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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 OPPOSITION TO MOTION
FOR PRELIMINARY APPROVAL OF WOOD
CLASS SETTLEMENT; ALTERNATIVE
PROPOSED PHYSICAL SOLUTIONS;
SEPARATE STATEMENT OF OBJECTIONS;
AND DECLARATION OF RALPH B.
KALFAYAN IN SUPPORT THEREOF**

Date: March 26, 2015

Time: 10:00 a.m.

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

Judge: Hon. Judge Komar

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1 The Willis Class respectfully submits this Opposition to the Joint Motion for Preliminary
2 Approval of Settlement filed on February 26, 2015 by the Wood Class and District 40. The Willis
3 Class objects to the Preliminary Approval of the Wood Class Stipulation of Settlement which
4 incorporates the Stipulation for Entry of Judgment and Proposed Physical Solution (hereinafter
5 collectively “SPPS”) on the following grounds: the SPPS (1) conflicts with the terms of the Willis
6 Stipulation of Settlement and Final Amended Judgment¹ entered by this Court on September 22,
7 2011 (the “Willis Judgment”); (2) prejudices the Willis Class, a non-Stipulating Party to the SPPS,
8 which owns 65,000 parcels of land in the Antelope Valley or over 60% of the Basin; (3) denies the
9 due process rights of the Willis Class Members; (4) violates the California Constitution; (5) is
10 inconsistent with California Water Code Sections 106 and 106.3; (6) contravenes established
11 common law; (7) imposes an undue financial burden on Willis Class Members; and (8) unjustly
12 discriminates against the Willis Class.

13 The SPPS directly contravenes this critical term of the Willis Stipulation of Settlement and
14 of the Willis Judgment:

15 ***The Settling Parties agree that the Willis Class Members have an Overlying Right***
16 ***to a correlative share of 85% of the Federally Adjusted Native Safe Yield for***
17 ***reasonable and beneficial uses on their overlying land free of any Replacement***
18 ***Assessment. The Settling Defendants will not take any positions or enter into any***
agreements that are inconsistent with the exercise of the Willis Class Members'
Overlying Right to produce and use their correlative share of 85% of the Basin's
Federally Adjusted Native Safe Yield.

19 Section IV.D.2 of the Willis Settlement, attached as Exhibit C (emphasis supplied).

20 In direct contravention to the PWS’ prior agreement in the Willis Settlement (as approved
21 in the Willis Judgment), the SPPS allocates the entire Native Safe Yield (“NSY”) *free of*
22 *replacement assessment* to all overlying landowners except the Willis Class and imposes onerous
23 and expensive terms on the members of the Willis Class before it is determined by the Watermaster
24 whether a member may commence any pumping—even for domestic or human use.²

25 ¹ Importantly, the Public Water Suppliers (“PWS”), entities subsidized by Willis Class taxpayers and working ostensibly in the
26 public interest, chose to exclude the Willis Class from participating in the negotiations that led up to the SPPS. The PWS chose to
27 violate the underlying material terms of the Willis Judgment by entering into the SPPS which is inconsistent with the exercise of
28 the Willis Class Members’ overlying right to produce and use their correlative share of 85% of the Basin’s Federally Adjusted
Native Safe Yield. The PWS are collaterally estopped from denying the water rights of the Willis Class, 85% of the NSY free of
replacement assessment, under the Willis Judgment.

² Given that section 3.5.18.1 of the SPPS lists overdraft as the first criterion to be considered in determining whether new
groundwater pumping will cause a “Material Injury,” and given that all of NSY yield is allocated by the SPPS to the Stipulating

1 The allocations of water production rights for the Stipulating Parties under the SPPS are
2 free, fixed, permanent, and indefinite. The permanent allocations change *pro rata* only if the Court
3 revises the total NSY seventeen (17) years from now. In stark contrast, there are no provisions in
4 the SPPS to allocate any of the NSY yield to the Willis Class. Thus, the effect of the SPPS'
5 permanent allocations is to abrogate the Willis Class' rights under the Willis Judgment. The
6 settlement cannot be within the range of reasonableness for preliminary approval as it severely
7 prejudices a non-settling party and robs them of their *Judgment-confirmed* correlative rights to the
8 NSY free of replacement assessment. Most significantly, this Court previously denied Preliminary
9 Approval of the Wood Class Settlement Agreement with the PWS in 2012 because the proposed
10 settlement agreement "attempt[ed] to establish . . . the 3 acre feet per year allocation [for Wood
11 Class members] as a standard that is going to bind all the nonsettling parties³." Nearly three years
12 later, nothing has changed, either factually or legally, that would allow the Court to grant
13 Preliminary Approval of the current settlement agreement, i.e., the SPPS, which includes the exact
14 same permanent allocation for the Wood Class -- plus permanent allocations for all Stipulating
15 Parties. The Court's prior ruling -- that it cannot approve a settlement with a permanent allocation
16 of groundwater "upon an agreement of some of the parties, **but not all of the parties**"⁴ -- applies
17 with equal force to the SPPS.

18 Finally, the PWS agreed that any Physical Solution adopted by this Court must be consistent
19 with the Willis Settlement and Judgment as provided in Section V.B:

20 *[T]he Settling Parties expect and intend that this Stipulation will become part of a*
21 *Physical Solution entered by the Court to manage the Basis and that the Court will*
22 *retain jurisdiction in the Coordinated Actions. **The Settling Parties agree to be part***

23 Parties only, it appears unlikely that any new pumping by the Willis Class will be approved. In this regard, it should be noted that
24 if the application is for domestic use for one single family household, the Watermaster Engineer has authority to recommend that
25 the domestic use is *de minimus* and to recommend a waiver of payment of a Replacement Water Assessment but, significantly, the
26 Watermaster Engineer is not required to make such recommendations.

27 ³ June 16, 2011 Hearing Transcript at 3: 4-7, attached as Exhibit A. After the Court's ruling, Wood Class Counsel removed the
28 objectionable portions of the settlement, including the "specific allocation of Class water rights, thereby creating [a settlement]
agreement that mirrored the earlier settlement of the Willis Class, which the Court approved." Wood Class Motion to Decertify
dated June 13, 2012 at 5: 3-6, attached as Exhibit B. However, District 40 and certain other PWS refused to sign the settlement
agreement as revised by Court Order. *Id.* at 5:7-8 & fn.1. Instead, District 40 waited a few years and now presents a "Wolf in
Sheep's Clothing" settlement agreement to the Court that contains the very same impermissible permanent allocation to the Wood
Class, along with impermissible permanent allocations for dozens of other Stipulating Parties who were not even parties to the
Wood Class action lawsuit.

⁴ Hearing Transcript dated June 16, 2011 at 3:10-11, attached hereto as Exhibit A. In fact, the Court correctly reminded all parties
at the outset of the January 7, 2015, telephonic hearing regarding the so-called "Global Settlement" that non-Stipulating Parties
cannot be bound by the agreement of settling parties. The 65,000-Member Willis Class is not a signatory to the SPPS. Therefore,
this Court must reject District 40's thinly-veiled attempts to pressure this Court to accept the SPPS because "over 140 parties"
have signed on to it.

1 of such a Physical Solution to extent it is consistent with the terms of this
2 Stipulation and to be subject to Court- administered rules and regulations
3 consistent with California and Federal law and the terms of this stipulation.

4 See, Section V.B. of the Willis Settlement, attached as Exhibit C (emphasis supplied).

5 Because the SPPS is not consistent with the Willis Stipulation of Settlement and Willis
6 Judgment, the SPPS cannot be approved by this Court.

7 **Factual and Procedural Background**

8 In 2007, at the behest of the Public Water Suppliers, Plaintiff Rebecca Willis brought her
9 case on behalf of a Class of approximately 65,000 landowners in the Antelope Valley Basin to
10 counter claims asserted by ten PWS that they had obtained prescriptive rights with respect to the
11 groundwater underlying the Basin. The class was certified and included as members all landowners
12 in the Basin who have never pumped groundwater in the past. After extensive proceedings and
13 mediation, the litigating parties settled their claims and notice of the settlement was mailed to all
14 65,000 Willis Class Members. A fairness hearing was held before the Court on February 24, 2011,
15 and the Court approved the settlement as fair, adequate, and reasonable to the Class. The Court
16 then entered a Final Judgment on May 22, 2011 based on the Stipulation of Settlement (Exh. D,
17 attached). At the request of the Public Water Suppliers, the Court modified the Judgment on
18 September 22, 2011, to incorporate the terms of the Attorneys' Fees Order in the Amended Final
19 Judgment (Exh. E, attached). Some of the PWS appealed the attorneys' fees portion of the
20 Amended Final Judgment. After mediation, the parties settled the appeal and the Court of Appeal
21 issued a remittitur. For all purposes in this action, the Willis Amended Final Judgment has now
22 become a final, non-appealable Judgment with res judicata effect to the Willis Class and the Public
23 Water Suppliers.

24 The Willis Judgment defined the groundwater rights of the Willis Class Members as
25 overlying and correlative with other overlying landowners. See Willis Class Stipulation of
26 Settlement paragraph III.D and IV.D.2., Exh. C. The Judgment conferred a groundwater right to
27 the Willis class up to 85% of the NSY free of any replacement assessment. *Id.* at IV.D.2. Finally,
28 the Judgment provided that the PWS may not enter into any agreement that impairs the Willis Class
rights to pump from the NSY. *Id.* Since the date the Willis Judgment was entered, no party has
asserted in this adjudication that the Willis Class has no overlying rights or that the Willis Class
rights are not correlative.

I. ARGUMENT

A. The SPPS Prejudices the Water Rights of the Willis Class

A settlement cannot bind or prejudice the interests of a non-settling party.⁵ This Court has repeatedly emphasized this principle.⁶ This principle is particularly appropriate where, as here, no party to this litigation has asserted any claims against the Willis Class seeking to limit their correlative water right, much less obtain a ruling from this Court that the overlying water rights of the Class should be limited. The SPPS directly and unlawfully violates the Court's prior Orders and prejudices the groundwater rights of the Willis Class.

The prejudice manifests itself in several ways. **First**, as previously discussed, the SPPS allocates the entire Native Safe Yield (82,300 AFY) on a fixed, permanent, and guaranteed priority basis to the exclusion of the Willis Class. **Second**, the water allocated is *free of replacement assessment* while, with the possible exception for domestic use, the Willis Class Members must pay the replacement assessment. **Third**, the proposed settlement imposes burdensome, uncertain, and expensive conditions on the Willis Class Members before a member may be allowed to commence any pumping—even for domestic and human use. No similar limitations are placed on the Stipulating Parties. **Fourth**, the Basin's principal water importer, AVEK, has represented that water allocations from the State Water project are being severely curtailed due to California's drought conditions. Thus, if Willis Class Members are denied access to the NSY, it appears likely that a member's pumping application will be denied. **Fifth**, compared to the Wood Class (as discussed below), the right of the Willis Class to domestic use and human use is contingent, uncertain, and unreasonably limited.

Sixth, the SPPS strips the Willis Class of its correlative rights to share in the NSY free of replacement assessment which is inconsistent with the Willis Judgment. **Seventh**, the SPPS unlawfully and erroneously provides, all by agreement and without a hearing affording due process

⁵ See *Levy v. Superior Court*, 10 Cal.4th 578, 583, 585 (1995) (Stipulated settlements must be signed by the parties themselves to be enforceable); see also *Harris v. Rudin, Richman & Appel*, 74 Cal.4th 299, 305 (1999) (to be binding settlement must be signed by both the party seeking enforcement and the party against whom it is to be enforced); *Williams v. Saunders*, 55 Cal.App.4th 1158, 1163 (1997) (court could not enforce settlement agreement against party who did not participate in creation of the agreement nor sign the agreement).

⁶ See Reporter's Transcripts of Proceedings (RT) 33:1-12, Nov. 4, 2014; see also RT. 44:6-14, Jan. 16, 2013; RT 25:24-28, Nov. 9, 2012; RT 14: 13-16, Aug. 30, 2011; RT 3:1-7:5, 9:20-26, 11:8-12:15, 13:3-7, June 16, 2011, all attached as Exhibit F.

1 to the Willis Class, that (a) the unexercised rights of the Willis Class should be modified, (b) that
2 the SPPS is consistent with the subordination provisions in the surface water decision of *In Re*
3 *Waters of Long Valley Creek Stream System*, and (c) the SPPS is consistent with the Willis
4 Judgment. **Eighth**, the Wood Class benefits are particularly unfair and inequitable in comparison
5 to the Willis Class. The members of the Wood Class are allocated a domestic use priority of 1.2
6 AFY and up to 3 AFY allocation for use on overlying land, both of which allocations are free of
7 replacement assessment, with no metering obligations, no reporting obligations, no administrative
8 assessments on 1.8 AFY, and a priority right under Water Code Section 106. The SPPS allocates
9 no such benefits to the Willis Class Members. **Ninth**, the SPPS pre-determines that the water use
10 of 65,000 landowners is unreasonable in the aggregate and that the water use of all others allocated
11 rights in the Basin is reasonable. The California Supreme Court case in *City of Barstow v. Mojave*
12 *Water Agency et al.*, 23 Cal.4th 1224 (2000), requires the Court to make an individualized finding
13 of unreasonable use as to the 65,000 landowners (which is not tenable) and an individualized
14 inquiry into the reasonableness of use for each other landowner. **Tenth**, the Willis Class was not
15 given notice or a pleading that their correlative water rights may be taken away in a physical
16 solution. Thus, approval of the SPPS would deny the procedural and substantive due process rights
17 of the Willis Class.

18 19 **B. The SPPS is Inconsistent with Water Code Sections 106 and 106.3**

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

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

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

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

28 *(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

1 *policies, regulations, and criteria are pertinent to the uses of water described in*
2 *this section.*

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

7 In contrast to the Wood Class, and contrary to the dictates of the Water Code, the SPPS
8 subordinates the rights of the Willis Class to pump water for domestic and human uses to below
9 the allocated rights of all other users in the Basin.⁷ The treatment of Willis Class' prospective
10 domestic and human use as compared to the treatment of the Wood Class is unjust, prejudicial
11 and inequitable as well as a violation of the Water Code. Therefore, the Court should not
12 preliminarily approve the SPPS.

13 **C. The Willis Class' Due Process Rights Will Be Violated if the Court Approves the**
14 **SPPS**

15 The Willis Class Action Complaint was dismissed with prejudice. There are no pleadings that
16 seek to "modify" the rights of Willis Class members to pump groundwater correlatively with other
17 landowners as to 85% of the NSY free of replacement assessment. Indeed, no party has challenged
18 the Willis Class' rights to pump groundwater from the NSY free of any replacement assessment.
19 The Wood Class does not. The Public Water Suppliers do not and cannot. In fact, the PWS are
20 duty-bound to honor the Judgment entered by this Court, which preserves the Willis Class'
21 correlative rights to pump up to 85% of the NSY free of replacement assessment. Yet the SPPS
22 contradicts and abrogates those specific terms all without a pleading or notice to the Willis Class.
23 The parties cannot circumvent due process requirements. Furthermore, the PWS cannot be
24 permitted to renege on their Court-approved obligation to respect the correlative rights of the Willis
25 Class to the NSY by subordinating the Willis Class correlative rights in the SPPS.

27 ⁷ The prospective uses of groundwater by the Willis Class Members have not yet been determined in this adjudication. However,
28 it is reasonable to infer that a very large percentage of the Willis Class will require groundwater for domestic use because over
28 49,000 members own parcels of less than 5 acres. In any event, the SPPS unlawfully subordinates the rights of all Willis Class
28 Members, regardless of prospective use.

1 If the Wood Class seeks to modify the correlative water rights of the Willis Class as
2 provided in the Willis Judgment, then the Wood Class must sue and provide notice to 65,000 Willis
3 Class Members. As overlying landowners owning present rights to future use of water, Willis Class
4 Members are entitled to notice and judicial determination of such rights and an opportunity to
5 challenge any interference with these rights. *See, Wright v. Goleta Water Dist.*, 174 Cal.App.3d
6 74, 88 (1985). The Court in *Wright* rejected the notion that an adjudication of underground basin
7 rights could affect the interests of absent landowners with overlying rights, holding those
8 landowners were necessarily entitled to “notice and an opportunity to resist any interference” with
9 those rights in accord with standards of due process. *Id.* Indeed, the California Supreme Court in
10 *City of Barstow* confirmed that if the Court were to entertain a reduction of an overlying right
11 (below a current but unreasonable waste usage) it must provide the “*same notice or due process*
12 *protections afforded riparian owners under the Water Code.*” *City of Barstow*, 23 Cal.4th at 1249,
13 n.13. There has been no notice, information, or pleading to the Willis Class that the Wood Class
14 and the PWS are illegally seeking to diminish their water rights in the SPPS.

15 **D. The SPPS Violates the Constitutionally-Protected Overlying Water Right**
16 **Priority of the Willis Class**

17 The Willis Class’ future unexercised overlying water right in groundwater is
18 Constitutionally based and Constitutionally protected. (*Tulare Irr. Dist. V. Lindsay-Strathmore Irr.*
19 *Dist.*, 3 Cal.2d 489, 524-25 (1935).) The SPPS violates the California Constitution by modifying
20 the Willis Class’ water rights in the NSY. *Id.* The California Constitution provides: “Riparian
21 rights in a stream or water course attach to, but to no more than so much of the flow thereof as may
22 be required or used consistently with this section, for the purposes for which such lands are, *or may*
23 *be adaptable*, in view of such reasonable and beneficial uses...” Cal. Const. art. X, § 2.⁸ The
24 California Supreme Court has interpreted this Constitutional amendment in a way that protects not
25 only the *present* exercised water right of overlying landowners, but also the *prospective* unexercised
26 right of overlying landowners. *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935); *Tulare Irr.*
27 *Dist.*, 3 Cal.2d at 524-25; *Wright*, 174 Cal.App.3d at 84. Thus, eliminating the Willis Class’
28 correlative rights to the NSY would violate the California Constitution. Furthermore, an overlying

⁸ California courts routinely find this particular Constitutional language equally applicable to groundwater rights.

1 right is not predicated on past use, nor on the time a person commences pumping, but solely on the
2 owner's current reasonable and beneficial need for water. *Tehachapi-Cummings Cnty. Water Dist.*
3 *v. Armstrong*, 49 Cal.App.3d 992, 1000 (1975).

4 The Willis Class' overlying water right priority may not *impaired*, or *altered* or *burdened*
5 absent a finding of unreasonable use. *City of Barstow*, 23 Cal.4th at 1243. The Supreme Court, in
6 the landmark *City of Barstow* case, emphasized these principles and said:

7 We agree that, within limits, a trial court may use its equitable powers to implement
8 a physical solution... Although it is clear that a trial court may impose a physical
9 solution to achieve a practical allocation of water to competing interests, **the**
10 **solution's general purpose cannot simply ignore the priority rights of the**
11 **parties asserting them. In ordering a physical solution, therefore, a court may**
12 **neither change priorities among the water rights holders nor eliminate vested**
13 **rights in applying the solution without first considering them in relation to the**
14 **reasonable use doctrine.** *Id.* at 1250. (emphasis supplied).

15 Here, the SPPS directly violates California law regarding the water right priority system. The
16 SPPS specifically states: the Willis Class' failure to pump "modifies" their water rights. (See
17 Paragraph 9.2.2 of SPPS). In an ill-fated attempt to justify the illegal limitation on the Willis Class
18 rights, the Stipulating Parties ignore the *City of Barstow* decision, and instead rely on two decisions
19 that have no application in this groundwater adjudication.

20 Proponents of the SPPS ask for a departure from a strict water right priority system in favor of
21 a mutual prescription doctrine similar to the Supreme Court's analysis in *City of Pasadena v*
22 *Alhambra*, 33 Cal.2d 908 (1949). (See paragraph 9.2.2 of SPPS). This argument fails for several
23 reasons. In *City of Pasadena*, the Court arrived at an apportionment of water rights to all water
24 users favoring a *pro tanto* reduction instead of eliminating the water rights of one of the most junior
25 appropriators. The apportionment came about from a finding of mutual prescription and a desire
26 to accommodate everyone's present water use in the system. The Court's objective was to honor
27 the water rights of a junior appropriator instead of eliminating them. A strict prior appropriation
28 system would have defeated a junior appropriator. The *City of Pasadena* principles are inapplicable
in this adjudication.⁹ **First**, there was no finding of prescription against the Willis Class in this
case. **Second**, far from accommodating parties, the Stipulating Parties here are seeking to modify
the water rights of the Willis Class to the point of elimination. **Third**, mutual prescription does not

⁹ In addition, the *City of Pasadena* principles were severely criticized by the California Supreme Court in *City of Los Angeles*
decision. City of Los Angeles v. City of San Fernando, 14 Cal.3d 199, 265-7 (1975).

1 impair rights to groundwater for *new* overlying uses. *City of Los Angeles v. City of San Fernando*,
2 14 Cal.3d 199, 293 n.100 (1975). Thus, even if the doctrine of mutual prescription is applicable,
3 the Willis Class' water rights are not eliminated. Mutual prescription addresses only present water
4 rights, not future water rights. **Fourth**, an allocation based on mutual prescription does not result
5 in an equitable apportionment. *City of Los Angeles*, 14 Cal.3d at 266. The SPPS is hardly a true
6 equitable apportionment when the Stipulating Parties have been allocated all of the water rights and
7 the Willis Class with correlative rights has been allocated no rights. *City of Los Angeles*, 14 Cal.3d
8 at 265 n.61.

9 The proponents of the SPPS also rely heavily on the decision of *In re Waters of Long Valley*
10 *Creek Stream System* 25 Cal 3d 339 (1979), as a purported justification to modify the rights of the
11 Willis Class. In addition to the fact that no party has sued to subordinate the Willis Class, the
12 principles of *In Re Waters of Long Valley Creek System* are inapplicable to this case. **First**,
13 California has two different systems of water rights, one for surface water rights and one for
14 groundwater. The Water Code specifically prohibits the application of the surface water
15 appropriation rules to groundwater basins. See Water Code, Section 1200. The State Water
16 Resources Control Board (the "Board") regulates surface water and it relies heavily on an extensive
17 statutory water scheme to determine surface water rights. *In Re Long Valley* was a surface water
18 adjudicative proceeding. Its principles are inapplicable to this groundwater adjudication. *Wright*,
19 174 Cal.App.3d at 87. **Second**, under the due process notice provisions afforded riparian water
20 rights in adjudications, the Board mails notice to each landowner, serves process, and holds
21 hearings for each riparian in the stream. The parties in *In re Long Valley* were provided with
22 individual notice and a hearing. Here, the SPPS modifies, limits, subordinates, or extinguishes
23 water rights by agreement without notice to the Willis Class. Previously, the Willis Class Members
24 were noticed of the underlying proceedings and they were told the following: (a) the Willis Class
25 claims have been resolved; (b) their correlative water rights free of replacement assessment were
26 preserved; and (c) they will only be subject to a physical solution provided it is consistent with the
27 settlement. The provisions of the SPPS modifying or eliminating the Willis Class' correlative rights
28 free of replacement assessment contradicts the notice given the Class. Any limitations on the
correlative water rights of the Willis Class must be preceded by a pleading, notice, and appointment

1 of defense counsel. The Supreme Court in *City of Barstow* commanded that due process
2 considerations be met as provided for under the Water Code if the Court considers the imposition
3 of an *In re Long Valley* subordination on a landowner who has both an exercised and unexercised
4 water rights. *City of Barstow*, 23 Cal.4th at 1249 n.13. **Third**, Willis Class Members have never
5 exercised the right to use water. Therefore, they do not fall within footnote 13 of the *City of Barstow*
6 decision and their interests may not be subordinated. **Fourth**, the Court in *In Re Long Valley*
7 declined to extinguish the unexercised rights of a riparian and considered quantification as an
8 alternative. The SPPS does not consider quantification as an alternative. **Fifth**, the appellant in *In*
9 *Re Long Valley* irrigated 89 acres and asked for an additional 3,000 acres to be irrigated. The entire
10 irrigated acreage in the system was only 4,130 acres. It was not reasonable to allocate more water
11 rights to the appellant under the facts and circumstances. The circumstances of the Willis Class in
12 this case are far different. The Class has *never* exercised their water rights.

13 “[N]o appellate court has endorsed an equitable apportionment solution that disregards
14 overlying owners' existing rights.” *City of Barstow*, 23 Cal.4th at 1249. To be sure, within certain
15 limits, a court may use its equitable power to implement a physical solution. However, the Court
16 may not impose a physical solution that ignores vested rights. *Id.* at 1249-50. Because the SPPS
17 ignores and negatively impacts the vested rights of the Willis Class, the SPPS cannot be
18 preliminarily approved by this Court.

19 **E. The SPPS Prospectively Determines that the Wood Class’ Water Use is**
20 **Reasonable and Beneficial and the Willis Class’ Water Use is Unreasonable**
21 **Without a Hearing**

22 Article X, Section 2 limits water rights to reasonable and beneficial uses. “The rule of
23 reasonable use as enjoined by ...the Constitution applies to all water rights enjoyed or asserted in
24 this state, whether the same be grounded on the riparian right, of the overlying land owner, or the
25 percolating water right, or the appropriative right.” *City of Barstow*, 23 Cal.4th at 1241-2.

26 In *City of Barstow*, the Supreme Court required an *individual* determination of unreasonable
27 use *before* the Court may depart from the water right priorities (in this case, an individual
28 determination of the correlative rights of all of the overlying pumping landowners and the rights of
the non overlying users in the Basin). The Court may not make a blanket determination that the

1 water use of all 65,000 Willis Class members is per se unreasonable without an individualized
2 inquiry.

3 **F. The SPPS is Not Consistent with the Willis Class Judgment**

4 The SPPS is not consistent with the Willis Judgment in many fundamental and material
5 ways.¹⁰ The Willis Class refers the Court to their concurrently-filed Separate Statement of
6 Objections for a comprehensive list of the inconsistencies between the SPPS and the Willis Class
7 Judgment. In summary, the SPPS modifies and practically abrogates the correlative water rights
8 of the Willis Class. The SPPS permanently allocates the entire NSY to the Stipulating Parties free
9 of replacement assessment, but allocates nothing to the Willis Class. The SPPS imposes
10 burdensome and costly application requirements on any member of the Willis Class seeking
11 approval of any pumping including the payment of water replacement assessments. Further, unless
12 the Watermaster has agreed to be bound by a majority vote, only a unanimous vote of the
13 Watermaster (a five-member board with a PWS-majority) can approve or deny the application. In
14 the absence of a unanimous vote, the application cannot be approved or denied and the Watermaster
15 Engineer's recommendations must be presented to the Court for a decision on an application.

16 As can be seen from the foregoing, there is no certainty that even after going through the
17 burdensome and costly application process, that a Willis Class Member will be allowed to pump
18 groundwater for a reasonable and beneficial use (including domestic and human use) on overlying
19 land in the Basin. Even if so allowed, there is no certainty that a domestic user will be entitled to
20 a waiver of the Replacement Water Assessment.

21 Finally, in wholly unsupported and self-serving fashion, the SPPS pre-ordains consistency
22 of the SPPS with the Willis Judgment. For brevity, each paragraph of the SPPS and its
23 inconsistency with the Willis Judgment is outlined in the Separate Statement of Objections.
24 However, the correlative water rights and permanent allocation of the NSY merit a brief discussion
25 below.

26
27
28 ¹⁰ The Willis Class has submitted several alternative proposed physical solutions ("APPS") to the Court for its
consideration. See APPS, filed concurrently herewith.

1 **1. The SPPS Violates the Shared Correlative Water Rights of the Willis Class**

2 The Supreme Court in *Katz v. Walkinshaw* first developed the principle of correlative
3 rights among overlying users of groundwater. “In disputes among overlying landowners, all have
4 equal rights.” Arthur L. Littleworth & Eric L. Garner, *California Water II* 75 (2nd ed. 2007). If
5 the water is not sufficient for the needs of all overlying landowners, then each is entitled to a fair
6 and just proportion of the water. *Katz v. Walkinshaw*, 141 Cal.116, 141 (1902); *City of Barstow*,
7 23 Cal.4th at 1241. No senior overlying users gain priority over other overlying owners by being
8 the first to pump groundwater. *Tehachapi-Cummings Cnty. Water Dist.* 49 Cal.App.3d at 1001.
9 Overlying rights are not lost by nonuse. *Wright*, 174 Cal.App.3d at 84. Looked at it differently,
10 the word correlative may be broken down into two parts- “co” meaning shared and “relative”
11 meaning in relation to all others. The Willis Class may only lose their correlative water right in
12 one of three ways: (1) voluntary surrender; (2) condemnation; or (3) prescription. *Orange County*
13 *v. City of Riverside*, 173 Cal.App.2d 137, 162 (1959). None of those ways are applicable in this
14 case. Indeed, the Willis Judgment preserved the correlative rights of the Willis Class. The SPPS
15 does not. For the PWS to attempt to modify or eliminate the correlative water rights of the Willis
16 Class by agreement is unconscionable.

17 The SPPS quantifies all water rights in the Basin on a permanent basis except for the water
18 rights of the Willis Class. **First**, in quantifying and allocating the entire NSY, the SPPS modifies
19 or eliminates the correlative rights of the Willis Class defined in the Willis Judgment. **Second**, the
20 nature of the projected water use- and, if for agriculture, the area sought to be irrigated, the character
21 of the soil, the practicality of irrigation, i.e. the expense thereof, the comparative profit of the
22 different crops which could be made of the water on the land- should not be resolved by agreement
23 of the parties, but must be resolved in the context of a physical solution proceeding. *Tehachapi-*
24 *Cummings Cnty. Water Dist.*, 49 Cal.App.3d at 1001-2. The task of apportionment may not be
25 circumvented just because it is complicated or impossible to perform. *Id.* at 1002. **Third**,
26 modifying, limiting, or eliminating the Willis Class’ water rights would require a pleading, notice
27 to the Class, and the appointment of counsel to defend the interests of the Class. **Fourth**,
28 quantification on a permanent basis is contrary to the dynamic nature of reasonable uses under the

1 California Constitution. **Fifth**, an expert will be necessary to quantify the future rights of the Willis
2 Class and aid Class Counsel in entering into a reasonable and consistent physical solution.

3
4 **2. A Fixed, Permanent, and Vested Allocation of the NSY to the Wood Class**
5 **Directly Harms the Water Rights of the Willis Class**

6 Overlying water rights are usufructuary in nature. Littleworth at 73. Overlying water rights
7 confer the legal right to use the groundwater superior to use by non overlying users, but do not
8 encompass the right of private ownership. *People v. Shirokow*, 26 Cal.3d 301, 307 (1980). The
9 State of California owns all of the groundwater in California, not as a proprietary owner, but in a
10 manner that empowers it to supervise and regulate water use. *Central Basin and West Basin Water*
11 *Replenishment Dist. v. Southern California Water Company*, 109 Cal.App.4th 891, 905 (2003).
12 Water right holders have the right to “take and use water,” but they do not own the water and cannot
13 waste it. *Id.* Title to the land is the only evidence necessary to prove an overlying right. *City of*
14 *Santa Maria v. Adam*, 211 Cal.App.4th 266, 298 (2012). Once the landowner proves title to the
15 overlying land, the burden shifts to the person who is claiming prescription (or some other superior
16 right) to show validity of the claim. *Id.* Here, the SPPS unlawfully converts the usufructuary right
17 into a fixed, permanent and vested water right that may not be modified by the Court or the parties
18 in the future. *See, e.g.*, Sections 5.1.31, 18.5.9, and 18.5.10 of the SPPS. This conversion of
19 usufructuary rights harms the Willis Class in several ways. **First**, a permanent allocation is not
20 consistent with the nature of reasonable uses. The SPPS allocates a vested and long term right to
21 the NSY free from scrutiny. The Willis Class Members on the other hand have no permanent right
22 to water and must comply with burdensome and costly application procedures requiring them to
23 commit to pay a replacement assessment before it is determined whether they will be allowed to
24 use groundwater for reasonable and beneficial uses (including domestic and human uses). **Second**,
25 a permanent allocation in the SPPS allows for long-term transfer rights for the certain Stipulating
26 Parties. Those Stipulating Parties will sell, exploit, and profit from a public resource while the
27 members of the Willis Class have no right to the NSY. Indeed, those Stipulating Parties will hold
28 a monopoly on the Basin’s groundwater and may sell the allocated rights at monopoly prices and

1 gain monopoly profits, all at the expense of the Willis Class. This outcome would eviscerate
2 Constitutional mandates regarding water rights in California.

3 **G. The SPPS is Palpably Unfair and Unreasonable**

4 There are many basic principles that should guide the Court in considering the reasonableness
5 of a settlement and in adopting a physical solution. For example, a settlement that includes a
6 physical solution must adopt a “common sense approach to water rights litigation.” Harold E.
7 Rogers and Alan H. Nichols, *Water for California* 548 (1967); it must “resolve competing claims
8 to water by cooperatively satisfying the reasonable needs of each user.” Littleworth at 173; it must
9 protect the “substantial enjoyment” of an overlying owner’s prior right. *Peabody*, 2 Cal.2d at 371;
10 it must be *adequate to protect the one having the paramount right in the substantial enjoyment*
11 *thereof and to prevent its ultimate destruction*, and in this connection, the court has power to and
12 should reserve unto itself the right to change and modify its orders and decree as occasion may
13 demand, either on its own motion or on motion of any party.” *City of Santa Maria*, 211 Cal.App.4th
14 at 288; it may not impose an unreasonable burden on a party. *City of Barstow*, 23 Cal.4th 1250; it
15 must take into account the priorities of water rights, and it may not be applied in such a way that
16 vested rights are eliminated (*Id.*); finally, the court may not demand that one party spend large sums
17 of money in order to satisfy a physical solution. See *Rancho Santa Margarita v. Vail* 11 Cal.2d
18 501, 561 (1938).

19 As set forth in detail previously, all of the foregoing principles have been violated in the SPPS
20 because it permanently allocates the entire NSY to the Stipulating Parties in derogation of the Willis
21 Class’ water rights. As a consequence, the SPPS in effect elevates the PWS’ unproven prescriptive
22 rights over and above the overlying rights of the 65,000-Member Willis Class. If approved, the
23 PWS (and other overlying landowners) will have effectively stolen the groundwater rights from
24 65,000 private landowners. This result is completely untenable and cannot be approved by this
25 Court.

26 The cost of this physical solution is borne and imposed on the Willis Class, but not the Wood
27 Class. The Small Pumper Class, which seeks to require a Willis Class member to pay a replacement
28

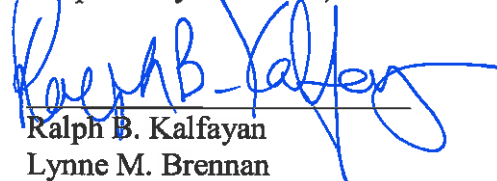
1 assessment, should have to prove why sharing those costs among the overlying users would be
2 unreasonable. If Willis Class Members must pay, then Wood Class Members must similarly pay.

3 There are other equitable reasons to not approve the SPPS. The Willis Class has not injured
4 the Basin with continuous over-pumping for the past 50 years. The Stipulating Parties are solely
5 responsible for the land subsidence, reduction in well levels, and compaction harm to a living
6 aquifer from the overdraft of the Basin. These pernicious effects were caused by the pumping
7 landowners who now seek to subordinate or extinguish the rights of the Willis Class. Fairness
8 demands that the landowners who caused the problem should pay for the physical solution, not the
9 Willis Class. Indeed, the Willis Class landowners contributed to the benefit of the Basin by
10 postponing their right to pump water in the future. If anything, equity should reward the Willis
11 Class, not punish them.

12 Moreover, the PWS demand in the SPPS that the Willis Class respect the PWS right to pump
13 15% of the NSY free of replacement assessment. But in the same breath, the PWS deny the Willis
14 Class' right to pump up to 85% of the NSY free of replacement assessment as previously agreed in
15 the Willis Settlement. The PWS cannot be allowed to enjoy the benefits of their bargain with the
16 Willis Class, while at the same time reneging on its obligations to the Willis Class. The Willis
17 Class demands equity and this Court has a fiduciary duty to enforce the Willis Judgment and protect
18 the interests of all the absent class members by denying preliminary approval of the proposed
19 settlement.

20 Dated: March 13, 2015

Respectfully submitted,



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