

1 Ralph B. Kalfayan (SBN 133464)
Lynne M. Brennan (SBN 149131)
2 KRAUSE KALFAYAN BENINK &
SLAVENS, LLP
3 550 West C Street, Suite 530
San Diego, CA 92101
4 Tel: (619) 232-0331
Fax: (619) 232-4019

5
6 Class Counsel for the Willis Class
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF LOS ANGELES

10 **ANTELOPE VALLEY GROUNDWATER**
11 **CASES**

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

15 *Plaintiffs,*

16 v.

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

24 *Defendants.*
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RELATED CASE TO JUDICIAL COUNCIL
COORDINATION PROCEEDING NO. 4408

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

Date: August 4, 2015

Time: 10:00 AM

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

Judge: Hon. Jack Komar

1 Not surprisingly, the Public Water Suppliers' Opposition is devoid of any
2 acknowledgement of their legal duties and obligations arising out of the Willis Settlement
3 Agreement. If a Judge or attorney unfamiliar with this case read the PWS' Opposition, they
4 would have no idea that the Public Water Suppliers had entered into a **binding** Settlement
5 Agreement with the Willis Class which included a **Release** of all claims and defenses against the
6 Willis Class, including but not limited to, any purported claim of prescriptive rights against the
7 Willis Class. In addition to the enforceable Release, principles of *res judicata* and collateral
8 estoppel **prevent** the Public Water Suppliers from **relitigating** any claim or defense against the
9 Willis Class in any subsequent proceeding. In addition to the enforceable Release and principles
10 of *res judicata* and collateral estoppel, the Public Water Suppliers **contractually agreed** in the
11 binding Willis Settlement Agreement **not to take any positions before this Court to contest the**
12 Willis Class' correlative right of up to 85% of the Native Safe Yield free of replacement
13 assessment.
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16 Thus, Paragraph 9.2.2 of the Stipulated Judgment and proposed Physical Solution
17 ("SPPS") which purports to extinguish the Willis Class' right to pump groundwater from the
18 Native Safe Yield constitutes an unequivocal breach of the **very core** of the Willis Settlement
19 Agreement, i.e., that the Willis Class has the right to pump groundwater from the Native Safe
20 Yield. See Paragraph ____ of the Willis Settlement Agreement. Moreover, it is critically
21 important to note that Paragraph 9.2.2 of the SPPS **on its face** states that the Willis Class' rights
22 have been "**modified**" which, aside from being absolutely erroneous under controlling California
23 Supreme Court precedent (see discussion II.A, *infra*), is an **irrefutable admission** by the Public
24 Water Suppliers that the SPPS is **not consistent** with the Willis Settlement Agreement. If the
25 SPPS and, in particular, Paragraph 9.2.2 of the SPPS, were truly "consistent" with the Willis
26 Settlement Agreement, then there would not be any language in the SPPS referencing
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1 "prescription,"¹ "modifies," or "no member of the Non-Pumper Class has established a Production
2 Right to the reasonable and beneficial use of Groundwater based on their unexercised claim of
3 right to Produce Groundwater." Not only does this last statement directly violate the California
4 Supreme Court's holding in *City of Barstow* that "the trial court [cannot] define or otherwise
5 limit an overlying owner's future unexercised groundwater rights, in contrast to this court's
6 limitation of unexercised riparian rights"², more importantly for purposes of this Motion, it
7 directly violates the Public Water Suppliers' legally enforceable and binding promise that "The
8 Settling Parties agree that the Settling Defendants and the Willis Class Members each have rights
9 to produce groundwater from the Basin's Federally Adjusted Native Safe Yield. ¶ IV.D." and
10 "The Settling Defendants [Public Water Suppliers] will not take any positions or enter into any
11 agreements that are inconsistent with the exercise of the Willis Class Members' right to produce
12 and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield. ¶
13 IV.D.2."

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16 That this Court has the power to determine the amount of the Willis Class' correlative
17 share in a Physical Solution in a way that merges and incorporates the Willis Judgment (thereby
18 preserving the Willis Class' right to pump groundwater and to maintain property values) does not
19 alter the fact that the Public Water Suppliers are legally and contractually prohibited from
20 breaching the promises they made to the Willis Class in the Willis Settlement Agreement by
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24 ¹ The Public Water Suppliers' assertion of prescription claims in the SPPS against the Willis Class is the ultimate
25 "have their cake and eat it too" scenario in that the PWS avoided the expense and uncertainty of trial and agreed to
26 release all claims of prescription against the Willis Class, only to come back five years later to audaciously and
27 illegally reassert claims of prescription in the SPPS against the Willis Class. That the Public Water Suppliers
28 brazenly stand behind their indefensible breach of the Release provision in the Willis Settlement Agreement is a
testament to the Public Water Suppliers' sense of power and "above the law" mentality that harkens back more than a
century to the earliest days of those government institutions. In 2015, the Judiciary has the ability and duty to rectify
illegal conduct by powerful governmental institutions, especially in the context of protecting absent class members.

² *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1248-49 (2000) (emphasis supplied).

1 entering into a subsequent agreement, i.e. the SPPS, that by its very terms directly contradicts the
2 terms of the Willis Settlement Agreement.

3 The Willis Class fully understands that there is a severe drought in California, including in
4 the Antelope Valley Basin. The Willis Class further understands that its right to pump
5 groundwater in the future is not limitless. Willis Class Counsel understands that the Willis Class
6 must "share the pain" that all overlying owners will experience when they finally cut back their
7 groundwater pumping to rectify the overdrafted Basin caused by the severe drought and the
8 extreme overpumping of the aquifer by past and current pumpers.³ To that end, the Willis Class
9 has presented the framework for modifying the existing proposed Physical Solution ("SPPS") to
10 ensure that the Willis Judgment is "merged and incorporated" into the Physical Solution
11 ultimately adopted by this Court as is required by law and by this Court's Consolidation Order.
12 The Willis Class is encouraged that the Court has stated that it will not be constrained by the
13 "Dynamite Provision" included in the SPPS which purports to "blow up" or void the SPPS if
14 even one term in the 61-page agreement is modified by this Court or the appellate court. This
15 will allow the Willis Class to present evidence the week of September 28, 2015, of its alternative
16 physical solutions, including most importantly its proposed revisions to the "otherwise salutary"
17 SPPS. The modified SPPS will incorporate the valid rights of the Willis Class under the Willis
18 Settlement Agreement and Willis Judgment, as well as the Willis Class' rights under controlling
19 California law, in particular the California Supreme Court's decision in *City of Barstow*.
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25 ³ The Public Water Suppliers' audacity extends to seeking to punish the Willis Class for an overdraft condition that it
26 had no part in creating by attempting to extinguish their unexercised water rights and erroneously arguing that
27 California law includes a "use it or lose it" requirement for the right to pump groundwater in the future. Not only is
28 this "use it or lose it" requirement conjured up by the Public Water Suppliers not the law in California (unless and
until the California Supreme Court reverses its holding in *City of Barstow* that the trial court cannot subordinate an
overlying landowners' unexercised right to pump groundwater -- as opposed to the trial court's ability to subordinate
unexercised riparian rights -- or the California Legislature promulgates a "use it or lose it" law with respect to
groundwater pumping), this refusal by the Public Water Suppliers to acknowledge the rights of the Willis Class to
pump groundwater from the Native Safe Yield constitutes a further breach of the Willis Settlement Agreement.

1 Simply stated, the fact that California is in a severe drought and that the Willis Class' right
2 to pump groundwater in the future is not limitless do not provide legal justification for the Public
3 Water Suppliers' brazen and undeniable breach of the Willis Settlement Agreement by entering
4 into the proposed Physical Solution ("SPPS").

5 ARGUMENT

6
7 The Public Water Suppliers claim they have not breached the Willis Settlement Agreement on
8 the following grounds: (1) the Willis Settlement Agreement expressly recognized limits on the
9 Willis Class' correlative rights and thus the Court may prospectively limit (subordinate or
10 extinguish) the Willis Class' water rights; (2) replacement water assessments are not discriminatory
11 in nature since they apply to all pumping in excess of the Native Safe Yield; (3) the Willis Class'
12 water rights would have been subordinated but for the Willis Settlement Agreement; and (4) the
13 burdens placed on the Willis Class are not unreasonable considering some overlying pumping
14 landowners have agreed to cut back production of groundwater. These arguments fail to refute or
15 excuse the Public Water Suppliers' breach of the Willis Settlement Agreement.
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17 A. The Willis Class' Recognition That They Share Correlative Rights with Other 18 Overlying Landowners in the Basin Does Not Provide a Valid Legal Excuse for the 19 Public Water Suppliers to Enter into the SPPS Which Rejects the Willis Class' Right 20 to Pump Groundwater

21 The Willis Settlement Agreement ("WSA") does not limit Willis Class Members from
22 sharing correlatively with other overlying landowners in the Native Safe Yield. On the contrary, it
23 expressly provides that Willis Class Members are entitled to "a fair share and just proportion of the
24 water available to overlying landowners." WSA, ¶ III.D. Furthermore, the Public Water Suppliers
25 agreed to honor the rights of the Willis Class to share equitably in the Native Safe Yield - a fair and
26 just proportion of up to 85% of the NSY free of replacement assessment- and not enter into any
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1 agreement which would impair those rights. WSA, ¶ IV.D.2. The SPPS directly violates these
2 provisions of the Willis Settlement Agreement and strips the Class of its correlative rights.

3 The Willis Class' acknowledgement in the Willis Settlement Agreement that they will be
4 sharing the Native Safe Yield with other overlying landowners in no way provides a legal
5 justification for the Public Water Suppliers to renege on the terms of the Willis Settlement
6 Agreement by agreeing in the SPPS to "modify" the rights of the Willis Class and assert that the
7 Willis Class has **no right** to pump groundwater from the Native Safe Yield. See Paragraph 9.2.2
8 of the SPPS. Again, the fact that other Stipulating Parties agreed to these terms in the SPPS does
9 not provide a "cloak of protection" or valid legal excuse for the Public Water Suppliers' breach.⁴
10 Quite the contrary is true. The Public Water Suppliers had contractually agreed in the Willis
11 Settlement Agreement as follows:
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13 The Settling Parties recognize that not all parties to the Coordinated Actions have entered
14 into this Stipulation and that a trial may be necessary as against non-settling parties. The
15 Settling Parties *agree to cooperate and coordinate their efforts in any such trial or hearing
so as to obtain entry of judgment consistent with the terms of this Stipulation; . . .* ¶ VIII.B.

16 The Public Water Suppliers' outrageous and intentional breach of Paragraph VIII.B of the Willis
17 Settlement Agreement is well documented in the Court files because the Public Water Suppliers
18 **deliberately excluded** the Willis Class from participating in the discussions and negotiations
19 leading up to the execution and attempted adoption of the SPPS by the 140-plus Stipulating Parties.
20 There was no cooperation or coordination with the Willis Class of any kind on the part of the Public
21 Water Suppliers and the direct proof of this breach can be found in Paragraphs 3.5.32; 5.1.4.1;
22 5.1.10; 9.2.1; 9.2.2; and 18.5.13 *et. seq.*
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28 ⁴ The Willis Class has opposed the SPPS on all grounds in earlier filings with this Court. This Motion is limited to the issue of enforcing the Willis Settlement Agreement against the Public Water Suppliers.

1 **B. The Public Water Suppliers Breached the Willis Settlement Agreement By Agreeing**
2 **in the SPPS to Prevent the Willis Class from Pumping Groundwater from the Native**
3 **Safe Yield**

4 It is undisputed that the SPPS does not provide the Willis Class with any right to pump
5 groundwater from the Native Safe Yield. The Public Water Suppliers' act of entering into the SPPS
6 is therefore a breach of the Willis Settlement Agreement. *See* WSA, ¶¶ III.K, IV.D, IV.D.2. It also
7 is undisputed that, pursuant to the SPPS, Stipulating Parties are entitled to pump from the Native
8 Safe Yield free of any replacement assessment. Therefore, it is further undisputed that under the
9 SPPS, unlike the Public Water Suppliers (as well as all other Stipulating Parties), the Willis Class
10 has no right to pump **any water** free of replacement assessment because they are prohibited from
11 pumping from the Native Safe Yield. This is discriminatory and also constitutes another breach of
12 the Willis Settlement Agreement by the Public Water Suppliers. The fact that the Public Water
13 Suppliers and other Stipulating Parties have to pay a replacement assessment **over and above** their
14 allocation of groundwater from the Native Safe Yield obviously does nothing to negate the
15 discriminatory terms in the SPPS that require Willis Class Members to pay a replacement
16 assessment for **any and all** water they pump, if and only if, they are given approval to pump by the
17 PWS-controlled Watermaster after completing onerous, expensive, and unprecedented procedures
18 to get a well permit.
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21 **C. The Public Water Suppliers Breached the Willis Settlement Agreement By Asserting**
22 **Prescriptive Rights Against the Willis Class in the SPPS and By Arguing that the**
23 **Willis Class' Right to Pump Groundwater Can Be Subordinated**

24 As this Court has recognized, the Public Water Suppliers released their prescription claims
25 against the Willis Class by entering into the Willis Settlement Agreement.⁵ A release is defined
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28 ⁵ This Court ruled in the Attorneys' Fees Order that "although 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

1 as “[t]he relinquishment, concession, or giving up of a right, claim, or privilege, by the person in
2 whom it exists or to whom it accrues, to the person against whom it might have been demanded
3 or enforced.’ (Black’s Law Dictionary, Fourth Ed.). *Commercial Ins. Co. of Newark, N. J. v.*
4 *Copeland*, 248 Cal.App.2d 561, 565 (1967). Notwithstanding this black letter law, the Public
5 Water Suppliers knowingly and intentionally entered into the SPPS which **explicitly asserts a**
6 **claim of prescription against the Willis Class**. See Paragraph 9.2.2 of the SPPS. Most courts
7 would sanction the Public Water Suppliers for committing a knowing and intentional violation of
8 a Release provision in a prior settlement agreement. At a minimum, this Court must find the
9 Public Water Suppliers in breach of the Release provision of the Willis Settlement Agreement
10 and rectify the breach by either voiding the Public Water Suppliers’ execution of the SPPS or by
11 enjoining the Public Water Suppliers from contesting the Willis Class’ submission of a modified
12 SPPS that excludes any reference to claims of prescription against the Willis Class.
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15 Even if this Court were to ignore this breach of the Willis Settlement Agreement, the
16 Willis Class’ right to pump groundwater is not extinguished by prescription. Simply put, dormant
17 overlying rights are not lost by either adverse use or non-use.
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19 In *Pasadena v. Alhambra*, 33 Cal. 2d 908 (1949), the Supreme Court recognized the
20 doctrine of “mutual prescription.” The Court reasoned that once overdraft commences, all
21 groundwater extraction becomes unlawful because aggregate extractions exceed the safe yield. If
22 overdraft continues for five years, and the other elements of prescription are satisfied, then “the
23 rights of all the parties, including both overlying users and appropriators, . . . become mutually
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28 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).

1 prescriptive against all the other parties and, accordingly, ... all rights are of equal standing, with
2 none prior or paramount.” *Id.* at 928.

3
4 In affirming this judgment and physical solution, however, the Supreme Court left open the
5 question of how the doctrine of mutual prescription applies to unexercised rights: “We need not
6 determine whether the overlying owners involved here retained simply a part of their original
7 overlying rights or whether they obtained new prescriptive rights to use water. The question might
8 become important in order to ascertain the rights of the parties in the event of possible future
9 contingencies, but these may never happen.” *Id.* at 932. The Court answered this question 26 years
10 later in its opinion in the Upper Los Angeles River Groundwater Adjudication, *City of Los Angeles*
11 *v. City of San Fernando*, 14 Cal. 3d 199 (1975).

13
14 The Supreme Court in *Los Angeles* held that unexercised overlying groundwater rights are
15 not lost or diminished by prescription, including in those situations where *active* overlying and
16 appropriative rights may be reduced based on prescription or mutual prescription—viz. where
17 aggregate pumping exceeds the safe yield of the aquifer. In summarizing the future rights of
18 overlying landowners in the Sylmar sub-basin, the Court explained that “the private defendants
19 may show overlying rights to native ground water for reasonable beneficial uses on their overlying
20 land, subject to any prescriptive rights of another party.” *Los Angeles*, 14 Cal. 3d at 293. It then
21 added that “[s]uch prescriptive rights would not necessarily impair the private defendants’ rights to
22 ground water for *new* overlying uses for which the need had not yet come into existence during the
23 prescriptive period.” *Id.* at 293 n.100 (emphasis in original). In other words, unexercised overlying
24 groundwater rights are not subject to loss or diminishment by active overlying or appropriative
25 users even under conditions of overdraft.
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1 discussed previously, the Willis Class accordingly requests this Court to either void the Public
2 Water Suppliers' execution of the SPPS or to enjoin the Public Water Suppliers from opposing the
3 Willis Class' modifications to the SPPS which will rectify their breach.

4 Dated: July 29, 2015

Respectfully submitted,

6 KRAUSE, KALFAYAN, BENINK &
7 SLAVENS, LLP

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11 Ralph B. Kalfayan, Esq.
12 Lynne M. Brennan, Esq.
13 Class Counsel for the Willis Class
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1 Ralph B. Kalfayan (SBN 133464)
2 Lynne M. Brennan (SBN 149131)
3 KRAUSE KALFAYAN BENINK &
4 SLAVENS, LLP
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6 San Diego, CA 92101
7 Tel: (619) 232-0331
8 Fax: (619) 232-4019

9 Class Counsel for the Willis Class

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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**ANTELOPE VALLEY
GROUNDWATER CASES**

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REBECCA LEE WILLIS and DAVID
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ANTELOPE VALLEY WATER CO.;
ROSAMOND COMMUNITY SERVICE
DISTRICT; PHELAN PINON HILL
COMMUNITY SERVICE DISTRICT;
and DOES 1 through 1,000;

Defendants.

RELATED CASE TO JUDICIAL COUNCIL
COORDINATION PROCEEDING NO. 4408

PROOF OF SERVICE

1 I, Lynne Brennan, declare:

2 I am a citizen of the United States and employed in San Diego County, California. I am
3 over the age of eighteen years and not a party to the within-entitled action. My business address is
4 Krause Kalfayan Benink & Slavens, LLP 550 West C Street, Suite 530, San Diego, California,
5 92101. On July 29, 2015, I caused the following document(s):
6 to be served on the parties in this action, as follows:

7
8 **WILLIS CLASS' REPLY BRIEF RE SECOND MOTION TO ENFORCE**
9 **SETTLEMENT AGREEMENT WITH DEFENDANT PUBLIC WATER SUPPLIERS**
10

11 (X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa Clara
12 County Superior Court website: www.scefilings.org regarding the Antelope Valley Groundwater
13 matter.

14 () (BY U.S. Mail) I am readily familiar with the firm's practice of collection and processing
15 of documents for mailing. Under that practice, the above-referenced documents(s) were placed in
16 sealed envelope(s) addressed to the parties as noted above, with postage thereon fully prepaid and
17 deposited such envelope(s) with the United States Postal Service on the same date at San Diego,
18 California, addressed to:

19 () (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other
20 overnight delivery service, for the delivery on the next business day. Each copy was enclosed in
21 an envelope or package designed by the express service carrier; deposited in a facility regularly
22 maintained by the express service carrier or delivered to a courier or driver authorized to receive
23 documents on its behalf; with delivery fees paid or provided for; addressed as shown on the
24 accompanying service list.

25 () (BY FACSIMILE TRANSMISSION) I am readily familiar with the firm's practice of
26 facsimile transmission of documents. It is transmitted to the recipient on the same day in the
27 ordinary course of business.

28 (X) (STATE) I declare under penalty of perjury under the laws of the State of California that
the above is true and correct.

() (FEDERAL) I declare under penalty of perjury under the laws of the United States of
America that the foregoing is true and correct.

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Lynne Brennan