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

**ANTELOPE VALLEY GROUNDWATER
CASES**

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

Plaintiffs,

v.

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

Defendants.

RELATED CASE TO JUDICIAL COUNCIL
COORDINATION PROCEEDING NO. 4408

**WILLIS CLASS' PHASE VI/PHYSICAL
SOLUTION TRIAL BRIEF**

Date: September 28, 2015

Time: 9:00 AM

Place: Superior Court of California, County of
Los Angeles, 111 North Hill Street, Los Angeles,
CA 90012, Room 222

Judge: Hon. Jack Komar

1 The Willis Class agreed to be part of a Physical Solution that merges and incorporates the
2 Amended Final Judgment entered by this Court on September 22, 2011. The stipulation and
3 proposed physical solution (“SPPS”) filed by the Stipulating Parties fails to incorporate the
4 groundwater rights of the Willis Class, violates California and Federal law including the Willis
5 Class’ due process rights, and is not fair and equitable to the Willis Class. Therefore, the Willis
6 Class will oppose the SPPS at trial. In addition, the Willis Class will introduce evidence at trial
7 of a “modified” SPPS that utilizes the existing framework of the SPPS, but incorporates the
8 groundwater rights of the Willis Class in a manner consistent with California law, the Willis
9 Judgment, and principles of fairness and equity.

11 **STATEMENT OF FACTS**

12 The following terms of the Willis Stipulation of Settlement (the “Willis Settlement
13 Agreement”) must be merged and incorporated into the Physical Solution adopted by this Court:

- 14 1. Correlative Rights means...that Overlying landowners may make reasonable and beneficial
15 use of the water in a Basin and that, if the supply of water is insufficient for all reasonable
16 and beneficial needs, *each Overlying Owner is entitled to a fair and just proportion of the*
17 *water available to the Overlying Owners.* ¶ **III.D** (Exh. A)
- 18 2. Federally Adjusted Native Safe Yield for any given year means the Basin’s Native Safe
19 Yield less the actual annual production of the United States’ during the prior year pursuant
20 to its Federal Reserved Right. ¶ **III.H.** (Exh. A)
- 21 3. Pumping of the Settling Parties' share of Native Safe Yield *is not subject to any Replacement*
22 *Assessment.* ¶ **III.K.** (Exh. A)
- 23 4. The Settling Parties agree that the Settling Defendants and the *Willis Class Members each*
24 *have rights to produce groundwater from the Basin’s Federally Adjusted Native Safe Yield.*
25 ¶ **IV.D.**
- 26 5. The Settling Parties agree that the Willis Class Members have an Overlying Right to a
27 correlative share to produce up to 85% of the Basin’s Federally Adjusted Native Safe Yield
28 *free of Replacement Assessment.* ¶ **IV.D.2.**

6. The Settling Defendants *will not take any positions or enter into any agreements* that are inconsistent with the exercise of the Willis Class Members' right to produce and use their correlative share of 85% of the Basin's Federally Adjusted Native Safe Yield. ¶ **IV.D.2.**
7. In no event shall this Agreement require the Willis Class Members to give to the Settling Defendants more than 15% of any rights to use the Basin's groundwater that they may obtain by way of settlement or judgment. ¶ **IV.D.2.a.**
8. The Settling Parties acknowledge and agree that they all have the right to recapture Return Flows from Imported Water that they put to reasonable and beneficial use in the Basin, consistent with California law. The Settling Parties will not be subject to any Replacement Assessment for their production of an amount equal to the Return Flows from Imported Water that they put to reasonable and beneficial use in the Basin. ¶ **IV.D.4.a.**
9. The Settling Parties agree to be part of such a Physical Solution to the extent it is consistent with the terms of this Stipulation... ¶ **V.B.**
10. The Settling Parties recognize that not all parties to the Coordinated Actions have entered into this Stipulation and that a trial may be necessary as against non-settling parties. The Settling Parties *agree to cooperate and coordinate their efforts in any such trial or hearing so as to obtain entry of judgment consistent with the terms of this Stipulation*; . . . ¶ **VIII.B.**
11. The Settling Defendants are permanently barred and enjoined from . . . prosecuting, or continuing to prosecute, either directly or indirectly, any Released Claim against any of the Class Members. . . . ¶ **19.**

The following terms of the SPPS are directly contradicted by the Willis Judgment and by California law and must be modified by this Court:

1. The total of the Production Rights decreed in this Judgment equals the Native Safe Yield. **SPPS, ¶ 3.5.32 (Exh B)**
 - a. The entire Native Safe Yield is allocated to the appropriators, current pumpers, the Small Pumper Class, and the Federal Government. These allocations are contained in Exhibits 3 and 4 to the SPPS. No part of the Native Safe Yield is available to the Non-Pumper Class in the future. The Stipulating Parties listed in Exhibits 3 and 4 to the SPPS have been permanently allocated the entire Native Safe Yield of 82,300 AF. There are no terms contained in the SPPS whereby a Willis Class Member ever gains the right to pump groundwater from the Native Safe Yield. The Public Water Suppliers unequivocally agreed in the Willis Settlement Agreement that the Willis Class had the right to pump groundwater from the Native Safe Yield and further agreed not to enter into any agreements that were inconsistent with this right. Thus, the Public Water Suppliers breached the Willis Settlement Agreement when they signed the SPPS.

- 1 2. Production Rights Claimed by Non-Stipulating Parties. Any claim to a right to Produce
2 Groundwater from the Basin by a Non-Stipulating Party shall be subject to procedural or
3 legal objection by any Stipulating Party [includes Defendant Public Water Suppliers].
4 **SPPS, ¶ 5.1.10** (Exh. C)
- 5 a. Public Water Suppliers are a “Stipulating Party” to the SPPS, however, they have
6 no right to object, either procedurally or substantively, to Willis Class Members’
7 right to pump groundwater from the Basin.
- 8 3. The Non-Pumper Class Stipulation of Settlement, executed by its signatories and approved
9 by the Court in the Non-Pumper Class Judgment, specifically provides for imposition of a
10 Replacement Water Assessment on Non-Pumper Class members. . . .
11 **SPPS, ¶ 9.2.1**
- 12 a. The Public Water Suppliers agreed that the Willis Class has the right to pump up to
13 85% of the Native Safe Yield free of replacement assessment.
- 14 4. Evidence presented to the Court demonstrates that Production by one or more Public Water
15 Suppliers satisfies the elements of prescription and that Production by overlying landowners
16 during portion(s) of the prescriptive period exceeded the Native Safe Yield. At the time of
17 this Judgment the entire Native Safe Yield is being applied to reasonable and beneficial uses
18 in the Basin. Members of the Non-Pumper Class do not and have never Produced
19 Groundwater for reasonable beneficial use as of the date of this Judgment. **Pursuant to**
20 **Pasadena v. Alhambra (1949) 33 Cal 2d 908, 931-32 and other applicable law, the**
21 **failure of the Non-Pumper Class members to Produce any Groundwater under the**
22 **facts here modifies their rights to Produce Groundwater except as provided in this**
23 **Judgment.** Because this is a comprehensive adjudication pursuant to the McCarran
24 Amendment, consistent with the California Supreme Court decisions, including *In Re*
25 *Waters of Long Valley Creek Stream System* (1979) 25 Cal. 3d 339, this Court makes the
26 following findings: (1) certainty fosters reasonable and beneficial use of water and is called
27 for by the mandate of Article X, section 2; (2) because of this mandate for certainty and in
28 furtherance of the Physical Solution, any New Production, including that by a member of
the Non-Pumper Class must comply with the New Production Application Procedure
specified in Paragraph 18.5.13; (3) as of this Judgment no member of the Non-Pumper Class
has established a Production Right to the reasonable and beneficial use of Groundwater
based on their unexercised claim of right to Produce Groundwater; (4) if in the future a
member of the Non-Pumper Class proposes to Produce Groundwater for reasonable and
beneficial use, the Watermaster as part of the New Production Application Procedure, has
the authority to determine whether such a member has established that the proposed New
Production is a reasonable and beneficial use in the context of other existing uses of
Groundwater and then-current Basin conditions; and (5) the Watermaster's determinations
as to the approval, scope, nature and priority of any New Production is reasonably necessary
to the promotion of the State's interest in fostering the most reasonable and beneficial use of
its scarce water resources. All provisions of this Judgment regarding the administration, use
and enforcement of the Replacement Water Assessment shall apply to each Non-Pumper
Class member that Produces Groundwater. . . . The Court finds that this Judgment is
consistent with the Non-Pumper Stipulation of Settlement and Judgment.
SPPS, ¶ 9.2.2 (emphasis supplied).

- 1
- 2 a. In addition to the fact that this term is legally and factually invalid, the Public
- 3 Water Suppliers are precluded from entering into an agreement that states that the
- 4 Willis Class does not have the right to pump groundwater from the Native Safe
- 5 Yield.

6 5. **New Production Procedure** [Applicable to all Willis Class Members]

7 . . . the Watermaster Engineer has authority to recommend that the application for New

8 Production be denied, or approved on condition of payment of a Replacement Water

9 Assessment. *SPPS*, ¶ 18.5.13

- 10 a. Even assuming that a Willis Class Member has the financial resources and time to
- 11 comply with the onerous and expensive requirements to apply for the right to
- 12 pump groundwater, there is no guarantee that the Willis Class Member's
- 13 application will be approved. Further, even if approved, the Willis Class Member
- 14 must still pay a Replacement Water Assessment. Therefore, this *SPPS* term
- 15 constitutes a breach of the Willis Settlement Agreement because the Public Water
- 16 Suppliers agreed that the Willis Class has the right to pump up to 85% of the
- 17 Native Safe Yield free of replacement assessment.

18 6. All Parties or Person(s) seeking approval from the Watermaster to commence New

19 Production of Groundwater shall submit a written application to the Watermaster Engineer

20 which shall include the following: . . . Written confirmation that applicant has complied with

21 CEQA, preparation of water conservation plan, an economic impact report, a physical

22 impact report, a statement from an engineer that production will not cause Material Injury

23 et

- 24 a. These regulations effectively extinguish the Willis Class Members' right to pump
- 25 when the Public Water Suppliers agreed that Class Members have a right to pump
- 26 from the Native Safe Yield.

27 7. In the event the United States does not Produce its entire 7,600 acre-feet in any given Year,

28 the unused amount in any Year will be allocated to the Non-Overlying Production Rights

29 holders... *SPPS*, ¶ 5.1.4.1

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

34 **THE SPPS IS NOT CONSISTENT WITH THE WILLIS JUDGMENT**

35 The *SPPS* is not consistent with the Willis Judgment in many fundamental and material

36 ways.

1 First, the SPPS modifies and abrogates the correlative water rights of the Willis Class from
2 the NSY. Current pumpers and appropriators are permanently allocated the entire NSY free of
3 replacement assessment, but not to the Willis Class. As demonstrated by expert witness Rod Smith,
4 the entire NSY of 82,300 is allocated to Overlying producers, Small Pumper Class, Federal Reserve
5 rights, State of California, and Non-Overlying Production. No portion of the NSY is reserved for
6 the Willis Class. In order for Willis Class members to have any right to pump under the SPPS, they
7 must pay a replacement water assessment. This allocation violates the Willis Judgment.

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

17 In the Willis Judgment,^p the Public Water Suppliers agreed that the Willis Class have a
18 correlative share of the Federally Adjusted Native Safe Yield free of replacement water assessment.
19 The SPPS on the other hand takes away the correlative rights of the Class from the NSY.

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

1 Federal Reserve rights and the amount of water actually produced by the United States however
2 must remain in the correlative rights pool under the Willis Judgment.

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

12
13
14 Thus SPPS over-allocates the NSY to the Public Water Suppliers. Per the report of Mr.
15 Smith, the economic benefit from this allocation is worth \$106 million.

16 Third, the SPPS imposes a legal and financial impediments on the right of the Willis Class
17 members to pump in the future which regulations effectively extinguishes their right to pump in the
18 future. The SPPS provides that any New Production must include a written application to the
19 Watermaster engineer which shall include the following: (1) payment of all costs of the engineer;
20 (2) summary of source of supply and manner of delivery; (3) maps; (4) copy of well permits; (5)
21 written confirmation of land use entitlements; (6) written confirmation of CEQA requirements; (7)
22 water conservation plan; (8) economic impact report; (9) physical impact report; (10) no material
23 injury report; (11) agreement to pay replacement water assessment; (12) any other information
24 which the Watermaster Engineer may require. ¶ 18.5.13 of the SPPS. These regulations impose a
25 material financial burden on Willis Class members and extinguishes their right to pump.
26
27
28

1 The Public Water Suppliers agreed in the Willis Judgment to permit the Willis Class
2 members to share in the NSY free of replacement assessment. The Willis judgment provides that
3 the Willis Class “have an Overlying Right to a correlative share of 85% of the Federally Adjusted
4 Native Safe Yield for reasonable and beneficial uses on their overlying land free of any
5 Replacement Assessment.” ¶ IV.D.2 The regulations in the SPPS not only impose a financial
6 obligation on Willis Class members to pay for replacement water but it also effectively burdens
7 their right to pump in the future to the point of extinguishment.
8

9 **THE SPPS VIOLATES CALIFORNIA LAW**

10 The SPPS redefines the unexercised overlying water right of Willis Class in contravention
11 of California law and the Willis Judgment:
12

13 California law has long-recognized that those who own real property that overlies an aquifer
14 have a shared first priority right to pump native groundwater within the safe yield as needed
15 to supply reasonable and beneficial uses on their overlying lands. The proposed judgment
16 is contrary to this fundamental principle, because it would strip the members of the Willis
17 Class of all of the benefits of this correlative first priority status. It purports to do so based
18 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.

19 In addition, the SPPS places an unreasonable burden on Willis Class Members to prove
20 availability of water to fulfill new overlying uses on the members of the Willis Class, unreasonably
21 vests discretion in a partial Watermaster to decide whether members of the Willis Class may
22 exercise their overlying right, imposes unreasonable and discriminatory requirements before
23 pumping, and subjects the Class to the Replacement Water Assessment.
24

25 Specifically, paragraph 18.5.13.1 of the SPPS requires that any new production must satisfy
26 twelve criteria which include the submission of a water conservation plan, an economic impact
27 report, a physical impact report, and a written statement by a licensed engineer that the new
28 production will not cause material injury. If the Watermaster determines that imported water is

1 available and the applicant has satisfied the twelve criteria then the Watermaster may approve the
2 new production. There is no requirement for the Watermaster to grant approval; rather, the decision
3 is within their discretion. These regulations and broad Watermaster discretion contrasts sharply
4 with the Willis Judgment and the agreement of the Public Water Suppliers to respect the correlative
5 water rights of the Willis Class.
6

7 The problem with the restrictions on new pumping and a proposed Replacement Water
8 Assessment is that they discriminate against the Non-Pumper Class.

9 The proposed judgment allows some groundwater right holders—the existing overlying and
10 appropriative users—to exercise the lion’s share of their rights free of compliance with the
11 foregoing criteria and free of charges for replacement water. In contrast, the proposed judgment
12 denies the Willis Class members the right to exercise *any* portion of their overlying rights unless
13 they fulfill the regulatory and financial requirements from which the existing users are exempt *and*
14 they obtain discretionary permission from the Watermaster to engage in new production.¹ This
15 strips the Willis Class members of their correlative status vis-à-vis other overlying landowners and
16 of their priority vis-à-vis the appropriators.

17 As described in *Barstow* and other cases, overlying landowners have shared (i.e.,
18 correlative) first priority rights to the native safe yield of the aquifer. Therefore, in an overdrafted
19 basin, if there is insufficient surplus water available to fulfill the new overlying use (given existing
20 reasonable and beneficial uses), the new overlying user is nevertheless entitled to pump
21 groundwater. The lawful means of ensuring that the new pumping does not cause aggregate
22 withdrawals to exceed the native safe yield is to curtail pumping by the most junior appropriator to
23 make water available to the new overlying user, because the latter has senior rights. The only valid
24 exception to this rule of priority would be where the junior appropriator (or some other party)
25 proves that the new overlying pumping and use would be unreasonable. As the Supreme Court
26 emphasized in *Barstow*, in an overdrafted groundwater basin, “overlying use is paramount, and the
27 rights of the appropriator must yield to the rights of the . . . overlying owner.” 23 Cal. 4th at 1243.

28 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.*

The Mojave Basin adjudication has not placed similar limits on new groundwater pumping:

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—

¹ 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.

1 a ‘free production allowance’ based on its prior use—which it can use at no cost. When a
2 party uses water in excess of its free production allowance, it is charged a fee to purchase
3 ‘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.”

4 Furthermore, the California Supreme Court in *City of Barstow v Mojave* contradicts the
5 SPPS. It would not be lawful for a trial court to discount or ignore the correlative priority of
6 overlying groundwater rights, both active and prospective. A Court may not charge overlying
7 landowners a replacement water assessment for exercising water rights absent consent to the
8 physical solution. This point is particularly important given the Willis Judgment. Although water
9 uses must be reasonable, the Court does not have authority to make categorical determinations of
10 reasonable use that alter existing correlative priority of overlying groundwater right holders nor a
11 categorical finding that all use by Willis Class members is unreasonable:
12

13 The application of these principles to the present cases demonstrates why the proposed
14 judgment and physical solution violates the correlative first priority rights of the members
15 of the Willis Class. Existing producers—overlying and appropriative—are entitled to pump
16 groundwater up to the limits of their respective production rights without having to prove
17 that water is available for their uses in light of all other competing demands on the native
18 safe yield; and they are exempt from the twelve permitting criteria of paragraph 18.5.13.1.
19 See Proposed Judgment ¶¶ 5.1.1.1, 5.1.1.2, 5.1.3 & 5.1.6. Existing production also is free
20 of replacement water charges. *Id.* ¶ 9.2. Under the proposed judgment, however, the
21 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.

22 This disparate treatment of the overlying rights of the Willis Class members vis-à-vis the
23 other overlying right holders violates the former’s correlative rights. And the subordination
24 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*.

25 Finally, the SPPS imposes financial and regulatory burdens on the Willis Class but not on
26 other overlying producers. These burdens directly conflict and contravene the agreement of the
27 Public Water Suppliers contained in the Willis Judgment. The Public Water Suppliers agreed not
28 to object and permit Willis Class members to share in the correlative pool with other overlying

landowners free of replacement assessment. ¶ IV.D.2 of the Willis Judgment. Not only did the Public Water Suppliers agree to respect the correlative water right of the Class but they also agreed not to take any position or enter into any agreement which is inconsistent with the Class' right to share in the NSY free of replacement assessment. (¶ IV.D.2 of the Willis Judgment):

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 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.

The SPPS is Inconsistent with Water Code Sections 106 and 106.3

Concerning the priority of domestic use, Section 106 of the Water Code declares:

It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.

With regard to the human use of water, Sections 106.3 (a) and (b) of the Water Code state:

(a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.

(b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.

In recognition of the priorities of domestic use, the SPPS specifically recognizes the Small Pumper Class' right to claim priority under Water Code section 106 (section 5.1 of the SPPS). Indeed, section 3.5.2 of the SPPS expressly places the domestic and household use of the Small Pumper Class as the first priority in the Basin.

1 In contrast to the Wood Class, and contrary to the dictates of the Water Code, the SPPS
2 subordinates the rights of the Willis Class to pump water for domestic and human uses to below
3 the allocated rights of all other users in the Basin. The treatment of Willis Class' prospective
4 domestic and human use as compared to the treatment of the Wood Class is unjust, prejudicial
5 and inequitable as well as a violation of the Water Code. The Public Water Suppliers are in
6 violation of the Willis Judgment by approving the Wood Class preference over the Willis Class.

7 **DEFENDANTS' BREACH IS NOT EXCUSED**

8
9 The fact that the Willis Class agreed to be bound by a later Physical Solution entered by the
10 Court in no way provides a legally cognizable excuse for the Public Water Suppliers' breach of the
11 Willis Settlement Agreement. Both the Consolidation Order and the Amended Final Judgment
12 entered by this Court mandate that the class action settlement agreements will be *merged* and
13 *incorporated* into any later Physical Solution:
14

15 “ . . . the Court may enter a final judgment approving any settlements, including the *Willis*
16 and *Wood* class settlements, that finally determine all cognizable claims for relief among
17 the settling parties **for purposes of incorporating and merging the settlements into a**
comprehensive single judgment containing such a declaration of water rights and a
physical solution.

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

20 and

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

24 *Amended Final Judgment*, ¶ 20 (emphasis supplied).

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

27 The Stipulating Parties expect and intend that this Stipulation will become part of a
28 Physical Solution entered by the Court to manage the Basin and that the Court will retain
jurisdiction in the Coordinated Actions. **The Settling Parties agree to be part of a**

1 **Physical Solution to the extent it is consistent with the terms of this Stipulation** and to
2 be subject to Court-administered rules and regulations consistent with California and
3 Federal law and the terms of this Stipulation.
4 ***Willis Settlement Agreement, ¶ V.B.*** (emphasis supplied).

5 Thus, the Public Water Suppliers had absolutely no legal basis to ignore and then intentionally
6 breach the Willis Settlement Agreement by entering into the SPPS. The terms agreed upon by the
7 Public Water Suppliers, including the Willis Class' right to pump water from the Native Safe Yield,
8 were to be merged and incorporated into the Physical Solution. Instead, the Public Water Suppliers
9 knowingly and intentionally breached the terms of the Willis Settlement Agreement by entering
10 into the SPPS which strips away the rights of the Willis Class to pump groundwater from the Native
11 Safe Yield free of replacement assessment or otherwise.

12 Any argument from the Public Water Suppliers that the Willis Class Members' share of the
13 Native Safe Yield can be zero under the Willis Settlement Agreement is utterly without merit and,
14 indeed, sanctionable. In awarding attorneys' fees to Willis Class Counsel as the "prevailing party"
15 pursuant to C.C.P. Section 1021.5, this Court ruled correctly and obviously that the Willis
16 Settlement Agreement had conferred "substantial benefits" on the Willis Class:
17

18 By eliminating the Public Water Suppliers' prescription claims and maintaining correlative
19 rights to portions of the Basin's native yield, the Willis Class members achieved a large
20 part of their ultimate goal - to protect their right to use groundwater in the future and to
21 maintain the value of their properties. Under these circumstances, they must be considered
22 "successful parties" for purposes of Code of Civil Procedure § 1021.5.

23 ***Order Awarding Attorneys' Fees*** at 5:1-5 (Exh. E).

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

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