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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 overly 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

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 OBG.

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  
27

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 *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  
27

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           **VIII.   THERE IS NO CONTOVERSY OR DISPUTE AMONGST OGB RIGHTS**  
2                           **HOLDERS**

3           It is also important to note that missing from the 3ACC is any suggestion that any owner  
4 of property overlying the OGB (or any other rights holder) has claimed that they are being  
5 injured (ie., a claim that their rightful use of OGB groundwater is being impeded, infringed or  
6 jeopardized). There is also no claim that either of the two Ojai groundwater basin is being  
7 lowered on a year-to-year basis such that the supply of groundwater will be eventually depleted.  
8 That is the true purpose of a groundwater basin adjudication. It allows groundwater rights  
9 holders *within a basin* (primarily overlying owners with) to share equitably when reductions in  
10 extractions are required to achieve sustainability in the groundwater basin. SBV is not a holder  
11 of overlying rights, appropriative rights or prescriptive rights with respect to the Ojai  
12 groundwater basin. SBV's claim of Pueblo Water Rights remains in the 3ACC but it is subject  
13 to being stricken and this will extinguish any legitimate claim of groundwater rights that could  
14 be made in the OGB.

15           Also overlooked is the fact that California has delegated the management of the Ojai  
16 groundwater basin to a Groundwater Sustainability Agency (GSA) – The Ojai Basin  
17 Groundwater Management Agency. The GSA's primary role is to develop a Groundwater  
18 Sustainability Plan (GSP) for the of the Ojai groundwater basin. Putting aside the issue of  
19 whether this court should abstain from interfering with the Ojai Basin Groundwater  
20 Management Agency's authority to regulate the sustainability of groundwater levels in the Ojai  
21 Groundwater Basin, there is no allegation that Ojai Basin Groundwater Management Agency is  
22 not carrying out its function to ensure that groundwater in the Ojai basin remains at sustainable  
23 levels.

24           //

25           //

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.  
26  
27



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*

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