

Exhibit D



July 14, 2015

VIA EMAIL

Ralph B. Kalfayan, Esq., LL.M.
Krause, Kalfayan, Benink & Slavens, LLP
550 W. C. Street, Suite 530
San Diego, CA 92101

RE: Analysis of the Consistency of the Proposed Physical Solution with the Willis Class Judgment

Dear Mr. Kalfayan:

You have requested that *Stratecon Inc.* analyze the consistency of the Proposed Physical Solution with the Willis Class Judgment. As discussed below, there are three inconsistencies:

1. The Proposed Physical Solution allocates greater groundwater rights to non-overlying production than the Willis Class Judgment.
2. The Proposal Physical Solution sets at zero the Willis Class “fair and just allocation” of the water available to Overlying Owners under the Willis Class Judgment.
3. By not recognizing the groundwater rights of the Willis Class, the Proposed Physical Solution places an economically material discriminatory burden on future groundwater production by the Willis Class.

Summary of Willis Class Judgment

The Willis Class Groundwater Rights are defined in the Willis Class Stipulation of Settlement.¹ “Willis Class members have an Overlying Right to a correlative share of

¹ Willis Class Stipulation of Settlement, Antelope Valley Groundwater Cases, July 13, 2010 (herein after cited as “Willis Class Judgment”).

85% of the Federally Adjusted Native Safe Yield for reasonable and beneficial uses on their overlying lands free of any Replacement Assessment.”² “The Settling Defendants will not take any positions or enter into any agreements that are inconsistent with the exercise of the Willis Class Members’ Overlying Right to produce and use their correlative share of 85% of the Basin’s Federally Adjusted Native Safe Yield.”³ The Willis Class Judgment defines the following capitalized terms:

- *Overlying Right*: “the appurtenant right of an Overlying Owner to use groundwater from the Native Safe Yield for overlying reasonable and beneficial use”.⁴
- *Native Safe Yield*: “the amount of pumping . . . (that) results in no long-term depletion of Basin groundwater storage.” “Pumping of the Settling Parties’ share of Native Safe Yield is not subject to any Replacement Assessment.”⁵ The settlement stipulates that the Native Safe Yield is 82,300 acre feet (“AF”).⁶
- *Federally Adjusted Native Safe Yield*: “Native Safe Yield less the actual annual production of the United States’ during the prior year pursuant to its Federal Reserve Right.”⁷

In effect, the Willis Class receives a correlative share of 85% of the Native Safe Yield (82,300 AF) less the actual annual production of the United States under its Federal Reserve Right. Production under this right is not subject to any replenishment assessment.

The Willis Class Judgment defines correlative rights as “Overlying Owners may make reasonable and beneficial use of the water in the Basin and that, if the supply of water is insufficient for all reasonable and beneficial needs, each Overlying Owner is entitled to a fair and just proportion of the water available to the Overlying Owners.”⁸

² Willis Class Judgment, p. 10.

³ *Ibid.*

⁴ *Ibid*, p. 7.

⁵ *Ibid*, pp. 6-7.

⁶ *Ibid*, p. 9.

⁷ *Ibid*, p. 6.

⁸ *Ibid*, pp. 5-6

Inconsistency #1: The Proposed Physical Solution Allocates Greater Groundwater Rights to Non-Overlying Production than the Willis Class Judgement

The Proposed Stipulated Interlocutory Judgment and Physical Solution specifies production rights for Overlying Production, Small Pumper (Wood) Class, Federal Reserve Rights, State of California, and Non-Overlying Production (see Table 1).⁹ These allocations exhaust the Native Safe Yield of 82,300 AF.

Table 1
Production Rights in Proposed Physical Solution

<i>Party</i>	<i>Acre-Feet</i>
Overlying Production	58,341.6
Small Pumpers (Woods)	3,806.4
Federal Reserve Rights	7,600.0
State of California	207.0
Non-Overlying Production	12,345.0
Total	82,300.0

The 12,345 acre feet (“AF”) allocated to non-overlying production equals 15% of Native Safe Yield.¹⁰ That is, non-overlying production receives 15% of the Federally Adjusted Native Safe Yield assuming that the actual use of Federal Reserve Rights is zero.

The Willis Class Judgment limits non-overlying production to 15% of Federally Adjusted Native Safe Yield.¹¹ Therefore, the production rights of non-overlying producers declines with the actual use of Federal Reserved Rights (see Figure 1 attached). Under the Willis Class Judgment, the production rights fall by 15% of the actual use of Federal Reserved Rights. As the actual use of Federal Reserved Rights increases to the amount recognized in the Proposed Physical Solution, the production rights of non-

⁹ Proposed Stipulated Interlocutory Judgment and Physical Solution (“Proposed Physical Solution), Draft July 31, 2014, pp. 15-23 and Exhibit 4.

¹⁰ 12,345 AF = 15% 82,300 AF

¹¹ “The Settling Parties agree that the Settling Defendants collectively have the right to produce up to 15% of the Basin Native Safe Yield free of any Replacement Assessments.” Willis Class Judgment, p. 10 (emphasis added).

overlying producers declines to 11,205 AF, the minimum available under the Willis Class Judgement.

In 2011 and 2012, respectively, the actual use of Federal Reserved Rights was 1,246.09 AF and 1,450.59 AF.¹² Under these circumstances, the production rights of non-overlying producers would be 12,158.09 AF and 12,127.41 AF respectively.¹³ These amounts of allowed pumping is less than the 12,345 AF stated for non-overlying producers in the Proposed Physical Solution.

The Proposed Physical Solution further states:¹⁴

“In the event that the United States does not produce its entire 7,600 acre feet in any given Year, the unused amount in any Year will be allocated to the Non-Overlying Right holders in the following Year . . .”

That is, the non-overlying producers receive 12,345 AF (amount under the Willis Class Judgment when there is no actual use of Federal Reserved Rights) plus the amount of unused Federal Reserved Rights. Under the circumstances where the actual use of Federal Reserved Rights were in the amounts used in 2011 and 2012, the allowed production of non-overlying producers under the Proposed Physical Solution would be 18,698.91 AF and 18,494.41 AF respectively.¹⁵ These allocations represent an increase above the allocations under the Willis Class Judgement by 6,540.82 AF and 6,367.00 AF respectively, equaling about 23% of the Native Safe Yield.¹⁶ The difference between the allocations decline with the actual use of Federal Reserve Rights (see Figure 2 attached).

¹² Amended [~~Proposed~~] Statement of Partial Decision for Phase IV Trial with Party Name Corrections, in Antelope Valley Groundwater Cases, dated June 29, 2013, filed July 19, 2013, see p. 4 for US: Edwards AFB and Plant 42.

¹³ $12,158.09 \text{ AF} = 15\% (82,300 \text{ AF} - 1,246.09 \text{ AF})$

$12,127.41 \text{ AF} = 15\% (82,300 \text{ AF} - 1,450.59 \text{ AF})$

¹⁴ Proposed Physical Solution, section 5.1.4.1, p. 19.

¹⁵ $18,699 \text{ AF} = 12,345 \text{ AF} + (7,600 \text{ AF} - 1,246.09 \text{ AF})$

$18,494 \text{ AF} = 12,345 \text{ AF} + (7,600 \text{ AF} - 1,450.59 \text{ AF})$

¹⁶ $6,540.82 \text{ AF} = 18,698.91 \text{ AF} - 12,158.09 \text{ AF}$, or $23\% = 18,698.91 \text{ AF} / 82,300 \text{ AF}$

$6,367.00 \text{ AF} = 18,494.41 \text{ AF} - 12,127.41 \text{ AF}$, or $22\% = 18,494.41 \text{ AF} / 82,300 \text{ AF}$

Inconsistency #2: The Proposed Physical Solution Eliminates the Willis Class's Correlative Share of Federally Adjusted Native Safe Yield

The Proposed Physical Solution states that the Willis Class pumpers “can Produce Groundwater from the Native Safe Yield for reasonable and beneficial use on their overlying land provided they pay the Replacement Water Assessment for any such Production.”¹⁷

Under the Willis Class Judgment, Willis Class members have “an Overlying Right to a correlative share of 85% of the Federally Adjusted Native Safe Yield for reasonable and beneficial uses on their overlying lands free of any Replacement Assessment.”¹⁸ The Willis Class Judgment defined correlative rights as “Overlying Owners may make reasonable and beneficial use of the water in the Basin and that, if the supply of water is insufficient for all reasonable and beneficial needs, each Overlying Owner is entitled to a fair and just proportion of the water available to the Overlying Owners.”¹⁹

The Proposed Physical Solution sets the Willis Class's correlative share at zero. Unlike the Overlying Owners who receive 58,341.6 AF under the Proposed Physical Solution, the Willis Class must incur the obligation of paying Replacement Water Assessments when they develop their lands, provided that they receive Watermaster approval for new production under onerous terms (see below). Under what standards of fairness and justice is an allocation that gives one set of Overlying Owners all the economic value of 85% of the Federally Adjusted Native Safe Yield and provides another set of Overlying Owners with nothing but a cost burden? The Proposed Physical Solution offers no justification.

In other words, the Willis Class Judgment provided the Willis Class with a correlative share of the Federally Adjusted Native Safe Yield. The Proposed Physical Solution provides the Willis Class with no correlative share.

¹⁷ Proposed Physical Solution, pp. 16-17.

¹⁸ Willis Class Judgment, p. 10.

¹⁹ *Ibid*, pp. 5-6.

Inconsistency #3: By not recognizing the groundwater rights of the Willis Class, the Proposed Physical Solution places an economically discriminatory burden on future groundwater production by the Willis Class.

The Proposed Physical Solution defines New Production as “Any Production of Groundwater from the Basin not of right under this Judgment, as of the date of the Judgment.”²⁰ Where the Willis Class Judgment recognized the Willis Class’s correlative share of the Federally Adjusted Native Safe Yield, the Proposed Physical Solution does not recognize the Willis Class’s groundwater rights.

Relegating the exercise of the Willis Class groundwater rights to “new production” places a material burden on the Willis Class. The Proposed Physical Solution would place thirteen requirements on “New Production” that includes many obligations outside the jurisdiction of the Watermaster.²¹ The list includes, among many requirements, hydrologic information related to well development, completion of all federal, state, local and land use entitlements, environmental compliance, economic impact analysis and an open-ended, non-specific “other pertinent information which the Watermaster may require.” None are required for groundwater production for rights “under this Judgment.”

This differential treatment of the Willis Class represents a “poison pill” for development of Willis Class lands. I have personal knowledge concerning the development of water projects. The proposed requirements for “new production” evidences a lack of understanding of how the world works. For example, land use approvals cannot be obtained without designation of a water supply. Yet, the Proposed Physical Solution requires obtaining land use approval prior to receiving approval of a groundwater source from the Watermaster. Further, it would be not be prudent for a developer to initiate environmental reviews of a project before securing a water supply.

These requirements are unprecedented for adjudicated groundwater basins in California. For example, a party without groundwater rights can acquire Free Production Allowances (groundwater rights recognized by the Mojave Adjudications) in the Mojave Basin. The major substantive requirement is that the party must become a party to the

²⁰ Proposed Physical Solution, section 3.5.19, p. 9.

²¹ Proposed Physical Solution, section 19.5.13.

Mojave Judgment.²² The list of burdensome (poison pill) requirements in the Proposed Physical Solution are not found.

Conclusion

The Proposed Physical Solution is not consistent with the Willis Class Judgment. There are three problems.

First, the Proposed Physical Solution provides non-overlying producers with greater allocation of groundwater rights than under the Willis Class Judgment. Using the average actual use of Federal Reserve Rights for 2011 and 2012, the Proposed Physical Solution grants non-overlying producers an extra 6,453.91 AF of allowed pumping without obligation to pay a Replacement Water Assessment.²³ Given that the economic value of groundwater rights in the Antelope Valley is \$1,630/AF,²⁴ the extra pumping granted non-overlying producers is worth \$106 million.²⁵

Second, the Proposed Physical Solution sets the Willis Class correlative share of the Federally Adjusted Native Safe Yield at zero. While Stratecon is still investigating the basis of a reasonable correlative share for the Willis Class, I believe that a reasonable range may be between 15% and 25%. In this instance, the Proposed Physical Solution extinguishes between 10,321.34 AF and 17,202.23 AF of groundwater rights available under the correlative rights recognized by the Willis Class Judgment.²⁶ With the economic value of groundwater rights at \$16,300/AF, the Proposed Physical Solution expropriates groundwater rights from the Willis Class worth between \$168 million and \$280 million.²⁷

²² See section 12, Transfers of Production Rights of the Mojave Watermaster Rules & Regulations.

²³ 6,453.91 AF = average of 6,453.91 AF and 6,367.00 AF, the extra allowed pumping from the Proposed Physical Solution given the actual water use of Federal Reserved Rights in 2011 and 2012 respectively.

²⁴ Letter from Rodney T. Smith, Ph.D. to Mr. Ralph Kalfayan, "Economic Valuation of Overlying Groundwater Rights in the Antelope Valley Groundwater Cases," January 9, 2015.

²⁵ \$106 million \approx 6,453.91 AF \times \$16,300/AF

²⁶ 10,321.34 AF = 15% \times 85% (82,300 AF – 1,348.34 AF)

17,202.23 AF = 25% \times 85% (82,300 AF – 1,348.34 AF)

²⁷ \$168 million \approx 10,321.34 AF \times \$16,300/AF

Third, the Proposed Physical Solution relegates the exercise of Willis Class groundwater rights to a regulatory purgatory. The substance of the Proposed Physical Solution speaks for itself. Having extinguished the Willis Class's correlative rights found in the Willis Class Judgment, the Proposed Physical Solution proposes economic barriers to groundwater development on Willis Class lands.

If you have any questions regarding the substance or basis of Stratecon's opinion, please do not hesitate to contact me.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'R.T. Smith', with a large circular flourish on the left and a horizontal line extending to the right.

Rodney T. Smith, Ph.D.
President

Figure 1
Non-Overlying Production Rights versus
Actual Use of Federal Reserved Rights

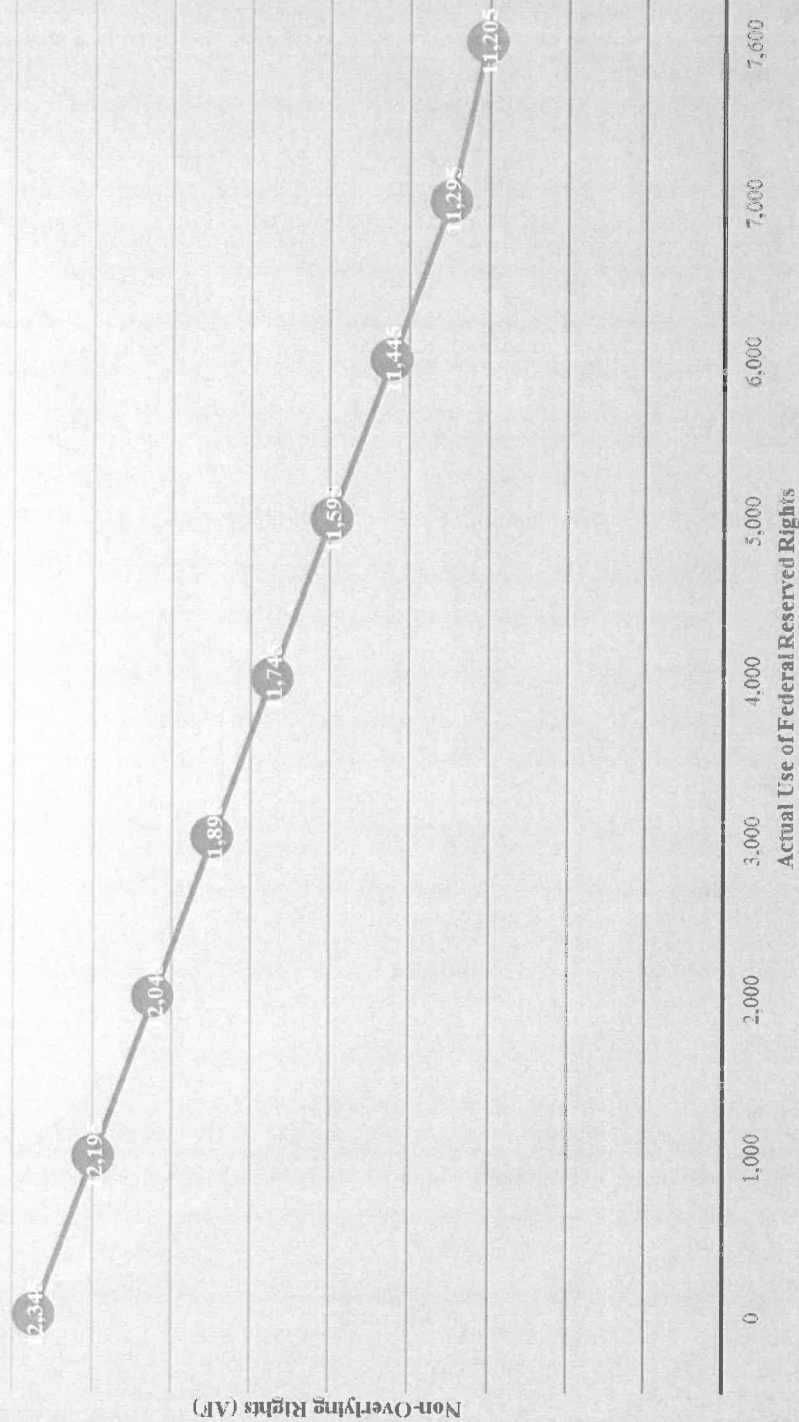


Figure 2
Non-Overlying Production Under Willis Class Judgment
versus Proposed Physical Solution

Willis Class Judgment Proposed Physical Solution

