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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF LOS ANGELES

18 **SANTA BARBARA CHANNELKEEPER,**

19
20 Petitioner,

21 v.

22 **STATE WATER RESOURCES CONTROL**
BOARD, a California State Agency; CITY
23 **OF BUENAVENTURA, a California**
24 **municipal corporation,**

25 Respondents.

26 **CITY OF SAN BUENAVENTURA,**
27 **California municipal corporation,**

28 Cross-Complainant,

Case No. 19STCP01176

**SWRCB'S AND CDFW'S PHASE ONE
TRIAL BRIEF**

Date: March 11, 2022
Time: 1:30 p.m.
Dept.: 10 (South Spring Courthouse)
Judge: Honorable William Highberger
Trial Date: March 16, 2022 (Phase One)
Action Filed: September 19, 2014

1 v.

2 **DUNCAN ABBOTT, an individual; et al.,**

3 Cross-Defendants.
4

5
6 Respondent and intervenor State Water Resources Control Board (“State Water Board”) and intervenor California Department of Fish and Wildlife (“CDFW”) respectfully and jointly submit this phase one trial brief in advance of the final pre-trial conference scheduled for March 11, 2022. This phase one trial is to decide whether there is an interconnection between the groundwater and surface water in this watershed. The question is not, however, whether any individual cross-defendant’s pumping of groundwater has a meaningful impact on streamflow. Rather, the question is whether these four groundwater basins and the surface water in this watershed should be adjudicated in one action – that is, the Court should determine whether each of the groundwater basins as a whole is connected with the surface water above that basin.

15 With that limited question in mind, we submit that the evidence that will be presented on the interconnection of each of the groundwater basins as a whole with the surface water above that basin is not just strong, but overwhelming. While the extent of the connection may be subject to disagreement, the limited question at issue is not in serious dispute: specifically, that there is a connection between some of the groundwater in each of the groundwater basins and the surface water in the watershed overlying and downstream of each of those basins. The expert hydrologist, engineer, and biologist testifying on behalf of the State Water Board and CDFW will testify that: (1) in each of the groundwater basins, there are places where a connection exists between the groundwater and surface water most of the time; (2) the groundwater pumping that occurs in parts of each of the four groundwater basins impacts the surface flow such that there is a substantial decrease in surface flow in many areas, including in the Ojai and Upper Ojai Basins; and (3) the public trust species at issue in this case, such as Southern California steelhead, are found in the surface water above all four groundwater basins and critical habitat for these species exists above all four groundwater basins, such that a depletion in surface water may adversely

1 affect these species (though the extent of such effect will be determined in a later phase of trial).

2 **I. THE ISSUES FOR THIS PHASE ARE FOCUSED ON THE BASINS AS A WHOLE**

3 We must start by defining the contours of this phase of the action. Cross-Complainant City
4 of San Buenaventura (“City of Ventura”) brought the motion to bifurcate this case and set a phase
5 one trial. That motion sought “an order bifurcating this proceeding such that the Court try the
6 issues of boundaries of the Ventura River Watershed (“Watershed”) and the four groundwater
7 basins therein, as well as *the interconnectivity of the Watershed and the groundwater basins* in a
8 first phase of trial.” (City of San Buenaventura’s Notice of Motion to Bifurcate and Partial
9 Lifting of the Discovery Stay, served May 11, 2021, p. 2, emphasis added.) No party opposed
10 bifurcating the case as requested (although there were disagreements about timing). The filed
11 notice of ruling stated simply that “[t]he Court granted the City’s Motion to Bifurcate and Partial
12 Lifting of the Discovery Stay for matters relevant to the Phase 1 trial on the basin and watershed
13 boundaries and interconnectivity.” (Notice of Ruling, served July 2, 2021, p. 3.) Therefore, the
14 question that remains to be adjudicated in phase one involves the interconnectivity of the
15 watershed and the groundwater basins.¹

16 Further, the streamlined comprehensive groundwater adjudication statutes, Code of Civil
17 Procedure sections 830 to 852, govern this action. Those statutes state: “[e]xcept as otherwise
18 provided in this section, the boundaries of the area subject to a comprehensive adjudication shall
19 be consistent with the boundaries of a basin.” (Code Civ. Proc., § 841, subd. (a).) This means
20 that a comprehensive adjudication is of a basin in its entirety, not a part of the basin. The Court
21 has already ruled that the Legislature’s use of the singular “basin” includes the use of the plural
22 “basins” (Notice of Ruling, filed Feb. 1, 2022 [ruling on City of Ojai’s motion for judgment on
23 the pleadings]), but still each adjudication must be of entire basins, not parts of individual basins.
24 This means that each defendant’s pumping from different areas of the Ojai and/or Upper Ojai
25 groundwater basins is not at issue in this phase, but simply whether those two groundwater basins
26 are connected to the surface water or watershed at all such that some pumping in the groundwater

27 ¹ The issues of the boundaries of the four groundwater basins and the Ventura River
28 watershed have been agreed to already by stipulation of the parties and order of the Court dated
January 13, 2022.

1 basins may have an effect on the surface water and watershed.

2 It bears remembering that this is a preliminary phase of this adjudication. No one has
3 established their water rights yet, or their water rights priority. The Court has not determined
4 whether too much water is being pumped, in total, out of any or all of the groundwater basins.
5 Nor has the Court determined if, and to what extent, the doctrine of reasonable use or the public
6 trust doctrine would place limits on the total amount of water diverted or pumped. We are at the
7 very start of this action, simply to determine if it is appropriate to adjudicate each of the
8 groundwater basins within the watershed together with the surface water of this watershed. If any
9 of the groundwater basins are not connected to the surface water, then there is no reason to join
10 those basins to this case, since any of the pumping from such a groundwater basin will not have
11 an effect on the surface water above or downstream of the groundwater basin, and thus on the
12 public trust resources at issue.

13 **II. THE STANDARD APPLICABLE TO THIS ACTION**

14 The streamlined comprehensive groundwater adjudication statutes also speak to the issue of
15 interconnection:

16
17 If the court finds that including an interconnected surface water body or subterranean
18 stream flowing through known and definite channels is necessary for the fair and
19 effective determination of the groundwater rights in a basin, the court may require the
20 joinder of persons who claim rights to divert and use water from that surface water
21 body or subterranean stream in a comprehensive adjudication conducted pursuant to
22 this chapter.

23 (Code Civ. Proc., § 833, subd. (c).) While this language is phrased in terms of who should be
24 joined to the action — and the City of Ventura has already joined all groundwater and surface
25 water rights holders in this case — it makes sense to apply this same standard to decide whether
26 to adjudicate the surface water rights with the groundwater rights in this action. Examining the
27 words of the statute, the issue has two parts: (1) whether the surface water and the groundwater
28 are “interconnected”; and (2) whether including the interconnected surface water is “necessary for
the fair and effective determination of the groundwater rights in a basin.”

The burden of proof in this action lays squarely on the City of Ventura. It must prove that
interconnection is more likely than not. (Evid. Code, § 115; *People v. Superior Court (Kaulick)*)

1 (2013) 215 Cal.App.4th 1279, 1305 fn. 28.)

2 The Court has raised the question of how much interconnection is required to adjudicate the
3 groundwater and surface water together. The State Water Board and CDFW submit that this
4 phase of this case does not require the Court to determine that dividing line. As explained further
5 below, the evidence in support of interconnection in this phase is so substantial that any dividing
6 line will be crossed and the interconnection is sufficient under any definition.

7 **III. THE EVIDENCE IN THIS CASE IS OVERWHELMING**

8 Examining whether the groundwater in each of these four basins as a whole is
9 interconnected with the surface water is easily answered in the affirmative. The State Water
10 Board and CDFW's proof will be based primarily on the State Water Board's groundwater-
11 surface water model. In order to understand that model, however, it is important to explain some
12 basic hydrogeologic truths. First, water flows downhill, both on the surface and in the subsurface.
13 Second, groundwater basins were generally formed millions of years ago, and intact small
14 groundwater basins like the Ojai Valley groundwater basin fill up with water over a short time
15 period (if not over-pumped by humans). Third, over a long enough period of time, water entering
16 a groundwater basin (for example, from percolation of rainwater) equals the amount of water
17 exiting a groundwater basin (for example, to rivers and streams on the surface). These basic
18 hydrogeologic truths apply here as well and help answer the questions at issue in phase one.²

19 The State Water Board and CDFW will show, as the Court is already aware, that the State
20 Water Board has been developing a sophisticated three-dimensional groundwater-surface water
21 model for several years, so that it can investigate the movement of water in the Ventura River
22 watershed. The State Water Board and CDFW will show that the State Water Board has invested
23 over \$ 1.7 million to ensure that good input data is available for this model, and that the model is
24 a reasonably accurate predictor of conditions in the Ventura River watershed.

25 The State Water Board and CDFW will show that the consultants hired to construct this

26
27 ² The Court will remember that a judicial benchbook on these issues is published by the
28 National Judicial College and entitled *Adjudicating Groundwater: A Judge's Guide to
Understanding Groundwater and Modeling*. (See
https://www.judges.org/dividing_the_waters/adjudicating-groundwater/.)

1 model used it, as requested by the California Department of Justice, to examine the extent of any
2 interconnection between groundwater and surface water in this watershed. The State Water
3 Board's consultants, Dr. Gregory Schnaar and Dr. Al Preston, will show those connections in
4 three ways.

5 First, the model includes the elevation of the streambeds (that is, the low point of the
6 surface water) that can then be compared with the elevation of the groundwater. While the level
7 of groundwater fluctuates year-to-year and season-to-season (and even day-to-day), the value of a
8 computer model is that it can calculate water elevations in multiple locations and tell us how
9 frequently those elevations occur. The State Water Board and CDFW will show that, while the
10 surface water and groundwater connection in the watershed is subject to large variation, there are
11 locations in each of the four groundwater basins where that connection exists over 75 percent of
12 the time. And there are many more locations where a connection exists, but at a lower frequency.

13 Second, the model allows us to adjust inputs to the model, and that allows us to compare
14 the surface water flow in current conditions (when there is pumping from the groundwater
15 aquifers) with the surface water flow if there was no groundwater pumping. The State Water
16 Board and CDFW will show that this is a standard way to examine the connection between
17 groundwater and surface water. The experts will provide the Court with "streamflow depletion
18 curves" which show how much less water is in the surface water flow when water is pumped
19 from the groundwater. These curves show that pumping in almost all areas of the watershed
20 results in at least a 70 percent decrease in surface flow for each gallon of water pumped from the
21 groundwater. A few areas, by the Pacific Ocean in the Lower Ventura groundwater basin and at a
22 distance from Lion Canyon Creek in the Upper Ojai groundwater basin, have lower percentages,
23 in the range between 17 and 50 percent, but the impacts are still substantial.

24 Third, the model can measure this streamflow depletion at key areas in the watershed, such
25 as the outflows from the Ojai Basin and Upper Ojai Basin. The State Water Board experts will
26 show that data from the model results show that groundwater pumping from much of the Ojai
27 Basin decreases the amount of surface water at the Ojai Basin outflow (on San Antonio Creek) by
28 over 85 percent of the volume of water pumped; and groundwater pumping from much of the

1 Upper Ojai Basin decreases the amount of surface water at the Upper Ojai Basin outflow (on Lion
2 Canyon Creek) by over 80 percent of the volume of water pumped.

3 All three of these lines of evidence, based on model results, show that there is a significant
4 connection between the groundwater in each of the four groundwater basins and the surface water
5 that runs through those basins, such that pumping in parts of each groundwater basin can have
6 significant effects on the surface water flows above the groundwater basins.

7 It is not entirely clear that any party disputes the State Water Board and CDFW's
8 proposition that there is some groundwater in the four groundwater basins that is interconnected
9 with the surface water above those groundwater basins. No one appears to dispute that there is at
10 least *some* connection between each of the groundwater basins and the Ventura River and/or its
11 tributaries.

12 Some of the parties appear to dispute the absolute accuracy of the State Water Board's
13 model. But the State Water Board does not contend that its model is 100 percent accurate. What
14 the State Water Board and CDFW will contend and show is that the model is reasonable and
15 based on scientific principles, and paints an accurate enough picture of the groundwater and
16 surface water interconnection such that (1) it is more than within reasonable and standard levels
17 of accuracy for hydrologic models; (2) in each instance when another expert has identified an
18 input that should be different than in the model, the State Water Board's experts have determined
19 that the change in input made no significant difference as to interconnection; and (3) there is
20 currently no better way to examine this issue based on the best available scientific information. It
21 bears remembering that the standard of proof in this action is a preponderance of the evidence; in
22 other words, whether those with the burden of proof have shown that what they intend to prove is
23 more likely than not (over 50 percent likely). (See Evid. Code, § 115 ["Except as otherwise
24 provided by law, the burden of proof requires proof by a preponderance of the evidence."];
25 *Kaulick, supra*, 215 Cal.App.4th at p. 1305 fn. 28 [the preponderance of the evidence standard
26 means "more likely than not"].)

27 Those parties also contend that the Ojai Valley groundwater basin and the Upper Ojai
28 groundwater basin have special features that prevent the normal flow of water in and out of a

1 groundwater basin. As to the Ojai Valley groundwater basin, Mr. Jordan Kear will express the
2 opinion that there is a solid clay layer in the subsurface that prevents water from moving from the
3 deeper parts of that basin to the shallow parts of that basin. But he admits that the shallow parts
4 of the groundwater basin are connected to the surface water. Moreover, the State Water Board's
5 experts will opine that water does, in fact, move through clay, just at a slower rate than other
6 materials like silt and gravel. Further, when the deeper parts of the Ojai Valley groundwater
7 basin fill up with percolating rainwater, there is no place for that groundwater to go but to the
8 surface. As to the Upper Ojai groundwater basin, Mr. Kear will opine that only small amounts of
9 groundwater leave the subsurface and flow at the surface. But the State Water Board's experts
10 will explain that Mr. Kear's observations, based on one dry December day, are not consistent
11 with CDFW's detailed observations taken over many years. In sum, Mr. Kear cannot avoid the
12 basic hydrogeologic truths that water flows downhill and that an equal amount of water that flows
13 into the groundwater also flows out of the groundwater to the surface.

14 The second part of the issue of connectivity is also not in serious dispute: whether including
15 the surface water is "necessary for the fair and effective determination of the groundwater rights
16 in a basin." (Code Civ. Proc., § 833, subd. (c).) Although there may be a dispute about how
17 much surface water is needed to bring the Southern California steelhead population back into
18 good condition and to maintain that good condition, there is no dispute that this is one of the
19 questions that will be decided in this adjudication. The State Water Board and CDFW maintain
20 that protecting public trust uses in the Ventura River by people, fish, and other species will
21 necessarily entail a close examination of the groundwater pumping, and therefore groundwater
22 rights, in all four groundwater basins that impact those public trust uses. The State Water Board
23 and CDFW will show that Southern California steelhead and other endangered and threatened
24 animal and plant species are found throughout the Watershed and in the surface water above the
25 four groundwater basins, including the Ojai Valley and Upper Ojai basins. CDFW's expert
26 biologist, Mr. Kyle Evans, will opine that the Southern California steelhead use, spawn, feed, and
27 migrate throughout the surface waters above the four groundwater basins and travel throughout
28 the four groundwater basins. While the issue of the effect of the pumping in these four

1 groundwater basins on the Southern California steelhead and other public trust species and
2 resources is not at issue in this phase one trial, it is important for the Court to hear the evidence
3 that the Southern California steelhead spawn, migrate, and feed in the surface water above all four
4 groundwater basins so that the Court can understand that it is important to include all sources of
5 water in the Watershed for there to be a “fair and effective” determination of the water rights. In
6 fact, Petitioner Santa Barbara Channelkeeper’s initial lawsuit that brought about this case sought
7 to protect these public trust resources and ensure that the Ventura River watershed has sufficient
8 surface water for endangered Southern California steelhead to be in good condition. Given the
9 need for this close examination of the groundwater pumping and the public trust needs in the
10 watershed, it would be effective, fair, and necessary to include the users of both the groundwater
11 and interconnected surface water in any adjudication of the groundwater basins here. All of the
12 groundwater basins contribute a significant amount of water to the Ventura River and its
13 tributaries.

14 It is important to note again that a ruling in the state agencies’ or the City of Ventura’s
15 favor at this first phase of trial does not mean that all parties will need to participate in later
16 phases of this adjudication. The streamlined comprehensive groundwater adjudication statutes
17 provide that small users can opt out upon a sufficient showing:

18 If the court finds that claims of right to extract or divert only minor quantities of
19 water, not to exceed five acre-feet of water per year, would not have a material effect
20 on the groundwater rights of the other parties, the court may exempt those claimants
with respect to those claims for only minor quantities of water, but a person who is
exempted may elect to continue as a party to the comprehensive adjudication.”

21 (Code Civ. Proc., § 833, subd. (d).) That can be analyzed later in this case — perhaps in the next
22 phase of this case — in the context of knowing how much water the fishery and other species
23 need and an accounting of the water use in this Watershed.

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1 **CONCLUSION**

2 In sum, the State Water Board and CDFW believe that the evidence at the trial of phase one
3 of this case will show that each of the four groundwater basins in this watershed is connected in a
4 significant way to the surface water in this watershed. This action should proceed to the next
5 phase of this adjudication.

6 Dated: March 2, 2022

7 Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **Santa Barbara Channelkeeper** No. **19STCP01176**
v. State Water Board

I hereby certify that on March 2, 2022, I electronically filed the following documents with the Clerk of the Court by using the One Legal system:

SWRCB'S AND CDFW'S PHASE ONE TRIAL BRIEF

I certify that **all** participants in the case are registered File & ServeXpress users and that service will be accomplished by the File & ServeXpress system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 2, 2022, at Oakland, California.

G. Guardado

Declarant



Signature