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

10 ANTELOPE VALLEY  
11 GROUNDWATER CASES

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

14 *Plaintiffs,*

15 v.  
16

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

24 *Defendants.*  
25  
26  
27  
28

RELATED CASE TO JUDICIAL COUNCIL  
COORDINATION PROCEEDING NO. 4408

Honorable Judge Jack Komar  
Coordinated Trial Judge

**WILLIS CLASS' OPPOSITION TO  
STIPULATED PROPOSED PHYSICAL  
SOLUTION ("SPPS"); SEPARATE  
STATEMENT OF OBJECTIONS; AND  
DECLARATION OF RALPH B. KALFAYAN  
IN SUPPORT THEREOF**

Date: August 3, 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

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1 The absolute need for the Willis Class to oppose the Final Approval of Wood Class  
2 Settlement as well as the Stipulation and proposed physical solution (“SPPS”) filed with the Court  
3 on March 4, 2015, has been obviated by the Court’s confirmation at the March 26, 2015 Hearing  
4 that the Willis Class cannot and will not be bound or affected by a settlement agreement to which  
5 it was not a signatory. The Willis Class is not a signatory to the SPPS. The Willis Class’ rights are  
6 not incorporated into that proposed physical solution (in fact, the Willis Class’ correlative water  
7 rights are essentially extinguished in the SPPS). The Court has requested any party that is not a  
8 signatory to the SPPS to notify the Court that the party will require a separate proceeding to assert  
9 claims to be incorporated into the overall Physical Solution to be adopted by this Court. The Willis  
10 Class has filed an Assertion of Claim concurrently herewith to provide such notification in  
accordance with the Court’s Second Amended CMO.

11 Notwithstanding the foregoing, out of an abundance of caution and to continue to protect  
12 the rights of the Willis Class against the adoption of a physical solution that abrogates those rights,  
13 the Willis Class submits this Opposition to the Approval of the Wood Class Stipulation of  
14 Settlement which incorporates the Stipulation for Entry of Judgment and Proposed Physical  
15 Solution (hereinafter collectively “SPPS”) on the following grounds: the SPPS (1) conflicts with  
16 the terms of the Willis Stipulation of Settlement and Final Amended Judgment<sup>1</sup> entered by this  
17 Court on September 22, 2011 (the “Willis Judgment”); (2) prejudices the Willis Class, a non-  
18 Stipulating Party to the SPPS, which owns 65,000 parcels of land in the Antelope Valley or over  
19 60% of the Basin; (3) denies the due process rights of the Willis Class Members; (4) violates the  
20 California Constitution; (5) is inconsistent with California Water Code sections 106 and 106.3; (6)  
21 contravenes established common law; (7) imposes an undue financial burden on Willis Class  
22 Members; and (8) unjustly discriminates against the Willis Class.

23 The SPPS directly contravenes this critical term of the Willis Stipulation of Settlement and  
24 of the Willis Judgment:

25  
26 <sup>1</sup> Importantly, the Public Water Suppliers (“PWS”), entities subsidized by Willis Class taxpayers and working  
27 ostensibly in the public interest, chose to exclude the Willis Class from participating in the negotiations that led up to  
28 the SPPS. The PWS chose to violate the underlying material terms of the Willis Judgment by entering into the SPPS  
which is 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. 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.

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

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

9           In direct contravention to the PWS' prior agreement in the Willis Settlement (as approved  
10          in the Willis Judgment), the SPPS allocates the entire Native Safe Yield ("NSY") *free of*  
11          *replacement assessment* to all overlying landowners except the Willis Class and imposes onerous  
12          and expensive terms on the members of the Willis Class before it is determined by the Watermaster  
13          whether a member may commence any pumping—even for domestic or human use.<sup>2</sup>

14          The allocations of water production rights for the Stipulating Parties under the SPPS are  
15          free, fixed, permanent, and indefinite. The permanent allocations change *pro rata* only if the Court  
16          revises the total NSY seventeen (17) years from now. In stark contrast, there are no provisions in  
17          the SPPS to allocate any of the NSY to the Willis Class. Thus, the effect of the SPPS' permanent  
18          allocations is to abrogate the Willis Class' rights under the Willis Judgment. The settlement cannot  
19          be within the range of reasonableness for approval as it severely prejudices a non-settling party and  
20          robs them of their *Judgment-confirmed* correlative rights to the NSY free of replacement  
21          assessment. Most significantly, this Court previously denied Preliminary Approval of the Wood  
22          Class Settlement Agreement with District 40 in 2012 because the proposed settlement agreement  
23          "attempt[ed] to establish . . . the 3 acre feet per year allocation [for Wood Class members] as a  
24          standard that is going to bind all the nonsettling parties<sup>3</sup>." Nearly three years later, nothing has

25          <sup>2</sup> Given that section 3.5.18.1 of the SPPS lists overdraft as the first criterion to be considered in determining whether  
26          new groundwater pumping will cause a "Material Injury," and given that all of the NSY is allocated by the SPPS to the  
27          Stipulating Parties only, it appears unlikely that any new pumping by the Willis Class will be approved. In this regard,  
28          it should be noted that if the application is for domestic use for one single family household, the Watermaster Engineer  
29          has authority to recommend that the domestic use is *de minimus* and to recommend a waiver of payment of a  
30          Replacement Water Assessment but, significantly, the Watermaster Engineer is not required to make such  
31          recommendations.

32          <sup>3</sup> June 16, 2011 Hearing Transcript at 3:4-7, attached as Exhibit B. After the Court's ruling, Wood Class Counsel  
33          removed the objectionable portions of the settlement, including the "specific allocation of Class water rights, thereby  
34          creating [a settlement] agreement that mirrored the earlier settlement of the Willis Class, which the Court approved."  
35          Wood Class Motion to Decertify dated June 13, 2012 at 5:3-6, attached as Exhibit C. However, District 40 and certain  
36          other PWS refused to sign the settlement agreement as revised by Court Order. *Id.* at 5:7-8 & fn.1. Instead, District  
37          40 waited a few years and now presents a "Wolf in Sheep's Clothing" settlement agreement to the Court that contains  
38          the very same impermissible permanent allocation to the Wood Class, along with impermissible permanent allocations  
39          for dozens of other Stipulating Parties who were not even parties of the Wood Class action lawsuit.

1 changed, either factually or legally, that should cause the Court to grant approval of the current  
2 settlement agreement, i.e., the SPPS, which includes the exact same permanent allocation for the  
3 Wood Class -- plus permanent allocations for all Stipulating Parties. The Court's prior ruling --  
4 that it cannot approve a settlement with a permanent allocation of groundwater "upon an agreement  
5 of some of the parties, **but not all of the parties**"<sup>4</sup> -- applies with equal force to the SPPS.

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

8 *[T]he Settling Parties expect and intend that this Stipulation will become part*  
9 *of a Physical Solution entered by the Court to manage the Basin and that the*  
10 *Court will retain jurisdiction in the Coordinated Actions. **The Settling Parties***  
11 ***agree to be part of such a Physical Solution to the extent it is consistent with***  
12 ***the terms of this Stipulation and to be subject to Court-administered rules and***  
13 ***regulations consistent with California and Federal law and the terms of this***  
14 ***stipulation.***

15 *See, Section V.B. of the Willis Settlement, attached as Exhibit A (emphasis*  
16 *supplied).*

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

### 19 **Factual and Procedural Background**

20 In 2007, at the behest of the Public Water Suppliers, Plaintiff Rebecca Willis brought her  
21 case on behalf of a Class of approximately 65,000 landowners in the Antelope Valley Basin to  
22 counter claims asserted by ten PWS that they had obtained prescriptive rights with respect to the  
23 groundwater underlying the Basin. The class was certified and included as members all landowners  
24 in the Basin who have never pumped groundwater in the past. After extensive proceedings and  
25 mediation, the litigating parties settled their claims and Notice of the Settlement was mailed to all  
26 65,000 Willis Class Members. A fairness hearing was held before the Court on February 24, 2011,  
27 and the Court approved the Settlement as fair, adequate and reasonable to the Class. The Court  
28 then entered a Final Judgment on May 22, 2011 based on the Stipulation of Settlement (Exh. D,  
attached). At the request of the Public Water Suppliers, the Court modified the Judgment on  
September 22, 2011, to incorporate the terms of the Attorneys' Fees Order in the Amended Final

<sup>4</sup> June 16, 2011 Hearing Transcript at 3:10-11, attached as Exhibit B. 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 Judgment (Exh. E, attached). Some of the PWS appealed the attorneys' fees portion of the  
2 Amended Final Judgment. After mediation, the parties settled the appeal and the court of appeal  
3 issued a remittitur. For all purposes in this action, the Willis Amended Final Judgment has now  
4 become a final, non-appealable Judgment with res judicata effect to the Willis Class and the Public  
5 Water Suppliers.

6 The Willis Judgment defined the groundwater rights of the Willis Class Members as  
7 overlying and correlative with other overlying landowners. See Willis Class Stipulation of  
8 Settlement ¶¶ III.D and IV.D.2, Exh. A. The Judgment conferred a groundwater right to the Willis  
9 Class up to 85% of the NSY free of any replacement assessment. *Id.* at IV.D.2. Finally, the  
10 Judgment provided that the PWS may not enter into any agreement that impairs the Willis Class  
11 rights to pump from the NSY. *Id.* Since the date the Willis Judgment was entered, no party has  
12 asserted in this adjudication that the Willis Class has no overlying rights or that the Willis Class  
13 rights are not correlative.

## 14 I. ARGUMENT

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

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

22 The prejudice manifests itself in several ways. **First**, as previously discussed, the SPPS  
23 allocates the entire Native Safe Yield (82,300 AFY) on a fixed, permanent, and guaranteed priority  
24 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 after a costly application process

25 <sup>5</sup> See *Levy v. Superior Court*, 10 Cal.4th 578, 583, 585 (1995)(Stipulated settlements must be signed by the parties  
26 themselves to be enforceable); see also *Harris v. Rudin, Richman & Appel*, 74 Cal.4th 299, 305 (1999) (to be binding  
27 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  
28 who did not participate in creation of the agreement nor sign the agreement).

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



1 (which means there is a *de facto* assessment even for domestic use), the Willis Class Members must  
2 pay the replacement assessment. **Third**, the proposed settlement imposes burdensome, uncertain,  
3 and expensive conditions on the Willis Class Members before a member may be allowed to  
4 commence any pumping—even for domestic and human use. No similar limitations are placed on  
5 the Stipulating Parties. **Fourth**, the Basin’s principal water importer, AVEK, has represented that  
6 water allocations from the State Water Project are being severely curtailed due to California’s  
7 drought conditions. Thus, if Willis Class Members are denied access to the NSY, it appears likely  
8 that a Member’s pumping application will be denied. **Fifth**, compared to the Wood Class (as  
9 discussed below), the right of the Willis Class to domestic use and human use is contingent,  
uncertain, and unreasonably limited.

10 **Sixth**, the SPPS strips the Willis Class of their correlative rights to share in the NSY free of  
11 replacement assessment which is inconsistent with the Willis Judgment. **Seventh**, the SPPS  
12 unlawfully and erroneously provides, all by agreement and without a hearing affording due process  
13 to the Willis Class, that (a) the unexercised rights of the Willis Class should be modified; (b) that  
14 the SPPS is consistent with the subordination provisions in the surface water decision of *In Re*  
15 *Waters of Long Valley Creek Stream System*; and (c) the SPPS is consistent with the Willis  
16 Judgment. **Eighth**, the Wood Class benefits are particularly unfair and inequitable in comparison  
17 to the Willis Class. The members of the Wood Class are allocated a domestic use priority of 1.2  
18 AFY and up to 3 AFY allocation for use on overlying land, both of which allocations are free of  
19 replacement assessment, with no metering obligations, no reporting obligations, no administrative  
20 assessments on 1.8 AFY, and a priority right under Water Code Section 106. The SPPS allocates  
21 no such benefits to the Willis Class Members. **Ninth**, the SPPS pre-determines that the water use  
22 of 65,000 landowners is unreasonable in the aggregate and that the water use of all others allocated  
23 rights in the Basin is reasonable. The California Supreme Court case in *City of Barstow v. Mojave*  
24 *Water Agency et al.*, 23 Cal 4<sup>th</sup> 1224 (2000), requires the Court to make an individualized finding  
25 of unreasonable use as to the 65,000 landowners (which is not tenable) and an individualized  
26 inquiry into the reasonableness of use for each other landowner. **Tenth**, the Willis Class was not  
27 given notice or a pleading that their correlative water rights may be taken away in a physical  
28 solution. Thus, approval of the SPPS would deny the procedural and substantive due process rights  
of the Willis Class.

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

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

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

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

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

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

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

19 In contrast to the Wood Class, and contrary to the dictates of the Water Code, the SPPS  
20 subordinates the rights of the Willis Class to pump water for domestic and human uses to below  
21 the allocated rights of all other users in the Basin.<sup>7</sup> The treatment of Willis Class' prospective  
22 domestic and human use as compared to the treatment of the Wood Class is unjust, prejudicial and  
23 inequitable as well as a violation of the Water Code. Therefore, the Court cannot approve the SPPS  
24 as is.

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

27 The Willis Class Action Complaint was dismissed with prejudice. There are no pleadings  
28 that seek to "modify" the rights of Willis Class members to pump groundwater correlatively with  
other landowners as to 85% of the NSY free of replacement assessment. Indeed, no party has

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

1 challenged the Willis Class' rights to pump groundwater from the NSY free of any replacement  
2 assessment. The Wood Class does not. The Public Water Suppliers do not and cannot. In fact, the  
3 PWS are duty-bound to honor the Judgment entered by this Court, which preserves the Willis Class'  
4 correlative rights to pump up to 85% of the NSY free of replacement assessment. Yet the SPPS  
5 contradicts and abrogates those specific terms all without a pleading or notice to the Willis Class.  
6 The parties cannot circumvent due process requirements. Furthermore, the PWS cannot be  
7 permitted to renege on their Court-approved obligation to respect the correlative rights of the Willis  
8 Class to the NSY by subordinating the Willis Class correlative rights in the SPPS.

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

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

23 The Willis Class' future unexercised overlying water right in groundwater is  
24 Constitutionally based and Constitutionally protected. *Tulare Irr. Dist. v. Lindsay-Strathmore Irr.  
25 Dist.*, 3 Cal.2d 489, 524-25 (1935). The SPPS violates the California Constitution by modifying  
26 the Willis Class' water rights in the NSY. *Id.* The California Constitution provides: "Riparian  
27 rights in a stream or water course attach to, but to no more than so much of the flow thereof as may  
28 be required or used consistently with this section, for the purposes for which such lands are, or may

1 *be adaptable*, in view of such reasonable and beneficial uses...”. Cal. Const. art. X, § 2.<sup>8</sup> The  
2 California Supreme Court has interpreted this Constitutional amendment in a way that protects not  
3 only the *present* exercised water right of overlying landowners, but also the *prospective* unexercised  
4 right of overlying landowners. *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935); *Tulare Irr.*  
5 *Dist.*, 3 Cal.2d at 524-25; *Wright*, 174 Cal.App.3d at 84. Thus, eliminating the Willis Class’  
6 correlative rights to the NSY would violate the California Constitution. Furthermore, an overlying  
7 right is not predicated on past use, nor on the time a person commences pumping, but solely on the  
8 owner’s current reasonable and beneficial need for water. *Tehachapi-Cummings Cnty. Water Dist.*  
9 *v. Armstrong*, 49 Cal.App3d 992, 1000 (1975).

10 The Willis Class’ overlying water right priority may not *impaired*, or *altered* or *burdened*  
11 absent a finding of unreasonable use. *City of Barstow*, 23 Cal.4<sup>th</sup> at 1243. The Supreme Court, in  
12 the landmark *City of Barstow* case, emphasized these principles and said:

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

18 Here, the SPPS directly violates California law regarding the water right priority system.  
19 The SPPS specifically states: the Willis Class’ failure to pump “modifies” their water rights. (*See*  
20 § 9.2.2 of SPPS). In an ill-fated attempt to justify the illegal limitation on the Willis Class rights,  
21 the Stipulating Parties ignore the *City of Barstow* decision, and instead rely on two decisions that  
22 have no application in this groundwater adjudication.

23 Proponents of the SPPS ask for a departure from a strict water right priority system in favor  
24 of a mutual prescription doctrine similar to the Supreme Court’s analysis in *City of Pasadena v.*  
25 *Alhambra*, 33 Cal.2d 908 (1949) (*See* § 9.2.2 of SPPS). This argument fails for several reasons. In  
26 *City of Pasadena*, the Court arrived at an apportionment of water rights to all water users favoring  
27 a *pro tanto* reduction instead of eliminating the water rights of one of the most junior appropriators.

28 <sup>8</sup> California courts routinely find this particular Constitutional language equally applicable to groundwater rights.

1 The apportionment came about from a finding of mutual prescription and a desire to accommodate  
2 everyone's present water use in the system. The Court's objective was to honor the water rights of  
3 a junior appropriator instead of eliminating them. A strict prior appropriation system would have  
4 defeated a junior appropriator. Even if valid, the *City of Pasadena* principles are inapplicable in  
5 this adjudication.<sup>9</sup> **First**, there was no finding of prescription against the Willis Class in this case.  
6 **Second**, far from accommodating parties, the Stipulating Parties here are seeking to modify the  
7 water rights of the Willis Class to the point of elimination. **Third**, mutual prescription does not  
8 impair rights to groundwater for *new* overlying uses. *City of Los Angeles v. City of San Fernando*,  
9 14 Cal.3d 199, 293 n.100 (1975). Thus, even if the doctrine of mutual prescription is applicable,  
10 the Willis Class' water rights are not eliminated. Mutual prescription addresses only present water  
11 rights, not future water rights. **Fourth**, an allocation based on mutual prescription does not result  
12 in an equitable apportionment. *City of Los Angeles*, 14 Cal.3d at 266. The SPPS is hardly a true  
13 equitable apportionment when the Stipulating Parties have been allocated all of the water rights and  
14 the Willis Class with correlative rights has been allocated no rights. *City of Los Angeles*, 14 Cal.3d  
15 at 265 n.61.

16 The Stipulating Parties to the SPPS also rely on the decision of *In re Waters of Long Valley*  
17 *Creek Stream System*, 25 Cal.3d 339 (1979), as a purported justification to modify the rights of the  
18 Willis Class. In addition to the fact that no party has sued to subordinate the Willis Class, the  
19 principles of *In Re Waters of Long Valley Creek System* are inapplicable to this case. **First**,  
20 California has two different systems of water rights, one for surface water rights and one for  
21 groundwater. The Water Code specifically prohibits the application of the surface water  
22 appropriation rules to groundwater basins. See Water Code § 1200. The State Water Resources  
23 Control Board (the "Board") regulates surface water and it relies heavily on an extensive statutory  
24 water scheme to determine surface water rights. *In Re Long Valley* was a surface water adjudicative  
25 proceeding. Its principles are inapplicable to this groundwater adjudication. *Wright*, 174  
26 Cal.App.3d at 87. **Second**, under the due process notice provisions afforded riparian water rights  
27 in adjudications, the Board mails notice to each landowner, serves process, and holds hearings for  
each riparian in the stream. The parties in *In re Long Valley* were provided with individual notice

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

1 and a hearing. Here, the SPPS modifies, limits, subordinates, or extinguishes water rights by  
2 agreement without notice to the Willis Class. Previously, the Willis Class Members were noticed  
3 of the underlying proceedings and they were told the following: (a) the Willis Class claims have  
4 been resolved; (b) their correlative water rights free of replacement assessment were preserved; and  
5 (c) they will only be subject to a physical solution provided it is consistent with the Settlement.  
6 The provisions of the SPPS modifying or eliminating the Willis Class' correlative rights free of  
7 replacement assessment contradicts the Notice given the Class. Any limitations on the correlative  
8 water rights of the Willis Class must be preceded by a pleading, notice, and appointment of defense  
9 counsel. The Supreme Court in *City of Barstow* commanded that due process considerations be  
10 met as provided for under the Water Code if the Court considers the imposition of an *In re Long*  
11 *Valley* subordination on a landowner who has both an exercised and unexercised water rights. *City*  
12 *of Barstow*, 23 Cal.4<sup>th</sup> at 1249 n.13. **Third**, Willis Class Members have never exercised the right  
13 to use water. Therefore, they do not fall within footnote 13 of the *City of Barstow* decision and  
14 their interests may not be subordinated. **Fourth**, the Court in *In Re Long Valley* declined to  
15 extinguish the unexercised rights of a riparian and considered quantification as an alternative. The  
16 SPPS does not consider quantification as an alternative. **Fifth**, the appellant in *In Re Long Valley*  
17 irrigated 89 acres and asked for an additional 3,000 acres to be irrigated. The entire irrigated  
18 acreage in the system was only 4,130 acres. It was not reasonable to allocate more water rights to  
19 the appellant under the facts and circumstances. The circumstances of the Willis Class in this case  
20 are far different. The Class has *never* exercised their water rights.

21 “[N]o appellate court has endorsed an equitable apportionment solution that disregards  
22 overlying owners' existing rights.” *City of Barstow*, 23 Cal.4<sup>th</sup> at 1249. To be sure, within certain  
23 limits, a court may use its equitable power to implement a physical solution. However, the Court  
24 may not impose a physical solution that ignores vested rights, unduly burdens a party, or fails to  
25 provide landowners with their fair share of water. *Id.* at 1249-50. Because the SPPS ignores and  
26 negatively impacts the vested rights of the Willis Class, unduly burdens the Willis Class, and fails  
27 to provide the Willis Class with their fair share of water, the SPPS cannot be approved by this  
28 Court.

29 **E. The SPPS Prospectively Determines that the Wood Class' Water Use is Reasonable**  
30 **and Beneficial and the Willis Class' Water Use is Unreasonable Without a Hearing**

31 Article X, Section 2 limits water rights to reasonable and beneficial uses. “The rule of  
32 reasonable use as enjoined by ...the Constitution applies to all water rights enjoyed or asserted in

1 this state, whether the same be grounded on the riparian right, of the overlying land owner, or the  
2 percolating water right, or the appropriative right.” *City of Barstow*, 23 Cal.4<sup>th</sup> at 1241-2.

3 In *City of Barstow*, the Supreme Court required an *individual* determination of unreasonable  
4 use *before* the Court may depart from the water right priorities (in this case, an individual  
5 determination of the correlative rights of all of the overlying pumping landowners and the rights of  
6 the non overlying users in the Basin). The Court may not make a blanket determination that the  
7 water use of all 65,000 Willis Class members is *per se* unreasonable without an individualized  
8 inquiry.

9  
10 **F. The SPPS is Not Consistent the Willis Class Judgment**

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

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

28 Finally, in wholly unsupported and self-serving fashion, the SPPS pre-ordains consistency  
of the SPPS with the Willis Judgment. For brevity, each paragraph of the SPPS and its

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<sup>10</sup> The Willis Class has submitted several alternative proposed physical solutions (“APPS”) to the Court for its consideration. See Motion to Admit APPS, filed concurrently herewith.

1 inconsistency with the Willis Judgment is outlined in the Separate Statement of Objections.  
2 However, the correlative water rights and permanent allocation of the NSY merit a brief discussion  
3 below.

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

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

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



1 modifying, limiting, or eliminating the Willis Class' water rights would require a pleading, notice  
2 to the Class, and the appointment of counsel to defend the interests of the Class. **Fourth,**  
3 quantification on a permanent basis is contrary to the dynamic nature of reasonable uses under the  
4 California Constitution. **Fifth,** an expert will be necessary to quantify the future rights of the Willis  
5 Class and aid the Court and Class Counsel in entering into a reasonable and consistent physical  
6 solution.

7  
8 **2. A Fixed, Permanent, and Vested Allocation of the NSY to the Wood Class Directly  
Harms the Water Rights of the Willis Class**

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

1 a monopoly on the Basin's groundwater and may sell the allocated rights at monopoly prices and  
2 gain monopoly profits all at the expense of the Willis Class. This outcome would eviscerate  
3 Constitutional mandates regarding water rights in California.

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

5 There are many basic principles that should guide the Court in considering the  
6 reasonableness of a settlement and in adopting a physical solution. For example, a settlement that  
7 includes a physical solution must adopt a "common sense approach to water rights litigation."  
8 Harold E. Rogers and Alan H. Nichols, *Water for California* 548 (1967); it must "resolve competing  
9 claims to water by cooperatively satisfying the reasonable needs of each user." Littleworth at 173;  
10 it must protect the "substantial enjoyment" of an overlying owner's prior right. *Peabody*, 2 Cal.2d  
11 at 371; it must be *adequate to protect the one having the paramount right in the substantial*  
12 *enjoyment thereof and to prevent its ultimate destruction*, and in this connection, the court has  
13 power to and should reserve unto itself the right to change and modify its orders and decree as  
14 occasion may demand, either on its own motion or on motion of any party." *City of Santa Maria*,  
15 211 Cal.App4th at 288; it may not impose an unreasonable burden on a party. *City of Barstow*, 23  
16 Cal.4th at 1250; it must take into account the priorities of water rights, and it may not be applied in  
17 such a way that vested rights are eliminated. *Id.*; finally, the court may not demand that one party  
18 spend large sums of money in order to satisfy a physical solution. *See, Rancho Santa Margarita v.*  
19 *Vail*, 11 Cal.2d 501, 561 (1938).

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

26 The cost of this physical solution is borne and imposed on the Willis Class, but not the  
27 Wood Class. The Small Pumper Class, which seeks to require a Willis Class member to pay a  
28 replacement assessment, should have to prove why sharing those costs among the overlying users  
would be unreasonable. If Willis Class Members must pay, then Wood Class Members must  
similarly pay.

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

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

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Respectfully submitted,

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