigation.

(See *Serrano III, supra,* 20 Cal.3d at p. 49.)

Other factors that may be considered include the benefits obtained or results achieved, the promptness of the settlement, and the amount of attorneys' fees typically negotiated in comparable litigation. (See *Lealao v. Benefit Cal.* (2000) 82 Cal.App.4th 19, 40, 47, 52.)

> "If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

> "There is no precise rule or formula for making these determinations. The [trial] court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment...."

(*Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 247-248, quoting *Hensley v. Eckerhart* (1983) 461 U.S. 424, 436-437, 439-440.)

The Willis Class argues that its counsel's lodestar of $2,300,618 is reasonable given the complexity of the case. The Opposing Parties contend that the amount of time expended by Class Counsel was excessive and, in many instances, unnecessary. While it is possible to use hindsight to look back and determine that effort expended by Class Counsel on a particular issue or motion might have been unnecessary, that does not mean that Class Counsel is not entitled to fees for that work. Absent circumstances rendering the award unjust, an attorneys' fee award should ordinarily include compensation for all the hours *reasonably* spent, including those relating solely to the fee. (*Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1133.) Further, the trial court has broad authority to determine the amount of a reasonable fee. (*Id.* at p. 1095.) A trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. (*Id.* at p. 1096.) Therefore, the Court can use its knowledge of the case and the efforts of Class Counsel to determine an equitable fee award.

Although an attorneys' fee award is generally based on the lodestar amount, in this instance there are several factors that weigh in favor of reducing the lodestar amount. First, even though the Willis Class obtained significant relief in this action, the Willis Class did not prevail on a number of causes of action and was unsuccessful in recovering any direct monetary benefit. Second, the fee award in this case will ultimately fall on taxpayers. Moreover, as pointed out by the Opposing Parties, some taxpayers are also ratepayers of various public agencies and would, in effect, have to pay their portion of the fee award twice. Additionally, although nobody can dispute that this is a complicated case, Class Counsel did not come into the case with much, if any, expertise in water law and properly associated other counsel with

such expertise. Then, additional time was spent by counsel educating themselves, thereby increasing fees somewhat beyond what appears reasonable necessary. Also, in reviewing the time spent on certain law and motion matters, it appears that an unnecessary amount of time was spent by counsel on various matters, in particular pleading matters, involving well settled legal principles. Moreover, by "block billing," counsel have made it impossible for the Court to analyze the time spent on the various functions performed by each counsel.[1]

This case included many parties who were not directly adverse to the Willis Class because they were not part of the Willis Class's action, many of whom had a common interest in defending against prescription. The Public Water Suppliers should not be required to pay attorneys' fees that were generated as a result of actions taken by non-parties to the Willis Class's action.

The Willis Class asserts that it is only seeking fees from the parties that have asserted claims to prescriptive rights. Los Angeles County Waterworks District No. 40 ("District 40") requests that the attorneys' fee award should be apportioned among each party that pumps from the Basin due to the involvement of those parties in this case even though those parties are not named as defendants in the Willis Class's action. If the Court were to order that other parties must also pay fees, the Court would be going beyond the scope of the requested relief. Moreover, in the Court's consolidation order, the Court states that "[c]osts and fees could only be assessed for or against parties who were involved in particular actions." (Order Transferring and Consolidating Actions for all Purposes, p. 3:13-14.) Such other parties are not parties to the settlement; the adjudication as it relates to them is ongoing and the Willis Class cannot be considered a prevailing party as to them. Accordingly, any fee award that is granted at this point may only be awarded against the parties to the settlement.

Regarding Class Counsel's billing rates, Class Counsel have provided evidence that their billing rates are reasonable. The lodestar was based on hourly rates of $400 per hour for Ralph B. Kalfayan, $450 per hour for David B. Zlotnick, and lesser amounts for associates who

---

[1] Block Billing involves showing various functions performed lumping together time expended without indicating how much time is allotted to each function.

worked on the case. These rates are reasonable. The Court notes, however, that in at least one case (Greg James) a higher billing rate was used because this was a contingent fee case. The fact that this is a contingent fee case should not be counted twice as a factor for raising the amount of the award – in the hourly rate charged and in the multiplier awarded.

This Court has presided over this case since the order of coordination and is familiar with the work of counsel for all parties, the complexity of the various issues, and the time necessarily involved in effectively representing the Willis Class. The Court has carefully reviewed all of the time claimed in the lodestar computation. The principal cause of action brought on behalf of the class was the declaratory relief cause of action which concededly was defensive in substance. Importantly, the fees should reflect the necessity of bringing the action to protect the class members' water rights against the claim of prescriptive rights by the Public Water Producers. However, the lodestar should also be reduced to account for the fact that the fees requested include fees incurred as a result of the involvement of parties that are not parties to the Willis Class's case. The lodestar should also be reduced based on the following other factors: the Willis Class did not prevail on a number of causes of action and was unsuccessful in recovering any direct monetary benefit; the fee award in this case will ultimately fall on taxpayers; and Class Counsel did not come into the case with much, if any, expertise in water law and appear to have spent more time educating themselves than would otherwise be necessary.

Accordingly, in reviewing all the time spent by counsel and others, considering the time accorded to various of the issues by relative import and consequence, it is the decision of the Court that reasonable attorneys' fees for the class in this matter is the sum of $1,839,494.

Costs

The Willis Class seeks an award of $65,057.68 in costs. District 40 argues that Code of Civil Procedure § 1021.5 only authorizes recovery of attorneys' fees, not costs. District 40 is correct. (See *Benson v. Kwikset Corp.* (2007) 152 Cal. App. 4th 1254, 1283.) Costs are

authorized, however, by Code of Civil Procedure §§ 1032 and 1033.5. (Code Civ. Proc. §§ 1032 and 1033.5; see also *Benson v. Kwikset Corp., supra*, 152 Cal. App. 4th at p. 1283.) No party has moved to tax the costs requested by the Willis Class. Moreover, the costs requested appear to have been reasonably necessary. Accordingly, the Willis Class's request for costs is GRANTED.

Incentive Award

The Willis Class seeks to give lead plaintiff Rebecca Lee Willis an incentive award of $10,000 to be paid out of the attorneys' fee award. Based upon the declaration submitted by Ms. Willis, the Court finds that an incentive award is justified. This class action would not likely have been initiated but for her involvement in this case. Counsel are authorized to pay her an incentive award in the sum of $10,000 from the attorneys' fee award.

CONCLUSION

The Willis Class's request for costs is GRANTED.

Lead plaintiff Rebecca Lee Willis may be awarded an incentive payment in the sum of $10,000 to be paid by counsel out of attorneys' fees awarded.

Attorneys' fees in the sum of $1,839,494 are awarded to counsel for the Willis Class against Los Angeles County Waterworks District No. 40, City of Palmdale, Palmdale Water District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Quartz Hill Water District, California Water Service Company, Rosamond Community Service District, Phelan

//

//

//

Piñon Hills Community Services District, Desert Lake Community Services District, and North Edwards Water District.

SO ORDERED.

Dated: 5-4-2011

Hon. Jack Komar
Judge of the Superior Court

EXHIBIT H

William J. Brunick, Esq. [SB No. 46289]
Leland P. McElhaney, Esq. [SB No. 39257]
BRUNICK, McELHANEY & KENNEDY PLC
1839 Commercenter West
San Bernardino, California 92408-3303

MAILING:
P.O. Box 13130
San Bernardino, California 92423-3130

Telephone: (909) 889-8301
Facsimile: (909) 388-1889
E-Mail: bbrunick@bmklawplc.com
lmcelhaney@bmklawplc.com

Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN WATER AGENCY

Exempt from filing fees pursuant to Gov't. Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation, Superior Court of California, County of Los Angeles, Case No. BC325201;

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. vs. City of Lancaster, Diamond Farming Company, a corporation, vs. City of Lancaster, Diamond Farming Company, a corporation vs. Palmdale Water District, Superior Court of California, County of Riverside, Case Nos. RIC 353840, RIC 344436, RIC 344668.

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
The Honorable Jack Komar, Presiding

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S PHASE VI TRIAL BRIEF

Trial Date:

September 28, 2015
Time: 9:00 a.m.
Dept.: Room 222
Los Angeles Superior Court

Cross-complainant, the ANTELOPE VALLEY-EAST KERN WATER AGENCY (AVEK) submits the following brief for the next phase of trial scheduled to commence on September 28, 2015.

I.

INTRODUCTION

AVEK is a public agency and a state water contractor. In its role as a state water contractor, AVEK arranges and pays for the delivery of the lion's share of the State Water Project water (SWP water) that is imported into the Antelope Valley area of adjudication (the Basin). Throughout these proceedings, commencing with the August 30, 2006 filing of its cross-complaint, AVEK has contended that it alone is entitled to control and/or recapture the return flows which result from the SWP water AVEK imports into the Basin.

AVEK's claim is *factually* based on the undisputed fact that AVEK is the party which arranges and pays the State for the importation of SWP water into the Basin, and it has done so with the intention of controlling and/or recapturing the resulting return flows. AVEK's claim to return flows is *legally* based on: (1) the specific authorization granted AVEK under its enabling Act, "To . . . **recapture**" or retake such water; and (2) California appellate court decisions which unequivocally state that the person who brings or delivers foreign water into a watershed, with the intention of recapturing the return flows derived therefrom, has the right to such return flows.

AVEK contends further that the subsequent "use" of the imported water by AVEK's customers and others, before the water percolates into and augments the natural supply of ground water in the Basin, does not impair in any way AVEK's entitlement and right to the resulting return flows.

Nevertheless, in consideration of the other stipulating parties' agreement to the proposed Judgment and Physical Solution and conditioned thereon, AVEK has agreed in the Stipulation For Entry Of Judgment And Physical Solution, to effectively relinquish its entitlement and right to most, <u>but not all</u>, of the return flows derived from the imported water, to wit:

5.2.2 **Water Imported Through AVEK.** The right to Produce Imported Water Return Flows from water imported through AVEK belongs exclusively to the Parties identified on Exhibit 8, attached hereto . . . *All Imported Water Return Flows from water imported through AVEK and not allocated to Parties identified in Exhibit 8 belong exclusively to AVEK, unless otherwise agreed by AVEK.* . . .

(Proposed Judgment and Physical Solution, pp. 25-26; italics added.)

Accordingly, this trial brief addresses the bases for AVEK's entitlement and right to the return flows derived from the SWP water it brings and delivers into the Basin, along with certain other issues pertinent to the next phase of trial.

II.

THE LEGISLATURE HAS SPECIFICALLY AUTHORIZED AVEK TO "RECAPTURE" WATER

One of AVEK's primary functions is to directly arrange for the delivery of SWP water into the Basin which is then transported, treated and distributed by AVEK to its various agricultural, industrial and municipal customers.

Under AVEK's enabling Act (Water Code Appendix 98-49 et seq.), AVEK is specifically authorized "To . . . control . . . [and] **recapture . . . any water** . . .for the beneficial use or uses and protection of the agency . . ."[1]

The commonly understood meaning of "Recapture" is "The act of **retaking**" (Merriam-Webster Dictionary). When it authorized AVEK to "recapture" and retake water, the Legislature

---

1 The Antelope Valley-East Kern Water Agency Law, Water Code Appendix 98-49 et seq., in pertinent part, provides:

"Sec. 61. The Antelope Valley-East Kern Water Agency, incorporated as herein provided, shall have power:

. . .

13. To . . . **control**, distribute, store, spread, sink, treat, purify, reclaim, **recapture**, and salvage **any water**, including sewage and storm waters, **for the beneficial use or uses and protection of the agency** or its inhabitants or the owners of rights to water therein;"

(Underscored bold print added.)

did not place any limitation or restriction on when, where or how AVEK may "recapture" or retake water. Accordingly, AVEK is authorized to recapture SWP water after it has been used and disposed of by AVEK's customers and other subsequent users, and after it has percolated into and augmented the Basin groundwater.

Thus, whether AVEK's customers or other subsequent users ultimately deposit the imported water into a stream, into a sewer or septic system, or onto the ground (before it percolates into and augments the natural supply of groundwater in the Basin), the Legislature has specifically empowered AVEK to "**recapture**" or retake such water. That includes the resulting return flows.

Therefore, AVEK's enabling Act authorizes AVEK to "recapture" the return flows which result from the SWP water it acquires and causes to be brought into the Basin.

III.

CASE LAW ALSO ESTABLISHES AVEK'S RIGHT TO RETURN FLOWS

In addition to AVEK's specific authorization in the Water Code to "recapture" water, the California Supreme Court has repeatedly explained that the person who "brings" or "delivers" foreign water into a watershed has the right to the return flows resulting from such imported water (see *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-78 [*Glendale*]; *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199, 257-259, 262-263 [*San Fernando*]).

This Court recognized the same principle in its February 3, 2015 PARTIAL STATEMENT OF DECISION FOR TRIAL RELATED TO PHELAN PINON HILLS COMMUNITY SERVICES DISTRICT (2nd AND 6th CASES OF ACTION), wherein the Court quoted from the decision in *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 301, as follows:

> "[O]ne who **brings** water into a watershed may retain a prior right to it even after it is used. . . . The practical reason for the rule is that the importer should be credited with the 'fruits . . . of his endeavors **in bringing** into the basin water that would not otherwise be there.'"

(Statement of Decision, Page 9, lines 17-21; bold print added.)[2]

Therefore, AVEK's contention that it is entitled to control and/or recapture the return flows from the SWP water it causes to be brought into the Basin is clearly supported by case law.

IV.

AVEK HAS MANIFESTED THE REQUIRED INTENT TO RECAPTURE RETURN FLOWS

An importer must manifest an intention to recapture or otherwise use return flows; such intention need not be manifested before importation begins (*Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343; *City of San Fernando, supra,* 14 Cal.3d, at 257-260), and is adequately manifested by filing a pleading claiming the right prior to final adjudication of that claimed right.

> . . . *the allegation of an intent to recapture the return waters in the present complaint, filed in 1955, was sufficient* for purposes of the present case to establish whatever rights would have arisen from the plaintiff's manifestation of such intent before commencing importation in 1915. (*Stevens v. Oakdale Irr. Dist., supra,* 13 Cal.2d 343.)

(*City of San Fernando, supra,* 14 Cal.3d, at 259-260; italics added.)

The Fourth Cause of Action of AVEK's August 30, 2006 cross-complaint filed in these proceedings adequately manifests the required intent to recapture the return flows derived from the SWP water AVEK causes to be brought and delivered into the Basin, to wit:

> As the primary importer of supplemental State Project water into the Basin, [AVEK] has the sole right to recapture return flows attributable to its State Project water. The rights of Cross-Defendants, if any, are limited to the native supply of the Basin and/or to their

---

2 On the same page of its Statement of Decision, the Court also quoted virtually identical language from the Supreme Court's decision in *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 261.

own imported water, and do not extend to groundwater attributable to [AVEK's] return flows.

(AVEK August 30, 2006 Cross-Complaint, ¶ 38)

Further manifesting that same intention, in 2008, AVEK purchased approximately 3,000 acres of farmland. Thirty-two (32) operational water wells are located on those properties, giving AVEK more than ample ability to extract the return flows derived from the SWP water it causes to be brought and delivered into the Basin.[3]

Thus, AVEK has adequately manifested its intention to recapture the return flows derived from the foreign water it brings into the Basin.

V.

THE IMPORTER NEED NOT MAKE ANY PARTICULAR "USE" ITSELF OF THE IMPORTED WATER

AVEK's right to the return flows derived from the SWP water it brings into the Basin is not conditioned or dependent, in any way, upon AVEK's own "use" of the imported water. This point is again made perfectly clear by the case decisions.

In *Glendale, supra*, Los Angeles spread a portion of its imported Owens River Valley water in gravel pits and ponds. "The remainder of the water was sold to the farmers of the San Fernando Valley . . ." (23 Cal.2d 68, 76.) Thus, except for its spreading operations, Los Angeles made no other "use" of the imported water beyond selling and delivering the imported water to its agricultural customers.

Nonetheless, the *Glendale* Court held that Los Angeles had the right to ALL resulting return flows. In support of its decision, the Court cited *Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 264 (*Stevens*), and noted that, ***"the importer brings the water to the land of the farmer, and the farmer uses it."*** (Id., at 78; emphasis added.) Thus, the "use" of imported water which

---

3 AVEK also has an additional 9 water wells located elsewhere in the Basin.

caused the groundwater in the basin to be augmented was manifestly *the farmer's use*, not the City's use. Notwithstanding that fact, the *Glendale* Court made it quite clear that,

> *The use by others* of this water as it flowed to the subterranean basin **does not cut off [the importer's] rights.** In *Stevens* . . ., it was recognized that one who **brings** water into a watershed may retain a prior right to the water after permitting others to use the water

(Id., at 77; emphasis added).

Based on the foregoing analysis, the Court in *Glendale* ruled that the importer is entitled to the resulting return flows, notwithstanding the undeniable fact that the farmers' subsequent "use" of the imported water was the direct cause of the return flows resulting from such use, not the importer's "use" of the water. This same principle was reaffirmed in *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199, 257 (*San Fernando*):

> The fact that the water drawn from a tap into a portable receptacle becomes the customer's disposable personal property [citation omitted] does not impair plaintiff's right to recapture the return flow *which is in fact produced by deliveries of its imported water*. (*City of L.A. v. City of Glendale, supra*, 23 Cal.2d at p. 78.)

(*Id.*, at 260; emphasis added.)

> . . . *an alteration in the type of use from which imported water is returned to the ground does not impair the importer's claim to it as return water.*

(Id., at 258-259; italics added.)

And as noted above, in its February 3, 2015 Partial Statement of Decision, the Court affirmed and quoted the holding in *City of Santa Maria* that, ""[O]ne who brings water into a watershed may retain a prior right to it *even after it is used.*" (Page 9, lines 17-21).

The foregoing controlling decisions consistently hold that to establish the right to return flows an importer need satisfy only two requirements: (1) "bring" or "deliver" foreign water into a watershed; and (2) do so, with the intention of later recapturing or controlling the resulting return flows. Nothing more is required *of the importer*! The importer itself need not make any

particular "use" of the imported water, and the use of the water by others does not impair in any way the importer's right to return flows.

In short, the controlling decisions do not impose a requirement that the importer itself make some "use" of the foreign water which augments the basin groundwater because of the importer's use.

As an aside, however, AVEK does make "use" of the imported water in ways that augment the Basin groundwater, to wit:

- Like the City of Los Angeles in *Glendale*, AVEK spreads and banks a portion of the SWP water it brings into the Basin;
- SWP water has also been used for agricultural operations on farmland owed by AVEK;
- In its treatment facilities, AVEK also converts raw aqueduct water into potable water suitable for human consumption (while in *Glendale*, Los Angeles merely provided untreated water to its farmer customers); and
- AVEK delivers the treated water directly into the water systems of the PWS and Edwards AFB.[4]

---

4 AVEK also is mandated to distribute and apportion the State water it imports on an equitable basis, *based on taxes collected.* AVEK must assure to each area within the Agency's service area receives a fair share of the imported water, and may contract and take all acts necessary to exercise the Agency's powers to accomplish this equitable apportionment. (Appendix 98-61, subdivisions 13, 14, and 15, and 98-61.1 [Equitable distribution and apportionment of water; determination of fair share].)

> Section 61.1. The agency shall whenever practicable, distribute and apportion the water purchased from the State of California or water obtained from any other source as equitably as possible on the basis of total payment by a district or geographical area within the agency regardless of its present status, of taxes, in relation that such payment bears to the total taxes and assessments collected from all other areas.
>
> It is the intent of this section to assure each area or district its fair share of water based upon the amounts paid into the agency, as they bear relation to the total amount collected by the agency.

Therefore, although not being required to do so to perfect its claim to return flows, AVEK's multiple "uses" of the SWP water it brings into the Basin, in fact, do result in the Basin being recharged, either through AVEK's banking and agricultural operations on AVEK owned properties, or through use of imported water by others after AVEK has processed, treated and delivered the water so that it can be consumptively used.

In summary, AVEK is statutorily authorized to "recapture" the SWP water it brings into the Basin. In addition thereto, under controlling case law AVEK is entitled to the resulting return flows because: AVEK is the party which has the contractual right to import SWP into the Basin; AVEK has ordered and paid the State for the lion's share of the SWP water imported into the Basin; and it has done so with the intention of recapturing the resulting return flows. Accordingly, in the event the Court accepts and implements the provisions of the proposed Judgment and Physical Solution, AVEK is entitled (as provided therein) to an award of "All Imported Water Return Flows from water imported through AVEK and not allocated to Parties identified in Exhibit 8."

VI.

THE PROPOSED PHYSICAL SOLUTION SHOULD BE APPROVED

At trial, AVEK will offer and submit testimony from expert witnesses (including Charles Binder and Robert Wagner) demonstrating that the proposed Physical Solution will benefit the Basin and, over time, succeed in bringing the Basin into balance, and that the stipulating parties' historical uses of groundwater have been both reasonable and beneficial.

VII.

WILLIS CLASS CLAIMS

In response to the claims made by the Willis Class, AVEK notes the following:

///

///

///

A. The conditions imposed on the exercise of dormant rights to groundwater apply equally to both stipulating parties and non-stipulating parties, and are not unreasonable or unduly burdensome

Many of the stipulating parties also own dormant parcels. Under the terms of the proposed Judgment and Physical Solution, those stipulating parties likewise will be required to (a) seek permission from the Watermaster or this Court before being allowed to pump groundwater on their dormant parcels, and (b) pay a replacement assessment for the new water so pumped (unless determined to be *de minimis* use).

Therefore, the members of the Willis Class are not treated unfairly or any differently that the stipulating parties who likewise also own dormant parcels. Both categories of overlying landowners will be required under the Judgment to satisfy the requirements set forth therein before being allowed to pump new groundwater.

Moreover, the Court has pointed out that it is not now possible to quantify the amount of water that will be required by members of the Willis Class. That is true also as to those stipulating parties who likewise own dormant parcels within the area of adjudication. The only fair and practical solution which preserves the correlative rights of both groups of overlying landowners is that which is set forth in the proposed Judgment and Physical Solution.

As the Court has also pointed out, many of the members of the Willis Class should encounter little or no difficulty, and no undue burden, in applying for and receiving from the Watermaster permission to pump on their properties *de minimis* amounts of groundwater. As to large landowners and possible developers within the Class, the conditions imposed under the Judgment are appropriate, reasonable, not unduly burdensome, and necessary to protect this fragile Basin.

VIII.

PROVE-UP OF AVEK PUMPING OF GROUND WATER

In the Phase IV trial, the Court found that AVEK pumped groundwater in the amount of 11,463 acre feet in 2011, and 2,792 acre feet in 2012 (see AMENDED STATEMENT OF

PARTIAL DECISION FOR PHASE IV TRIAL WITH PARTY NAME CORRECTIONS, filed July 19, 2013).

The Barnes, Flory, Chisam, Flood and Qiu declarations (4-AVEK-1 and 4-AVEK-3), AVEK's trial exhibits (4-AVEK-2), and the related stipulation (4-AVEK-4), all of which were received into evidence during the Phase IV trial demonstrate further that: (a) AVEK also used 5,027 acre feet of *in lieu* water in 2011 on AVEK owned property (for a total of 16,491 acre feet in 2011), and 3,641 acre feet of *in lieu* water in 2012 (for a total of 6,430 acre feet in 2012); and (b) the significant decline in water use in 2012 was the result of AVEK taking acreage out of agricultural production and devoting that acreage to water banking operations.

The referenced declarations and exhibits also demonstrate groundwater pumping and water use on AVEK owned properties during the years 2000 through 2004. To avoid duplication of evidence and an unnecessary expenditure of trial time to establish these undisputed facts, and because the AVEK declarations and exhibits were already received into evidence during the Phase IV trial, AVEK will rely upon such already admitted evidence for this next phase of the trial, absent other direction from the Court.[5]

IX.

BASED ON THE PARTIES' STIPULATION, AVEK WILL NOT PRESENT AT THIS NEXT PHASE OF TRIAL DEFENSES IT WOULD OTHERWISE PRESENT

As previously noted in the JOINT CASE MANAGEMENT STATEMENT OF UNDERSIGNED OVERLYING PUBLIC AND PRIVATE LANDOWNER PARTIES, filed on July 7, 2015 (which is incorporated herein by this reference), many of the stipulating parties, including AVEK, will not assert defenses otherwise available to them during this phase of the

---

5 In its May 28, 2013 Fourth Amendment to Case Management Order for Phase Four Trial, "to eliminate, to the extent possible, the necessity of presenting evidence through witnesses at Trial," the Court established a procedure whereby parties could present declarations and stipulations as to the amount of groundwater pumping, other parties could object thereto, and ""Any portion of a Stipulation or Declaration to which no objection has been made by the time set forth in paragraph 3 hereof will be accepted by the Court in the Trial as competent evidence of the facts stated therein, without the necessity to call a witness to establish the fact" (paragraph 5).

trial, including without limitation defenses to the PWS' prescription claim, the claimed federal reserve right, etc. Because of the agreements memorialized in the parties' stipulation for entry of the proposed Judgment and Physical Solution, such defenses are not advanced at this time. However, should the Court determine not to enter the proposed Judgment and Physical Solution as a final judgment in this action, AVEK requests an opportunity and, to the extent it has a right to do so, reserves the right to submit evidence in support of such defenses.

IX.

CONCLUSION

For the foregoing reasons, AVEK respectfully submits that the Court should determine and hold that: (1) "All Imported Water Return Flows from water imported through AVEK and not allocated to Parties identified in Exhibit 8 belong exclusively to AVEK, unless otherwise agreed by AVEK," as set forth in the proposed Judgment and Physical Solution; (2) the proposed Physical Solution will benefit the Basin and, over time, should succeed in bringing the Basin into balance; (3) the correlative rights of the members of the Willis Class are appropriately confirmed, conditioned and protected under the terms of the proposed Judgment and Physical Solution; and (4) AVEK has submitted adequate evidence of its groundwater pumping and use of in lieu water for agricultural operations to establish and prove its entitlement to the groundwater allocation assigned to AVEK in Exhibit 4 of the proposed Judgment and Physical Solution.

Dated: September 22, 2015

Respectfully submitted,

BRUNICK, McELHANEY & KENNEDY

By: _____

WILLIAM J. BRUNICK
LELAND P. McELHANEY
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN
WATER AGENCY

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}

I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California.

On September 22, 2015, I served the foregoing document(s) described as: **ANTELOPE VALLEY-EAST KERN WATER AGENCY'S PHASE VI TRIAL BRIEF** on the interested parties in this action served in the following manner:

__XX__ **BY ELECTRONIC SERVICE AS FOLLOWS** by **POSTING** the document(s) listed above to the Santa Clara website in the action of the *Antelope Valley Groundwater Litigation*, Judicial Council Coordination Proceeding No. 4408, Santa Clara Case No. 1-05-CV-049053.

__X__ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 22, 2015, at San Bernardino, California.

P. Jo Anne Quihuis

EXHIBIT I

BEST BEST & KRIEGER LLP
ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
WENDY Y. WANG, Bar No. 228923
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612
TELEPHONE: (949) 263-2600
TELECOPIER: (949) 260-0972
Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
MARY WICKHAM, BAR NO. 145664
INTERIM COUNTY COUNSEL
WARREN WELLEN, Bar No. 139152
PRINCIPAL DEPUTY COUNTY COUNSEL
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
TELEPHONE: (213) 974-8407
TELECOPIER: (213) 687-7337
Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40
[See Next Page For Additional Counsel]

EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

RICHARD WOOD, on behalf of himself and all other similarly situated v. A.V. Materials, Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC509546

Judicial Council Coordination Proceeding
No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

PUBLIC WATER SUPPLIERS' PHASE SIX TRIAL BRIEF

RICHARDS WATSON & GERSHON
James L. Markman, Bar No. 43536
355 S. Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101
(213) 626-8484; (213) 626-0078 fax
Attorneys for City of Palmdale

MURPHY & EVERTZ LLP
Douglas J. Evertz, Bar No. 123066
650 Town Center Drive, Suite 550
Costa Mesa, CA 92626
(714) 277-1700; (714) 277-1777 fax
Attorneys for City of Lancaster and Rosamond Community Services District

LEMIEUX & O'NEILL
W. Keith Lemieux, Bar No. 161850
4165 E. Thousand Oaks Blvd., Ste. 350
Westlake Village, CA 91362
(805) 495-4770; (805) 495-2787 fax
Attorneys for Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, and Big Rock Mutual Water Company

LAGERLOF SENECAL GOSNEY & KRUSE
Thomas Bunn III, Bar No. 89502
301 North Lake Avenue, 10th Floor
Pasadena, CA 91101-4108
(626) 793-9400; (626) 793-5900 fax
Attorneys for Palmdale Water District

CHARLTON WEEKS LLP
Bradley T. Weeks, Bar No. 173745
1031 West Avenue M-14, Suite A
Palmdale, CA 93551
(661) 265-0969; (661) 265-1650 fax
Attorneys for Quartz Hill Water District

CALIFORNIA WATER SERVICE COMPANY
John Tootle, Bar No. 181822
2632 West 237th Street
Torrance, CA 90505
(310) 257-1488; (310) 325-4605 fax

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	PUBLIC WATER SUPPLIERS' HAVE VESTED WATER RIGHTS ENTITLING THEM TO PRODUCE GROUNDWATER IN THE BASIN	3
	A. The Public Water Suppliers Have Acquired Rights to Produce Groundwater in the Basin By Prescription	3
	1. The Public Water Suppliers Use of Groundwater From the Basin Was Continuous and Uninterrupted Over a Five-Year Period	4
	2. The Public Water Suppliers' Use of Water Was Adverse Because Pumping Exceeded Safe-Yield	4
	3. The Public Water Suppliers' Use Has Been Open and Notorious and Under a Claim of Right Because All Parties in the Basin Have Been on Notice of the Basin's Overdraft	5
	B. The Public Water Suppliers Have the Right to Recapture Return Flows From Imported Water	8
	C. The Public Water Suppliers Reserve the Right to Further Brief Additional Grounds for Claiming Entitlement to Produce Water from the Basin	9
III.	OVERLYING LANDOWNERS THAT ENGAGED IN SELF-HELP DURING THE PRESCRIPTIVE PERIOD RETAINED A PORTION OF THEIR OVERLYING RIGHTS	9
IV.	A COMMON WATER SYSTEMS IS GENERALLY REQUIRED TO PROVE PRESCRIPTION	11
V.	MUTUAL WATER COMPANIES	12
VI.	IN LIEU WATER CLAIMS	12
VII.	JUDGMENT SHOULD BE ENTERED AGAINST DEFAULTING PARTIES	13
VIII.	THE PROPOSED PHYSICAL SOLUTION IS REASONABLE AND TREATS ALL PARTIES FAIRLY	14
	A. Legal Standard	14
	B. The Proposed Physical Solution Protects the Basin by Preventing Future Overdraft	17
	C. All Parties Are Treated Reasonably	18
	1. Federal Reserved Rights	18
	2. Wood Class	19
	3. Overlying Landowners That Have Established Self-Help	19
	4. Unknown Existing Pumpers	19
	5. Importers of Non-Native Water	19
	6. Phelan Piñon Hills Community Services District	20
	7. Defaulting Parties	21
IX.	THE WILLIS CLASS IS TREATED REASONABLY UNDER THE PROPOSED PHYSICAL SOLUTION	21

TABLE OF CONTENTS
(continued)

			Page
	A.	The Proposed Physical Solution Is Consistent with the Willis Class Stipulation	21
	B.	The Proposed Physical Solution Does Not Unreasonably Affect the Willis Class	23
	C.	The Willis Class' Due Process Rights Are Not Violated	25
	D.	Standing	26
X.		THE JUDGMENT SHOULD COMPREHENSIVELY ADJUDICATE ALL INTERESTS IN AND TO THE BASIN	26
XI.		CONCLUSIONS	27

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF AUTHORITIES

Page

Federal Cases

Cappaert v. United States (1976)
426 U.S. 128 18

United States v. New Mexico (1978)
438 U.S. 696 18

State Cases

Brown v. Brown (1915)
170 Cal. 1 ..... 14, 21

California Water Service Co. v. Edward Sidebotham & Son (1964)
224 Cal.App.2d 715 9

City of Barstow v. Mojave Water Agency (2000)
23 Cal.4th 1224 ..... 10, 14, 15, 16, 18, 23, 27

City of Lodi v. East Bay Municipal Utility Dist. (1936)
7 Cal.2d 316 ..... 14, 15, 17, 18

City of Los Angeles v. City of Glendale (1943)
23 Cal.2d 68 8

City of Los Angeles v. City of San Fernando (1975)
14 Cal.3d 199 ..... 3, 4, 5, 8, 14, 21

City of Pasadena v. City of Alhambra (1949)
33 Cal.2d 908 ..... 3, 4, 5, 15, 18, 23

City of San Bernardino v. City of Riverside (1921)
186 Cal. 7 ..... 9, 11

City of Santa Maria v. Adam (2012)
211 Cal.App.4th 266 ..... 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 23

Eden Township Water Dist. v. City of Hayward (1933)
218 Cal. 634 3

Fitzgerald v. Herzer (1947)
78 Cal.App.2d 127 ..... 13, 21

Flood v. Simpson (1975)
45 Cal.App.3d 644 ..... 13, 21

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

TABLE OF AUTHORITIES
(continued)

Page

Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc. (1994)
23 Cal.App.4th 1723 10

Jones v. Pleasant Valley Canal Co. (1941)
44 Cal.App.2d 798 ..... 14, 21

Katz v. Walkinshaw (1903)
141 Cal. 116 ..... 9, 23

Lee v. Pacific Gas & Elec. Co. (1936)
7 Cal.2d 114 4

Locke v. Yorba Irrigation Co. (1950)
35 Cal.2d 205 12

Mings v. Compton City School Dist. (1933)
129 Cal.App. 413 3

Moore v. California Oregon Power (1943)
22 Cal.2d 725 ..... 10, 11, 23

Orange County Water Dist. v. City of Riverside (1959)
173 Cal.App.2d 137 12

Peabody v. City of Vallejo (1935)
2 Cal.2d 351 15

People ex rel. State Water Resources Control Board v. Forni (1976)
54 Cal.App.3d 743 15

Rancho Santa Margarita v. Vail (1938)
11 Cal.2d 501 ..... 14, 15

Ryan v. California Interscholastic Federation-San Diego Section (2001)
94 Cal.App.4th 1048 25

Estate of Thomas (1905)
147 Cal. 236 12

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District (1935)
3 Cal.2d 489 ..... 3, 9, 11, 15

In re Waters of Long Valley Creek Stream Sys. (1979)
25 Cal.3d 339 ..... 15, 16, 17, 23, 24, 25

TABLE OF AUTHORITIES
(continued)

Page

Wright v. Goleta Water District (1985)
174 Cal.App.3d 74 ..... 14, 21, 23

State Statutes

Cal. Water Rights Law 16

Civ. Code § 1007 3

Code Civ. Proc., §§ 585(c), 1014 13

Code Civ. Proc., § 761.020 3

Code Civ. Proc., § 585(c) 13

Water Code 7075 8

Water Code, §§ 1005.1 et seq. 12

Rules

Cal. Rules of Court, rule 3.110(g) 13

Constitutional Provisions

Article X, § 2 of the California Constitution 15, 17, 18, 27

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Los Angeles County Waterworks District No. 40, City of Palmdale, City of Lancaster, Rosamond Community Services District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, Big Rock Mutual Water Company, Palmdale Water District, Quartz Hill Water District, and California Water Service Company (collectively, "Public Water Suppliers") respectfully submit the following Phase 6 trial brief.

I. INTRODUCTION

The Antelope Valley Groundwater Adjudication Area ("Basin") has been in a state of overdraft since at least 1951. (Statement of Decision Phase Three Trial, pp. 5:17-6:28 ("Phase 3 Decision"); Partial Statement of Decision for Trial Related to Phelan Piñon Hills Community Services District (2nd and 6th Causes of Action), p. 4, fn. 1.) In Phase Three of these proceedings, the Court determined that the Basin has a safe yield of 110,000 acre-feet per year ("AFY"), consisting of a native safe yield of 82,300 AFY and return flows. (Phase 3 Decision at 9:27-28; see also Supplemental Request for Judicial Notice, posted on the Court's website on January 24, 2014 ("Supplemental RJN"), Ex. II, at 30:8-31:4.) Groundwater production has exceeded this safe yield and continues to exceed this safe yield causing harm to the Basin. (*Id.* at 6:18-27, 7:24-26.)

As the Court is aware, a large number of Parties ("Stipulating Parties") have stipulated to a [Proposed] Judgment and Physical Solution ("Proposed Physical Solution" or "Proposed Judgment") that would bring pumping in the Basin within the safe yield and allow for the Basin to recover from the significant loss of groundwater over the last 60 years which has led to subsidence in large areas of the Basin. The Stipulating Parties represent a majority of the total groundwater production in the Basin, and the Proposed Physical Solution resolves all groundwater issues between them and provides for a sustainable groundwater supply for all parties. The Proposed Physical Solution addresses all parties' rights to produce and store groundwater in the Basin while furthering the mandates of the State Constitution and the water

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

policy of the State of California. Significantly, the Proposed Physical Solution does the following things:

1) Imposes a groundwater production "rampdown" to progressively reduce the amount each party produces and bring Basin production within the safe yield within seven years;

2) Provides certainty to Basin groundwater users by allocating the safe yield to Parties on the basis of their respective legal entitlements in an overdrafted groundwater basin;

3) Permits and protects groundwater storage in the Basin which will benefit groundwater levels;

4) Permits groundwater use transfer amongst stipulating Basin groundwater users as long as the transfer does not cause material harm to the Basin, any subarea of the Basin, or a party;

5) Permits new groundwater pumping in the Basin so long as it does not cause material harm to the Basin, any subarea of the Basin, or a party;

6) Imposes replacement water assessments to fund the purchase of imported replacement water to the Basin for new pumping to ensure that each party can fully exercise its allocation and to potentially increase Basin groundwater levels via return flows from purchased State Water Project ("SWP") water; and

7) Appoints a Watermaster—a five member board—to oversee the Basin, including by monitoring the health of the Basin, adopting appropriate rules and regulations, enjoining conduct prohibited by the Court's judgment, levying and collecting assessments, managing the administrative budget, and providing for flexibility by, for example, considering new production applications.

For the reasons that follow, the Proposed Physical Solution is fair and reasonable. In as much as the Phase Six Trial has the Public Water Suppliers' proving their water right claims as against defaulted and a few non-stipulating private property owners, the following discussion in Section II addresses those rights. Beginning in Section VIII, the Public Water Suppliers explain

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

why the Physical Solution is, in fact, a physical solution to the Basin's long-standing overdraft conditions, is fair and equitable given the long-standing overdraft conditions and the facts of this case, and should be approved by the Court.

II. PUBLIC WATER SUPPLIERS' HAVE VESTED WATER RIGHTS ENTITLING THEM TO PRODUCE GROUNDWATER IN THE BASIN

In an overdrafted basin such as this Basin, there is no surplus water to appropriate. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 535 ("*Tulare*").) Thus, an appropriator must have another basis for asserting a water right. Here, the Public Water Suppliers can prove both prescriptive rights and the right to recapture return flows from water imported and used by the Public Water Suppliers. These rights are the basis of the Public Water Suppliers allocations in the Proposed Physical Solution. The Public Water Suppliers also seek a judicial determination of the existence of these rights and their amount and priority with regards to the potential claims of non-stipulating or defaulting parties.

A. The Public Water Suppliers Have Acquired Rights to Produce Groundwater in the Basin By Prescription

"A prescriptive right in groundwater requires proof of the same elements required to prove a prescriptive right in any other type of property: a continuous five years of use that is actual, open and notorious, hostile and adverse to the original owners, and under a claim of right." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 291 ("*Santa Maria*"); see also *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 281-82 ("*San Fernando*") [citing *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926-27 ("*Pasadena*")].) A prescriptive water right is a permanent property right that is sufficient to bar any action for recovery of that property or to support an action to quiet title in the property. (Civ. Code § 1007; Code Civ. Proc., § 761.020; *Eden Township Water Dist. v. City of Hayward* (1933) 218 Cal. 634, 640 ("*Hayward*") [when the prescriptive period runs, the right is vested]; *Mings v. Compton City School Dist.* (1933) 129 Cal.App. 413.) For the following reasons, the Public Water Suppliers have prescriptive rights to produce water from the Basin.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

1. The Public Water Suppliers Use of Groundwater From the Basin Was Continuous and Uninterrupted Over a Five-Year Period

Any continuous five-year adverse use period is sufficient to vest title in the adverse user, even if the period does not immediately precede the filing of a complaint to establish the right. (*Santa Maria, supra*, 211 Cal.App.4th at 266 [rejecting argument that prescription claim based on actions taken over 30 years ago should be barred by laches]; *Pasadena, supra*, 33 Cal.2d at 930-33 [upholding trial court's determination that a prescriptive right vested even though pumping failed to meet the adversity requirement during two of the three years immediately preceding the filing of the action]; *Lee v. Pacific Gas & Elec. Co.* (1936) 7 Cal.2d 114, 120.) Each Public Water Supplier claiming a prescriptive right has pumped continuously and without interruption for at least five years. For example, Los Angeles County Waterworks District No. 40 ("District No. 40") has been pumping continuously since the 1940s through its predecessor Waterworks District No. 4. (District No. 40's Statement of Claims, ¶6.) During this time period, District No. 40 pumped as much as 17,589 AFY continuously over a five year period. (Id. at ¶8.)

2. The Public Water Suppliers' Use of Water Was Adverse Because Pumping Exceeded Safe-Yield

"The adversity element is satisfied by pumping whenever extractions exceed the safe yield." (*Santa Maria, supra*, 211 Cal.App.4th at 292; see also *San Fernando, supra*, 14 Cal.3d at 278, 282; *Pasadena, supra*, 33 Cal.2d at 929.) This is because "appropriations of water in excess of surplus then invade senior basin rights, creating the element of adversity against those rights prerequisite to their owners' becoming entitled to an injunction and thus to the running of any prescriptive period against them." (*San Fernando, supra*, 14 Cal.3d at 278 [citing *Pasadena, supra*, 33 Cal.2d at 928-29].) The Public Water Suppliers' production of water from the Basin has been hostile and adverse because each has pumped water from Basin at a time when the Basin was in overdraft. District No. 40's production of Basin water—which has been continuous since the 1940s—became hostile and adverse to other parties in the Basin by at least 1951 when this Court has determined that there ceased to be surplus water to appropriate. Overlying landowners and other senior water rights holders became entitled at that point to seek an injunction.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

3. *The Public Water Suppliers' Use Has Been Open and Notorious and Under a Claim of Right Because All Parties in the Basin Have Been on Notice of the Basin's Overdraft*

Adverse use of groundwater is "open and notorious" and "under a claim of right" when "parties 'should reasonably be deemed to have received notice of the commencement of overdraft.'" (*Santa Maria, supra*, 211 Cal.App.4th at 293; *San Fernando, supra*, 14 Cal.3d at 282-83; *Pasadena, supra*, 33 Cal.2d at 930.) To establish prescription, a party must present evidence establishing a time at which the basin water rights holders received this constructive notice. (*San Fernando, supra*, 14 Cal.3d at 283.) "[L]ong-term, severe water shortage itself [is] enough to satisfy the element of notice." (*Santa Maria, supra*, 211 Cal.App.4th at 293 [citing *San Fernando, supra*, 14 Cal.3d at 283].) In addition, notice has been found "by virtue of the fluctuating water levels, the actions of political leaders, the Acts of Congress, and the public notoriety surrounding the need and construction of [water projects]." (*Id.* at 293.)

As this Court has established, the Basin has been overdrafted since at least 1951. (Phase 3 Decision at 6:1-4 & fn. 4.) Because the overdraft has been severe and continuous, the state of the Basin alone is sufficient to establish that all Parties in the basin were on notice of the overdraft since well before 1951 and ever since.

In addition, there is extensive evidence—which will be supported at trial with the testimony of Douglas R. Littlefield, Ph.D.—that shows knowledge of the Basin's severe state of overdraft has in fact been common and pervasive within the region since the 1940s. (PWS-43a.) Indeed, on February 20, 1945, the Los Angeles County Board of Supervisors adopted a an ordinance that made it a misdemeanor to drill a new well in the Basin except for in limited circumstances precisely because of rapidly declining groundwater levels. (Exhibit A [Ordinance No. 4457]; PWS-47; see also *Santa Maria, supra*, 211 Cal.App.4th at 293 [parties "were on notice...by virtue of...the actions of political leaders...and the public notoriety surrounding the need [for actions]"].) In the ordinance, the Board of Supervisors explicitly found that "the water table in [Antelope Valley] is now so low and is continuing to drop so rapidly that if restrictions upon the drilling of further water wells are not effective within the next thirty days the whole such

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

portion will be rendered unfit for agricultural use." (Exhibit A, p. 2.) The ordinance and the reaction that it elicited within the Basin garnered the public's attention in the Los Angeles Times. (PWS-47 [referring to "mass meetings in Lancaster, protesting [the ordinance] and further restrictions"].) Comments received by the Board of Supervisors from many agricultural associations and landowners throughout Antelope Valley further document the regional awareness of the ordinance and the overdraft problem that it sought to address. (Exhibit A.)

By 1947, groundwater level declines in the Basin were so publicly prominent that the State of California requested an investigation of the situation. (PWS-51.) The California Department of Water Resources later reported to the Assembly of the State Legislature on the "progressive decline in ground water levels, now averaging three feet per year over the portion of Antelope Valley from which extractions are heavy." (*Id.* at 6.) The public report concluded that "[e]very effort shall be made to reduce consumptive use in the valley." (*Id.* at 26.)

In 1959, wide-spread concern over the Basin's severe overdraft led the California Legislature to form the Antelope Valley-East Kern Water Agency ("AVEK") for the purpose of wholesaling imported water from the SWP to supplement the Basin's overdrafted groundwater resources. The public formation of AVEK alone is sufficient to demonstrate notice. (See *Santa Maria, supra*, 211 Cal.App.4th at 294 ["[Santa Barbara County Water Agency] was formed in 1945 specifically to respond to persistent water shortage problems. This fact is sufficient on its own to support the conclusion that landowners were, by then, on notice that the Basin was in overdraft."].) Furthermore, AVEK's public activities since its formation drive home the fact that Basin landowners and water users were on notice.

In 1962, the California Department of Water Resources issued a report entitled "Report on Feasibility of Serving [AVEK] from The State Water Facilities" noting that "[a]s long as overdrafting of the ground water basins persists and ground water levels continue to decline, irrigated acreage will be forced out of production as pumping depths exceed economic limits" and "[t]he ground water basins within the areas encompassed by the boundaries of [AVEK] appear to have been subjected to a substantial amount of overdrafting for a considerable number of years, and are currently being overdrawn at the rate of 94,000 acre-feet per year." (PWS-89.)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

In the early 1970s, AVEK sought to construct a system to distribute SWP water locally to relieve reliance on Basin groundwater, and its bid to pass a bond to fund the project placed the Basin and its overdraft status in the public spotlight. (PWS-130-142, 148-149, 156, 174.) For example, in one Antelope Valley Press article, a local water district manager noted the "massive overdraft of groundwater now occurring throughout the Antelope Valley-East Kern area" and explained that a SWP distribution system is need because "drilling more wells won't solve the problem because additional wells 'would only steal water from each other.'" (PWS-131.)

Since the 1940s, newspapers, including the Los Angeles Times and the Antelope Valley Press, reported regularly on declining groundwater levels in the Basin. (See, e.g., PWS-46, 47, 53 [1947 article reporting that the Antelope Valley Agricultural and Conservation Committee was seeking less water-consuming crops due to declining groundwater], 54, 55 [1949 article reporting that conservation of run-off and flood waters needed to help Antelope Valley due to limited groundwater], 56, 57, 58-68, 71-75, 77, 78 [1959 article reporting that "[Governor Brown] told his audience that Antelope Valley's underground water basin [is] now being depleted...."], 79-80, 83, 105, 106, 109 [1963 article reporting that waste water facility would "establish a new water source in an area where the water table is diminishing constantly...."], 111, 128, 129, 131 [1971 article reporting that "the water level in wells [at Quartz Hill] has been dropping an average of six feet a year"], 134, 137, 140, 142, 145-183, 187, 189-191, 192 [1991 article reporting that scientists blame cracks near Lancaster on "extensive ground-water pumping, which has caused some sections of the rapidly growing Antelope Valley to sink more than five feet in 20 years"].)

Each of the above-cited documents is admissible to prove that Basin landowners and water users were on notice of the Basin's overdraft. As the appellate court explained in upholding the admission of similar evidence in *Santa Maria, supra*, 211 Cal.App.4th at 294:

> [T]he truth of the assertion that the Basin was in overdraft, is not the point.... The documents were offered to prove that the statements contained within them were made.... The evidence supports the inference that appellants and their predecessors in interest had notice of the statements and, therefore, constructive notice of the commencement of the purported overdraft.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

For the same reasons, the ordinance, articles and reports offered by Public Water Suppliers here are admissible and prove notice to all Basin property owns and their predecessors.

Because knowledge of the Basin's severe state of overdraft has been prevalent throughout the Basin continuously since the 1940s, all Parties' are deemed to be on notice. (See *Santa Maria, supra*, 211 Cal.App.4th at 293.) The Public Water Suppliers' adverse use of water from the Basin was therefore open and notorious and under a claim of right.

B. The Public Water Suppliers Have the Right to Recapture Return Flows From Imported Water

An entity that uses imported water has the right to recapture and use the return flows from that water. (*Santa Maria, supra* 211 Cal.App.4th at 301-303; Wat. Code 7075 ["Water which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another shall not be diminished."]; see also *San Fernando, supra*, 14 Cal.3d at 261); *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-77.) The recapture right "does not necessarily attach to the corpus of water traceable to particular deliveries but is a right to take from the commingled supply an amount equivalent to the augmentation contributed by the return flow from those deliveries." (*San Fernando, supra*, 14 Cal.3d at 260.)

Following this precedent, this Court determined here that "water users who have imported the water into the basin and who have augmented the water in the acquifer through use are entitled rights to the amount of water augmenting the acquifer." (Order After Hearing on January 27, 2014: Motion by Cross-Complainant AVEK for Summary Judgment/Summary Adjudication, p. 4:13-16 ("Order re AVEK's MSA").) The Court specified that "[t]he return flow [right] results from *use* of imported water, not just importation." (Id. at 4:8 [emphasis added].) For this reason, the Court ruled that, as a matter of law, "AVEK has failed to establish that, as a [SWP] contractor with a contractual entitled to receive and deliver SWP water to public water suppliers and private property owners," it is entitled to recapture return flows "delivered to and *used by others*." (*Id.* at 4:9-14 [emphasis added].)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

The Public Water Suppliers, as the parties that purchase, use and receive deliveries from AVEK, are the ones entitled to recapture return flows. In Phase 5, the Public Water Suppliers presented evidence showing that they are the importers and users of imported SWP water in the Basin, including invoices, statement and spreadsheets demonstrating the amount of SWP water purchased from AVEK, and that their use has recharged and continues to recharge the Basin. (See Public Water Suppliers' Phase 5 Trial Brief, p. 9:3-6, 14-18.)

C. The Public Water Suppliers Reserve the Right to Further Brief Additional Grounds for Claiming Entitlement to Produce Water from the Basin

Public Water Suppliers' claims to prescriptive rights and return flow recapture rights are not their exclusive claims to water from the Basin. Public Water Suppliers additionally claim that they have domestic priority to water use in the Basin, that they have the right to store imported water in the Basin, and that the use of other Basin water users has been unreasonable. If allowed by the Court, the Public Water Suppliers can submit briefs on these legal issues at a the close of trial.

III. OVERLYING LANDOWNERS THAT ENGAGED IN SELF-HELP DURING THE PRESCRIPTIVE PERIOD RETAINED A PORTION OF THEIR OVERLYING RIGHTS

Generally, all overlying landowners have equal rights to water in a basin. (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 136 ("*Katz*").) Where the supply is insufficient for all, as it has been in the Basin since 1951, each overlying landowner is entitled to a fair and just proportion of the water, i.e., a correlative right. (*Ibid.*; see also *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 15 ("*San Bernardino*"); *Santa Maria, supra*, 211 Cal.App.4th at 279; *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 725 [in an overdrafted basin, each overlyer may only use their reasonable individual share]; *Tulare, supra*, 3 Cal.2d at 524 [a trial court must determine whether overlying owners "considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion"].)

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Correlative water rights can be lost to a prescriptive taking. (*Santa Maria, supra*, 211 Cal.App.4th at 279.) To protect correlative water rights, overlying owners must either seek an injunction before the prescriptive right is perfected or engage in "self-help." (*Ibid.*) "Self-help in this context requires the landowner to continue to pump nonsurplus water concurrently with the adverse users. When they do, the landowners retain their overlying rights losing only the amount of the prescriptive taking." (*Ibid.*; see also *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1731-32; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241 ("*Mojave*").) Here, for the reasons set forth above, the Public Water Suppliers have perfected their long-exercised prescriptive rights. Thus, any party claiming an overlying right must establish that the party pumped nonsurplus water concurrently with the Public Water Suppliers. Otherwise, any overlying right retained by the party will be subordinate to the Public Water Suppliers' prescriptive rights.

Landowners that have stipulated to the Proposed Physical Solution did engage in self-help pumping. The Court has already received evidence of the stipulating parties' groundwater production in 2011 and 2012 during the Phase 4 trial, and has already admitted evidence to that regard. To the extent that further evidence of the stipulating landowners' self-help is required, the Public Water Suppliers expect that the stipulating landowners will present the evidence at the upcoming trial.

In contrast, the non-stipulating landowners in the Basin have not and apparently cannot establish that they pumped during the prescriptive period. As a result, any water rights retained by the non-stipulating landowners are subordinate to the self-help rights of the stipulating landowners; for self-help to mean anything, it must preserve for the landowner engaging in self-help a higher priority right than that retained by those who do not pump. Although subordination of unexercised overlying correlative rights by self-help groundwater pumping has not been directly addressed by the courts, they have addressed the analogous situation of riparian rights holders. In *Moore v. California Oregon Power* (1943) 22 Cal.2d 725, 735 ("*Moore*"), an upstream riparian stored water and obtained a prescriptive right against the downstream riparian: "The law is so well-established in this state as to require no extended citation of authorities that

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

an upper riparian owner may acquire a prescriptive right to the waters of a stream as against a lower riparian owner by an adverse use of said waters for the prescriptive period." (*Ibid.*) The water use of the upper riparian owner in *Moore* is analogous, here, to the pumping of overlying landowners that engaged in self-help—whose pumping alone exceeded the safe yield of the Basin. The pumping of the overlying landowners that engaged in self-help was adverse to that of the non-pumping overlying landowners, and thus subordinated the rights of the non-pumping overlying landowners.

In the Public Water Suppliers' settlement with the Willis Class, the Willis Class acknowledged that the Public Water Suppliers would assert prescriptive rights and intended to prove such rights. However, as part of the settlement, the Public Water Suppliers agreed to limit the assertion of their prescriptive rights against the Willis Class. (Willis Class Stipulation of Settlement at 10:18-22 ["The Willis Class Members acknowledge that the [Public Water Suppliers] may at trial prove prescriptive rights against all groundwater pumping in the Basin during a prior prescriptive period. If the [Public Water Suppliers] do prove prescriptive rights, [Public Water Suppliers] shall not exercise their prescriptive rights to diminish the Willis Class Members' Overlying Right below a corrective share of 85%."].)

IV. A COMMON WATER SYSTEMS IS GENERALLY REQUIRED TO PROVE PRESCRIPTION

Generally, an overlying water right must be used on the overlying property itself; if the water is exported or placed in a common water systems, such as a common well used at a mobile home estate, it is deemed to be appropriated.[1] (*San Bernardino, supra*, 186 Cal. at 25.) Thus, common water systems, as appropriators in an overdrafted basin, must establish prescription. (*Santa Maria, supra*, 211 Cal.App.4th at 279; see also *Tulare, supra*, 3 Cal.2d at 535.) To the extent that any non-stipulating parties claim entitlement to Basin water on the basis of production for a common water system, they will have the burden of proving prescription.

[1] There is an exception, however, for mutual water companies as explained in Section V, *infra*.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

V. MUTUAL WATER COMPANIES

An exception to the rule set forth in Section IV, *supra*, exists for mutual water companies. Where landowners with overlying rights join together and form a mutual water company in order to jointly operate facilities for the production and distribution of water, the conveyance of the individual water rights to the company is considered a formality, and the rights remain appurtenant to the lands of the stockholders. (*Orange County Water Dist. v. City of Riverside* (1959) 173 Cal.App.2d 137, 194 [citing *Estate of Thomas* (1905) 147 Cal. 236, 242 & *Locke v. Yorba Irrigation Co.* (1950) 35 Cal.2d 205, 209].) Therefore, mutual water companies in the Basin, including some stipulating parties, have correlative overlying rights. Mutual water companies that have stipulated to the Proposed Physical Solution did engage in self-help pumping. The Court has already received evidence of the stipulating parties' groundwater production in 2011 and 2012 during the Phase 4 trial, and has already admitted evidence to that regard. To the extent that further evidence of the mutual water companies' self-help is required, the Public Water Suppliers expect that the stipulating landowners will present the evidence at the upcoming trial.

VI. IN LIEU WATER CLAIMS

The Water Code provides protections for a groundwater right holder that has ceased or reduced its use of groundwater due to its use of a nontributary alternate source of water or in order to allow for the replenishment of the groundwater. (Cal. Water Code, §§1005.1 et seq.) To obtain the protection, the groundwater right holder must file a specified statement with the State Water Resources Control Board. (*Ibid.* [a water user "cannot claim the benefit of this section for any water year for which such statement is not so filed"].) Additionally, Los Angeles County has special filing requirements that must be met. (*Ibid.*) If the protection is triggered by the proper filing, the amount of water from the alternative sources that is applied to a reasonable beneficial use will be construed to constitute reasonable beneficial use of groundwater, not exceeding the amount of the reduction in groundwater use. (*Ibid.*) To the extent that a party in the Basin claims its non-use or reduced use is protected by Water Code, Section 1005.1 et seq., it must

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

demonstrate that it filed the requisite statements with the County and with the State Water Resources Control Board for each water year at issue.

VII. JUDGMENT SHOULD BE ENTERED AGAINST DEFAULTING PARTIES

Numerous parties to this action have failed entirely to make a statutorily permissible response to a complaint filed against them or otherwise make an appearance in these coordinated, consolidated proceedings. (See Code Civ. Proc., §§ 585(c), 1014 .) Pursuant to Code of Civil Procedure, section 585(c), a default judgment may be entered against them (see also Cal. Rules of Court, rule 3.110(g)):

> In all actions where the service of the summons was by publication, upon the expiration of the time for answering, and upon proof of the publication and that no answer, demurrer, notice of motion to strike of the character specified in subdivision (f), notice of motion to transfer pursuant to Section 396b, notice of motion to dismiss pursuant to Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10, or notice of the filing of a petition for writ of mandate as provided in Section 418.10 has been filed, the clerk, upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint; and the court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor for that relief, not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for in Section 425.115, as appears by the evidence to be just.... In all cases affecting the title to or possession of real property, where the service of the summons was by publication and the defendant has failed to answer, no judgment shall be rendered upon proof of mere occupancy, unless the occupancy has continued for the time and has been of the character necessary to confer title by prescription.

The Public Water Suppliers have submitted written applications establishing that that a summons was served by publication and that the time for answering has expired without appropriate response of the defaulting parties. The Public Water Suppliers will supplement the submitted Exhibit 1 to the Proposed Physical Solution with additional defaulting parties. In addition, for the reasons set forth above, the Public Water Suppliers' prescriptive rights have been perfected.

A defaulting party confesses the material allegations in the complaint (*Fitzgerald v. Herzer* (1947) 78 Cal.App.2d 127, 131 ("*Fitzgerald*")) and is estopped from denying the allegations in a later action (*Flood v. Simpson* (1975) 45 Cal.App.3d 644, 651 ("*Flood*")). Thus,

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

a defaulting party is said to have consented to the plaintiff obtaining the relief requested pursuant to the facts set forth in the complaint. (*Brown v. Brown* (1915) 170 Cal. 1, 5 ("*Brown*").) In water rights litigation, courts consistently have deprioritized the rights of parties that have defaulted, making their rights subordinate to all other parties. (See, e.g., *Jones v. Pleasant Valley Canal Co.* (1941) 44 Cal.App.2d 798, 802-803 ("*Jones*"); *City of Los Angeles v. City of San Fernando* (January 26, 1979, Judgment, No. 650079) [nonpub, opn.], at 6, 21; *Wright v. Goleta Water District* (June 16, 1989, Judgment, No. SM57969) [nonpub. opn.].) The rights of the defaulting parties here likewise should be deprioritized and made junior to all rights established by the Proposed Physical Judgment because the burden to produce evidence of ownership, reasonable and beneficial use, and self-help belonged to the defaulting parties, and they failed to do so.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

VIII. THE PROPOSED PHYSICAL SOLUTION IS REASONABLE AND TREATS ALL PARTIES FAIRLY

A. Legal Standard

A physical solution is a practical remedy employed by courts to permit as many uses of a groundwater supply as possible, while advancing the constitutional rule of reasonable and beneficial use of the State's water supply and continuing to recognize and respect water rights. (See *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 339-341 ("*Lodi*"); *Santa Maria, supra*, 211 Cal.App.4th at 287-88.) The Proposed Physical Solution does just that—it brings pumping in the basin within the native safe yield by employing a seven-year rampdown and then apportions ongoing use of the native safe yield on the basis of the amount and priority of existing water rights. It also recognizes legal rights to imported water return flows, and, consistent with those rights, apportions production of return flow water based on the levels of water imported into the Basin.

A trial court has broad authority to use its equitable powers to fashion a physical solution. (*Mojave, supra,* 23 Cal.4th at 1249; *Santa Maria, supra*, 211 Cal.App.4th at 288 ["Each case must turn on its own facts, and the power of the court extends to working out a fair and just resolution"] [citing *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560-61].) The

physical solution, however, must carry out the mandates of Article X, Section 2 of the California Constitution, including the mandate that the state's water resources be put to "beneficial use to the fullest extent of which they are capable." (*Lodi, supra,* 7 Cal.2d at 341.) In addition, while a physical solution may permit the modification of existing water uses practices, it may not result in substantial injury or material expense to the holder of prior and paramount water rights. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351; *Mojave, supra,* 23 Cal.4th at 1250 ["In ordering a physical solution...a court may neither change priorities among the water rights holders nor eliminate vested rights...without first considering them in relation to the reasonable use doctrine."]; *Pasadena, supra,* 33 Cal.2d at 948-49 [Physical Solution should "avoid [] waste, ... at the same time not unreasonably and adversely affect the prior appropriator's vested property right."]; *Lodi, supra,* 7 Cal.2d at 341 ["Although the prior appropriator may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators, it cannot be compelled to make major changes or to incur substantial expense."].)

Factors that weigh into the reasonableness of water allocations in a physical solution include actual use (*Tulare, supra,* 3 Cal.2d at 565), whether use has been reasonable and beneficial (*id.* at 526), and the effect of the use on the basin and overall water supply (*Lodi, supra,* 7 Cal.2d at 344-45). Reviewing courts have upheld minor changes to methods of use and appropriation in a physical solution as reasonable. (*Lodi, supra,* 7 Cal.2d at 341; see also *People ex rel. State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3d 743, 750, 754 [allegations of unreasonable method of use state valid causes of action for injunctive and declaratory relief].) Reviewing courts have also upheld requirements that senior rights holders spend reasonable sums of money. (*Rancho Santa Maria v. Vail* (1938) 11 Cal.2d 501, 560.)

A physical solution must also provide certainty, particularly with regards to dormant water rights. As the California Supreme Court explained in *In re Waters of Long Valley Creek Stream Sys.* (1979) 25 Cal.3d 339 ("*Long Valley*"):[2]

[2] Although *Long Valley, supra,* 25 Cal.3d 339 was a statutory stream adjudication by the State Water Resources Control Board, courts and the State Water Resources Control Board have concurrent jurisdiction over water rights. Furthermore, riparian rights are analogous to groundwater rights.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

> Uncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long range planning and investment for the development and use of waters in a stream system. (Robie & Steinberg, Existing Water Laws and Industry Practices: Their Contribution to the Waste of Water (1977) 53 L.A. Bar J. 164, 171-172; Governor's Com. to Review Cal. Water Rights Law, Final Rep. (Dec. 1978) supra, at p. 16.) Thus with respect to dormant riparian rights, one authority has observed: "These rights constitute the main threat to nonriparian and out-of-watershed development, they are the principal cause of insecurity of existing riparian uses, and their presence adds greatly to the cost of obtaining firm water rights under a riparian system. They are unrecorded, their quantity is unknown, their administration in the courts provides very little opportunity for control in the public interest. To the extent that they may deter others from using the water for fear of their ultimate exercise, they are wasteful, in the sense of costing the economy the benefits lost from the deterred uses." (Trelease, A Model State Water Code for River Basin Development (1957) 22 Law & Contemp. Prob. 301, 318; see also Milliman, Water Law and Private Decision-making: A Critique (1959) 2 J. Law & Econ. 41, 47.)
>
> Uncertainty also fosters recurrent, costly and piecemeal litigation. In the present case, for example, there has been incessant litigation between the claimants to the waters of the stream system since about 1883. And, as the Board engineer observed, the inconclusive fragmentary definition of water rights resulting from that litigation was "the prime reason for the proposed adjudication." The principal cause of this untoward effect appears to be that a private suit for determining title to water binds only those who are parties to the suit; such suits are inadequate, however, because shortages in supply or new appropriations or riparian uses have the potential for bringing all water users on the stream in conflict. (Governor's Com. To Review Cal. Water Rights Law, Final Rep. (Dec. 1978) supra, at p. 22.)

(*Id.* at 355-56.) To this end, the California Supreme Court, in *Mojave, supra*, has stated that reduced allocations and constraints on new pumping should be expected, particularly in a groundwater basin that is so severely overdrafted and that has so much undeveloped land:

> If Californians expect to harmonize water shortages with a fair allocation of future use, courts should have some discretion to limit the future groundwater use of an overlying owner who has exercised the water right and to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin.

(23 Cal.4th at 1249, fn. 13.) In particular, a physical solution can reasonably burden the new of use water by an unexercised correlative right. The California Supreme Court identified the burdens that can be imposed upon water uses by dormant users in *Long Valley, supra*:

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

> As previously discussed, when the Board determines all rights to the use of the water in a stream system, an important interest of the state is the promotion of clarity and certainty in the definition of those rights; such clarity and certainty foster more beneficial and efficient uses of state waters as called for by the mandate of article X, section 2. *Thus, the Board is authorized to decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised.* Moreover, to the extent that an unexercised riparian right may also create uncertainty with respect to permits of appropriation that the Board may grant after the statutory adjudication procedure is final, and may thereby continue to conflict with the public interest in reasonable and beneficial use of state waters, the Board may also determine that the future riparian right shall have a lower priority than any uses of water it authorizes before the riparian in fact attempts to exercise his right. *In other words, while we interpret the Water Code as not authorizing the Board to extinguish altogether a future riparian right, the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources.*

(*Id.* at 358-359 [emphasis added].)

B. <u>The Proposed Physical Solution Protects the Basin by Preventing Future Overdraft</u>

The Proposed Physical Solution will protect all water rights in the Basin by preventing future overdraft and improving the Basin's overall groundwater levels and prevent the risk of new land subsidence. (See *Lodi, supra*, 7 Cal.2d at 344-45.) Dennis E. Williams, Ph.D., will testify that pumping at existing levels will continue to degrade and cause undesirable results in the Basin, but that the Proposed Physical Solution will bring the Basin into balance and stop undesirable results including land subsidence. The rampdown set forth in the Proposed Physical Solution will bring pumping in the Basin within the native safe yield. Furthermore, the Proposed Physical Solution is likely to lead to additional importation of water into the Basin and thus additional return flows which will help to restore groundwater levels in the Basin. This will happen in several ways. First, if existing groundwater users exceed their respective allocations, they will pay a replacement assessment that will be used to bring additional imported water into the Basin. Second, because allocations are capped at the total yield of the Basin, new pumpers will be required to bring imported or supplemental water into the Basin. Finally, the Proposed Physical Solution allows parties to store water during wet years.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

At trial, Dr. Williams will present the United States Geological Survey ("USGS") groundwater flow model ("ModFlow") that has been calibrated based on evidence already received by the Court and recent groundwater pumping data. He will use ModFlow to show what will happen to groundwater levels if current pumping levels continue without a physical solution, and he will compare it with scenario in which parties pump in accordance with the Proposed Physical Solution. Dr. Williams' testimony and the ModFlow model will show that water level subsidence risk will decrease under the Proposed Physical Solution. In contrast, in the absence of a physical solution, subsidence will continue to be a problem. This evidence will demonstrate that management by the Proposed Physical Solution is necessary to sustain groundwater levels and protect future use of entitlements in the Basin.

C. All Parties Are Treated Reasonably

Each party is treated reasonably by the Proposed Physical Solution: the priority of rights in the Basin is preserved; no vested rights are eliminated; and allocations are reasonably tied to reasonable and beneficial use and the health of the Basin. (See *Lodi, supra*, 7 Cal.2d at 341; *Mojave, supra*, 23 Cal.4th at 1250; *Pasadena, supra*, 33 Cal.2d at 948-49.)

1. Federal Reserved Rights

The United States has a right to produce 7,600 AFY from the native safe yield as a federal reserved water right for use for military purposes at Edwards Air Force Base and Air Force Plant 42. (See *Cappaert v. United States* (1976) 426 U.S. 128, 138; *United States v. New Mexico* (1978) 438 U.S. 696, 700.) The Proposed Physical Solution preserves the United States' right to produce 7,600 AFY at any time for uses consistent with the federal reserved water right, and shields the United States' water right from the rampdown and pro-rata reduction due to overdraft that govern all other rights in the Basin pursuant to the Proposed Physical Solution. (Proposed Physical Solution, ¶5.1.4.) When the United States does not take its allocation, the Proposed Physical Solution provides for the parties with the most consistent ongoing demand to take the water, consistent with the Constitutional mandate of Article X, Section 2 to put the water to its fullest use.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

2. Wood Class

Wood Class members are allocated 3 AFY per existing household for reasonable and beneficial use on their overlying land, with the entire Class' aggregate use capped at 3806.4 AFY. Only production by a Wood Class member greater than 3 AFY is subject to a replacement water assessment. (Proposed Physical Solution, ¶5.1.3.) The Court has already admitted evidence regarding the Wood Class' use of water by the Court-appointed expert, Tim Thompson.

3. Overlying Landowners That Have Established Self-Help

The Proposed Physical Solution allocates approximately 82 percent of the adjusted native safe yield to overlying landowners that have established self-help. (Proposed Physical Solution, Ex. 4.) This allocation is fair and reasonable in light of the overlying landowners' reasonable and beneficial use.

4. Unknown Existing Pumpers

The Proposed Physical Solution provides that an amount equal to seven percent of the native safe yield may be allocated to unknown *existing* pumpers that prove entitlement to water rights at some time in the future. (Proposed Physical Solution, ¶¶5.1.10, 18.5.13.) In addition, if a water use is domestic for a single-family household, and provided it is not transferable, the Watermaster has authority to consider it *de minimis* and thus not subject it to payment of a replacement water assessment. (*Id.* at ¶18.5.13.2.) Dr. Williams will testify that these provisions provide the Watermaster with flexibility regarding unknown existing users to ensure that the Proposed Physical Solution is implemented fairly and reasonably.

5. Importers of Non-Native Water

The Proposed Physical Solution recognizes the return flow entitlements of importers of non-native water by allocating to those importers the right to pump an amount equal to estimated return flows for the imported water they use. (Proposed Physical Solution, ¶5.2.) Return flows are calculated by multiplying the quantity of water imported and used by the party in the Basin by a percentage representing the portion of that water that is expected to augment the acquifer. (*Ibid.*) Paragraph 18.5.11 provides the Watermaster with flexibility to adjust the return flow percentages in the seventeenth year. The Proposed Physical Solution is consistent with the

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Court's determination that "water users who have import water into the basin and have augmented the water in the acquifer through use are entitled rights to the amount of water augmenting the acquifer." (Order re AVEK's Motion for Summary Adjudication at 4:13-16.)

6. Phelan Piñon Hills Community Services District

The Proposed Physical Solution permits Phelan Piñon Hills Community Services District ("Phelan Piñon Hills")—who is a not a stipulating party—to produce up to 1,200 AFY from the Basin and deliver it outside of the Basin for use in the Phelan Piñon Hills service area so long as that amount of water is available without causing material injury and provided that Phelan Pinion Hills pays a replacement water assessment to replace the amount of water exported lost from the Adjudication Area. (Proposed Physical Solution, ¶6.4.1.2.) This allocation and the correlating assessment are fair and reasonable in light of findings already made by this Court.

In this Court's Partial Statement of Decision for Trial Related to Phelan Piñon Hills, the Court concluded that "Phelan Piñon Hills 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." (*Id.* at 6:19-21.) The Court based this conclusion on the following facts: Phelan Piñon Hills owns land in the Basin but the water pumped from the property is provided to customers outside of the Basin (id. at 7:3-6); the Basin has been in a state of overdraft with no surplus water available for pumping for the entire duration of Phelan Piñon Hills' pumping (i.e., since at least 2005) (id. at 4:9, 8:3-8); and the entire Basin, including the Butte subbasin where Phelan Piñon Hills pumps, is hydrologically connected as a single groundwater aquifer (id. at 8:2-3, 16-22). The Court additionally determined that Phelan Piñon Hills does not have return flow rights to groundwater in the Basin because that right is limited to imported water and Phelan Piñon Hills admittedly has never imported water to the Basin. (*Id.* at 9:3-10:6.) Finally, the Court concluded that that Phelan Pinion's pumping of groundwater from the Basin negatively impacts the Butte subbasin and the Basin because groundwater flows generated from native water pumped by Phelan Pinion Hills are intercepted by three groundwater wells operated by Phelan Pinion just outside of the Basin, and the remaining flows that enter the

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Basin "merely 'lessen the diminution occasioned' by Phelan Pinion Hills' extraction and do not augment the [Basin's] groundwater supply." (*Id.* at 10:7-11, 15-17, 23-25.)

7. Defaulting Parties

Consistent with the treatment of defaulting parties in other water rights cases, the rights of the defaulting parties here are subordinate to the rights recognized by the Proposed Physical Solution. (See, e.g., *Jones, supra*, 44 Cal.App.2d at 802-803; *City of Los Angeles v. City of San Fernando* (January 26, 1979, Judgment, No. 650079) [nonpub, opn.], at 6, 21; *Wright v. Goleta Water District* (June 16, 1989, Judgment, No. SM57969) [nonpub. opn.].) The defaulting parties are deemed to have consented to the relief requested by the other parties (*Fitzgerald, supra*, 78 Cal.App.2d at 131; *Flood, supra*, 45 Cal.App.3d at 651; *Brown, supra*, 170 Cal. at 5), and additionally have failed to meet their burden to produce evidence of ownership, reasonable and beneficial use, and self-help.

IX. THE WILLIS CLASS IS TREATED REASONABLY UNDER THE PROPOSED PHYSICAL SOLUTION

A. The Proposed Physical Solution Is Consistent with the Willis Class Stipulation

The Public Water Suppliers entered into a Stipulation of Settlement with the Willis Class ("Willis Class Stipulation" or "Stipulation") which was approved by the Court on September 22, 2011. As this Court had already recognized, the Stipulation—which was only between the Willis Class and the Public Water Suppliers—did not and cannot establish a water rights determination binding upon all parties in these proceedings. (Order after November 18, 2010 Hearing ["the court determination of physical solution cannot be limited by the [Stipulation]"; the Stipulation "may not affect parties who are not parties to the [Stipulation]"].) Rather, water rights must be determined by this Court as part of a comprehensive physical solution to the Basin's chronic overdraft condition. Indeed, the Willis Class acknowledged in the Stipulation that the ultimate determination of its reasonable correlative right would depend upon the existing and historical pumping of all other overlying landowners in the Basin. (Stipulation, ¶IV.D.3.) While the Stipulation recognized that the Willis Class members may receive whatever is later to be

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

determined by the Court as their reasonable correlative right to the Basin's native safe yield for actual reasonable and beneficial uses, it could do nothing more.

Thus, as set forth in the Public Water Suppliers' Opposition to Willis Class' Second Motion to Enforce Settlement, which is incorporated herein by reference, the Proposed Physical Solution is consistent with the Willis Class Stipulation for at least the following reasons:

1) The Willis Class Stipulation recognizes that there would be court-imposed limits on the Willis Class' correlative share of overlying rights because the Basin is and has been in an overdraft condition for decades;

2) But for the Willis Class Stipulation, the Willis Class' never-exercised overlying rights would be subordinate to rights of the landowners and Public Water Suppliers who used groundwater during the overdraft conditions;

3) No member of the Willis Class has established any right to produce groundwater for reasonable and beneficial use based on their unexercised overlying claim; and

4) The Proposed Physical Solution recognizes the Willis Class' share of correlative overlying rights and does not unreasonably burden its members' rights given the significant reductions in groundwater pumping and increased expense incurred by the stipulation parties in the Proposed Physical Solution. At this time, more than the entire native safe yield is being applied to reasonable and beneficial uses.

In the Willis Class Stipulation, the Willis Class also agreed that a court-imposed physical solution may require the installation of a meter on any groundwater pump by a Willis Class member (Willis Class Stipulation at ¶V.B. at 11:28-12:27) and that Willis Class member production from the Basin above its allocated share in a physical solution would require the member to import replacement water or pay a replacement assessment (id. at ¶IV.D. at 12:19-26). The requirements set forth in Paragraphs 9.2 and 9.2.1 of the Proposed Physical Solution are thus consistent with the Willis Class Stipulation.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

B. **The Proposed Physical Solution Does Not Unreasonably Affect the Willis Class**

As overlying landowners in an overdrafted basin, the members of the Willis Class are entitled to a fair and just proportion of the water available to overlying landowners, i.e., a correlative right. (*Katz, supra*, 141 Cal. at 136; see also Willis Class Stipulation, ¶III.D at 5:26-6:2.) The Willis Class members, however, have never exercised their rights to produce groundwater from the Basin. While overlying rights are not lost by nonuse (*Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74), the Willis Class members' failure to put water to reasonable and beneficial use impacts their fair and just allocation of native safe yield in an overdrafted basin. (See *Mojave, supra*, 23 Cal.4th at 1249, fn. 13; *Long Valley, supra*, 25 Cal.3d at 358-59, 362, fn. 15; see also Section VIII.A., *supra*.) Case law has established that an overlying landowner who does not pump does not retain a self-help right. (*Santa Maria, supra*, 211 Cal.App.4th at 279; *Pasadena, supra*, 33 Cal.2d at 931-32.) Furthermore, a self-help right has priority over a right that was not used, particularly where self-help rights exceed safe yield. (See Section III, *supra*; *Moore, supra*, 22 Cal.2d at 735.)

Notwithstanding the fact that the Willis Class has failed to engage in self-help and the fact that senior right holders already put more than the native safe yield to reasonable and beneficial use, the Proposed Physical Solution does not eliminate the Willis Class's right but preserves the Willis Class' ability to pump in the future. Willis Class members will have the opportunity to prove a claim of right to the Court (Proposed Physical Solution, ¶5.1.10) or, like all other new pumpers in the Basin, apply to the Watermaster for new production (¶18.5.13). Thus, the Willis Class' correlative rights are more than fairly protected by the Proposed Physical Solution.

Furthermore, the replacement water assessment imposed on the Willis Class by the Proposed Physical Solution is reasonable. Significantly, the assessment is consistent with the Willis Class Stipulation in which the Willis Class agreed to pay a replacement assessment if a member produced "more than its annual share" of the native safe yield less the amount of the federal reserved right. In addition, the replacement assessment is imposed uniformly on all

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

producers in the basin that produce more than their available allocation in any given year. (Proposed Physical Solution, ¶9.2.)

In today's unprecedented drought conditions with the cost of water rising, a replacement assessment for an acre foot of water would be approximately $310.[3] Assuming an acre foot of water is sufficient for domestic use in the Antelope Valley as testified by the court-appointed expert, Tim Thompson, the average monthly cost for a Willis Class member would be a mere $26 – a monthly amount less than what most Californians are likely paying for that amount of water. This is hardly an unreasonable burden upon any Willis Class member who would be installing a well for domestic use.

Even that small amount of replacement assessment cost can be avoided under the Physical Solution if the Watermaster determines that the particular Willis Class member's domestic use will not harm other groundwater users. (Proposed Physical Solution, ¶18.5.13.2 ["If the New Production is limited to domestic use for one single-family household, the Watermaster Engineer has the authority to determine the New Production to be *de minimis* and waive payment of a Replacement Water Assessment; *provided*, the right to Produce such *de minimus* Groundwater is not transferable, and shall not alter the Production Rights decreed in this Judgment."].) There is no reasonable basis for any argument that a replacement assessment somehow unreasonably burdens or significantly harms a Willis Class member who might have to pay a relatively small amount for a relatively large amount of water.

In fact, the Proposed Physical Solution's treatment of the Willis Class carefully follows the *Long Valley, supra*, requirements for reasonably burdening the new use of water by an unexercised correlative right, including the following:

> [I]n order to implement the fundamental water policies expressed in the Constitution and Water Code, we conclude that at any time after the statutory adjudication has taken place, the Board has the authority to evaluate the riparian's proposed use of his unexercised right in the context of other proposed uses of water in the stream system, and to determine whether the riparian use should be permitted in light of the state's interest in promoting the most

[3] The current published cost of AVEK's SWP Water is approximately $310 an acre foot for untreated water. (Exhibit B.) An acre-foot is the amount of water needed to cover an acre of land to the depth of one foot and is generally considered to be the approximate amount of water used by a household of four people over a period of two years.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

> efficient and beneficial use of state waters. Because the statutory adjudication procedure and section 2900 are designed to promote finality and certainty, however, the Board may not grant the unexercised riparian claim a priority with respect to existing rights that is higher than it granted at the time the decree became final.

(*Id.* at 363, fn. 15.) To allow the Willis Class to start a new use and pump groundwater without a replacement assessment would give a water right to the Willis Class that is superior to existing rights and contrary to the California Supreme Court decision in *Long Valley, supra.*

C. The Willis Class' Due Process Rights Are Not Violated

For the reasons stated above, the Proposed Physical Solution does not "extinguish" the water rights of the Willis Class, as the Willis Class claims. Rather, it allows Willis Class members—who have never put their overlying rights to reasonable and beneficial use and whose unexercised and unquantified overlying rights have been deprioritized by way of self-help pumping by other overlying owners—to prove their entitlement to a fair share of native safe yield to the Court or apply as a new pumper to the Watermaster. (Proposed Physical Solution, ¶¶5.1.10 & 18.5.13.)

Furthermore, for the reasons set forth in the Public Water Suppliers' Opposition to Motion to Enforce Due Process Rights of the Willis Class ("Due Process Opposition") and incorporated herein, the Willis Class received adequate notice that the Court could adopt a physical solution that would restrict or place conditions on the Willis Class members' ability to pump groundwater. Due process protects parties from "arbitrary adjudicative procedures." (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1070.) No such risk exists here because the Court approved class notice to the members of the Willis Class that put them on notice that they would be subject to a physical solution yet to be approved by the Court. The notice stated that the Willis Class members "will be bound by the terms of any later findings made by the Court and any Physical Solution imposed by the Court" and "it is likely that there will be limits imposed on the amount of pumping in the near future." In addition, the Willis Class has actively participated in these proceedings since January 11, 2007, knows that the other landowners claim a correlative share of the Basin's native safe yield, and agreed in the Willis

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Class Stipulation that they would be subject to the Court's future jurisdiction and judgment and would be bound by a physical solution.

D. Standing

To the extent that the Willis class challenges anything other than the consistency of the Willis Settlement with the Proposed Physical Solution, the Willis Class lacks sufficient interest to establish standing.

X. THE JUDGMENT SHOULD COMPREHENSIVELY ADJUDICATE ALL INTERESTS IN AND TO THE BASIN

A Judgment should comprehensively adjudicate all of the interests in and to the Basin so as to provide all water users in the Basin certainty as to their respective water rights. To this end, the Public Water Suppliers request that this Court issue the following injunctions set forth in the Proposed Judgment:

1) Injunction Against Unauthorized Production. Each and every Party, its officers, directors, agents, employees, successors, and assigns, except for the United States, is enjoined and restrained from producing groundwater from the Basin except pursuant to the Judgment. (Proposed Judgment, ¶6.1.)

2) Injunction Re Change in Purpose of Use Without Notice to the Watermaster. Each and every Party, its officers, directors, agents, employees, successors, and assigns, is enjoined and restrained from changing its purpose of use of groundwater at any time without notifying the Watermaster. (*Id.* at ¶6.2.)

3) Injunction Against Unauthorized Capture of Stored Water. Each and every Party, its officers, directors, agents, employees, successors, and assigns is enjoined and restrained from claiming any right to produce stored water that has been recharged in the Basin, except pursuant to a storage account with the Watermaster, and as allowed by this Judgment, or pursuant to a water banking operation in existence and operating at the time of this Judgment as identified in Paragraph 14 of the Proposed Physical Solution. This injunction does not prohibit Parties from importing water into the Basin for direct use, or from producing or using imported

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

water return flows owned by such parties pursuant to Paragraph 5.2 of the Proposed Judgment. (*Id.* at ¶6.3.)

4) Injunction Against Transportation from the Basin. Except upon further order of the Court, each and every Party, its officers, directors, agents, employees, successors, and assigns is enjoined and restrained from transporting groundwater hereafter produced from the Basin to areas outside of the Basin except as provided for by the Proposed Judgment. (*Id.* at ¶6.4.)

It is also important that the Court adopt Paragraph 20.10 of the Proposed Physical Solution, declaring that the final judgement is binding on all Parties and their successors-in-interest.

In accordance with the Proposed Judgment and Physical Solution, the Court should exercise continuing jurisdiction over this matter to ensure that all production and use of water from the basin is consistent with the Court's final judgment. The Court's continuing oversight will ensure that the Basin's supplies are protected in accordance with Article X, Section 2 of the California Constitution, including by ensuring that Parties do not take, waste or fail to conserve water from the Basin in any manner which interferes with the rights established by the Court's physical solution. (*Mojave, supra*, 23 Cal.4th at 1241-42.)

XI. CONCLUSIONS

For the reasons stated above, the Public Water Suppliers respectively request that the Court adopts the Proposed Judgment and Physical Solution and enter judgment against non-stipulating and defaulting parties as described above. The Public Water Suppliers additionally request a judicial determination of the existence, amount and priority of their prescriptive and return flow recapture rights as against defaulted parties and any other non-stipulating party.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

Dated: September 22, 2015

BEST BEST & KRIEGER LLP

By _____
ERIC L. GARNER
JEFFREY V. DUNN
WENDY Y. WANG
Attorneys for
LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

PROOF OF SERVICE

I, Rosanna R. Pérez, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP,300 S. Grand Avenue, 25th Floor, Los Angeles, California 90071. On September 22, 2015, I served the following document(s):

PUBLIC WATER SUPPLIERS' TRIAL BRIEF

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 22, 2015, at Los Angeles, California.

Rosanna R. Pérez

26345.00000\18747072.4

EXHIBIT J

Lee McElhaney

From: Lee McElhaney
Sent: Thursday, September 24, 2015 9:33 AM
To: 'Warren Wellen'
Cc: 'jeffrey.dunn@bbklaw.com'; eric.garner@bbklaw.com; rparris@avek.org; Bill Brunick; 'tombunn@lagerlof.com'
Subject: RE: Antelope Valley Groundwater Adjudication

Warren,

Thank you for your response.

The basis for the provision in the agreement that allows the PWS to pump return flows is that the importer, AVEK, has agreed and stipulated that the right to pump return flows is to be allocated to all of the stipulating parties listed in Exhibit 8, including the PWS. Nothing more is needed! Moreover, that position does not undercut any stipulating party's rights to return flows under the terms of the Judgment.

We also look forward to working cooperatively with the PWS at the prove up hearing and trial, but it is problematic when the PWS advocate a position which directly undercuts a material provision of the judgment that benefits AVEK.

Lee McElhaney
Attorney
Brunick, McElhaney & Kennedy
1839 Commercenter West
San Bernardino, Ca 92408
Phone: 909-889-8301
Fax: 909-388-1889
Email: lmcelhaney@bmklawplc.com

From: Warren Wellen [mailto:wwellen@counsel.lacounty.gov]
Sent: Thursday, September 24, 2015 8:47 AM
To: Lee McElhaney
Cc: eric.garner@bbklaw.com; jeffrey.dunn@bbklaw.com; Wendy Wang; tombunn@lagerlof.com; rparris@avek.org; Bill Brunick
Subject: Re: Antelope Valley Groundwater Adjudication

Lee,

Thanks for your email.

The PWS trial brief accurately describes the law. It sets forth the legal basis for the provisions in the agreement that allow the PWS to pump return flows from the state water they purchase and deliver to their customers.

The PWS trial brief is consistent with Judge Komar's written opinion and interpretation of the law when he denied AVEK's motion for summary adjudication seeking to take return flows rights from District 40.

We are doing our best to protect the settlement that the Board of Supervisors and the AVEK Board of Directors approved. We look forward to working cooperatively with AVEK at the prove up hearing and trial.

Warren R. Wellen
Principal Deputy County Counsel
Office of the County Counsel
County of Los Angeles
500 West Temple Street
Los Angeles, CA 90012
Tel: (213) 974-9668
Fax: (213) 687-7337

Sent from my iPad

On Sep 24, 2015, at 7:12 AM, Lee McElhaney <lmcelhaney@bmklawplc.com> wrote:

Dear counsel:

The Public Water Suppliers trial brief for the Phase VI trial (pages 8 and 9) argues that AVEK does not have any right to return flows resulting from the SWP water it brings into the Basin and distributes to its customers and, to the contrary, "An entity that uses imported water has the right to recapture and use the return flows from that water." That argument directly undercuts the material term set forth in paragraph 5.2.2 of the proposed Judgment and Physical Solution which provides that "*All Imported Water Return Flows from water imported through AVEK and not allocated to Parties identified in Exhibit 8 belong exclusively to AVEK, unless otherwise agreed by AVEK.*"

In direct contradiction to the aforesaid material term of the proposed Judgment and Physical Solution, the PWS' argument provides direct support to the claims of non-stipulating parties that they, rather than AVEK, are entitled to the return flows resulting from the imported water AVEK distributes to non-stipulating parties.

This is unacceptable. The PWS' argument invites the Court to eliminate a material term of the proposed Judgment and Physical Solution, in which event the "Stipulation [therefor] is void *ab initio*" (Stipulation, para. 4), and also breaches

the PWS' agreement and commitment to "cooperate in good faith and take any and all necessary and appropriate actions *to support the Judgment*" (Stipulation, para. 5).

Lee McElhaney
Attorney
Brunick, McElhaney & Kennedy
1839 Commercenter West
San Bernardino, Ca 92408
Phone: 909-889-8301
Fax: 909-388-1889
Email: lmcelhaney@bmklawplc.com

EXHIBIT K

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

RICHARD WOOD, on behalf of himself and all other similarly situated v. A.V. Materials, Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC509546

Judicial Council Coordination Proceeding No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

STATEMENT OF DECISION

The Court, having considered the evidence and arguments of counsel, orally issued its tentative decision on November 4, 2015 upon the conclusion of trial. For the reasons described in further detail below, the Court now issues its Statement of Decision and hereby affirms and confirms its previous statements of decision from earlier trial phases.

I. INTRODUCTION

Cross-complainants Los Angeles County Waterworks District No. 40, Palmdale Water District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Quartz Hill Water District, California Water Service Company, Rosamond Community Services District, Desert Lake Community Services District, North Edwards Water District, City of Palmdale and City of Lancaster (collectively, the "Public Water Suppliers") brought an action for, *inter alia*, declaratory relief, alleging that the Antelope Valley Adjudication Area groundwater aquifer ("Basin") was and is in a state of overdraft and requires a judicial intervention to provide for water resource management within the Basin to prevent depletion of the aquifer and damage to the Basin. They also seek a comprehensive adjudication of Basin groundwater rights for the physical solution.

West Valley County Water District and Boron Community Services District are also Public Water Suppliers but not cross-complainants.

Cross-defendants include the United States, numerous private landowners (collectively, "Landowner Parties"), numerous public landowners ("Public Overliers"), Small Pumper Class, other public water suppliers, and Phelan Piñon Hills Community Services District ("Phelan"). Small Pumper Class and Willis Class filed actions to adjudicate their respective groundwater rights. All actions were coordinated and consolidated for all purposes.

The Court divided trial into phases. The first and second phases concerned the Basin boundaries and the hydrogeological connectivity of certain areas within the Basin, respectively. The third phase of trial determined that (1) the Basin was and has been in a state of overdraft since at least 1951; and (2) that the total safe yield of the Basin is 110,000 acre feet per year ("AFY"). The Court finds that the Basin's safe yield consists of 82,300 AFY of native or natural yield and the remaining yield results from the augmentation of the Basin by parties' use of

imported supplemental water supplies, i.e., State Water Project water for urban, agricultural and other reasonable and beneficial uses. The fourth phase of trial determined parties' groundwater pumping for calendar years 2011 and 2012.

The fifth and sixth phases of trial included substantial evidence of the federal reserved right held by the United States, evidence concerning Phelan's claimed groundwater rights, and concluded with the Court's comprehensive adjudication of all parties' respective groundwater rights in the Basin with a resulting physical solution to the Basin's chronic overdraft conditions.

This Statement of Decision contains the Court's findings as to the comprehensive adjudication of all groundwater rights in the Basin including the groundwater rights of the United States, Public Water Suppliers, Landowner Parties, Public Overliers, Small Pumper Class, Willis Class, Phelan, Tapia Parties, defaulted parties, and parties who did not appear at trial. After consideration as to all parties' respective groundwater rights and in recognition of those rights, the Court approves the stipulation and physical solution presented as the [Proposed] Judgment and Physical Solution (hereafter, "Judgment and Physical Solution" or "Physical Solution") in the final phase of trial and adopts it as the Court's own physical solution.

II. THESE COORDINATED AND CONSOLIDATED CASES ARE A COMPREHENSIVE ADJUDICATION OF THE BASIN'S GROUNDWATER RIGHTS

The Court finds that these coordinated and consolidated cases are a comprehensive adjudication of the Basin's groundwater rights under the McCarran Amendment (43 U.S.C. §666) and California law. In order to effect jurisdiction over the United States under the McCarran Amendment, a comprehensive or general adjudication must involve all claims to water from a given source. (*Dugan v. Rank* (1963) 372 U.S. 609, 618-19; *Miller v. Jennings* (5th Cir. 1957) 243 F.2d 157, 159; *In re Snake River Basin Water System* (1988) 764 P.2d 78, 83.)

Here, all potential claimants to Basin groundwater have been joined. They have been provided notice and an opportunity to be heard regarding their respective claims.

III. THE UNITED STATES HAS A FEDERAL RESERVED WATER RIGHT TO BASIN GROUNDWATER

The Judgment and Physical Solution provide the United States with a Federal Reserved Water Right of 7,600 AFY from the native safe yield for use for military purposes at Edwards Air Force Base and Air Force Plant 42 (collectively, "Federal Lands.") The Federal Lands consist of a combination of lands reserved from the public domain and acquired by transfer from public or private sources. In the fifth phase of trial, the Court heard extensive evidence presented by the United States as to its claimed rights to the Basin's groundwater. The Court finds such evidence to be both substantial and credible and determines that the evidence presented is sufficient to support that part of the Judgment and Physical Solution related to the United States' Federal Reserved Water Right, including the allocation of 7600 AFY.

The federal reserved water rights doctrine provides that when the federal government dedicates its lands for a particular purpose, it also reserves by implication, sufficient water necessary to accomplish the purposes for which the land was reserved. (*See, United States v. New Mexico* (1978) 438 U.S. 696; 715; *Cappaert v. United States* (1976) 426 U.S. 128, 138; *Arizona v. California* (1963) 373 U.S. 546, 601; *Winters v. United States* (1908) 207 U.S. 564; *United States v. Anderson* (9th Cir. 1984) 736 F.2d 1358.) The Federal Lands within the Basin are dedicated to a military purpose, and that purpose by necessity requires water. Relevant to this adjudication, the federal reserved water rights doctrine may apply to groundwater. (*In re the General Adjudication of all Rights to Use Water in the Gila River Sys. and Source* (1999) 989 P.2d 739, 748.)

The evidence at trial established that the water use on the Federal Lands is necessary to support the military purpose including water used for ancillary and supportive municipal, industrial and domestic purposes. Further, water reserved for federal enclaves is intended to satisfy the present and future water needs of the reservation. (*Arizona v California, supra*, 373 U.S. at p. 600.) The future water needs on the Federal Lands was supported by evidence and

expert witness testimony presented at trial that persuasively established the unique attributes of the Federal Lands, their capacity for additional missions, and the trends within the Air Force and military that make the Federal Lands a likely candidate for potential expansion of the mission. The evidence presented at the fifth phase of trial was sufficient to establish facts necessary to support that part of the Judgment and Physical Solution related to the recognition and quantification of the United States' Federal Reserved Water Right.

IV. CROSS-COMPLAINANT PUBLIC WATER SUPPLIERS HAVE PRESCRIPTIVE RIGHTS

Cross-complainant Public Water Suppliers sought an award of prescriptive rights against the Tapia parties, defaulted parties, and parties who did not appear at trial. As explained below, the Court finds that those Public Water Suppliers have established the requisite elements for their respective prescriptive rights claims against these parties.

A. Evidence of Adverse Use (Overdraft)

"A prescriptive right in groundwater requires proof of the same elements required to prove a prescriptive right in any other type of property: a continuous five years of use that is actual, open and notorious, hostile and adverse to the original owner, and under claim of right. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266 (*Santa Maria*) citing *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 726 (*California Water Service*).)

Because appropriators are entitled to the portion of the safe yield that is surplus to the reasonable and beneficial uses of overlying landowners, "[t]he commencement of overdraft provides the element of adversity which makes the first party's taking an invasion constituting a basis for injunctive relief to the other party." (*Santa Maria, supra*, 211 Cal.App.4th at p. 291 quoting *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 282 (*San Fernando*).) "The adversity element is satisfied by pumping whenever extractions exceed the safe yield." (*Santa Maria, supra*, 211 Cal.App.4th at p. 292; see also *San Fernando, supra*, 14 Cal.3d at 278 and 282; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 903, 928-929 (*Pasadena*).) This is because "appropriations of water in excess of surplus then invade senior basin rights, creating the element of adversity against those rights prerequisite to their owners' becoming

entitled to an injunction and thus to the running of any prescriptive period against them." (*San Fernando, supra*, 14 Cal.3d at p. 278 citing *Pasadena, supra*, 33 Cal.2d at pp. 928-29].) Undisputed evidence was submitted that the Cross-Complainant Public Water Suppliers' production of water from the Basin has been hostile and adverse to the Tapia parties, defaulted parties, and parties who did not appear at trial. Each Cross-Complainant Public Water Supplier has pumped water from the Basin for at least five continuous years while the Basin was in overdraft.

In the third phase of trial, the court took evidence on the physical manifestations of overdraft and, finding substantial evidence thereof, concluded that there was Basin-wide overdraft. The Court found that the overdraft conditions commenced by at least 1951 and continue to the present. During this entire period, there was no groundwater surplus, temporary or otherwise.[1]

The evidence of historical overdraft—years when pumping exceeded the safe yield—is credible, substantial and sufficient. There was voluminous evidence, both documentary and testimonial, showing that extractions substantially exceeded the safe yield since at least the 1950's. By the beginning of this century, the cumulative deficit was in the millions of acre-feet.

Here, the adversity element of prescription is satisfied by the various Cross-Complainant Public Water Suppliers pumping groundwater when extractions exceeded the safe yield beginning in the 1950's and continuing to the present time. The Court finds that the evidence of Cross-Complainant Public Water Supplier groundwater production in the Basin to be credible, substantial and undisputed.

B. Evidence of Notice

"To perfect a prescriptive right the adverse use must be 'open and notorious' and 'under claim of right,' which means that both the prior owner and the claimant must know that the adverse use is occurring. In the groundwater context that requires evidence from which the court

[1] There was no evidence of a temporary surplus condition. Overdraft commences when groundwater extractions exceed the safe yield plus the volume of a temporary surplus. (*San Fernando, supra*, 14 Cal.3d at 280.)

may fix the time at which the parties 'should reasonably be deemed to have received notice of the commencement of overdraft.'" (*Santa Maria*, *supra*, 211 Cal.App.4th at p. 293 citing *San Fernando, supra*, 14 Cal.3d at 283.) That can sometimes be difficult to prove. (*Santa Maria, supra,* 211 Cal.App.4th at p. 291.) But that was not the case here.

The Court finds that the long-term, severe water shortage in the Basin was sufficient to satisfy the element of notice to the Tapia parties, defaulted parties, and parties who did not appear at trial. The Court finds that there is credible evidence that the Basin's chronically depleted water levels within the Basin, and resulting land subsidence, were themselves well known. (See *Santa Maria, supra,* 211 Cal.App.4th at p. 293 ["In this case, however, the long-term, severe water shortage itself was enough to satisfy the element of notice.]) Undisputed evidence of notice was presented including the long-standing and widespread chronic overdraft; the decline and fluctuation in the water levels in the Basin aquifer; the resulting actions of state and local political leaders; the public notoriety surrounding the need and the construction of the State Water Project; the subsequent formation of the Antelope Valley East Kern Water Agency ("AVEK"); land subsidence in portions of the Basin; the loss of irrigated agricultural lands as groundwater conditions worsened; decades of published governmental reports on the chronic overdraft conditions including land subsidence; operational problems at Edwards Air Force Base due to land subsidence; and decades of extensive press accounts of the chronic overdraft conditions.

The Court heard credible expert witness testimony from Dr. Douglas Littlefield, a recognized water rights historian. His opinion was supported by substantial documentary evidence of the widespread information on overdraft conditions throughout the Basin since at least 1945. Of particular note, the Los Angeles County Board of Supervisors enacted an ordinance declaring the Antelope Valley groundwater basin to be in a state of overdraft in 1945.

The Court finds that there was abundant and continual evidence of actual and constructive notice of the overdraft conditions going back to at least 1945. The numerous governmental reports and newspaper accounts admitted into evidence are not hearsay because they are not admissible for the truth of their contents. (Evid. Code, § 1200.) "The truth of the contents of the documents, i.e., the truth of the assertion that the Basin was in overdraft, is not the point. Other

evidence proved that. The documents were offered to prove that the statements contained within them were made. That is not hearsay but is original evidence." (*Santa Maria, supra*, 211 Cal.App.4th at p. 294 citing *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316.)

Here, the documents are evidence that public statements were made and actions taken by local, state, and federal officials, demonstrating concern about depletion of the Basin's groundwater supply. The notice evidence is substantial, credible and sufficient that the chronic overdraft conditions were obvious to the Tapia parties, defaulted parties, and parties who did not appear at trial. At the local level, AVEK was formed in the 1960's specifically to -bring State Water Project water into the Basin as a response to persistent groundwater shortage problems. These facts are sufficient to support the conclusion that the Tapia parties, defaulted parties, and parties who did not appear at trial were on notice that the Basin was in overdraft.

C. Continuous 5 Years Use

Any continuous five-year adverse use period is sufficient to vest title in the adverse user, even if the period does not immediately precede the filing of a complaint to establish the right. (*Santa Maria, supra*, 211 Cal.App.4th at p. 266 [rejecting argument that prescription claim based on actions taken over 30 years ago should be barred by laches]; *see Pasadena, supra*, 33 Cal.2d at pp. 930-33 [upholding trial court's determination that a prescriptive right vested even though pumping failed to meet the adversity requirement during two of the three years immediately preceding the filing of the action]; *Lee v. Pacific Gas & Elec. Co.* (1936) 7 Cal.2d 114, 120.)

As to the prescriptive rights claims by each of the Cross-Complainant Public Water Suppliers, the Court concludes that they have the burden of proof. The Court finds that the Public Water Suppliers have met the burden of proof by undisputed evidence as to their following prescriptive rights against the Tapia parties, defaulted parties, and parties who did not appear at trial:

Public Water Supplier	Prescriptive Amount (AF)	Prescriptive Period
Los Angeles County Waterworks District No. 40	17,659.07	1995-1999
Palmdale Water District	8,297.91	2000-2004
Littlerock Creek Irrigation District	1,760	1996-2000
Quartz Hill Water District	1,413	1999-2003
Rosamond Community Services District	1,461.7	2000-2004
Palm Ranch Irrigation District	960	1973-1977
Desert Lake Community Services District	318	1973-1977
California Water Service Company	655	1998- 2002
North Edwards Water District	111.67	2000-2004

The above prescriptive amounts were established by evidence of each Public Water Supplier's respective groundwater production. Specifically, a five-year period with the lowest single year amount was used as the prescriptive right for each respective party's five-year period shown above.

The total prescriptive amount is greater than the amount of native water allocated to the Cross-Complainant Public Water Suppliers in the Judgment and Physical Solution. The Court finds that the amount of water allocated to the Cross-Complainant Public Water Suppliers is appropriate and reasonable, and does not unreasonably burden the groundwater rights of other parties. Additionally, West Valley County Water District and Boron Community Services District also pumped groundwater in quantities greater than their respective allocated amounts in the Judgment and Physical Solution, and their allocations are fair and reasonable in light of their

historical and existing reasonable and beneficial uses, and the significant and material reductions thereto required by the Physical Solution.

V. PHELAN DOES NOT HAVE AN APPROPRIATIVE RIGHT AND VOLUNTARILY DISMISSED ITS PRESCRIPTIVE RIGHT CLAIM

Phelan is also a public water supplier but it waived its prescriptive rights claim. Phelan seeks a court-adjudicated right to pump groundwater from the Basin for use outside of the Adjudication Area. For the reasons that follow, Phelan has no appropriative or any other right to Basin groundwater.

Phelan's service area falls entirely within San Bernardino County and outside the Adjudication Area. Phelan has one well within the Adjudication Area and several wells outside the Adjudication Area. Phelan uses that well water to provide public water supply to Phelan customers outside the Adjudication Area and within the adjacent Mojave Adjudication Area. In this Court's Partial Statement of Decision for Trial Related to Phelan, the Court found that "Phelan Piñon Hills does not have water rights to pump groundwater and export it from the Adjudication Area or to an area for use other than on its property where Well 14 is located within the adjudication area." (*Id.* at 6:19-21.) The Court makes this finding based on the following facts: Phelan owns land in the Adjudication Area but the water pumped from the well is provided to customers outside of the Adjudication Area (*Id.* at 7:3-6); the Basin has been in a state of overdraft with no surplus water available for pumping for the entire duration of Phelan's pumping (i.e., since at least 2005) (*Id.* at 4:9, 8:3-8); and the entire Basin, including the Butte sub-basin where Phelan pumps, is hydrologically connected as a single aquifer. (*Id.* at 8:2-3, 16-22).

The Court further finds that Phelan's pumping of groundwater from the Basin negatively impacts the Butte sub-basin. Phelan's expert witness, Mr. Tom Harder, testified that Phelan's groundwater pumping deprives the Basin of natural recharge that would otherwise flow into the Basin by taking water from the Adjudication Area for use within the Mojave Adjudication Area.

The Court finds that Phelan does not have return flow rights to groundwater in the Basin because any right to return flow is limited to return flows from imported water and Phelan has never imported water to the Basin (*Id.* at 9:3-10:6.); any groundwater flows generated from native

water pumped by Phelan are intercepted by three groundwater wells operated by Phelan just outside of the Adjudication Area; and the remaining flows that enter the Basin "merely 'lessen the diminution occasioned' by Phelan's extraction and do not augment the [Basin's] groundwater supply." (*Id.* at 10:7-11, 15-17, 23-25.)

In summary, Phelan claims an appropriative right to pump groundwater from the Basin. The Court has found that there has been overdraft from the 1950's to the present time and there is no surplus available for the acquisition or enlargement of appropriative rights by Phelan. Its appropriations of Basin groundwater invade other parties' Basin rights. Phelan voluntarily dismissed its prescriptive rights claim and thus has no right to pump groundwater from the Basin except under the terms of the Court-approved Physical Solution herein.

VI. STIPULATING LANDOWNER PARTIES AND PUBLIC OVERLIERS HAVE ESTABLISHED THEIR OVERLYING RIGHTS TO THE BASIN'S NATIVE SAFE YIELD

Each stipulating Landowner Party and Public Overlier claims an overlying right to the Basin's groundwater. They have proven their respective land ownership or other appropriate interest in the Basin and reasonable use and established their overlying right. (*Santa Maria, supra*, 211 Cal.App.4th at p. 298 citing *California Water Service, supra*, 224 Cal.App.2d at p. 725; *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 524-525 ("*Tulare*") [a trial court must determine whether overlying owners "considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion"].)

As explained below regarding the Physical Solution herein, the Court finds that it is necessary to allocate the Basin's native safe yield to protect the Basin for all existing and future users. The Court received evidence of each stipulating Landowner Party's, each Public Overlier's and the Small Pumper Class's reasonable and beneficial use of Basin groundwater. "E]vidence of the quantity of a landowner's reasonable and beneficial use is necessary in many cases. . . . For example, when it is alleged that the water supply is insufficient to satisfy all users the court must

determine the quantity needed by those with overlying rights in order to determine whether there is any surplus available for appropriation." (*Santa Maria, supra*, 211 Cal.App.4th at p. 298 citing *Tulare, supra,* 3 Cal.2d at p. 525.) "And it stands to reason that when there is a shortage, the court must determine how much each of the overlying owners is using *in order to fairly allocate the available supply among them.*" (*Santa Maria, supra,* 211 Cal.App.4th at p. 298 [emphasis added].)

Here, the Court heard evidence from four water engineers in the sixth phase of trial regarding the stipulating Landowner Parties and Public Overliers' reasonable and beneficial uses of water. Based on their credible and undisputed expert witness testimony, and substantial evidence in the fourth and sixth phases of trial, the Court finds that each stipulating Landowner Party and each Public Overlier has reasonably and beneficially used amounts of water which collectively exceeded the total native safe yield; and the amounts allocated to each of these parties under the Judgment and Physical Solution are reasonable and do not exceed the native safe yield.

The Court finds that the Landowner Parties and the Public Overliers will be required to make severe reductions in their current and historical reasonable and beneficial water use under the physical solution. The evidence further shows that the Basin's native safe yield alone is insufficient to meet the reasonable and beneficial uses of all users, so the Court must allocate quantities for each party's present use. The Court therefore finds that there is substantial evidence that all allocations of groundwater in the Physical Solution herein and as stipulated by the parties will effectively protect the Basin for existing and future users.

The Court further finds that the native safe yield allocations amongst the parties in the Physical Solution make maximum reasonable and beneficial uses of the native safe yield under the unique facts of this Basin, as required by the California Constitution, Article X, section 2. The Court finds based on the credible testimony by water engineers Robert Beeby and Robert Wagner that the Landowner Parties' and Public Overliers' allocated amounts are reasonable and beneficial uses of water, and are significant reductions from their present and historical uses.

VII. SUPPORTING LANDOWNER PARTIES – TRIAL STIPULATIONS

On March 4, 2015, a large number of parties representing a majority of the total groundwater production in the Basin (the "Stipulating Parties") stipulated to the Proposed Judgment and Physical Solution, which was subsequently amended on March 25, 2015. Since March 25, 2015, a limited number of parties not signatory to, but supportive of, the Proposed Judgment and Physical Solution (a "Supporting Landowner Party" or collectively, "Supporting Landowner Parties") asserted claims to produce groundwater from the Basin and executed separate Trial Stipulations for Admission of Evidence by Non-Stipulating Parties and Waivers of Procedural and Legal Obligations to Claims by Stipulating Parties Pursuant to Paragraph 5.1.10 of the Judgment and Physical Solution ("Trial Stipulations") with the Stipulating Parties.

Under the Trial Stipulations, Supporting Landowner Parties agreed to reduce production of groundwater under Paragraph 5.1.10 of the Judgment and Physical Solution to the following amounts:

a. Desert Breeze MHP, LLC – 18.1 acre-feet per year;

b. Milana VII, LLC dba Rosamond Mobile Home Park – 21.7 acre-feet per year;

c. Reesdale Mutual Water Company – 23 acre-feet per year;

d. Juanita Eyherabide, Eyherabide Land Co., LLC and Eyherabide Sheep Company. – 12 acre-feet per year;

e. Clan Keith Real Estate Investments, LLC. dba Leisure Lake Mobile Estates – 64 acre-feet per year; and

f. White Fence Farms Mutual Water Co. No. 3 - 4 acre-feet per year.

g. LV Ritter Ranch, LLC - 0 acre-feet per year.

h. Robar Enterprises, Inc., Hi-Grade Materials Co., and CTR, a General Partnership – 200 acre-feet per year.

The Supporting Landowner Parties claim overlying rights to the Basin's groundwater. Each Supporting Landowner Party has proven its respective land ownership or other appropriate interest in the Basin, and its reasonable and beneficial use, and established its overlying right. (*Santa Maria, supra*, 211 Cal.App.4th at p. 298 citing *California Water Service, supra*, 224 Cal.App.2d at 725; *Tulare, supra*, 3 Cal.2d at p. 524.)

Here, the Court heard evidence from the Supporting Landowner Parties in the sixth phase of trial. Based on the credible and undisputed evidence presented by the Supporting Landowner

Parties, the Court finds that there is substantial and credible evidence that each Supporting Landowner Party has reasonably and beneficially used amounts of water. The Court finds that the Supporting Landowner Parties will be required to make severe reductions in their current and historical reasonable and beneficial water use under the Trial Stipulations and the Physical Solution. The Court further finds that there is substantial evidence that all allocations of groundwater in the Trial Stipulations and the Physical Solution will effectively protect the Basin for existing and future users.

Therefore, based on the evidence submitted by the Supporting Landowner Parties, the Court approves the Trial Stipulations executed by the Stipulating Parties and the Supporting Landowner Parties and finds that the production rights agreed to therein are for reasonable and beneficial uses.

VIII. SMALL PUMPER CLASS SETTLEMENT AGREEMENT IS APPROVED

The Small Pumper Class settlement agreement with the Public Water Suppliers which was previously approved conditionally by the Court is hereby approved. The Court finds that the agreement is fair, just, and beneficial to the Small Pumper Class members.

The Court finds the testimony by Mr. Thompson, the Court-appointed expert, to be credible and undisputed regarding Small Pumper Class water use. The Court finds that the average use of 1.2 AFY per parcel or household is reasonable, and is supported by Mr. Thompson's report and testimony. Given the variation in Class Member water use for reasonable and beneficial purposes, the same is true of individual Class Member use of up to 3 AFY. The Court finds reasonable all other provisions in the proposed Judgment and Physical Solution that impact or relate to the Small Pumper Class members rights or administration of those rights.

IX. CHARLES TAPIA, AS AN INDIVIDUAL AND AS TRUSTEE OF NELLIE TAPIA FAMILY TRUST

Charles Tapia, as an individual and as trustee of Nellie Tapia Family Trust (collectively, "Tapia Parties") failed to prove their groundwater use. The Court finds that the evidence and testimony presented by the Tapia Parties was not credible in any way and that the evidence presented by Tapia Parties was inherently contradictory. Consequently, the Court cannot make a

finding as to what amount of water was used on the Tapia Parties' land for reasonable and beneficial use. Therefore, the Tapia Parties have failed to establish rights to groundwater pumping based on the evidence and there is no statutory or equitable basis to give them an allocation of water under the physical solution. The Tapia Parties will be subject to the provisions of the Physical Solution.

X. WILLIS CLASS

The Willis Class members are property owners in the Basin who have never exercised their overlying rights. Because the Willis Class objected to the Physical Solution, it is entitled to have its rights tried as if there were no stipulated physical solution. (*Pasadena, supra*, 33 Cal.2d at p. 924 ["Since the stipulation made by the other parties as to the reduction in pumping by each is not binding upon appellant, it is necessary to determine appellant's rights in relation to the other producers in the same manner as if there had been no agreement."]; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1251-1252, 1256 (*Mojave.*)

In certain situations, as the Willis Class argues, unexercised overlying rights can be exercised at any time, regardless of whether there has been any previous use. The Willis Class concedes, however, the Court has authority to reasonably limit or burden the exercise of their overlying rights. .

Here, despite the Willis Class' settlement with the Public Water Suppliers limiting the impact of the prescriptive right, the Court finds multiple grounds to condition the unexercised overlying rights of the Willis Class. Because the landowners' reasonable and beneficial use pumping alone exceeded the native safe yield while public water supplier pumping was taking place, the unexercised overlying rights of the Willis Class are not entitled to an allocation in the Physical Solution. If that were not required under these circumstances in this Basin, the Court finds that the pumping here by Landowner Parties, Public Overliers and the Small Pumper Class would become legally meaningless because all unexercised overlying rights could eliminate long-established overlying production.

Furthermore, the Willis Class settlement and Notice of Proposed Willis Class Action Settlement and Settlement Hearing specifically state that the court will make a determination of

rights in the physical solution that will bind the Willis Class as part of the physical solution. (Notice of Proposed Settlement at § 9 ["The Court is required to independently determine the Basin's safe yield and other pertinent aspects of the Basin after hearing the relevant evidence, and the Settling Parties will be bound by the Court's findings in that regard. In addition, the Parties will be required to comply with the terms of any Physical Solution that may be imposed by the Court to protect the Basin, and the Court will not be bound by the Settling Parties' agreements in that regard."].)

As explained below concerning the Physical Solution herein, the Court finds that the Basin requires badly needed certainty through quantifying all pumping rights, including overlying rights. The Court finds that the Willis Class overlying rights cannot be quantified because they have no present reasonable beneficial use; their future groundwater needs are speculative; substantial evidence shows that the Basin's groundwater supply has been insufficient for decades; and unexercised overlying rights create an unacceptable measure of uncertainty and risk of harm to the public including Edwards Air Force Base, existing overlying pumpers and public water supplier appropriators. This uncertainty and risk unreasonably inhibits critically-needed, long-range planning and investment that is necessary to solve the overdraft conditions in this Basin.

The Court has heard evidence on all parties' water rights. The Court has considered these water rights in relation to the reasonable use doctrine in Article X, section 2 of the California Constitution. The Court finds that the unique aspects of this Basin explained below and its chronic overdraft conditions prevent the Willis Class from having unrestricted overlying rights to pump Basin groundwater.

The Court also finds an alternative basis for conditioning the Willis Class unexercised overlying rights in Article X, section 2 of the California Constitution. The Court finds that because of the circumstances existing in the Basin it would be unreasonable under the Constitution to allow unexercised overlying rights holders to pump without the conditions imposed by the Physical Solution. The Legislature has now recognized that unexercised overlying rights holders may have conditions imposed upon them by a physical solution. (Assemb. Bill 1390, 2014-2015 Reg. Sess., ch.672, Code of Civil Procedure section 830, subdivision (b)(7),

http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1351-1400/ab_1390_bill_20151009_chaptered.pdf" http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1351-1400/ab_1390_bill_20151009_chaptered.pdf.)

Here, the Court must impose a physical solution that limits groundwater pumping to the safe yield, protects the Basin long-term, and is fair and equitable to all parties. The Court's Physical Solution meets these requirements. It severely reduces groundwater pumping, provides management structure that will protect the Basin, balances the long-term groundwater supply and demand, and limits future pumping by management rules that are fair, equitable, necessary and equally applied to all overlying landowners.

The Court also notes that the Willis Class does not presently pump any groundwater and thus, has no present reasonable and beneficial use of water. The Court finds it would be unreasonable to require present users to further reduce their already severely reduced water use to reserve a supply of water for non-users' speculative future use. Here, quantification of overlying rights is necessary because there is a present need to allocate the native supply. Accordingly, the Landowner Parties, Public Overliers and Small Pumper Class are entitled to continue their significantly reduced production of the native or natural safe yield as set forth in the Physical Solution. (*Santa Maria, supra*, 211 Cal.App.4th at p. 300.)

The Court finds that without reasonable conditions upon the exercise of an overlying right in this overdrafted Basin, the Willis Class members' unrestricted right to exercise of the overlying right during shortage conditions would make it impossible to manage and resolve the overdraft conditions under the unique facts of this Basin and "[t]he law never requires impossibilities." (Civ. Code, § 3531.) The Court therefore finds that the Willis Class members have an overlying right that is to be exercised in accordance with the Physical Solution herein.

XI. PARTIES WHO FAILED TO APPEAR AT TRIAL

Parties who failed to appear at trial failed to meet their burden to produce evidence of ownership, reasonable and beneficial use, and self-help. The Court finds that the Public Water Suppliers have established their prescriptive rights claims as against these parties. They are

bound by the Physical Solution and their overlying rights are subject to the prescriptive rights of the Public Water Suppliers.

XII. PHYSICAL SOLUTION

A. Legal Standard

"'Physical solution' is defined as an 'equitable remedy designed to alleviate overdrafts and the consequential depletion of water resources in a particular area, consistent with the constitutional mandate to prevent waste and unreasonable water use and to maximize the beneficial use of the state's limited resource.'" (*Santa Maria, supra*, 211 Cal.App.4th at pp. 287-288 quoting *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480.) A court may use a physical solution to alleviate an overdraft situation. (*Ibid.*)

"'[I]f a physical solution be ascertainable, the court has the power to make and should make reasonable regulations for the use of the water by the respective parties, provided they be adequate to protect the one having the paramount right in the substantial enjoyment thereof and to prevent its ultimate destruction, and in this connection the court has the power to and should reserve unto itself the right to change and modify its orders and decree as occasion may demand, either on its own motion or on motion of any party." (*Santa Maria, supra*, 211 Cal.App.4th at p. 288 quoting *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383–384 (*Peabody.*)) The California Supreme Court has encouraged the trial courts "to be creative in devising physical solutions to complex water problems to ensure a fair result consistent with the constitution's reasonable-use mandate." (*Santa Maria, supra,* 211 Cal.App.4th at p. 288 citing *Tulare, supra*, 3 Cal.2d at 574.)

"'So long as there is an 'actual controversy,' the trial court has the power to enter a judgment declaring the rights of the parties (Code Civ. Proc., § 1060) and to impose a physical solution where appropriate (*City of Lodi v. East Bay Mun. Dist.* (1936) 7 Cal.2d 316, 341 ("*Lodi*")). 'Each case must turn on its own facts, and the power of the court extends to working out a fair and just solution, if one can be worked out, of those facts.' (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560–561 ("*Vail*").) . . . .[T]he court not only has the power but the duty to fashion a solution to insure the reasonable and beneficial use of the state's water resources as required by article X, section 2. (*Lodi, supra*, at 341.) The only restriction is that, absent the

party's consent, a physical solution may not adversely affect that party's existing water rights. (Cf. *Mojave, supra*, 23 Cal.4th at pp. 1243–1244, 1250–1251.) (*Santa Maria, supra*, 211 Cal.App.4th at p. 288.) Pursuant to this duty a trial court is obliged to consider a physical solution "when it can be done without substantial damage to the existing rights of others." (*Peabody, supra,* 2 Cal.2d at p. 373.)

A trial court has broad authority to use its equitable powers to fashion a physical solution. (*Mojave, supra,* 23 Cal.4th at p. 1249; *Santa Maria, supra*, 211 Cal.App.4th at p. 288 ["Each case must turn on its own facts, and the power of the court extends to working out a fair and just solution"] [quoting *Vail, supra*, 11 Cal.2d at pp 560-61].) The physical solution, however, must carry out the mandates of Article X, Section 2 of the California Constitution, including the mandate that the state's water resources be put to "beneficial use to *the fullest extent of which they are capable*." (*Lodi, supra,* 7 Cal.2d at p. 340 [emphasis added] quoting Cal.Const., art. XIV, § 3.) In addition, while a physical solution may permit the modification of existing water uses practices, it may not allow waste. (*Pasadena, supra,* 33 Cal.2d at pp. 948-949 [Physical solution should "avoid [] waste, ... at the same time not unreasonably and adversely affect the prior appropriator's vested property right."] [emphasis added in original]; *Lodi, supra*, 7 Cal.2d at 341 ["Although the prior appropriator may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators, it cannot be compelled to make major changes or to incur substantial expense."] citing *Peabody, supra,* 2 Cal.2d at p. 376.)

Here, the Court finds that because the Basin is and has been so severely overdrafted and contains so much undeveloped land that existing pumping must be limited and constraints on new pumping are required in the Physical Solution to protect the Basin, Edwards AFB and the public at large. Accordingly, the Court finds that water allocations and reasonable conditions on new pumping are required in the Physical Solution.

Factors that weigh into the reasonableness of water allocations in a physical solution include actual use (*Tulare, supra*, 3 Cal.2d at 565), whether use has been reasonable and

beneficial (*id.* at 526); and the effect of the use on the basin and overall water supply. (*Lodi, supra*, 7 Cal.2d at pp. 344-345.)

B. A Physical Solution Is Required Now

The Court finds that a physical solution with an allocation of water rights is required now. The Basin has been in a state of overdraft since at least 1951. (Statement of Decision Phase Three Trial, pp. 5:17-6:28 ("Phase 3 Decision"); Partial Statement of Decision for Trial Related to Phelan Piñon Hills Community Services District (2nd and 6th Causes of Action), p. 4, fn. 1.) In the phase three trial, the Court determined that the Basin has a safe yield of 110,000 AFY, consisting of a native safe yield of 82,300 AFY and return flows. (Phase 3 Decision at 9:27-28; see also Supplemental Request for Judicial Notice, posted on the Court's website on January 24, 2014 ("Supplemental RJN"), Ex. II, at 30:8-31:4.). The Court finds that groundwater production has exceeded this native and total safe yield and continues to exceed this safe yield causing harm to the Basin. (Phase 3 Decision at 6:18-27, 7:24-26.)

C. The Physical Solution Is Unique Because Each Basin Is Unique

The Court finds that there are facts which necessarily make the Physical Solution here unique and different from any other groundwater basin's physical solution.

The Basin encompasses more than 1,000 square miles of desert land. It is one of the driest locations in California. The Basin is mostly recharged by nearby mountain front runoff as well as lesser amounts of recharge from use of State Water Project water. While drought conditions impact California, they are particularly harmful to the Basin because it has limited surface stream supplies, and no coastal desalination facilities or other significant natural sources of supply (except for mountain front recharge).

The largest landowner is the United States which operates Edwards Air Force Base ("Edwards AFB") and other facilities in the Antelope Valley such as the "Plant 42" site. The federal facilities including Edwards AFB provide strategic national defense and aerospace capabilities and are critical to the local economy including the cities of Palmdale and Lancaster. Testimony by the United States establishes that Edwards AFB is unique amongst the federal

military bases because it has and continues to conduct test flights and aerospace operations that cannot be conducted elsewhere.

Due to its location within the Basin, Edwards AFB has been and continues to be particularly prone to chronic lowering of local groundwater levels and land subsidence which is caused by groundwater pumping throughout the Basin. The Court received substantial evidence concerning the land subsidence in and around Edwards AFB.

The Court finds that there must be a physical solution which stops the overdraft conditions in and around Edwards AFB and that protects it from the future exercise of overlying rights that would exacerbate the existing overdraft or cause it anew. The Court finds that parties cannot continue to exercise their overlying rights in an unregulated manner because that will continue to harm the Basin and, in particular, Edwards AFB. The Court finds that the Physical Solution here allows for the reasonable exercise of overlying rights by all parties in a manner that will protect the operations at Edwards AFB and the rest of the Basin for all parties.

The Court finds that the current cost of supplemental State Water Project water from AVEK is approximately $310 per acre foot – even in today's severe drought conditions. The Court finds that the cost of supplemental State Water Project water is approximately $26 a month (i.e., $310 to $312 AFY) that the cost for an acre foot of water is less than what most Californians would pay for their household water needs. The Court finds that it is fair, reasonable and beneficial for the Willis Class members to pay for the cost of replacement water from AVEK if a Class member should decide to exercise its overlying right by installing a groundwater well and using its water for reasonable and beneficial uses. The Court further finds that the Physical Solution provides that the Water Master has discretion to allow a Willis Class member to pump groundwater without having to pay any replacement assessment in certain circumstances.

D. <u>The Court Uses Its Independent Judgment To Adopt The Physical Solution</u>

A large number of parties representing a majority of the total groundwater production in the Basin ("Stipulating Parties") have stipulated to the Physical Solution. The Court, however, uses its own independent judgment and discretion to approve the Physical Solution here; the

Court adopts the Physical Solution as its own physical solution for the Basin after it determined and considered the parties' respective groundwater rights.

E. All Parties Are Bound By The Physical Solution

The Willis Class challenges the Physical Solution's allocation of native safe yield to those who exercise and have exercised their overlying rights. All present and historical users of the Basin's overdrafted groundwater supply have a legally protected interest in the native yield after their sustaining severe restrictions that will be imposed by the Physical Solution to decades-long water shortage conditions. The Willis Class interest in the long term health of the Basin is the same as every other overlying user of groundwater; there is no conflict between the Willis Class and the other parties in the Physical Solution. And the Court's continuing jurisdiction protects the Willis Class from the possibility that a future exercise of the overlying right by any party could adversely affect them.

The Willis Class asks to not be bound by the Physical Solution. The Willis Class argues that they cannot be bound by provisions they did not agree to, but the Court finds otherwise. "'[I]t should be kept in mind that the equity court is not bound or limited by the suggestions or offers made by the parties to this, or any similar, action.' The court 'undoubtedly has the power regardless of whether the parties have suggested the particular physical solution or not, to make its injunctive order subject to conditions which it may suggest . . . .'" (*Santa Maria, supra*, 211 Cal.App.4th at p. 290 quoting *Tulare, supra*, 3 Cal.2d at 574.) The Court finds that to protect the Basin it is necessary that all parties participate and be bound by the groundwater management provisions of the Physical Solution.

F. The Physical Solution Protects the Basin by Preventing Future Overdraft

The Physical Solution will protect all water rights in the Basin by preventing future overdraft, improving the Basin's overall groundwater levels, and preventing the risk of new land subsidence. (See *Lodi, supra*, 7 Cal.2d at 344-45.) Dr. Williams testified that pumping at existing levels will continue to degrade and cause undesirable results in the Basin, but that the Physical Solution will bring the Basin into balance and stop undesirable results including land

subsidence. The ramp-down of groundwater production set forth in the Physical Solution will bring pumping in the Basin within its safe yield.

Furthermore, the Physical Solution is likely to lead to additional importation of water into the Basin and thus additional return flows which will help to restore groundwater levels in the Basin in two ways. First, if existing groundwater users exceed their respective allocations, they will pay a replacement assessment that will be used to bring additional imported water into the Basin. Second, because allocations are capped at the total yield of the Basin, new production, whether by existing pumpers or new pumpers will result in importation of additional supplemental water into the Basin. Finally, the Physical Solution allows parties to store water in the Basin which will improve water levels. The Court further finds that the carryover and transfer provisions in the Judgment and Physical Solution are reasonable and beneficial, and are essential in the management of the Basin.

Dr. Williams testified as to what will happen to groundwater levels if current pumping levels continue without a physical solution, compared to scenarios in which parties pump in accordance with the Physical Solution. His testimony showed that water level decline and subsidence risk will decrease under the Physical Solution. In the absence of a physical solution, he testified, subsidence will continue to be a problem. This credible and undisputed testimony demonstrates that management by the Physical Solution is necessary to sustain groundwater levels and protect future use of entitlements in the Basin.

The Court finds that the Basin's safe yield, together with available supplemental supplies, are sufficient to meet current water demands. This confirms further that the Physical Solution will work for this Basin

G. <u>The Physical Solution Reasonably Treats All Overlying Rights</u>

The Court finds that each party is treated reasonably by the Physical Solution; the priority of rights in the Basin is preserved; no vested rights are eliminated; and allocations are reasonably tied to reasonable and beneficial use and the health of the Basin. (See *Lodi, supra*, 7 Cal.2d at 341; *Mojave, supra*, 23 Cal.4th at p. 1250; *Pasadena, supra*, 33 Cal.2d at pp. 948-949.)

1) Federal Reserved Rights

The United States has a right to produce 7,600 AFY from the native safe yield as a federal reserved water right for use for military purposes at Edwards Air Force Base and Air Force Plant 42. (See *United States v. New Mexico, supra,* 438 U.S. at p. 700; *Cappaert v. United States, supra,* 426 U.S. at p. 138.) The Physical Solution preserves the United States' right to produce 7,600 AFY at any time for uses consistent with the federal reserved water right, and shields the United States' water right from the ramp down and pro-rata reduction due to overdraft. (Physical Solution, ¶5.1.4.) When the United States does not take its allocation, the Physical Solution provides for certain parties who have cut back their present water use to use that water consistent with the Constitutional mandate of Article X, Section 2 to put the water to its fullest use..

2) Small Pumper Class

Small Pumper Class members are allocated up to and including 3 AFY per existing household for reasonable and beneficial use on their overlying land, with the known Small Pumper Class members' aggregate use of native supply limited to 3,806.4 AFY. A Small Pumper Class member taking more than 3 AFY is subject to a replacement water assessment. (Physical Solution, ¶5.1.3.) The Court has already admitted evidence regarding the Small Pumper Class' use of water by the Court-appointed expert, Tim Thompson.

3) Overlying Landowner Parties and Public Overliers

The Physical Solution allocates approximately 82 percent of the adjusted native safe yield to the Landowner Parties and Public Overliers. (Physical Solution section 5.1.5, Ex. 4.) The allocation is fair and reasonable in light of their historical and existing reasonable and beneficial uses, and the significant and material reductions thereto required by the Physical Solution.

4) Unknown Existing Pumpers

The Physical Solution provides for the allocation of groundwater to unknown *existing* pumpers that prove their respective entitlement to water rights in the future. (Physical Solution, ¶¶5.1.10, 18.5.13.) Such allocations will not result in continuing overdraft, as the Physical Solution provides for the Water Master to adjust allocations or take other action necessary to prevent overdraft. (*Id.* at ¶18.5.13.2.) The Court finds that the Physical Solution approved herein

provides sufficient flexibility to the Court and the Water Master so that the Physical Solution is implemented fairly and reasonably as to any unknown existing users.

5) Return Flows From Imported Water

Return flow rights exist with respect to foreign water brought into the Basin, the use of which augments the Basin's groundwater. (*City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-78; *San Fernando*, *supra*, 14 Cal.3d at pp. 257-259, 262-263; *Santa Maria*, *supra*, 211 Cal.App.4th at p. 301.) Return flows are calculated by multiplying the quantity of water imported and used in the Basin by a percentage representing the portion of that water that is expected to augment the aquifer. (*Ibid.*) Paragraph 18.5.11 provides the Water Master with flexibility to adjust the return flow percentages in the seventeenth year. The Court finds that the right to return flows from imported State Water Project water is properly allocated as set forth in paragraph 5.2 and Exhibit 8 of the Judgment and Physical Solution.

6) Phelan

The Physical Solution permits Phelan to pump up to 1,200 AFY from the Basin and deliver the pumped water outside of the Basin for use in the Phelan service area if that amount of water is available without causing material injury and provided that Phelan pays a replacement water assessment. (Physical Solution, ¶6.4.1.2.) This allocation and the correlating assessment are fair and reasonable in light of findings made by the Court.

7) Defaulted Parties and Parties That Did Not Appear At Trial

Defaulting parties and parties who did not appear at trial failed to meet their burden to produce evidence of ownership, reasonable and beneficial use, and self-help. They are bound by the Physical Solution and their overlying rights, if any, are subject to the prescriptive rights of the Public Water Suppliers.

~~8) Robar Enterprises, Inc., Hi-Grade Materials Co., CJR, a general partnership.~~

~~The Court has severed Robar Enterprises, Inc., Hi-Grade Materials Co., CJR, a general partnership (collectively, "Robar") from the trial and retains jurisdiction over Robar's~~ groundwater rights claim.

H. The Physical Solution Is Consistent With the Willis Class Settlement Agreement

The Public Water Suppliers entered into a Stipulation of Settlement with the Willis Class ("Willis Class Stipulation" or "Stipulation") which was approved by the Court on September 22, 2011. As the Court has already recognized, the Stipulation—which was only between the Willis Class and the Public Water Suppliers—did not and cannot establish a water rights determination binding upon all parties in these proceedings. (Order after November 18, 2010 Hearing ["the court determination of physical solution cannot be limited by the [Stipulation]"; the Stipulation "may not affect parties who are not parties to the [Stipulation]"].) Rather, water rights must be determined by the Court as part of a comprehensive physical solution to the Basin's chronic overdraft condition. Indeed, the Willis Class acknowledged in the Stipulation that the ultimate determination of its reasonable correlative right would depend upon the existing and historical pumping of all other overlying landowners in the Basin. (Stipulation, ¶IV.D.3.) While the Stipulation recognized that the Willis Class members may receive whatever is later to be determined by the Court as their reasonable correlative right to the Basin's native safe yield for actual reasonable and beneficial uses, it could do nothing more. Nothing in the Decision, Judgment, or Physical Solution, alters the agreed-upon allocations between the Public Water Suppliers and the Willis Class. That relationship has no impact on the Court's duty to impose a Physical Solution that protects the Basin.

The Court finds that the Physical Solution is consistent with the Willis Class Stipulation for at least the following reasons:

1) The Willis Class Stipulation recognizes that there would be Court-imposed limits on the Willis Class' correlative share of overlying rights because the Basin is and has been in an overdraft condition for decades;

2) No member of the Willis Class has established any present right to produce groundwater for reasonable and beneficial use based on their unexercised overlying claim; and

3) The Physical Solution recognizes the Willis Class' share of correlative overlying rights and does not unreasonably burden its members' rights given the significant reductions in groundwater pumping and increased expense incurred by the Stipulating Parties in the Physical Solution. At

this time, more than the entire native safe yield is being applied to reasonable and beneficial uses.

In the Willis Class Stipulation, the Willis Class also agreed that a Court-imposed physical solution may require the installation of a meter on any groundwater pump by a Willis Class member (Willis Class Stipulation at ¶V.B. at 11:28-12:7) and that Willis Class member production from the Basin above its allocated share in a physical solution would require the member to import replacement water or pay a replacement assessment (*Id.* at ¶IV.D. at 12:19-26). The requirements set forth in Paragraphs 9.2 and 9.2.1 of the Physical Solution are thus consistent with the Willis Class Stipulation.

I. <u>The Physical Solution Does Not Unreasonably Affect the Willis Class</u>

As overlying landowners in an overdrafted basin, the members of the Willis Class are entitled to a fair and just proportion of the water available to overlying landowners, i.e., a correlative right. (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 136; see also Willis Class Stipulation, ¶III.D at 5:26-6:2.) The Willis Class members, however, have never exercised their rights to produce groundwater from the Basin. Recognizing this fact, the Physical Solution does not provide for an allocation to the Willis Class, but preserves their ability to pump groundwater in the future. This right cannot be unrestricted, however, due to the unique aspects of this Basin, its long-standing overdraft conditions, and the significant reductions in groundwater use by parties who have relied and continue to rely upon the Basin for a sustainable groundwater supply.

Here, the Court must fashion a physical solution that limits groundwater pumping to the safe yield, protects the Basin long-term, and is fair and equitable to all parties. Willis Class members will have the opportunity to prove a claim of right to the Court (Physical Solution, ¶5.1.10) or, like all other pumpers in the Basin, apply to the Water Master for new groundwater production. (¶18.5.13). Thus, the Willis Class' correlative rights are more than fairly protected by the Physical Solution.

As discussed above, to the extent the Court finds that a replacement water assessment is necessary the Court finds it is reasonable. Significantly, the assessment is consistent with the Willis Class Stipulation in which the Willis Class agreed to pay a replacement assessment if a

member produced "more than its annual share" of the native safe yield less the amount of the federal reserved right. In addition, the replacement assessment is imposed uniformly on all existing producers in the Basin that produce more than their available allocation in any given year. (Physical Solution, ¶9.2.)

In today's unprecedented drought conditions with the cost of water rising, a replacement assessment for an acre foot of water would be approximately $310. Assuming an acre foot of water is sufficient for domestic use in the Antelope Valley as testified by the court-appointed expert, Tim Thompson, the average monthly cost for a Willis Class member would be a mere $26 – a monthly amount less than what most Californians are likely paying for that amount of water. The Court finds that the replacement assessment is not an unreasonable burden upon any Willis Class member who may someday install a well for domestic use.

But even the small amount of replacement assessment cost can be avoided under the Physical Solution if the Water master determines that the particular Willis Class member's domestic use will not harm the Basin or other groundwater users. There is no reasonable basis for any argument that a replacement assessment somehow unreasonably burdens or significantly harms a Willis Class member who might have to pay a relatively small amount for a relatively large amount of water.

J. <u>The Willis Class' Due Process Rights Are Not Violated</u>

The Court finds that the Physical Solution does not "extinguish" the water rights of the Willis Class, as the Willis Class claims. Rather, the Physical Solution allows Willis Class members—who have never put their overlying rights to reasonable and beneficial use - to prove their entitlement to a Production Right to the Court or apply as a new pumper to the Water master. (Physical Solution, ¶¶5.1.10 & 18.5.13.) The Willis Class had notice and an opportunity to present evidence on this and all other issues determined by the Court.

The Court finds that the Willis Class received adequate notice that the Court would adopt a physical solution that could restrict or place conditions on the Willis Class members' ability to pump groundwater. Due process protects parties from "arbitrary adjudicative procedures." (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1070.)

No such risk exists here because the Court-approved notice to the Willis Class, put them on notice that they would be subject to a physical solution yet to be approved by the Court. The notice stated that the Willis Class members "will be bound by the terms of any later findings made by the Court and any Physical Solution imposed by the Court" and "it is likely that there will be limits imposed on the amount of pumping in the near future." (Notice of Proposed Settlement at §§ 9 & 17.)

The Willis Class has actively participated in these proceedings since January 11, 2007, knows that the other Landowner Parties and Public Overliers claim a correlative share of the Basin's native safe yield, and agreed in the Willis Class Stipulation that they would be subject to the Court's future jurisdiction and judgment and be bound by a physical solution.

XIII. CONCLUSION

The Court finds that the Physical Solution is required and appropriate under the unique facts of the Basin. The Physical Solution resolves all groundwater issues in the Basin and provides for a sustainable groundwater supply for all parties now and in the future. The Physical Solution addresses all parties' rights to produce and store groundwater in the Basin while furthering the mandates of the State Constitution and the water policy of the State of California. The Court finds that the Physical Solution is reasonable, fair and beneficial as to all parties, and serves the public interest.

Dated: December 23, 2015

JUDGE OF THE SUPERIOR COURT

26345.00000\23141316.3

BANKS & WATSON
CASE NAME: **ANTELOPE VALLEY GROUNDWATER CASES**
COURT: **Santa Clara County Superior Court**
CASE NO: **CGC-13-533134 (JCCP No. 4408)**

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

At the time of service, I was over 18 years of age and not a party to this action. My business address is 901 F Street, Suite 200, Sacramento, California 95814. My electronic address is jyoshida@bw-firm.com.

On August 17, 2016, I served the within copy of:

DECLARATION OF LELAND P. McELHANEY IN SUPPORT OF MOTION TO DISQUALIFY BEST BEST & KRIEGER AS LEGAL COUNSEL IN ANTELOPE VALLEY GROUNDWATER CASES

on the interested parties in this action served in the following manner:

(✓) **BY ELECTRONIC FILING** – I caused the document(s) listed above to be transmitted *via* Odyssey File & Serve to all parties appearing on the electronic services list for the Antelope Valley Groundwater matter; proof of electronic filing through Odyssey File & Serve is then printed and maintained in our office. Electronic service is complete at the time of transmission.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 17, 2016, at Sacramento, California.

Janna Yoshida