Exhibit E

Expert Report of Brian E. Gray

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Antelope Valley Groundwater Cases
Los Angeles County Superior Court
Judicial Council Coordination Proceeding No. 4408

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

July 15, 2015

Statement of Qualifications

I am a Professor Emeritus at the University of California, Hastings College of the Law, in San Francisco.[1] I was a full-time member of the UC Hastings faculty for thirty years. My courses and areas of expertise include: California Water Resources, Federal and Interstate Water Resources, Environmental Law, Public Lands and Natural Resources, the American West, Property, and the Takings Clause of the Constitution. I also have taught courses in California water resources law at Stanford University and the University of San Diego.

I am a graduate of Pomona College and the University of California, Berkeley, School of Law, where I was Editor-in-Chief of the California Law Review. I also have served as Chair of the Environment Committee of the California State Bar and as Chair of the Advisory Committee of the University of California's Water Resources Center. I am currently an Adjunct Research Fellow at the Public Policy Institute of California.

I have written numerous articles on the subjects of water rights, water policy, and takings law, and I am co-author of an interdisciplinary study of contemporary California water policy, Managing California's Water: From Conflict to Reconciliation (Public Policy Institute of California 2011). My articles that focus on the reasonable use doctrine and the nature of the property right in water include: *In Search of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution,* 17 Hastings Con. L.Q. 225 (1989); *The Modern Era in California Water Law,* 45 Hastings L.J. 249 (1994); *The Property Right in Water,* 9 West·Northwest 1 (2003); and *The Uncertain Future of Water Rights in California: Reflections on the Governor's Commission Report,* 36 McGeorge L. Rev. 43 (2005), *Ensuring the Public Trust,* 45 U.C. Davis L. Rev. 973 (2012), and *The Reasonable Use Doctrine in California Water Law and Policy,* in Sustainable Water: Challenges and Solutions from California, Chapter 4 (University of California Press 2015).

I have argued water law cases in the California Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, and the United States District Courts for the Northern and Eastern Districts of California. These include several takings and breach of contract cases that arose out of congressional reforms to federal reclamation law. *See, e.g., Westlands Water District v. Natural Resources Defense Council,* 43 F.3d 457 (9th Cir. 1994); *Madera Irrigation District v. Hancock,* 985 F.2d 1397 (9th Cir. 1993); and *Peterson v. Department of the Interior,* 899 F.2d 799 (9th Cir. 1990).

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[1] This reference is for identification purposes only. The opinions and conclusions set forth in this report do not represent the opinions or legal position of either the University or the College.

I have served as an expert witness in two other groundwater rights cases. In *Moores v. Irish Beach Water District,* No. SCUK CVG 09-54665 (Mendocino Supr. Ct. 2014), an inverse condemnation action, I testified on behalf of the Irish Beach Water District on the nature of the plaintiff's groundwater rights vis-à-vis the district. In *Aqua Capital Management v. California Steel Industries,* No. RS 1108911 (San Bernardino Supr. Ct. 2015), a private party adjudication of groundwater rights in the Chino Basin, I am scheduled to testify on behalf of cross-defendant CCG Industries on the effects of the Chino Basin judgment and physical solution on various water rights and contract issues.

In addition, I have testified as an expert witness in two other cases. In *Popov v. Hayashi,* No. 400545 (San Francisco Superior Court 2003), which involved competing claims to the baseball with which Barry Bonds set the single season major league home run record in 2001, I testified on the law of capture and first possession. Judge Kevin McCarthy adopted my definition of possession and title as the law of the case. In the PG&E bankruptcy proceeding, *In re Pacific Gas & Electric Company,* No. 01-30923 DM (U.S. Bankruptcy Court, N.D. Cal. 2003), I provided expert testimony on the applicability of the federal, state, and local environmental laws to the reorganized debtor.

My educational background, academic writings, litigation experience, consulting, and other professional activities are described in detail in my *curriculum vitae,* which is attached to this report.

Introduction

This report is submitted on behalf of the Willis Class of parties who have overlying groundwater rights in the Antelope Valley basin, but who have not yet exercised those rights.[2]

The purposes of this report are: (1) to advise the Court of how, in my professional opinion, the proposed judgment and physical solution violates the Willis Class members' groundwater rights; and (2) to suggest a way for the parties

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[2] I will refer to these parties in a variety of synonymous terms, including "members of the Willis Class," "Non-Pumper Class members," and "dormant overlying groundwater right holders." The Willis Class is comprised of "[a]ll private (i.e., non-governmental) persons and entities that own real property within the Basin, as adjudicated, that are not presently pumping water on their property and have not done so at any prior time . . . ." Willis Class Stipulation of Settlement (Mar. 1, 2011), at 8, ¶ III(X). Paragraph 3.5.22 of the proposed judgment defines the Non-Pumper Class somewhat differently as all private persons and entities that own real property within the basin "that are not presently pumping water on their property and did not do so at any time during the five Years preceding January 18, 2006."

and the Court to revise the proposed judgment and physical solution to correct these problems.

I conclude that the proposed judgment and physical solution violates the overlying groundwater rights of the Willis Class members in three ways. First, it unlawfully places the burden of proving the availability of water and new production rights on members of the Non-Pumper Class who may seek to exercise their groundwater rights at some future date. Second, it renders the exercise of these water rights subject to the discretionary permission of the Watermaster. Third, it unlawfully requires members of the Willis Class who exercise their rights to pay the Replacement Water Assessment.

These requirements relegate the dormant overlying rights of the Willis Class members to a position that is inferior to the rights of the active overlying and appropriative right holders in a manner that is inconsistent with decisions of the California Supreme Court. Moreover, the justifications offered in the proposed judgment and physical solution to justify this subordination of the rights of the Non-Pumper Class—equity, prescription, and unreasonable use—also contradict Supreme Court and other precedent.

Fortunately, there is a ready solution to the flaws in the proposed judgment that would simultaneously honor and protect the overlying rights of the Willis Class members and fulfill the otherwise salutary (and necessary) goals of the proposed physical solution. The suggested changes that I offer here also would accommodate the rights of the active water right holders and better achieve the reasonable use mandates of Article X, Section 2 of the California Constitution.

Part I of this report sets forth my criticisms of the proposed judgment's subordination of the overlying rights of the Willis Class members. Part II offers several relatively simple solutions to these problems. In addition, in the Appendix to this report, I analyze the legal theories by which the proposed judgment attempts to justify subordination of the Willis Class members' overlying rights to those of all active groundwater producers.

Analysis

The proposed judgment and physical solution addresses the critical problem of overdraft and unsustainable aggregate groundwater use in the Antelope Valley Basin. In most respects, the proposed physical solution sets forth an effective long-term conjunctive groundwater management program that is likely to bring aggregate groundwater production within the safe yield of the basin, and it creates a source of funds to augment the native waters of the basin with imported water that will inure to the benefit of all groundwater users. Unfortunately, the proposed judgment does not lawfully allocate either the production limitations or financial responsibility for the costs of the physical solution among the various groundwater right holders.

Paragraph 3.4 of the proposed judgment states that the physical solution: "(1) is a fair and reasonable allocation of Groundwater rights in the Basin after giving due consideration to water rights priorities and the mandate of Article X, section 2 of the California Constitution; (2) provides for a reasonable sharing of Imported Water costs; (3) furthers the mandates of the State Constitution and State water policy; and (4) is a remedy that gives due consideration to applicable common law rights and priorities to use Basin water and storage space without substantially impairing such rights." As applied to the Non-Pumper Class, however, the proposed judgment and physical solution violates each of these guiding principles.

I

The Proposed Judgment and Physical Solution is Inconsistent with California Groundwater Rights Law

The most serious flaw in the proposed judgment and physical solution is its redefinition of the unexercised overlying groundwater rights of the members of the Willis Class.

California law has long-recognized that those who own real property that overlies an aquifer have a shared first priority right to pump native groundwater within the safe yield as needed to supply reasonable and beneficial uses on their overlying lands.[3] The proposed judgment is contrary to this fundamental principle, because it would strip the members of the Willis Class of all of the benefits of this correlative first priority status. It purports to do so based on the fact that the Willis Class members have not exercised their overlying groundwater rights. *See* ¶ 9.2.2. Yet, California 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.

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[3] As the proposed judgment and physical solution correctly recognizes (see ¶¶ 3.5.43 & 4.1), the aggregate lawful exercise of groundwater rights is limited to the "safe yield" of the aquifer. Safe yield is "'the maximum amount of water that could be extracted annually, year after year, without eventually depleting the underground basin.' Safe yield is generally calculated as the net of inflows less subsurface and surface outflows." *City of Santa Maria v. Adam,* 211 Cal. App. 4th 266, 278 (2012) (quoting *City of Los Angeles v. City of San Fernando,* 15 Cal. 3d 199, 278-80 (1975)).

The proposed judgment defines safe yield in several different ways, including "safe yield" (¶ 3.5.43), "native safe yield" (¶ 3.5.19), "adjusted native safe yield" (¶ 3.5.2), and "total safe yield" (¶ 3.5.51). Except where necessary to explain a specific point of analysis, I will simply use the term "native safe yield" in this report.

A. Summary of the Law of Groundwater Rights.

In its most recent groundwater rights decision, *City of Barstow v. Mojave Water Agency,* 23 Cal. 4th 1224 (2000), the California Supreme Court observed that the courts "typically classify water rights in an underground basin as overlying, appropriative, or prescriptive." *Id.* at 1240. Four aspects of the Court's summary of California groundwater rights law are relevant to the analysis of the proposed judgment and physical solution in the cases now before this Court:[4]

1. *Basis of Overlying and Appropriative Groundwater Rights.* The Supreme Court explained that the overlying right comprises "'the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto.'" *Id.* (quoting *California Water Service Co. v. Edward Sidebotham & Son, Inc.,* 224 Cal. App. 2d 715, 725-26 (1964)).

   In contrast, those who do not own overlying land, or who seek to use groundwater on property away from the aquifer that is the source of the groundwater, may obtain appropriative rights. "Any water not needed for the reasonable beneficial use of those having prior rights [i.e., the overlying landowners] is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed." *Id.* at 1241.[5]

2. *Correlative Rights and Priority of the Overlying Right.* "'As between overlying owners, the rights, like those of riparians, are correlative; [i.e.,] each may use only his reasonable share when water is insufficient to meet the needs of all.'" *Id.* In contrast, the rights of overlying landowners are "superior to that of other persons who lack legal priority"—i.e., those with appropriative rights. *Id.* at 1240. "'Proper overlying use,'" the Court continued, "'is paramount and the rights of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the

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[4] I will reserve analysis of prescriptive rights for the Appendix, where I address the assertion set forth in the proposed judgment that the members of the Willis Class have lost the correlative first priority of their unexercised overlying groundwater rights to the prescriptive uses of other parties.

[5] The Supreme Court has held that the supply of water as part of a municipal water supply system is not a valid overlying groundwater right, even where the lands that comprise the municipal service area overlie the aquifer. *City of Pasadena v. City of Alhambra,* 33 Cal. 2d 908, 927 (1949). Municipal water suppliers therefore are appropriative groundwater right holders.

[adverse, open and hostile] taking of nonsurplus waters.'" *Id.* at 1241 (quoting *California Water,* 224 Cal. App. 2d at 725-26).

3. *Reasonable and Beneficial Use.* The requirement of reasonable and beneficial use, set forth in Article X, Section 2 of the California Constitution, "applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right . . . of the overlying land owner, or the percolating water right, or the appropriative right.'" *Barstow,* 23 Cal. 4th at 1241-42 (quoting *Peabody v. City of Vallejo,* 2 Cal. 2d 351, 383 (1935)). The Court explained that the "constitutional amendment therefore dictates the basic principles defining water rights: that no one can have a protectable interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially." *Id.* at 1242.

4. *Priority of the Dormant Overlying Right.* The Court emphasized, however, that Article X, Section 2 otherwise "carefully preserves riparian and overlying rights." *Id.* One aspect of those rights is the long-standing rule that a riparian or overlying groundwater right holder does not have to exercise his or her rights in order to preserve their correlative first priority. "Because the court cannot fix or absolutely ascertain the quantity of water required for future use at any given time, *a trial court should declare prospective uses paramount to the appropriator's rights,* so the appropriator cannot gain prescriptive rights in the use. *Until the paramount right holder needs it,* the appropriator may continue to take water." *Id.* (emphasis added).[6]

B. The Proposed Judgment and Physical Solution Redefines the Overlying Rights of the Willis Class Members By Eliminating Their Correlative Status Vis-à-Vis the Other Overlying Groundwater Right Holders and Their First Priority Status Vis-à-Vis the Appropriators.

The proposed judgment and physical solution does not formally abolish the dormant overlying rights of the Willis Class members. But it does redefine them in a way that removes the correlative first priority status recognized in *Barstow* and other cases, and it thereby abrogates these individuals' groundwater rights. The proposed judgment does this in three ways: First, it unlawfully places the burden of

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[6] Nor do existing overlying uses displace or take priority over unexercised overlying rights. In *Tehachapi-Cummings County Water District v. Armstrong,* 49 Cal. App. 3d 992, 1001 (1975), a dispute exclusively among overlying groundwater right holders, the Court of Appeal held that the "proportionate share of each owner is predicated not on his past use over a specified period of time, nor on the time he commenced pumping, but solely on his current reasonable and beneficial need for water." *See also* Arthur L. Littleworth & Eric L. Garner, California Water II (Solano Press 2007), at 75 (citations omitted): "There are no senior overlying users who gain priority by being the first to pump groundwater. Overlying rights are not lost by nonuse."

proving the availability of water to fulfill new overlying uses on the members of the Non-Pumper Class. Second, it vests in the Watermaster discretionary authority to decide whether members of the Non-Pumper Class may exercise their overlying rights. Third, it unlawfully subjects the future activation of Non-Pumper Class rights to the Replacement Water Assessment.

1. Outline of the Proposed Judgment and Physical Solution.

According to paragraph 9.2.2 of the proposed judgment, to effectuate their overlying rights, members of the Non-Pumper Class must submit an application to the Watermaster Engineer and obtain permission from the Watermaster board to engage in pumping. The applicant must satisfy twelve criteria, including payment of an application fee, confirmation that he or she has complied with all applicable laws, submission of a water conservation plan approved by a licensed civil engineer, analysis of the "economic impact" and the "physical impact" of the proposed pumping on both the basin and other groundwater producers, and a written statement from a licensed civil engineer that the new production will not cause material injury. Proposed Judgment ¶ 18.5.13.1.[7]

Paragraph 18.5.13 directs the Watermaster Engineer to "consider[] common law water rights and priorities, the mandate of certainty in Article X, section 2, and all other relevant factors" before making a recommendation to approve or to deny a proposed exercise of overlying groundwater rights.[8] Paragraph 18.5.13 then states that the applicant—viz. the overlying groundwater right holder—must "establish[] the reasonableness of the New Production 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 used reasonably and beneficially."

If the Watermaster Engineer determines that imported water *is* available in sufficient quantities to supply a proposed new reasonable and beneficial use, and he finds that the applicant has satisfied the other twelve criteria, then the Watermaster board may approve the new production. Proposed Judgment ¶ 18.5.13.3. There is no requirement, however, that the Watermaster grant its approval if the applicant

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[7] Paragraph 3.5.18 defines "material injury" as "impacts to the Basin caused by pumping or storage of Groundwater that [c]auses material physical harm to the Basin, any Subarea, or any Producer, Party, or Production Right, including, but not limited to, Overdraft, degradation of water quality by introduction of contaminants to the aquifer . . . , liquefaction, land subsidence and other material injury caused by elevated or lowered Groundwater levels."

[8] Paragraph 18.5.13.2 adds that the Watermaster Engineer "shall not make [a] recommendation for approval of an application to commence New Production of Groundwater unless the Watermaster Engineer finds . . . that such New Production will not cause Material Injury."

fulfills these conditions. Rather, the decision to grant or to deny new production is solely within the Watermaster's discretion.

Finally, if the Watermaster approves the new production, the proposed judgment requires members of the Non-Pumper Class who exercise their overlying rights to pay the Replacement Water Assessment. Paragraph 9.2 states that the purpose of the Replacement Water Assessment is "to ensure that *each Party* may fully exercise its Production Right." (Emphasis added.) Yet, the Assessment does not apply equally or equitably to each party; nor does it function in a manner that comports with the correlative first priority rights held by the members of the Willis Class.

The proposed judgment charges the Replacement Water Assessment to two groups of groundwater users. Paragraph 9.2 requires the Watermaster to "impose the [Assessment] on any Producer whose Production of Groundwater from the Basin in any Year is in excess of the sum of such Producer's Production Right and Imported Water Return Flow available in that Year.[9] Paragraphs 9.2.1 and 9.2.2 also impose the Replacement Water Assessment on members of the Non-Pumper Class who may exercise their overlying groundwater rights in the future.[10]

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[9] A groundwater right holder's "production right" is the "amount of Native Safe Yield that may be Produced each Year free of any Replacement Water Assessment and Replacement Obligation. The total of the Production Rights decreed in this Judgment equals the Native Safe Yield." Proposed Judgment ¶ 3.5.32. The proposed judgment assigns production rights to all of the active groundwater producers. *See id.* ¶¶ 5.1.1-5.1.10. It grants the members of the Non-Pumper Class a production right of zero. *Id.* ¶ 9.2.2.

[10] The proposed judgment does include a possible exemption for single-family domestic water supply. Paragraph 18.5.13.2 provides:

> 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 minimis* Groundwater is not transferable, and shall not alter the Production Rights decreed in this Judgment.

This provision treats the Non-Pumper Class in a discriminatory manner vis-à-vis some other overlying landowners who may choose to exercise their rights in the future for new or expanded domestic uses. Paragraph 5.1.3 of the proposed judgment assigns the Small Pumper Class an aggregate production right of 3,806.4 afa and then allows any member of the Small Pumper Class to produce as much as 3 afa "per existing household for reasonable and beneficial use on their overlying land" without payment of the Replacement Water Assessment. In contrast to the Non-Pumper Class, however, this future production by individual members of the

Paragraph 9.2.1 asserts that the "Non-Pumper Class members specifically agreed to pay a replacement assessment if that member produced 'more than its annual share' of the Native Safe Yield less the amount of the Federal Reserved Right." Paragraph 9.2.2 then explains that the members of the Non-Pumper Class "do not and have never Produced Groundwater for reasonable beneficial use as of the date of this Judgment." Because the members of the Non-Pumper Class are not entitled to *any* share of the native safe yield, the proposed judgment declares that all of their future pumping would be in excess of their individual shares of the safe yield and therefore would be subject to the Replacement Water Assessment.

2. Analysis of the Proposed Judgment and Physical Solution.

Regulation of pumping and financial charges for groundwater production are salutary features of the judgments and physical solutions in adjudicated and managed groundwater basins.[11] Regulation of groundwater extraction ensures that aggregate withdrawals do not exceed the native safe yield. In turn, replacement water assessments promote aggregate sustainable use of groundwater by deterring (or at least penalizing) excess pumping and by creating a funding mechanism for the purchase and distribution of supplemental water.

The problem with the restrictions on new pumping from the Antelope Valley Groundwater Basin and with *this* proposed Replacement Water Assessment, however, is that they discriminate against the Non-Pumper Class. The proposed judgment allows some groundwater right holders—the existing overlying and appropriative users—to exercise the lion's share of their rights free of compliance with the foregoing criteria and free of charges for replacement water.[12] In contrast,

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Small Pumper Class may occur without review of the Watermaster Engineer or approval by the Watermaster board. This disparate treatment of these two sets of overlying landowners also violates the correlative first priority rights of the Willis Class.

[11] Adjudicated and managed basins that have both features include the Mojave Basin, *see Barstow,* 23 Cal. 4th at 1235, the Chino Basin, *see* Littleworth & Garner, *supra,* at 184-85, and the lower Santa Ana River Basin, which is managed by the Orange County Water District pursuant to special legislation. *See* Anne Schneider, Groundwater Rights in California: Governor's Commission to Review California Water Rights Law, Staff Paper No. 2, pp. 37-62 (1977).

[12] The proposed judgment assigns specific production rights to the individual active groundwater users in Exhibit 3 (non-overlying right holders) and Exhibit 4 (overlying landowners). These production rights range from 33% to 100% of the their "pre-rampdown" production. The mean production right assigned to active overlying right holders is 55% of their pre-rampdown pumping. Proposed Judgment, Exhibits 3 & 4.

the proposed judgment denies the Willis Class members the right to exercise *any* portion of their overlying rights unless they fulfill the regulatory and financial requirements from which the existing users are exempt *and* they obtain discretionary permission from the Watermaster to engage in new production.[13] This strips the Willis Class members of their correlative status vis-à-vis other overlying landowners and of their priority vis-à-vis the appropriators.

As described in *Barstow* and other cases, overlying landowners have shared (i.e., correlative) first priority rights to the native safe yield of the aquifer. Therefore, in an overdrafted 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) proves that the new overlying pumping and use would be unreasonable. As the Supreme Court 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.

Similarly, California law does not permit the imposition of pumping charges on new 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 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 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 preserve water right priorities to the extent those priorities do not lead to unreasonable use." *Id.*

3. *City of Barstow v. Mojave Water Agency* is Controlling Precedent.

Indeed, a careful reading of *Barstow* reveals that the facts that led the Supreme Court to emphasize these legal principles are remarkably similar the facts of the present cases; and the Court's protection of the correlative priority of overlying groundwater rights therefore applies with equal force to the proposed judgment and physical solution in these cases.

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[13] 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. These requirements also go well beyond any regulatory requirements applicable to new groundwater pumping under existing law.

The judgment and physical solution for the Mojave Basin "places no limits on the amount 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 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 each party, determined by the producer's maximum annual production for the five-year period from 1986 to 1990." *Id.*

To bring aggregate pumping within the safe yield, the physical solution required each active groundwater producer to reduce its annual pumping by 20 percent. This pro rata reduction applied equally to the active groundwater users, regardless of whether they held overlying or appropriative rights. As with the proposed judgment and physical solution in the present cases, this meant that the active water users could continue to pump most of their prior production (80 percent) for free, but that additional pumping—whether by existing users or by overlying landowners who had not yet exercised their rights—would be charged a replacement water assessment. *Id.*

The Superior Court ordered the parties "either to stipulate to the physical solution, file an answer to the cross-complaint, or suffer default." *Id.* Several parties chose to litigate their rights. Following trial, the Superior Court decided to impose the terms of the judgment and physical solution on the objecting parties. It determined that "a mechanical allocation of legal water rights could lead to an inequitable apportionment and impose undue hardship on many parties. For these reasons and more, the trial court enjoined all parties from asserting special priorities or preferences." *Id.* at 1237.

The Court of Appeal reversed, and the Supreme Court affirmed that decision. *Id.* at 1256.[14] The two courts' analysis of the overlying groundwater rights of one group of objecting parties, the "Cardozo Appellants," establishes that a trial court may not impose a physical solution that subordinates the unexercised rights of overlying landowners—either for the right to extract groundwater or for the cost of that pumping—in comprehensive groundwater adjudications.

The Cardozo Appellants were a group of alfalfa and dairy farmers who held overlying groundwater rights. They challenged the Superior Court's application of the judgment and physical solution to them on the ground that it ignored their correlative first priority rights to the safe yield of the aquifer. "The Court of Appeal directed the trial court to exclude the Cardozo appellants from the judgment and to grant them injunctive relief protecting their overlying water rights to the current

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[14] The Supreme Court reversed the Court of Appeal's decision with respect to one of the other parties that challenged the judgment and physical solution. *Barstow,* 23 Cal. 4th at 1254-56. The Supreme Court's disposition of the Jess Ranch claims is not relevant here.

and prospective reasonable and beneficial need for water on their respective properties." *Id.* at 1252-53 (emphasis added). "It also directed the trial court to order a refund of any assessments [i.e., the replacement water assessment] the Cardozo appellants paid under the judgment pending appeal." *Id.* at 1253.

In affirming this judgment, the Supreme Court held that, "[a]s overlying owners, the Cardozo appellants have the right to pump water from the ground underneath their respective lands for use on their lands. The overlying right is correlative and is therefore defined in relation to other overlying water right holders in the basin. In the event of water supply shortage, overlying users have priority over appropriative users." *Id.* The Court emphasized that this "water right priority has long been the central principle in California water law." *Id.*

Barstow thus contradicts both of the provisions of the proposed judgment and physical solution addressed here. It is unlawful for a trial court to discount or to ignore the correlative priority of overlying groundwater rights, both for their active and prospective uses. Nor can a court charge overlying landowners a replacement water assessment for exercising their rights unless the overlying right holders consent to such charges as part of the physical solution. Although all uses of water—including future pumping—must be reasonable and beneficial, a trial court has no authority to make categorical determinations of reasonable use that alter the existing correlative priority of overlying groundwater right holders.

The application of these principles to the present cases demonstrates why the proposed 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 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 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. 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 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 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. *Id.* ¶¶ 9.2.2 & 18.5.13. And, they must pay the Replacement Water Assessment for the privilege of exercising any of their overlying rights. *Id.* ¶ 9.2.1.

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 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 in *Barstow.*[15]

4. Other Observations.

In addition, two other aspects of the proposed judgment's treatment of the Willis Class members' overlying rights merit special attention.

First, the proposed judgment is inconsistent with the long-standing directive that trial courts should "be creative in devising physical solutions to complex water problems to ensure a fair result consistent with the constitution's reasonable-use mandate." *City of Santa Maria v. Adam,* 211 Cal. App. 4th 266, 288 (2012) (citing *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* 3 Cal. 2d 489, 547 (1935)). Paragraph 4.1 asserts that its physical solution "is a fair and equitable basis for satisfaction of all water rights in the Basin." Yet, the assignment of production rights and the structure of the proposed Replacement Water Assessment—imposed as part of this equitable physical solution—are themselves inequitable. Those groundwater right holders who have done nothing to contribute to overdraft of the aquifer receive no free production rights, while the users who caused the overdraft are allowed to pump all of the native safe yield of the aquifer free of charge. The proposed judgment therefore rewards prior aggregate unreasonable use and penalizes those who may seek to exercise their water rights reasonably at some future time.

Second, this unlawful subordination of the correlative first priority rights of the Non-Pumper Class members is likely to have severe practical consequences. In an overdrafted groundwater basin—even one that is sustainably managed to keep aggregate pumping within the safe yield—there is seldom likely to be native groundwater available to supply newly activated rights. This means that, unless the Watermaster is able to import supplemental water into the Antelope Valley Basin, the members of the Willis Class will not be able to meet their burden of proof under paragraph 18.5.13—viz. that they establish "the reasonableness of the New Production 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 used reasonably and beneficially."

Moreover, if members of the Willis Class are allowed to pump groundwater, the cost of such pumping would be expensive. Paragraph 9.2 of the proposed

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[15] The proposed judgment offers three theories to justify its disparate treatment of the members of the Willis Class and the subordination of their correlative first priority rights to those of the active overlying and appropriative right holders. I address these theories—"equalization" of all groundwater rights, prescription, and relegation of dormant overlying rights to lowest priority in the basin—in the Appendix to this report.

judgment requires the Watermaster to set the Replacement Water Assessment at a volumetric rate based on "the cost to the Watermaster of Replacement Water, including any Watermaster spreading costs." Because imported water is costly, this charge is likely to be high. In the Mojave Groundwater Basin, for example, the replacement water assessment for fiscal year 2013-14 was $448 per acre foot.[16] The proposed judgment and physical solution therefore will impose a significant financial burden on the members of the Willis Class who seek to exercise their overlying rights in the future.

Paragraph 9.2 also contemplates that imported water might not be readily available or affordable in the future, and it gives short shrift to the correlative priority rights of the Non-Pumper Class in the event of this contingency. It provides:

> If available Imported Water is insufficient to fully meet the Replacement Water obligations under contracts, the Watermaster shall allocate the Imported Water for delivery to areas on an equitable and practicable basis pursuant to the Watermaster rules and regulations.

Thus, even in this context—the paragraph that is designed to provide water for the Willis Class members' prospective reasonable and beneficial uses—the proposed judgment ignores the Supreme Court's admonition that while "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." *Barstow,* 23 Cal. 4th at 1243.[17]

C. Conclusion

In *City of Santa Maria v. Adam,* 211 Cal. App. 4th 266, 288 (2012), the Court of Appeal recently summarized the law that governs the rights of the members of the Willis Class in this groundwater adjudication. "The full amount of the overlying right," the Court emphasized, "is that required for the landowners' *'present and prospective'* reasonable beneficial use upon the land." *Id.* (quoting *Barstow,* 23 Cal. 4th at 1240) (emphasis added). As with all water rights, "the court not only has the

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[16] Mojave Basin Watermaster, Annual Report for Water Year 2013-14 (2015), at 30; available at: http://www.mojavewatermaster.org.files/21AR1314.pdf.

[17] Paragraph 5.1.4.1 of the proposed judgment compounds this problem by assigning any water that the United States does not pump pursuant to its federal reserved right to members of the appropriative class. It provides that if the Government "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 Production Rights holders, except for Boron Community Services District and West Valley County Water District, in the following Year, in proportion to Production Rights set forth in Exhibit 3."

power but the duty to fashion a solution to insure the reasonable and beneficial use of the state's water resources as required by article X, section 2. *The only restriction is that, absent the party's consent, a physical solution may not adversely affect that party's existing water rights. Id.* at 288 (emphasis added).

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

II

Recommendations for Correcting the Legal Deficiencies of the Proposed Judgment and Physical Solution

The preceding analysis of the proposed judgment and physical solution identified two essential problems: (1) assignment of the burden of proving the availability of surplus water and production rights to support the Willis Class members' potential future beneficial uses on those individuals; and (2) imposition of the Replacement Water Assessment on the Willis Class members' potential future exercise of *any* of their individual overlying rights, when active producers with equal or lesser priority to the native safe yield pay nothing for the exercise of their assigned production rights.

Fortunately, there is a simple way for the Court to revise the proposed judgment to honor the correlative priority rights of the members of the Willis Class as required by *Barstow* and other cases. This revision also would achieve the adjudication's overarching goals of adopting a truly equitable physical solution that protects the sustainable use of the groundwater of the basin, promotes reasonable and beneficial uses of these waters, and is consistent with California water rights law.

In its *Barstow* opinion, the Supreme Court suggested that trial courts may have authority to define a quantity of water that is available for future uses of overlying landowners:

> One with overlying rights has rights superior to that of other persons who lack legal priority, but is nonetheless restricted to a reasonable beneficial use. Thus, after first considering this priority, courts may limit it to *present and prospective reasonable beneficial uses,* consonant with article X, section 2 of the California Constitution. (*Barstow,* 23 Cal. 4th at 1240 (emphasis added)).

The Supreme Court did not base its decision on this statement, and therefore it is not clear whether this Court could impose this type of physical solution on the Willis Class members without their consent. But the Supreme Court's suggested treatment of the unexercised component of overlying groundwater rights nonetheless may serve as a basis for a negotiated settlement among the parties, which the Court then could incorporate into the judgment and physical solution.

I therefore recommend that the Court direct the parties to attempt to negotiate revisions to the proposed judgment and physical solution that accomplish the following:

1. Determine the quantity of water that members of the Non-Pumper Class are likely reasonably to require for projected future beneficial uses on their overlying lands.

2. Based on this quantity, determine the portion of the native safe yield that the judgment should allocate to the Non-Pumper Class.

    a. This allocation should take into account the existing reasonable and beneficial uses of the native safe yield as represented by the production rights set forth in paragraphs 5.1.1 through 5.1.10 and Exhibits 3 & 4 of the proposed judgment.

    b. The allocation of water to the Non-Pumper Class should be guided, however, by the principles of groundwater rights law reiterated in *Barstow*—viz. that the prospective production rights of the Non-Pumping Class members are correlative vis-à-vis the production rights of the other overlying landowners and are paramount to the production rights of the appropriators.

3. Declare that the members of the Non-Pumper Class collectively have paramount rights to the portion of the native safe yield that is allocated to them.

    a. Until individual members of the Non-Pumper Class obtain authority to begin pumping water to serve future beneficial uses, however, the members of the existing user classes—i.e., active overlying and non-overlying producers identified in paragraphs 5.1.1 though 5.1.10 and Exhibits 3 & 4 of the proposed judgment—may continue to use water from the Non-Pumper Class allocation.[18]

    b. As individual members of the Non-Pumper Class obtain future production rights, the active groundwater users must reduce their production to make water available within the native safe yield to allow for new production by individual members of the Non-Pumper Class. This could be achieved by pro rata reduction (as paragraph 18.5.9 of the proposed judgment requires for possible future reductions in the native safe yield) or any other reasonable reallocation method.

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[18] The judgment should emphasize that these are temporary production rights that are subject to diminution if and when members of the Non-Pumper Class exercise their rights to produce water within the Non-Pumper Class allocation.

4. Declare that future production by individual members of the Non-Pumper Class shall be free of the Replacement Water Assessment, provided that aggregate future production by the members of the Non-Pumper Class does not exceed the future production rights allocated to the Non-Pumper Class under the revised judgment.[19]

5. Vest in a Non-Pumper Class representative board the authority to decide whether to authorize future production by individual members of the Non-Pumper Class.[20]

    a. The decision should be based on the Non-Pumper Class Board's determination that the new production of groundwater is reasonable and that the water will be applied to beneficial uses on lands that overlie the groundwater basin.

    b. The Non-Pumper Class Board also would be responsible for notifying the Watermaster Engineer and the Watermaster board of new production decisions.

    c. Any individual new production that would exceed the allocation reserved by the judgment for the Non-Pumper Class would be conditioned on payment of the Replacement Water Assessment.

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[19] The Court may leave for future negotiation among the Willis Class members how the individual future production rights within the Non-Pumper Class allocation should be allocated *inter se*. (The Court also could insist, of course, that the Willis Class members agree on internal allocation rules before entry of the revised judgment.) Any such agreement among the Willis Class members would be subject to approval by the Court.

[20] The Watermaster board—on which there are no representatives of the Non-Pumper Class—should not have authority to decide whether members of the Non-Pumper Class may exercise their individual production rights to the water that has been reserved for their prospective uses. This is especially true when future pumping by Non-Pumper Class members—within the allocation assigned to them by the judgment—may require other active users who have been temporarily using this water to curtail their production. A Watermaster board comprised entirely of representatives of the active user classes would be in an inherent conflict of interest position in these circumstances. *See* Proposed Judgment ¶ 18.1.1 (emphasis added):

> The Watermaster shall be a five (5) member board composed of one representative each from AVEK and District No. 40, a second Public Water Supplier representative . . . and two (2) landowner Parties, *exclusive of* public agencies and *members of the Non-Pumper and Small Pumper Classes* . . . .

d. Decisions by the Non-Pumper Class Board to authorize or to deny a new production application by a member of the Non-Pumper Class would be subject to judicial review.

6. Declare that active future production by individual members of the Non-Pumper Class shall be subject to the same rules applicable to other active producers, including the requirement to install a water meter (¶ 8.1); responsibility for Administrative Assessments and Balance Assessments (¶¶ 9.1 & 9.3); the right to enter into water storage agreements with the Watermaster (¶ 14); in lieu production, imported water return flow, and production right carryover rights (¶¶ 15.1-15.3); and the right to transfer water (¶¶ 16.1 & 16.2).

Modification of the proposed judgment and physical solution based on these principles would accomplish all of the goals of sustainable groundwater management of the Antelope Valley basin while also recognizing and protecting the overlying rights of the members of the Willis Class as required by *Barstow* and other cases. A revised judgment based on these principles would not alter the requirement that aggregate production remain within the native safe yield. Rather, it would allocate the safe yield consistent with the water rights of the various parties and provide fair treatment to those who have contributed in no way to the overdraft of the aquifer.

Nor would recognition of the prospective overlying rights of the Willis Class members create uncertainty. The revised judgment would set aside a specific quantity of water for the Non-Pumper Class that would be available to individual class members if and when they develop future reasonable and beneficial uses of water on their overlying lands. In the mean time, this water would continue to be available to the existing producers. These users would be on notice, however, that their rights to use that water may be diminished or terminated in the future as required to fulfill the prospective reasonable and beneficial needs of the members of the Willis Class up to the limits of the Non-Pumper Class allocation. This is the most efficient and fair accommodation of the rights of the respective parties.

For these reasons, I urge Court to direct the parties to negotiate revisions to the proposed judgment and physical solution based on these principles. It also may be useful for the Court to appoint a facilitator or mediator to assist with these negotiations.

Conclusion

As noted at the outset, the proposed judgment and physical solution's treatment of the overlying rights of the members of the Willis Class contradicts each of its four stated goals. *See* Proposed Judgment ¶ 3.4.

The proposed judgment does not provide a "fair and reasonable allocation of Groundwater rights in the Basin after giving due consideration to water rights priorities and the mandate of Article X, section 2 of the California Constitution." Rather, it rewards prior unreasonable use by allocating all of the native safe yield of the basin to those whose aggregate excess pumping caused the overdraft. It also ignores the correlative priority of those who have done nothing to contribute to that overdraft by allocating none of the native safe yield to the Non-Pumping Class.

Nor does the proposed judgment "provide[] for a reasonable sharing of Imported Water costs." Rather, it disproportionately charges the members of the Willis Class for these costs by levying the Replacement Water Assessment on all of the water that they may produce pursuant to their overlying rights, while exempting most of the production by existing overlying users and appropriators from the Replacement Water Assessment.

Although the proposed judgment may give "due consideration to applicable common law rights and priorities to use Basin water and storage space," it certainly does not do so "without substantially impairing such rights." Its disparate treatment of the Willis Class members' overlying rights is contrary to the express protection of the correlative priority of those rights that is required by *Barstow* and other cases.

The proposed judgment therefore does not "further[] the mandates of the State Constitution and State water policy." This Court has an obligation under Article X, Section 2 to craft a physical solution that protects and promotes the reasonable use of the safe yield of the Antelope Valley groundwater basin. The Supreme Court made clear in *Barstow,* however, that the physical solution may not categorically alter or subordinate overlying rights without the consent of those parties.

As described in part II of this report, however, there is a relatively simple way to revise the proposed judgment and physical solution to resolve the incongruences between its goals and its currently illegal terms. A fair, lawful, and reasonable accommodation of the rights of the various parties—including those of the Willis Class—is wholly consistent with sustainable management of the waters of the basin and consonant with the directives of the California Constitution.

APPENDIX

The Justifications Offered in the Proposed Judgment and Physical Solution to Support the Subordination of the Overlying Rights of the Willis Class Members to the Rights of All Active Groundwater Users Are Inconsistent with California Supreme Court Precedent.

The proposed judgment and physical solution provides three explanations for its subordination of the overlying rights of the members of the Non-Pumper Class. None of these explanations is consistent with California groundwater rights law.

1. The Purported "Equalization" of All Groundwater Rights is Contrary to *City of Barstow v. Mojave Water Agency,* 23 Cal. 4th 1224 (2000).

In allocating rights to the native safe yield, paragraph 5.1 asserts that "[c]onsistent with the goals of this Judgment and to maximize reasonable and beneficial use of the Groundwater of the Basin pursuant to Article X, section 2 of the California Constitution, all the Production Rights established by this Judgment are of *equal priority.*" (Emphasis added). The proposed judgment then allocates the native safe yield according to this ostensibly equal priority system by assigning *all* of the available water to the active overlying and appropriative water right holders; and it does so free of the Replacement Water Assessment.[21]

This equalization of rights is factually incorrect, as the "equal priority" held by the members of the Willis Class affords them no water except that which the Watermaster Engineer and Watermaster board may choose to grant them in the future conditioned on payment of the Replacement Water Assessment. Moreover, even if the proposed judgment actually did give equal treatment to the rights of the Willis Class and the other groundwater right holders, this equalization—done for the asserted purpose of promoting the goals of the proposed judgment and the mandates of Article X, Section 2—would in fact violate the Constitution. For the central holding of the Supreme Court's decision in *Barstow* is that a physical solution may not declare the rights of overlying landowners and appropriators to be categorically equal.

The Supreme Court expressly rejected the "equitable apportionment" theory by which the Superior Court "concluded it had 'the authority to draft and impose a physical solution which requires all users to share equitably in the *cost and reduction of use,* to safe yield.'" *Barstow,* 23 Cal. 4th at 1249 (emphasis added). In

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[21] Paragraph 5.1 makes exceptions for the federal reserved groundwater right, which it grants top priority (including first priority for future uses on federal lands), *id.* ¶¶ 5.1.4 & 5.1.4.1, and for members of the Small-Pumper Class, who receive a priority of up to 3 afa (for both existing and future uses) free of the Replacement Water Assessment. *Id.* ¶¶ 5.1.3 & 5.1.3.1; *see supra* note 10.

response, the Supreme Court held that "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." *Id.* at 1250. Indeed, the Court emphasized, "we have never endorsed a pure equitable apportionment that completely disregards overlying owners' existing legal rights." *Id.* at 1248.

The equalization of priority theory of paragraph 5.1 of the proposed judgment and physical solution in the current cases violates these directives.

2. The Proposed Judgment's Prescriptive Rights Theory Does Not Support the Subordination of the Overlying Groundwater Rights of the Willis Class.

Paragraph 9.2.2 of the proposed judgment states that "[e]vidence presented to the Court demonstrates that Production by one or more Public Water Suppliers satisfies the elements of prescription and that Production by overlying landowners during portion(s) of the prescriptive period exceeded the Native Safe Yield." It then notes that the members of the Non-Pumper Class "do not and have never Produced Groundwater for reasonable beneficial use as of the date of this Judgment." From this, it asserts that "pursuant to *Pasadena v. Alhambra* (1949) 33 Cal 2d 908, 931-32 and other applicable law, the failure of the Non-Pumper Class members to Produce any Groundwater under the facts here modifies their rights to Produce Groundwater except as provided in this Judgment." In other words, the members of the Willis Class have lost their rights by prescription.

This is a puzzling claim, as most of the appropriators who have endorsed the proposed judgment have entered into a Stipulation of Settlement, subsequently approved by the Court, by which they agreed not to exercise prescriptive rights that they might establish at trial "to diminish the Willis Class Members' Overlying Right below a correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield." Willis Class Stipulation of Settlement (Mar. 1, 2011), at 10, ¶ IV(D)(2). Indeed, the Court later described the Willis Class Settlement in terms that would seem to preclude the assertion of prescriptive rights in paragraph 9.2.2 of the proposed judgment: "[A]lthough the Willis Class did not recover any monetary payment, it was successful in achieving a significant benefit *by preventing the Public Water Suppliers from proceeding on their prescription claims* and by maintaining certain correlative rights to the reasonable and beneficial use of water underlying their land." Order on Motion by Plaintiff Rebecca Lee Willis and the Class for Attorneys Fees (May 5, 2011), at 5 (emphasis added).

Regardless of whether the prescriptive rights theory of the judgment is precluded by the Willis Class Settlement, California law does not support the contention that the members of the Non-Pumper Class have lost their correlative first priority rights by prescription. Simply put, dormant overlying rights are not lost by either adverse use or non-use.

California has long-recognized that an unlawful use of water may "ripen" into a prescriptive water right. The Court of Appeal recently summarized this law:

> "A prescriptive right in groundwater requires proof of the same elements required to prove a prescriptive right in any other type of property: a continuous five years of use that is actual, open and notorious, hostile and adverse to the original owner, and under claim of right. Since appropriators are entitled to only that part of the safe yield the overlying landowners do not need, '[t]he commencement of overdraft provides the element of adversity which makes the first party's taking an invasion constituting a basis for injunctive relief to the other party.'" (*City of Santa Maria v. Adam,* 211 Cal. App. 4th 266, 278, 291 (2012) (quoting *City of Los Angeles v. City of San Fernando,* 14 Cal.3d 199, 282 (1975))); *see Barstow,* 23 Cal. 4th at 1241.

As the proposed judgment correctly observes, the California Supreme Court applied this law in *Pasadena v. Alhambra,* 33 Cal. 2d 908 (1949), to recognize the doctrine of "mutual prescription." The Court reasoned that that, once overdraft commences, all groundwater extraction becomes unlawful because aggregate extractions exceed the safe yield. If overdraft continues for five years, and the other elements of prescription are satisfied, then "the rights of all the parties, including both overlying users and appropriators, . . . become mutually prescriptive against all the other parties and, accordingly, . . . all rights are of equal standing, with none prior or paramount." *Id.* at 928.[22]

The judgment in *Pasadena* required all active groundwater users to reduce their pumping by approximately one-third, the amount that the Superior Court determined was required to bring aggregate pumping within the safe yield. *See id.* at 922-23. In affirming this judgment and physical solution, however, the Supreme Court left open the question of how the doctrine of mutual prescription applies to unexercised rights: "We need not determine whether the overlying owners involved here retained simply a part of their original overlying rights or whether they

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[22] The theory of mutual prescription is that all of the active groundwater producers—both overlying and appropriative—simultaneously obtain prescriptive rights vis-à-vis one another through this prescriptive use; and they simultaneously protect a portion of their rights through "self-help." In the Court's words:

> [A]lthough the pumping of each party to this action continued without interruption, it necessarily interfered with the future possibility of pumping by each of the other parties by lowering the water level. The original owners by their own acts, although not by judicial assistance, thus retained or acquired a right to continue to take some water in the future. The wrongdoers also acquired prescriptive rights to continue to take water, but their rights were limited to the extent that the original owners retained or acquired rights by their pumping. (*Pasadena,* 33 Cal. 2d at 932.)

obtained new prescriptive rights to use water. The question might become important in order to ascertain the rights of the parties in the event of possible future contingencies, but these may never happen." *Id.* at 932. The Court answered this question 26 years later in its opinion in the Upper Los Angeles River Groundwater Adjudication, *City of Los Angeles v. City of San Fernando,* 14 Cal. 3d 199 (1975).

The *Los Angeles* decision addressed a variety of important aspects of California groundwater rights law of which two are relevant to these cases. First, the Court held that, under section 1007 of the Civil Code, prescriptive water rights may not be asserted against cities and public water suppliers without their consent. *Id.* at 270-77. For this reason, as the proposed judgment recognizes, the appropriative groundwater rights of the public water suppliers in these cases were not lost or diminished by prescription or mutual prescription. *See* Proposed Judgment ¶ 9.2.2.

Second, the Supreme Court in *Los Angeles* held that unexercised overlying groundwater rights also are not lost or diminished by prescription, including in those situations where *active* overlying and appropriative rights may be reduced based on prescription or mutual prescription—viz. where aggregate pumping exceeds the safe yield of the aquifer. In summarizing the future rights of overlying landowners in the Sylmar sub-basin, the Court explained that "the private defendants may show overlying rights to native ground water for reasonable beneficial uses on their overlying land, subject to any prescriptive rights of another party." *Los Angeles,* 14 Cal. 3d at 293. It then added that "[s]uch prescriptive rights would not necessarily impair the private defendants' rights to ground water for *new* overlying uses for which the need had not yet come into existence during the prescriptive period." *Id.* at 293 n.100 (emphasis in original). In other words, unexercised overlying groundwater rights are not subject to loss or diminishment by active overlying or appropriative users even under conditions of overdraft.

The reason for this rule is inherent in the law of prescription: A prescriptive right does not accrue until the allegedly prescriptive use is "adverse to the original owner," *Santa Maria,* 211 Cal. App. 4th at 291—i.e., until the allegedly prescriptive use deprives another water right holder of its beneficial use. "There is no such deprivation, and consequently no basis upon which to found a prescriptive right, in the use of waters at times when the owner of record does not require them for his own purposes." Wells A. Hutchins, The California Law of Water Rights (State of California 1956), at 309.

Thus, in situations like the present cases, where the active groundwater right holders (whose collective pumping has caused overdraft) assert prescriptive rights against those who have never extracted groundwater, the law does not recognize prescriptive rights. The aggregate pumping in excess of the safe yield has not harmed the members of the Non-Pumper Class, because their need to pump groundwater "has not yet come into existence." *Los Angeles,* 14 Cal. 3d at 293 n.100.

Or, as the Supreme Court explained in *Barstow,* "a trial court should declare prospective uses paramount to the appropriator's rights, so the appropriator cannot gain prescriptive rights in the use." 23 Cal. 4th at 1242.

Accordingly, the assertion in paragraph 9.2.2 of the proposed judgment that "[e]vidence presented to the Court demonstrates that Production by one or more Public Water Suppliers satisfies the elements of prescription" is factually and legally incorrect as applied to the members of the Willis Class. The theory of prescriptive rights advanced by the proposed judgment therefore does not support the subordination of the unexercised overlying rights of these parties.

3. The Supreme Court's Decision in *In re Waters of Long Valley Creek Stream System,* 25 Cal. 3d 339 (1979), Does Not Support the Proposed Judgment's Subordination of the Willis Class Members' Overlying Groundwater Rights.

Finally, the proposed judgment and physical solution relies on *In re Waters of Long Valley Creek Stream System,* 25 Cal. 3d 339 (1979), to justify its subordination of the overlying rights of the Willis Class members to those of all active groundwater users. Proposed Judgment ¶ 9.2.2. As subsequent decisions have made clear, however, the law that gave rise to the "*Long Valley* principle" does not apply to groundwater adjudications, including comprehensive adjudications such as these cases.

a. *Long Valley Creek Stream System*

In *Long Valley,* the Supreme Court held that, in a statutory adjudication of all surface water rights conducted pursuant to sections 2500-2868 of the Water Code, the State Water Resources Control Board has authority to relegate unexercised riparian rights to a priority below that of all active surface water rights. The Court explained:

> [W]hen 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. . . . [T]he 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. (*Long Valley,* 25 Cal. 3d at 358-59.)

Although the Court relied heavily on the policy of reasonable use, *see id.* at 354-56, it did not hold that Article X, Section 2 directly conferred authority to abrogate the priority of dormant riparian rights on either the SWRCB or the courts. Rather, the Court determined that in "light of these policies and of the constitutional intent to limit unduly expansive interpretations of water rights that would

contravene them, it becomes clear that article X, section 2, *enables the Legislature to exercise broad authority in defining and otherwise limiting future riparian rights, and to delegate this authority to the Board*." *Id.* at 351 (emphasis added).

The constitutional policies that the Supreme Court identified in *Long Valley*—promotion of certainty, finality, and current and future reasonable use—apply to groundwater adjudications just as they do to comprehensive surface water adjudications. *See Barstow,* 23 Cal. 4th at 1241-42; *Santa Maria,* 211 Cal. App. 4th at 287-88. But the means of implementing these policies in groundwater adjudications do not include the subordination of unexercised overlying rights.

b. *Wright v. Goleta Water District*

This conclusion is confirmed by *Wright v. Goleta Water District,* 174 Cal. App. 3d 74 (1985), in which the Court of Appeal reversed a Superior Court decision that applied the *Long Valley* principles to relegate the unexercised rights of overlying landowners below those of all active groundwater producers, including overlying users and appropriators. *See id.* at 82. The Court of Appeal explained that "[e]ven though it may appear a logical extension of *Long Valley* to allow a trial court adjudicating competing claims to groundwater to subordinate an unexercised right to a present appropriative use, we must hold such extension inappropriate." *Id.* at 87. The Court noted that it agreed "philosophically" that the principles of *Long* Valley should apply to groundwater adjudications, "but *stare decisis* and due process considerations . . . compel us to reach the opposite conclusion in this case." *Id.* It concluded that, "even though article X, Section 2 applies to groundwater as well as stream water and courts have enjoyed concurrent jurisdiction with the Board to enforce it, *absent a statutory scheme for comprehensive determination of all groundwater rights,* the application of *Long Valley* to a private adjudication would allow prospective rights of overlying landowners to be subject to the vagaries of an individual plaintiff's pleading without adequate due process protections." *Id.* at 89 (citation deleted; emphasis added).

As the Court of Appeal alluded, *Wright* was not a comprehensive adjudication because the compliant and cross-complaint did not include all of the potential groundwater right holders. *See id.* at 78-79. Thus, it might be possible to distinguish *Wright* from the facts of the present cases in which all groundwater right holders have been named as defendants or cross-defendants and have been notified of these proceedings. Proposed Judgment ¶¶ 1.1-1.4. This would not be appropriate, however, for two reasons.

First, although the comprehensive nature of these cases satisfies the *Wright* Court's concerns about due process, the Court of Appeal's principal reason for declining to apply *Long Valley* remains present here—viz. the Legislature has not authorized the SWRCB or the courts to eliminate the correlative first priority of the unexercised overlying groundwater right as it has done for dormant riparian rights that are the subject of a statutory adjudication. Second, the Supreme Court's more

recent decision in *Barstow* forecloses the argument that *Long Valley* may be applied to groundwater rights adjudications absent legislative authorization.

c. *City of Barstow v. Mojave Water Agency*

As described in the main body of this report, *see supra* part IB, the Supreme Court held in *Barstow* that, while 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." *Barstow,* 23 Cal. 4th at 1250 (citation omitted). In other words, in comprehensive groundwater adjudications, the trial court does not have authority to make categorical changes in water rights priorities, although it does have the power (and responsibility) to make individualized determinations of reasonable use. The proposed judgment in these cases violates this directive because it categorically subordinates all of the Willis Class members' overlying rights to the exercised rights of the active overlying landowners and appropriators.

In addition to this reiteration that "water right priority has long been the central principle in California water law," *id.* at 1243, the Supreme Court also addressed the applicability of *Long Valley* to comprehensive groundwater adjudications. It explained that the "*Wright* court refused to apply *Long Valley* to limit the scope of an overlying owner's future unexercised groundwater right to a present appropriative use, because the comprehensive legislative scheme applicable to the adjudication of surface water rights and riparian rights is not applicable to groundwater." *Id.* at 1249 n.13 (citing *Wright,* 174 Cal. App, 3d at 87-89).

Although declining to decide that specific question, the Supreme Court did say the following:

> *Wright* does suggest that, in theory at least, a trial court could apply the *Long Valley* riparian right principles *to reduce a landowner's future overlying water right use below a current but unreasonable or wasteful usage,* as long as the trial court provided the owners with the same notice or due process protections afforded the riparian owners under the Water Code. 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. (*Id.* (emphasis added; citations deleted.))

The emphasized clauses deserve special attention, because they show that the Supreme Court did not endorse (expressly or obliquely) the authority of trial

courts to subordinate the dormant overlying rights held by overlying landowners who have never exercised their water rights.

What the Supreme Court does address in footnote 13 is the uncontroversial notion that a Superior Court has authority to limit *currently exercised* overlying rights to a future production right that is lower than existing levels of pumping based on a finding that continuation of the current production levels would be unreasonable. This authority exists notwithstanding the general correlative priority of overlying rights and despite the fact that the overlying right otherwise may expand or contract as the overlying landowner's beneficial uses may change over time. Footnote 13 therefore is simply an embellishment of the *Barstow* Court's earlier statements that Article X, Section 2 "dictates the basic principles defining water rights: that no one can have a protectable interest in the unreasonable use of water," *id.* at 1242, and that in "ordering a physical solution, . . . a [trial] 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." *Id.* at 1250.

Footnote 13 does not authorize, however, that which the proposed judgment and physical solution in these cases seeks to achieve—viz. the categorical subordination of the dormant overlying rights of the Willis Class members who have never exercised their rights by pumping groundwater. The text of footnote 13 makes no mention of these types of overlying groundwater right holders; and the Supreme Court's concluding comment on *Long Valley* and *Wright* was emphatic: "Contrary to respondents' contention, no appellate court has endorsed an equitable apportionment solution that disregards overlying owners' existing rights." *Id.* at 1249.

Indeed, there is a significant difference between the concerns that the Supreme Court addressed in footnote 13 and the groundwater rights of the Willis Class members. The Court was responding to the problems created by existing producers whose aggregate pumping has caused overdraft of the basin and whose future pumping poses a risk of frustrating the physical solution's policies of reducing such pumping to the safe yield. The entire footnote focuses on the risks posed by "a *current* but unreasonable or wasteful usage" and the trial court's "authority to limit the future groundwater use of an overlying owner *who has exercised the water right.*" *Id.* at 1249 n.13 (emphasis added). And this is appropriate, because it is these users who both have caused and benefitted from the overdraft and aggregate unreasonable use. *See supra* part IB.

In contrast, those overlying landowners who have never exercised their water rights have neither contributed to nor benefitted from the overdraft and unreasonable use of the aquifer. When they seek—as the Willis Class members do here—to preserve their dormant overlying rights at correlative first priority, they are simply trying to retain the opportunity to share in the native safe yield of the

basin to the extent of their own prospective individual reasonable and beneficial uses.