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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

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

Plaintiffs,

v.

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

Defendants.

RELATED CASE TO JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

REPLY MEMORANDUM IN SUPPORT OF WILLIS CLASS' MOTION FOR COURT-APPOINTED EXPERT OR, IN THE ALTERNATIVE, FOR MOTION TO DECERTIFY

Date: March 26, 2015
Time: 10:00 am
Place:

Superior Court of California
County of Los Angeles
111 North Hill Street, Room 222
Los Angeles, Ca 90012

Judge: Hon. Judge Komar

The Opposition brief filed by the Public Water Suppliers fails to refute the compelling need for a Court-appointed expert to independently address the many factual issues facing the Willis Class. The Stipulation for Judgment and Physical Solution ("SPPS") filed by the Stipulating Parties on March 4, 2015, purports to bind and would prejudice the rights of the Willis Class Members. Willis Class Counsel must oppose the SPPS to protect the vested rights of the Willis Class. As set forth in detail in the moving papers, Class Counsel cannot adequately oppose the SPPS without a Court-appointed expert.

As one example, the SPPS imposes requirements on Willis Class Members to apply for a permit to pump groundwater that are unduly restrictive, onerous, and expensive and can effectively result in a forfeiture of the right to pump groundwater. This is not a legal issue that the Court can resolve as a matter of law. Rather, a Court-appointed expert must analyze the propriety and cost of the SPPS' requirement that Willis Class Members obtain a CEQA report, an economic impact report, and an engineering study (to name a few of the requirements) and then pay the entire cost for the Watermaster Engineer's and Watermaster's review of those application reports, all with no guarantee that the Willis Class Members' application to pump groundwater will be approved. In many cases, it appears to Willis Class Counsel that the application cost for pumping groundwater will be greater than the purchase price for the Willis Class Member's parcel of land. But Class Counsel's lay opinion cannot substitute for necessary expert opinion on this topic and many others.

Further, the Willis Class must oppose the permanent allocations in the SPPS because, under the SPPS, all of the NSY has been allocated to the Stipulating Parties, with no allocation of any portion of the NSY for the 65,000-Member Willis Class in the future. The Willis Class cannot contest or oppose the prove-ups of the Stipulating Parties, nor submit evidence of the amount of groundwater needed for the Willis Class in the future without the assistance of a Court-

appointed expert. Thus, contrary to the PWS' assertions, there are significant factual issues involved in the upcoming physical solution proceedings relating to the rights of the Willis Class that will require a Court-appointed expert to address. The notion that the Stipulating Parties will present expert testimony during the physical solution proceedings, but the Willis Class' rights can be determined as a "matter of law" is frankly absurd.

In addition, the PWS assert that the proposed physical solution they submitted to the Court is the only physical solution that the Court is permitted to evaluate and consider and the Stipulating Parties' experts are the only ones permitted to testify during the upcoming physical solution proceedings. That assertion is contrary to the California Supreme Court's ruling in *City of Lodi* and contrary to this Court's ruling at the January 22, 2015 Hearing:

> So just because a group of people, parties to a lawsuit think that a particular physical solution is the appropriate one does not necessarily mean that the Court is going to be bound to adopt that. There's got to be an **independent evaluation** . . . and parties have to have an opportunity to weigh in. **Due process would require that. The Court does have an interest in protecting the class members in both classes.**

Hearing Transcript dated January 22, 2015 at 42:26 to 43:5 (emphasis supplied), attached as Exhibit A.

Not surprisingly, the PWS utterly failed to refute the rulings of this Court and the prior admissions of parties such as the United States and the Wood Class that an **independent expert** is needed to evaluate the groundwater rights of the class members. This is true not only in connection with the physical solution proposed by the Stipulating Parties, but also with respect to the four alternative proposed physical solutions ("APPS") submitted by the Willis Class. *See* APPS filed 3/13/15. The PWS' attempt to bully the Willis Class and pressure this Court into accepting the SPPS "as is, or else" by listing 140 signatory parties and by including a provision in the SPPS that the **entire** SPPS must be adopted by this Court or it will be entirely void is both unconscionable and directly in conflict with controlling California law.

Lastly, a reasonable and beneficial use determination of water is required as to **all** parties. The PWS made this same point in connection with the prior Wood Class Settlement: "… an evidentiary hearing on the Wood Class's groundwater pumping and reasonable and beneficial use of that water is required as to all parties. As water rights are correlative, the Court cannot adjudicate groundwater rights of any of the water suppliers without determining the Wood Class water rights as against all parties. (*Orange County Water Dist. v. Colton* (1964) 226 Cal.App.2d 642, 647 ["Since, under the law, all overlying rights are correlative, in order to make a complete determination every parcel from which the right was purported to have been granted would have to be analyzed to determine its beneficial requirement of water in comparison with all other overlying parcels. ."]. As the court-appointed expert's testimony or report is necessary to determine the Settling Defendants' water rights . . .

See Exhibit M, attached to Willis Class' Motion for Court-Appointed Expert.

The Court Must Admit Evidence Relating to Alternative Physical Solutions in Addition to Objections to the SPPS; Both Types of Evidence Require Expert Opinion That Will Not Be Offered By an Existing Expert in the Adjudication

The California Supreme Court has ruled that the trial court **must** admit evidence regarding possible physical solutions even where, as here, certain parties object or attempt to prevent the trial court from considering alternative physical solutions:

> Other suggestions as to possible physical solutions were made during the trial. The trial court apparently took the view that none of them could be enforced by it unless the interested parties both agreed thereto. That is not the law. Since the adoption of the 1928 constitutional amendment, it is not only within the power, but **it is also the duty of the trial court to admit evidence relating to possible physical solutions**, and if none is satisfactory to it to suggest on its own motion such physical solution. (Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., [3 Cal.2d 489, 574 (1935)].) The court possesses the power to enforce such solution regardless of whether the parties agree.

City of Lodi v. E. Bay Mun. Util. Dist., 7 Cal.2d 316, 341 (1936) (emphasis supplied).

Thus, under California law, it is of no consequence that the Stipulating Parties have shamelessly attempted to force this Court to accept the SPPS "as is . . .or else" when they stated in the SPPS that: "If the Court does not approve the Judgment as presented . . . then this Stipulation is void ab initio . . .". *See*, Stipulation for Entry of Judgment and Physical Solution, ¶ 4. Despite the statement in the SPPS, this Court has the power to suggest or even impose alternative physical solutions, if necessary, or to accept alternative physical solutions presented by non-stipulating parties to ensure that all parties' rights to groundwater are properly incorporated into the Physical Solution ultimately adopted by the Court.

After *Lodi*, the California Supreme Court in *City of Barstow v. Mojave* provided more specific guidance to trial courts for adopting alternative physical solutions:

> **First**, the doctrine of correlative rights is the governing rule for overlying uses of groundwater. (*City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1241 (2000)). This means, "in disputes among overlying landowners, all have equal rights. If the supply of water is insufficient for all needs, each user is entitled to a fair share and just proportion of the water." (Arthur L. Littleworth & Eric L. Garner, California Water II 75 (2nd ed. 2007)). **Second, there are no senior overlying users who gain priority by being the first to pump groundwater.** (*Tehachapi-Cummings Cnty. Water Dist. v. Armstrong*, 49 Cal.App.3d 992, 1001 (1975)). **Third**, the substantial enjoyment of a prior right must be protected. (*Peabody v. City of Vallejo*, 2 Cal.2d 351, 383-4 (1935)). **Fourth**, the physical solution may not change priorities or eliminate vested rights without first considering them in relation to the reasonable use doctrine. "Although it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution's general purpose cannot simply ignore the priority rights of the parties asserting them. **In ordering a physical solution, therefore, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine.**" (*City of Barstow*, 23 Cal.4th at 1250). **Fifth**, any physical solution must be fair to all parties who have vested overlying water rights. (*Id.*) **Sixth**, the physical solution may not unreasonably burden a party. (*Id.*)

City of Barstow v. Mojave Water Agency, 23 Cal.4th 1224 (2000) (emphasis supplied). It is undeniable that the requirements mandated by the California Supreme Court for achieving a legally viable physical solution are **highly fact-intensive.** Adjudicating a physical solution that is

fair to **all** of the parties will require a Court-appointed expert to address issues relating to the Willis Class, not just expert testimony from the Stipulating Parties.

This Court may ultimately adopt a Physical Solution with permanent allocations of groundwater, or a Physical Solution based on one of the alternative physical solutions submitted by the Willis Class, or a Physical Solution of its own (perhaps a combination of the best elements from each proposal). Regardless, it would be patently unfair and unjust to deny the Willis Class' request to have its 64,999 absent class members and this Court gain the benefit of expert advice regarding the SPPS and APPS and how the Willis Class' correlative rights can be incorporated into the Physical Solution. Neither this Court nor Class Counsel has the expertise to address the complexities involved in addressing the reasonable and beneficial uses of current pumpers and the future needs of 65,000 Willis Class Members who have undisputed correlative rights in the 82,300 NSY. The fact that incorporating the rights of the Willis Class into a physical solution will be complex and difficult does not provide a basis for this Court to ignore or eliminate the Willis Class' vested rights. *See City of Barstow* at 1250. As established in the Willis Class' Motion for a Court-Appointed Expert and unrefuted by the PWS, those complexities and difficulties require expert analysis.

Significantly, the PWS failed to object to the stellar qualifications of Dr. Sunding as a proposed Court-appointed expert on Willis Class issues as outlined in his Scope of Work Proposal. *See* Exhibit I to Willis Class' Motion for Court-Appointed Expert. Dr. Sunding is eminently qualified to provide expert advice to the Court and to Willis Class Counsel.[1] The PWS mistakenly argue that the Willis Class requested that Dr. Sunding be appointed directly to the Willis Class as its expert. This is simply not true. The Willis Class has requested that an expert be appointed by the Court pursuant to Evidence Code Section 730 **in the same manner** that the

[1] The Willis Class acknowledges the Court's absolute right to appoint an expert of its own choosing even though the PWS did not file any specific objections to the appointment of Dr. Sunding by the Court.

Court appointed an expert to address the groundwater needs of the 3700-member Wood Class. The 65,000-member Willis Class would use the same mechanisms for communications with the expert that were established for the Wood Class. Like Dr. Thompson's expert work, Dr. Sunding's expert work would be shared with the PWS and a landowner representative and, of course, the Court. In fact, like Dr. Thompson's work, all parties would have access to Dr. Sunding's expert work on this case.

Finally, the PWS argue that because no Stipulating Party believes an expert is needed to address the Willis Class' groundwater rights, the Court should not appoint one. This argument is absurd. Parties to a groundwater adjudication that get together and divvy up **all of the NSY amongst themselves** and leave none for the Willis Class are not going to turn around and suddenly advocate for the rights of the Willis Class. Just like the Wood Class, the Willis Class has the right to obtain Court-appointed expert advice for the highly technical physical solution proceedings, especially when all of the Stipulating Parties will have their rights presented to the Court with the aid of experts. The Court-appointed expert's testimony will be absolutely critical to the Willis Class' ability to oppose the SPPS and to present its own testimony regarding the Willis Class' groundwater needs either in the context of a permanent allocation or, more preferably, in the context of one of the alternative physical solutions presented to the Court by the Willis Class in the APPS.

IF THE COURT DOES NOT APPOINT AN EXPERT FOR THE WILLIS CLASS, THEN THE WILLIS CLASS MUST BE DECERTIFIED

The PWS does not dispute that the Court has the ability to decertify a class post-judgment. Rather, the PWS' sole argument against decertifying the Willis Class in the event an expert is not appointed for the Willis Class is that there are no "changed circumstances" to warrant decertification. That argument is demonstrably false. The PWS' decisions to enter into a binding

settlement with the Willis Class which recognizes the Class' overlying correlative groundwater rights and **then to renege on and breach that binding settlement** to subordinate those rights to the alleged rights of the Stipulating Parties **are changed circumstances** that warrant decertification of the Willis Class if a Court-appointed expert is not retained by the Court to address issues relating to the Willis Class. Had the PWS upheld their obligations to the Willis Class as set forth in the Willis Stipulation of Settlement and Willis Judgment, the Willis Class would not need a Court-appointed expert to analyze the SPPS and to present alternative physical solutions.

Having breached the Willis Stipulation of Settlement, the PWS are in no position to force the Willis Class to be subjected to physical solution proceedings without the assistance of an expert and to limit the Class to contesting the issue of "consistency" between the SPPS and the Willis Stipulation of Settlement and Willis Judgment. California Supreme Court precedent conclusively establishes the Willis Class' right to present alternative physical solutions for the Court's consideration and to oppose the SPPS which eviscerates the vested rights of the Willis Class. Court-appointed expert testimony is critical to the Willis Class for both the APPS and their substantive opposition to the SPPS.

For reasons set forth in detail in the moving papers, an expert is absolutely critical to ensuring that the Willis Class' vested rights are incorporated into the Physical Solution ultimately adopted by the Court. Without the assistance of an expert, fundamental due process rights of the Willis Class will be violated. Under these circumstances, the 65,000-member Willis Class cannot be forced to participate in physical solution proceedings where their rights will not and cannot be

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adequately represented. If an expert is not appointed, then the Willis Class must be decertified.

Dated: March 19, 2015

Respectfully submitted,

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