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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

**WILLIS CLASS' SECOND MOTION TO
ENFORCE SETTLEMENT AGREEMENT
WITH DEFENDANT PUBLIC WATER
SUPPLIERS**

Date: August 4, 2015

Time: 10:00 AM

Place: Superior Court of California, County of
Los Angeles, 111 North Hill Street, Los Angeles,
CA 90012

Judge: Hon. Jack Komar

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1
2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3
4 **PLEASE TAKE NOTICE** that on August 4, 2015 at 10:00 am or as soon thereafter as the
5 matter may be heard, before the Honorable Judge Komar, Superior Court of California, County of
6 Los Angeles, 111 North Hill Street, Los Angeles, CA 90012, the undersigned law firm, Class
7 Counsel for the Willis Class, will and hereby does move for an Order to Enforce Willis Class
8 Settlement Agreement with Defendant Public Water Suppliers. The briefing schedule and hearing
9 date for this Motion was ordered by the Court at the July 10, 2015, Case Management Conference.

10 This Motion is based on this Notice, the attached Memorandum of Points and Authorities
11 with Exhibits, including the Expert Report of Brian E. Gray and the Expert Report of Rodney T.
12 Smith, Ph.D., the Declaration of Lynne M. Brennan, and such other and further evidence as may
13 be presented at the hearing.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **INTRODUCTION**

16
17 On July 13, 2010, the Public Water Suppliers entered into a Stipulation of Settlement with
18 the Willis Class (hereinafter "Willis Settlement Agreement," attached as Exhibit A). The Willis
19 Settlement Agreement was approved by the Court as fair, adequate and reasonable and entered as
20 an Amended Final Judgment on September 22, 2011 (the "Willis Judgment," attached as Exhibit
21 B). In awarding attorneys' fees under C.C.P. Section 1021.5, the Court ruled that by entering into
22 the Willis Settlement Agreement, Willis Class Counsel had secured for the Willis Class the
23 substantial benefits of protecting their "right to use groundwater in the future" and "to maintain the
24 value of their properties." The Public Water Suppliers agreed to specific terms in the Willis
25 Settlement Agreement to effectuate those significant benefits for the Willis Class. However, as set
26 forth in detail in this brief and in the Expert Reports of Brian E. Gray and Rodney T. Smith, Ph.D.,
27 the Public Water Suppliers have breached the Willis Settlement Agreement by entering in the
28 Stipulated Judgment and proposed Physical Solution ("SPPS") filed with this Court on March 4,
2015.

1 The sole focus of this Motion to Enforce is the Public Water Suppliers. Therefore, the
2 actions of the other Stipulating Parties in agreeing to the provisions of the SPPS are entirely
3 irrelevant for purposes of this Motion. The only issue presently before the Court is whether the
4 **Public Water Suppliers** have breached and reneged on their prior binding promises made in the
5 Willis Settlement Agreement by entering into the SPPS. A comparison between the Willis
6 Settlement Agreement and the SPPS establishes that the Public Water Suppliers have indeed
7 breached the Willis Settlement Agreement as a matter of law. The appropriate remedy for the
8 unequivocal breach by the Public Water Suppliers is for the Court to render the SPPS null and void
9 as to the Public Water Suppliers. The Expert Report of Brian E. Gray provides a further remedy
10 for the Public Water Suppliers' breach of the Willis Settlement Agreement by suggesting a
11 framework for maintaining the "otherwise salutary (and necessary) goals of the proposed physical
12 solution" by incorporating into the SPPS the overlying rights of the Willis Class as established in
13 the Willis Settlement Agreement and under California law.

14 Just as the actions of the other Stipulating Parties to the SPPS are of no import to this
15 Motion, the Court's eventual imposition of a physical solution likewise does not excuse the Public
16 Water Suppliers' breach of the Willis Settlement Agreement. Indeed, the Court has the duty to
17 "incorporate and merge" the Willis Settlement Agreement into the Physical Solution ultimately
18 adopted by the Court. Otherwise, the Willis Settlement Agreement and the Willis Judgment would
19 have no legal significance whatsoever. That clearly is not the law. The Public Water Suppliers
20 agreed to specific contractual terms in the Willis Settlement Agreement that they must honor,
21 regardless of what physical solution the Court ultimately adopts in this adjudication.

22 As set forth in detail in the Expert Report of Rodney T. Smith, Ph.D., there are several ways
23 in which the Public Water Suppliers breached the Willis Settlement Agreement by entering into the
24 SPPS. One such example of breach is based on the Public Water Suppliers' agreement to a 23%
25 share of the Native Safe Yield in the SPPS, while agreeing to give the Willis Class 0% of the NSY
26 and permanently foreclosing the Willis Class' ability to pump from the NSY. This agreement in
27 the SPPS by the **Public Water Suppliers** – not by any of the other overlying landowners -- directly
28 violates the terms of the Willis Settlement Agreement. Whether the Court ultimately adopts the
23% share of the NSY for the Public Water Suppliers and 0% share of the NSY for the Willis Class

1 in a Physical Solution (which would be contrary to law) is entirely irrelevant to the legal issue of
2 whether the Public Water Suppliers breached the Willis Settlement Agreement by agreeing to those
3 provisions in the SPPS.

4 The focus of the Willis Class' Motion to Enforce must properly remain on the breach of the
5 Willis Settlement Agreement by the Public Water Suppliers in entering into the SPPS and not on
6 any of the overlying landowners or the Court's ultimate adoption of a Physical Solution. When
7 kept in focus, the breach by the Public Water Suppliers of the Willis Settlement Agreement is
8 undeniable and must be remedied by this Court.

9 STATEMENT OF FACTS

10 WILLIS SETTLEMENT AGREEMENT TERMS BREACHED BY THE PUBLIC 11 WATER SUPPLIERS BY ENTERING INTO THE SPPS

- 12
13 1. Correlative Rights means...that Overlying landowners may make reasonable and beneficial
14 use of the water in a Basin and that, if the supply of water is insufficient for all reasonable
15 and beneficial needs, *each Overlying Owner is entitled to a fair and just proportion of the*
water available to the Overlying Owners. ¶ III.D (Exh. A)
- 16 2. Federally Adjusted Native Safe Yield for any given year means the Basin's Native Safe
17 Yield less the actual annual production of the United States' during the prior year pursuant
18 to its Federal Reserved Right. ¶ III.H. (Exh. A)
- 19 3. Pumping of the Settling Parties' share of Native Safe Yield *is not subject to any Replacement*
20 *Assessment.* ¶ III.K. (Exh. A)
- 21 4. The Settling Parties agree that the Settling Defendants and the *Willis Class Members each*
22 *have rights to produce groundwater from the Basin's Federally Adjusted Native Safe Yield.*
23 ¶ IV.D. (Exh. A)
- 24 5. The Settling Parties agree that the Willis Class Members have an Overlying Right to a
25 correlative share to produce up to 85% of the Basin's Federally Adjusted Native Safe Yield
26 *free of Replacement Assessment.* ¶ IV.D.2. (Exh. A)
- 27 6. The Settling Defendants *will not take any positions or enter into any agreements* that are
28 inconsistent with the exercise of the Willis Class Members' right to produce and use their
correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield. ¶ IV.D.2.
(Exh. A)
7. In no event shall this Agreement require the Willis Class Members to give to the Settling
Defendants more than 15% of any rights to use the Basin's groundwater that they may
obtain by way of settlement or judgment. ¶ IV.D.2.a. (Exh. A)

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8. The Settling Parties acknowledge and agree that they all have the right to recapture Return Flows from Imported Water that they put to reasonable and beneficial use in the Basin, consistent with California law. The Settling Parties will not be subject to any Replacement Assessment for their production of an amount equal to the Return Flows from Imported Water that they put to reasonable and beneficial use in the Basin. ¶ IV.D.4.a. (Exh. A)
 9. The Settling Parties agree to be part of such a Physical Solution to the extent it is consistent with the terms of this Stipulation...¶ V.B. (Exh. A)
 10. The Settling Parties recognize that not all parties to the Coordinated Actions have entered into this Stipulation and that a trial may be necessary as against non-settling parties. The Settling Parties *agree to cooperate and coordinate their efforts in any such trial or hearing so as to obtain entry of judgment consistent with the terms of this Stipulation*; . . ¶ VIII.B. (Exh. A)
 11. The Settling Defendants are permanently barred and enjoined from . . .prosecuting, or continuing to prosecute, either directly or indirectly, any Released Claim against any of the Class Members. . . . Willis Judgment, ¶ 19 (Exh. B).

SPPS TERMS THAT CONSTITUTE A BREACH OF THE WILLIS SETTLEMENT AGREEMENT BY THE PUBLIC WATER SUPPLIERS

1. The total of the Production Rights decreed in this Judgment equals the Native Safe Yield. *SPPS*, ¶ 3.5.32 (Exh. C)
 - a. Breach: The entire Native Safe Yield is allocated to the appropriators, current pumpers, the Small Pumper Class, and the Federal Government. These allocations are contained in Exhibits 3 and 4 to the SPPS. No part of the Native Safe Yield is available to the Non-Pumper Class in the future. The Stipulating Parties listed in Exhibits 3 and 4 to the SPPS have been permanently allocated the entire Native Safe Yield of 82,300 AF. There are no terms contained in the SPPS whereby a Willis Class Member ever gains the right to pump groundwater from the Native Safe Yield. The Public Water Suppliers unequivocally agreed in the Willis Settlement Agreement that the Willis Class had the right to pump groundwater from the Native Safe Yield and further agreed not to enter into any agreements that were inconsistent with this right. Thus, the Public Water Suppliers breached the Willis Settlement Agreement when they signed the SPPS.
2. Production Rights Claimed by Non-Stipulating Parties. Any claim to a right to Produce Groundwater from the Basin by a Non-Stipulating Party shall be subject to procedural or legal objection by any Stipulating Party [includes Defendant Public Water Suppliers]. *SPPS*, ¶ 5.1.10 (Exh. C)
 - a. Breach: Public Water Suppliers are a “Stipulating Party” to the SPPS, however, they have no right to object, either procedurally or substantively, to Willis Class Members’ right to pump groundwater from the Basin.

1 3. The Non-Pumper Class Stipulation of Settlement, executed by its signatories and approved
2 by the Court in the Non-Pumper Class Judgment, specifically provides for imposition of a
3 Replacement Water Assessment on Non-Pumper Class members. . . .
4 **SPPS, ¶ 9.2.1 9 (Exh. C)**

5 a. **Breach:** The Public Water Suppliers agreed that the Willis Class has the right to
6 pump up to 85% of the Native Safe Yield free of replacement assessment.

7 4. Evidence presented to the Court demonstrates that Production by one or more Public Water
8 Suppliers satisfies the elements of prescription and that Production by overlying landowners
9 during portion(s) of the prescriptive period exceeded the Native Safe Yield. At the time of
10 this Judgment the entire Native Safe Yield is being applied to reasonable and beneficial uses
11 in the Basin. Members of the Non-Pumper Class do not and have never Produced
12 Groundwater for reasonable beneficial use as of the date of this Judgment. **Pursuant to**
13 **Pasadena v. Alhambra (1949) 33 Cal 2d 908, 931-32 and other applicable law, the**
14 **failure of the Non-Pumper Class members to Produce any Groundwater under the**
15 **facts here modifies their rights to Produce Groundwater except as provided in this**
16 **Judgment.** Because this is a comprehensive adjudication pursuant to the McCarran
17 Amendment, consistent with the California Supreme Court decisions, including *In Re*
18 *Waters of Long Valley Creek Stream System* (1979) 25 Cal. 3d 339, this Court makes the
19 following findings: (1) certainty fosters reasonable and beneficial use of water and is called
20 for by the mandate of Article X, section 2; (2) because of this mandate for certainty and in
21 furtherance of the Physical Solution, any New Production, including that by a member of
22 the Non-Pumper Class must comply with the New Production Application Procedure
23 specified in Paragraph 18.5.13; (3) as of this Judgment no member of the Non-Pumper Class
24 has established a Production Right to the reasonable and beneficial use of Groundwater
25 based on their unexercised claim of right to Produce Groundwater; (4) if in the future a
26 member of the Non-Pumper Class proposes to Produce Groundwater for reasonable and
27 beneficial use, the Watermaster as part of the New Production Application Procedure, has
28 the authority to determine whether such a member has established that the proposed New
Production is a reasonable and beneficial use in the context of other existing uses of
Groundwater and then-current Basin conditions; and (5) the Watermaster's determinations
as to the approval, scope, nature and priority of any New Production is reasonably necessary
to the promotion of the State's interest in fostering the most reasonable and beneficial use of
its scarce water resources. All provisions of this Judgment regarding the administration, use
and enforcement of the Replacement Water Assessment shall apply to each Non-Pumper
Class member that Produces Groundwater. . . . The Court finds that this Judgment is
consistent with the Non-Pumper Stipulation of Settlement and Judgment.
SPPS, ¶ 9.2.2 (Exh. C) (emphasis supplied).

a. **Breach:** In addition to the fact that this term is legally and factually invalid, the
Public Water Suppliers are precluded from entering into an agreement that states
that the Willis Class does not have the right to pump groundwater from the Native
Safe Yield.

5. **New Production Procedure** [Applicable to all Willis Class Members]
. . . .the Watermaster Engineer has authority to recommend that the application for New
Production be denied, or approved on condition of payment of a Replacement Water

1 Assessment. *SPPS*, ¶ 18.5.13 (Exh. C)

2
3 a. Breach: Even assuming that a Willis Class Member has the financial resources
4 and time to comply with the onerous and expensive requirements to apply for the
5 right to pump groundwater, there is no guarantee that the Willis Class Member's
6 application will be approved. Further, even if approved, the Willis Class Member
7 must still pay a Replacement Water Assessment. Therefore, this SPPS term
constitutes a breach of the Willis Settlement Agreement because the Public Water
Suppliers agreed that the Willis Class has the right to pump up to 85% of the
Native Safe Yield free of replacement assessment.

8 6. All Parties or Person(s) seeking approval from the Watermaster to commence New
9 Production of Groundwater shall submit a written application to the Watermaster Engineer
10 which shall include the following:... Written confirmation that applicant has complied with
11 CEQA, preparation of water conservation plan, an economic impact report, a physical
impact report, a statement from an engineer that production will not cause Material Injury,
etc. *SPPS*, ¶ 18.5.13 *et. seq.*

12 a. Breach: These regulations effectively extinguish the Willis Class Members' right
13 to pump. The Public Water Suppliers agreed that Willis Class Members have a right
to pump from the Native Safe Yield.

14 7. In the event the United States does not Produce its entire 7,600 acre-feet in any given Year,
15 the unused amount in any Year will be allocated to the Non-Overlying Production Rights
16 holders... *SPPS*, ¶ 5.1.4.1 (Exh. C)

17 a. The Public Water Suppliers agreed not to exceed 15% of the Federally Adjusted
18 Native Safe Yield which was defined as the Native Safe Yield less the actual annual
19 production of the United States' during the prior year pursuant to its Federal Reserve
Right.

20 LEGAL ARGUMENT

21 THE PUBLIC WATER SUPPLIERS BREACHED THE WILLIS SETTLEMENT 22 AGREEMENT BY ENTERING INTO THE SPPS

23 The Public Water Suppliers breached the Willis Settlement Agreement in many
24 fundamental and material ways by entering into the SPPS.

25 First, the SPPS modifies and abrogates the correlative water rights of the Willis Class from
26 the NSY as agreed to by the Public Water Suppliers. Current pumpers and appropriators are
27 permanently allocated the entire NSY free of replacement assessment, but not the Willis Class. As
28 demonstrated by expert witness Rodney T. Smith, Ph.D. (attached as Exhibit D), the entire NSY of

1 82,300 is allocated to Overlying Producers, Small Pumper Class, Federal Reserve Rights, State of
2 California, and Non-Overlying Production. No portion of the NSY is reserved for the Willis Class.
3 Even if Willis Class Members obtain the discretionary, i.e., not guaranteed, approval to pump under
4 the SPPS, they must pay a replacement water assessment. By agreeing to these terms in the SPPS,
5 the Public Water Suppliers breached their prior and binding agreement with the Willis Class as set
6 forth in the Willis Settlement Agreement and approved by the Court in the Willis Judgment.

7 The Willis Settlement Agreement provides that Willis Class Members have “an Overlying
8 Right to a correlative share of 85% of the Federally Adjusted Native Safe Yield for reasonable and
9 beneficial uses on their overlying lands free of replacement water assessment.” Willis Settlement
10 Agreement, ¶ IV.D.2 (Exh. A). “Pumping of the Settling Parties’ share of the Native Safe Yield is
11 not subject to any Replacement Assessment.” Willis Settlement Agreement, ¶ IV.D.2 (Exh. A).
12 “The Settling Parties agree that the Settling Defendants and the Willis Class Members each have
13 rights to produce groundwater from the Basin’s Federally Adjusted Native Safe Yield.” Willis
14 Settlement Agreement, ¶ IV.D. (Exh. A).

15 The Public Water Suppliers agreed in the Willis Settlement Agreement that the Willis Class
16 has a correlative share of the Federally Adjusted Native Safe Yield free of replacement water
17 assessment. The SPPS takes away the correlative rights of the Willis Class from the NSY and
18 requires payment of replacement water assessment if the Willis Class Member’s application to
19 pump water is even approved. Therefore, the Public Water Suppliers unequivocally breached the
20 Willis Settlement Agreement by entering into the SPPS.

21 Second, under the SPPS, the Public Water Suppliers have been allocated a portion of the
22 NSY that is far greater than the 15% they agreed to in the Willis Settlement Agreement. The SPPS
23 does so by transferring any unused Federal Reserve rights to the Public Water Suppliers. ¶ 5.1.4.1
24 of the SPPS. Exh. C. The unused Federal Reserve rights amounts to an additional 6,540.82 AFY
25 in 2011 or 6,367.00 AFY in 2012 of the NSY. Expert Report of Dr. Smith, p. 4 (Exh. D). This is
26 because while the Federal Reserve right is 7,600 AFY, actual production by the United States is far
27 less. Specifically, in 2011 and 2012, the United States produced only 1,246.09 AFY and 1,450.59
28 AFY from the aquifer. The difference between the Federal Reserve Rights and the amount of water

1 actually produced by the United States, however, must remain in the correlative rights pool under
2 the Willis Settlement Agreement.

3 The Willis Settlement Agreement provides that the Public Water Suppliers “collectively
4 have the right to produce up to 15% of the Basin’s Federally Adjusted Native Safe Yield free of
5 Replacement Assessment.” Willis Settlement Agreement, ¶ IV.D.1 (Exh. A). The Willis
6 Settlement Agreement further provides that “In no event shall this Agreement require Willis Class
7 Members to give to the Settling Defendants more than 15% of any rights to use the Basin’s
8 groundwater that they may obtain by way of settlement or judgment.” Willis Settlement
9 Agreement, ¶ IV.D.2. (Exh. A). The Basin’s Adjusted Native Safe Yield is defined in the Willis
10 Settlement Agreement as the Basin’s Native Safe Yield less the actual annual production of the
11 United States during the prior year pursuant to its Federal Reserve Right. Willis Settlement
12 Agreement, ¶ III.H. (Exh. A).

13 Thus, the SPPS over-allocates the NSY to the Public Water Suppliers from the agreed-
14 upon 15% up to 23%. Expert Report of Dr. Smith, p. 4 (Exh. D).¹ By agreeing to this over-
15 allocation of the NSY in the SPPS, the Public Water Suppliers unequivocally breached their prior
16 and binding agreement in the Willis Settlement Agreement to an allocation of no more than 15%
17 of the NSY. Of course, this breach is made even more egregious and brazen by the fact that the
18 Public Water Suppliers get 23% of the NSY under the SPPS, while the Willis Class gets 0% (also
19 a breach of the Willis Settlement Agreement by the Public Water Suppliers as demonstrated above).

20 Third, the SPPS imposes legal and financial impediments on the right of the Willis Class
21 Members to pump in the future with regulations that effectively extinguish their right to pump in
22 the future. See Expert Report of Dr. Smith (Exh. D). The SPPS provides that any New Production
23 must include a written application to the Watermaster Engineer which shall include the following:
24 (1) payment of all costs of the engineer; (2) summary of source of supply and manner of delivery;
25 (3) maps; (4) copy of well permits; (5) written confirmation of land use entitlements; (6) written
26 confirmation of CEQA requirements; (7) water conservation plan; (8) economic impact report; (9)

27 ¹ Per the report of Dr. Smith, the economic benefit to the Public Water Suppliers from this allocation is worth
28 \$106 million. Expert Report of Dr. Smith, p.7. (Exh. D).

1 physical impact report; (10) no material injury report; (11) agreement to pay replacement water
2 assessment; (12) any other information which the Watermaster Engineer may require. ¶ 18.5.13 of
3 the SPPS (Exh. C). These regulations impose a material financial burden on Willis Class Members
4 and extinguishes their right to pump.

5 The Public Water Suppliers agreed in the Willis Settlement Agreement not to contest the
6 Willis Class Members' right to share in the NSY free of replacement assessment. Specifically, the
7 Willis Settlement Agreement provides that the Willis Class "have an Overlying Right to a
8 correlative share of 85% of the Federally Adjusted Native Safe Yield for reasonable and beneficial
9 uses on their overlying land free of any Replacement Assessment." ¶ IV.D.2 (Exh. A). The
10 regulations in the SPPS not only impose a financial obligation on Willis Class Members to pay for
11 replacement water in the event they are allowed to pump water, but, more significantly, the SPPS
12 takes away Willis Class Members' right to pump based on the discretionary power of the
13 Watermaster. Therefore, the Public Water Suppliers unequivocally breached the prior and binding
14 Willis Settlement Agreement by entering into the SPPS.
15

16 **THE PUBLIC WATER SUPPLIERS' BREACH OF THE WILLIS SETTLEMENT**
17 **AGREEMENT BY ENTERING INTO THE SPPS IS NOT EXCUSED UNDER**
18 **CALIFORNIA LAW GOVERNING WATER RIGHTS**

19 The SPPS redefines the unexercised overlying water rights of Willis Class Members in
20 contravention of California law and the Willis Settlement Agreement. See Expert Report of Mr.
21 Brian Gray (Exh. E). As explained by Mr. Gray:

22 California law has long-recognized that those who own real property that overlies an aquifer
23 have a shared first priority right to pump native groundwater within the safe yield as needed to
24 supply reasonable and beneficial uses on their overlying lands. The proposed judgment is contrary
25 to this fundamental principle, because it would strip the members of the Willis Class of all of the
26 benefits of this correlative first priority status. It purports to do so based on the fact that the Willis
27 Class members have not exercised their overlying groundwater rights. See ¶ 9.2.2. Yet, California
28 law expressly provides that, absent a specific and individualized determination of unreasonable use,
overlying landowners have correlative first priority rights both for their active reasonable beneficial
uses and for their future reasonable and beneficial uses unless those "paramount rights" have been
displaced by prescription. See Page 4 of Brian E. Gray report.

1 In addition, the SPPS places an unreasonable burden on Willis Class Members to prove
2 availability of water to fulfill new overlying uses on the Members of the Willis Class, unreasonably
3 vests discretion in a partial Watermaster to decide whether Members of the Willis Class may
4 exercise their overlying right, imposes unreasonable and discriminatory requirements before
5 pumping, and subjects the Class to the Replacement Water Assessment. See Expert Report of
6 Brian Gray (Exh. E).

7 Specifically, Paragraph 18.5.13.1 of the SPPS requires that any new production must satisfy
8 twelve criteria which include the submission of a water conservation plan, an economic impact
9 report, a physical impact report, and a written statement by a licensed engineer that the new
10 production will not cause material injury. If the Watermaster determines that imported water is
11 available and the applicant has satisfied the twelve criteria, then the Watermaster may approve the
12 new production. There is no requirement for the Watermaster to grant approval; rather, the decision
13 is within their discretion. These regulations and broad Watermaster discretion constitute a breach
14 of the Willis Settlement Agreement by the Public Water Suppliers to not contest the correlative
15 water rights of the Willis Class.

16 Per Mr. Gray, the problem with the restrictions on new pumping and a proposed
17 Replacement Water Assessment is that they discriminate against the Non-Pumper Class:

18 The proposed judgment allows some groundwater right holders—the existing overlying and
19 appropriative users—to exercise the lion's share of their rights free of compliance with the
20 foregoing criteria and free of charges for replacement water. In contrast, the proposed judgment
21 denies the Willis Class members the right to exercise *any* portion of their overlying rights unless
22 they fulfill the regulatory and financial requirements from which the existing users are exempt *and*
23 they obtain discretionary permission from the Watermaster to engage in new production.² This
24 strips the Willis Class members of their correlative status vis-à-vis other overlying landowners and
25 of their priority vis-à-vis the appropriators.

26 As described in *Barstow* and other cases, overlying landowners have shared (i.e.,
27 correlative) first priority rights to the native safe yield of the aquifer. Therefore, in an overdrafted
28 basin, if there is insufficient surplus water available to fulfill the new overlying use (given existing
reasonable and beneficial uses), the new overlying user is nevertheless entitled to pump
groundwater. The lawful means of ensuring that the new pumping does not cause aggregate
withdrawals to exceed the native safe yield is to curtail pumping by the most junior appropriator to
make water available to the new overlying user, because the latter has senior rights. The only valid
exception to this rule of priority would be where the junior appropriator (or some other party)

² As described in the Expert Report submitted by Dr. Rodney T. Smith, the new production permit application requirements are likely to be prohibitively expensive for many of the Willis Class Members who may seek to exercise their overlying groundwater rights in the future (Exh. D). These requirements also go well beyond any regulatory requirements applicable to new groundwater pumping under existing law.

1 proves that the new overlying pumping and use would be unreasonable. As the Supreme Court
2 emphasized in *Barstow*, in an overdrafted groundwater basin, “overlying use is paramount, and the
rights of the appropriator must yield to the rights of the . . . overlying owner.” 23 Cal. 4th at 1243.

3 Similarly, California law does not permit the imposition of pumping charges on new
4 production by overlying landowners to the exclusion of those groundwater right holders with equal
or lesser legal priority. The proposed judgment’s requirement that members of the Willis Class pay
5 a Replacement Water Assessment for the exercise of any portion of their correlative first priority
right subordinates their rights below those active overlying landowners with whom they share that
6 first priority, as well as below the appropriators against whom they hold superior rights. This too
violates the Supreme Court’s directive in *Barstow* that “an equitable physical solution must
7 preserve water right priorities to the extent those priorities do not lead to unreasonable use.” *Id.*
See pages 9-10 of Brian E. Gray report.

8 The Mojave Basin adjudication has not placed similar limits on new groundwater pumping.
9 Per Mr. Gray:

10 The judgment and physical solution for the Mojave Basin “places no limits on the amount
11 of water a party can withdraw. Instead, each party is allotted a certain quantity of water—a ‘free
production allowance’ based on its prior use—which it can use at no cost. When a party uses water
12 in excess of its free production allowance, it is charged a fee to purchase ‘replacement’ water for
that subarea.” *Id.* at 1235. The physical solution “also sets a ‘base annual production’ amount for
13 each party, determined by the producer’s maximum annual production for the five-year period from
1986 to 1990.” *Id.* See page 11 of Brian E. Gray report.

14 The Public Water Suppliers breached the Willis Settlement Agreement by contesting the
15 correlative rights of Willis Class Members to the NSY free from replacement assessment as further
16 explained by Mr. Gray:

17 The application of these principles to the present cases demonstrates why the proposed
18 judgment and physical solution violates the correlative first priority rights of the members of the
Willis Class. Existing producers—overlying and appropriative—are entitled to pump groundwater
19 up to the limits of their respective production rights without having to prove that water is available
for their uses in light of all other competing demands on the native safe yield; and they are exempt
20 from the twelve permitting criteria of paragraph 18.5.13.1. See Proposed Judgment ¶¶ 5.1.1.1,
5.1.1.2, 5.1.3 & 5.1.6. Existing production also is free of replacement water charges. *Id.* ¶ 9.2.
21 Under the proposed judgment, however, the members of the Non-Pumper Class must satisfy the
twelve standards set forth in paragraph 18.5.13.1. They must prove the reasonableness of their
22 extraction and use of groundwater “in the context of all other uses of Groundwater in the Basin at
the time of the application, including whether all of the Native Safe Yield is then currently being
23 used reasonably and beneficially.” *Id.* ¶ 18.5.13. They must obtain permission from the
Watermaster—permission that may or may not be granted, even if these conditions are fulfilled.
24 *Id.* ¶¶ 9.2.2 & 18.5.13. And, they must pay the Replacement Water Assessment for the privilege
25 of exercising any of their overlying rights. *Id.* ¶ 9.2.1.

26 This disparate treatment of the overlying rights of the Willis Class members vis-à-vis the
other overlying right holders violates the former’s correlative rights. And the subordination of the
27 Willis Class members’ overlying rights to those of the appropriators violates the Willis Class
members’ priority vis-à-vis the appropriative right holders. Both are inconsistent with the judgment
28 in *Barstow*. See pages 12-13 of Brian E. Gray report.

1 Finally, the SPPS imposes financial and regulatory burdens on the Willis Class, but not on
2 other overlying producers. These burdens directly conflict and contravene the agreement of the
3 Public Water Suppliers contained in the Willis Settlement Agreement. The Public Water Suppliers
4 agreed not to object and permit Willis Class Members to share in the correlative pool with other
5 overlying landowners free of replacement assessment. Willis Settlement Agreement, ¶ IV.D.2
6 (Exh. A). Not only did the Public Water Suppliers agree to respect the correlative water right of
7 the Willis Class, but they also agreed not to take any position or enter into any agreement which is
8 inconsistent with the Class' right to share in the NSY free of replacement assessment. Willis
9 Settlement Agreement, ¶ IV.D.2. Per Mr. Gray:

11 "In *City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 288 (2012), the Court of Appeal
12 recently summarized the law that governs the rights of the members of the Willis Class in this
13 groundwater adjudication. "The full amount of the overlying right," the Court emphasized, "is that
14 required for the landowners' 'present and prospective' reasonable beneficial use upon the land."
15 *Id.* (quoting *Barstow*, 23 Cal. 4th at 1240) (emphasis added). As with all water rights, "the court
16 not only has the power but the duty to fashion a solution to insure the reasonable and beneficial use
17 of the state's water resources as required by article X, section 2. *The only restriction is that, absent
18 the party's consent, a physical solution may not adversely affect that party's existing water rights.*
19 *Id.* at 288 (emphasis added). See pages 14-15 of Brian E. Gray report.

20 As currently drafted, the proposed judgment and physical solution violates these governing
21 standards."

22 **DEFENDANT PUBLIC WATER SUPPLIERS' BREACH OF THE WILLIS**
23 **SETTLEMENT AGREEMENT BY ENTERING INTO THE SPPS IS NOT**
24 **EXCUSED BY A LATER-IMPLEMENTED PHYSICAL SOLUTION**

25 The fact that the Willis Class agreed to be bound by a later Physical Solution entered by the
26 Court in no way provides a legally cognizable excuse for the Public Water Suppliers' breach of the
27 Willis Settlement Agreement. Both the Consolidation Order and the Amended Final Judgment
28 entered by this Court mandate that the class action settlement agreements will be *merged* and
incorporated into any later Physical Solution:

" . . . the Court may enter a final judgment approving any settlements, including the *Willis*
and *Wood* class settlements, that finally determine all cognizable claims for relief among
the settling parties **for purposes of incorporating and merging the settlements into a**

1 comprehensive single judgment containing such a declaration of water rights and a
2 physical solution.

3 *Order Transferring and Consolidating Actions for All Purposes* dated February 19, 2010
at 4:25 to 5:1 (emphasis supplied) (Exh. F); and

4 “In addition, without effecting the finality of this Judgment, the Court retains
5 jurisdiction over the Parties for purposes of incorporating and merging this
6 Judgment into a physical solution or other Judgment that may ultimately be entered in
the Consolidated Actions.”

7 *Amended Final Judgment*, ¶ 20 (emphasis supplied) (Exh. B).

8 Further, the Public Water Suppliers explicitly agreed to be part of a Physical Solution to the
9 extent it is *consistent* with the terms of the Willis Settlement Agreement:

10 The Stipulating Parties expect and intend that this Stipulation will become part of a
11 Physical Solution entered by the Court to manage the Basin and that the Court will retain
jurisdiction in the Coordinated Actions. The Settling Parties agree to be part of a
12 Physical Solution to the extent it is consistent with the terms of this Stipulation and to
13 be subject to Court-administered rules and regulations consistent with California and
Federal law and the terms of this Stipulation.

14 *Willis Settlement Agreement*, ¶ V.B. (Exh. A) (emphasis supplied).

15 Thus, the Public Water Suppliers had absolutely no legal basis to ignore and then intentionally
16 breach the Willis Settlement Agreement by entering into the SPPS. The terms agreed upon by the
17 Public Water Suppliers, including the Willis Class’ right to pump water from the Native Safe Yield,
18 were to be merged and incorporated into the Physical Solution. Instead, the Public Water Suppliers
19 knowingly and intentionally breached the terms of the Willis Settlement Agreement by entering
20 into the SPPS which strips away the rights of the Willis Class to pump groundwater from the Native
21 Safe Yield free of replacement assessment or otherwise.

22 Any argument from the Public Water Suppliers that the Willis Class Members’ share of the
23 Native Safe Yield can be zero under the Willis Settlement Agreement is utterly without merit and,
24 indeed, sanctionable. In awarding attorneys’ fees to Willis Class Counsel as the “prevailing party”
25 pursuant to C.C.P. Section 1021.5, this Court ruled correctly and obviously that the Willis
26 Settlement Agreement had conferred “substantial benefits” on the Willis Class:

27 By eliminating the Public Water Suppliers’ prescription claims and maintaining correlative
28 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

1 maintain the value of their properties. Under these circumstances, they must be considered
2 "successful parties" for purposes of Code of Civil Procedure § 1021.5.
3 *Order Awarding Attorneys' Fees* at 5:1-5 (Exh. G).

4 The Willis Settlement Agreement, the Willis Judgment, and the Court's Order Awarding
5 Attorneys' Fees would all be rendered absolutely meaningless if the Willis Class' "share" of the
6 Native Safe Yield could be zero under the Physical Solution adopted by the Court. Such an absurd
7 interpretation by the Public Water Suppliers of these legally-enforceable documents makes a
8 mockery of the judicial system and the Willis Class Members' substantive and procedural rights
9 under the laws of California and the U.S. Constitution.

10 **CONCLUSION**

11
12 For all the foregoing reasons, it is clear that the Public Water Suppliers have breached the
13 Willis Settlement Agreement by entering into the SPPS. To rectify this breach, this Court has the
14 power and the jurisdiction to enter an Order stating that the SPPS is null and void as to the Public
15 Water Suppliers based on their breach of the Willis Settlement Agreement. To further remedy the
16 breach, the Court has the power and jurisdiction to enter a Physical Solution as suggested by Mr.
17 Gray that incorporates the rights of Willis Class Members under the Willis Settlement Agreement
18 and California law.

19
20 Dated: July 15, 2015

Respectfully submitted,

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