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Exempt from filing fees

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

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

14 Petitioner,

15 v.

16 STATE WATER RESOURCES CONTROL
17 BOARD, a California State Agency;
18 CITY OF SAN BUENA VENTURA, a
19 California municipal corporation, incorrectly
20 named as CITY OF BUENA VENTURA,

21 Respondents.

22 CITY OF SAN BUENA VENTURA, a
23 California municipal corporation,

24 Cross-Complainant,

25 v.

26 DUNCAN ABBOTT; et al.
27
28

Case No. 19STCP01176

Hon. William F. Highberger

CITY OF OJAI'S TRIAL BRIEF

Action Filed: September 19, 2014

Third Amended Complaint Filed:

Trial Date: March 16, 2022

BARTKIEWICZ, KRONICK & SHANAHAN, PC

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 This phase is meant to address the question of whether or not the distinct groundwater
3 basins in the Ventura River Watershed are hydrologically connected in a material and
4 substantial way such that they should be adjudicated in this action. The parties disagree as to
5 what “connectivity” means and what Ventura’s burden of proof is. Ultimately the question of
6 connectivity is not a question of whether there is some interaction between some groundwater
7 and surface water at some time. Instead, it is a question of what interaction, how much
8 interaction, and how that interaction, if any, allegedly results in harm. Thus, connectivity is a
9 fact specific question that operates within certain guideposts as described below.

10 There are a few questions that this court should consider throughout the trial and at the
11 close and submission of evidence to address the issue of the alleged connectivity. First, what is
12 the origin of this dispute and therefore the scope of the issues before the court. Second, what is
13 the alleged relief sought by Ventura as it relates to the groundwater in the four distinct
14 groundwater basins. And lastly but most importantly, has Ventura met its burden of proof
15 regarding the nature of connectivity between the groundwater and surface water in the Ojai
16 Basin relevant to the litigation and holdings of the 2018 Court of Appeal decision that Ventura
17 cites as the law of the case?

18 Ventura and its allies will likely argue that this phase is not meant to address these
19 questions because it wants to avoid its burden of proof and specific findings of connectivity as
20 it is meant to apply to groundwater adjudications. That argument however is asking this court
21 to hold a three-week trial on a general finding that has no purpose. As explained below
22 connectivity does not mean, and never has meant, a connection of some kind, or one drop of
23 water.

24 **II. PROCEDURAL HISTORY OF THE CASE AND SUMMARY OF RELEVANT**
25 **FACTS**

26 This litigation began in 2014 when Santa Barbara Channelkeeper filed suit alleging that
27 the City of Ventura’s “pumping and diversion of water during summer months leave too little
28 flow in the river ‘to protect steelhead.’” (*Santa Barbara Channelkeeper v. City of San*

1 *Buenaventura* (2018) 19 Cal.App.5th 1176, 1188.) In January 2018, the Second District Court
 2 of Appeal ruled that Ventura was authorized to file a cross-complaint against other water users
 3 in the Ventura River watershed. (*Id.*) The Complaint filed by Channelkeeper that initiated this
 4 action “alleges that the City [of Ventura]’s water use is unreasonable because it results in
 5 insufficient flow in reaches 3 and 4 of the river during summer months. This is
 6 Channelkeeper’s sole allegation as to what is unreasonable about the City’s water use.” (*Id.* at
 7 1189.)

8 The Court of Appeal therefore reasoned that Ventura could file cross-complaints
 9 because “other water users’ pumping and diversion activities may be contributing to the
 10 alarmingly low waterflow alleged in reaches 3 and 4, and if these activities were curtailed the
 11 waterflow in the Ventura River might improve.” (*Id.* at 1188.) As the Court correctly pointed
 12 out, “[t]he only way to know how influential other water users are—or are not—is to look at
 13 their water use, too.” (*Id.*)

14 The Court of Appeal further defined the term “hydrological connection,” finding “[t]his
 15 means that other water users’ pumping and diversion activities may be contributing to the
 16 alarmingly low water flow alleged in reaches 3 and 4, and if these activities were curtailed the
 17 waterflow in the Ventura River might improve.” (*Id.*) As such, Ventura was permitted to “file a
 18 cross-complaint against other water users in the Ventura River watershed, where it alleges that
 19 other users are partially responsible for the reduced waterflow in reaches 3 and 4 during
 20 summer months.” (*Id.* at 1190.) These are the facts that give rise to the cause of action and
 21 therefore is considered to be the relevant “transaction¹” that governs Ventura’s Cross-
 22 Complaint. (*Id.* at 1186-1188) [citing *Hanes v. Coffee*, (1931) 212 Cal. 777 at p. 781].)

23 The Court essentially identified a “but for” causation test that Ventura, as the Cross-
 24 Plaintiff, would have to prove— that is, but for the groundwater pumping activities of others,
 25 waterflow in the Ventura River would not be alarmingly low. Put another way, the Court
 26

27
 28 ¹ In explaining the significance of “transaction” the Court noted that “[t]he law allows a defendant
 in a civil case to cross-complain against entities not originally parties to the action if there is a sufficient
 subject matter connection between the action and the cross-complaint.”(*Id.* at 1186)

1 highlighted the questions of whether there is a nexus between the Cross-Defendants' pumping
 2 of groundwater and the Plaintiff's alleged injury, harm to the fishery in reaches 3 and 4 of the
 3 Ventura River during the summer months.

4 On or about January 2, 2020, Ventura filed its Third Amended Cross-Complaint against
 5 thousands of Cross-Defendants based on their rights to take water from the Ventura River, its
 6 tributaries, or one of four groundwater basins in the region. Because the appellate court opinion
 7 is the law of the case (which Ventura admits), it frames the standards applicable to this phase of
 8 trial. Thus, the key question to be decided now, for each groundwater basin, is whether it is
 9 sufficiently hydrologically connected to the Ventura River such that the water uses of the
 10 Cross-Defendants “are partially responsible for the reduced waterflow in reaches 3 and 4
 11 during summer months.”

12 On October 18, 2021, the Court addressed the question of whether the issues for Phase
 13 1 had been determined or could be agreed to among counsel for Ventura, the City of Ojai (Ojai)
 14 and Casitas MWD. This Court noted that the Minute Order on the motion to bifurcate issues
 15 did not identify the specific issues that would be tried under Phase 1 and asked the parties
 16 whether or not they were in agreement. Thereafter, there were attempts to stipulate to language
 17 that could broadly describe phase 1 issues, but the parties were unable to reach agreement.
 18 Ignoring the direction from Court of Appeal's decision, Ventura seems to contend that the issue
 19 for Phase 1 is whether there is any connectivity of any water between the basins and the
 20 Ventura River. Ojai and others, on the other hand, have consistently stated that Ventura must
 21 demonstrate that there is sufficient connectivity between the Ojai Basin and the Ventura River
 22 such that Ventura can show that the groundwater pumped from the Ojai Basin diminishes the
 23 flows in reaches 3 and 4 of the Ventura River during the summer months justifying a
 24 comprehensive adjudication.

25 **III. ARGUMENT**

26 **A. The Only Matter at Issue in This Phase of Trial Is Whether the** 27 **Groundwater in the Separately Defined Basins Is Sufficiently** 28 **Interconnected with the Surface Water of the Ventura River So That** **Pumping from a Basin Can Be Shown to Diminish Ventura River Summer** **Flows in Reaches 3 and 4, as Alleged by Channelkeeper in Its Complaint.**

1 As set forth in the Court of Appeal’s decision discussed above, this phase of trial is
 2 meant to address the crucial question of whether there exists a natural, hydrologic connection
 3 between the groundwater that is used by the pumpers in each basin and the surface water such
 4 that the pumping in a basin prevents groundwater from naturally flowing in an amount that
 5 would “ensure sufficient waterflow” in Reaches 3 and 4 of the Ventura River during the
 6 summer months. This scope of Phase 1 logically sets the stage for the next phase to determine
 7 whether each basin is in overdraft and whether the water rights of parties may be subject to a
 8 court judgment that adjudicates the priority of and quantifies each of their rights and imposes
 9 an injunction or physical solution. (Code of Civ. Proc. § 834 (b); Code of Civ. Proc. § 847(a).)

10 **B. As the Cross Plaintiff, Ventura Bears the Burden to Prove the Waters Are**
 11 **Sufficiently Connected So That Pumping in the Ojai Basin Reduces**
 12 **Summer Flows in Reaches 3 and 4 of the Ventura River.**

13 Cross Plaintiff has the burden to prove the pumping activities in the Ojai Basin reduces
 14 the summer streamflow in Reaches 3 and 4 of the Ventura River, which is the harm alleged in
 15 the Complaint. “[W]hen a party seeks relief the burden is upon him to prove his case, and he
 16 cannot depend wholly upon the failure of the defendant to prove his defenses.” (*California*
 17 *Employment Com. v. Malm* (1943) 59 Cal. App. 2d 322, 323.) “Except as otherwise provided
 18 by law, a party has the burden of proof as to each fact the existence or nonexistence of which is
 19 essential to the claim for relief or defense that he is asserting.” (Evidence Code §500.)

20 Here, Ventura has pled several causes of action alleging that Cross-Defendants'
 21 groundwater pumping in the Ojai basin is partially responsible for the harm alleged in
 22 Channelkeeper’s Complaint. (*See* Ventura’s Third Amended Complaint.) To prove its claim,
 23 then, Ventura must establish, that the pumping of groundwater in the Ojai Basin substantially
 24 reduces the amount of water that would otherwise naturally make its way into Reaches 3 and 4
 25 of the Ventura River during the summer months. Likewise, Ventura bears the burden to prove
 26 its allegation that the groundwater pumping activities in the Ojai Basin materially contribute to
 27 the harm alleged in Channelkeeper’s Complaint so as to justify the relief sought, an injunction
 28 or physical solution.

1 Ventura and its allies seem to argue its burden of proof is met if it can demonstrate that
 2 any amount of groundwater in the Ojai Basin does, or theoretically can, physically touch San
 3 Antonio Creek for any period of time. Alternatively, the proponents seem to think that they can
 4 meet the burden of proof by demonstrating that if all groundwater pumping were to cease, over
 5 time, the water table could be assumed to rise and to overflow into San Antonio Creek. Yet
 6 they will offer no evidence that this spillover water would actually make its way into Reaches 3
 7 and 4 of the Ventura River during the summer months in sufficient quantity to affect the
 8 alleged harm.

9 As a result, Ventura cannot demonstrate that groundwater pumping from the Ojai Basin
 10 substantially reduces the summer streamflows in Reaches 3 and 4 of the Ventura River in the
 11 summer months. Consequently, Ventura will fail to meet its burden of proof, as it cannot show
 12 a nexus between the conduct complained of – groundwater pumping in the Ojai Basin – and the
 13 alleged harm – reduction of flow in Reaches 3 and 4 of the Ventura River during the summer.
 14 Therefore, Cross-Defendants within the Ojai Basin should not be subject to an injunction or
 15 physical solution.

16 **C. Connectivity Must Be Proven, and It Requires a Showing That**
 17 **Groundwater Pumping Materially Reduces Surface Water Flows.**

18 **1. Under the Comprehensive Groundwater Adjudication Statute and**
 19 **the Sustainable Groundwater Management Act, Connectivity**
 20 **Requires a Finding That the Groundwater Pumping Has Significant**
 21 **Impact on the Specified Surface Water Flows.**

22 Code of Civil Procedure section 833, subdivision (c), authorizes the court to join parties
 23 with surface water rights to a pending comprehensive groundwater adjudication of a basin: "[i]f
 24 the court finds that including an interconnected surface water body or subterranean stream
 25 flowing through known and definite channels is necessary for the fair and effective
 26 determination of the groundwater rights in a basin, the court may require the joinder of persons
 27 who claim rights to divert and use water from that surface water body or subterranean stream in
 28 a comprehensive adjudication conducted pursuant to this chapter." (*Id.*) Though the statute does
 not contemplate that it could be used in the reverse – to join groundwater users to an existing
 adjudication of the surface water rights to the Ventura River – that is what Ventura has done in

1 this case.

2 Ventura has alleged that the Ojai Basin’s groundwater is connected or “interconnected”
 3 with the surface flows of San Antonio Creek, a tributary to the Ventura River. As the Cross-
 4 Complainant, Ventura bears the burden to demonstrate that the inclusion of the Ventura River
 5 in the adjudication of the Ojai Basin’s groundwater rights is necessary for the fair and effective
 6 determination of those groundwater rights. This, in turn, requires Ventura to prove that
 7 pumping activities in the Ojai Basin result in “significant and unreasonable adverse impacts on
 8 beneficial uses of the surface water” of the Ventura River. (*See* Water Code § 10721(x)(6).)

9 The meaning of the term “interconnected surface water,” as used in Code of Civil
 10 Procedure section 833, subdivision (c) of the Comprehensive Groundwater Adjudication
 11 Statute (“CGAS”), can be understood with reference to the parallel term in the Sustainable
 12 Groundwater Management Act (“SGMA”), since CGAS was intended to be read in conjunction
 13 with SGMA.

14 SGMA includes harm to an “interconnected surface water” in its listing of “undesirable
 15 results”: an undesirable result “means one or more of the following effects caused by
 16 groundwater conditions occurring throughout the basin...[d]epletions of interconnected surface
 17 water that have significant and unreasonable adverse impacts on beneficial uses of the surface
 18 water.” (Water Code § 10721(x)(6).) Thus, a stream can be joined as an “interconnected surface
 19 water” in an adjudication under CGAS when necessary because groundwater pumping is
 20 alleged to be causing a significant and unreasonable adverse impact on the surface water. In
 21 other words, “interconnection” under CGAS and SGMA requires something more than mere
 22 connectivity between surface water and groundwater, or some depletion of surface water flows:
 23 for purposes of these statutes, interconnection exists when groundwater pumping is shown to
 24 have significant and unreasonable impacts on the surface water flows.

25 **2. The Existence and Extent of Hydrologic Connectivity and**
 26 **Interconnectedness is a Fact-Specific Question of Geology and**
 27 **Cannot Be Assumed.**

28 It is well-established that groundwater, by its very nature, is presumed *not* to be part of
 a surface stream or watercourse. (*Los Angeles v. Pomeroy* (1899) 124 Cal. 597, 628 [emphasis

1 added]; *see also* Water Code § 1200.) Thus, the simple fact that water percolates into the
2 ground does not establish connectivity between a groundwater basin and surface waters in the
3 same area. Because groundwater exists within physical constraints that can vary widely
4 depending upon the physical properties of each basin, it is necessarily a fact-specific analysis to
5 determine whether the groundwater that is being pumped is separate from the surface flows or
6 other aquifers in the same area. In other words, the characteristics of the subsurface strata are
7 critical, and it cannot be assumed that any particular groundwater exists within homogenous or
8 semi-homogenous layers of sand that allows free (or relatively free) flow of water; such
9 conditions may not exist in reality. This is why the law presumes that groundwater is not
10 connected to surface water. (*Cf., Los Angeles v. Pomeroy* (1899) 124 Cal. 597, 628; *see also*
11 Water Code § 1200.)

12 One of the earliest cases examining whether the groundwater pumping activities of a
13 defendant were connected to the plaintiff's allegations of harm is *Hudson v. Dailey*, (1909) 156
14 Cal. 617. There, although there was some degree of connectivity between groundwater and
15 surface water, the Court deemed it insufficient for plaintiff to meet her burden of showing
16 harm. The Court did recognize that there could be a need to limit groundwater pumping "where
17 the pumping of such percolating water and its use on the land in which it is found *will diminish*
18 *the surface stream, to the injury of those having such riparian or prescriptive rights therein.*"
19 (*See Hudson v. Dailey*, (1909) 156 Cal. 617,628 [emphasis added].) In that case, which arose in
20 the Los Angeles area, groundwater existed "in the gravels *immediately beneath and directly*
21 *support[ed]* surface flow." (*Id.* [emphasis added].)

22 In addition to the fact that shallow groundwater directly supported the surface flow,
23 there was evidence that one of the defendants had placed wells within that portion of the
24 ground, i.e., "immediately beneath and directly supporting the surface flow" and that his
25 pumping activities immediately decreased the flow in the creek. (*Id.* at 630) However, the
26 Court found the plaintiff still failed to meet her burden of proof. Although geologic conditions
27 in that area resulted in a direct connection between some groundwater and the surface water,
28 and even though that groundwater was being pumped, the evidence demonstrated that the

1 pumping activity did not take enough water from the stream to support the claim of injury.
2 Therefore, the relief sought – an injunction – was not justified. (*Hudson v. Dailey* (1909) 156
3 Cal. 617, 629-630).

4 Under *Hudson*, evidence of connectivity alone – without a corresponding showing of
5 harm to the plaintiff's water rights – is not sufficient to maintain a claim. Even in a system
6 where the groundwater that is being pumped lies just beneath the surface and does directly
7 impact surface flows *in some way*, the plaintiff cannot meet her burden absent a showing of
8 substantial injury.

9 Nor does mere reference to the "common source" doctrine overcome the need to
10 demonstrate sufficient connection between the groundwater and the surface water with
11 evidence that groundwater pumping causes injury to the streamflows. In *Los Angeles v. San*
12 *Fernando*, (1975) 14 Cal. 3d 199, there was evidence that some water escaped the basin at
13 some point but that “flow did not emanate from the confined aquifers which supply the wells
14 but [rather] from the ground waters which supply those aquifers.” (*Id.* at 249.) In particular, the
15 “water from wells in the Sylmar subarea is drawn from confined aquifers, that is, bodies of
16 ground water cut off from free hydraulic connection with overlying ground water except at the
17 intake.” (*Id.* at 249.) The court concluded that the subareas were separate basins and that “the
18 extractions of water in each basin affect the other water users in the same basin but do not
19 significantly or materially affect the ground water levels in other basins.” (*Id.* at 249-250.)
20 Thus, the Court analyzed whether the conduct complained of resulted in significant or material
21 harm, reaffirming the requirement to demonstrate a nexus, or proximate cause, with the alleged
22 injury. Moreover, the Court concluded that even if the groundwater in one basin *could*
23 contribute to flows in another, the City of Los Angeles had no legal right to enjoin the
24 groundwater pumping in those basins. (*Id.* at 250.)

25 Here, the Court of Appeal has directed this court, on remand, to focus its inquiry on
26 whether groundwater pumping is diminishing the flow of the Ventura River in Reaches 3 and 4
27 during the summer months, such that curtailment of that pumping would result in river flows
28 adequate to eliminate the harm Channelkeeper has alleged. (*Santa Barbara Channelkeeper v.*

1 *City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1188-90.) This is the test that must be
2 met to establish connectivity between the Ojai Basin – or indeed any of the four separate
3 Bulletin-118 designated basins Ventura has joined in this case – and the Ventura River. And
4 this is the proper framing of the issues to be tried in Phase 1.

5 **IV. CONCLUSION**

6 In sum, connectivity is never established by hypotheticals or one-drop of some water, at
7 some time under some conditions. If that were true, the question of interconnectedness would
8 never be a question for the trier of fact. Rather, connectivity is fact-specific and requires a
9 nexus to the harm alleged. Ventura and its allies will proffer evidence in this phase along the
10 lines that they need only prove that some groundwater, under limited very wet conditions, may
11 briefly touch surface water and therefore the two sources somehow become “one common
12 source.” This is not sufficient to meet the burden of proof, because Ventura will not and cannot
13 demonstrate that groundwater pumping in the Ojai Basin substantially reduces the surface
14 water flows in Reaches 3 and 4 of the Ventura River during the summer months.

15
16 Dated: March 2, 2022

Respectfully submitted,
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