COURT OF APPEAL, STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT
F075451

ANTELOPE VALLEY GROUNDWATER CASES

Appeal from the Superior Court of Los Angeles
Superior Court No. JCCP4408
Hon. Jack Komar

APPELLANTS' REPLY TO RESPONDENT'S BRIEF FOR UNITED STATES

(3 of 3)

(Willis Class appeal)

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INTRODUCTION

The Willis Class appeals the lower court's 2015 Judgment which approved a Physical Solution that extinguished their overlying water right by permanently allocating in perpetuity the entire Native Safe Yield ("NSY") of water to stipulating parties. The Consolidated Adjudication entailed the determination of a Federal Reserve Right of the United States government due to its ownership of Edwards Air Force Base within the Antelope Valley Basin.

Although the Willis Class does not dispute the lower court's determination of the Federal Reserve Right, the United States responded to Appellants' Opening Brief for the limited purpose of advising the Court of the federal interests in the litigation and to request the Court to affirm the lower court's 2015 Judgment and Physical Solution, subject to review of Appellants' claims and the responses of the other respondents. (United States Reply Brief ("USRB") at pp. 5, 10.)

While the Willis Class does not challenge the adjudicated Federal Reserved Water Right, for the reasons presented below,

the Willis Class challenges the provisions of the 2015 Judgment and Physical Solution, which annually allocates any "unused" portion of the Federal Reserved Water Right to the Public Water Suppliers ("Purveyors"). The United States does not address the "unused" portion of its Federal Reserve Water Rights in its brief.

For the reasons presented herein and in Appellants' Merit Reply Briefs' to the Landowners and Purveyors (Appellants' Reply Briefs 1 and 2 of 3) Appellants respectfully request this Court to remand the trial court's 2015 Judgment and Physical Solution with orders to incorporate and recognize the Willis Class landowners' overlying right to the NSY and their right to return flows consistent with the 2011 Judgment, recognize the Federal Reserve Right but reallocate the unused portion from the appropriators to the Willis Class as overlying landowners, and to revise those provisions of the Physical Solution that permanently allocate the NSY in perpetuity so as to comply with the doctrine of reasonable and beneficial use, Water Code sections 106 and 106.3, and leading California water precedent.

CLARIFICATION OF THE RECORD

As correctly noted by Respondent United States, the stipulated Physical Solution and 2015 Judgment provide the United States with 7,600 acre-feet of water per year. However, on average, the United States only uses approximately 1,350 acre-feet/year. (1REPLYEXCT358:7[1,246.09 acre-feet in 2011 and 1,450.59 in 2012, for an average of 1,348.34 acre-feet/year]) (79JA75216:7.)

The Physical Solution provides that any unused portion of the Federal Reserve Right shall be allocated to the Purveyors.[1] (3REPLYEXCT2397:4-8)(176JA157540:4-8.) Thus, on average, the Purveyors receive an additional 6,250 acre-feet/year of the NSY and to the exclusion of the Willis Class who received no production right to pump from the NSY.

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[1] Boron Community Services District and West Valley County Water District are excluded from this pro rata allocation of the unused Federal Reserve Right. (3REPLYEXCT2397:4-8) (176JA157540:4-8.)

ARGUMENT

I. THE 2015 JUDGMENT AND PHYSICAL SOLUTION CONTRAVENE CALIFORNIA WATER LAW BY AWARDING THE ANNUAL UNUSED PORTION OF THE GOVERNMENT'S FEDERAL RESERVED RIGHT TO PURVEYORS RATHER THAN THE OVERLYING LANDOWNERS.

The United States has a federal reserved water right. (USRB at p.7.) The federal reserved right doctrine is based on the theory that when the federal government withdraws land from the public domain and reserves it for a specific federal purpose, the government also reserves the riparian rights attached to the land, which exempts the water rights from appropriation under the state laws. (*Winters v. United States* (1908) 207 U.S. 564, 577.) This reserved "federal right" applies to both surface water and to groundwater. (*See, Aqua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (2017) 9th Cir. 849 F.3d 1262.) For our purposes here, the federal reserved right to groundwater is analogous to overlying correlative rights under California law since both are based on the ownership of land and are appurtenant to the land. (*Id.*)

As detailed in Appellants' Opening Brief, an overlying right is "the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224,1240 ("*Barstow*") [quoting *California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 725-26].) Consistent with this principle, the 2011 Judgment defines an "overlying right" as "the appurtenant right of an Overlying Owner to use groundwater from the Native Safe Yield for overlying reasonable and beneficial use." (3REPLYEXCT2538:3-4) (176JA157681:3-4.)

The full amount of the overlying right is that amount of water that is required for the landowners' "'present and prospective' reasonable beneficial use upon the land." (*Barstow, supra,* 23 Cal.4th at 1240.) "As between overlying owners, the rights ... are correlative; [i.e.,] each may use only his reasonable share when water is insufficient to meet the needs of all." (*Id.* at 1241.) Existing overlying uses do not take priority over

unexercised overlying rights. (*Tehachapi-Cummings County Water District v. Armstrong* (1975) 49 Cal.App. 3d 992, 1001.)

In contrast, those who do not own overlying land, or who seek to use groundwater on property that does not overlie the aquifer from which the groundwater is pumped, obtain only appropriative rights. (*Barstow, supra*, 23 Cal.4th at p. 1241["[A]ny water not needed for the reasonable beneficial use of those having prior rights [i.e., the overlying landowners] is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed"].)[2]

The rights of overlying landowners are "superior to that of other persons who lack legal priority" – i.e., those with appropriative rights. (*Id.* at 1240.) "Proper overlying use," the Court continued, "is paramount and the rights of an appropriator, being limited to the amount of the surplus, must yield to that of the

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[2] The supply of water required as part of a municipal water system is <u>not</u> an overlying groundwater right, even where the lands supplied with water overlie the groundwater basis. (*City of Pasadena v. City of Alhambra*, (1949) 33 Cal. 2d 908, 927.) Thus, the Respondents are appropriative groundwater rights holders.

overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the [adverse, open and hostile] taking of non-surplus waters." (*Id.* at 1241 [quoting *California Water Service Co., supra,* 224 Cal. App. 2d at 725-26]).

Given the overlying nature of the federal reserved groundwater right in this case, California law of overlying and appropriative rights seems to require that if the United States does not pump the full amount of the federal reserved right, the unused portion should have been allocated to the overlying landowners, not appropriators. In contravention of this principle, the Physical Solution allocates the unused portion of the correlative share of the United States solely to Purveyors, who are appropriators, and not the overlying landowners. (3REPLYEXCT 2397:4-8; 2486-2487) (176JA157540:4-8; 157629-157630.)

II. BY AWARDING THE ANNUAL UNUSED PORTION OF THE GOVERNMENT'S FEDERAL RESERVED RIGHT TO PURVEYORS, THE 2015 JUDGMENT AND PHYSICAL SOLUTION ALSO CONFLICT WITH THE 2011 JUDGMENT WHICH LIMITS PURVEYORS' RIGHT TO PUMP GROUNDWATER TO FIFTEEN PERCENT.

The allocation of the unused water right to Purveyors also violates the court-approved 2011 Judgment based on the Willis Class's Settlement with Purveyors. The 2011 Judgment limits Purveyors' right to pump groundwater to no more than 15 percent of the Federally Adjusted Native Safe Yield ("FANSY"). (3REPLYEXCT2541:6-8) (176JA157684:6-8.) The FANSY for any given year is defined as "the Basin's Native Safe Yield less the actual annual production of the United States' during the prior year pursuant to its Federal Reserved Right." (3REPLYEXCT 2537:15-17)(176JA157680:15-17.)

Here, the trial court determined the Basin's NSY is 82,300 acre-feet/year. (3REPLYEXCT2335:27-2336:2) (176JA157459:27-157460:2.) Under the 2015 Judgment and Physical Solution, Purveyors were collectively allocated approximately fifteen percent, or 12,255 acre-feet/year. (3REPLYEXCT2469) (176JA

157612.)[3] However, since Purveyors also received a *pro rata* allocation of all of unused Federal Reserve Right each year which is on average 6,250 acre-feet/year, Purveyors were actually allocated approximately 18,505 acre-feet/year – or nearly 23 percent of the FANSY (12,255 acre-feet/year under the Physical Solution plus 6,250 acre-feet/year unused Federal Reserve Rights).[4] (3REPLYEXCT 2397:4-8)(176JA157540:4-8)

Since Purveyors stipulated to and was ordered by the court to pump no more than 15 percent of the FANSY, the additional 8 percent of the FANSY resulting from unused Federal Reserve Right should inure to the benefit of the overlying landowners.

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[3] Although the Boron Community Services District ("Boron") and West Valley County Water District ("West Valley") are Purveyors, they did not stipulate to the Willis Class Settlement. Therefore, their allocations of 50 and 40 acre-feet of the Native Safe Yield were subtracted from the total 12,345 acre-feet provided collectively to the Purveyors, leaving 12,255 acre-feet. (3REPLYEXCT2469)(176JA157612)

[4] Native Safe Yield [82,000 acre-feet] minus the United States' average annual use [1,350 acre-feet/year] provides a FANSY of 80,950 acre-feet – or **22.86** percent [18,505 ÷ 80,950]

III. THE 2015 JUDGMENT VIOLATES CALIFORNIA WATER LAW PRINCIPLES.

The Class refers to the counterpoints made in its Reply to the Purveyor and Landowners' Respondents Brief (Reply Briefs 1 & 2 of 3), and hereby incorporates the discussion of California water law herein.

IV. THE 2015 JUDGMENT AND PHYSICAL SOLUTION IS IN INCONSISTENT WITH THE WILLIS CLASS SETTLEMENT AND COURT'S 2011 JUDGMENT.

The Class refers to the counterpoints made in its Reply to the Purveyor Respondents Brief (Reply Brief 2 of 3), and hereby incorporates that discussion of the inconsistencies herein.

V. THE WILLIS CLASS WAS NOT AFFORDED DUE PROCESS OF LAW.

In Appellants' Opening Brief, the Willis Class argued the process used by the court to evaluate and approve the Physical Solution violated the Willis Class's due process rights. (AOB at pp. 23, 60, 148-163.)

Respondents response is three-fold: (1) whether the Class even had standing to participate in Phase Six; (2) the notice to the Class was "adequate"; (3) the trial court merely acted within its

discretion to exclude the Willis Class's evidence; and (4) the court was "not required to consider some specified range of alternative physical solutions."

A. The Willis Class Maintained Its Standing to Raise Inconsistencies and Criticize the Proposed Physical Solution in Phase Six.

Respondents first argue the Willis Class — having fully resolved all claims and dismissed its complaint in connection with the 2011 Settlement — lacked standing to propose alternative solutions. (LORB p. 94) According to the Respondents, "Willis had no live causes of action and arguably lacked standing, but for the continuing jurisdiction of the court in the adjudication and the agreement that the 2015 Judgment must be consistent with the 2011 Judgment." (LORB p. 75) Therefore, the trial court was not required to consider any of the alternative physical solutions offered by the Willis Class in the first instance. (LORB at p. 94.) The only solution the trial court was required to consider, they argue, is the one submitted as the Stipulated Physical Solution. (*Id.*) Their argument fails for at least four reasons.

First, the 2011 Judgment expressly recognized the Willis Class's standing to participate in any future proceeding "that may affect their rights." (3REPLYEXCT2547:18-20)(176JA157690:18-20.) Further, the Wills Class and Purveyors acknowledged that "a trial [Phase Six] may be necessary as against non-settling parties" and "agree[d] 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..." (3REPLYEXCT2547:14-16) (176JA157690:14-16.) The fact that the Willis Class had dismissed its complaint is of no consequence to the Willis Class's standing because, as the Respondents concede, the Class members' allocation of water was yet to be determined. (LORB at p. 95 ["Neither the Class Settlement nor the 2011 Judgment quantified the extent of the Class's remaining correlative rights..."].) Because there was no specific allocation of water to the Willis Class, the court's consolidation order, as Respondents also acknowledge, specifically deemed all who claimed a water right necessary parties to the adjudication. (*Id.*) Because the Willis Class members' groundwater rights were severely impacted by the

Physical Solution, the Willis Class was a necessary party regardless of whether it had dismissed its complaint. Therefore, the Class rightfully presented alternative physical solutions to the court and the court had a duty to give each due consideration.

Second, the trial court found that "[b]ecause the Willis Class objected to the Physical Solution, it [was] entitled to have its rights tried as if there were no stipulated physical Solution." (176JA157472:8-9.) Additionally, the court's Phase Six case management order regarding the scope of trial *directed* the Willis Class to participate in the Phase Six trial, including offering objections to the Physical Solution. (1REPLYEXCT422) (127JA123889-123890.)[5] In particular, the court invited the Class to provide a "written statement of objections" to the Physical Solution "and any assertion of claims or rights to produce groundwater from the Basin by Non-Stipulating Party [i.e., the Willis Class]." (*Id.*) In response to the court's invitation, the Willis Class did just that – provided written objections to the Physical

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[5] The case management order was twice amended regarding the filing deadlines. (*See*, 1REPLYEXCT443-446; 2REPLYEXCT 12791282) (128JA125522-125525; 130JA127651-127654.)

Solution, including alternatives. (*See,* 2REPLYEXCT1164-1182; 1420-1430; 1619-1634; 3REPLYEXCT1993-2057; 2058-2331) (130JA126865-126883; 131JA127835-127845; 132JA130623-130638; 174JA 154829-154893; 174JA 155346-155619.)

Third, contrary to Respondents' assertion, Willis Class's alternative proposed Physical Solutions *were* properly before the court. (LORB at 94) The Willis Class filed numerous motions regarding the inconsistency between the 2011 Judgment and the Physical Solution. (*See,* 2REPLYEXCT1164-1182; 1420-1430; 1619-1634; 3REPLYEXCT1993-2057; 2058-2331) (130JA126865-126883; 132JA130623-130638; 131JA127835-127845; 174JA 154829-154893; 174JA155346-155619.) In one motion filed on April 7, 2015 (more than eight months before the court entered its statement of decision), the Class proposed alternative solutions. (2REPLYEXCT1420-1430)(131JA127835-127845.) However, the court refused to rule on these motions until the Phase Six trial was over. (42RT23813:19-22 ["THE COURT:... I cannot and will not interpret the agreement, settlement agreement of the Willis Class, today to determine whether or not what you're saying has

any validity at all, okay?"]; 3REPLYEXCT2359-2360,¶XII.H) (176JA157483-157484¶XII.H.) Later, the court sought to cover its tracks by falsely stating "no party ever objected or made any attempt to modify the stipulation and judgment or to prevent its enforcement..." (3AA2076,¶6.) The record is clear – the proposed alternative solutions were properly before the court.

Fourth, Respondents concede any later Physical Solution was to be consistent with the 2011 Judgment and that this consistency was yet to be determined. (LORB at p. 21, 23, 65, 72, 87, 94, 95, 101.) As detailed in Appellants' Reply to the Purveyors Respondents' Brief (Reply Brief 2 of 3), the Physical Solution was and is facially inconsistent with the 2011 Judgment. Therefore, the Willis Class had standing to present alternative physical solutions that were consistent with the 2011 Judgment's protection of the Willis Class landowners' ability to share in the NSY free of Replacement Assessments with the ability to recapture return flows that result from the use of any imported water paid for by Class members.

B. The Notification Sent by Purveyors' Counsel Did Not Inform the Willis Class That Their Overlying Rights May Be Extinguished by the Court in the Physical Solution Eventually Approved by the Court.

In Appellants' Opening Brief, the Willis Class noted the members of the Class were never given notice that their right to pump water from the NSY could or would later be extinguished by the Physical Solution ultimately adopted by the Court.

In response, Respondents argue the Willis Class had notice that the Respondents could prescribe against the Class members' groundwater rights thereby extinguishing those rights. (LORB at pp. 66, 68; PRB at p. 103-104.) Respondents further argue that the entire class of over 18,000 Willis Class landowners were "on notice" of the extinguishment of their rights because the Physical Solution was electronically filed. (LORB at p.69.)

Respondents' arguments fail for several reasons:

First, as discussed in Appellants' Reply Briefs to Landowner and Purveyors Respondents' (Briefs 1 & 2 of 3), the concept of landowners prescribing against the groundwater rights of other landowners is wholly unsupported by law. Therefore, any general

notice sent to the Class would be insufficient to place Class members on notice that the court might prescribe against the Class members' groundwater rights thereby extinguishing those rights.

Second, none of the evidence Respondents cite to – the Willis Class Complaint, Purveyors' Cross-Complaint, the court's Consolidation Order, Willis Class Notice of Class Certification, Settlement Notice – supports their position. The Settlement Notice informed all Class landowners that they had a right to produce groundwater from the Basin's NSY. (1REPLYEXCT 260,¶4)(13JA15274,¶4.) The Settlement Notice also directed the Class to the Adjudication's website to access the Willis Class Settlement in its entirety, which further informed them that any later physical solution would be consistent with the terms of the Willis Class Settlement. (*Id.*) However, the plain terms of the Physical Solution state the Willis Class has no right to produce from the NSY, directly contradicting the 2011 Judgment. (3REPLYEXCT 2411:28-2412:2; 2348:22-23) (176JA157554:28-157555:2; 157472:22-23.)

Third, an adversary pleading is required anytime a citizen is denied "any significant property interest." (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 542.) Respondents never filed a pleading against the Willis Class to claim prescription over the Class members' rights. (3AA2078,¶3 ["Nor was there legal adversity between Willis Class and the Landowners or any other parties in the case since there were no claims by the landowners, or others, against the ownership interest of the class members"].) Respondents wrongly assert that adversarial pleadings against the Willis Class were not necessary because "the court had discretion to adjudicate inter se the amount of water to which each party was entitled." (LORB at pp.70-71; PRB at p. 99-103.) While this may be true, the court was nonetheless required to respect the due process rights of the Willis Class. (*Robinson v. Hanrahan* (1972) 409 U.S. 38, 38 [holding that the requires of the Constitution's Due Process Clause are not modified by the inter se or in rem nature of the underlying proceedings]; *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 312-313.) The 18,000 Willis Class landowners were not afforded the opportunity to opt

out of the court-adopted inconsistent Physical Solution that precluded the Willis Class from using the NSY or to intervene in the Phase Six trial. Indeed, the court knew at least by March 26, 2015 that it was going to approve the Physical Solution *verbatim* when it preliminarily approved the Wood Class Stipulation that relied on and incorporated the Physical Solution. (2REPLYEXCT1278; 812:5-7) (130JA127632; 128JA125758:5-7.) Additionally, Class counsel filed a Motion to Enforce Due Process Rights of the Willis Class on May 21, 2015. (2REPLYEXCT1619-1634) (132JA130623-130638.) However, the court denied the motion without prejudice, reasoning that "I don't think that this is the time for the Court to hear that." (42RT23817:3-6; 23819:13-16; 23823:22-24; 23825:3-4.)[6]

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[6] As noted in Appellants' Opening Brief, a party not actually made a defendant to an accusatory pleading cannot thereafter be deemed a defendant thereto, no matter how convenient and efficient such a process might be. (*Nelson v. Adams USA, Inc.* (2000) 529 U.S. 460, 465.) Landowners' attempt to distinguish *Nelson* by claiming the Willis Class "received ample notice that it was subject to a comprehensive water rights adjudication that could impact its ability to pump groundwater." However, as Landowners point out, the *Nelson* court found a violation of due process because "Nelson, in his personal capacity, received no notice...and thus was afforded no opportunity to be heard."

Fourth, Respondents weakly defend the Physical Solution's evisceration of the terms of the prior 2011 Judgment by arguing the Class Notice adequately informed Willis Class members because the Class Settlement Notice informed them that they "will be bound by the terms of any later findings made by the Court and any Physical Solution imposed by the Court." (LORB at p 101; PRB at 96, quoting 9JA10297, emphasis removed.)

Under Respondents' argument, the consideration the Class would receive if they remained in the Class could effectively be *anything* or *nothing*, as it would be up to the court to decide in future proceedings. This cannot be. Respondents' reading of the Willis Class Settlement and 2011 Judgment would render that Judgment a nullity. More importantly, it would violate basic constitutional tenets of due process requiring notice and an opportunity to be heard. (*See, Mullane v. Central Hanover Trust Co.* (1950) 339 U.S. 306, 314-15.) For notice to pass constitutional muster, it must reasonably inform absent class members of the

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Similarly, the Willis Class did not receive notice that its rights could be extinguished and was not provided a meaningful opportunity to be heard before the Physical Solution and 2015 Judgment stripped them of their overlying groundwater rights.

settlement terms to which they would be bound if they should opt to remain in the class and release their rights to continue litigating. As Respondents concede, "[t]he purpose of a class notice is to 'fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.'" (PRB at 95 [quoting (1975) *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152].)

Under the Purveyors' argument, the Class Notice requirements were met here even though the Notice itself left the Willis Class members entirely in the dark as to the settlement terms (leaving them to be defined or taken away by the court later). But court-approved settlements and court-entered judgments must be construed as to render them constitutional. (*In re Sheena K.* (2007) 40 Cal.4th 875,890 [condition in an order that imposes limitations on a person's constitutional rights must be closely tailored to avoid being invalidated as unconstitutional].)

Here, a proper reading of the Willis class-wide settlement and Judgment—and one that would pass constitutional due process scrutiny—is that it guaranteed Willis Class members

correlative rights in 85% of the NSY. Entry of another future judgment or order that would undo this key term of the court-approved Settlement and 2011 Judgment would, by definition, be inconsistent with the 2011 Judgment. And, if allowed to stand, such a future judgment, order, or physical solution would violate basic due process norms by taking away from Willis Class members the consideration they had been notified they would receive in exchange for remaining in the Class and foregoing their rights to continue litigating against Respondents.

Finally, Respondents conflate notice to an attorney via electronic filings with notice to the entire Willis Class. The Willis Class Notice of Settlement was the last notice of terms that the Class was apprised of, which protected their overlying right to a correlative share of the Basin's native groundwater.

C. The Trial Court Was NOT Merely Acting Within Its Discretion to Exclude the Willis Class's Evidence.

As noted above, the court found the Willis Class was entitled to have its rights tried and *directed* the Willis Class to participate in the Phase Six trial, specifically requiring (1) a "written

statement of objections" to the Physical Solution and (2) "any assertion of claims or rights to produce groundwater from the Basin by Non-Stipulating Party [i.e., the Willis Class]." (1REPLYEXCT422-423) (127JA123889-123890.)

Nevertheless, the court apparently felt "Willis Class participation was neither mandatory nor appropriate" and that "[t]here was no need for the [C]lass to be present" in Phase Six trial. (3AA2076-2077.) The presence of Willis Class counsel was nothing more than window dressing. Each of Willis Class's attempts at informing the court of the dire inequities of the Physical Solution were met with adverse rulings and/or complete disinterest in the Class's arguments/requests/evidence. (42RT23813:19-23814:1 ["I cannot and will not interpret the ... settlement agreement of the Willis Class today"]; 42RT23822:2-25 ["I don't think that I'm interested in hearing the motion today"]; 43RT24449:1-6 ["I'm not prepared to make a finding this morning if they are [consistent]"]; 43RT24438:27-24439:21; 43RT 24445:4-7.)

The trial court clearly understood the impact of a zero-percent allocation of the native groundwater rights on the Class's ability to develop their properties in the future, and hence the value of their properties now. (1REPLYEXCT278:1-5 ["By eliminating the [Purveyors'] prescription claims and *maintaining corelative rights to portions of the Basin's native yield*, the Willis Class members achieved a large part of their ultimate goal – to protect their right to use groundwater in the future and ***maintain the value of their properties***"], emphasis added) (13JA15487:1-5.) The court's refusal to allow Willis Class counsel to continue to protect the Class's "right to use groundwater in the future" and "maintain their correlative rights to the Basin's native yield" (*Ibid.*) in the Phase Six trial was clearly an abuse of the court's powers.

1. The Class is not merely challenging the trial court's *in limine* rulings.

In their Respondents' Brief, Respondents represent that the court granted a motion *in limine* filed by Purveyors in September 2015 "precluding evidence of alternative physical solutions [because] the purpose of the Phase 6 trial was to determine

whether to approve the global settlement and not an opportunity to hear evidence of alternative proposals." (LORB at pp. 95-96) The Respondents then seek to diminish the Willis Class arguments as nothing more than an "effort to reverse the ruling on the motion *in limine*." (LORB at p. 73, orig. italics; PRB. at p. 116)

This characterization severely misrepresents the issues on appeal before this Court. The Willis Class is not attacking the court's "ruling on the motion *in limine*" because the court made clear that "any ruling on a motion *in limine* is likely to be tentative..." (46RT25321:20-23.) In fact, at various other points during the proceedings, the court specifically requested argument as to why alternative solutions would be better than the one ultimately adopted by the court. (43RT24453:25-27 ["I think the better mode is for counsel to present argument as to and establish why something is better than something else"]; (1REPLYEXCT423:25-27 [Case management order setting deadline for "***written statement of objections to the proposed Stipulated Judgment and Physical Solution***, and any

assertion of claims or rights to produce groundwater from the Basin by Non-Stipulating Party"], emphasis added)(127JA123890:25-27.) Therefore, in sustaining the Purveyors' objection to expert witness testimony regarding alternative proposals, the court's decision was temporary.

2. The Trial Court improperly excluded the Willis Class expert Rod Smith and improperly limited the scope of expert witness Stephen Roach.

A crucial issue on appeal is the lower court's improper exclusion of expert testimony from Rodney Smith, Ph.D. and imposition of an arbitrary time limitation on the examination of Stephen Roach after entertaining an offer of proof.

The court improperly sustained the Purveyors' objection to Dr. Smith's testimony which related to three areas: (1) the value of water allocated on a permanent basis in perpetuity in California; (2) the impact of the proposed physical solution on the Willis Class landowners' overlying rights and alternative ways of incorporating their rights into a physical solution consistent with California law; (3) the reasonableness of the total allocation to the Purveyors which includes the unused portion of the Federal

Reserve Right in addition to the 12,345 acre-feet allocated in exhibit 3 to the Physical Solution. (49RT26534:231-26537:4.)

Similarly, the court only allowed ten minutes of testimony for Willis Class's expert Stephen Roach, who also was to opine on the material negative impact the Physical Solution had on the Willis Class landowners. (3REPLYEXCT1967-1982) (173JA154493-154508.) Specifically, Mr. Roach determined that the Willis Class's exclusion from the NSY "greatly diminish[es] the potential economic uses" of the Class's properties, "materially impact[s] the values of [their] properties" and that the New Production procedures are so rigorous and costly that "could more than offset the value gain the properties would achieve with water." (3REPLYEXCT1981)(173JA154507.)

Both Dr. Smith's and Mr. Roach's testimony were necessary to show how the Physical Solution unlawfully extinguished the overlying rights of the Willis Class and therefore was *inconsistent* with the 2011 Judgment, as well as present alternative physical solutions consistent with the 2011 Judgment.

3. The Willis Class's Due Process rights were violated by the court's denial of their right to cross-examine the Phase Four landowner-declarants regarding their current and planned future uses of groundwater.

In Phase Six, the court admitted, over the Wills Class's objections, a series of declarations submitted by the stipulating parties in Phase Four of these proceedings. The use of those declarations to determine the reasonableness of stipulating parties' water uses was inconsistent with trial court's Phase Four Case Management Order which explicitly stated that "Phase [Four] trial is only for the purpose of determining groundwater pumping during 2011 and 2012," and that it "***shall not result in any determination of any water right, or the reasonableness of any party's water use*** or manner of applying water to the use." (1REPLYEXCT346:5-6, emphasis added) (73JA67776,; 42RT 23819:3-12.)

During Phase Four, counsel for Antelope Valley Ground Water Agreement Association expressed his concern: "I think the particular concern is when we come to a later phase of trial, that parties can't just say, 'well this declaration was admitted into evidence and won't be subject to cross-examination.'"

(38RT19948:10-18.) The court reassured the Association's counsel that "those statements in those declarations, ***other than the amount*** of pumping, except insofar as they support the conclusion as to what the pumping is, ***should not be used in the future.***" (38RT19948:15-18, emphasis added.)

In Phase Six, the court (despite its previously ordered limitations on the use of the declarations and verbal assurances that they would not be reused in any future proceedings "in any determination of any water right, or the reasonableness of any party's water use or manner of applying water to the use") (1REPLYEXCT346:5-6)(73JA67776:5-6) overruled the Class's hearsay objection and admitted the Phase Four declarations in lieu of live testimony or any cross-examination. (42RT23818:3-25; 23819:1-7.) The court then proceeded to use the declarations as evidence of the "reasonable and beneficial use" of Respondents' claimed pumping rights at issue during the Phase Six trial. (46RT25439:23-25442:27.)

More importantly, the court precluded any cross-examination of the declarants on the continued validity of their

previous statements during Phase Six trial proceedings. (46RT25438:4-25443:5.) Since the information in those declarations was expressly limited to historic pumping quantities for 2011 and 2012, the court's refusal to permit the Class to cross-exam the declarants on the use of water during, and more importantly, after those dates were an abuse of discretion. Further, the denial of the Willis Class request to cross-examine the landowners whose water use was considered by the court in connection with its 2015 Judgment and adoption of the Physical Solution was a violation of the Class's member's Due Process right to a fair hearing.

On appeal, Respondents concede that during Phase 4, there was "no assessment of reasonable and beneficial use" and further concede the trial court "[did] not allow cross examination of Beeby [Respondents' expert on reasonable and beneficial use] on the findings of fact from the Phase 4 trial." (LORB at p. 79 [citing 46RT25443:3-5] and p. 80.) However, Respondents incorrectly argue that "'everybody had the opportunity to appear and present

evidence with regard to' current pumping during the Phase 4 trial." (LORB at p. 79.)

In support of this argument, Respondents simply rely on statements of the court without factual citations or any additional argument.[7] (*Id.*; citing 42RT23818:17.23.) A trial court's statements are not evidence. (*Orange County Water Dist. v. The Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 124, fn. 10.) Respondents must provide proper citations to the evidence supporting factual assertions in its briefing. (*Ibid.*)

While the trial judge may have offered the opinion that "everybody had the opportunity to appear and present evidence with regard to – and objections – with regard to what the stipulations were, which were supported by declarations," the record more accurately reflects the reality of what occurred during Phase Six and, in particular, the court's contradiction of its own explicit Phase Four Trial Order. (LORB at p. 79; *see also* 35RT18707:24-18708:5 [in response to Willis Class counsel's

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[7] In fact, this reliance on the trial court's statement attempting to justify its actions is a constant theme throughout Landowners' and Purveyors' briefs.

request for clarification whether the Phase Four discovery order applied to the Class, the court replied, "it would not, and it would not anyways, since you are non-pumping parties"].)

For example, Willis Class counsel asked Robert Beeby whether he conducted "any evaluation of one party's use relative to another party's use and determine whether or not it's reasonable to have that particular use?" (46RT25438:13-27.) The question was met with a barrage of objections from Respondents which were sustained by the trial court stating, "this witness's testimony is that he reviewed the various declarations and exhibits and other materials in order to determine whether ... the ***claimed*** water usage ***that was stipulated to*** and agreed to by the parties here was reasonable." (*Id.*)

This, of course, is not what the reasonable and beneficial use doctrine requires. According to the Supreme Court, the question of whether a party's water use is *reasonable* "cannot be resolved *in vacuo*," and beneficial use does not equate to reasonable use. (*Barstow, supra*, 23 Cal.4th at 1242 [*citing Joslin v. Marin Mun. Water Dist.* (1967), 67 Cal.2d 132, 143]; *see also Tulare Dist. V.*

Lindsay-Strathmore Dist. (1935), 3 Cal.2d 489, 567.) Further, stipulating parties cannot agree to an automatic right to water based on their past use. (*Tulare, supra,* 3 Cal.2d at 567.) Since the court must determine whether a party's water use is "reasonable and beneficial," as *compared to all other uses*, the Willis Class was entitled to be heard or to cross-examine the stipulating parties regarding reasonable and beneficial use of water.

Finally, Respondents fault the Willis Class for ignoring the "longstanding and continuing overdraft requiring active overliers and prescribing appropriators to absorb severe cuts in their existing pumping to achieve safe yield and ensure long-term Basin sustainability." (LORB p. 53) They claim California law "only preserve[s] prospective overlying rights absent overdraft, absent prescription, and absent a need to severely cut existing overlier and prescriptive appropriator pumping to achieve safe yield." (*Id.* at p. 55) Respondents admit that "[i]f, under different conditions, the Basin had not been in severe overdraft, equities *might* favor allocating a portion of the Native Safe Yield to Class members

with a beneficial use," but "because of the limited Native Safe Yield and severe reductions [were] imposed on Settling Parties," no allocation to the Willis Class was appropriate. (LORB at p. 88, italics added.)

Respondents' analysis is faulty. First, the status of the Willis Class as overlying landowners and the rights attached thereto do not disappear when the Basin is in an overdraft. (*Barstow, supra,* 23 Cal.4th at 1240.) Second, it is ironic that the Respondents who so excessively pumped water as to cause the overdraft in the first place, now inappropriately seek *sympathy* for having to correct their misconduct by reducing their water use to preserve the native safe yield.

D. The Trial Court Did Not Consider ANY Other Possible Physical Solutions.

As noted in Appellants' Opening Brief, it is "the duty of the trial court to admit evidence relating to possible physical solutions (*City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 341), and "thoroughly investigate" the possibility of other reasonable physical solutions. (*Rancho Santa Margarita v. Vail, supra,* 11 Cal.2d at 560-561.)

In support of the trial court's judgment, Respondents argue the court was "not required to consider some specified range of alternative physical solutions – rather, they must only ascertain a physical solution that is equitable and in compliance with the reasonable use doctrine and California groundwater law." (LORB at p. 74; PRB at p.111-112.)

The problem with Respondents' argument is not that the range of alternatives considered by the trial court was a too small. It is that the trial court refused to consider ***any*** alternative physical solution, at all. Since the trial court excluded the Class's proffered alternatives, the Physical Solution considered was the one proposed by the settling parties. As detailed throughout Appellants' three Reply Briefs, the Physical Solution adopted by the trial court is not equitable, nor does it comply with the reasonable use doctrine or California law. To the contrary, this Physical Solution promotes waste and unreasonable use. (*E.g.*, 3REPLYEXCT2413,¶9.3.4 [even if a stipulating party exercises its right in such a manner to cause material injury to the aquifer, that party may continue to excessively extract water whereby "the

Watermaster provides an equivalent quantity of water to such Party as substitute water supply, with such water paid for from the Balance Assessment proceeds"])(176JA157556,¶ 9.3.4.)

Respondents also seek to justify the court's focus on the proposed Physical Solution, to the exclusion of alternatives, by noting the court found "the Basin requires badly needed certainty through quantifying all pumping rights, including overlying rights." (LORB p. 61) They suggest any physical solution recognizing the Willis Class's "unexercised overlying rights [would] create an unacceptable measure of uncertainty and risk of harm to the public including Edwards Air Force Base, existing overlying pumpers and public water supplier appropriators." (*Id.*)

However, each of the alternative physical solutions proffered by the Willis Class provided the certainty that the Respondents so adamantly now argue should be the very basis for extinguishing the Willis Class from the NSY. For example, the Willis Class alternative solutions provided models that informed the court how the Willis Class' overlying rights could be incorporated into a physical solution for the Basin.

(2REPLYEXCT1420-1430)(131JA127835-127846.) Each of the Willis Class alternatives remain viable examples that demonstrate how this Court, even now, could have lawfully and equitably incorporated the Willis Class in the Physical Solution it ultimately adopted *verbatim*.

Finally, Respondents now in their brief, belatedly attempt to dis-credit each of the alternatives proffered by the Willis Class. This is exactly the type of analysis missing from the trial court's decision. Respondents' analysis of the Class's alternatives should have been considered – along with the Class's counter arguments – prior to the adoption of the court's Physical Solution. Nevertheless, the Willis Class appreciates the opportunity to present the various solutions on appeal.

The **Antelope Valley Accord** (also called "Waldo Accord") – cited in its entirety in Appellants' Opening Brief – included "a system for managing groundwater resources" that incorporated and recognized the Willis Class landowners' overlying right and correlative share in such a way that "achieve[d] certainty and stability in groundwater management necessary for the water

uses to act now to enhance the Basin's water supplies for the future." (1REPLYEXCT59;63-64)(8JA8695; 8699-8700.) Interestingly, the Accord is *an agreement to which the Landowners stipulated* to. (1REPLYEXCT47:12-48:25; 58)(8JA8683:12-8684:25; 8694.) In fact, Bolthouse, one of the Respondent Landowners, has repeatedly championed the Antelope Valley Accord as "mak[ing] logical sense" and "the first meaningful settlement proposal reduced to writing [] supported by independent scientific review." (1REPLYEXCT 173:20-23;174:22-24) (8JA8899:20-23; 8900:22-24.)

Equally unpersuasive is the Respondents' attempt to discredit the **Chino Basin Plan** by pointing out that prescription was found as to unexercised overlying rights in the Chino Basin adjudication. (LORB at p. 98 ["such rights have all been lost to ***prescription***"], emphasis added.) Here, the 2011 Judgment removed prescription from the equation as to the Willis Class landowners' dormant overlying rights. (3REPLYEXCT2546:10-14) (176JA157689:10-14; 3AA162060,¶2 ["they [the Willis Class] was immune from prescription by the only party who had such a claim

– i.e. the [Purveyors], which immunity the class obtained in the 2011 settlement..."].) But this fact does not negate the importance of the Chino Basin adjudication as a model for how dormant overlying rights can, and should, be protected and incorporated into a long-term physical solution. The Chino Basin Plan remains a viable resource to guide the court in how the Willis Class's overlying rights may be incorporated into a physical solution consistent with the 2011 Judgment and California precedent.

Respondents attempt to discredit the **Tulare Plan** by arguing "*Tulare* does not involve overdraft, prescription or the need for severe cuts in existing groundwater use by overlying rights." (LORB at p. 98) According to Respondents, "[t]his alternative ... would wrongfully provide Willis a *de minimis* use that amounted to approximately 15 percent of the safe yield" which "would further exacerbate the Basin's existing overdraft." (LORB at p. 99.) Respondents also argue without any citation to the record or authority that "allocating a pool of water to some members of the Class, to the exclusion of other members, would be

inconsistent with the 2011 Judgment and Class notice." (LORB at p.99.)

Respondents obviously misunderstand the concept of a correlative pool. Under this alternative, the allocated pool of water would be used by others until a Willis Class member exercised its overlying right. (2REPLYEXCT1423:25-27)(131JA127838:25-27.) This way, water would be put to reasonable and beneficial use at all times, while providing certainty as to the maximum the Willis Class may pump from the NSY. (*Ibid.*) Further, contrary to Respondents' assumption, this alternative considers the reality of the Basin's water shortage and the competing interests in that water. Under the Tulare Plan, the Willis Class could lease their unused rights to generate income to pay for Replacement Assessments for those that exercise their rights after the capped portion is put to use by other Class members. This would prevent the exclusion of any Class members from pumping free water for domestic uses. And, with 12,345 acre-feet to be distributed among over 18,000 Class members, 15 percent of the NSY for the Willis Class can hardly be deemed unreasonable as the Respondents

suggest. (LORB at p. 99.) Comparatively, the ***seven*** parties that comprise the Respondents collectively received ***26,755 acre-feet***, 14,410 acre-feet more than the Willis Class proposed for themselves under this plan. (3REPLYEXCT2470-2473)(176JA157613-157616.)

Respondents refer to the **Tiered Allocation Model** as an "absurd proposal [which] is not supported by any legal authority and would be inequitable." (LORB p. 99) Respondents do not like the Tiered approach because it would recognize California law's protection of the Willis Class's "priority right over the Public Water Suppliers and overliers with historical beneficial uses in an over-drafted Basin." (*Id.*)

Missing from the Respondents' discussion is the Willis Class's modified version of Tiered approach to the Physical Solution at issue here. (3REPLYEXCT1997-2057; 2241-2320) (174JA154833-154893; 155529-155608.) This alternative took the then-proposed Physical Solution and modified its terms to incorporate the Willis Class landowners' overlying rights and modified the provisions providing the stipulating parties with a

permanent allocation. (3REPLYEXCT1993)(174JA154829-154893.) This alternative modified the steps required for a Class member to obtain a permit to install a well to comport with Kern County and Los Angeles County requirements, removing the burdensome CEQA, environmental impact statement, economic impact statement requirements. (3REPLYEXCT2015¶5.1.2.1) (174JA154851, ¶5.1.2.1.) Next, this alternative provided the Class with a *de minimis* domestic use up to a collective maximum of 5,160.5 acre-feet per a year free of Replacement Assessments, consistent with the amount given the Wood Class of small overlying landowners. (*Id.* at ¶5.1.2.2.) The alternative further provided a maximum of 5,160.5 acre-feet for non-*de minimis* use. (3REPLYEXCT2016) (174JA154852,¶5.1.2.3.) It thus recognizes the reality that some Willis Class landowners own more acreage than others and also provides that other landowners could use the Willis Class's share until they exercised their right. This alternative limits the use by large Willis Class landowners while protecting domestic water needs for small landowners.

Any one of these alternatives proffered by the Willis Class would have been consistent with California law by preserving the Class landowners' ability to pump from the NSY, albeit capped to a maximum amount. Simultaneously, these alternatives provided certainty to curtail the pernicious effects that *Long Valley* cautioned against. (*In re Waters of Long Valley Creek System* (1979) 25 Cal.3d. 339, 355.)

The court had an affirmative duty to admit and consider alternative physical solutions as the Physical Solution was facially inconsistent with the court's 2011 Judgment. (*See City of Lodi, supra,* 7 Cal.2d at 341.) Its failure to do so in this case is reversible error.

VI. ALL OF APPELLANTS' ISSUES ARE RIPE.

The Class refers to the counterpoints made in its Reply to the Purveyor Respondents Brief (Brief 2 of 3), and hereby incorporates that discussion of ripeness herein.

CONCLUSION

The Class refers to the conclusion in its Reply to the Landowner Respondents' Brief (Reply Brief 1 of 3), and hereby incorporates the discussion of remand here.

DATED: 10/5/20 THE KALFAYAN LAW FIRM, APC

By: */s/ Ralph B. Kalfayan*
Ralph B. Kalfayan

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the accompanying APPELLANTS' REPLY TO THE UNITED STATES' RESPONDENT'S BRIEF (3 of 3) contains 7,452 words (including footnotes) as counted by the Corel Word 11 Program.

DATED: 10/5/20 THE KALFAYAN LAW FIRM, APC

By: */s/ Ralph B. Kalfayan*
Ralph B. Kalfayan

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 2262 Carmel Valley Road, Suite 200, Del Mar, California 92014.

October 5, 2020, I served true copies of the following document(s) described as APPELLANTS' REPLY TO RESPONDENT'S BRIEF FOR UNITED STATES (3 of 3) (Willis Class appeal) on the interested parties in this action as follows:

BY TRUEFILING (EFS): I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling portal operated by ImageSoft, Inc. Participants in the case who are registered EFS users will be served by the TrueFiling EFS system. Participants in the case who are not registered TrueFiling EFS users will be served by mail or by other means permitted by the court rules.

BY ELECTRONIC SERVICE: By posting the document(s) to the Antelope Valley Watermaster website regarding the Antelope Valley Groundwater matter with e-service to all parties listed on the website Service List. Electronic service and electronic posting completed through www.avwatermaster.org via Glotrans.

BY FEDERAL EXPRESS: I served a true and correct copy by Federal Express or other overnight delivery service, for the delivery on the next business day. Each copy was enclosed in an envelope or package designed by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its

behalf; with delivery fees paid or provided for; addressed as shown below.

Honorable Jack Komar

c/o Rowena Walker
Complex Civil Case Coordinator
Superior Court of California, County of Santa Clara
191 N. 1st Street, Departments 1 and 5
San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 5, 2020, at Del Mar, California.

s/ Ralph B. Kalfayan
Ralph B. Kalfayan