CONSOLIDATED CIVIL CASE NOS. H032750, H033544, H034362, and H035056 (LEAD CASE NO. H032750)

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

EDWARD WINEMAN, et al.,

Plaintiffs, Cross-Defendants and Appellants,

vs.

CITY OF SANTA MARIA, et al.,

Defendants, Cross-Complainants and Respondents.

Appeal From the Superior Court of California, County of Santa Clara
Superior Court Case Nos.: Santa Clara Superior Court Lead Case No. CV 770214 [Consolidated with Case Nos. CV784900, CV784921, CV784926, CV785509, CV785511, CV785515, CV785522, CV785936, CV786971, CV787150, CV787151, CV787152, CV790597, CV790599, CV790803, CV790741]; San Luis Obispo County Superior Court Case Nos. 990738 and 990739

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Lopez Lake

Twitchell Reservoir

Arroyo Grande Creek

Los Berros Creek

Santa Maria River

Orcutt Creek

Cuyama River

Sisquoc River

Santa Maria Basin

Location Map

Legend:

- Major Streams
- Santa Maria Groundwater Basin *

* The Phase II Boundary line as defined by the Court's Order After Hearing on Trial (Phase II) and as depicted on Exhibit 5 to the Declaration of Robert C. Wagner, November 20, 2003

Road Classification

- Limited Access Freeway
- Highway
- Secondary Roads
- Local Road
- Minor Road
- Ramps

DATE: 10\03\ 2003

0 2.5 5 Miles

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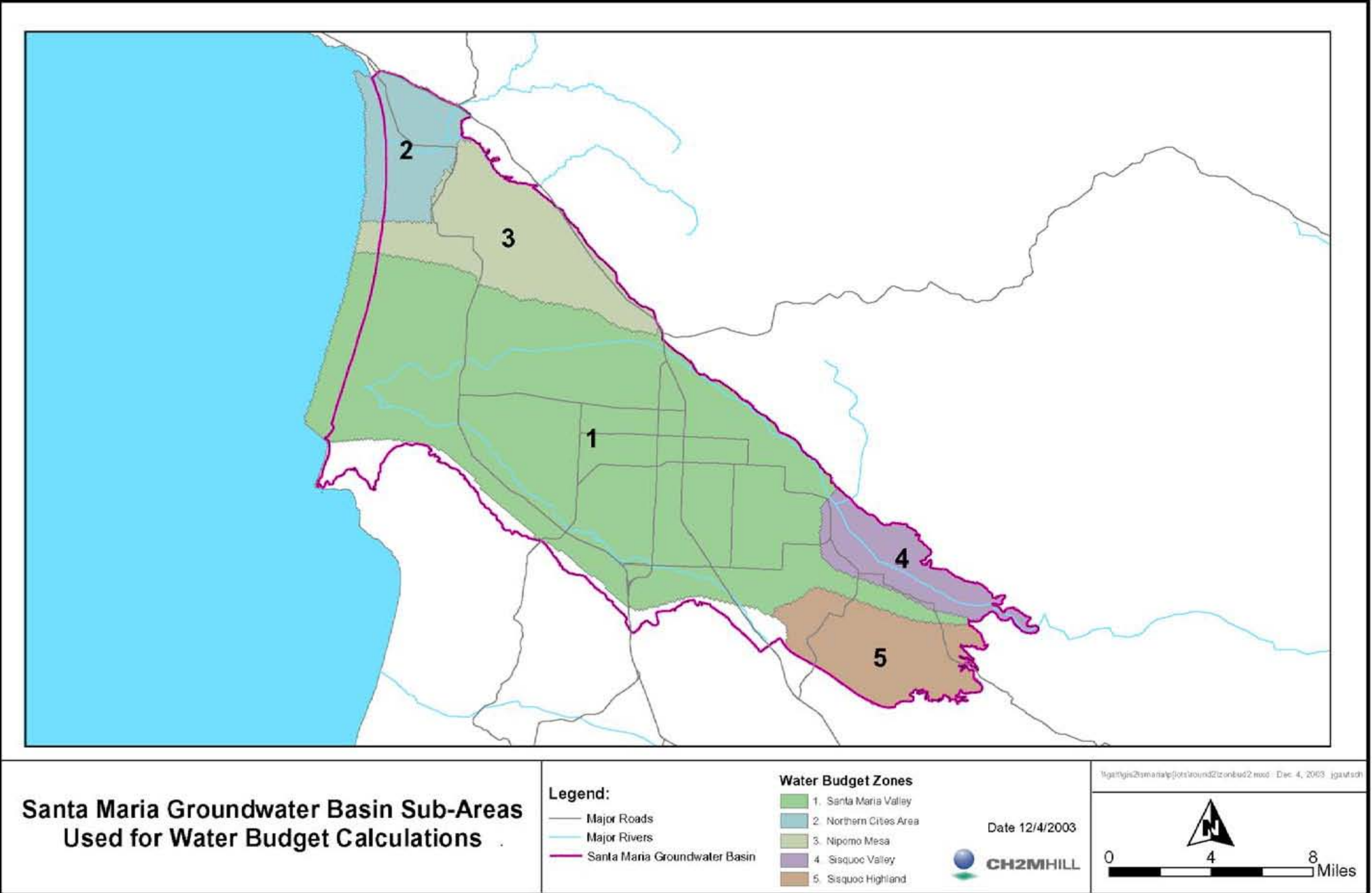
Attached to Respondents' Brief Pursuant to Rules of Court Rule 8.204(d)



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I. INTRODUCTION

Appellants seek to reverse the 2008 Final Judgment ("Judgment") in the actions known as the "Santa Maria Groundwater Litigation." The Judgment ended more than a decade of litigation over water rights in the Santa Maria Groundwater Basin ("Basin"), the primary water source for thousands of residents, landowners, and businesses in Santa Barbara and San Luis Obispo Counties.

The Judgment resolves all claims to the Basin's water, and it achieves a "physical solution" – an equitable remedy that protects and manages the Basin's water resources for all parties, and provides for oversight by the trial court through its continuing jurisdiction. (CT-2, Vol. 1, pp. 4-5 [Judgment After Trial (Jan. 25, 2008)].)

This groundwater adjudication involved more than one thousand parties, including nearly all landowners who pump groundwater from the Basin, as well as the public water suppliers that provide water to tens of thousands of residents and businesses. In 2005, after three phases of trial and lengthy negotiations, nearly all of the parties settled their claims vis-à-vis one another (hereafter "Settlement Stipulation"). (CT-1, Vol. 17, pp. 4501, 4505 [Settlement Stipulation (June 30, 2005)]; CT-2, Vol. 1, p. 1 [Judgment After Trial (Jan. 25, 2008)].) Only two small landowner groups, the "Landowner Group" or "LOG," and the Wineman Parties (collectively "Appellants"), rejected the Settlement Stipulation. At trial, they unsuccessfully litigated their claims to a final judgment and now appeal.

After Judgment was entered in 2008, the LOG Appellants challenged its post-judgment management and monitoring programs, despite the fact that such programs do not harm Appellants and protect the Basin for all users. (See CT-4, Vol. 9, pp. 2179-80, 2286-

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87 [LOG's Notice of Appeal (Nov. 4, 2008)].) The LOG Appellants filed an unsuccessful Petition for Writ of Supersedeas and several post-judgment objections and appeals to halt groundwater monitoring designed to protect against sea water intrusion. (See, e.g., Exhibit "A" of the Request For Judicial Notice Attached To LOG's Opening Brief.)

Appellants seek to terminate the settling parties' protection of the Basin, which protects Appellants' own water resources, even though Appellants bear no costs or responsibilities for these benefits.

This Respondents' brief is submitted by the public water suppliers: the City of Santa Maria, Golden State Water Company, Nipomo Community Services District, City of Arroyo Grande, City of Grover Beach, Oceano Community Services District and Rural Water Company (collectively, "Respondents").

Although the record and briefing in this matter are lengthy, the resolution of the appeal is straightforward:

First, substantial evidence supports the physical solution imposed by the trial court, which protects the Basin's resources without impacting Appellants' rights.

Second, substantial evidence supports the trial court's finding that the City of Santa Maria ("Santa Maria") and Golden State Water Company ("GSWC") proved prescriptive rights against Appellants.

Third, Appellants failed to prove any overlying groundwater rights, when they put on no evidence that they pump any groundwater and no evidence of the amounts of groundwater that they could reasonably and beneficially use.

Fourth, Appellants failed to establish that any claimed errors by the trial court were "prejudicial" and caused Appellants "substantial injury."

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Fifth, substantial evidence supports the lower court's designation of Respondents as prevailing parties and its allocation of costs.

II. STATEMENT OF THE CASE

A. Physical Setting

The Basin is a coastal groundwater basin of approximately 163,700 acres straddling Santa Barbara and San Luis Obispo Counties. (Phase IV Trial, RT-1, Vol. 39, p. 7362 (March 2, 2006); Phase IV, Exs. F-2 and F-3; CT-1, Vol. 17, p. 4558 [Settlement Stipulation Ex. C (June 30, 2005)].) The Basin is bounded on its west by the Pacific Ocean. (Phase III, Ex. A-3; CT-1, Vol. 17, p. 4558 [Settlement Stipulation Ex. C (June 30, 2005)].) The Basin has been threatened with sea water intrusion because over-pumping Basin water can draw seawater into the Basin aquifers, destroying the quality and utility of Basin groundwater. (Phase III Trial, RT-1, Vol. 14, pp. 3722-33 (Oct. 22, 2003).) As noted during trial by Dr. David Todd, a renowned expert on groundwater basins, "You can't drink seawater." (*Id.* at pp. 3715-17, 3722.)

The northwest section of the Basin, located in San Luis Obispo County, includes the cities of Arroyo Grande, Pismo Beach, Grover Beach and Oceano Community Services District (hereinafter "Northern Cities Area"). The Basin extends south into Santa Barbara County and includes Santa Maria and a large unincorporated area of Santa Barbara County. (CT-1, Vol. 10, p. 2551 [Order After Hearing re Trial Phase II (Dec. 21, 2001)], incorporating CT-1, Vol. 10, p. 2560 [Declaration of Robert C. Wagner, Ex. 5 attached thereto (Nov. 20, 2001)].)

Groundwater is located in alluvial deposits throughout the

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Basin, all of which have a hydrological connection. The Basin has been divided by the settling parties and by the trial court into three management areas: the Northern Cities, the Nipomo Mesa, and the Santa Maria Valley. (CT-1, Vol. 17, pp. 4506, 4558 [Settlement Stipulation (June 30, 2005)]; CT-1, Vol. 17, p. 4663 [2005 Order Approving Settlement Stipulation].)

1. The Santa Maria Valley

The largest area of the Basin, located primarily in Santa Barbara County, is the Santa Maria Valley ("the Valley"). For many years, the Valley has had significant urban and agricultural water demands. (Phase III, Exs. A-73, A-74; CT-1, Vol. 17, p. 4417 [Partial Statement of Decision re Trial Phase III (May 5, 2004)].) As early as the 1930s, water users in the Valley recognized that the Basin was in overdraft, groundwater levels were dropping, and that the Basin's native water supplies were insufficient to meet increasing demands. (Phase IV, Ex. X [Bureau of Reclamation, Report (Nov. 1951), at pp. 33-34].)

a. The Twitchell Project

The first attempt to augment the native water supply was a project now known as the "Twitchell Project." The Project had two primary objectives: 1) to develop supplemental water for the depleted groundwater reservoir; and, 2) to provide flood control. (Phase IV, Exs. B, G, H [p. 23], J, K, O [pp. 2-3], P [p. 905], S [pp. 14249-14250] V, and EE.)

The Twitchell Project was authorized as a federal reclamation project by Congress on September 3, 1954. Voters approved the project in 1956 and construction was completed in 1958. Although the Bureau of Reclamation ("Bureau") owns the Twitchell Project facilities, it transferred certain operational responsibilities to the Santa

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Barbara County Water Agency, which in turn delegated a portion of its responsibilities to the Santa Maria Valley Water Conservation District ("District"). The Army Corps of Engineers operates the flood control portion of the Twitchell Project. (RT-1, Vol. 27, pp. 6280:28-6281:2 [Phase III Trial Transcript (Jan. 28, 2004)].)

The Twitchell Project is located on the Cuyama River and retains surface water that under natural conditions would flow to the ocean. (CT-1, Vol. 28, p. 7165 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) These salvaged flood flows are then released during dry periods and deep-percolate through the Santa Maria River channel into the underlying groundwater Basin. Approximately 32,000 acre-feet ("AF") of average annual supply is salvaged by the Twitchell Project.[1] (*Id.* at p. 7167 ; RT-1, Vol. 40, p. 7515.) Without the benefit of the Twitchell Project, this salvaged or "developed"[2] water would not be available to water users in the Basin.

This developed supply provides numerous benefits to the Basin: a) more water for use within the Basin; b) higher Basin water levels which reduce pumping costs; c) reduced frequency and impacts of dry hydrologic conditions; d) protection against seawater intrusion; e) improved water quality; f) prevention of land subsidence; and g) flood control. (See generally RT-1, Vol. 12, pp. 3160-3325 [Phase III Trial Testimony of Terry Foreman] (Oct. 16, 2003)]; RT-1, Vol. 13, pp. 3425-3524 [Phase III Trial Testimony of Robert Beeby (Oct. 17, 2003)].)

Since the Twitchell Project's construction, more than 40,000

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[1] An acre-foot of water is approximately 326,000 gallons.

[2] The term "developed water" is used to refer to water added to the native supplies from non-tributary sources or "foreign sources." Hutchins, California Law of Water Rights (1956) at p. 383.

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AF of sediment has accumulated in the Reservoir. (RT-1, Vol. 27, p. 6280 [Phase III Trial Transcript (Jan. 28, 2004)].) This sediment accumulation increasingly harms the Project's ability to recharge the Basin. (*Id.* at pp. 6280-81.) The Settlement Stipulation solved the financial and management problems of the Twitchell Project, including enhanced recharge and sediment management, as discussed below.

b. Santa Maria's State Water Project Imports

In 1994, Santa Maria entered into a written contract with the Central Coast Water Authority to purchase 17,800 acre-feet per year ("AFY") of imported State Water Project ("SWP") water. (CT-1, Vol. 17, p. 4593-94 [Santa Maria Valley Public Water Purveyor Water Management Agreement (June 30, 2005)]; CT-1, Vol. 17, p. 4516 [Settlement Stipulation (June 30, 2005)].) Santa Maria residents pay approximately $17 million each year for this supplemental water supply. (Phase IV Trial, RT-1, Vol. 38, p. 7166:20-24 (March 1, 2006); Phase IV, Exs. JJ, and KK.) The SWP water from northern California was needed to improve water quality and secure a long-term supplemental water supply. Santa Maria began taking delivery of SWP water in August 1997 and currently receives an average of about 12,000 AFY. (Phase IV Trial, RT-1, Vol. 38, p. 7166:20-24 (March 1, 2006).) GSWC, which serves water to a portion of the Santa Maria Valley and the Nipomo Mesa, also imports SWP water. (RT-1, Vol. 39, p. 7401-04 [Phase IV Testimony (March 2, 2006)].)

Every gallon of imported water reduces the need to pump Basin groundwater for municipal use. Additionally, a percentage of the imported water, once used, returns to the Basin via percolation, further augmenting the native water supply. These augmentations of a

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basin's supply are commonly known as "return flows." For example, 65 percent of Santa Maria's use of imported water augments the aquifer as return flows. (RT-1, Vol. 41, p. 7638.)

2. The Nipomo Mesa

The Nipomo Mesa is located adjacent to and north of the Santa Maria Valley, and south and east of the Northern Cities Area. (Phase III, Ex. C-3.) The Nipomo Mesa is elevated above the floor of the Santa Maria Valley. (See Phase III, Exs. C-6 through C-10; Phase III Trial, RT-1, Vol. 28, p. 6407 (Jan. 29, 2004).) No developed water project has been implemented on the Nipomo Mesa to supplement the area's local supplies. Thus, the Nipomo Mesa is particularly vulnerable to seawater intrusion induced by excessive groundwater pumping. (Phase III Trial, RT-1, Vol. 28, pp. 6387-88, 6396, 6405 (Jan. 29, 2004).)

The average annual supply of native groundwater in the Nipomo Mesa is approximately 6,540 AFY. (RT-1, Vol. 13, pp. 3449-66.) That amount, the "safe yield," has been exceeded by water consumption during every year since 1986. The annual over pumping (deficit) was approximately 2,500 AFY at the time of trial. (*Id.* at pp. 3466-67.)

Deep pumping depressions have been generated in the Nipomo Mesa area due to the close concentration of water production facilities, some of which are pumping water from an elevation below sea level. (RT-1, Vol. 13, p. 3478.) Excessive production from these wells threatens to reverse the gradient of fresh water flowing west to the sea and thus induce seawater intrusion. (*Id.* at pp. 3487-89.) Managing the Nipomo Mesa's groundwater is addressed in the Settlement Stipulation, as discussed below.

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3. The Northern Cities Area

The Northern Cities Area is the northwest corner of the Basin, between the Nipomo Mesa and the Pacific Ocean. (Phase III, Exs. B-3 and B-10.) It has only a small hydrological connection to the rest of the Basin. (RT-1, Vol. 14, pp. 3720-21.)

For over 50 years, the Northern Cities have cooperated with local landowners and with San Luis Obispo County to share, protect, and manage their surface and groundwater. They financed and built the Lopez Reservoir in the 1960s to cure declining groundwater levels and prevent seawater intrusion. (CT-1, Vol. 28, p. 7168:1-13 [Partial Statement of Decision re Trial Phase IV].) The Northern Cities and landowners paid approximately $85 million to construct and maintain the Lopez Reservoir. (RT-1, Vol. 14, pp. 3687-88, 3693.) Appellants did not contribute to this expensive project or to the other water conservation projects in the Northern Cities Area; Appellants do not own land or use groundwater in the Northern Cities Area. (*Id.* at p. 3688:23-27; CT-1, Vol. 28, p. 7168:11-13.)

On average, the Northern Cities also import 1,200 AFY from the SWP, and their use of that water generates an additional 100 AFY of return flows, augmenting groundwater in this sub-basin. (RT-1, Vol. 14, p. 3703.)

The Northern Cities and northern landowners have repeatedly agreed to cooperatively share their water resources, allocating 57 percent of the safe yield of this area to northern landowners and 43 percent to the Northern Cities, in settlement agreements approved by the court and reaffirmed in the Settlement Stipulation, as explained in Section M below.

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B. Procedural History

1. The Pleadings

The District initiated this litigation in 1997, when it filed a complaint against Santa Maria, the City of Guadalupe ("Guadalupe"), GSWC and unnamed Doe Defendants. (CT-1, Vol. 1, p. 1 [Complaint (July 14, 1997)].) The District challenged, among other things, the rights of Santa Maria, Guadalupe and GSWC to import SWP water and to use its return flows.

In 1998, Santa Maria and GSWC filed cross-complaints against the District and unnamed Roe Cross-Defendants. (See CT-1, Vol. 1, pp. 161, 165-66.) In March 1999, LOG filed a cross-complaint, followed by a first amended cross-complaint to quiet title, for declaratory relief, and for inverse condemnation. (CT-1, Vol. 2, pp. 312, 316-27.) LOG sought to quiet title to alleged superior rights to extract groundwater from the Basin as well as their exclusive ownership of all groundwater storage space beneath their properties; a declaration of their rights with respect to groundwater and storage space; a declaration of their rights with respect to the Respondents' return flows; and an award of just compensation for their property taken through Respondents' acquisition of prescriptive rights. (*Id.* at pp. 328-30.)

The Northern Cities were brought into this litigation in 1999 by LOG's cross-complaints, and the Northern Cities cross-complained against LOG in 2003. (CT-1, Vol. 11, p. 2938 [Cross-Complaint of Northern Cities (Jan. 13, 2003)].) The Northern Cities sought, *inter alia*, a declaration of superior rights to use both (1) groundwater in the Northern Cities Area, and (2) surface water that the Northern Cities salvaged and imported into the Northern Cities Area, for example, the surface waters and return flows of the Lopez Reservoir and imported

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SWP water. (*Id.* at pp. 2946-47.)

From March 1999 through June 1999, more than 15 related cases were filed. These cases were consolidated, assigned to Santa Clara County Superior Court and became known as the Santa Maria Groundwater Cases. At the lower court's direction, nearly all groundwater users in the Basin became parties to the consolidated action.

2. Trial Phases I And II

In January 2000, the lower court ordered the case to be tried in separate phases. (CT-1, Vol. 4, pp. 939-40 [Case Management Order No. 3 (Jan. 26, 2000)].) The Phase I trial was to establish the hydrogeological boundaries of the Basin. Phase I concluded with an order dated January 9, 2001 adjudicating the outermost hydrologic boundaries of the Basin. (CT-1, Vol. 8, pp. 2078-79.)

On January 9, 2001, the lower court issued a Case Management Order establishing that the Phase II Trial would determine whether there were areas within the outermost Basin boundaries that should be excluded from the adjudication. (CT-1, Vol. 8, pp. 2067-71.) The lower court designated a later Phase III for Basin overdraft and related issues. (*Id.* at p. 2068.)

The Phase II Trial began on October 9, 2001. On December 21, 2001, the lower court denied the Northern Cities' request to be severed from the case and established the Basin's boundary line for court-adjudication purposes. (CT-1, Vol. 8, pp. 2022, 2025 [Northern Cities' Motion for Entry of Case Management Order for Phase II (Dec. 15, 2000)].) The boundary line included both the Northern Cities and the Nipomo Mesa subareas but there was no ruling yet regarding separate groundwater management or water rights in the Basin's subareas. (*Id.* at p. 2552.)

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In the spring of 2002, the Northern Cities and northern landowners entered into a settlement agreement wherein they agreed to cooperatively share and independently manage water resources and facilities in the Northern Cities. The lower court approved this settlement agreement on August 27, 2002. (CT-1, Vol. 11, p. 2875-77 [Clerk's Minute Order (Aug. 27, 2002)].)

3. Trial Phase III

The Phase III Trial on overdraft commenced on October 7, 2003 and ended January 29, 2004 (CT-1, Vol. 17, p. 4409 [Partial Statement of Decision re Trial Phase III (May 5, 2004)].) The lower court found that parties asserting prescriptive rights had not yet met their burden of proving that the Basin was or is in overdraft. (*Id.* at pp. 4412-13, 4420, 4422.)

4. The Settlement Stipulation

In May 2004, the court ordered that the Phase IV trial would include: (1) determination of rights to Twitchell water, (2) determination of rights to Lopez water, (3) determination of rights to SWP water, and (4) determination of rights to return flows. (See generally CT-1, Vol. 17, pp. 4409-22, 4441 [Partial Statement of Decision re Trial Phase III (May 5, 2004)].)

In September 2004, the lower court was apprised of a settlement between Santa Maria and the District, two of the major litigants. As a result, the lower court vacated the Phase IV trial date. (CT-1, Vol. 17, p. 4466 [Order After Case Management Conference (Sep. 22, 2004)].) Beginning in the Fall of 2004, and continuing until the Spring of 2005, nearly all parties to the adjudication participated in a lengthy series of court-facilitated settlement negotiations. Appellants were invited to participate but they refused. Ultimately, these negotiations resulted in the June 30, 2005 Settlement

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Stipulation, which was approved by the trial court on August 3, 2005:

> [The Settlement Stipulation] was negotiated in good faith, that its terms are reasonable, that it provides certainty to the parties, that it is a physical solution that protects the water resource and the rights and interests of all parties, that it provides flexibility for changing conditions, that it provides for judicial supervision through continuing jurisdiction of the Court, that it logically divides the basin into three separate management subareas that will resolve current and future water issues in each subarea, that it establishes an effective political solution to the actual and potential problems of this groundwater basin, and that it constitutes a reasonable compromise of disputed claims and defenses. (CT-1, Vol. 17, pp. 4662-63 [Order Approving Settlement Stipulation (Aug. 3, 2005)].)

More than 700 parties, including nearly all landowners, all Respondent public water suppliers (comprised of Santa Maria, GSWC, Rural Water Company, Guadalupe, the Northern Cities, and Nipomo Community Services District), and the District signed the Settlement Stipulation and agreed to be bound by its terms. Only Appellants refused amongst all parties.

The Settlement Stipulation includes a physical solution that enhances and protects the Basin's water resources and is consistent with common law water right priorities. (CT-1, Vol. 17, pp. 4509-11 at III [Settlement Stipulation (June 30, 2005)].) The physical solution includes separate, but coordinated management of the Basin's three management areas under varying hydrologic conditions (i.e., surplus and drought); establishes a monitoring program for the collection and analysis of groundwater production and other data; and promotes the development of new water supplies for the Basin. (*Ibid.*)

Within the "Santa Maria Valley Management Area," the Settlement Stipulation provides for the management and

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administration of the Twitchell Project. (CT-1, Vol. 17, pp. 4520-23 at V.D.) Specifically, it mandates that the settling parties who are "Twitchell Participants" "shall be responsible for ensuring the ongoing operational integrity of the Twitchell Project and the maintenance of the Twitchell Yield." This obligation imposes significant financial obligations (*Id.* at pp. 4521-22 at V.D.3), and requires Santa Maria, GSWC, and Guadalupe to continue their importation of expensive SWP water at specified levels. (*Id.* at pp. 4514-16 at V.A.3.c.) The Settlement Stipulation quantifies "Twitchell Yield" and allocates that yield to the "Twitchell Participants" who are financially obligated to the future maintenance and operation of the Twitchell Project. (*Id.* at pp. 4515-16 at V.A.3.b.) The Settlement Stipulation also establishes a monitoring committee (the "Twitchell Management Authority") to develop a groundwater monitoring plan for the Valley and to administer capital improvement projects for the Twitchell Reservoir. (*Id.* at p. 4517.) The Twitchell Management Authority pays for the monitoring program for the Santa Maria Valley Management Area, which includes the cost of a Management Area Engineer and preparation of annual reports to the lower court. These costs are divided among the Twitchell Participants. (*Ibid.)*

Within the Northern Cities, the Settlement Stipulation reaffirmed the northern parties' 2002 settlement agreement. The Settlement Stipulation reaffirms the northern parties' continued operation and financing of the Lopez Project. (CT-1, Vol. 17, p. 4531 [Settlement Stipulation (June 30, 2005)].) It also affirms the prior allocation of water between Northern Cities and landowners, and defines the Northern Cities' monitoring and management responsibilities. (*Id.* at pp. 4510, 4531, 4574.)

Within the Nipomo Mesa area, the Settlement Stipulation

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establishes a monitoring program to, among other things, track groundwater levels and identify water quality issues, including seawater intrusion. (CT-1, Vol. 17, p. 4528.) The Settlement Stipulation also provides that Nipomo Community Services District will purchase 2,500 AFY of water from Santa Maria. The purchased water is to be transported to the Nipomo Mesa to reduce the amount of groundwater used and thereby reduce Nipomo Mesa pumping depressions that could lead to seawater intrusion. (*Id.* at pp. 4524-25.) In addition, the Settlement Stipulation provides that Nipomo Community Services District, Woodland Mutual Water Company, Southern California Water Company (now GSWC) and Rural Water Company will purchase supplemental water from Santa Maria. (*Id.* at p. 4526.) Lastly, the Settlement Stipulation provides for the formation of a Nipomo Mesa Management Area Technical Group, which is charged with developing a court-approved monitoring plan, as well as water shortage contingency plans to anticipate and mitigate shortage conditions. All of these programs are funded entirely by five parties, Nipomo Community Services District, GSWC, Rural Water Company, Conoco Phillips, and Woodlands Mutual Water Co. (*Id.* at p. 4527.) Appellants benefit from, but do not pay for, these programs.

5. Trial Phase IV

The Phase IV Trial, which involved the Respondent public water suppliers and the non-settling Appellants, began in February 2006. During the trial, Appellants withdrew all causes of action except their quiet title claims. (CT-1, Vol. 19, p. 5069 [LOG Trial Brief (Feb. 1, 2006)].) Pursuant to their cross-complaints, Respondent public water suppliers sought declaratory relief including an *inter se* declaration of all parties' rights to the Basin's native supply, to the supplemental yield created by the Twitchell Project and Lopez

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Reservoir, and to the return flows from Respondents' importation of supplemental SWP water. (See CT-1, Vol. 20, pp. 5196, 5199-5202, 5203-04 [Respondents' Phase IV Closing Brief (March 7, 2006)].)

Upon conclusion of the Phase IV trial, the lower court found that Santa Maria had established prescriptive rights in the Basin's native yield in the amount of 5,100 AFY and GSWC established prescriptive rights in the Basin's native safe yield in the amount of 1,900 AFY. (CT-1, Vol. 28, pp. 7149, 7173.) The lower court also found that the evidence from Phases III and IV conclusively established that the Basin was in overdraft from at least 1944 through 1951, 1953 through 1957 and 1959 through 1967. (*Ibid.*)

The lower court found that the Northern Cities have a superior right to 7,300 AFY of surface and groundwater in the Northern Cities Area – based on "the combination of the Lopez Reservoir, State Water Project imports, percolation ponds, and return flows" – whereas Appellant LOG parties have no overlying or other water rights in this area. (CT-1, Vol. 28, pp. 7168-69.)

The lower court found there were no prior rights to Twitchell Reservoir's supplemental Basin yield that predated the commencement of the adjudication. (CT-1, Vol. 28, pp. 7167, 7172-73 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) The lower court also found that, during times of groundwater shortage conditions, as long as the District properly exercised its authority and responsibilities under its enabling legislation, the District "may regulate and allocate the appropriated [Twitchell] water" in accordance with existing Twitchell Project contracts and the State's surface water right license issued for the Twitchell Project. (*Id.* at p. 7170:19-20.)

With respect to Respondents' rights to return flows from their

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SWP importation, the lower court found that Respondents are exclusively entitled to their use during times of groundwater shortage conditions, but otherwise the return flows could be available to any Basin user. (*Id.*, pp. 7171-72 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].)

6. Trial Phase V

The Phase V Trial was to determine whether: (1) Appellants were entitled to relief arising out of their quiet title claims or under Respondent public water suppliers' declaratory relief claims to adjudicate the parties' conflicting water rights claims; (2) Appellants had preserved rights to pump groundwater by proving they exercised "self-help" during the prescriptive periods, and if so, to what extent; and (3) the District's allocation of "Twitchell Yield" is a valid exercise of the District's authority such that the Settlement Stipulation's "Twitchell Participants" have priority rights to 32,000 AF of water in times of shortage. (CT-1, Vol. 28, pp. 7136-37 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].) Also during Phase V, the lower court determined whether it should approve Respondents' request for a physical solution, and whether the court would enter a single or multiple judgments. (*Id.* at p. 7137.)

During the Phase V Trial, Respondents presented evidence that the Settlement Stipulation did not substantially impair Appellants' water rights and, in fact, that the physical solution benefitted all parties, including Appellants. (See generally RT-1, Vol. 42, pp. 7820-76 [Phase V Trial Transcript (July 17, 2006)].)

7. Final Judgment

After the Phase V Trial, the lower court entered a single judgment consistent with its Statement of Decision, incorporating the Settlement Stipulation as binding on the settling parties. The lower

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court also imposed a physical solution, which, among other things, ordered all parties, including Appellants, to comply with the monitoring programs described in the Settlement Stipulation. The lower court found that these programs ensure the continued integrity and sustainability of the Basin for all users, including Appellants. (CT-2, Vol. 1, pp. 4-5 [Judgment After Trial (Jan. 25, 2008)].) The lower court also found that the yield from Twitchell Reservoir operations, and all costs and duties required to maintain and optimize the yield, be allocated consistent with the Settlement Stipulation. (*Id.* at pp. 3, 5.)

As part of the final judgment, the lower court included the prescriptive rights acquired by Santa Maria and GSWC as against Appellants. (CT-2, Vol. 1, pp. 4-5.) The court also entered judgment for the Respondents on Appellants' cross-complaints for quiet title. (*Id.* at p. 6.) The lower court denied Appellants' request to quiet title to their water rights but did find Appellants had title to parcels of real property. (*Ibid.*)

8. Post Judgment Motions And The Appeal

LOG Appellants filed appeals of the lower court's approval of area management plans and annual reports, both of which are required by the Settlement Stipulation. (See CT-4, Vol. 9, p. 2179-80; [LOG's Notice of Appeal (Nov. 4, 2008)]; CT-4, Vol. 9, p. 2286 [LOG's Notice of Appeal (Nov. 4, 2008)]; see also CT-1, Vol. 17, pp. 4517-18 [Settlement Stipulation (June 30, 2005)]; (CT-11, Vol. 1, pp. 77-78 [Notice of Appeal (Dec. 4, 2009)].) LOG Appellants claim that the lower court lacked jurisdiction, due to the pending appeals, to approve the management plans and annual reports. (LOG's Opening Brief, pp. 143-44; see also CT-6,Vol. l, p. 144:16-17.)

The Judgment plainly states that "[n]o non-stipulating party is

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bound in any way by the stipulation except as the court may otherwise independently adopt as its independent judgment on term or terms that are the same or similar to such term or provision of the stipulation." (CT-2, Vol. 1, p. 2:5-7 [Judgment After Trial (Jan. 25, 2008)].) The only part of Basin management applicable to Appellants is their required adherence to the monitoring program in the two areas from which they produce water. They also must monitor their own water production, maintain resulting use data and provide it to the lower court if ordered to do so. (*Id.* at pp. 4-5.) In other words, the only action required of Appellants is to report their own water production so that the lower court can maintain the protection and health of the Basin for all users.

Although the Settlement Stipulation protects Appellants' interests and is paid for by settling parties only, LOG Appellants have filed numerous appeals and an unsuccessful Petition for Writ of Supersedeas. Appellants never identify any rights that are infringed by the Settlement Stipulation or Judgment. Historically, the Basin has been over-pumped and has been protected only because of cooperative efforts made and costs incurred by Respondent public water suppliers, tax payers and ratepayers in funding the Lopez Project, Twitchell Project, and SWP water purchases. The Judgment excuses Appellants from participating in or paying for these basin protection projects that protect Appellants' water supply. Nonetheless, Appellants assert numerous objections, none of which are supported by reasonable arguments. Instead, Appellants' arguments are unsubstantiated by proper citations to the record. Moreover, Appellants fail to show how the lower court's Judgment is not supported by substantial evidence. That is because, as detailed herein, substantial evidence in the record, based on five phases of

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trial, witness testimony and exhibits all support the Judgment's physical solution and allocation of prescriptive rights.

III. STANDARD OF REVIEW

A. The Substantial Evidence Rule Applies To The Lower Court's Factual Determinations

The fundamental rule of appellate review is that a judgment is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Winograd v. American Broadcasting Company* (1998) 68 Cal.App.4th 624, 631-32.) Appellate courts will only reverse or modify a judgment upon a clear showing of prejudicial error. (*Ibid.*) The burden lies with the appellant to affirmatively demonstrate prejudicial error. (*Ibid; Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 [appellate court will not act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial].)

After a trial on the merits, the "substantial evidence" rule usually determines whether the evidence supports the judgment. If substantial evidence supports the judgment, the appellate court will affirm it. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) The court will not reweigh evidence or re-determine credibility and will apply presumptions in favor of the correctness of the judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-26.) The appellate court will defer to the fact finder because (a) it reviews only the written record on appeal and (b) the fact finder was in a better position to evaluate witness credibility. (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243, disapproved on another ground in *Liodas v. Sahadi* (1977) 19 Cal.3d 278.)

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B. The Court Exercises Its Independent Review Of Questions Of Law

Matters presenting questions of law, that do not require resolution of disputed facts, allow the appellate court to exercise *de novo* review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801, sub. opn. (1996) 14 Cal.4th 39.)

IV. LEGAL ARGUMENT

A. Appellants Fail To Meet Their Burden On Appeal

1. Appellants Fail To Show The Trial Court's Findings Are Not Supported By Substantial Evidence

Appellants ignore their burden to establish the absence of "substantial evidence" supporting the trial court's findings. Most of Appellants' arguments are wrongly presented as if they were pure legal issues. Moreover, when evidence is referenced, Appellants only discuss the evidence supporting their arguments and disregard substantial evidence supporting the Judgment. But Appellants are required to summarize evidence, favorable and unfavorable, and show why it is insufficient:

> If appellants mean to suggest that we must independently search the evidentiary record to determine its sufficiency, they are mistaken. An appellate court "'must presume that the record contains evidence to support every finding of fact … .'" (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887 (internal citations omitted).)

"It is the *appellant's burden, not the court's, to identify and establish deficiencies in the evidence.*" (*Brown v. World Church* (1969) 272 Cal.App.2d 684, 690 (emphasis added).) This burden is a "daunting" one. (*In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328–29.) "A party who challenges the sufficiency of the evidence to

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support a particular finding *must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient.*" (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208 (emphasis added).)

> [W]hen an appellant urges the insufficiency of the evidence to support the findings *it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient.* He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect. (*Hickson v. Thielman* (1956) 147 Cal.App.2d 11, 14–15; *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409 (emphasis added); see also *In re S.C.* (2006) 138 Cal.App.4th 396, 414-15 [failure to discuss all evidence forfeits the contention].)

As shown below, Appellants' election to ignore unfavorable evidence forfeits most, if not all, of their contentions of error.

2. Appellants Fail To Show "Prejudicial" Errors

Appellants' Opening Briefs fail to show how alleged errors by the trial court were "prejudicial." California Constitution Article VI, section 13 prohibits reversal of a judgment unless "the error complained of has resulted in a miscarriage of justice." Likewise, Code of Civil Procedure section 475 prohibits reversal unless the record shows that the error was "prejudicial" and caused the appellant "substantial injury." Consequently, an appellant must demonstrate that the trial court's error was prejudicial. (See, e.g., *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 ["no form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party"].) Despite numerous complaints of error concerning the Settlement Stipulation, Appellants

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cannot establish prejudicial error for the simple reason that the Settlement Stipulation does not harm Appellants' alleged water rights, whatever those rights may be.

B. <u>The Court Had The Authority To Impose A Physical Solution</u>

Appellants contend that, for a variety of reasons, the physical solution imposed by the trial court is improper. (See, e.g., LOG's Opening Brief, pp. 92-132 ["LOG AOB"]; Wineman Parties' Opening Brief, pp. 12-18 ["Wineman AOB"].) Appellants, particularly LOG, rarely provide legal authority to support their erroneous assertions, and what little authority they rely upon is inapposite. Further, neither LOG nor Wineman provide any evidence that the alleged errors by the trial court cause prejudice to Appellants. There is no showing of prejudice because the lower court's physical solution benefits all parties within the Basin, including Appellants.

A "physical solution" is a practical equitable remedy employed by courts to permit the maximum groundwater supply uses, while continuing to recognize and respect water rights. (See *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 339-41 ["*Lodi"*].) A physical solution is a "common sense approach to water rights litigation,"[3] and courts use physical solutions to resolve competing water claims by cooperatively satisfying each water user's reasonable needs. (See, e.g., *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383-84 ["*Peabody"*].) Courts have broad equitable powers to impose physical solutions that achieve a practical allocation of competing interests and protect the reliability and adequacy of a

[3] 1 Roger & Nichols, Water for California (1967) Physical Solutions, § 404, pp. 547-48. [citing *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 556, 560-61].

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water supply. (See, e.g., *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250 ["*Mojave*"]; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 924 ["*Pasadena*"].)

Several California Supreme Court cases involving groundwater disputes, including *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 256-62, 288, overruled in part by *Mojave, supra,* 23 Cal.4th 1224 [*"San Fernando"*], *Pasadena*, and *Mojave*, affirm the trial court's broad authority to fashion an appropriate physical solution to protect a groundwater basin. (See, e.g., *Mojave*, *supra*, 23 Cal.4th at p. 1250 ["[i]t is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests"]; *Pasadena*, *supra*, 33 Cal.2d at p. 924 ["there can be no question that the trial court had authority to limit the taking of ground water for the purpose of protecting the supply and preventing a permanent undue lowering of the water table."].)

The imposition of a physical solution is directly and fundamentally linked to Article X, section 2 of the California Constitution, which requires that the State's water resources be put to maximum reasonable and beneficial use.[4] Since Article X, section 2

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[4] Article X, section 2 of the California Constitution provides:
It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of

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was adopted in 1928 as a constitutional amendment, "it is not only within the power but it is also *the duty of the trial court* to fashion a physical solution, and to suggest one on its own motion if none is offered by the parties." (*Lodi, supra*, 7 Cal.2d at p. 341 (emphasis added).) Physical solutions are necessary to implement public water policy as codified in the Constitution. (*Ibid.*; *Pasadena, supra*, 33 Cal.2d at pp. 937-38; *Peabody, supra,* 2 Cal.2d at pp. 382-83.)

1. Physical Solutions Can Be Imposed Over Parties' Objections

Courts may impose a physical solution "regardless of whether the parties agree." (*Lodi, supra,* 7 Cal.2d at p. 341; *Tehachapi-Cummings County Water District v. Armstrong* (1975) 49 Cal.App.3d 992, 998-99 ["*Armstrong"*].) A trial court may impose a physical solution over a dissenting party's objection. (*Mojave, supra,* 23 Cal.4th at p. 1249; see also *Peabody*, *supra,* 2 Cal.2d 351; *Lodi*, *supra*, 7 Cal.2d 316.) Appellants' arguments to the contrary (LOG AOB, pp. 92-96; Wineman AOB, pp.14-16) are not supported by the law. Moreover, a physical solution can modify existing water practices so long as those modifications do not substantially impair the exercise of valid rights. (*Lodi, supra,* 7 Cal.2d at p. 341; *Mojave, supra,* 23 Cal.4th at p. 1250; see *Peabody, supra*, 2 Cal.2d 351.)

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water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

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2. Physical Solutions Can Be Imposed When A Basin Is Not In Overdraft

Overdraft conditions are not a prerequisite to impose a physical solution. In *Lodi*, the court ordered a physical solution despite the lack of "immediate danger" to the water supply. (*Lodi, supra,* 7 Cal.2d at p. 341.) The court held that a physical solution was appropriate, and required, to avoid waste and unreasonable use, to protect the supply, and to avoid future injury. (*Id.* at pp. 341-45.) Appellants' erroneous claim that a basin must be in overdraft for a physical solution to be imposed ignores the *Lodi* holding and the Constitutional mandate of Article X, section 2, which requires the court to consider a physical solution that maximizes reasonable and beneficial uses in a basin, both now and in the future.

3. The Evidence Demonstrates That Future Shortages May Occur Unless the Santa Maria Groundwater Basin is Managed

Substantial evidence established that while the Basin may not currently be in overdraft, there is significant risk of future groundwater shortages and harm to the groundwater supply unless the Basin and its water resources are properly managed. For example, Respondents presented evidence in Trial Phases III, IV and V that the Twitchell Project, which provides supplemental recharge on an average of 32,000 AFY and is critical to maintaining balanced water levels in the Basin, is being negatively impacted by ongoing siltation. (See, e.g., CT-1, Vol. 17, pp. 4409, 4418-19 [Partial Statement of Decision re Trial Phase III (May 5, 2004)]; CT-1, Vol. 28, pp. 7172-73 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)]; CT-1, Vol. 28, p. 7147 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].) Unless the siltation is managed, the ability of the Project to recharge the Basin will be compromised. (*Id.* at pp. 7172-73

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[Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) Indeed, prior to the time the Twitchell Project was constructed, the Basin suffered numerous periods of declining water levels and severe overdraft conditions. (*Id.* at p. 7147, n.4 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].)

Respondents also presented evidence that deep pumping depressions have been generated in the Basin in the Nipomo Mesa area, which could reverse the gradient of fresh water flowing west to the sea and thus induce seawater intrusion into the Nipomo Mesa. (RT-1, Vol. 13, pp. 3487-89 [Phase III Trial Transcript (Oct. 17, 2003)].) The Settlement Stipulation addresses this threat by establishing a monitoring program to, among other things, track groundwater levels and identify quality issues, such as the inclusion of seawater in the water supply, and by providing for the Nipomo Community Services District's annual purchase of 2,500 AF of water from Santa Maria. (CT-1, Vol. 17, pp. 4524-25; 4528.) Without these protections, the evidence established that harm to the Basin is likely. (RT-1, Vol. 12, pp. 3239-40 [Phase III Trial Transcript (Oct. 16, 2003)].)

Based on this and other evidence, the lower court made numerous findings regarding the need for a physical solution:

"[T]here is a reasonable certainty that the Basin will suffer water shortages in the future and that the court will be required to act in the future to preserve the rights of the various parties to this litigation in the event that Twitchell is not renovated and restored. Even if Twitchell is restored, there is a possibility that such shortages may occur." (CT-1, Vol. 28, pp. 7141:24-7142:2 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].);

"[T]he agreement between the stipulating parties offers some

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hope for the future of the Basin but is not a guaranty even under the best of circumstances. . . . The area has experienced extreme variations in precipitation and run off from the surrounding watershed, and drought years have historically been lengthy and severe. The evidence before the court is that similar patterns may be expected to recur in the future." (CT-1, Vol. 28, p. 7147:8-15 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].);

"[T]he court determines that there is a reasonable likelihood that drought and overdraft conditions will occur in the Basin in the foreseeable future that will require the exercise of the court's equity powers." (CT-2, Vol. 1, p. 5, ¶ 7 [Judgment After Trial, (Jan. 25, 2008)].);

"[A]ll subareas of the basin have been affected by insufficient recharge, and there is a risk of future overdraft if periods of drought occur and coincide with increased consumption." (CT-1, Vol. 28, p. 7167:28-7168:1 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].)

The Settlement Stipulation "is a physical solution that protects the water resource and the rights and interests of all parties, that it provides flexibility for changing conditions, [and] that it provides for judicial supervision through continuing jurisdiction of the Court." (CT-1, Vol. 17, p. 4663 [Order Approving Settlement Stipulation (Aug. 3, 2005)].)

The trial court's findings were supported by overwhelming evidence in the record, evidence that Appellants fail to summarize or otherwise reference. Stated simply, the lower court did *not* err in imposing a physical solution for the benefit of all parties, including Appellants.

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C. The Physical Solution Is Consistent With *Mojave* And Other Supreme Court Case Law

Mojave is the last California Supreme Court case addressing a major groundwater dispute and a physical solution. (*Mojave, supra,* 23 Cal.4th at p. 1233.) In that case, the trial court approved a physical solution developed by a majority of the parties to the adjudication. (*Id.* at pp. 1237-38.) Among other things, the physical solution established a production right for each party based on historical pumping, subject to reduction, if necessary. (*Ibid.*) The trial court imposed the physical solution on all parties, but a small number of landowners exercising overlying rights opposed the imposition of the physical solution, arguing that the physical solution did not consider or protect the "substantial enjoyment" of their overlying rights. (*Ibid*.)

Ultimately, the *Mojave* court refused to apply the physical solution to the landowners who opposed it because it may have violated their water rights.[5] However, the *Mojave* court upheld the physical solution as between the settling parties and reiterated the importance of physical solutions to resolve water rights disputes in a manner consistent with Article X, section 2:

> Under such circumstances the 1928 constitutional amendment, as applied by this court . . ., compels the

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5 The *Mojave* court refused to apply the physical solution to the overlying landowners that contested the physical solution because their water rights had not yet been established prior to issuing a final judgment at trial, but upheld the physical solution as to the signatories, which represented approximately ninety percent of water users. (*Mojave*, *supra*, 23 Cal.4th at pp. 1237, 1247-48.) As discussed herein, *Mojave* is factually distinguishable from this case because here the lower court fully considered existing water rights and priorities.

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> trial court, before issuing a decree entailing such waste of water, to ascertain whether there exists a physical solution of the problem presented that will avoid the waste, and that will at the same time not unreasonably and adversely affect the prior appropriator's vested property right. (*Mojave, supra,* 23 Cal.4th at p. 1250.)

Further, the *Mojave* court stated that a physical solution can modify existing water practices so long as those modifications do not substantially impair valid rights. (*Ibid.*)

Here, the trial court followed the guidance set forth in *Mojave.* The lower court's physical solution is consistent with *Mojave* because it fully considers and adheres to established water rights priorities and does not impair the established rights of Appellants. Indeed, the uncontroverted evidence shows that the physical solution in this case confers substantial benefits on all Basin users, including Appellants.

1. The Physical Solution Does Not Impair Established Rights

The physical solution is divided into two parts. The first is the June 30, 2005 Settlement Stipulation, which binds only signatories. The Settlement Stipulation protects and enhances Basin's resources, monitors changing conditions, and facilitates responsible Basin management without impacting vested rights. The Settlement Stipulation is incorporated into the Judgment After Trial, making its terms binding only on stipulating parties, not on Appellants.

The second part of the physical solution includes the groundwater monitoring provisions and management area monitoring programs defined in the Settlement Stipulation, which were independently adopted by the court and included in the Judgment. (CT-2, Vol. 1, pp. 4-5 [Judgment After Trial (Jan. 25, 2008)].) The trial court found the monitoring provisions "necessary to manage water production in the basin" and that they should be enforced

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against the non-stipulating parties, including Appellants. (*Id.* at p. 5.) Only the monitoring provisions directly apply to Appellants.[6]

The physical solution protects vested rights, maximizes reasonable and beneficial uses, seeks to prevent waste and unreasonable use, enhances native and supplemental supplies, and provides for long-term management and monitoring programs, along with the court's continuing jurisdiction to address issues as they arise. Contrary to Appellants' assertions (LOG AOB, pp. 127, 130; Wineman AOB, p. 13), neither the terms of the Settlement Stipulation, nor the imposition of the monitoring program impairs Appellants' rights. As discussed *supra* at pages 19 and 20, and despite lengthy briefing, Appellants failed to meet their burden to show how their rights were harmed or prejudiced.

a. The Physical Solution Is Consistent With Water Rights Priorities

The Settlement Stipulation physical solution is consistent with common law water rights priorities. It expressly sets out the signatory parties' relative priorities and makes no attempt to "regulate" or otherwise interfere with Appellants' alleged water rights. Moreover, during Trial Phases IV and V, Appellants were provided an opportunity to prove their water rights in the Basin by showing ownership of land, water production history, reasonable and beneficial water use on appurtenant land overlying the Basin, and self-help. At

[6] Appellants assert both the trial court and Respondents have been inconsistent and/or ambiguous about whether the Monitoring Provisions apply to Appellants. (LOG AOB, pp. 114-117.) Paragraph 5 of the Judgment After Trial unambiguously imposes on Appellants the Monitoring Provisions that are contained in the Stipulation. (CT-2, Vol. 1, pp. 4-5 [Judgment After Trial (Jan. 25, 2008)].) Neither the trial court nor the Respondents have ever indicated otherwise.

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the conclusion of Trial Phase V, the lower court declared all parties' rights in the Basin's water supplies adjudicated. *The only rights established by Appellants were their ownership of real property identified in Exhibit 2 to the Judgment After Trial*. (CT-2, Vol. 1, p. 4.) *Appellants failed to meet the burden of proof in their action to quiet title to a quantity of their groundwater rights as overlying owners and failed to present any evidence whatsoever regarding their exercise of overlying rights*. (*Id.* at p. 5.) *Appellants likewise failed to establish a priority right to the augmented groundwater supply derived from the Twitchell Project*. (*Ibid.*) *Appellants established no right to any other water available in the Basin*. (*Ibid.*)

Moreover, as stated above, only the monitoring and reporting portions of the physical solution apply to Appellants. (CT-1, Vol. 17, pp. 4663-64 [Order Approving Settlement Stipulation (Aug. 3, 2005)].) Appellants' overlying rights, whatever they were claimed to be, are unaffected by the physical solution imposed.[7] Thus, the trial court satisfied its due process obligations (*Mojave, supra,* 23 Cal.4th at p. 1249), and consistent with *Mojave,* the court gave due regard for the declared rights of all parties in crafting a physical solution. (See CT-1, Vol. 28, pp. 7149-73 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)]; see also CT-2, Vol. 1, pp. 1-2, 4-8 [Judgment After Trial (Jan. 25, 2008)].)

b. The Physical Solution Supply Allocation Is Consistent with Parties' Water Rights

The Settlement Stipulation's supply allocation is consistent

[7] Appellants' alleged overlying rights were limited only by the court's award of prescriptive rights, which were litigated and proven through clear and convincing evidence submitted in Trial Phases III, IV and V discussed in greater detail *infra*, pages 57 through 69.

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with parties' rights. Based on the evidence presented and described *infra*, Appellants did not establish a pre-Stipulation priority right to Twitchell Project water. Appellants also did not establish any right to return flows from imported SWP water. (See CT-2, Vol. 1, pp. 5-6 [Judgment After Trial (Jan. 25, 2008)].)[8] Because Appellants have no rights to these developed supplies, their allocation under the Settlement Stipulation does not adversely affect Appellants' overlying water rights.

c. The Physical Solution Does Not Alter Or Impair the Twitchell Project

The Settlement Stipulation does not alter or impair the Twitchell Project or the benefits provided to landowners within the District and the Santa Maria Valley. In fact, the Settlement Stipulation provides for the Twitchell Project's future operation and maintenance in a manner that "maximize[s] recharge of the Santa Maria Valley Management Area from Twitchell Water, including without limitation, the avoidance of impacts on recharge resulting from ongoing accumulation of silt to the maximum extent practical,"

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[8] In the Statement of Decision Re Trial Phase V, the court concluded that, based on applicable law and the evidence presented at trial, "[n]either the LOG and Wineman parties, nor any other parties have a contractual right to any water produced by Twitchell except as the District may be authorized to enter into such agreements for the future operation of the project. Thus, enforcement of the Twitchell allocation prescribed by the stipulation does not affect any rights, contractual or otherwise, of the non-stipulating parties. Further, enforcement of the stipulation's Twitchell allocation, as between the stipulating parties, does not adversely affect the rights to native ground water of any of any non-stipulating parties. The correlative rights of non-stipulating parties to native ground water will remain unaffected by the stipulation." (CT-1, Vol. 28, p. 7143 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].) The allocation of Twitchell water is discussed in greater detail *infra,* pages 45 through 57.

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and simultaneously provides for funding necessary to satisfy this obligation. (CT-1, Vol. 17, p. 4520 at V.D. [Settlement Stipulation (June 30, 2005)].) The evidence at trial demonstrated that the ongoing operation of Twitchell Reservoir will be maintained and the augmented supply of Twitchell water will continue to supplement the Basin, thereby reducing the risk of future overdraft.

d. The Physical Solution Does Not Cause Appellants to Incur Additional Expenses

Implementing the Settlement Stipulation will not cause Appellants to incur any new expenses. Appellants will simply continue to incur the nominal costs associated with the District's assessment on District landowners, which has existed for decades. Only the "Twitchell Participants," including Santa Maria, GSWC, Guadalupe and stipulating landowners, bear the burden to finance capital expenditures and extraordinary expenses required for the Twitchell Project's continued operation and maintenance. As such, imposing the Settlement Stipulation as a physical solution on all stipulating parties will not cause Appellants to incur any additional expense.

e. The Only Settlement Stipulation Provisions That Apply To Appellants Deal With Groundwater Monitoring

As stated above, only the groundwater monitoring provisions and management area monitoring programs apply to Appellants (CT-1, Vol. 17, pp. 4511-52 [Settlement Stipulation (June 30, 2005)]; CT-1, Vol. 28, p. 7143 [Statement of Decision re Trial Phase V (Jan. 8, 2007)]), which were independently adopted by the court "as necessary to manage water production in the basin." (CT-2, Vol. 1, pp. 4-5 [Judgment After Trial (Jan. 25, 2008)].) These provisions require

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only monitoring and reporting and do not require Appellants to incur additional expenses, nor do they impede or affect Appellants' ability to produce water.

For the foregoing reasons, the physical solution imposed by the court is consistent with *Mojave* and with established Supreme Court case law regarding physical solutions.

2. Uncontroverted Expert Testimony Demonstrated That The Physical Solution Benefits Appellants

Uncontroverted substantial evidence from Phase V by Respondents' expert Robert Beeby, further demonstrates that the Settlement Stipulation's physical solution does not substantially impair Appellants water rights. In fact, Mr. Beeby's testimony established that the Settlement Stipulation benefits all Basin users and actually enhances Appellants' overlying rights, whatever they may be.

a. Substantial Evidence Shows The Settlement Stipulation Protects Basin Water Supply And Benefits Appellants

As part of his Phase V testimony, Mr. Beeby conducted a detailed analysis considering: (1) whether the water resource plan contained in the Settlement Stipulation is adequate to protect the Basin's water resources (RT-1, Vol. 42, p. 7816:15-19 [Phase V Trial Transcript (July 17, 2006)]); (2) whether Appellants would be adversely affected by the Settlement Stipulation's water resource plan (*Id.* at p. 7817:9-13); and (3) what impact, if any, reasonably expected land use changes would have on water conditions in the Basin. (*Id.* at p. 7817:14-18.)

Mr. Beeby testified that the Settlement Stipulation's water resource plan provides adequate Basin management. In particular, the technical committees established to evaluate and monitor conditions

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in the Basin not only provide sound Basin management, but also establish a mechanism to identify water shortage conditions, as well as actions that should be taken to avoid or offset adverse impacts. (RT-1, Vol. 42, pp. 7827-28 [Phase V Trial Transcript (July 17, 2006)]; Phase V, Ex. A-3.)

b. Substantial Evidence Demonstrates That Appellants Will Not Be Adversely Impacted By The Water Management Set Forth In The Settlement Stipulation

Mr. Beeby further testified that Appellants would not be adversely affected by the Settlement Stipulation's water resource plan. Specifically, Mr. Beeby testified that if the stipulated management principles are implemented, current supplies, along with existing infrastructure, are sufficient to meet Basin water demands through 2030. (Phase V, Ex. A-4; RT-1, Vol. 42, pp. 7830:24 - 7831:4 [Phase V Trial Transcript (July 17, 2006)].) Thus, implementing the water resource plan will make a severe water shortage condition very unlikely, which benefits all parties, including Appellants.

Mr. Beeby's unrebutted analysis of both current and projected land use conditions indicates that only a limited amount of land overlying the Basin is potentially developable. (RT-1, Vol. 42, p. 7838:20-23 [Phase V Trial Transcript (July 17, 2006)]; Phase V, Ex. A-10; Ex. A-11.) As urban development occurs and agricultural land converts to urban uses, however, overall water demands on a per-acre basis will decrease because the per-unit urban water use is less than the per-unit agricultural water use. (RT-1, Vol. 42, pp. 7839:1-7; 7841:7-16; 7846:12-15; Phase V, Ex. A-7.) Additionally, pursuant to the Settlement Stipulation, urban growth is supported by imported supplies and Twitchell, not native supplies. (RT-1, Vol. 42, pp. 7842:21 - 7843:1, 7845:25 - 7846:6; Phase V, Ex. A-9.) Finally, Mr.

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Beeby testified that there is very little possibility of additional agricultural development (RT-1, Vol. 42, pp. 7786, 7838-39.) These factors led Mr. Beeby to conclude that "[i]t is highly unlikely that the availability of groundwater resources to the contesting parties will be significantly impacted by anticipated growth in the Nipomo or Santa Maria Management Areas." (*Id.* at p. 7835:13-18; Phase V, Ex. A-6.)

c. Substantial Evidence Shows That With Expected Changes In Land Use Conditions, The Settlement Stipulation Protects Basin Supply

Considering historic, existing, and projected land use conditions, Mr. Beeby concluded that there will not be significant additional demand on the Basin over the next thirty years. (Phase V, Exs. A-13; Ex. A-16; RT-1, Vol. 42, pp. 7857-58, 7861-62 [Phase V Trial Transcript (July 17, 2006)].) Thus, with the Settlement Stipulation in place, reasonably anticipated changes in land use conditions will likely have little to no effect on the Basin.

Mr. Beeby also testified that because the Settlement Stipulation does not provide for carryover of SWP return flows, "[t]he return flow of the imported water supplies delivered to urban developments would augment the groundwater supplies if not repumped by the urban users within one year." (Phase V, Ex. 8; RT-1, Vol. 42, p. 7843:23-27 [Phase V Trial Transcript (July 17, 2006)].) Additionally, there is enough groundwater in storage such that during a dry year series there would be sufficient time for the technical committees to make changes and implement management tools that could ultimately prevent adverse effects. (Phase V, Exs. A-17 through A-22; RT-1, Vol. 42, pp. 7860-70 [Phase V Trial Transcript (July 17, 2006)].)

In sum, Mr. Beeby established that the Settlement Stipulation's water management makes it less likely that water levels in the Basin

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would drop below sea level. (RT-1, Vol. 3, p. 7876:10-16 [Phase V Trial Transcript (July 17, 2006)].) This protection against seawater intrusion substantially benefits the Basin, and all of its users, including Appellants.

Based on the foregoing, the trial court correctly concluded that:

> [A] physical solution is necessary and appropriate to provide for future exigencies and that the water management plan provided for in the stipulation is necessary and appropriate and will provide an efficacious solution to the Basin's current and future problems. *Further, the water management plan contained in the stipulation . . . does not impair or otherwise adversely affect the rights of the any [sic] parties not signatory thereto.* (CT-1, Vol. 28, p. 7142 [Statement of Decision re Trial Phase V (Jan. 8, 2007) (emphasis added)].)

D. Appellants' Arguments Related To The Validity Of The Physical Solution Are Not Supported By Law Or By The Record In This Case

Appellants attack the physical solution. Most, if not all, of their arguments are raised for the first time on appeal, and should be barred. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 ["issues not raised in the trial court cannot be raised for the first time on appeal"] ["*Sea & Sage*"].) Appellants' arguments are not supported by law or by the record. Indeed, many arguments fail to cite any applicable authority and thus, should be disregarded for that reason alone. Moreover, Appellants have uniformly failed to show how the trial court's alleged errors have harmed Appellants.

1. Appellants' Reliance On Code of Civil Procedure Section 664.6 Is Misplaced

Appellants argue that the trial court erred in "converting the Settlement Stipulation to a Judgment in the absence of a duly noticed

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motion pursuant to Code of Civil Procedure section 664.6" (LOG AOB, pp. 94-96.) The argument has no merit, is trivial, and shows no prejudice to Appellants.

Section 664.6, in relevant part, provides: "If parties to pending litigation stipulate,… The court, upon motion, *may* enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction…" (Emphasis added.) This language is permissive rather than mandatory and allows for other non-statutory remedies. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 438-40.)

Furthermore, the motion to approve the Settlement Stipulation (CT-1, Vol. 17, pp. 4662-64 [Order Approving Settlement Stipulation (Aug. 3, 2005)].) complied with the requirements in Section 664.6, even though it did not specifically cite that section. Appellants were not prejudiced because they had ample notice and an opportunity to respond, and did respond, to the Statement of Decision re Trial Phase V (indicating the court's intent to "enter a single judgment consistent with this Statement of Decision, incorporating the settlement stipulation as to the stipulating parties" and stating that the monitoring program would apply to all parties, as well as the proposed Judgment After Trial), as well as the motion for approval of the Settlement Stipulation and the proposed Judgment After Trial. (See CT-1, Vol. 28, pp. 7211-19 [LOG's Comments on Statement of Decision (Jan. 23, 2007)]; CT-1, Vol. 28, p. 7324 [Joinder by Wineman Parties in LOG Objections to Purveyor Proposed Judgment (Apr. 3, 2007)]; CT-1, Vol. 28, 7352-72 [LOG Objections to Purveyor Proposed Judgment of April 11, 2007 (Apr. 30, 2007)]; (CT-1, Vol. 17, pp. 4643-4652 (LOG Opposition to Stipulation (June 29, 2005)]; CT-1, Vol. 17, pp. 4662-4664 [Order Approving Settlement Stipulation (Aug. 3, 2005)].)

Appellants also wrongly argue the Settlement Stipulation is

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invalid because it is "illegal, contrary to public policy, or unjust," in violation of Section 664.6. (See generally LOG AOB, pp. 97-113.) Although most of Appellants' arguments relate to erroneous claims of inconsistencies between the Settlement Stipulation and "common law" or "case law," Appellants cite no applicable authority for their arguments. (See *id.*)[9] The purpose behind a physical solution is to create flexible and practical solutions while respecting vested water rights and protecting the resource. As discussed herein, this physical solution achieves these goals and benefits all Basin users, consistent with *Mojave* and other established law. Further, as indicated *supra*, the trial court made numerous findings, which were supported by uncontroverted testimony and other uncontroverted evidence in the record, that the Settlement Stipulation provides multiple benefits to all Basin users.

2. Implementing The Settlement Stipulation Does Not Deprive Appellants Of Due Process

LOG incorrectly argues the Settlement Stipulation deprives Appellants of due process because only stipulating parties have a right to be involved in the creation and administration of the monitoring program. (See LOG AOB, pp. 108-09.) This argument should be rejected because (1) the monitoring program does not affect water rights of any parties, including Appellants; (2) Appellants provide no legal authority supporting this argument; and (3) the proposed monitoring program was subject to a public hearing and public

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[9] It bears noting that in LOG's brief, page 98, it asserts the Settlement Stipulation allows groundwater exportation during times of shortage. To the contrary, the Settlement Stipulation and Judgment both specifically prohibit groundwater exportation at all times unless the return flows generated by uses outside the Basin, return to the Basin. (CT-2, Vol. 1, p. 4 [Judgment After Trial (Jan. 25, 2008)]; CT-2, Vol. 1, at pp. 10, 26-27, 42 [Settlement Stipulation (June 30, 2005)].)

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comment (LOG submitted written comments), as well as a noticed motion for trial court approval. (See, e.g., CT-5, Vol. 2, pp. 271-79, 285-89 [LOG Comment on Proposed Nipomo MMA Program (Aug. 22, 2008)].)

3. The Trial Court's Continuing Jurisdiction Is Based On Article X, Section 2 Of The California Constitution

Appellants criticize the trial court's continuing jurisdiction over the Settlement Stipulation, and the physical solution therein, as an "improper expenditure of public resources." (LOG AOB, pp. 109-10.) Specifically, Appellants dislike the allocation of court resources on "administrative" tasks, i.e., overseeing the implementation of the physical solution, arguing, without legal authority, that the court's role is more properly reserved for "adjudicatory" functions, here, the resolution of disputes among all the parties. (*Ibid.*)

As explained above, a physical solution is an equitable remedy enforceable by the trial court, which "sit[s] as a court of equity" and, "possesses broad powers to see that justice is done." (*Lodi, supra,* 7 Cal.2d 316 at p. 341; *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560-61 ["*Vail*"].) Courts, in turn, rely on continuing jurisdiction to ensure a physical solution is effective and to make adjustments, where necessary, to satisfy state water policy goals. (*Pasadena, supra*, 33 Cal.2d. at p. 937 ["[w]here a judgment provides for a physical solution of the rights of litigants to the use of water, and includes therein appropriate flexibility to meet pertinent changes and developments, it is proper that a trial court should retain jurisdiction"]; see, e.g., *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424, 452-53 [jurisdiction retained to adjust physical solution to avoid undue burden attributable to changes

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in rate, amount, and time of diversions]; *Vail*, *supra*, 11 Cal.2d 501 at pp. 558-60, 562 [jurisdiction retained to determine practicality of physical solution and to make necessary adjustments over time]; *Lodi, supra,* 7 Cal.2d 316 at p. 341 [jurisdiction retained to determine new, changed, and additional sources of water]; *Peabody, supra*, 2 Cal.2d at pp. 382-83.)

As the California Supreme Court has held, the trial court not only has the power to do so "but should reserve unto itself the right to change and modify its orders and decree as occasion may demand, either on its own motion or on motion of any party." (*Peabody, supra*, 2 Cal.2d at 382-383; see also *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 81 ["*Glendale*"].) "The retention of jurisdiction to meet future problems and changing conditions is recognized as an appropriate method of carrying out the policy of the state to utilize all water available." (*Pasadena, supra*, 33 Cal.2d at pp. 937-38.) The inevitable changes over time in groundwater basin hydrologic conditions make a physical solution, and the court's continuing supervisory power over it, a crucial remedy in groundwater adjudications. (*Ibid*.)

Appellants label the Constitutionally-prescribed duty an "improper expenditure of public funds." (LOG AOB, pp. 109-10.) Their argument is wrong as a matter of law.[10]

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[10] Failure on the part of an appellant to articulate a pertinent or intelligible argument on an issue in an opening brief is cause for its abandonment in the discretion of the Court of Appeal and no further discussion on that point is warranted. (*City of Arcadia v. State Water Resources Control Bd*. (2006) 135 Cal.App.4th 1392, 1431 ["[w]here a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion."] ["*Arcadia*"]; cf. *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.)

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4. The Trial Court Appropriately Accepted Limitations In The Settlement Stipulation

LOG incorrectly claims the Settlement Stipulation "improperly dictates what the court is required to do and what the court is prohibited from doing," citing, for example, a provision of the Settlement Stipulation that limits the trial court's reserved jurisdiction. LOG cites no legal support for this argument, so it should be disregarded. (See, *supra*, fn. 10.)

LOG's argument should also be rejected because LOG does not, and cannot, show how these alleged "limitations" in the Settlement Stipulation prejudice or harm LOG. The primary paragraph cited by LOG, Paragraph IX(A) of the Stipulation, is a standard contract provision protecting the stipulating parties' rights, agreed to by the parties and by the court, from subsequent modification by the court. (See CT-2, Vol. 1, p. 44.) A court, exercising its continuing jurisdiction, may not alter a settlement agreement's material terms to reflect terms not contemplated by the parties. (See, e.g., *Weddington Productions, Inc. v. Flick* (1968) 60 Cal.App.4th 793, 810.)

LOG improperly contends Paragraph X(A) of the Settlement Stipulation, which permits settling parties to be released from the Stipulation if Paragraph IX(A) is materially altered, renders the finality of the Judgment suspect, and deprives Appellants of the ability to have their groundwater rights "enforced and protected by the court in violation of the law and public policy." (LOG AOB, p. 113.) The argument is nonsensical because LOG's rights, if any, are not impacted by the Settlement Stipulation or the potential withdrawal of any party from the Settlement.

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5. Appellants' Argument Regarding Judicial Conflict Of Interest Is Raised For The First Time On Appeal And Is Waived

Appellants' argument regarding a potential trial court conflict of interest related to its involvement in settlement discussions which resulted in the Settlement Stipulation is untimely and was waived. Appellants knew Judge Komar was participating in settlement discussions with the parties, and Appellants failed to object. Retroactive claims regarding potential conflicts raised for the first time on appeal are appropriately dismissed. (Cf. *In re Steven O.* (1991) 229 Cal.App.3d 46, 54 ["one manner in which a party may waive a judge's disqualification is by failing to raise the issue promptly . . . the matter cannot then be raised for the first time on appeal"]; *People v. Scott* (1997) 15 Cal.4th 1188, 1207 [challenge raised for first time on appeal not timely, particularly when defendant knew all facts pertinent to the issue of impartiality months before seeking disqualification].) Thus, Appellants' failure to timely and appropriately raise this issue is fatal to their claim on appeal.[11]

6. Physical Solutions Regularly Establish Governing Bodies To Manage of Groundwater Resource

Physical solutions frequently include a watermaster, and watermasters typically include governing bodies of public and private stakeholders to manage adjudicated basins. (See generally *Mojave, supra,* 23 Cal. 4th at pp. 1249-50.) Appellants wrongly assert the physical solution violates the Fourteenth Amendment by delegating to the Twitchell Management Authority ("TMA"), the decision-making power for capital improvements. Like the TMA, watermaster

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[11] Even if this were a viable claim, which it is not, there is no showing of harm or prejudice to Appellants, and as discussed earlier in section V.A.2 of this Brief, is not reversible error.

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committees are regularly composed of basin stakeholders—i.e., groundwater producers—including private for-profit entities. For example, in the Upper San Gabriel Basin adjudication, the court created a watermaster board comprised of six members nominated by public and private groundwater producers and an additional three members nominated by the two public water districts in the that basin. (*Upper San Gabriel Valley Municipal Water District v. City of Alhambra* (1973) Super. Ct. Case No. 924128, at p. 24.) The physical solution vested the board with substantial discretion in the annual operation of the basin. (*Ibid*.)

The cases cited by Appellants stand for a different proposition not presented here, namely that "the delegation of *absolute legislative discretion*" to an administrative body "with no guide for the exercise of the delegated authority" is not proper. (*State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal.2d 436, 448 (emphasis added) ["*Thrift-D-Lux*"]; see also *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 225 ["*Blumenthal*"].) In those cases, private entities were granted unlimited discretion to give meaning to certain code sections. The effect of the delegation was that dispensing opticians decided who could enter the profession, doctors determined whether a pregnant woman had the right to an abortion, and active members of the dry cleaning industry dictated fundamental business decisions—by setting the minimum price schedule—for the entire industry. (*Blumenthal*, at p. 239; *People v. Belous* (1969) 71 Cal.2d 954, 972-73; *Thrift-D-Lux Cleaners,* at pp. 438-40.) Here, the TMA does not make law or exercise legislative functions, and the cases cited by Appellants are therefore inapposite. As usual, Appellants fail to show how they are harmed by this ruling.

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7. The Propriety Of The Physical Solution Was Fully Litigated

Contrary to Appellants' unsubstantiated claim that the Settlement Stipulation "improperly avoids litigation of water basin issues," (LOG Brief, p. 112), the propriety of the physical solution was repeatedly and fully litigated, especially in Phase V. (See CT-1, Vol. 27, pp. 7060-61, 7066-67 [Tentative Decision re Trial Phase V (Nov. 7, 2006)]; CT-1, Vol. 24, p. 6283-86 [Respondent public water suppliers' Phase V Closing Brief (Aug. 14, 2006)]; CT-1, Vol. 28, pp. 7137, 7147-78 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].) Phase V adjudicated, among other things, Appellants' quiet title claims, Appellants' rights to self-help (if any), whether the court should craft a physical solution, and whether the court should enter a single judgment or a separate judgment on the stipulation of the settling parties. (CT-1, Vol. 28, pp. 7136-37 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].)

Moreover, settlements are encouraged as a matter of public policy, and it is absurd for LOG to suggest otherwise. (*MWS Wire Industries, Inc. v. California Fine Wire Co., Inc.* (9th Circ. 1986) 797 F.2d 799, 802 [citing *United States v. McInnes* (9th Circ. 1977) 556 F.2d 436, 441 ["*McInnes*"]; *Williams v. First National Bank* (1910) 216 U.S. 582, 595].) "There is an 'overriding public interest in settling and quieting litigation.' Promotion of this policy requires judicial enforcement of settlement agreements." (*McInnes, supra*, 556 F.2d 436 at p. 441 [citing *Richards Construction Co. v. Air Conditioning Co. of Hawaii* (9th Circ. 1963) 318 F.2d 410; *Van Bronkhorst v. Safeco Corp.* (9th Circ. 1976) 529 F.2d 943, 950].)

8. The Court Did Not Err By Entering A Single Judgment

LOG erroneously contends the lower court was required to

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enter at least two judgments in this matter. The first judgment would implement the Settlement Stipulation, and the second judgment would adjudicate the rights of Appellants. Yet LOG fails to cite any authority holding a settlement cannot be part of a single judgment.

Contrary to LOG's unsupported of the judgments in complex proceedings, the Code of Civil Procedure authorizes a single judgment against several defendants based on different claims. Code of Civil Procedure section 379, subsection (b), provides: "[i]t is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities."[12]

The court correctly entered a single judgment in this matter, and Appellants cannot show that their rights would be better protected if there were two judgments.

E. The Court Correctly Found The District Can Allocate Twitchell Water Consistent With The Settlement Stipulation

1. Appellants Do Not Have Rights To Twitchell Water

a. Appellants Do Not Have Common Law Rights To Twitchell Water

Appellants did not succeed on their claims to quiet title. (See, e.g., CT-1, Vol. 2, pp. 312-30 [First Amended Cross-Complaint of Landowner Group Parties (March 31, 1999)]; (CT-2, Vol. 1, p. 6 [Judgment After Trial (Jan. 25, 2008)].) The trial court found only that the LOG and Wineman Parties owned the real property listed in Exhibit 2 to the Judgment After Trial. (CT-3, Vol. 1, p. 4 [Judgment

[12] Compare California Rules of Court, Rule 1545(c), which requires separate judgments in actions which are coordinated, but not consolidated. These proceedings were ordered consolidated on March 6, 2000.

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After Trial (Jan. 25, 2008)]) Thus, Appellants' overlying rights, if any, are limited to overlying rights associated with that land. Moreover, even if Appellants had succeeded on their quiet title claims, they would only be entitled to those rights associated with overlying property ownership; that is, correlative rights in the Basin's native yield. (*Glendale, supra*, 23 Cal.2d at 76-78.)

The undisputed evidence is that the water captured in the Twitchell Reservoir is surface water from the Cuyama River. (CT-1, Vol. 28, p. 7165 [Partial Statement of Decision re Phase IV (Jan. 8, 2007)]; RT-1, Vol. 27, p. 6257:10-14 ["we know one important fact that is not in dispute about Twitchell water. And that is it's water from the Cuyama River, surface water, that is trapped by the Twitchell Reservoir Project…"].) Pursuant to California law, the Bureau of Reclamation was required to obtain a license from the State Water Resources Control Board ("State Board") to appropriate the Cuyama River surface water and store it in Twitchell Reservoir, for later augmented groundwater recharge. (*Ibid.*) Water released from the Twitchell Reservoir percolates into the Basin, rather than wasting to the Pacific Ocean. As described in the Bureau's application to the State Board to appropriate Cuyama River water:

> Vaquero Reservoir [now Twitchell Reservoir] would detain the Cuyama River flows during periods when these flows would waste to the ocean. Then the conserved water would be released downstream at rates equal to, or less than, the percolation capacity of the Santa Maria River channel. It will be stored in the underground reservoir to be later pumped for beneficial use within the described Potential Service Area[.] (Phase IV Ex. F, p. 4 [State of California, Department of Public Works, Division of Water Resources, Application No. 11344 to Appropriate Unappropriated Water, (March 25, 1946)].)

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Substantial evidence established that water recharged from the Twitchell Reservoir supplements and augments the yield of the Basin by approximately 32,000 AFY, on average. (RT-1, Vol. 40, p. 7515.)

The overlying right of a landowner extends only to the native supply. The overlying right does not include developed or supplemental water supplies. (*San Fernando, supra,* 14 Cal.3d at pp. *256-62, 288*; *Pomona Land and Water Company v. San Antonio Water Company* (1908) 152 Cal. 618, 623-24 ["full recognition is accorded of the right to water of one who saves as well as of one who develops it"].) Like riparian rights to a surface stream, overlying rights only extend to the natural or native water supply and do not attach to developed or supplemental water that would not be available absent human intervention. (*Glendale*, *supra*, 23 Cal.2d at pp. 76-78; *Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343, 348-50 ["*Stevens*"]; *Haun v. DeVaurs* (1950) 97 Cal.App.2d 841, 843-45; *Crane v. Stevinson* (1936) 5 Cal.2d 387, 400 ["*Crane*"]; see also In the Matter of Treated Waste Water Change Petition WW-20 of El Dorado Irrigation District, WR 95-9 (1995) [finding water stored from a prior season to be beyond the claim of riparian rights].) As the *Mojave* court stated:

> Private defendants should be awarded the full amount of their overlying rights, less any amounts of such rights lost by prescription, from the part of the supply shown to constitute *native ground water*. (*San Fernando, supra,* 14 Cal.3d at pp. 293-94; *Mojave, supra,* 23 Cal.4th at p. 1247 [citing *San Fernando* for this proposition] (emphasis added).)

Thus, Appellants' common law rights, alleged but never proven, do not extend to supplemental water supplies, such as Twitchell water, that would not be present in the Basin absent human intervention.

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2. Appellants Do Not Have Contract Rights In Twitchell Reservoir

As described above, the Bureau of Reclamation received a license to appropriate water from the Cuyama River for the Twitchell Project. In doing so the Bureau was following California law and there is no evidence that Congress intended to supplant state water rights law. (*California v. United States* (1978) 438 U.S. 645 ["*California v. United States*"]; *Klamath Irrigation District v. United States* (2005) 67 Fed. Cl. 504.)

Further, there is no evidence, and the court correctly concluded, that Appellants are not intended third party beneficiaries to those contracts or that any other special type of "contract right" inures to the benefit of Appellants. (CT-1, Vol. 28, p. 7169 [Partial Statement of Decision re Phase IV (Jan. 8, 2007)].)

3. The District Is Authorized To Allocate Twitchell Water By Contract

After the Bureau obtained the water rights permit (now license) required under California law, the Bureau contracted with the Santa Barbara County Water Agency to operate the Twitchell Project, which then contracted with the District. The District is a water conservation district organized under Water Code section 74000, *et seq.* Water Code sections 74501, 74526 and 74592 authorize the District to do the following:

> Section 74501. A district may make contracts and do all acts necessary for the full exercise of its powers.

> Section 74526. A district may sell, deliver, distribute, or otherwise dispose of any water that may be stored or appropriated, owned, or controlled by the district.

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> Section 74592. A district may enter into contracts with municipalities, water districts of any type or kind, counties, cities and counties, the State of California, or the United States, under such terms as may be mutually advantageous, for the acquisition or disposal of water or water rights or water storage facilities and rights, or any interest in such water, water rights, or water storage facilities and rights for any useful purpose.

Consistent with the District's Water Code powers, the District entered into a contract, the Settlement Stipulation, which contractually approved the Twitchell Project water allocation in a fair and reasonable manner, one that carries out the District's statutory and contractual functions. The Settlement Stipulation allocates water made available by the Twitchell Project to stipulating parties that agreed to fund the improvements needed to maintain the Project's yield and ensure Twitchell's ongoing operation.

The parties that have been allocated Twitchell Yield under the Settlement Stipulation, Santa Maria; GSWC; Guadalupe; and, stipulating overlying property owners whose property lies within the boundaries of the District, have committed to fund between $500,000 to $700,000 annually for Twitchell improvements. (See CT-1, Vol. 17, pp. 4534-35.)

As the trial court correctly concluded in the Statement of Decision re Trial Phase V, "[t]he District's contractual agreement to permit certain parties to pay for the on-going operation and management of the project, including any necessary improvements to the project, a project that will continue to benefit the entire valley and all valley parties, and to compensate those parties for their financial commitments, is entirely consistent with the District's statutory authorities." (CT-1, Vol. 28, p. 7146.)

In the Statement of Decision Re Trial Phase 5, the trial court

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further held:

> So long as the District uses [Twitchell] water for the general purposes prescribed by its contract with the Santa Barbara County Water Agency, and properly exercises its statutory powers in that regard for the public good within the District, it may regulate and allocate the Twitchell Water consistent with its contract and under the terms of the License. Thus, the District does have the right to provide by contract (the settlement stipulation) for the ongoing maintenance and operation of the Twitchell project, and in doing so, to carry out its contractual duties arising out of the contract between the U.S. Department of the Interior (Bureau of Reclamation) and the Santa Barbara County Water Agency and the District. (CT-1, Vol. 28, p. 7145 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].)

The trial court's conclusion is consistent with the evidence and California law.

LOG incorrectly asserts that the trial court "transferred rights to water from the Twitchell Reservoir" to Santa Maria, GSWC and Guadalupe by ratifying the District's Settlement Stipulation contractual allocation. (LOG AOB, pp. 75-76.) The water rights associated with the Twitchell Project are held by the Bureau and administered by the District through its operation of the Project. In allocating the Twitchell water in the Settlement Stipulation, the District did not transfer *any water rights*. Instead, it merely allocated the Twitchell Project water supply by specifying that, in times of shortage, certain parties have a contractual right to a priority use of that supply.

LOG also incorrectly asserts that "[t]he Judgment must . . . reflect that the Purveyor Parties failed to prove priority to Twitchell water on any theory." (LOG AOB, p. 77.) The Judgment correctly states that "[n]o party established a pre-Stipulation priority right to

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any portion of that increment of augmented groundwater supply within the Basin that derives from the Twitchell Project's operation." (CT-2, Vol. 1, p. 5 [Judgment After Trial (Jan. 25, 2008)].) The Settlement Stipulation does not confer water rights associated with the Twitchell Project on any party (only the Bureau would have the authority to transfer these rights). Instead, the Settlement Stipulation confers a contractual priority to use the Twitchell Project's water supply. The Settlement Stipulation was specifically incorporated into the Judgment and made binding as between the stipulating parties. (*Id.* at p. 2.) Thus, the Judgment fully addressed this trial issue.

4. The District Has The Power To Allocate Water Based On Priority In Times Of Shortages

Appellant Wineman Parties incorrectly argue that the physical solution cannot allocate a priority to water to Santa Maria and GSWC in shortage situations. (Wineman AOB, pp. 16-17.) They misplace their reliance upon *Leavitt v. Lassen Irrigation Co.* (1909) 157 Cal. 82, and other cases as legal support for this position. (*Ibid.*) *Leavitt* and the other cases do not support the contention that consumers may not receive priority *contractual* rights, but instead illustrate that preferential allocations between classes of consumers created by contract are typical and permissible, such as the well-established practice of the Bureau to grant priority contractual rights in connection with the Central Valley Project. (See, e.g., *Madera Irrigation District v. All Persons* (1957) 47 Cal.2d 681, 692-93, *revd.* *Ivanhoe Irrigation Dist. v. McCracken* (1958) 357 U.S. 275 ["*Madera*"].)

In *Leavitt*, the court distinguished between the plaintiff's claim to a private property right in certain water appropriated for public use,

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and a water consumer's contractual right to service. (*Leavitt, supra,* 157 Cal. at pp. 89-93.) The court found that water appropriated for distribution and sale could not be converted to *private property* that would attach to a specific piece of land as an appurtenance to the exclusion of all others. (*Id*. at pp. 89-90.)

Leavitt, however, stated: "It does not follow that a water company may not make specific contracts with individual consumers which are within the purview of the constitution and within valid legislative enactments regulating the public use." (*Id*. at p. 90.) The court went on to state that: "We are not to be understood as saying that the company may not fix the limits of its territory, and lawfully agree to supply its waters, first, to the lands within that territory, and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied." (*Id*. at p. 92.) The court's example is analogous to the facts here. The District has lawfully recognized two classes of consumers based upon their contributions to the cost of maintenance of the Twitchell Project, and has allocated priority between the classes by contract in proportion to their respective contributions. This allocation is not contrary to any provision of law.

In *Madera, supra,* 47 Cal.2d 681, which is cited by Appellant Wineman Parties, the California Supreme Court explicitly recognized Madera Irrigation District's "*permanent priority right to contract* for an annual supply of water from" the Bureau in connection with the Central Valley Project while simultaneously holding that individual landowners within the district did not develop a private freehold right to that water. (*Id.* at pp. 686, 692-93 (emphasis added).) The priority contractual rights granted and recognized in *Madera* are no different than the preference set forth in the physical solution at issue here. In

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both cases, the appropriator is the Bureau and the preferential right is established by contract.

This distinction between a private property right to water and a contractual right to service, is again explained in *Butte County Water Users' Association v. Railroad Commission of California* (1921) 185 Cal. 218 ["*Butte County"*]. *Butte County* is an unremarkable case establishing that a public utility's water supplies are dedicated to public use within its retail service area and that users cannot be classified according to longevity on the system. In *Butte County*, all persons within the service areas were entitled to retail service under reasonable conditions and could not be deprived of such service. These public, retail water service cases are distinguishable from the facts in this case.

Here, the District is operating a water conservation and recharge facility pursuant to a permit from the State Board and is not limited by principles applicable to retail public utilities. The District can allocate the water it controls pursuant to its specific statutory authority. Furthermore, the District is allocating the water to persons willing to pay for substantial costs necessary to maintain the operation of the Twitchell Project.

5. The District's Allocation Of Twitchell Water Is Consistent With The Twitchell Project's Water Rights License

The undisputed substantial evidence is that the water captured in the Twitchell Reservoir is surface water from the Cuyama River. (See CT-1, Vol. 28, p. 7165 [Partial Statement of Decision re Phase IV (Jan. 8, 2007)].) Pursuant to California law, the State Board License exclusively governs and controls Twitchell's storage and water use. Twitchell Project water can only be used consistent with

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the License terms. (See Wat. Code, §§ 1628, 1675.)

The License provides that Twitchell Project water can be used for "irrigation, domestic, salinity control, municipal, industrial, and recreational uses." (Phase IV, Ex. DD, p. 1.) Consistent with these License provisions, the Settlement Stipulation allocates Twitchell water for municipal, domestic and irrigation uses. (CT-1, Vol. 17, pp. 4253, 4530 [Stipulation (June 30, 2005 Version)].) Thus, the District's contractual commitment in the Settlement Stipulation to allocate the benefits of Twitchell Project operations is consistent with the Project's water rights license.

LOG incorrectly asserts that "[t]he water rights license held by the Federal Government is limited to temporary impoundment of the surface water. . . . Once released from the reservoir into streams and watercourses within the basin, this water is unappropriated pursuant to Water Code section 1202(d) and is available for use by all."[13] (LOG AOB, p. 77.) As misplaced support for this inaccurate assertion, LOG cites Phase IV Trial Exhibit F, which is the Bureau's Application to Appropriate Water and the initial Permit that was granted by the State, not the License. (See Phase IV, Ex. DD.) LOG's argument is not supported by the language of the Application, the Permit, or the License. Indeed, the very document cited by LOG specifically states that the purpose of the proposed appropriation is to impound water that would otherwise waste to the ocean and then

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[13] Although LOG fails to provide the applicable language in its brief, Water Code section 1202(d) provides as follows:

> The following are hereby declared to be unappropriated water: (d) Water which having been appropriated or used flows back into a stream, lake or other body of water. (Wat. Code, § 1202(d).)

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release that water for recharge into the underground reservoir "to be later pumped for beneficial use." (Phase IV Ex. F, p. 4.) The language directly contradicts LOG's argument that the water is abandoned after leaving the Twitchell Reservoir.

In addition to the language cited above regarding the purpose of use, the License specifically includes in the place of use land within the Santa Maria Valley. (Phase IV, Ex. DD, p. 1 [describing place of use as "recreational use at Twitchell Reservoir; domestic, municipal, industrial, salinity control, and irrigation of 31,000 acres within a gross irrigable area of 45,900 acres; all being within a gross area of 73,000 acres"].) This language is entirely inconsistent with LOG's argument that the License extends only to temporary impoundment behind the Reservoir and then is abandoned. Instead, the License language conclusively shows that the water was intended to be released and then placed to beneficial use within the Valley. Because of this, the District's allocation of Twitchell water for use within the Santa Maria Valley, is consistent with the license terms.

6. State Law, Not Federal Reclamation Law, Governs The Allocation Of Twitchell Yield

Federal law requires that water rights and water distribution in California be subject to state law. In enacting section 8 of the Reclamation Act in 1902, codified at section 383 of title 43 of the United States Code. Congress required the Bureau of Reclamation to defer to state law on the allocation of water rights:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with

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> such laws, and nothing herein contained shall in any way affect any right of any State or the Federal Government or any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof….

The United States Supreme Court, in *California v. United States* , *supra,* 438 U.S. 645, reaffirmed the paramount role of state law with respect to water allocation and the use of water in federal reclamation projects:

> [states] may impose any condition on the "control, appropriation, use, or distribution of water" through a federal reclamation project that is not inconsistent with clear congressional directives regarding the project. (*Id.* at p. 672.)
>
> . . .
>
> Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the "control, appropriation, use or distribution of water." . . . . The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." (*California v. United States, supra,* 438 U.S. at pp. 674-75.)

Section 8 of the Reclamation Act and *California v. United States* mandate that state law govern the water rights associated with the Twitchell Project. Appellants' arguments (see, e.g., Wineman AOB, pp. 12-14) are inconsistent with the Reclamation Act and Supreme Court case law. [14]

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[14] In *United States v. California State Water Resources Control Board* (9th Circ. 1982) 694 F.2d 1171, the Ninth Circuit distinguished between allocation of project water, which is governed by state law,

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7. Undisputed Substantial Evidence Showed That Congress Intended The Benefits Of The Twitchell Project To Extend To Both Municipal And Irrigation Purposes

Appellants argue that water from the Twitchell Project is for the benefit of agricultural uses. (See Wineman AOB, p. 12-13.) Specifically, they argue that Reclamation Projects must prefer agricultural uses over municipal uses. The Phase IV evidence established that the Twitchell Project was planned and developed with the intent to supply water for domestic and municipal purposes as well as for irrigation. Examples from the historical documents submitted by Respondents include the following:

- On March 25, 1946, the U.S. Bureau of Reclamation filed with the California Department of Public Works, Division of Water Resources, Application Nos. 11343 and 11344 to Appropriate Unappropriated Water. The "Supplement to Application No. 11343," which was included with the application, stated that the "quantities applied for and indicated under (b) of this application will be the same water applied for under Application 11344 for municipal and industrial purposes" and that "water released from Vaquero Reservoir will contribute to ground water to assist in maintaining a fresh water barrier to salt water encroachment in the areas along the coastal plain." (Phase IV, Ex. E [State of California, Department of Public Works, Division of Water

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and project operations, which generally remain within the purview of the federal government. (*Id.* at p. 1182.) Here, however, the Bureau delegated, by contract, Twitchell Project operations to the District. (Phase IV, Exs. Y, Z.)

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Resources, Application No. 11343 to Appropriate Unappropriated Water, March 25, 1946].)

- On March 25, 1946, the U.S. Bureau of Reclamation also filed with the California Department of Public Works, Division of Water Resources, Application No. 11344 to Appropriate Unappropriated Water. Under item 3 ("The use to which the water is to be applied") Application No. 11344 stated "municipal and industrial." The Application also stated that it was "made for the purpose of serving Santa Maria, Guadalupe, Orcutt, Betteravia, Sisquoc, and Garey having a population of 20,000." The "Supplement to Application 11344" explained that: "Water demands for municipal and industrial purposes will be supplied as required to cities, towns, and other municipalities presently in existence or as may be created . . . ." (Phase IV, Ex. F, p. 3 [State of California, Department of Public Works, Division of Water Resources, Application No. 11344 to Appropriate Unappropriated Water, March 25, 1946].)
- The Bureau's 1951 "Project Planning Report" stated that the Santa Maria Project "would add sufficient water to the ground-water reservoir to overcome the present average annual overdraft of 14,000 acre-feet, provide for anticipated municipal and industrial growth, and provide enough additional yield to irrigate 3,000 acres of presently nonirrigated land for 50 years." (Phase IV, Ex. H, p. 29 [U.S. Bureau of Reclamation, "Santa Maria Project, Southern Pacific Basin, Calif., Project Planning

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Report of November 1951," contained in U.S. Congress, House, Letter from [the] Secretary of the Interior Transmitting A Report on the Santa Maria Project, California, Pursuant to the Provisions of Section 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) H. Doc. 217, 83 Cong., 2 sess., July 29, 1953.)

- Following the authorizing legislation for the Santa Maria Project, in September 1955, the U.S. Bureau of Reclamation released its "Santa Maria Project, California, Definite Plan Report." Chapter III, entitled "Water Requirements," stated:

> The present municipal and industrial water use is about 7,500 AFY. Based on the trend of past use of water for municipal and industrial purposes in the Santa Maria Project service area and an increasing population, the ultimate gross water requirement for that use is expected to be 10,000 AFY. Any larger increase in municipal and industrial water use will be offset by a reduction in irrigation requirements as these uses will take over irrigated lands. (Phase IV, Ex. X [U.S. Bureau of Reclamation, "Santa Maria Project, California, Definite Plan Report," Sept. 1955, at pp. 28-29].)

- On December 23, 1974, the State Board granted to the U.S. Bureau of Reclamation License No. 10416 for Diversion and Use of Water from the Santa Maria River for the Santa Maria Project. The License stated that the purposes of the diversion and use were "irrigation, domestic, salinity control, municipal, industrial and recreational uses." The License added that the description of the lands or place of use was "recreational use at Twitchell Reservoir; domestic, municipal, industrial, salinity control, and irrigation of 31,000 acres

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> within a gross irrigable area of 45,900 acres; all being within a gross area of 73,000 acres[.]" (Phase IV, Ex. DD, p. 1 [License for Diversion and Use of Water, License No. 10416, Dec. 23, 1974].)

These documents, together with the other historical documents in evidence, clearly establish that Congress intended the Twitchell Project to provide water for municipal and domestic purposes, in addition to irrigation. Appellant Wineman's arguments are contrary to the substantial evidence before the trial court. (See Wineman AOB, pp. 12-14.)

F. Substantial Evidence Supports The Court's Finding Of Prescription

An appropriative taking of non-surplus water may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under a claim of right. (*San Fernando, supra*, 14 Cal.3d at 282 [citing *Pasadena, supra*, 33 Cal.2d at pp. 926-27].) Once the property has been adversely used for five years, prescriptive title vests in the claimant. (*Pasadena,* at pp. 930-33.)

A prescriptive water right is a permanent right to use water acquired when the elements for adverse use are met. The title is sufficient to bar any action for the recovery of that property and therefore is absolute. (Civ. Code, § 1007; *Eden Township Water Dist. v. City of Hayward* (1933) 218 Cal. 634, 640 [when the prescriptive period runs the right is vested] ["*Hayward*"].) At the end of the five-year period, the adverse claimant owns the property and may defend an action concerning property ownership or bring an action to quiet title in the property. (Code Civ. Proc., § 761.020; see *Mings v.*

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Compton City School Dist. (1933) 129 Cal.App. 413.)

Any continuous five-year adverse use period is sufficient to vest title in the adverse user, whether immediately preceding the filing of a complaint to enjoin the adverse use or otherwise. (*Pasadena, supra,* 33 Cal.2d at pp. 930-33 [upholding the trial court's determination that water pumped from the groundwater basin exceeded the basin's safe yield during the period 1913-14 to 1933-34, but not in two of the three years immediately preceding the filing of the complaint]; *Lee v. Pacific Gas & Elec. Co.* (1936) 7 Cal.2d 114, 120 ["it must be continuous and uninterrupted for a period of five years prior to the commencement of the action, not, however, necessarily next before the commencement of the action"].)

The lower court held that, according to undisputed substantial evidence presented by the Respondents during Trial Phases III and IV, the elements of prescription were met during the periods 1944 through 1951, 1953 through 1957, and 1959 through 1967. Specifically, based on the evidence presented at trial, the court concluded that Santa Maria proved a 5,100 AFY prescriptive right, and GSWC proved a 1,900 AFY prescriptive right. The court arrived at these numbers by utilizing the lowest continuous water pumped by Santa Maria and GSWC, respectively, during five consecutive years in which the prescriptive elements were met. (CT-1, Vol. 28, p. 7161 [Partial Statement of Decision re Phase IV (Jan. 8, 2007)].) As explained below, substantial evidence overwhelmingly supports the court's decision.[15]

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[15] LOG wrongly argues that the trial court erred by purportedly failing to require proof of prescription "by clear and convincing evidence." (See, e.g., LOG AOB, p. 50.) The obligation upon the claimant proving prescription is discharged by a preponderance of the evidence

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1. Substantial Evidence Supports The Court's Conclusion That Santa Maria And GSWC Demonstrated Notice

The party against whom a prescriptive right is sought must have either actual or constructive notice of the adverse taking. (*Bennet v. Lew* (1984) 151 Cal.App.3d 1177, 1184 ["the requisite elements for a prescriptive easement are designed to insure that the owner of the real property which is being encroached upon has actual or

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and not by "clear and convincing evidence" as Appellants claim. (*Skelly v. Cowell* (1918) 37 Cal.App. 215, 217.) Nonetheless, although the Statements of Decision and Judgment do not specifically refer to the standard of proof, the trial court noted the overwhelming, unrebutted evidence supporting prescription, and the court concluded in the Phase III Statement of Decision that prescription must be proven by clear and convincing evidence. Thus, even if the standard of proof is "clear and convincing," as LOG suggests, it can be inferred that the court concluded that the "clear and convincing" standard had been satisfied. As described herein, the unrebutted evidence presented during Phases III, IV and V of the trial was more than sufficient to meet a "clear and convincing" standard of proof. Numerous documents showing these facts were either judicially noticed or admitted into evidence over hearsay objections. The court correctly noted that, regardless of whether the documents were admissible under an exception to the hearsay rule, the court relied on the documents not for the truth of the matter asserted, but to show actual or constructive notice of overdraft conditions before and during the time Twitchell was constructed. Thus, the documents were not relied upon for hearsay purposes, and Appellants' arguments to the contrary must be rejected. (Evid. Code, § 1200(a) ["'hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated"].) Further, the court correctly rejected LOG's argument that reports and studies shown to be "inaccurate" cannot be used to impart notice. Even if such documents were shown to be inaccurate (LOG made no such showing), inaccuracy does not negate notice. The court correctly concluded that it is the existence of the documents, and the notoriety of groundwater conditions in the community, that created notice, not the accuracy or inaccuracy of the documents.

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constructive notice of the adverse use"] (emphasis added); *Kerr Land & Timber Co. v. Emmerson* (1969) 268 Cal.App.2d 628, 634 ["it is settled that to establish rights by adverse use the owner must be notified in some way that the use is hostile and adverse but actual notice is not indispensable. Either the owner must have actual knowledge or the use must be so open, visible and notorious as to constitute reasonable notice"].)

The standard for notice in groundwater basins is falling water levels or other relevant evidence such that pumpers can reasonably be charged with notice that there is a deficiency of water supply. (*Pasadena, supra,* 33 Cal.2d at p. 930.) Thus, constructive notice of adverse conditions, by which a party "should reasonably be deemed to have received notice of the commencement of overdraft," is sufficient to establish prescriptive rights. (*San Fernando, supra,* 14 Cal.3d at p. 283.)

a. Undisputed Substantial Evidence Presented By Santa Maria And GSWC Demonstrated That Prior To The Construction Of Twitchell Reservoir, Water Levels Were Declining

Here, undisputed evidence demonstrated that, prior to the time the Twitchell Dam and Reservoir were constructed, the conditions of depleted water levels within the Basin were well known, or should have been known, to all water users within the Basin. Overwhelming evidence showed that the parties and their predecessors-in-interest were on notice of the wide fluctuation in the water levels in the aquifer as well as the actions of political leaders, the Acts of Congress, and the public notoriety surrounding the need for the construction of the Twitchell Project (as well as the Lopez Project) to augment the Basin's supply. There was also ample notice that the

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municipalities and the water companies continued to pump during drought times.

Specifically, written historical evidence offered in Trial Phases III and IV confirmed that the existence of overdraft prior to 1967 was widely known throughout the Basin. Undisputed evidence showed that Basin groundwater has been consumptively used since the late 1800s, with the first indication of overdraft in the 1930s. (See Phase IV, Ex. X [Bureau of Reclamation, Santa Maria Project: Southern Pacific Basin, California, Project Planning Report (Nov. 1951) at pp. 33-34].) The Bureau of Reclamation reported that by 1936, groundwater levels had reached their lowest levels on record. (*Ibid.*) By 1951, the Bureau reported a critical water shortage. (*Ibid.*) The Geological Survey, Department of Interior reported that the perennial yield was being exceeded by approximately 12,000 AFY and that continued yearly overdrafts with no additional source of supply would result in a permanent depletion of storage and water levels far below their low level in 1936. (*Ibid.*; See Phase III, Ex. F-7 [Worts, Geological Survey Water- Supply Paper 1000, Geology and Ground-Water Resources of the Santa Maria Valley Area, California (1951) at pp. 2, 129].) The 1966 USGS report prepared in cooperation with the Santa Barbara County Water Agency reported a decrease in groundwater storage from 3,070,000 AF in 1918 to 2,360,000 AF in 1950, as well as an average annual decrease in storage of 21,000 AF between 1918-1959. (Phase III, Ex. F-9 [G.A. Miller & R.E. Evenson, Utilization of Ground Water in the Santa Maria Valley Area, California, USGS Water-Supply Paper 1819-A (1966) at A7].)

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b. Evidence of Testimony Before Congress Is Substantial Evidence of Declining Water Levels

In addition, Respondents presented Phase III evidence regarding testimony before Congress prior to Twitchell Reservoir's construction, which further showed that declining well levels and water in storage was known by local water users. Phase III evidence included statements by the then-President of the District, Leonald H. Adam, who testified before Congress about the severity of the water supply problems in the area:

> My observations over the years indicate to me that we have a continuously diminishing water supply. Each period of years where we have plentiful rainfall the average water level rises considerably but not to the high point of previous years.
>
> During each period of years where we have drought conditions, the water level continuously recedes to lower and lower levels. There is only one answer to this situation, and that is that eventually the area east of Santa Maria will be out of water excepting during years following heavy rainfall when perhaps the land can be irrigated for a year or so. Each well in the valley is different, depending upon the sands and gravels penetrated by the wells. The overall picture, however, indicates a continuously diminishing supply and eventual exhaustion of the supply. This is obvious to those who are farming and irrigating the land and has been verified by every engineer who has studied the problem. The answer, of course, is not additional wells, but provisions for a supplemental water supply. (Phase III, Exs. F-1 and F-2 [1953 Hearings, at p. 31, testimony of Leonald H. Adam, California, president, Santa Maria Valley Water Conservation District].)

Respondents also presented evidence that John Adam, a one-time director of the District testified that "[a]ll of the farmers who own or farm land west of Santa Maria are equally aware of the fact

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that we do have a water problem." (Phase III, Exs. F-1 and F-2 [1953 Hearings, at p. 42, testimony of John Adam, Director of the Santa Maria Valley Water Conservation District].) Mr. Adam then summarized the severity of the water supply problem:

> Therefore, all of the water users that I have talked to are most concerned about their water situation and are quite aware of the fact that unless we recharge our underground reservoirs with additional and supplemental water we are going to reach a point where we cannot irrigate our land. No one knows when this time will come, but the situation appears to be inevitable at some future date unless we obtain an adequate supplemental water supply. (*Ibid.*)

c. Financial Assessments To Fund Twitchell's Construction And Operation Are Evidence of Constructive Notice

Further, unrebutted Phase III and Phase IV evidence indicated that landowners within the District knew about the Twitchell Project's construction and operation because for 40 years prior to the adjudication, assessments were levied by the District on landowners within the District. (Phase III, Ex. F-15; Phase IV Exs. JJ - LL.)

d. There Is Undisputed Technical Evidence Supporting Notice

Lastly, undisputed technical evidence, including evidence presented by the District's expert, Mr. Scalmanini, indicated that falling water levels were present during the pre-Twitchell period. (CT-1, Vol. 28, p. 7157 [Partial Statement of Decision re Phase IV (Jan. 8, 2007)]; see also Phase III, Ex. 1-63 [Mr. Scalmanini's Water Budget Summary- No Twitchell Scenario]; Phase III, Ex. A-123 [Mr. Foreman's Water Budget Summary- No Twitchell Scenario].)

The trial court correctly found that there was substantial evidence supporting actual or constructive notice of adversity for

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purposes of prescription. Notably, Appellants failed to present any evidence of lack of notice to rebut the inferences of notice to be drawn from the uncontradicted evidence.

LOG argues that the numerous studies cited above could not have imparted notice based on the dates the studies were published. (See generally LOG AOB, pp. 45-47.) LOG's argument misses the point. It is not the studies themselves that imparted notice. Rather, the studies relied on by the trial court, as well as the congressional testimony and other evidence described above, provided evidence that landowners in the Santa Maria Valley either knew or should have known of the overdraft conditions in the Basin, as indicated by dramatically falling water levels and the need to construct the Twitchell Reservoir. The trial court correctly concluded that this evidence was sufficient to impart actual or constructive notice at the time the prescriptive rights were accruing.

LOG also argues that notice requires an expert hydrogeological opinion. (LOG AOB, pp. 47-48.) LOG cites no authority for this argument, and Respondents are not aware of any authority that supports this untenable position.[16]

2. Evidence Supports The Court's Conclusion That Santa Maria And GSWC Met The Burden Of Proving Adversity

The prescriptive period begins when the adverse use element is present. In a groundwater basin, "[t]he commencement of overdraft provides the element of adversity which makes the first party's taking an invasion constituting a basis for injunctive relief to the other

[16] Again, Appellants fail to cite to any law to support the claim made. Failure on the part of the appellant to articulate a pertinent or intelligible argument on an issue in an opening brief is cause for its abandonment . (*Arcadia, supra,* 135 Cal.App.4th at p. 1431.)

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party." (*San Fernando, supra,* 14 Cal.3d at p. 282 [citing *Pasadena, supra,* 33 Cal.2d at pp. 926-27].) The Court in *Pasadena* also found actual adverse use began with the commencement of overdraft because each taking of water in excess of the safe yield was wrongful and injurious. (*Pasadena*, at p. 929.)

Establishing adverse use does not require injury based upon the immediate inability to obtain water. (*Pasadena, supra,* 33 Cal.2d at p. 929.) Adversity for purposes of prescription is present when overdraft begins and extractions exceed safe yield on an annual basis. As stated in *San Fernando*, overdraft commences whenever extractions increase, or the withdrawable maximum decreases, or both, to the point where the surplus ends. (*San Fernando, supra,* 14 Cal.3d at p. 282 [citing *Pasadena*, at pp. 928-29].)

During the period before Twitchell was constructed, only the Basin's native groundwater supplies were available. Dr. Williams testified in Phase IV that the inflow into the Basin, or the native groundwater, during this period was 60,000 AFY. (Phase IV, Ex. F-10.) Moreover, Dr. Williams' native groundwater figure did not include ocean outflow. During Phase III, Mr. Foreman testified that based on historical conditions, a minimum of 8,000-10,000 AFY of outflow are necessary to guard against seawater intrusion. (RT-1, Vol. 12, pp. 3316-17 [Phase III Trial Transcript (Oct. 16, 2003)].) Mr. Scalmanini testified that significantly more water was actually discharging into the Ocean during this time. (See, e.g., Phase III, Ex. F-14; RT-1, Vol. 20, pp. 5127-32 [Phase III Trial Transcript (Dec. 9, 2003)].) Taking the lower ocean discharge number, the evidence showed that the native groundwater less ocean outflow is 50,000 to 52,000 AFY.

Both Mr. Scalmanini and Mr. Foreman produced in-depth

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analyses of Basin withdrawals dating from 1944 through and beyond the date the Twitchell and Lopez Projects became operational. (See Phase III, Ex. 1-63 [Mr. Scalmanini's Water Budget Summary – No Twitchell Scenario]; see also, Phase III, Ex. A-123 [Mr. Foreman's Water Budget Summary – No Twitchell Scenario].) In all years from 1944 through 1962 (and beyond) pumping substantially exceeded Dr. Williams's native yield budget.

Further, the report prepared by Mr. Scalmanini shows falling water levels during the pre-Twitchell period:

> Hydrographs of ground-water elevations in the study area illustrate that a substantial decline in ground-water levels, from historical high to historical low levels, occurred between 1945 and the late 1960's with a progressively greater decline inland from the coast.... The decline ranged from approximately 20 to 40 feet near the coast, 70 feet near Orcutt, to as much as 100 feet further inland (in the area just east of downtown Santa Maria). (Phase III, Ex. F-14 [Development of a Numerical Ground-Water Flow Model and Assessment of Ground-Water Basin Yield, Santa Maria Valley Ground-Water Basin" (March 2000) at p. 14].)

LOG argues that exhibits submitted by Mr. Foreman and Mr. Scalmanini show years of surplus, or non-overdraft conditions, in 1962 and 1967. (LOG AOB, p. 36.) LOG's argument represents a fundamental misreading or misunderstanding of the evidence presented during trial. Contrary to LOG's assertion, Mr. Foreman concluded that total discharge (extractions plus ocean discharge, which is required to avoid seawater intrusion) exceeded safe yield in all but five years between 1944-2000, including 1962 and 1967 (and every year in between). It appears that LOG is arguing that because the annual supply in 1962 and 1967 exceeded total discharge in those years, a "surplus" was created that would defeat prescription.

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However, the proper measure of overdraft, and therefore prescription, is whether the discharge exceeded *safe yield*. Mr. Foreman's evidence clearly indicates that discharge exceeded safe yield in all of the prescriptive periods identified by the court. (See Phase III, Exs. A-65, A-123, A-124 and A-130.) This is true using the safe yield numbers presented by Dr. Williams as well as the safe yield numbers presented by Mr. Foreman. For the same reason, the LOG's reliance on Mr. Scalmanini's Exhibit 1-55 is inapposite. That exhibit is simply a water budget summary showing total withdrawals and total recharge on an annual basis. There is no attempt in exhibit 1-55 to show withdrawals as measured against safe yield. (See Phase III, Exs. 1-55.)

In sum, the evidence offered during Phase III and Phase IV support the court's conclusion that Santa Maria and GSWC proved, by clear and convincing evidence, that the Basin was in overdraft from at least 1944 through 1951, 1953 through 1957, and 1959 through 1967.

3. The Court Utilized The Correct Standard Of Overdraft

Following the Phase III trial, the court found that the Respondents had not yet met the burden of proving that the Basin was in hydrologic overdraft, as defined by the court during that phase of trial. The court in that phase defined overdraft as "extractions in excess of the safe yield of water from the aquifer, which over time will lead to a depletion of the water supply within a ground water basin as manifested by a *permanent* lowering of the water table." (CT-1, Vol. 17, p. 4412:10-12 [Partial Statement Of Decision Re Phase III Trial (May 5, 2004)].) "Safe yield" is defined as "the maximum quantity of water which can be withdrawn annually from a

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groundwater supply under a given set of conditions without causing an undesirable result." An "undesirable result" is the "gradual lowering of the ground water levels resulting eventually in depletion of the supply." (*San Fernando, supra,* 14 Cal.3d at p. 278 [citing *Pasadena, supra,* 33 Cal.2d at p. 929].)

The court based its Phase III tentative decision, in part, on evidence showing that after the time the Twitchell Project became operational, there were years in which there was sufficient recharge to restore water levels in the Basin to historic highs. Even if in some years there was greater pumping than recharge, such that water levels fell in those years and there was no surplus of water in the aquifer, there was no apparent permanent lowering of water levels in the Basin. However, in its Phase IV Statement of Decision, the court held that evidence of a permanent lowering may not be necessary to a finding of prescriptive rights acquired during overdraft.[17] The court noted that, if there is no surplus of water, and if overdraft is defined as extractions exceeding recharge such that there is serious depletion of the water supply, as defined in *Mojave, supra,* 23 Cal.4th 1224, that may set in motion the prescriptive process because it creates the danger of permanent lowering of groundwater levels and exhaustion of the supply. (CT-1, Vol. 28, pp. 7153:25-7154:2 [Partial Statement of Decision re Trial phase IV (Jan. 8, 2007)].)

The overdraft standard utilized by the court in its Phase IV

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[17] As the court correctly noted in its Phase IV Statement of Decision, (CT-1, Vol. 28, p. 7152, n.3 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)]), a tentative decision such as the court's tentative decision re Phase III can be modified or changed by the court anytime before entry of judgment. (Cal. Rules of Court, Rule 232(a); see also *Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 203 ["*Horning*"].)

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Statement of Decision is consistent with Supreme Court case law and is the appropriate standard for determining whether "overdraft" exists for purposes of determining prescriptive rights.[18] According to the California Supreme Court, "overdraft commences whenever extractions increase, or the withdrawable maximum decreases, or both, to the point where the surplus ends." (*San Fernando, supra,* 14 Cal.3d at p. 282 [citing *Pasadena*, *supra,* 33 Cal.2d at pp. 928-29.) Case law does not support the theory that overdraft exists only when there is a permanent lowering of groundwater levels in a Basin.

LOG argues that the overdraft definition adopted by the trial court failed to require the exhaustion of "temporary surplus." (LOG AOB, pp. 31-32.) LOG presented no evidence of "temporary surplus" during Phases III, IV or V, and LOG readily admits that there was no expert testimony indicating the presence of "temporary surplus" in the Basin. (*Ibid.*) Nonetheless, LOG apparently believes that Respondents have the burden of proving a negative, i.e., that "temporary surplus" did not exist. Neither *San Fernando* nor other case law require such a showing. Even if it did, Respondents and other parties presented significant and voluminous evidence regarding groundwater levels in the Basin, the necessity of maintaining ocean

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[18] Appellants argue and cite to rulings from earlier trial phases, which they allege contradict later rulings and the final judgment. Appellants suggest that these rulings are the "law of the case." However the law of the case doctrine applies only to opinions rendered by the Supreme Court or a Court of Appeal, not to partial rulings made by a trial court in a phased proceeding. (*Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App. 1180, 1186; *Provience v. Valley Clerks Trust Fund* (1984) 163 Cal.App.3d 249, 256.) Furthermore, a preliminary decision can be modified or changed by the court anytime before entry of judgment. (*Horning, supra,* 130 Cal.App.4th at 203.) Therefore, Appellants' allegations are without merit.

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discharge, and the Basin's hydrologic condition during the prescriptive periods. (CT-1, Vol. 28, pp. 7152-54, 7156, 7167 [Partial Statement of Decision re Trial phase IV (Jan. 8, 2007)].) Based on this evidence, the trial court concluded that no surplus existed, "temporary or otherwise," during the prescriptive periods. (*Id.* at p. 7154:23-27.) The court's finding was supported by substantial evidence, and LOG presented no evidence to rebut the court's finding.

4. Respondent Public Water Suppliers' Claims Of Prescription Are Not Barred By Laches Or Other Equitable Doctrines

Appellants raise equitable defenses (e.g., laches, unclean hands, and sovereign wrongdoing) for the first time on appeal that they argue should have prevented Santa Maria and GSWC from perfecting prescriptive rights. (LOG AOB, pp. 19-21.) It is well-settled, however, that equitable defenses, like those argued here, must have been raised at the trial court level. (See, e.g., *Worthen v. Jackson* (1956) 139 Cal.App.2d 615, 618 ["[l]aches cannot initially be asserted on review, but must be presented in some manner in the trial court in order that the plaintiff may have the opportunity to meet it"]; *Rouse v. Underwood* (1966) 242 Cal.App.2d 316, 323 ["existence of laches is a question of fact to be determined by a weighing of all of the applicable circumstances by the trial judge"]; see generally *Fillmore v. Reilly* (1938) 28 Cal.App.2d 460, 463 ["*Fillmore*"]; *Reed v. Norman* (1953) 41 Cal.2d 17, 22 ["*Reed*"]; *Phoenix Mut. Life Ins. Co. v. Birkelund* (1946) 29 Cal.2d 352, 363) ["*Birkelund*"].) Appellants' failure to raise these issues at trial is fatal to their claims. (*Ibid.*)

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a. Laches Is Not A Defense That Applies To Prescription And The Trial Court Correctly Found That Santa Maria and GSWC Had Acquired Title To The Water During The Prescriptive Periods

Turning then to the merits of Appellants' argument, their procedural error notwithstanding, Appellants' argument must be rejected because it is inconsistent with well-established law.

Appellants argue that laches barred Santa Maria and GSWC from claiming prescriptive rights in 1997—thirty to forty years after the 5-year statutory period concluded that gave rise to the prescriptive claims. (LOG AOB, pp. 19-20.) Appellants' argument is meritless: laches is not a defensive bar to a claim of prescription. Indeed, an argument similar to the one Appellants make here was struck down in a 1994 Court of Appeal opinion that dealt with adverse possession. (See *Marriage v. Keener* (1994) 26 Cal.App.4th 186 ["*Keener*"].)

California law does not require an adverse possessor to bring an action to perfect its claim of prescription, and thus the element of "unreasonable delay" that must be demonstrated to sustain a laches defense cannot be met. (See *Keener, supra*, 26 Cal.App.4th at pp. 191-92; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624 [laches requires affirmative proof of unreasonable delay].) Instead, the burden is on the title holder, and not the intruder, to bring an action to stop the running of the 5-year statute of limitations. (Code Civ. Proc., § 318; *Keener,* at pp. 191-92; see *Alta Land & Water Co. v. Hancock* (1890) 85 Cal. 219, 227-228 [owner failed to bring suit within statutory period and thus defendant acquired title to water rights by adverse possession]; *Montecito Valley Water Co. v. City of Santa Barbara* (1904) 144 Cal. 578, 593 (internal quotations omitted) ["the owner is simply required to sue within a limited period. If he

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does not, he cannot maintain an action to recover the property"] ["*Santa Barbara*"].) Santa Maria and GSWC were under no obligation to bring an action to perfect its claim, and the fact that it acquired title thirty to forty years before the trial began is irrelevant, and is simply not a delay amenable to laches. (*Keener,* at pp. 191-92.)

Having demonstrated the elements of prescription and that the right of the record holder had thus been extinguished, a perfect title vested in Santa Maria and GSWC, which was as effectual and complete as one obtained by conveyance. (*Strong v. Baldwin* (1908) 154 Cal. 150, 162.) For the reasons set forth above, Appellants' argument fails.

b. It Is Well-Settled That A Public Agency Can Acquire Rights By Prescription

Appellants claim that a public agency cannot engage in the type of trespassory conduct necessary to establish prescription. (LOG AOB, pp. 20-21.) In making this argument, Appellants curiously disregard noted California Supreme Court decisions that have long-recognized the ability of public agencies to acquire and exercise prescriptive rights. (See, e.g., *Santa Barbara, supra,* 144 Cal. at p. 594; *Hayward, supra,* 218 Cal. 634.) This is a well-accepted legal principle and does not carry the illusion of uncertainty Appellants argue.

Setting legal precedent aside, Appellants conjecture instead that unclean hands[19] and something coined "sovereign wrongdoing"[20]

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[19] As set forth, *supra*, Section IV.F.4, unclean hands is an equitable defense that cannot be raised for the first time on appeal. (*Fillmore, supra,* 28 Cal.App.2d at p. 463; *Reed, supra,* 41 Cal.2d at p. 22; *Birkelund, supra,* 29 Cal.2d at p. 363) Additionally, unclean hands is of no relevance to the facts at issue here. Indeed, not every wrongful act constitutes "unclean hands." (*CrossTalk Prods. Inc. v. Jacobson*

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precluded Santa Maria, as a public agency, from acquiring prescriptive rights. (LOG AOB, pp. 20-21.) More specifically, Appellants posit that an agency cannot faithfully serve its constituents and also acquire additional sources of water for public use if the supply is obtained by prescription. (*Ibid.*) Appellants' argument not only belies case law on this topic, but disregards the policy upon which the law of adverse possession and prescription is based. The desire to maximize the utility of real property and water resources allowed for an adverse possessor—public agency, private citizen, or corporate entity alike—to capitalize from its own wrongdoing and claim title to property and water held by another if certain elements were met. The law assumed that the rightful owner either knew or should have known about the conduct and simply failed to take any act to interrupt the taking. (See Civ. Code, § 1007; *Crandall v. Woods* (1857) 8 Cal. 136, 140 ["as a general rule, a property in water cannot be acquired by appropriation, but only by grant or prescription"]; *Alhambra Addition Water Company v. Richardson* (1887) 72 Cal. 598, 600-01 ["it has been the settled rule…that the possession of property of the requisite character and time confers title to the property"].)

Similarly, Appellants claim that a public agency cannot acquire prescriptive rights because it requires conduct "prohibited by the California Constitution," i.e., pumping from an overdrafted basin.

(1998) 65 Cal.App.4th 631, 639 [whether the doctrine applies is a question of fact].) It is a doctrine typically invoked by unconscionable conduct, like fraud (*De Rosa v. Transamerica Title Inc. Co.* (1989) 213 Cal.App.3d 1390, 1395; *Soon v. Beckman* (1965) 234 Cal.App.2d 33, 44), and thus does not contemplate the kind of trespassory conduct that is part and parcel of prescription.

[20] There does not appear to be any legal authority that defines or refers to the phrase "sovereign wrongdoing."

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(LOG AOB, pp. 21-22.) Unsurprisingly, Appellants have not cited any authority in support of the proposition that pumping from an overdrafted basin is unconstitutional. That is because the law does not support Appellants' position; rather, Appellants' arguments are based on their (misguided) view of what the law should be. Such concerns should be aired before the state legislature, and not this Court.[21]

c. The Prescriptive Claims Are Not Barred By Civil Code Section 315 Because Santa Maria Was Under No Obligation To File An Action To Perfect Title

The rule in California is that the rights of the sovereign are not barred by lapse of time unless the immunity is expressly waived by legislation. (*Marin Healthcare District v. Sutter Health* (2002) 103 Cal.App.4th 861, 873 ["*Sutter Health*"].) Section 315 of the Code of Civil Procedure addresses the time period applicable to the recovery of real property by the state and sets forth a 10-year statute of limitations period. (*Id.* at pp. 873-74.) It is a recognition that the state is not in the same position as a private landowner and should thus have a longer period of time in which to protect its rights. Thus, for example, where public property is at stake, to have title quieted to the adverse possessor requires that the elements of adverse possession be proven over the 10-year period governed by Civil Code section 315, as opposed to the ordinary 5-year period that applies where non-

[21] That a citizen cannot prescribe against the government does not make Santa Maria's conduct any less lawful, despite what Appellants suggest. (LOG AOB, p. 22.) Civil Code section 1007 is a mere recognition that the government holds public waters in trust for the people of the state, and thus the element of adversity a citizen would be required to show for prescription cannot be established against the state.

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public land is involved.[22] (*Southern Pacific Company v. City and County of San Francisco* (1964) 62 Cal.2d 50, 53-54 & fn. 1 ["*Southern Pacific*"].)

Appellants contend that Civil Code section 315 barred Santa Maria from claiming prescriptive rights because the cause of action accrued more than 10 years before Santa Maria filed its claim in 1998. (LOG AOB, pp. 22-23.) The cause of action here concerns prescription and, as already explained herein, the law places the burden on the title holder, and not the adverse possessor, to bring an action to stop the 5-year limitations period that applied. (See, e.g., *Keener, supra*, 26 Cal.App.4th at pp. 191-92.) It is therefore irrelevant that Santa Maria did not file its claim until 1998 because it was under no obligation to file any action to perfect its prescriptive title.

d. Santa Maria And GSWC's Prescriptive Rights Were Not Lost By Nonuse

A prescriptive right can be lost from nonuse only upon proof that the right has not been exercised for any useful or beneficial purpose at any time over the 5-year statutory period. (Civ. Code, § 811(4); *Lema v. Ferrari* (1938) 27 Cal.App.2d 65, 72-73 ["*Lema*"]; see, e.g., *Garbarino v. Noce* (1919) 181 Cal. 125, 130 [water not used

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[22] Since the amendment of Civil Code section 1007 in 1935, title to property held by government agencies and devoted to a public use is no longer subject to loss by adverse possession; Civil Code section 315 thus applies to adverse possession that took place prior to 1935. (*Southern Pacific Company v. City and County of San Francisco* (1964) 62 Cal.2d 50 at pp. 53-54 & fn. 1*; People v. Chambers* (1951) 37 Cal.2d 552, 556-57.)

[22] Additionally, prescription requires that the adverse use extend throughout the 5 years of the limitations period, but those 5 years need not be the years that immediately precede the action. (*Witherill v. Brehm* (1925) 74 Cal.App. 286, 293.)

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on lot for period of 10 years extinguished prescriptive right].) The burden is on the challenger to show the loss of the right. (*Ibid.*) Appellants have proffered no evidence to support this argument and their claim thus fails. (LOG AOB, pp. 23-24.)

Appellants' argument rests on an illogical assumption that a condition of overdraft must continue for a prescriptive right to be preserved, an argument that has no basis in the law.[23] Subsequent to the prescriptive right vesting in Santa Maria and GSWC, that there was a surplus of water merely prevented the expansion of the prescriptive rights to include any additional quantity of water drawn (in times of surplus) in excess of the amount actually produced during the prescriptive period. (See *Moore v. California Oregon Power Company* (1943) 22 Cal.2d 725, 737-38.) This is consistent with case law, which measures a prescriptive right by the maximum amount of water produced during the prescriptive period, not by the additional quantity of water taken in the future. (Cf. *San Bernardino v. Riverside* (1921) 186 Cal. 7, 25-28.) Thus, the continued exercise of the perfected prescriptive rights defeats LOG's argument.

G. <u>The Trial Court Properly Interpreted And Applied The Law Of Self-Help</u>

The doctrine of "self help" originated in *Pasadena. (Pasadena, supra,* 33 Cal.2d 908.) In *Pasadena* the court held that, in a groundwater basin where overpumping is gradually depleting the supply, overlying owners can prevent a prescriptive right from fully usurping their overlying right by "self-help" pumping. If a landowner engages in self-help, it prevents a prescriptor from completely taking

[23] Appellants argue, "[t]o avoid loss by non-use, Santa Maria and Golden State must have exercised a prescriptive priority to those rights prior to 1973, five years after overdraft was last alleged to have occurred." (LOG AOB, p. 24.)

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the landowner's overlying right. (*Pasadena,* at p. 931.) As the trial court in the instant case correctly concluded, the concept of "self-help," if proven, does not negate prescription, but rather, if proven, allows a landowner to retain a quantified "self-help" right to the amount pumped during the prescriptive period. (*Ibid*; *Hi-Desert Co. Water Dist. v. Blue Skies County Club* (1994) 23 Cal.App.4th 1723, 1731 ["*Hi-Desert*"].)

Once a prescriptive right has been proven, the burden of production shifts to an overlying owner to prove the amount of its pumping, or "self-help," if any, during the prescriptive periods. Because the doctrine of self-help provides that pumping during a prescriptive period may limit the scope of the prescriptive right acquired (*Pasadena, supra,* 33 Cal.2d at p. 931; *Hi-Desert, supra,* 23 Cal.App.4th at p. 1731; see also *San Fernando, supra,* 14 Cal.3d at pp. 293-94), the burden of proving self-help necessarily falls to each and every party claiming an overlying right.

1. To Prove Self Help, A Landowner Must Provide Evidence Of Specific Amounts Pumped During The Prescriptive Period

To demonstrate self-help, an overlying owner must demonstrate that it exercised its overlying rights in the face of prescription by extracting groundwater from the basin for reasonable and beneficial purposes on appurtenant land during the prescriptive period. (*Pasadena, supra,* 33 Cal.2d at p. 931; *Hi-Desert, supra,* 23 Cal.App.4th at p. 1731.) Because the exercise of self-help entitles the user to a quantified overlying right (as described below in more detail), each overlying landowner must produce evidence of (1) the quantity of water pumped by them (or those with whom they can demonstrate privity of interest), (2) on land owned by them (or those

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with whom they are in privity of interest), (3) that the water was used reasonably and for beneficial purposes, and (4) that it was pumped during each of the prescriptive periods at issue. As described below, overlying owners lose “amounts not pumped” in any prescriptive period. (*Hi-Desert, supra, 23 Cal.App.4th* at p. 1732.) Thus, each overlying landowner must produce evidence of the fact that they exercised self-help throughout each of the prescriptive periods. Failure to continue to exercise their rights during periods of prescription subjects the overlying landowner to loss of the amounts not pumped.

Further, because the doctrine of self-help favors those landowners who exercised their overlying rights throughout the prescriptive period, each overlying owner must produce evidence of their own, individual self-help. Without individual production data for each parcel of land for which an overlying right is claimed, there is no method by which the court can differentiate between those that have versus those that have not exercised self-help.

It is important to note that even though prescription is properly proven basin-wide, self-help must be shown on an individual basis. (*Hi-Desert*, *supra*, 23 Cal.App.4th at p. 1731.) The basin-wide condition of overdraft (i.e., adversity) is an essential element of proving prescription. However, individual prescriptors must also prove their actual production to show the amount of the prescriptive right obtained. Santa Maria and GSWC provided unrebutted evidence of their own groundwater pumping throughout applicable prescriptive periods. (See *supra,* pp. 57-69; CT-1, Vol. 20, pp. 5285, 5289-90 [Phase IV Tentative Decision (March 24, 2006)]; Phase IV, Exs. F-17-19, MM, NN.) Likewise, the individual landowners claiming self-help rights must prove their actual production during those same

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periods. Generalized landowner production data proves nothing about whether any individual landowner exercised self-help, much less the extent to which such self-help may have been achieved during the prescriptive period. As such, this evidence is irrelevant and fails to satisfy each landowner's burden of proof.

The Wineman Appellants argue that they satisfied the burden of proving self-help by submitting generalized evidence that the LOG and Wineman parties "pumped whatever they needed whenever they needed it." (Wineman AOB, p. 25.) However, the Wineman brief ignores the fact that the California Supreme Court expressly rejected this argument when it held that an overlying owner's rights may be prescripted, despite the fact that the overlying owner was not immediately prevented from taking the water it needed during the prescriptive period:

> Although no owner was immediately prevented from taking the water he needed, the report demonstrates that a continuation of the overdraft would eventually result in such a depletion of the supply stored in the underground basin that it would become inadequate. The injury thus did not involve an immediate disability to obtain water, but, rather, it consisted of the continual lowering of the level and gradual reducing of the total amount of stored water, the accumulated effect of which, after a period of years, would be to render the supply insufficient to meet the needs of the rightful owners. (*Pasadena*, *supra,* 33 Cal. 2d at p. 929 (emphasis added); see also *id.* at p. 931 [distinguishing the operation of self-help in surface water contexts wherein adversity by another user would immediately deprive the owner of the water to which he was previously entitled].)

In its holding, the *Pasadena* court drew on the early California case of *Smith v. Hampshire* (1906) 4 Cal.App. 8, where appellant had for ten years used a ditch on respondents' land adversely. However, for six

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years respondents had jointly used the ditch adversely to appellant. It was held that both had rights to the ditch. Although respondents could not acquire a prescriptive right on their own land they could prevent appellant's claim of exclusive right by establishing their own claim of right against appellant. As detailed above, in the groundwater context, *Pasadena* rejected the proposition that a water user's rights are not invaded if he continues to receive the quantity of water to which he is entitled (*Pasadena,* at p. 931.) *Pasadena* found cases involving adverse use of flowing surface water inapplicable because they do not deal with the problem of gradual depletion of water stored in a basin or lake. Injury in flowing water cases immediately deprives users of water, and the language in the opinions does not apply to an invasion of rights in a stored supply of water such as a groundwater basin. (*Ibid.* (internal citations omitted).)

In other words, generalized pumping data showing that overlying owners throughout the Basin were mining the Basin's supply during the prescriptive period is not legally sufficient to establish that any one landowner protected itself against prescription during the applicable periods sufficient to have maintained its self-help right to pump water from the Basin. Wineman's argument to the contrary is not supported by applicable law and should be rejected.

2. The Exercise Of Self-Help Does Not Negate Prescription

In the event that an overlying landowner produces evidence of its self-help during the applicable prescriptive periods, that landowner retains a right to a specified quantity of water, the quantity of water *actually* pumped. (*Hi-Desert*, *supra,* 23 Cal.App.4th at p. 1932.) The exercise of self-help merely preserves a portion of an overlying owner's formerly unquantified right and quantifies it; it does not

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defeat prescription.

In *Pasadena*, the Court concluded that overlying owners' continuous pumping during the prescriptive period did not defeat the appropriators' prescriptive right claims, but rather granted overlying owners a right to share in the supply, to the extent that they had protected themselves. (*Pasadena, supra,* 33 Cal.2d at p. 932 [relying on *Smith v. Hampshire* (1906) 4 Cal.App. 8, for the proposition that self-help defeats an appropriator's claim of *exclusive* right to the supply, but does not defeat it entirely].) *Pasadena* confirmed that just as appropriators acquired prescriptive rights to continue to take some water in the future (i.e., in shortage conditions when they otherwise would not have had such rights), overlying owners, by their self-help, "retain or acquire"[24] a right to continue to take some water in the future. (*Pasadena,* at p. 932.) The *Pasadena* court further explained that the right that overlying owners retained or acquired was something less than the common law overlying right to which they otherwise (absent prescription) would have been entitled. Moreover, the court rejected the proposition that an overlying owner's rights are not invaded if the overlying owner continues to receive the quantity of water to which it is entitled:

> *Unlike the situation with respect to a surface stream where a wrongful taking by an appropriator has the immediate effect of preventing the riparian owner from receiving water in the amount taken by the wrongdoer, the owners of water rights in the present case* were not immediately prevented from taking water, and they in

[24]The *Pasadena* court expressly declined to determine whether the overlying owners against whom prescription had been established but whom had exercised self-help during the prescriptive period had retained a part of their overlying right or whether they obtained new prescriptive rights to use water. (*Pasadena*, *supra,* 33 Cal.2d at p. 932.)

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> fact continued to pump whatever they needed. As we have seen, the Raymond Basin Area is similar to a large lake or reservoir, and water would be available until exhaustion of the supply. The owners were injured only with respect to their rights to continue to pump at some future date. The invasion was thus only a partial one, since it did not completely oust the original owners of water rights, *and for the entire period both the original owners and the wrongdoers continued to pump all the water they needed.*
>
> The pumping by each group, however, actually interfered with the other group in that it produced an overdraft which would operate to make it impossible for all to continue at the same rate in the future. If the original owners of water rights had been ousted completely or had failed to pump for a five-year period, then there would have been no interference whatsoever on the part of the owners with the use by the wrongdoers, and the wrongdoers would have perfected prior prescriptive rights to the full amount which they pumped. As we have seen, however, such was not the case, and, although the pumping of each party to this action continued without interruption, it necessarily interfered with the future possibility of pumping by each of the other parties by lowering the water level. The original owners by their own acts, although not by judicial assistance, thus retained or acquired a right to continue to take some water in the future. The wrongdoers also acquired prescriptive rights to continue to take water, but their rights were limited to the extent that the original owners retained or acquired rights by their pumping. (*Pasadena,* at p. 931 (all emphasis added).)

This principle was re-affirmed in *San Fernando, supra,* 14 Cal.3d, where the California Supreme Court set forth the precise quantification of a prescriptive right in light of the exercise of self-help by one or more overlying landowners during the prescriptive period:

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> The effect of the prescriptive right would be to give to the party acquiring it and take away from the private defendant against whom it was acquired either (1) enough water to make the ratio of the prescriptive right to the remaining rights of the private defendant as favorable to the former in time of subsequent shortage as it was throughout the prescriptive period (*City of Pasadena v. City of Alhambra, supra*, 33 Cal.2d at pp. 931-933) or (2) the amount of the prescriptive taking, whichever is less (*Id.* at p. 937). [FN101]
>
> [FN101] Even though cities cannot *lose* their water rights by prescription, their *acquisition* of prescriptive ground water rights is subject to the limitations stemming from the lawful owner's self help set forth in *City of Pasadena v. City of Alhambra, supra*, 33 Cal.2d at pp. 931-933.[25] (*San Fernando, supra,* 14 Cal.3d at pp. 293-294, 294 & fn.101.)

The Court went on to provide that "[p]rivate defendants should be awarded the full amount of their overlying rights, less any amounts of such rights lost by prescription, from the part of the supply shown to constitute native ground water." (*San Fernando,* at p. 294.)

Finally, following both *Pasadena* and *San Fernando*, the *Hi-Desert* court[26] clarified that overlying owners retain a portion of their overlying rights in the face of prescription by using them, but "lose amounts not pumped." (*Hi-Desert, supra,* 23 Cal.App.4th at p. 1732.) In other words, the overlying landowner preserves its right to pump water from the groundwater basin for reasonable and beneficial

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[25] It should be noted that while *Pasadena's* application of the "mutual prescription doctrine" is called into question by the *San Fernando* court, the *San Fernando* court expressly follows and affirms the *Pasadena* court's measure of the prescriptive right, as illustrated here.

[26] Although interpreting the provisions of a stipulated judgment, e.g., a contract (*Hi-Desert*, *supra,* 23 Cal.App.4th at p. 1732), and therefore of limited precedence, *Hi-Desert* provides this Court with some additional guidance with respect to the operation and effect of self-help.

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purposes on land it owns that overlies the basin, but loses the right, previously afforded to overlying owners, to increase that usage over time to satisfy prospective uses. To the extent that an overlying owner fails to establish self-help, the prescriptive right is applied against the unexercised or dormant portion of that right. The self-helped landowner retains a right similar to a prescriptive right. (*Pasadena*, *supra,* 33 Cal.2d at pp. 931-33.) It is a quantified right; not an overlying right in its original or common law sense. (*Hi-Desert, supra,* 23 Cal.App.4th at p. 1732.)

In summary, self-help preserves that portion of an original overlying right that corresponds to the amount actually pumped during the prescriptive period for reasonable and beneficial purposes on appurtenant land (land owned by the overlying owner) that overlies the Basin. (*Hi-Desert*, *supra,* 23 Cal.App.4th at p. 1731.) It entitles the overlying owner only to a *quantified* overlying right It does not defeat a prescriptive right but merely defeats a prescriptor's complete ouster of overlying uses. The quantity not pumped during the prescriptive period, or the ability to increase one's production in the future, is lost to the prescriptive right. As such, self-help distinguishes between and among overlying owners by shifting the burden of prescription to those parties who failed to exercise their rights during the prescriptive period.

3. Appellants Failed To Meet The Burden Of Proving Self-Help During The Applicable Prescriptive Periods

Of the approximately 146 Appellant parties who appeared at trial in Phase IV, not a single one demonstrated its individual "self-help" pumping during the prescriptive periods.

The testimony of the Appellants' expert, Anthony Daus, is

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irrelevant to the self-help inquiry. As evidenced by the following testimony, Mr. Daus' testimony contained no statements, evidence, or conclusions regarding quantities of water pumped by individual LOG or Wineman party, at any period during the historical record, much less the prescriptive periods, or on any particular parcel of land.

> Q Did you, Mr. Daus, attempt to determine the actual amounts of pumping on any particular parcel at any given time in the Santa Maria Basin?
>
> A No. The issue was the availability of water and not the amount of water that individual farmers needed or wanted in the historical record. I was focused on the availability of groundwater for -- for production. . . .
>
> Q (By Mr. Zimmer:) Your determination -- why did you determine the availability of the water?
>
> A The intent of my analysis was to assess whether the availability of the water, the availability of the water for irrigation pumping was limited within the Santa Maria Valley. It was not a determination of how much water the farmers needed or wanted at any particular point in history. It was about the availability rather than the need.

(RT-1, Vol. 43, pp. 2915:4-10, 2916:3-11 [Phase V Trial Transcript (July 18, 2006)].)

On cross-examination, Mr. Daus confirmed that he did not analyze, and could not testify regarding specific amounts of water pumped on individual Land Owner Parcels:

> Q Mr. Daus, individual landowner pumping amount; is it fair to say that you cannot testify as to any particular landowner for the LOG or Wineman Groups actual pumping amount during the historical period.
>
> A I was not tasked to do that particular calculation, yes.

(RT-1, Vol. 43, p. 7960:20 – 25 [Phase V trial (July 18, 2006)].)

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Mr. Daus' opinions that irrigation and municipal and industrial pumping in the Basin have increased over time are immaterial to the issue of whether any individual Appellant engaged in self-help pumping at times when the Basin's safe yield had been exceeded during the prescriptive periods. Importantly, Mr. Daus could not associate any of the irrigation pumping with any particular landowner in the Basin, much less a Wineman Group or LOG party. Evidence that pumping continued throughout a prescriptive period, or that water was "available" for such pumping, cannot satisfy a landowner's burden of proof.

Other than the opinion of Mr. Daus, the only evidence presented by the Wineman Group parties in Phase V, presumably for the purpose of supporting their self-help claims, were 14 individual declarations provided by certain Wineman Group parties and other persons not party to this litigation. The declarations contain only general information about the "availability" of water on 16 of the 17 parcels owned by one or more Wineman Group parties, per the Phase IV stipulation. (See Phase V, Wineman Exs. 1-14.) Importantly, the declarations do not provide evidence of the total quantity of water pumped for reasonable and beneficial uses on any parcel within the Basin, for any time during the historical period, much less the prescriptive periods. Further, the declarations provide no foundational information on which these facts might be implied or extrapolated. For example, the declarations provide no information about the total acreage irrigated, the number of crops irrigated, the type of crops irrigated, the quantity of water applied to each crop grown, and no other information relevant to determining individual water usage during the applicable prescriptive periods.

The declarations merely contain yes/no responses to boilerplate

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questions prepared by counsel and serve no useful purpose with respect to the issue of self-help. At very best, the 14 declarations support the conclusion that certain landowners used some quantity of water on some "ranches," for some period of time in the past. From this information, however, it cannot be determined how much water was used, on which parcels, or in what years, as necessary to prove self-help pumping during the prescriptive periods. Moreover, the Wineman Group parties presented no additional documentary evidence corroborating the statements contained in the declarations.

Other than the opinions of Mr. Daus, the LOG presented *no other evidence at trial*.[27] As such, there is a complete failure of proof with respect to the issue of self-help by each and every LOG party.

In summary, contrary to the trial court's direction that the landowners "establish their own individual pumping activity," (CT-1, Vol. 28, p. 7162:18 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)]), each and all of the approximately 146 Appellant landowners failed to produce any such evidence, much less meet their burden of proving self-help. As illustrated above, neither the opinion testimony of Mr. Daus, nor the Wineman Group's declarations provide evidence of actual quantities of water pumped by any Appellant landowner during the prescriptive periods. As such, Appellants failed to meet their burden of proving self-help.

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[27] Despite representations of LOG counsel at trial (RT-1, Vol. 42, p. 7848 to RT-1, Vol. 43, p. 7947 [Phase V Trial (July 17 and 18, 2006)]) that the LOG, like the Wineman Group, would offer a number of declarations in support of the LOG's self-help claims, those declarations were never offered into evidence.

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H. The Court Correctly Concluded That Santa Maria, The Northern Cities And GSWC Are Entitled To Return Flows From Imported SWP Water

1. Developed Water Supplies Are Distinguished From Native Supplies Under California Law

California courts separately allocate rights in native and developed water supplies. Parties who develop additional or supplemental water supplies that would not otherwise be available in a groundwater basin ("developers") hold an exclusive right to that developed supply, apart from any rights the developer may have in the native supply.[28]

Important public policy considerations justify the special treatment afforded to developed water:

> The purpose of giving the right to recapture returns from delivered imported water priority over overlying rights and rights based on appropriations of the native ground supply is to credit the importer with the fruits of his expenditures and endeavors in bringing into the basin water that would not otherwise be there. (*San Fernando, supra,* 14 Cal. 3d at p. 261; see also *Glendale, supra,* 23 Cal.2d at pp. 76-77; *Ide v. United States* (1924) 263 U.S. 497, 506 ["*Ide*"].)

California law ensures that the developer, who incurs the expense of procuring a new and additional water supply and building the necessary infrastructure to transport that supply into the basin or to salvage it from loss to the ocean (i.e., pipelines, treatment facilities,

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[28] "Native water" is water that, without human intervention, provides replenishment to any given water supply. Rainfall, snow, stream channel infiltration, and unimpeded tributary runoff all comprise the natural or native water supply. (See *San Fernando*, supra, 14 Cal.3d at p. 210 [describing that water in the Upper Los Angeles River Area that is derived from rain and snow; and distinguishing water that is imported into the basin from the Owens Valley, Colorado River and the State Water Project]; *Mojave*, supra, 23 Cal.4th at pp. 1241-42.)

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dams, etc.) is rewarded for its efforts.

The developer's right includes the right to use, store and recapture the water that it develops, so long as no other users are injured in the process. (*San Fernando*, *supra,* 14 Cal.3d. at pp. 256-62, 288; *Glendale, supra,* 23 Cal.2d at pp. 76-77.) The measure of a developed water right is "an undivided right to a quantity of water in the ground reservoir equal to the net amount by which the reservoir is augmented by [developed water] deliveries." (*San Fernando,* at p. 262.) It makes no difference whether the developed supply augments the native supply directly (such as when spread or artificially injected into a groundwater basin) or indirectly (such as by return flows).

The developer may utilize existing watercourses or groundwater basins to transport or store that supply. The right permits the developer to take advantage of local geologic conditions and store the developed supply within a groundwater basin. (*San Fernando, supra,* 14 Cal.3d at pp. 260, 264 ["[Los Angeles] is entitled to use the San Fernando basin for temporary storage of its water by means of artificial recharge and subsequent recapture"]; *Glendale, supra,* 23 Cal.2d at pp. 76-78 [the City of Los Angeles did not abandon its imported water supply when it delivered that water to the San Fernando sub-basin for purposes of economic transportation and storage].)[29]

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[29] *Ide, supra*, 263 U.S. 497 [a reclamation district had the right to retake seepage, even though the water had left is boundaries]; *Stevens, supra,* 13 Cal.2d at p. 352 ["the right to use a natural channel as a temporary conduit or as a drain for artificial flow has been frequently upheld"]; *Stevinson Water Dist. v. Roduner* (1950) 36 Cal.2d 264, 267-70; *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 74-76; *Crane, supra,* 5 Cal.2d at pp. 394-95, 400; *Barton Land & Water Co. v. Crafton Water Co.* (1915) 171 Cal. 89; *Hoffman v. Stone* (1857) 7 Cal. 46; See also Wat. Code, § 7075.)

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The right to recapture the developed supply after storing it in a groundwater basin is not impaired by the fact that the developed supply commingles with the native groundwater supply:

> The waters which percolate underground from . . . rainfall and delivered water become commingled and are physically unidentifiable as to source of origin. The recapture right, however, does not necessarily attach to the corpus of water physically traceable to particular deliveries but is a right to take from the commingled supply an amount equivalent to the augmentation contributed by the return flow from those deliveries. (*San Fernando, supra,* 14 Cal.3d at p. 260 (internal quotations omitted).)

2. Appellants Have Provided No Evidence Showing "Injury" Associated With SWP Water Imports

LOG alleges that it is injured by the importation of SWP water because it allegedly "displaces" native groundwater supplies. (LOG AOB, pp. 56, 63.) However, neither LOG, nor Wineman, nor any other legal user of water produced evidence during trial showing that the Basin is "full" or that imported supplies displace native water (or, conversely, that imported supplies are displaced by native water). (See CT-1, Vol. 28 pp. 7143:18-24, 7172 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].)

Moreover, neither the Judgment nor the Settlement Stipulation provide carry-over rights for imported return flows. (CT-2, Vol. 2, pp. 1-8 [Judgment After Trial (Jan. 25, 2008)]; CT-2, Vol. 1, pp. 10-35 [Settlement Stipulation (June 30, 2005 Version)].) Thus, return flows not used in any one year are not carried over into the next year and therefore do not accumulate in the Basin. Thus, there is no evidence that importation of SWP water has injured any of the Basin's

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users by displacing native groundwater.[30] To the contrary, the evidence unequivocally indicates that importing State Water Project water has significantly reduced demand on the Basin's native supplies, which benefits all Basin users, including LOG.

3. Return Flows From SWP Water Net Augment The Basin

As the trial court correctly concluded, it is undisputed that Santa Maria and GSWC paid for and received water from the SWP, distributed it to their customers, recaptured it in waste water systems after initial use, and placed it in the aquifer by way of percolation ponds, or other comparable percolation methods. (See CT-1, Vol. 28, pp. 7171-72 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)]; See Phase IV, Ex. B-5; RT-1, Vol. 42, pp. 7683-7687 [Phase IV Trial (March 10, 2006)]; RT-1, Vol. 14, pp. 3701-3703 [Phase III Trial (Oct. 22, 2003)].) The trial court also correctly concluded that in times of shortage Santa Maria, GSWC, and Guadalupe are entitled to the exclusive use of return flows generated from their SWP deliveries in the amount by which the Basin is augmented. (CT-1, Vol. 28, pp. 7171-72 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].)

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[30] LOG claims that the trial court erred by awarding imported water rights absent proof by Santa Maria and Golden State that its importation does not injure LOG or other legal users of water. LOG then speculates that imported State Water Project water "likely would" displace native water, causing injury. Contrary to LOG's unsupported assertion, the burden is on LOG to prove injury if one exists. (See, e.g., *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1365-66; *Brown v. Smith* (1858) 10 Cal. 509, 511 ["it was incumbent on the plaintiff to prove that the defendant had diverted more water from rabbit Creek than we was entitled to , and that he (plaintiff) had been injured thereby"].) Santa Maria and GSWC are not obligated to prove a negative.

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The trial court noted that unrebutted Phase IV testimony by Santa Maria's Utility Manager, Mr. Chisam, as well as undisputed expert testimony offered by Mr. Wagner establish that Santa Maria's return flows net augment the Basin in an amount equal to at least 65 percent of the amount imported by Santa Maria on an annual basis. (RT-1, Vol. 38, pp. 7287, 7294-95, 7334-35 (Phase IV Trial (March 1, 2006)].) Phase III and IV testimony from Mr. Foreman establishes that GSWC's return flows net augment the Basin on an annual basis. (RT-1, Vol. 39, pp. 7417-18 [Phase IV Trial (March 2, 2006)].) Based on this evidence, the trial court ultimately concluded that Santa Maria and GSWC have the right to store and recapture return flows in those amounts. (CT-2, Vol. 1, p. 4 [Judgment After Trial (Jan. 25, 2008)].)[31]

Appellants argue that the evidence was not sufficient to support the trial court's findings. However, undisputed and unrebutted evidence from both lay witnesses and experts support the conclusions reached by the trial court.[32]

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[31] LOG complains that "the Judgment fails to require proof of net augmentation" by using the words "adds to," rather than "net augments." (LOG AOB, pp. 63-64.) However, the trial court was clear that its conclusion was based on <u>net</u> augmentation, not gross augmentation. (See, e.g., CT-1, Vol. 28, pp. 7171:18-25 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)] ["Each Public Water Producer's right . . . is an undivided right to a quantity of water in the commingled waters in the basin equal to the net amount by which the basin is augmented by such deliveries. . . . Unrebutted Phase IV testimony . . . establish[es] that Santa Maria's return flows net augment the basin in an amount equal to at least 65 percent of the amount imported by Santa Maria on an annual basis"].)

[32] LOG argues that the Judgment "improperly permanently quantifies" the return flow rights utilizing a fixed percentage of imported water. (LOG AOB, pp. 64-65.) As with LOG's other arguments, LOG fails to show how it is prejudiced by this so-called permanent

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4. LOG's Miscellaneous Arguments Regarding Return Flows Are Not Supported By Law Or Facts

LOG raises several arguments, some for the first time on appeal, in an attempt to persuade this Court to ignore more than six decades of Supreme Court case law concluding that an importer of water has the right to store and recapture such water in a groundwater basin. LOG's arguments are misguided, at best.

First, despite the fact that LOG includes several pages of briefing describing the priority right of an importer of water to store and recapture imported supplies (LOG AOB, pp. 52-55), LOG nonetheless argues that return flows from imported supplies are considered "unappropriated pursuant to Water Code section 1202(d) . . . [e]ven if the treated water was not abandoned." (LOG AOB, p. 60.) LOG's argument is nonsensical and is a misreading of the applicable law. Water Code section 1202(d) provides that water which has been appropriated or used (i.e., return flows) and flows back into a stream may be in fact be used by others. As numerous Supreme Court decisions and State Board decisions make clear, if the source of the water is *imported*, the return flows may be recaptured and used exclusively by the *importer* of the supplies. (*In the Matter of Treated Waste Water Change Petition WW-20 of El Dorado Irrigation District* (1995) SWRCB Order WR 95-9.) If the return flows are abandoned and not used, they may be appropriated and used by others until such time as the importer puts the return flows to reasonable and beneficial use. Nothing in the Judgment indicates otherwise.

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quantification. In addition, as discussed herein, the trial court has continuing jurisdiction to address changing conditions, if necessary.

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Second, for the first time on appeal, LOG raises an argument based on Water Code section 1210, which provides that the owner of a waste water treatment plant has the right to treated waste water as against anyone who has supplied water to the waste water collection and treatment system. (Wat. Code, § 1210; LOG AOB, pp. 59-60, 70-71.) LOG offers no facts showing this statute applies. As to Santa Maria, Water Code section 1210 has no impact because it operates its own treatment plant. (See generally RT-1, Vol. 38, pp. 7261-349 [Phase IV Testimony of Dwayne Chisam (March 1 and 2, 2006)].) As to GSWC, LOG does not have standing to raise this argument, as LOG does not operate the treatment facility owned by Laguna Sanitation District and has no redressable injury.

Third, LOG argues that the State of California, rather than those parties who contract and pay for SWP water, is the importing entity and therefore entitled to any rights associated with that importation. (LOG AOB, pp. 60-62.) This unsupported argument was rejected by the trial court, which stated "[n]othing in the evidence presented (e.g., the State Water Project contracts themselves) nor the law (see *San Fernando, supra,* 14 Cal.3d at p. 261 [awarding Glendale and Burbank prior rights to return flows attributable to their imported water deliveries, a portion of which included SWP deliveries]) supports this claim." (CT-1, Vol, 28, pp. 7171-72 [Partial Statement of Decision re Phase IV (Jan. 8, 2007)].) The trial court's conclusion was correct, and LOG has not presented any evidence to the contrary.

Fourth, LOG argues that the return flows are effectively abandoned by Respondents because they do not have the ability to recapture the specific molecules of water that have been recharged in the Basin. LOG's argument ignores the Supreme Court's language in

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San Fernando, *supra,* 14 Cal.3d, which provides that "[t]he recapture right . . . does not necessarily attach to the corpus of water physically traceable to particular deliveries but is a right to take from the commingled supply an amount equivalent to the augmentation contributed by the return flow from those deliveries." (*Id.* at p. 260.)

Fifth, LOG suggests that the trial court erred by awarding "storage rights" to Santa Maria and GSWC. (LOG AOB, p. 71.) This is a mischaracterization of the Judgment. The trial court simply followed Supreme Court precedent allowing the temporary storage and recapture of return flows from imported supplies by those who import those supplies. It did not award a special class of "storage rights" to anyone.

Sixth, LOG suggests that return flows from SWP water diminish water quality in the Basin. (LOG AOB, pp. 70-71.) It is undisputed that Santa Maria, which is the only party generating a substantial amount of return flows, has been issued a permit by the Regional Water Quality Control Board ("RWQCB") that allows Santa Maria to discharge water, including return flows, from its water treatment plants. The RWQCB permit contains various terms and conditions designed to meet stringent state water quality requirements. In addition, undisputed evidence indicated that importation of SWP water and discharge of return flows into the Basin enhances water quality in the Basin. (See RT-1, Vol. 38, pp. 7288-91, 7303-04 [Phase IV Trial (March 1, 2006)].)

Last, LOG advances the wholly unsupported argument that a water right cannot exist to treated effluent. (LOG AOB, pp. 64, 70-71.) LOG did not raise this argument in the trial court. Unsurprisingly, LOG cites no authority now to support this assertion. That is because none exists. In fact, LOG itself acknowledges

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repeatedly that return flows (which are often treated effluent) that have been abandoned to a stream or river are specifically identified as water available for appropriation under the Water Code. (See, e.g., LOG AOB, p. 52.)

I. <u>Substantial Evidence Supported The Finding That Appellants Did Not Meet the Burden Of Quieting Title To Their Overlying Water Rights</u>

Appellants asserted a claim to quiet title the alleged "superior priority" of their water rights. (CT-1, Vol. 2, p. 312, 319-22 [LOG First Amended Cross-Complaint (March 31, 1999)];CT-1, Vol. 18, pp. 4681, 4683-86, 4690 [Wineman Group Cross-Complaint (Sep. 9, 2005)].) Although the quiet title remedy may be appropriate to establish water rights in some cases, the trial court correctly found that Appellants did not meet their burden of proof in this case. (CT-2, Vol. 1, pp. 5-6 [Judgment After Trial (Jan. 25, 2008)].)

First, Appellants failed to sue the other overlying landowners in the Basin, who have adverse claims to these water rights. Code of Civil Procedure section 762.060(b) requires that the quiet title plaintiff "shall name as defendants the persons having adverse claims that are of record or known to the plaintiff." Code of Civil Procedure section 760.010 defines "claim" broadly to include "a legal or equitable right, title, estate, lien, or interest in property." Such adverse claims can be "uncertain or contingent." (Code Civ. Proc., § 762.020(b).) Here, other landowners, both those who have settled and those who have not, have "correlative rights" to use part of the Basin's native supply. (CT-1, Vol. 27, pp. 7060, 7062 [Tentative Decision re Trial Phase V (Nov. 7, 2006)].) When the Basin is in overdraft, each landowner must take a proportionate reduction in its use of water. (*Katz v. Walkinshaw* (1902) 141 Cal. 116, 134-36.) So

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every overlying landowner has a legal right and interest in the limited native supply. Appellants cannot pick and choose whom to sue in a quiet title action, they must sue *all* known persons with adverse interests in the property. (*Taliafero v. Riddle* (1959) 166 Cal.App.2d 124, 128.) Unlike Code of Civil Procedure section 389, section 762.060(b) allows no discretion to proceed without such indispensable parties.

Second, Appellants failed to present any evidence as to their actual pumping or the reasonable and beneficial use of groundwater underlying their land.

Third, as detailed in Section IV.F, the trial court determined that Santa Maria and GSWC established prescriptive rights as against Appellants. (CT-1, Vol. 28, p. 7138:12-16 [Statement of Decision re Trial Phase V (Jan. 8, 2007)]; CT-1, Vol. 28, pp. 7161-64 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) The burden then shifted to Appellants to prove a quantified self-help right. As shown above in Section IV.G, Appellants failed to produce any evidence to prove a self-help right.

Fourth, title to most of the Appellants' real property was stipulated by the Respondent public water suppliers, and no evidence of any "adverse claims" to title to their real property was presented. (See Code Civ. Proc., § 760.020(a).) Accordingly, there was substantial evidence to support the trial court's judgment entered in favor of the Respondent public water suppliers on the Appellants' quiet title causes of action.

The only evidence presented by Appellants in support of their quiet title action was a stipulation reached in Phase IV regarding Appellants' ownership of certain parcels of land as of February 28, 2006 for the Wineman Group parties and as of March 3, 2006 for the

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LOG parties. (RT-1, Vol. 37, pp. 7072-76 [Phase IV Trial (Feb. 28, 2006)]; Phase IV, Ex. A; RT-1, Vol. 39, p. 7431:1-21 [Phase IV Trial (March 2, 2006)]; Phase IV, Exs. 2A, 2B, 3, 5.) The Appellants presented no other evidence of their ownership of land overlying the Basin or more importantly, of their water use.

Furthermore, and as detailed above, in the Phase IV trial, the trial court concluded that Santa Maria and GSWC had pumped water in specified amounts during periods of overdraft and that such pumping was open, notorious and hostile to the rights of Appellants. (CT-1, Vol. 28, pp. 7154-61 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) The prescriptive rights must be measured against whatever quantified rights Appellants have, if any. Thus, while the evidence presented by Appellants is sufficient to establish legal title to the property, there was no other evidence presented that would permit the court to quiet title to, or quantify, the overlying water rights in light of the claim of prescription. As the trial court properly concluded, "the effect of that adverse appropriation on the LOG and Wineman parties' rights cannot be determined without evidence of the extent of the LOG and Wineman parties' (and all other water producers) water rights within this single basin aquifer." (CT-1, Vol. 28, pp. 7137-78 [Statement of Decision re Trial Phase V (Jan. 8, 2007)].)[33]

J. <u>The Court Properly Dismissed With Prejudice The Remainder Of LOG's Claims (Two Through Six)</u>

On the eve of the Phase IV trial, Appellants indicated that they would not proceed on any of their cross-claims other than those to

[33] For this reason the Court should also reject LOG's argument that Appellants' overlying rights should have been declared as part of the Judgment. (LOG AOB, pp. 17-18.)

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quiet title. (CT-1, Vol. 28, p. 7137 [Statement of Decision re Trial Phase V] (Jan. 8, 2007)]; CT-2, Vol. 1, p. 6 [Judgment After Trial (Jan. 25, 2008)].) Such was their right, and the Court accordingly dismissed those claims pursuant to Code of Civil Procedure section 581(d), which provides in pertinent part: "…the court shall dismiss the complaint, or any cause of action asserted in it, in its entirety or as to any defendant, with prejudice, when upon the trial and before the final submission of the case, the plaintiff abandons it." (See CT-1, Vol. 28, p. 7150 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007) [dismissing causes of action except quiet title pursuant to section 581(d)]].)

Ordinarily a judgment of dismissal on motion of plaintiff is not a bar to a subsequent action, but such rule does not apply where it affirmatively appears that the plaintiff intended to abandon the action, in which case it is treated as a dismissal with prejudice, or a "retraxit." (*Eulenberg v. Torley's, Inc.* (1943) 56 Cal.App.2d 653, 657-68.) Counsel for LOG announced in open court that LOG intended to abandon its claims other than quiet title. (RT-1, Vol. 38, p. 7154-56 [Trial Transcript Phase IV, (March 1, 2006)].) Although counsel for LOG moved for dismissal without prejudice, (RT-1, Vol. 38, p. 7155:15-24 [Trial Transcript Phase IV, (March 1, 2006)]), ultimately the Court dismissed the action with prejudice pursuant to Code of Civil Procedure section 581(d), since LOG had abandoned its claims other than for quiet title. No evidence was presented on these issues and LOG expressly declined to produce any evidence thereon. (RT-1, Vol. 38, pp. 7154-56 [Trial Transcript Phase IV, (March 1, 2006)].)

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K. The Court Properly Refused To Adjudicate Unsupported Claims

1. The Trial Court Did Not Err In Refusing To Determine Groundwater Rights For Which No Claims Were Made Or For Which No Evidence Was Submitted

The LOG Parties argue, without citation to law, that the trial court erred in failing to determine the groundwater rights of all parties in the Basin and pueblo rights in particular. (LOG AOB, p. 17.) However, a trial court cannot adjudicate rights that were not sought or proven.

Because no party claimed pueblo rights in this basin, the court properly declined to grant declaratory relief as to pueblo rights. (See Code Civ. Proc., § 1060; *County of San Diego v. State* (2008) 164 Cal.App.4th 580, 605-07.) The fact that an issue is of broad general interest does not justify the granting of relief in the absence of a definite and concrete controversy between parties with adverse interests. (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662-63.)

Furthermore, it was not imperative for the court to define each and every groundwater right within the Basin. Pursuant to Code of Civil Procedure section 1061, a "court may refuse to [grant declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." [34]

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[34] For this reason, among others, LOG's argument that the court erred in failing to declare the amounts and priority of Respondents' appropriative rights (LOG AOB, p. 51) is without merit. The amount and priority of Respondents' appropriative rights are relevant only in shortage conditions, and the court has continuing jurisdiction to address Respondents' appropriative rights if it becomes necessary to do so in the future. Further, the amount and priority of Respondents' appropriative rights have literally no bearing on Appellants' overlying

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L. The Court Had the Authority To Approve And Implement The Management and Monitoring Plans And Accept Annual Reports Pending This Appeal

LOG has filed several successive appeals contesting the trial court's approval of the stipulating parties' annual reports. An automatic stay is intended to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. Code of Civil Procedure section 916(a) effectively prevents the trial court from rendering an appeal "futile" by altering the appealed judgment or order or by conducting other proceedings that may affect the judgment or order. (*Varian Med. Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 ["*Delfino*"]; *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 362.)

However, a stay does not suspend all trial court proceedings, but rather is limited in scope. The stay only suspends superior court proceedings "upon the judgment or order appealed from or upon the matters embraced therein or affected thereby …." (Code Civ. Proc., § 916(a).) A stay does not deprive the trial court of jurisdiction to "proceed upon any other matter embraced in the action and not affected by the judgment or order" on appeal. (*Ibid.*) Whether a particular matter is "embraced in" or "affected by" an appealed judgment or order so as to be subject to the stay depends on whether the purpose of the stay would be frustrated by further trial court proceedings on the matter. (*Marriage of Varner* (1998) 68 Cal.App.4th 932, 936; *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

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rights (if any); thus, once again, LOG has utterly failed to show how it is remotely harmed or prejudiced by the trial court's alleged "error," or that it even has standing to raise this argument.

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916 pending an appeal is evaluated was succinctly framed by this court in *Betz v. Pankow* (1993) 16 Cal. App. 4th 931, in terms of the 'impact' the exercise of post judgment jurisdiction by the trial court would have on the 'effectiveness' of the pending appeal." (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174 ["*Franklin*"].) Essentially, if trial court proceedings on the particular matter would have any impact on the "effectiveness" of the appeal, the proceedings are stayed; otherwise, the proceedings are permitted. (*Delfino, supra,* 35 Cal.4th at p. 189; *Franklin,* at p. 1173.)

Here, a majority of the parties to the litigation, including a majority of the overlying landowners, signed the Settlement Stipulation; Appellants did not. Among other things, the court's January 25, 2008 Final Judgment ("Judgment") incorporated the terms of the Settlement Stipulation *as to those parties who stipulated*. The Judgment included separate provisions for non-stipulating parties and made binding on the non-stipulating parties certain limited provisions of the Settlement Stipulation, including provisions that require groundwater monitoring. (CT-2, Vol. 1, pp. 4-5 [Judgment After Trial (Jan. 25, 2008)].)

Notably, the procedures governing the preparation and filing of the annual report, as well as the required components of the annual report, are detailed in the Settlement Stipulation. The stipulating parties are bound by the terms of the Settlement Stipulation and have been implementing the Settlement Stipulation since the Court's Judgment.

As detailed above in Section II.B.8, the Settlement Stipulation, including the filing and acceptance of annual report, does not impact LOG's rights or LOG's ongoing appeals. LOG's ancillary appeals of

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the trial court's limited exercise of its ongoing jurisdiction simply have no material bearing on the underlying appeal of the Judgment.

M. <u>The LOG Parties' Attacks On The Northern Cities' Water Rights Are Unfounded And The Alleged Errors Are Harmless</u>

Many of the LOG arguments about the Northern Cities' adjudicated water rights are identical to LOG's objections to the other Respondent public water suppliers, e.g., imported and salvaged water rights. These arguments are refuted above and need not be repeated. The remaining LOG arguments about the Northern Cities are both unsupported and insubstantial, as shown below. The Wineman Appellants do not challenge any of the Northern Cities' adjudicated water rights.

1. Northern Cities – Factual Background And Role In This Litigation

a. Geography & Hydrogeology

The "Northern Cities" consist of the cities of Arroyo Grande, Pismo Beach, Grover Beach, and the Oceano Community Services District. They are located in the northwest corner of the Basin, between the Nipomo Mesa and the Pacific Ocean. The "Northern Cities Area" constitutes approximately 7% of the Basin. (CT-2, Vol. 1, p. 69 [Judgment After Trial (Jan. 25, 2008)].) It has only a small hydrological connection to the rest of the Basin due to its location and hydrogeology. (RT-1, Vol. 14, pp. 3720-21 [Phase III Trial Testimony of Dr. Todd (Oct. 22, 2003)].)

b. Pleadings

The Northern Cities were brought into this litigation in 1999 by Cross-Complaints of the LOG parties, and they cross-complained against the LOG parties in 2003. (CT-1, Vol. 11, p. 2938 [Cross-Complaint of Northern Cities (Jan. 13, 2003)].) The Northern Cities

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sought declaratory and other relief, including a declaration of their superior rights to use both: (1) groundwater in the Northern Cities Area of the Basin, and (2) surface water that the Northern Cities salvaged in and imported into the Northern Cities Area, for example, the surface waters and return flows of the Lopez Reservoir and water imported from the SWP. (Id. at pp. 9-10.)

c. Lopez Reservoir

For over 50 years, the Northern Cities have cooperated with local landowners and with San Luis Obispo County to share, protect, and manage surface and ground water in the Northern Cities area of the Basin. For example, the Northern parties financed and built the Lopez Reservoir in the 1960s to cure declining groundwater levels and prevent seawater intrusion in the Northern Cities Area. (CT-1, Vol. 28, p. 7168:1-15 [Partial Statement of Decision Re Trial Phase IV (Jan. 8, 2007)].)

The Lopez Reservoir delivers its salvaged water and benefits this sub-basin in two ways: (1) deliveries through pipelines to the Northern Cities, pursuant to their contracts (approximately 5,200 acre feet per year), which reduces their need to pump groundwater; plus return flows from the Northern Cities' usage of Lopez water that augment groundwater supplies (approximately 400 acre-feet per year); and (2) releases of water into Arroyo Grande Creek, which augment groundwater supplies by approximately 300 acre feet per year and prevent seawater intrusion. (CT-1, Vol. 28, p. 7168:19-22 [Partial Statement of Decision Re Trial Phase IV (Jan. 8, 2007)]; RT-1, Vol. 14, pp. 3699-3701 [Phase III Trial Testimony of Dr. Priestaf (Oct. 22, 2003)].)

The Northern Cities and landowners paid approximately $85 million to construct and maintain the Lopez reservoir, roughly 80

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percent by the Northern Cities (by water purchase contracts) and 20 percent by landowners (by tax assessments). (RT-1. Vol. 14, pp. 3687-88, 3693 [Phase II Trial Testimony of Paavo Ogren (Oct. 22, 2003)].) The LOG parties' did not contribute to this expensive project or to the other water conservation projects in the Northern Cities Area, because *no LOG parties own land or use groundwater in the Northern Cities Area*. (Id. at p. 3688:23-27; CT-1, Vol. 28, p. 7168:11-13 [Partial Statement of Decision Re Trial Phase IV (Jan. 8, 2007)].)

d. Imported Water

The Northern Cities also import an average of 1200 AFY from the SWP, and their usage of that water generates an additional 100 acre-feet per year of return flows, augmenting groundwater in this sub-basin. (RT-1, Vol. 14, p. 3703 [Phase III Trial Testimony of Dr. Priestaf (Oct. 22, 2003)].)

e. Percolation Ponds

The Northern Cities constructed and financed six percolation ponds to capture runoff of rainfall and prevent it from wasting to the ocean. These percolation ponds augment the groundwater supply in the Northern Cities Area by approximately 100 AFY. (Id. at pp. 3702-03.)

f. Cooperative Water Management And Sharing

Beginning in the early 1980s, the Northern Cities and landowners agreed to divide the safe yield of their area (approximately 9,500 acre-feet per year), allocating 57 percent to the landowners for irrigation and 43 percent to the Northern Cities for urban uses. (CT-1, Vol. 11, p. 2735 [Notice of Motion to Approve Settlement Agreement Between Northern Cities, Northern

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Landowners, and Other Parties; Supporting Brief and Declarations (Aug. 2, 2002)].) This Settlement Agreement was approved by the Court upon noticed motion on August 27, 2002. (CT-1, Vol. 11, p. 2877 [Clerk's Minute Order (Aug. 27, 2002)].) This 2002 Settlement Agreement was reaffirmed and its terms were incorporated in the 2005 Settlement Stipulation and the final Judgment, confirming the Northern parties' sole management and financing of water resources in their area, and it is attached thereto as Exhibit E. (CT-1, Vol. 17, p. 4573 [Settlement Stipulation, (June 30, 2005)].) The Stipulation states, *inter alia*:

> Existing Groundwater, SWP Water and Storage Space in the Northern Cities Management Area will continue to be allocated and independently managed by the Northern Parties in accordance with the Northern Cities and Northern Landowners' 2002 Settlement Agreement (Exhibit "E") for the purpose of preserving the long-term integrity of water supplies in the Northern Cities Management Area. (CT-1, Vol. 17, p. 4531:11-22.)

As before, the Settlement Stipulation and Judgment did not require the LOG parties to contribute a penny to the Lopez Reservoir or other water conservation projects in the Northern Cities Area. (CT-1, Vol. 17, p. 4531:11-22 [Settlement Stipulation (June 30, 2005)].) In addition, in the Court's Order Approving Settlement Stipulation dated August 3, 2005, the Court expressly found that the Settlement Stipulation "logically divides the basin into three separate management subareas that will resolve current and future water issues in each subarea." (*Id.* at p. 4663.)

2. The Alleged Errors Were Not Errors And Cannot Be "Prejudicial" Because LOG Has No Water Rights In The Northern Cities Area

It is indisputable that the only water granted to the Northern Cities are rights to use water in the Northern Cities Area of the Basin.

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In contrast, the trial court repeatedly found, and Appellants do not deny, that no LOG parties own land, use groundwater, or have any water rights in the Northern Cities Area. The Judgment states:

> 4. (a) The Northern Cities have a prior and paramount right to produce 7,300 acre-feet of water per year *from the Northern Cities Area of the Basin*; and (b) the Non-Stipulating Parties have no overlying, appropriative, or other right to produce any water supplies *in the Northern Cities Area of the Basin.* (CT-2, Vol. 1, p. 4:21-24 [Judgment After Trial (Jan. 25, 2008)] (emphasis added).)

The Phase IV Statement of Decision explains the Judgment for the Northern Cities in greater detail:

> Because the Santa Maria groundwater basin extends beyond the boundaries of the Santa Maria Valley Water Conservation District, and the issues before the court also involve those other subareas of the basin, it is important to set forth the rights of the Northern Cities as against the non-settling landowners with regard to the Lopez Reservoir water and other water supplies in the Northern Cities Area. (CT-1, Vol. 28, p. 7167:24-28 [Partial Statement Of Decision Re Trial Phase IV].)

> The non-settling Land Owner parties did not claim or prove that they own any land in the Northern Cities Area or that they paid any money toward the construction or operation of the Lopez Reservoir. (*Id.* at p. 7168:11-13.)

> The Land Owners failed to present any evidence that they have any overlying, appropriative, or other right to use these or any other water supplies in the Northern Cities Area. (*Id.* at p. 7169:6-8.)

Having no water rights in the Northern Cities Area, the LOG parties cannot prove they were prejudiced by the Judgment's award of water rights in this corner of the Basin. LOG cites no evidence that the Northern Cities' exercise of their water rights in this area harms

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LOG in any way. LOG fails to even discuss the abundant evidence that groundwater pumping in the Northern Cities Area "has not had any effect on the rest of the basin," that this subarea has only a "minimal hydrologic connection" to the rest of the Basin, or that groundwater supplies in the Northern Cities Area have been generated and managed separately from the other subareas of the Basin. (See, e.g., RT-1, Vol. 14, pp. 3718:5-3723:11; 3725:13-3728:8 [Phase III Trial Testimony of Dr. Todd (Oct. 22, 2003)].) Likewise, LOG ignores the evidence, discussed above, regarding the Lopez Reservoir and the history of separate financing and management of Northern Cities water resources.

Therefore there was more than substantial evidence to support the trial court's allocation of Northern Cities Area water rights and the court's finding, in the court's 2005 Order Approving the Settlement Stipulation, that the Settlement: "logically divides the basin into three separate management subareas that will resolve current and future water issues in each subarea." (CT-1, Vol. 17, pp. 4663 [Order Approving Settlement Stipulation and Phase IV Pretrial Conference Order (Aug. 3, 2005)].) Similarly, in *San Fernando, supra,* 14 Cal.3d 199, the Supreme Court upheld Los Angeles' water rights in the San Fernando sub-area of the basin, but not in the Sylmar and Verdugo sub-areas, because inter alia, "the extractions of water in each basin affect the other water users in the same basin but do not significantly or materially affect the groundwater level in other basins." (*Id.* at 249-50.) Likewise, here, the evidence proves that extractions of water in the Northern Cities Area do not materially affect groundwater in the other 2 subareas, where the LOG parties do own land.

LOG's only support for this objection is the trial court's earlier finding in Phase II that the Basin is a single basin (LOG AOB, p.

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81:1). But that preliminary finding did not decide anything about subareas, and even if it had, the trial court was free to rule otherwise in later phases or in the final Judgment. (See, e.g., *Horning, supra,* 130 Cal.App.4th at p. 203 ["[u]ntil entry of judgment, the court may vacate or change a previously rendered verdict as it sees fit."]; *Phillips v. Phillips* (1953) 41 Cal.2d 869, 874) ["at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced"].) Consequently, the trial court was free to ultimately decide, after hearing the Phase III testimony of Dr. Todd, Dr. Priestaf, Mr. Ogren, and others, that the Basin and its water rights should be managed and allocated separately in its three subareas. In addition, the Settlement Stipulation allows the court to adjudicate future disputes "across Management Area boundaries." (CT-1, Vol. 17, p. 4533:6-11 [Settlement Stipulation (June 30, 2005)].)

LOG's objection to the ruling that they lack overlying water rights in the Northern Cities Area "deprives Appellants of equal protection" (LOG AOB, p. 91) is unsupported. Obviously, if LOG parties owned land in the Northern Cities Area, they would have the same overlying water rights as other landowners in this area. Similarly, LOG claims that the Judgment restrains their liberty by "preventing them from acquiring and pumping groundwater upon land they may acquire in the future in or around the Northern Cities Area," (LOG AOB, p. 91) – but the Judgment does no such thing.

Emblematic of the LOG's trivial objections is their objection to the court's use of the term "Northern Cities" and its award of water rights to them, rather than to individual cities. The reason for this joint award is obvious: the Northern Cities agreed to share and jointly manage their water rights and resources in their 2002 and 2005

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Settlement Agreements, discussed above. (See CT-1, Vol. 17, pp. 4531-32 [Settlement Stipulation (June 30, 2005)]; CT-1, Vol. 17, p. 4575 [Settlement Agreement Between and Among Northern Cities, Northern Landowners and Other Parties (April 30, 2002)].) LOG ignores these facts and cannot explain how this joint award harms LOG.

LOG cites no evidence that any of the court's Northern Cities rulings injure LOG, and LOG cannot abolish the abundant evidence supporting the Judgment merely by ignoring it. The award of water rights in the Northern Cities Area does not affect any overlying rights LOG may have in other areas of the Basin. The California Constitution, statutes, and cases prohibit reversal unless the record shows a "prejudicial" error that caused the appellant "substantial injury." Even if they could show an error, Appellants cannot pass this Constitutional threshold.

3. The Trial Court Properly Declared The Northern Cities' Surface Water Rights

Appellants complain that the court improperly awarded the Northern Cities *surface* water rights (Lopez Reservoir water and imported SWP water), arguing that we "did not plead nor request any surface water rights." (LOG AOB, p. 83.) Appellants are wrong. As discussed above, the Northern Cities' Cross-Complaint sought a declaration of their superior rights to both (1) groundwater and (2) surface water that the Northern Cities salvaged and imported into the Northern Cities area. (CT-1, Vol. 11, pp. 2946-47 [Cross-Complaint of Northern Cities (Jan. 13, 2003)].)

The Phase IV Statement of Decision explains the basis for each element of the Northern Cities' 7,300 AFY of water rights (CT-1, Vol. 28, p. 7167:24-7169:8 [Partial Statement of Decision re Trial

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Phase IV (Jan. 8, 2007)]), and each element is amply supported in the record. For example, Dr. Priestaf and Mr. Ogren testified that the Northern Cities purchase an average of 5,200 AFY from the Lopez Reservoir pursuant to contracts with the owner of Lopez, the San Luis Obispo County Flood Control and Water Conservation District. (RT-1, Vol. 14, p. 3699:12-25 [Phase III Trial Testimony of Dr. Priestaf (Oct. 22, 2003)]; RT-1, Vol. 14, pp. 3669:15-3670:12 [Phase III Trial Testimony of Mr. Ogren (Oct. 22, 2003)].)

LOG's other objections barely deserve a response. For example, LOG complains that "there was a lack of indispensable parties since other water users with contractual rights to water from the Lopez Reservoir were not included as parties." LOG does not explain who these parties are or why they were in any sense "indispensable." This objection was not properly asserted in the trial court, no motion was made under CCP §389 and LOG provides no facts or law to support it.

4. The Trial Court Properly Determined The Northern Cities' Rights To Return Flows, Salvaged Water, And Other Sources Of Supply

LOG also objects to the court's award of small amounts of water to the Northern Cities based on: return flows from the use of the Northern Cities' contractual purchases of Lopez Reservoir water (400 AFY); the amount by which releases of Lopez water into Arroyo Grande Creek augment Basin groundwater (300 AFY); return flows from the use of SWP water imported by the Northern Cities (100 AFY); and augmentation of Basin groundwater by the Northern Cities' construction and operation of percolation ponds that prevent rainwater from wasting to the Pacific Ocean (100 AFY).

Respondents have cited abundant case law granting parties

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water rights when they import, salvage, and develop water supplies at their expense. Dr. Priestaf explained and the court found that each of these water supplies was developed and/or salvaged by the Northern Cities, at their expense, with no contribution from LOG parties; and these supplies "augment" the Basin groundwater supply in the amounts listed above. (RT-1, Vol. 14, pp. 3698-3704 [Phase III Trial testimony of Dr. Priestaf (Oct 22, 2003)]; CT-1,Vol. 28, p. 7168:1-28 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) LOG cites no evidence or law contrary to these rulings, and no evidence that these rulings prejudice LOG.

N. The Court's "Prevailing Parties" Determination Was Correct Under Code Of Civil Procedure Section 1032

Because Santa Maria, GSWC and the Northern Cities obtained material non-monetary relief against Appellants, the trial court's Order After Hearing Regarding Motions to Tax Costs awarded Santa Maria, GSWC and the Northern Cities an aggregate recovery of costs of approximately $100,000.00. (CT-4, Vol. 6, p. 1600:8-10 [Order re Prevailing Parties (June 6, 2008)].) Appellants argue that because the trial court found there are portions of the case for which neither party prevailed, there should be no "prevailing parties" finding under Code of Civil Procedure section 1032. Yet, Appellants provide no reason why the trial court abused its discretion in designating Santa Maria, GSWC and the Northern Cities prevailing parties.

1. The Trial Court Correctly Declared GSWC, Santa Maria, And The Northern Cities Prevailing Parties Because They Recovered Relief On Their Cross-Complaints Against Appellants

Costs are recoverable only by a "prevailing party" to a lawsuit. (See Code Civ. Proc., § 1032.) In addition to certain criteria where

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recover of costs may be obtained as a matter of right, where other than monetary relief is recovered, the court has discretion to award costs to "prevailing party". (Code Civ. Proc., § 1032(a)(4); *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105.)

Appellants' arguments that Santa Maria, GSWC and the Northern Cities were "merely awarded some non-monetary relief," and thus the trial court abused its discretion by awarding costs, is a complete understatement.

Santa Maria, GSWC and the Northern Cities obtained significant non-monetary relief against Appellants, as set forth in paragraphs 2 through 7 of the Judgment After Trial. Given the following result, the court properly exercised its discretion in awarding costs to Santa Maria, GSWC and the Northern Cities. Specifically, the trial court found:

- Santa Maria and GSWC obtained prescriptive rights against Appellants. (CT-2, Vol. 1, ¶¶ 2 and 7(a) [Judgment After Trial (Jan. 25, 2008)].)
- Santa Maria and GSWC are legally entitled to store and recapture within the Basin return flows from imported water. (Id. at ¶¶ 3 and 7(b).)
- The Northern Cities have a prior and paramount right to produce 7,300 acre feet per year from the Northern Cities area. (Id. at ¶ 4(a).)
- Appellants have no overlying, appropriative or other right to produce any groundwater from the Northern Cities area. (Id. at ¶ 4(b).)
- Appellants are bound by and required to participate in the applicable Management Area Monitoring Program, and must maintain and share their water production

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data. (Id. at ¶ 5.)

- Appellants are not entitled to any portion of that increment of augmented groundwater supply derived from the Twitchell project's operation. (Id. at ¶ 6.)
- Appellants will be subject to the Court's continuing jurisdiction to administer the physical solution on all of their land within the Basin, whether now owned or acquired in the future. (Id. at ¶ 7.)
- The Prevailing Parties settled with nearly all the active overlying landowners by entering into the Settlement Stipulation, which provides for among other things, ongoing basin Management.
- The court approved the Settlement Stipulation despite Appellants' objections. In addition, in its August 3, 2005 order, the court found that "the Settlement Stipulation was negotiated in good faith, that its terms are reasonable, that if provides certainty to the parties, that is a physical solution that protects the water resource and the rights and interests of all parties…" (CT-1, Vol. 17, pp. 4662:28-4663:2 [Order Approving Settlement Stipulation and Phase IV Pretrial Conference Order (Aug.3, 2005)].)

In contrast, Appellants do not fall within the express categories described in Code of Civil Procedure section 1032. Appellants did not receive any relief (monetary or non-monetary) against the Prevailing Parties. Neither LOG nor Wineman are otherwise "discretionary prevailing parties," because they did not prevail on any of their causes of action, nor did they obtain any relief under the Judgment. In light of the court's determinations above, the LOG and

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Wineman parties' assertion that they "successfully defended against almost all of the claims of the Purveyor Parties…" is demonstrably false.

Appellants cite *McLarand, Vasquez & Partners v. Downey Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1450, 1454, which states that when neither the plaintiff nor defendant who has filed a cross-complaint prevails, the defendant is the prevailing party entitled to costs. This case is inapplicable here, where the trial court expressly found that Santa Maria, GSWC and the Northern Cities were prevailing parties as to the majority of their claims. Whereas, Appellants failed to secure *any relief* under the Judgment After Trial. Appellants only argument is that Santa Maria's, GSWC's and the Northern Cities' recovery were insignificant. If it is true that no significant relief was obtained, as alleged by Appellants, one questions why Appellants would even bring this appeal.

2. Appellants Are Not A Prevailing Party By Their Cross-Complaints

Appellants also cannot be considered "prevailing parties" through their cross-complaints. Through their first amended cross-complaint in the lead action, the LOG parties asserted cross-claims for quiet title as to groundwater rights (1st), declaratory relief as to groundwater rights (2nd), declaratory relief as to groundwater storage rights (3rd), quiet title as to ownership of groundwater storage space (4th), declaratory relief as to ownership of groundwater storage space (5th), declaratory relief as to return flows (6th), and inverse condemnation (7th). (CT-1, Vol. 2, p. 316-27 [First Amended Cross-Complaint of LOG to Quiet Title, for Declaratory Relief, and for Inverse Condemnation (Verified) (March 31, 1999)].)

As discussed above, on the eve of the Phase IV trial,

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Appellants indicated that they would not proceed on any of their cross-claims other than those to quiet title. In other words, Appellants abandoned all their claims other than quiet title to water rights.

Appellants thereafter failed to carry their respective burdens of proof in the Phase 4 and 5 trials on their remaining causes of action for quiet title. (CT-2, Vol. 1, p. 6, ¶ 8 [Judgment After Trial (Jan. 25, 2008)].) As to the quiet title claim, the Judgment provides:

> The LOG and Wineman Parties have failed to sustain the burden of proof in their action to quiet title to the quantity of their ground water rights as overlying owners. All other LOG and Wineman party causes of action having been dismissed, judgment is hereby entered in favor of the Public Water Producers as to the quiet title causes of action brought by the LOG and the Wineman Parties. (Id. at ¶ 8.)

In light of the court's unambiguous findings in the Judgment; that Appellants did not recovery anything in their own cross-complaints, Appellants' arguments that they were the true prevailing party is simply nonsensical.

3. Costs Cannot Be Apportioned On A Phase-by-Phase Basis

Appellants erroneously argue that since they were "prevailing parties" in phases I through III, they are entitled to apportioned costs for those phases. (LOG AOB, p. 140.) There is no authority that requires cost apportionment by trial phases. Instead, the final judgment determines the prevailing party for awarding costs.

Opinions of the judge and orders that precede the judgment are merged into or controlled by the final judgment. (*Prothero v. Superior Ct.* (1925) 196 Cal. 439, 444.) "Courts typically embody their final rulings not in statements of decision but in orders or judgments." (*Alan v. American Honda Motor Co., Inc.* (2007) 40

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Cal.4th 894, 901.) An opinion of the trial court that is not part of the final judgment or decision, and is without legal effect does not override the court's final judgment or decision. (*Grossman v. Davis* (1994) 28 Cal.App.4th 1833, 1836 & fn. 1.) As to the award of costs, the final Judgment is the only operative document upon which the court is to make its determination. (CT-2, Vol. 1, pp. 4-6 [Judgment After Trial (Jan. 25, 2008)].)

Moreover, all trial phases are inextricably intertwined, and each phase is built on evidence presented in previous phases. Each phase was not a separate and complete trial. Phases I and II were necessary to determine the boundaries of the adjudication area: "[o]nly the lands, groundwater extraction claims and claims to groundwater storage rights within the Boundary Line shall be subject to the claims in this lawsuit." (CT-1, Vol. 10, p. 2552 [Order After Hearing re Trial Phase II (Dec. 21, 2001)].) Determination of the Basin boundaries was necessary to the ultimate resolution of the case because the court had to determine available water supply within a geographic area. Without Basin boundaries, there could be no determination of yield, nor the groundwater production; the parties and the court could not determine the water rights in subsequent trial phases.

Likewise, the facts established and the analyses (and therefore the associated costs) presented as a part of the Phase III trial were integral to establishing prescriptive rights in Phases IV and V. In Phase III, a comprehensive hydrologic analysis of the Basin from 1944 through 2000 was presented to demonstrate that the Basin had been, for several decades, in an overdraft condition before the operation of the Twitchell and Lopez reservoirs. This same evidence was used in Phases IV and V to support Santa Maria's and GSWC's

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prescriptive right claims. [Respondent public water suppliers' Phase IV Closing Brief (March 7, 2006)]; CT-1, Vol. 20, p. 5289 [Tentative Decision re Trial Phase IV (March 24, 2006)].)

Phase III evidence demonstrated the Basin was in overdraft for extensive periods throughout the historical period examined. As reflected in the Court's Phase IV findings, an overdraft finding in any five-year period prior to 1997 — the date on which the Plaintiff's initial complaint was filed — is sufficient to sustain a prescriptive rights claim, so long as all other elements are satisfied. (See CT-1, Vol. 28, pp. 7153-57 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) In the Phase IV Partial Statement of Decision the Court cited to Phase III evidence to support a finding that "the Basin was in overdraft without any surplus water (and water levels seriously declined) from at least 1944-51; 1953-57; 1959-1967 …" and the parties had notice of overdraft. (*Id.* at p. 7157.) The Court concluded that "the undisputed Phase III and Phase IV evidence" shows that the Basin was in overdraft…"for more than the statutory period…. Thus, the Public Water Suppliers have now met the burden of proving overdraft in excess of the statutory period for purposes of a claim for prescriptive rights." (*Ibid.*) The record demonstrates costs incurred in Phases I, II, and III were reasonable and necessary to ultimately establish prescriptive rights and return flows in Phases IV and V. Thus, Appellants cannot be awarded costs for phases of trial which led to a final judgment against Appellants.

O. The Judgment Properly Identified Subject Properties

LOG's contention that "all land bound by the judgment must be identified by legal description" is without merit. (LOG AOB, pp. 134–135.) The trial court properly approved the use of party names,

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Assessor Parcel Numbers (APN) and document recordation numbers, in lieu of legal descriptions, for all identified parcels. CT-1, Vol. 28, p. 7157 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) The exhibits to the Judgment allow the court to accurately identify the stipulating parties, the non-stipulating parties, and the defaulting parties, along with the corresponding parcels owned by each party at the time the exhibits were created.[35]

Pursuant to the Judgment, "[a]ll real property owned by the Parties within the Basin is subject" to the Judgment. (CT-1, Vol. 28, p. 7157 [Partial Statement of Decision re Trial Phase IV (Jan. 8, 2007)].) It is clear that the information contained in the exhibits must be modified over time because ownership of these parcels and names of the landowners will change. In light of this, the Judgment reserves jurisdiction to the trial court to make supplemental orders, based on noticed motions, clarifying or amending the Judgment. (CT-2, Vol. 1, p. 7.) Further, to track parcels as they change hands, any party who transfers property subject to the Judgment must "notify any transferee thereof of this judgment and shall ensure that the Judgment is recorded in the title of said property." (Judgment, p. 8.) The Judgment also provides that the court "shall maintain at all times a current list of Parties to whom notices are to be sent and their

[35] On August 22, 2007, the Public Water Producers filed with the Court, and posted to the Court's website, draft Exhibits 1A, 1D, 2 and 3 for the review by all parties and the Court. (CT-7, Vol. 16, p. 4054 [Declaration of Ms. Steinfeld in Support of Public Water Producers' Response to LOG Comments (Dec. 21, 2007)], ¶ 11.) Several parties filed corrections to ensure accuracy. In addition, the Public Water Producers also performed an independent audit and review of Exhibits 1A, 2 and 3. (CT-7, Vol. 16, pp. 4052-53[Declaration of Ms. Steinfeld in Support of Public Water Producers' Response to LOG Comments (Dec. 21, 2007)].)

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addresses for purposes of service." (CT-2, Vol. 1, p. 8.) Lastly, a notice of entry of judgment, has been filed "in the Office of the County Reporter in Santa Barbara and San Luis Obispo Counties." (*Ibid.*) Pursuant to this order, the Judgment has been recorded against all parties owning property in both counties and listed in Exhibits 1A, 2, and 3 to the Judgment. (CT-8, Vol. 3, pp. 619-622 [Notice of Recordation of Judgment After Trial (March 25, 2008)]; CT-8, Vol. 3, pp. 628-29 [Notice of Recordation of Judgment After Trial (March 26, 2008)].)

No confusion will result when property is transferred because the new party will receive notice of the Judgment from the transferee and from the document recordation number, as the Judgment has been recorded against the specific landowner's property.

There is no legal requirement that land bound by a groundwater adjudication judgment be identified by legal descriptions. (See, e.g., *United Water Conservation District v. City of San Buenaventura et al.*, Ventura County Sup. Ct. No. 115611, Judgment (1996) [properties identified by party name without legal description in Santa Paula Basin adjudication]; *San Timoteo Watershed Management Authority v. City of Banning et al.*, Riverside County Sup. Ct. No. RIC 389197, Judgment Pursuant to Stipulation, Ex. D (Feb. 4, 2004) [listing overlying parties by APN number and party name in Beaumont Basin adjudication]; *Chino Basin Municipal Water District v. City of Chino et al.*, San Bernardino County Sup. Ct. No. 164327 (1989) [providing legal description of the basin boundaries and identifying overlying parties by party name in Chino Basin adjudication]; *City of Los Angeles v. City of San Fernando*, Los Angeles County Sup. Ct. No. 650079, Judgment (1979) [identifying overlying parties by party name and no legal description required in

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San Fernando Basin adjudication]; *Upper San Gabriel Valley Municipal Water District v. City of Alhambra*, Los Angeles County Sup. Ct. No. 924128, Amended Judgment (1989) [identifying parcels by producer name and designee without legal description in Upper San Gabriel adjudication].) LOG's cases are inapposite as they do not involve groundwater adjudications. (LOG brief, pp. 136–37.)

In fact, when a deed is transferred, there is no requirement that a legal description be used in order to give the transfer effect. A street address, APN, or the recorder's filing number of the deed conveying the property to the seller usually is sufficient. (*Dennis v. Overholtzer* (1960) 178 Cal.App.2d 766, 775-76, overruled on other grounds [property described by reference to recorder's series number on deeds]; *Finn v. Goldstein* (1927) 201 Cal. 605, 607 [description by address sufficient where it included entire property]; *Smart v. Peek* (1931) 213 Cal. 452, 457 [Civil Code section 1092 allows description of property in deed by descriptive name; see *King v. Stanley* (1948) 32 Cal. 2d 584, 585.) Thus, when recording a judgment, it would be absurd to require more information than is required to transfer ownership of real property.

In sum, the Judgment's inclusion of party names and document recordation numbers, along with the court's maintenance of a current list of parties and contact info, will ensure that existing and new landowners have notice of the Judgment. This method is common practice in adjudicated groundwater basins.

1. Exhibit 1A: Parties To Settlement Stipulation, Dated June 30, 2005

Exhibit 1A identifies the names of all stipulating parties – i.e., those parties to the litigation who have executed the Settlement Stipulation, dated June 30, 2005, the APNs, and the deed or deed

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reference number, if available. By its terms, the Settlement Stipulation binds all property owned by the parties to it. (CT-1, Vol. 17, p. 4537 at H [Settlement Stipulation (June 30, 2005)] ["[t]he Stipulating Parties agree that all property owned by them within the Basin is subject to this Stipulation and the judgment to be entered based upon the terms and conditions of this Stipulation. This Stipulation and the judgment will be binding upon and inure to the benefit of each Stipulating Party and their respective heirs, executors, administrators, trustees, successors, assigns, and agents"].) In other words, all stipulating parties have agreed that the Settlement Stipulation shall govern any and all parcels overlying the Basin that are presently, or may hereafter be, owned by them. Again, and importantly, the deed or document reference numbers are for reference only. The Settlement Stipulation binds all parcels owned by a Stipulating Party, whether identified on Exhibit 1A or not.

Further, to ensure that all successors-in-interest to the stipulating parties are provided adequate notice of the effect of the Settlement Stipulation and Judgment upon real property overlying the Basin, the stipulation provides that the stipulating parties must provide notice of this adjudication, their execution of the Settlement Stipulation, final Judgment and the Court's continuing jurisdiction over the Basin to any proposed transferee or assignee, and also to provide notice of any transfer or assignment of an interest in real property overlying the Basin to all parties to the Judgment. (CT-1, Vol. 17, p. 4536, ¶ E [Settlement Stipulation (June 30, 2005)].) Each Stipulating Party shall designate the name, address and e-mail address, if any, to be used for purposes of all subsequent notices and service, either by its endorsement on the Settlement Stipulation or by a separate designation to be filed within thirty days after execution of

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the Stipulation. (*Ibid.*) This designation may be changed from time to time by filing a written notice with the Court. (*Ibid.*)

Exhibit 1A also identifies, largely for informational and reference purposes only, the names of parties who are co-owners with respect to one or more parcels overlying the Basin, the deed or document reference number for each parcel known to be owned by a Stipulating Party and the applicable APNs for those parcels. In most circumstances, the parcels referenced in Exhibit 1A are the same parcels identified by the stipulating parties themselves on the Settlement Stipulation executed, filed with the Court and posted to the Court's website. In rare circumstances, where no parcel information was provided by a Stipulating Party, parcel information from the applicable county was obtained (or the applicable deeds), and the relevant information was included in Exhibit 1A. (CT-7, Vol. 16, p. 4053, ¶ 5 [Declaration of Ms. Steinfeld in Support of [Respondent] Public Water Providers' Response to LOG Comments (Dec. 21, 2007)].) Again, however, this information is for reference only. The executed Settlement Stipulations, identifying each Stipulating party, are "in evidence."

Exhibit 2: Non-Stipulating Landowner Group Parties And Wineman Parties

Exhibit 2 lists all non-stipulating parties. All information contained in Exhibit 2 is derived solely from documentation accepted into evidence. The APN and ownership information provided in Exhibit 2 was obtained directly from LOG's pre-trial exhibits, (CT-1, Vol. 19, p. 5127 [Exchange of Trial Exhibits: LOG Exhibits (Feb. 21, 2006)]; Phase IV, Exs. G100-G675), and from the deeds produced by LOG, marked as exhibits in Phase IV of the trial, and incorporated into the stipulation entered on February 28, 2006 between the LOG

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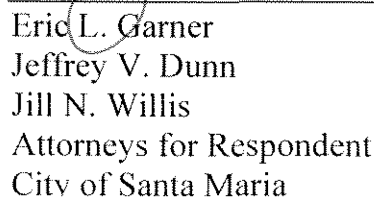
and Wineman Parties, on the one hand, and the certain stipulating parties on the other. (CT-1, Vol. 19, p. 5143 [Court Trial Minutes on Property Ownership Stipulation, Phase IV Trial (Feb. 28, 2006)].) As with Exhibit 1A, the Judgment requires all parties, including non-stipulating landowners and defaulting parties, to notify transferees of the Judgment. (CT-2, Vol. 1, p. 8 [Judgment After Trial (Jan. 25, 2008)].)

V. CONCLUSION

This appeal seeks to destroy a settlement and physical solution that protect this groundwater Basin, including Appellants' water resources, but do not violate Appellants rights or require Appellants to bear their costs. This appeal seeks to overturn a Judgment that is supported by overwhelming evidence, but Appellants do not discuss that evidence in their lengthy opening briefs. This appeal purports to protect Appellants' overlying groundwater rights, but Appellants elected not to prove that they pump any groundwater or the amounts of groundwater that they could reasonably and beneficially use. This appeal is based on myriad legal arguments, but they are rarely supported by applicable law. This appeal asserts numerous trial court errors, but most of them are trivial, theoretical, and harmless. This appeal should be dismissed and the Judgment should be affirmed.

Dated: May 17, 2011 BEST BEST & KRIEGER LLP



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Dated: May _____, 2011	NOSSAMAN LLP By: ____________________ Henry S. Weinstock Attorneys for Respondents, City of Arroyo Grande, City of Grover Beach, and Oceano Community Services District
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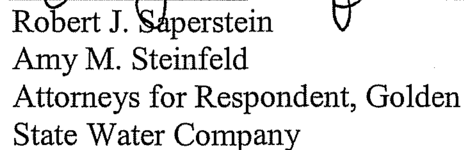
By: 
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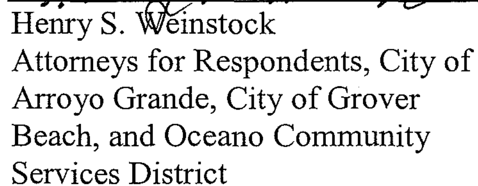
Dated: May 17, 2011 NOSSAMAN LLP

By: 
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Dated: May _____, 2011 ARNOLD, BLEUEL, LAROCHELLE, MATHEWS & ZIRBEL, LLP

By:______________________________
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Dated: May _____, 2011 RICHARDS WATSON & GERSHON

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Dated: May _____, 2011 NOSSAMAN LLP

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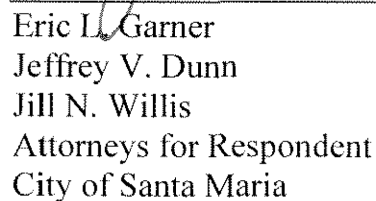
Certificate of Word Count

(California Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of approximately 36,678 words as counted by Microsoft Office Word 2002 used to generate this brief.

Dated: May 17, 2011 Respectfully submitted,

BEST BEST & KRIEGER LLP

By: 

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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 300 South Grand Avenue, 25th Floor, Los Angeles, California 90071. On May 17, 2011, I served the following document(s):

JOINT RESPONDENTS' BRIEF

☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

☒ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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☒ **By Santa Clara Superior Court E-Filing in Complex Litigation pursuant to Clarification Order dated October 27, 2005.***

☒ **Electronic Service of Civil Appellate Briefs to Supreme Court.**** I caused a single electronic copy of a civil appellate brief to be served on the California Supreme Court via Electronic Notification Address (the "Service") pursuant to California Rules of Court, rule 8.212. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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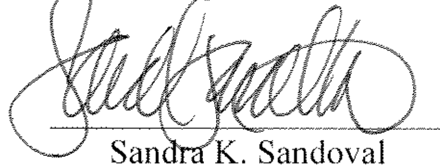
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 17, 2011, at Los Angeles, California.



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EDWARD WINEMAN, et al., *Plaintiffs, Cross-Defendants and Appellants,*
v.
CITY OF SANTA MARIA, et al., *Cross-Complainants and Respondents*
Court of Appeal Case Nos. H032750, H033544, H034362, and H035056

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Clerk - Superior Court for the County of Santa Clara Appellate Division 191 N. First Street San Jose, CA 95113	1 copy
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