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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**

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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

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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

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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.

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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.

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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

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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.)

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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.

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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].)

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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"].)

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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

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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*.

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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

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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,

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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.

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

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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.

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> 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*:

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> 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. The Proposed Physical Solution Protects the Basin by Preventing Future Overdraft

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.

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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.

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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

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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

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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

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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.

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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

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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.

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> 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

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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

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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.

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Dated: September 22, 2015

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By _____
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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

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