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

11
 12 SANTA BARBARA CHANNELKEEPER,
 13 a California non-profit corporation,

14 Petitioner,

15 v.

16
 17 STATE WATER RESOURCES CONTROL
 18 BOARD, A CALIFORNIA STATE AGENCY;
 19 CITY OF SAN BUENAVENTURA, a
 20 California municipal corporation, incorrectly
 21 named as CITY OF BUENAVENTURA,

22 Respondents.

23
 24 CITY OF SAN BUENAVENTURA,
 25 a California municipal corporation,

26 Cross-Complainant,

27 v.

28 DUNCAN ABBOTT, an individual, et al.

Cross-Defendants.

Case No. 19STCP01176
 Assigned to Judge William F. Highberger
 Dept.: 10

Complaint filed: September 19, 2014

CROSS DEFENDANTS ANDREW K.
 WHITMAN, HEIDI A. WHITMAN,
 NANCY L. WHITMAN AND JOHN R.
 AND NANCY L. WHITMAN FAMILY
 INVITED BRIEF RE PRIORITY OF
 DETERMINATION OF PUEBLO WATER
 RIGHTS CLAIM

MARCH 11, 2022

DEPARTMENT 10

9:00 A.M.

1 TO: CROSS-COMPLAINANT CITY OF SANBUENAVENTURA, ALL
2 PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Cross-Defendants Andrew K. Whitman, Heidi A. Whitman, Nancy L. Whitman and
4 John R. and Nancy L. Whitman Family Trust submit the following statement at the invitation of
5 this Court. It should be noted that this brief impacts every Cross-Defendant who is named
6 based upon their status as an owner of property overlying the Ojai or Upper Ojai Groundwater
7 basins.

8 **I. INTRODUCTION**

9 This court invited a brief to explain why this court should determine the issue of whether
10 the City of San Buenaventura (SBV) has a legitimate claim to Pueblo Water Rights prior to
11 beginning of the phase 1 trial. The shortest answer is that with respect to a groundwater
12 adjudication concerning the Ojai and Upper Ojai groundwater basins (hereafter OGB), SBV
13 has no standing to instigate the basin adjudication under Code of Civil Procedure section 830 et.
14 seq. Determining whether SBV has any standing to sue for purposes of invoking a groundwater
15 basin adjudication procedure is a pre-requisite to this court making any substantive findings
16 concerning the OGB under the Comprehensive Groundwater Adjudication Statute ("CGAS").
17 The law prohibits this court beginning a Phase I trial concerning Ojai groundwater prior to
18 determining whether SBV has any right to the groundwater which is the subject matter of
19 claimed adjudication. A litigant's standing to sue is a threshold issue that a judge must resolve
20 before considering the case on the merits. California Judges Benchbook Civil Procedure Before
21 Trial § 10.26 (April 2021 update). [citing *Mendoza v JPMorgan Chase Bank, N.A.* (2016) 6
22 Cal.App.5th 802, 810; *Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal. App. 4th 456, 466;
23 *Iglesia Evangelica Latina, Inc. v Southern Pac. Latin Am. Dist. of Assemblies of God* (2009)
24 173 Cal.App.4th 420, 445 (justiciable controversy requires standing).

25 Of equal importance as to why this court must address standing first is the fact that
26 several thousand property owners overlying the OGB will be saved the unnecessary expense of
27

1 a trial concerning whether there is “interconnectedness.” It is true that fewer than a thousand
2 property owners have “appeared” to participate in Phase 1 of the trial but that is because Ojai
3 Valley Property Owners are at a distinct economic disadvantage. Individual property owners
4 cannot afford to pay an attorney to prepare for and attend a trial that is expected to last weeks.
5 This court should require that SBV demonstrate it has standing to claim any right to the
6 groundwater that is in the OGB before any substantive aspect of the adjudication process
7 occurs.

8 In 2013, Eric Garner, a senior partner at Best Best and Krieger was a speaker at a 2019
9 symposium discussing the adjudication process under the SGMA (Sustainable Groundwater
10 Management Act). Mr. Garner is quoted in reference to the future of SGMA adjudications: If
11 you do the math waters is \$10,000 an acre-foot, and you can pay a lawyer a lot of money for a
12 long time and that doesn’t come any close to the cost of replacing the water supply.” The fact
13 that there are cost benefit advantage to SBV in laying claim to groundwater rights where none
14 exist is not a basis for proceeding with a trial. Property owners overlying the OGB should not
15 be the ones that pay for SBV’s despicable scheme to acquire water rights through litigation.

16 **II. REQUESTED RELIEF**

17 As a matter of law, the scheduled trial must be stayed/delayed until the challenge to
18 SBV’s standing to initiate CGAS action with respect to groundwater rights within the OGB is
19 resolved. California Judges Benchbook Civil Procedure Before Trial § 10.26, *infra*.

20 The issue of SBV’s right to extract groundwater from the OGB is an issue that must be
21 determine first. The Third Amended Cross-Complaint (“3ACC”) currently includes an
22 allegation that SBV is the holder of Pueblo Water Rights despite the fact that this court has
23 acknowledged that the manner in which the Pueblo Water rights are asserted is deficient. The
24 legal basis for striking the 3ACC allegations concerning the Pueblo Rights issue has already
25 been briefed – primarily in the Whitman Cross-defendants Reply to Opposition to Judgment on
26 the Pleadings. The brief is attached for this Court’s convenience and reference as Exhibit A.

1 Cross-defendant are entirely confident that a proper claim of Pueblo Rights cannot be
2 asserted by SBV. This is because had the Spanish or Mexican Governments granted Pueblo
3 Rights to SBV or a predecessor (history establishes that no such grant ever occurred) SBV or its
4 predecessor was required to file a claim with a special commission created by Congress or the
5 putative rights expired. If the claim was not confirmed by the commission the purported
6 Pueblo water right expired as a matter of law. Had any such claim been affirmed by the
7 Commission SBV would have long ago asserted that claim. In any event, the ball is now
8 properly in SBV's court. SBV needs to demonstrate by reference to legal enactments that SBV
9 preserved its rights via submission to the Commission created by Congress.

10 Cross-defendants are improperly delayed in moving forward with this legal standing
11 issue by the SBV's refusal to amend until after trial of Phase 1. As pointed out in the following
12 brief, once the fallacious claim to Pueblo Water Rights is stricken from the 3ACC it is
13 abundantly clear that SBV does not have a claim to water rights in the OBV and therefore SBV
14 has no standing to bring a comprehensive adjudication of OGB groundwater rights. In the
15 event, that SBV does not amend the 3ACC (despite having been given the opportunity to do so),
16 Cross-defendants file a motion to strike and will oppose any effort to amend the 3ACC absent
17 an offer of proof containing the legal documents establishing the Pueblo Rights claim (including
18 an enactment of the Congressional Committee affirming the claim).

19 A determination of the standing issue should not be overly time consuming and will not
20 unduly delay the potential adjudication of Riparian and groundwater rights for the Ventura
21 River and the Lower and Upper Ventura Groundwater Basins should the parties elect to proceed
22 with those adjudications. This is because the facts concerning SBV water rights are undisputed.
23 Ventura extracts groundwater from the Ventura River at a location known as Foster Park
24 approximately 6 miles from the Pacific Ocean. SBV also apparently extracts groundwater at
25 this same location. The location is approximately at the border of the Ventura River
26 Groundwater basin and the Upper Ventura River Groundwater basin. This potentially gives
27

1 SBV the right to a comprehensive adjudication of groundwater rights in these two groundwater
2 basins (Lower and Upper Ventura Groundwater Basins). It does not however establish that
3 SBV has any groundwater rights in the OGB. The fact that SBV does not hold groundwater
4 rights in the OGB is discussed extensively below.

5 This court should immediately stay the Phase I trial as relates to the adjudication of
6 rights in the OGB so that the standing issue can be resolved.

7 **III. BACKGROUND**

8 This litigation arises out of SBV's over extraction of water from the Ventura
9 River. SBV was sued by an environmental watch dog (Santa Barbara Channelkeepers) over the
10 negative impacts that SBV's over-extraction of water from the Ventura River had on the ability
11 of steelhead trout to survive in the Ventura River. Rather than reduce its use of Ventura River
12 water, SBV filed a cross-complaint (the current version is the Third Amended Cross-Complaint
13 - hereafter "3ACC"). SBV contends that it has the right to assert a claim and obtain an
14 adjudication as against anyone within the greater Ventura River watershed. It must be noted
15 that there is no statutory procedure for the adjudication of a "watershed." Further the CGAS
16 does not contain any provision which authorizes a "watershed wide" adjudication. CGSA is
17 specific to Groundwater Basins only. It is the failure of the 3ACC to state facts supporting a
18 claim against certain categories of cross-defendants (property owners overlying the Ojai
19 Groundwater Basin) that was the subject matter of Cross-defendant's motion for judgment on
20 the pleadings.

21 Cross-defendants are property owners who overlie groundwater basins within the same
22 watershed as the Ventura River. Cross-defendants Andrew Whitman and Heidi Whitman own
23 land overlying the Ojai Groundwater Basin. Cross-defendants Nancy Whitman and the John and
24 Nancy Whitman Family Trust own land overlying the Upper Ojai Groundwater Basin. OGB is
25 intended to refer to both of these basins
26
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1 California Groundwater rights are unique. California law spells out the ways that
2 groundwater rights can be acquired: (1) by ownership of property overlying the groundwater;
3 (2) by appropriation of groundwater rights; (3) by prescription of groundwater rights; and (4) by
4 acquisition of Pueblo Water Rights. This court has already indicated that it would strike the
5 allegation of Pueblo Rights from the 3ACC. Without the Pueblo Rights claim SBV's rights to
6 groundwater in the OGB evaporate. The 3ACC does not allege that SBV owns land overlying
7 the OGB. The 3ACC does not allege that SBV is an appropriator of groundwater from the
8 OGB. The 3ACC does not allege that that SBV has prescriptive rights to groundwater in the
9 OGB.

10 Instead of specifying rights to the groundwater in the OGB itself, the 3ACC alleges that
11 SBV has appropriative and prescriptive water rights in the "Ventura River watershed."
12 However, this does not create a claim of right to groundwater in the OBV. More specifically
13 SBV does not take groundwater from the OBV. SBV takes its water from the Ventura River
14 approximately 6 miles from the Pacific Ocean and several miles away from the closest extent of
15 the Ojai groundwater basin.

16 It cannot be disputed that SBV is not among those persons or entities who extract
17 groundwater from the OGB. "In reach 4, about six miles upstream from the mouth of the river,
18 the City diverts water with a subsurface dam and extracts groundwater that would otherwise
19 flow into the river." *Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.
20 App. 5th 1176, 1181. There is no allegation in the 3ACC that the SBV extracts water at any
21 other point within the watershed. The 3ACC states that SBV has the right to take water from
22 the "Ventura River Watershed." This is an insufficient basis for SBV to state a claim to
23 groundwater rights underlying the OGB.

24 Based upon these circumstances the Whitman Cross-Defendants filed a motion for
25 judgement on the pleadings (additional grounds were cited but the gist of the motion was that
26 property owners overlying groundwater have priority or "senior rights" while SBV had
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1 articulated no cognizable right to anything but Ventura River waters. In opposition to the
2 motion for judgment on the pleadings SBV pointed out that the 3ACC contained allegations that
3 SBV held Pueblo water rights. Pueblo water rights are rights granted under Spanish or Mexican
4 rule and could theoretically include the right to take Ojai groundwater under certain
5 circumstances. In reply the Whitman Cross-defendants pointed out that alleging “on
6 information and belief” that SBV had acquired Pueblo water rights was improper as a matter of
7 law. This Court agreed that the manner in which Pueblo water rights was asserted was
8 improper. The court indicated it would grant a motion to strike the pueblo rights allegation.
9 However, the court disagreed that the removal Pueblo water rights would extinguish SBV’s
10 claim for adjudication of groundwater rights in the OBV.

11 Moving forward to adjudicate substantive aspects of the CGAS claim with respect to the
12 OGB causes immediate and prejudicial harm to any property owner who overlies the OGB.
13 Whether SBV has right to groundwater in the OGB is a threshold issue that must be determined
14 first - as a matter of law. The legal issue impacts thousands of residents in the greater Ojai
15 Valley who legally should not be legally subjected to defending a comprehensive adjudication
16 of OBG groundwater rights.

17 Cross-defendants met and conferred with SBV. Cross-defendants let SBV know that
18 they intended to file a motion to strike but would allow SBV the opportunity to amend the
19 3ACC to include additional allegations to establish its Pueblo water rights claim. SBV
20 indicated that consideration had been given to an amendment but it believed a motion to strike
21 would be untimely and refused to amend, if at all, until some weeks after the trial. Cross-
22 defendants responded that it would take little time to amend the 3ACC to state whatever facts to
23 support their claim for Pueblo water rights given that SBV is presumed to have control of the
24 facts to support the claim (otherwise it was improper for SBV to assert the claim in the first
25 instance).

1 There is no question that SBV has a right to a comprehensive groundwater adjudication
2 under the CGAS but only with respect to groundwater basin in which SBC has a legitimate
3 claim to groundwater rights. Cross-defendants do not object to this court proceeding with a
4 Phase I trial to determine the interconnectedness of the Lower Ventura River Groundwater
5 basin and the Upper Ventura Groundwater basin and/or the Ventura River. Cross-defendants do
6 not extract water from the Ventura River or its groundwater basins. Without the ability to claim
7 any legally recognized right to extract water from the OGB, SBV has no standing to bring a
8 comprehensive adjudication of OGB groundwater rights.

9 **IV. SBV’s STANDING TO ASSERT ANY RIGHT CONCERNING THE TWO**
10 **OJAI GROUNDWATER BASINS MUST BE RESOLVED BEFORE ANY OTHER**
11 **ISSUE CONCERNING THE TWO OJAI GROUNDWATER BASINS CAN BE**
12 **LITIGATED**

13 “To have standing, a party must be beneficially interested in the controversy; that is, he
14 or she must have ‘some special interest to be served or some particular right to be preserved or
15 protected over and above the interest held in common with the public at large.’ [*Carsten v.*
16 *Psychology Examining Com.* (1980) 27 Cal.3d 793, 796]. The party must be able to demonstrate
17 that he or she has some such beneficial interest that is concrete and actual, and not conjectural
18 or hypothetical.” [*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 315].”
19 *Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal. App. 4th 456, 466.

20 Groundwater rights in California are determined under a special set of laws. In this
21 case, SBV cannot demonstrate that it holds any “right” with respect to OGB groundwater.

22 To have standing, a party must be beneficially interested in the controversy, i.e., the
23 party must have some special interest to be served or some particular right to be preserved or
24 protected over and above the interest held in common with the public at large. *Abernathy v*
25 *Superior Court* (2007) 157 Cal.App. 4th 642, 646. There is no general “public interest”
26 exception to the requirement that a party bringing an action must have standing. People ex rel
27

1 *Becerra v Superior Court* (2018) 29 Cal.App. 5th 486, 497 (party does not have standing to
2 challenge validity of legislation based on public interest in this legislation). Public interest
3 standing is available only in mandate proceedings, not in ordinary civil actions. 29 Cal.App.5th
4 at 503.

5 The party bringing the action must have a beneficial interest that is concrete and actual,
6 not conjectural or hypothetical. *MTC Fin. Inc. v California Dep't of Tax & Fee Admin.* (2019)
7 41 Cal.App.5th 742, 747; *Mendoza v JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802,
8 810.

9 **IV. STANDING IS A THRESHOLD ISSUE THAT MUST BE LITIGATED**
10 **FIRST**

11 A litigant's standing to sue is a threshold issue that a judge must resolve before
12 considering the case on the merits. California Judges Benchbook Civil Procedure Before Trial §
13 10.26 (April 2021 update) citing *Mendoza v JPMorgan Chase Bank, N.A.*, supra, 6 CA5th at
14 810; *Boorstein v CBS Interactive, Inc.*, supra, 222 CA4th at 465; *Iglesia Evangelica Latina, Inc.*
15 *v Southern Pac. Latin Am. Dist. of Assemblies of God* (2009) 173 Cal.App.4th 420, 445
16 (justiciable controversy requires standing).]

17 Because the elements for standing are not merely pleading requirements but are an
18 indispensable part of the plaintiff's case, each element must be supported in the same way as
19 any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and
20 degree of evidence required at the successive stages of the litigation. *Troyk v Farmers Group,*
21 *Inc.* (2009) 171 Cal.App.4th 1305, 1343.

22 **V. THIS CHALLENGE TO SBV'S STANDING IS TIMELY**

23 SBV has objected that the challenge to the 3ACC is not timely and beyond the motion
24 cut off set by the court. Standing can be raised at any time. "Because standing goes to the
25 existence of a cause of action, lack of standing may be raised by demurrer or at any time in the
26 proceeding, including at trial or in an appeal. [Citations.]" (citation) "[C]ontentions based on a
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1 lack of standing involve jurisdictional challenges and may be raised at any time in the
2 proceeding.’ [Citations.]” *Troyk v. Farmers Grp., Inc.*, supra, 171 Cal. App. 4th at 1345.

3 A litigant's standing to sue is a threshold issue to be resolved before the matter can be
4 reached on the merits. *Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 71 “If we
5 were to conclude that plaintiff did not have standing to maintain the action, not having been
6 personally damaged by the defendants' conduct, then there would be no need to address the
7 merits of her cause. Equally wasteful of judicial resources would be a resolution on the merits
8 without reaching the standing issue.” (Ibid.) Courts do not address the merits of litigation when
9 the plaintiff lacks standing, because “ ‘California courts have no power ... to render advisory
10 opinions or give declaratory relief.’ ” *Municipal Court v. Superior Court (Gonzalez)* (1993) 5
11 Cal.4th 1126, 1132. Standing “ ‘goes to the existence of a cause of action.’ [Citation.]” 5
12 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 862, p. 320. Lack of standing may be raised
13 at any time in the proceeding, including at trial or in an appeal. *Associated Builders &*
14 *Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361, 87 Cal.Rptr.2d
15 654, 981 P.2d 499

16 **VI. SBV CANNOT ESTABLISH THAT IT HOLDS ANY RIGHT TO**
17 **EXTRACT OJAI GROUNDWATER**

18 California water law is complicated. However, it is simplified in the present case for
19 multiple reasons. First, the issue raised by the Whitman cross-defendants only involves
20 groundwater rights. Second, SBV does not extract any groundwater from the OGB. SBV
21 doesn't even have an extraction facility to take groundwater from the OGB. Under these
22 circumstances SBV has no claim of any right to groundwater in the OGB. Since SBV does not
23 overly the OGB, appropriation and prescription are potential bases for acquiring groundwater
24 rights. With respect to appropriation, it is undisputed that SBV's water is taken from the
25 Ventura River approximately 6 miles from the Pacific Ocean. SBV presents no enactment or
26 legal document in which it acquired (appropriated) the right to pump water from the OGB.

1 Furthermore, prescriptive rights only occur with open notorious adverse use of groundwater.
2 Since SBV doesn't even extract from the OGB its purported "use" of OGB groundwater cannot
3 be said to be open and notorious. As mentioned earlier the 3ACC does not claim appropriative
4 of prescriptive rights to the OGB but instead claims those rights as to the "watershed." That is a
5 meaningless allegation where OGB water rights are concerned.

6 "...[T]here is no private ownership of groundwater. *State of California v. Superior*
7 *Court* (2000) 78 Cal.App.4th 1019, 1023, 1025. The State of California owns all of the
8 groundwater in California, not as a proprietary owner, but in a manner that empowers it to
9 supervise and regulate water use. (Id. at pp. 1022, 1026. Water rights holders have the right to
10 "take and use water," but they do not own the water and cannot waste it. Id. at p. 1025.

11 A person obtains a right to extract groundwater by owning specific land, by
12 appropriating water [citation], or by inheriting a pueblo right. [citation]. Ownership of land
13 appurtenant to groundwater engenders an "overlying right." [citation].

14 Under the "correlative rights doctrine," "as between the owners of land overlying strata
15 of percolating waters, the rights of each to the water are limited, in correlation with those of
16 others, to his 'reasonable use' thereof when the water is insufficient to meet the needs of all.
17 [Citations.]" An appropriative right is based on the taking of groundwater. [citation] Pueblo
18 rights apply to municipal successors to Mexican and Spanish pueblos. [citation]." *Central &*
19 *West Basin Water Replenishment Dist. v. Southern California Water Co.*, (2003) 109 Cal. App.
20 4th 891, 905–06.

21 As discussed herein SBV cannot establish that it is an owner of property overlying the
22 OGB. It also cannot establish that it is an appropriator or prescriptive user if the groundwater in
23 the OGB. Once it can be established that SBV does not holds Pueblo water rights, all four
24 potential bases for claiming a right to OGB ground water will be exhausted.

25 Even if SBV could establish it was an appropriator of Ojai groundwater it would not be
26 able to assert a right as against owners of property overlying the Ojai groundwater basin.

1 “Under California law, “[p]roper overlying use ... is paramount, and the right of an appropriator,
2 being limited to the amount of the surplus, must yield to that of the overlying owner in the event
3 of a shortage unless the appropriator has gained prescriptive rights through the taking of
4 nonsurplus waters.” [Citation.] Thus, while the rights of all overlying owners in a groundwater
5 basin are correlative and subject to cutbacks when the basin is overdrafted, overlying rights are
6 superior to appropriative rights. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th
7 1224, 1251–52.

8 Thus, even if the OGB were in overdraft and found to be unsustainable under current
9 extraction of groundwater (a proposition that is patently false under the Bulletin 118 for each of
10 the Ojai groundwater basins) priority and seniority of rights would be held by property owners
11 overlying the OGB.

12 **VII. THERE IS NO STATUTORY AUTHORITY FOR A COMPREHENSIVE**
13 **“WATERSHED” ADJUDICATION**

14 SBV has devised a procedural device that does not exist within the law. SBV purports
15 to undertake a comprehensive adjudication of an entire “watershed.” Whatever that procedure
16 is, it is not what is described in the statutes authorizing a groundwater basin adjudication.

17 Code Civil Procedure § 832 (c) defines "comprehensive adjudication" as "an action
18 filed in superior court to comprehensively determine rights to extract groundwater in a basin."
19 Code of Civil Procedure section 830(b)(5) [describes the purpose of CGAS is to "establish[]
20 procedures bywhich courts may conduct comprehensive determinations of all rights and
21 priorities to groundwater in a basin" (emphasis added)]

22 These statutes make clear that a comprehensive adjudication is confined to defining the
23 rights of groundwater users in a basin. The purpose is to streamline resolution of water rights in
24 a basin amongst those who have a proper claim to groundwater rights. SBV is not a
25 groundwater user in the OGB and it has no place (no standing) to initiate the adjudication
26 process of OGB groundwater rights as relates to OGB groundwater.

1 **IX THE STATUTORY PURPOSE OF SGMA AND CGAS DOES NOT**
2 **ENCOMPASS THE CLAIM BY SBV AGAINST OGB RIGHTS HOLDERS**

3 The concept behind SGMA and the CGAS process is to create a streamlined means of
4 adjudicating the rights of groundwater users in a basin in the event that extraction rates could
5 not be sustainably maintained or the rights between rights holders became disputed. In this
6 case the many cross-defendants who have a legitimate claim to take groundwater from the OGB
7 do not have a dispute with each other. Neither statutory scheme creates a new form of rights or
8 cause of action in a distant appropriator of riparian rights and/or a distant groundwater basin
9 (such as SBV which takes water from a river several miles from either basin). Both schemes
10 are careful to articulate that common law water rights survive. “Groundwater management
11 pursuant to this part shall be consistent with Section 2 of Article X of the California
12 Constitution. Nothing in this part modifies rights or priorities to use or store groundwater
13 consistent with Section 2 of Article X of the California Constitution...” Water Code section
14 10720.5(a). “Nothing in this part, or in any groundwater management plan adopted pursuant to
15 this part, determines or alters surface water rights or groundwater rights under common law or
16 any provision of law that determines or grants surface water rights.” Water Code section
17 10720.5(b).

18 Water Code section 10721 provides in relevant part “(a) ‘Adjudication action’ means an
19 action filed in the superior or federal district court ***to determine the rights to extract***
20 ***groundwater*** from a basin or store water within a basin, including, but not limited to, actions to
21 quiet title respecting rights to extract or store groundwater or an action brought to impose a
22 physical solution on a basin.” The problem with the adjudication action as to the OGB is that
23 SBV has no “right to extract groundwater” from the OGB. SBV is an interloper in an action to
24 adjudicate Ojai groundwater rights. SBV holds no rights and has no standing to force an
25 adjudication of Ojai groundwater rights.
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1 **X. CCP 833(c) DOES NOT CREATE A WATER RIGHT IN SBV WITH**
2 **RESPECT TO THE OGB**

3 SBV claims that CCP section 833(c) authorizes a statutory adjudication amongst any
4 person in the Ventura River watershed. CCP section 833 is a provision within the CGAS.
5 CGAS expressly states that it does not alter existing common law water rights. Therefore, CCP
6 section 833(c) cannot be interpreted to give SBV rights in the OGB.

7 CCP section 833(c) provides in relevant part “If the court finds that including an
8 interconnected surface water body or subterranean stream flowing through known and definite
9 channels is necessary for the fair and effective determination of the groundwater rights in a
10 basin, the court may require the joinder of persons who claim rights to divert and use water
11 from that surface water body or subterranean stream in a comprehensive adjudication conducted
12 pursuant to this chapter.” This section grants a **power to the Court** to include a riparian rights
13 holder (who would not otherwise be included in a groundwater adjudication) in the
14 adjudication. This sub-section does not create a right **in that riparian rights holder** to initiate
15 a CGAS proceeding or to claim any right to the groundwater in the basin.

16 **XI. THE SCOPE OF THE 3ACC EXCEEDS THE PERMISSIBLE SCOPE OF**
17 **THE CROSS-COMPLAINT**

18 Besides SBV’s lack of standing, the purported ‘comprehensive adjudication’ invoked by
19 SBV does not come close to the authorization give by the Court of Appeal in *Santa Barbara*
20 *Channelkeeper v. City of San Buenaventura* (2018) 19 Cal. App. 5th 1176

21 SBV maintains that the procedure it invokes to comprehensively adjudication OBG
22 groundwater rights mandates that every owner and or user of groundwater from the basin must a
23 party to the adjudication.¹ Any meaningful reading of the decision written by Court of Appeal
24

25
26
27 ¹ SBV extends this claim of required inclusiveness to the entire Ventura River Watershed
although the CGAS includes no provisions concerning a “Watershed Adjudication.”

1 reveals that the Court’s primary concern was that a defendant who is found to have caused an
2 injury is allowed to equitably blame others for the harm the defendant is obligated to
3 compensate. SBV does not limit the groundwater basin adjudication cause of action to persons
4 who can be blamed for depletion of the water in the Ventura River. In fact, the action is
5 brought against owners of property overlying the OGB without regard for whether they have
6 ever extracted water from the groundwater basin. The comprehensive adjudication process
7 mandates bringing entirely innocent non-users of groundwater into the litigation. This fact
8 alone, demonstrates that the CGAS procedure grossly exceeds what the Court of Appeal
9 permitted in allowing for a cross-complaint.

10 The second concern by the Court of Appeal was that the Complaint filed by Channel
11 Keepers failed to include facts describing the rights of other users of the watershed. Therefore,
12 it was impossible to determine the extent of SBV’s right to cross-complain. This Court recently
13 quoted from *Channelkeeper v. City of San Buenaventura* in a tentative ruling:

14 “Whether and to what extent the Cross-defendants water rights are junior to the City’s
15 [junior to SBV’s water rights] is not apparent from the pleadings, but Channelkeeper has
16 alleged that the City’s right to divert water from the river was first put to use in 1870 so its
17 rights may be senior to some of the Cross-defendants rights.”

18 It is extremely important to note that the Court of Appeal is referring to an 1870 riparian
19 right acquired by SBV. The Court refers to the age of the riparian rights as creating a
20 presumption of priority – but as a matter of law the seniority of these rights only applies with
21 respect to claims against riparian rights holders. As a matter of law, the rights to groundwater
22 are not influenced by seniority of the use. Groundwater rights are correlative with respect to all
23 owners of land overlying a groundwater basin. The Court of Appeal’s reference to 1870 rights
24 therefore cannot be read to have any impact on groundwater rights in the OGB.

1 No one contests that SBV has riparian rights that might be senior to other extractors
2 *from the Ventura River*. With respect to the OGB the rights of overlying owners are senior and
3 the rights of SBV are simply non-existent (as discussed extensively, above).

4 SBV has the right to adjudicate claims and seek apportionment against those persons
5 and entities who take from the Ventura River. Ventura also has the right to assert its rights to
6 groundwater in the Lower Ventura River groundwater basin and possibly also in the lower
7 groundwater basin. The 3ACC sufficiently defines that SBV has no right with respect to Ojai
8 groundwater. Or if SBV has a right to groundwater it has failed to assert it in the 3ACC.

9 **XII. THIS BRIEF ONLY ADDRESSES THE FACT THAT SBV DOES NOT**
10 **HAVE A RIGHT TO INITIATE AN ADJUDICATION OF GROUNDWATER RIGHTS**
11 **IN THE OJAI AND UPPER OJAI GROUNDWATER BASINS**

12 Cross-defendants do not attempt to assert that the SBV cannot bring an action against
13 any given property owner overlying the OGB if (1) the property owner's use of groundwater
14 exceeds what is "reasonable" and (2) the amount that exceeds reasonable depletes the water that
15 is available in the Ventura River. Cross-defendants contend that the CGAS is not an
16 appropriate vehicle to assert that type of permissible claim. The CGAS in no way embraces that
17 type of claim. In fact, even if SBV had a rightful groundwater extraction facility overlying the
18 OGB the CGAS would not authorize SBV's claim. CCP section 833(b)(1) provides:

19 "This chapter does not apply to any of the following: (1) An action that concerns only
20 allegations that a groundwater extraction facility, or group of facilities, is interfering with
21 another groundwater extraction facility or facilities and does not involve a comprehensive
22 allocation of the basin's groundwater supply."

23 Under CCP section 833(b)(1), SBV is not permitted to include innocent groundwater
24 rights holders (owners of property overlying groundwater who either extract only a reasonable
25 amount of groundwater or who do not extract any groundwater but are unwilling to relinquish
26 their rights in the future). There is no basis for a comprehensive adjudication of either Ojai
27

1 groundwater basin because they are not in overdraft or not being extracted at unsustainable rates
2 (per the Bulletin 118 for each of the Ojai and Upper Ojai Groundwater Basins.

3 **CONCLUSION**

4 Addressing the OGB only, the Phase I trial must be stayed/continued until the challenge
5 to SBV standing to initiate CGAS action with respect to groundwater rights within the OGB can
6 be resolved. California Judges Benchbook Civil Procedure Before Trial § 10.26, *infra*.

7 The issue of SBV’s right to extract groundwater from the OGB is an issue that must be
8 determine first. Cross-defendants are improperly delayed in moving forward with this legal
9 standing issue by the City’s refusal to amend the 3ACC until after a trial of Phase 1. However,
10 as pointed out in the foregoing brief, once the fallacious claim of SBV’s Pueblo Water Rights is
11 stricken from the 3ACC it is abundantly clear that SBV does not have a claim to groundwater
12 rights in the OGB and therefore SBV has no standing to bring an adjudication. In the event, that
13 SBV does not amend the 3ACC despite having been given the opportunity to do so then Cross-
14 defendants will oppose any effort to amend the 3ACC to include Pueblo Rights unless a
15 competent offer of proof of the legal enactments required to perfect a Pueblo Rights claim.

16 Dated: March 2, 2022

17
18 */s/ Andrew K. Whitman*

19 By: _____
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25
26
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