



1 EARLY SULLIVAN WRIGHT
 GIZER & MCRAE LLP
 2 BRYAN M. SULLIVAN (BAR NO. 209743)
 6420 Wilshire Boulevard, 17th Floor
 3 Los Angeles, California 90048
 Telephone: (323) 301-4660
 4 Facsimile: (323) 301-4676
 E-Mail: bsullivan@earlysullivan.com

5 ALLEN MATKINS LECK GAMBLE
 MALLORY & NATSIS LLP
 6 DAVID L. OSIAS (BAR NO. 091287)
 One America Plaza
 7 600 West Broadway, 27th Floor
 8 San Diego, California 92101-0903
 Telephone: (619) 233-1155
 9 Facsimile: (619) 233-1158
 E-Mail: dosias@allenmatkins.com

10 Attorneys for Cross-Defendant
 11 JEFFREY S. BACON, AS TRUSTEE OF THE VILLA
 NERO TRUST

12
 13 **SUPERIOR COURT OF CALIFORNIA**
 14 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

15 SANTA BARBARA CHANNELKEEPER,
 a California non-profit corporation,

16 Petitioner,

17 v.

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

22 Respondents.

23
 24
 25 AND RELATED CROSS-ACTION..

Case No. 19STCP01176

BY FAX

ASSIGNED FOR ALL PURPOSES TO
 Judge William F. Highberger
 Department 10

**CROSS-DEFENDANT JEFFREY S.
 BACON'S, AS TRUSTEE OF THE VILLA
 NERO TRUST, CONCERNS REGARDING
 DRAFT PROPOSED PHYSICAL
 SOLUTION**

Date: July 19, 2021
 Time: 3:00 p.m.
 Dept: 10

Complaint Filed: September 19, 2014
 Trial Date: February 14, 2022

1 Cross-Defendant Jeffrey S. Bacon, as Trustee of the Villa Nero Trust ("VNT") submits his
2 Concerns Regarding Draft Proposed Physical Solution ("VNT Concerns"). As expressly
3 authorized by the Court, VNT reserves all rights to object, dispute and litigate any and all issues at
4 the time, if any, that the Draft Proposed Physical Solution (Draft PS) is submitted to the Court for
5 adoption.

6 **I. INTRODUCTION**

7 VNT owns an 8-acre residential parcel with an existing well and some olive trees located
8 north and east of the town of Ojai, in Senior Canyon, which may or may not overlie the Ojai
9 Ground Water Basin, and which may or may not overlie the subsurface flows of the Senior
10 Canyon and/or Ladera Creeks. VNT is a minor user of water, with senior water rights that run
11 with the land, and plans to construct a water-efficient home and landscaping. The purpose of VNT
12 submitting the VNT Concerns is to identify problems and potentially curable components of the
13 Draft PS. Given the Court's desire for brevity, VNT summarizes the problems in general terms.

14 **II. VNT CONCERNS**

15 VNT is primarily concerned with two aspects of the Draft PS: (i) the Draft PS needlessly
16 and wrongfully clouds title to VNT's real property and water rights; and (ii) the Draft PS treats all
17 water rights holders and users, regardless of geography of location, and regardless of surface or
18 groundwater source, in only two ways, as either a *De Minimis* Producer or a Producer. All are
19 bound to the entirety of the Draft PS in the same way.

20 **A. It Is Unnecessary to Preserve Meritless Claims Against Certain Parties**

21 The Draft PS states at page 2, ll 16-17 that "This Physical Solution does not determine
22 water rights or directly limit water **Production.**" (Emphasis in original.) Yet, the Draft PS also
23 states that it is a binding judgment and provides at page 12, ll 14-16 that: "This Physical Solution
24 is intended to serve as a stipulated judgment, resolving the City's sixth claim for relief for the
25 imposition of a physical solution. All other claims in the Amended Cross-Complaint are
26 conditionally reserved as is discussed in section 3.2 herein." Further, the Draft PS requires:

27 Any Bound Party transferring any real property subject to this
28 Physical Solution shall notify the transferee of the existence of the
Physical Solution and its binding effect on the real property; provide

1 grantee with a copy of the Physical Solution; and notify the MC of
2 the transfer and file a written notice of transfer within ten (10) days
3 after the transfer of the real property, stating the name, address,
4 email address, and other contact information of the transferee.
5 Transferee shall become a Bound Party, and if necessary, City shall
6 substitute the transferee as Cross-Defendant pursuant to Code of
7 Civil Procedure section 368.5 (Page 88, ll 14-20.)

8 The reservation of claims and burdens on real property transfers needlessly and wrongfully clouds
9 title to VNT's water rights and property.

10 For example, among the claims reserved is the City's specious claim for priority based on
11 alleged prescriptive rights held by the City as a downstream surface water appropriator against
12 VNT, a very distant upstream overlying groundwater or riparian user. That geography alone
13 makes prescription impossible. Water in the Ventura River diverted by the City at its downstream
14 diversion point cannot possibly be a hostile, open, notorious and continuous diversion by the City
15 for water in the River that VNT would otherwise have a right to use, but lost VNT lost by the
16 City's hostile taking. No judicial precedent exists for this baseless prescriptive claim by a
17 downstream appropriative right holder against an upstream riparian or overlying right holder.

18 Similarly, VNT is unaware of any facts that would enable the City to assert a priority
19 pueblo right to the groundwater or riparian water that VNT's well accesses in Senior Canyon. The
20 lack of historical status of the City as a "Pueblo" under California law is important and
21 determinative of this claim. Finally, the preservation of any other claim for priority by the City
22 over VNT's overlying or riparian rights, which as a matter of law have priority over the
23 appropriative rights of the City, is unnecessary and unfounded. The purpose of this adjudication is
24 not to allocate a scarce supply, it is to enhance steelhead habitat where it is needed.

25 The Draft PS should be modified to eliminate the preservation of meritless claims that
26 unfairly impact VNT. To do so may require that the Draft PS not treat all water users the same.
27 For example, some parties may be users downstream from the City and prescription might be
28 possible. But, not against VNT.

29 **B. The Draft Physical Solution Should Not Utilize a One-Size-Fits-All Approach**

30 The purpose of this comprehensive adjudication is clearly stated in the Draft PS at page 33,
31 ll 5-11:

1 The core goal of this Physical Solution is to address the anadromous
2 life history form of the Southern California Steelhead within the
3 Ventura River Watershed that has been listed as endangered under
the Endangered Species Act.

4 To accomplish that goal, the Draft PS identifies critical habitat and habitat improvements that will
5 assist the steelhead without changing water use extractions and diversions. In fact, the Draft PS
6 asserts that:

- 7 • "This Physical Solution divides the River into seven reaches based on habitat requirements,
8 habitat function, and shared hydrologic conditions." (Page 19, ll 6-8.)
- 9 • "[C]hanges in consumptive use have not had a detectable effect on instream flows within
10 the period of record analyzed (1930-2019)." (Page 32, ll 13-14.)
- 11 • "Actions to protect Historical Flow Conditions, which are largely replicated by existing
12 flow conditions, in combination with habitat enhancement elements identified in the Plan,
13 will be sufficient, barring extraordinary conditions, to move the Fishery from Baseline
Conditions to Good Condition." (Page 44, ll 23-26.)

14 The Draft PS identifies critical reaches of the Ventura River and certain tributaries for the
15 steelhead population, and what and where needed habitat improvements will be focused. Yet,
16 despite identification of separate River and tributary reaches, the Draft PS treats all parties
17 identically (other than with respect to volume of use, either *de minimis* or not.) The Draft PS
18 assumes all parties are proportionately responsible for habitat degradation or lack of water for the
19 steelhead, despite the location of the party or source of water. That cannot be true.

20 VNT's property is located far up Senior Canyon with a well that is 380 feet deep, cased,
21 with screen openings at 140 to 280 foot and 280 to 300 foot depths. The well accesses water that
22 is not found in sand, gravel or boulder alluvium, the composition of the Ojai Ground Water Basin,
23 but rather accesses water found within blackish-gray fine grain, brittle sandstone and shale. The
24 property is either outside the boundary of the Ojai Ground Water Basin or on its very northern and
25 shallow edge. It is remote from the nearest habitat location in the Draft PS. VNT's property is
26 steep with a probable geologic structure resulting in slow percolation during storm events. It
27 seems highly improbable, subject to review of the City's expert reports, that VNT's well could in
28 any way impact critical steelhead habitat. Why then, should VNT be subject to the same

1 provisions of the Draft PS as a party that diverts directly from a habitat-critical reach of the
2 Ventura River, or diverts from an important habitat tributary to the River, or extracts from a
3 groundwater basin area that might directly discharge to the River or tributary?

4 It would be more fair to VNT and others with real property-based water rights if they were
5 separately categorized by location and water source to distinguish those whose location and water
6 source are so geographically and hydrologically remote from steelhead concerns that impact is
7 improbable and regulatory change unnecessary, versus those parties that might directly impact
8 steelhead habitat as a result of their location and water sources and uses. The science should be
9 sufficient to identify these locational and water source differences and allow for appropriately
10 disparate treatment. Such a distinction might result in the Draft PS making VNT exempt from the
11 judgment, but subject to a future claim of impact and a corresponding request for water
12 rights/water use consequences to VNT, if and when facts warrant. The Draft PS assumes that
13 everyone should be bound because of a false presumption that everyone is proportionately
14 responsible for steelhead habitat impacts. That presumption should be reversed for VNT and
15 others whose property location and water source make it improbable that identified steelhead
16 habitat is impacted.

17 **III. CONCLUSION**

18 The Draft PS, as currently drafted, is too much of a blunt instrument for the purpose it was
19 intended to serve. Unfair, unnecessary and unmeritorious water rights claims should not be
20 preserved against VNT, and VNT should not be lumped in with those whose location and uses
21 may be relevant to saving the steelhead.

22
23 Dated: July 15, 2021

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

24
25 By: 

26 DAVID L. OSIAS
27 Attorneys for Cross-Defendant
28 JEFFREY S. BACON, AS TRUSTEE OF
THE VILLA NERO TRUST