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

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

15 v.

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

21 Respondents.

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CITY OF SAN BUENAVENTURA,  
 24 a California municipal corporation,

25 Cross-Complainant,

26 v.

27 DUNCAN ABBOTT, an individual, et al.

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Cross-Defendants.

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

Complaint filed: September 19, 2014  
 BRIEF OF WHITMAN CROSS-  
 DEFENDANTS RE SCOPE OF PHASE 1  
 TRIAL AND PRELIMINARY  
 DETERMINATIONS FOR NOVEMBER  
 15, 2021 STATUS CONFERENCE

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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BRIEF OF WHITMAN CROSS-DEFENDANTS RE SCOPE OF PHASE 1 TRIAL AND PRELIMINARY  
 DETERMINATIONS FOR NOVEMBER 15, 2021 STATUS CONFERENCE - 1

1           It is my understanding that the Court has invited input as to the management of the initial  
2 phase of a trial of the 6<sup>th</sup> cause of action of the Third Amended Cross-Complaint. My belief is  
3 that the Court has been led down a primrose path by the primary voice in the litigation – the City  
4 of San Buenaventura (hereafter VENTURA). VENTURA has been given the lead voice in  
5 dictating this Court’s activities and this fact has distorted the procedure that VENTURA and this  
6 Court are marching towards. This statement is not intended to be critical of the Court as this is a  
7 difficult, complicated case and the scope of issues that can be litigated at this point is not an easy  
8 issue to tackle. Unfortunately, armed with millions of dollars for attorneys’ fees and with millions  
9 of dollars of developers’ fees at stake VENTURA has created a void of accurate information and  
10 then stepped into the void to distort the issues while the POWOGW (Property Owners Who  
11 Overlie a Ground Water Basin)cross-defendants have only been parties to the litigation since 2020  
12 or 2021 and are still getting their bearings.

13           My clients are (wrongfully) participants in this litigation because they are POWOGW of  
14 the Ojai and the Upper Ojai groundwater basins. There are distinct legal issues to resolve as to  
15 similarly situated OWOOGW cross-defendants. There are other issues to be resolved as to cross-  
16 defendants who overlie the Ventura River basins or take water via the riparian rights system.  
17 These distinctions are critically important because the rights held by the cross-defendants are  
18 completely different whether they are POWOWG or have water rights based upon some other  
19 basis (appropriation, prescription, riparian, etc.) Just to be clear VENTURA does not have  
20 POWOGW status for the Ojai or Upper Ojai groundwater basins. VENTURA wants the Court  
21 to meld the issues of the separate basins and the separate types of rights holders and thereby avoid  
22 the application of superior groundwater rights enjoyed by POWOGW cross-defendants under  
23 California’s correlative rights concerning groundwater.

24           **MY FIRST RECOMMENDATION** to the Court is to give the CITY OF OJAI (hereafter  
25 OJAI) a lead role in guiding and briefing the court on the procedure that should be followed  
26 concerning adjudication of the Ojai and Upper Ojai groundwater basins. Currently VENTURA  
27 is ringleader and puppet master with respect to all litigated issues in the case. The reason that

1 cross-defendant OJAI is a logical and more appropriate choice to lead the discussion concerning  
2 procedure concerning the Ojai and Upper Ojai groundwater basins) is that OJAI, as I understand  
3 it, does not lay claim to any rights to the Ventura River or to the groundwater basins of the Ventura  
4 River. It is further my understanding that this cannot be said of the cross defendants that are water  
5 districts that are primary players in the litigation (as distinguished from the “pip squeak” cross  
6 defendants as characterized by this court). The State of California and its agencies also appear to  
7 be disinterested in the groundwater basins or the preservation of POWOGW groundwater rights  
8 (their interest seems focused on waterflow in the Ventura River only).

9 VENTURA is also not the logical lead litigant for the Ojai and Upper Ojai groundwater  
10 basin adjudications. VENTURA is the wrongdoer in these proceedings. They are the party that  
11 has been called out for overuse and abuse of water flowing in the Ventura River such that the  
12 survival of the Steelhead Trout in the river is threatened. I have said this before, but to allow  
13 VENTURA to control and direct procedure in this case is like having the fox guard the hen house.  
14 VENTURA has and will distort the issues to the Court to its advantage. The current proposed  
15 scope of trial is an example of that effort to distort the law.

16 I do not propose that the court remove VENTURA from the lead role with respect to  
17 litigation of the Ventura River groundwater basins or the litigation of riparian water flow issues  
18 in the Ventura River. I think that Casitas Municipal Water District could make a good case for  
19 taking the lead role over those aspects of the litigation, but that is their decision. My clients are  
20 non-parties to the Ventura River and the Ventura River groundwater basins.

21 Another reason OJAI should take the lead role with respect to describing appropriate  
22 procedure concerning the Ojai and Upper Ojai groundwater basins is that OJAI is a groundwater  
23 extractor from the Ojai basin and VENTURA is not. OJAI has an appropriate government entity  
24 stake in the Ojai groundwater basin. Ojai should be given the benefit and should not be doubted  
25 that it has the interests of overlying groundwater users at heart since it is a POWOGW. Whatever  
26 water use claims are made by VENTURA are not based upon being a POWGOW of the Ojai or  
27 Upper Ojai groundwater basin. VENTURA does not even own an extraction facility that takes

1 water directly from either of those basins. As discussed below whatever rights VENTURA may  
2 claim that it has those rights are subservient to POWOGW rights which are superior to any other  
3 form of groundwater rights under the California correlative groundwater rights law. Finally, there  
4 does not appear to be a “big player” with respect to POWOGW for the Upper Ojai groundwater  
5 basin. However, it seems apparent that POWOGW for Upper Ojai should have a unity of interest  
6 in getting the law and procedure correct as relates to adjudication of a ground water basin even if  
7 Ojai and Upper Ojai are distinct basins. Therefore, OJAI is a preferrable spokes person or leader  
8 to VENTURA and I urge the court to remove VENTURA from their assumption of a lead role  
9 with respect to adjudication of the Ojai groundwater basin and the Upper Ojai groundwater basins.

10 MY SECOND RECOMMENDATION is that the Court separate out the litigation into  
11 distinct groundwater basins or at least as to the Ojai and the Upper Ojai basin. This provides two  
12 advantages. First, it is the law. I will not repeat the well stated legal arguments advanced by the  
13 OJAI. The statutory intent is clear that adjudication of a groundwater basin is a singular  
14 undertaking for each distinct groundwater basin. It also makes sense as to the Court’s duty to  
15 preserve the rights of POWOGW cross-defendants. The law is absolutely clear that POWOGW  
16 have priority over any other claimants to a groundwater basin. VENTURA seeks to muddle  
17 varying sources of groundwater rights into a physical solution that ignores or erodes the priority  
18 of rights given to the POWOGW cross-defendant. Again, this recommendation only relates to  
19 the Ojai and Upper Ojai basins. If the cross-defendants from the Ventura River groundwater  
20 basins and the riparian cross-defendants want to litigate the issues together in a single adjudication  
21 that is their choice, but any single cross-defendant joined to the litigation based upon POWOGW  
22 who is an owner of land overlying a groundwater basin should be able to object and halt the  
23 adjudication of more than one groundwater basin at a time. On behalf of my clients, I object to  
24 litigating more than one groundwater basin at a time or litigating with the Ventura River issues  
25 intertwined . The Ojai groundwater basin (where some of my clients are owners overlying the  
26 groundwater basin) and the Upper Ojai basin (where other of my clients are allegedly overlying  
27 owners – patently false allegation) each should be litigated separately.

1           **MY FINAL RECOMMENDATION is that the Court stay and/or continue the trial**  
2 **as to the Ojai and Upper Ojai groundwater basins and that the Court look carefully at**  
3 **VENTURA’s standing to sue the POWOGW cross-defendants in these basins.** These  
4 groundwater basins include hundreds of litigants who have been drug into the litigation kicking  
5 and screaming. The circumstances, procedural history and the law of correlative groundwater  
6 rights are such that perhaps not a single one of these POWOGW cross-defendants is a legitimate  
7 cross-defendant to the third amended cross-complaint’s 6<sup>th</sup> cause of action. The reason for this  
8 bold statement finds its source within the appellate court decision in this case and the law of  
9 correlative groundwater rights.

10           This Court needs to keep at the forefront the fact that VENTURA’s attempt to cross-  
11 complain was initially rejected by the predecessor trial court. That trial court believed that the  
12 issue framed by the Channel keeper complaint was limited to VENTURA’s overuse and abuse of  
13 Ventura River water that imperiled the river’s steelhead trout population.

14           The trial court’s rejection of the cross-complaint was the subject of an appeal, but the  
15 manner in which that ruling was reversed does not contemplate or endorse nearly so broad of a  
16 cross-complaint as the current Third Amended Cross-Complaint. The Court of Appeal cited the  
17 fact that when one defendant is singled out as a bad actor they are not required to be the sole  
18 source of compensation to the injured party who equitably should **share the blame**.

19           See *Santa Barbara Channelkeeper v City of San Buenaventura* (2018) 19 Cal.App.5th  
20 1176, 1189-90 “[A] defendant is generally authorized to file a cross-complaint against a  
21 concurrent tortfeasor for partial indemnity on a comparative fault basis, even when such  
22 concurrent tortfeasor has not been named a defendant in the original complaint.” (Id. at p. 607,  
23 146 Cal.Rptr. 182, 578 P.2d 899.) By analogy, the City is authorized to file a cross-complaint  
24 against other water users in the Ventura River watershed, where it alleges that other users are  
25 partially responsible for the reduced waterflow in reaches 3 and 4 during summer months.”]

26           Therefore, the Court of Appeal allowed the cross-complaint but in doing so specified who  
27 could be held to blame. Those potential cross-defendants were limited to persons who (1)

1 extracted water from the watershed and (2) whether the extraction is in an amount that was  
2 “unreasonable” and resulted in the reduction of water in the Ventura River. *Id.*. The court of  
3 appeal also addressed the importance of priority of users. None of these issues are addressed by  
4 the proposed initial phase of the trial and this is a problem because it leaves in the case many  
5 cross-defendants who are not even alleged to be active extractors and it fails to distinguish  
6 between extractors who comply with the rule of reasonableness and those who do not.

7 Under California law, the POWOGW cross-defendants enjoy the highest priority of right  
8 to the use of underlying groundwater. Other users of groundwater who are not POWOGW hold  
9 lesser rights, including those who can be said to have appropriative rights or prescriptive rights  
10 to the groundwater (as alleged by VENTURA). Furthermore, California law forbids the  
11 adjudication of future use of groundwater by a POWOGW. [A trial court cannot not define or  
12 otherwise limit an overlying owner's future unexercised groundwater rights, in contrast to this  
13 court's limitation of unexercised riparian rights. *In re Waters of Long Valley Creek Stream System*  
14 (1979) 25 Cal.3d 339, 358–359] Therefore, for most of the cross-defendants an adjudication of  
15 their rights has not been properly framed or invoked by the Third Amended Cross Complaint.  
16 This is particularly true of an owner overlying groundwater **who does not currently extract**  
17 **groundwater from the basin.** There are hundreds of cross-defendants who fall into this category  
18 and who have been duped into entering into stipulations concerning their groundwater rights.  
19 VENTURA has never had a right to litigate the rights of a POWOGW of the Ojai or Upper Ojai  
20 groundwater basins who does not extract groundwater. Furthermore, these POWOGW who do  
21 not extract groundwater cannot possibly be a contributor to deficits in Ventura River stream flow.  
22 Therefore, they cannot possibly be a proper cross-defendant as has been narrowly allowed by the  
23 court of appeal.

24 The situation is similar but different with respect to cross-defendants who overlie the  
25 groundwater basin and actually have extraction facilities (i.e., a well). For those users there could  
26 be claim allowed by the court of appeal but only if their use of groundwater is determined to be  
27 “unreasonable” and can be shown to contribute to a deficit of water in the Ventura River. The

1 Third Amended Cross-Complaint is not so limited. The Third Amended Cross-Complaint asserts  
2 a right to an adjudication as to any POWOGW without regard to whether they are an extractor  
3 and even if they are an extractor, without regard to whether their use of the groundwater  
4 underlying their property is unreasonable. This is not the scope of “comparative fault” issues  
5 that the Court of Appeal was willing to carve out for VENTURA.

6 A first step to the litigation of the Ojai and Upper Ojai groundwater basins should be a  
7 determination of which cross defendants are extractors and of those extractors which can be  
8 shown to use an unreasonable amount of groundwater. Any of the cross-defendants who cannot  
9 be shown to be (1) an extractor of groundwater, (2) who uses an unreasonable amount of  
10 groundwater and (3) the use reduces the amount of water in reaches 3 and 4 of the Ventura River  
11 should have judgment entered in their favor. In addition, VENTURA’s priority status as  
12 compared to POWOGW cross-defendants should determine as this may preclude any claim  
13 made by VENTURA with respect to POWOGW.

14 Finally, this Court has the legal authority to require that VENTURA find a separate water  
15 source for all further development. That would put an appropriate end to the litigation. This is  
16 an equitable action. VENTURA is the bad actor and cannot demonstrate the clean hands that are  
17 required to obtain a declaration of rights of users who are not constantly, year after year adding  
18 to the destruction of the Ventura River habitat by its reckless and continuous issuance of  
19 unsustainable development permits.

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21 Dated: November 8, 2021

22 */s/ Andrew K. Whitman*

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24 ANDREW K. WHITMAN, in pro per, and  
25 attorney for HEIDI A. WHITMAN, NANCY  
26 L. WHITMAN and the JOHN R and  
27 NANCY L WHITMAN FAMILY TRUST