SHAWN HAGERTY, Bar No. 182435
shawn.hagerty@bbklaw.com
BEST BEST & KRIEGER LLP
655 West Broadway, 15th Floor
San Diego, California 92101
Telephone: (619) 525-1300
Facsimile: (619) 233-6118

CHRISTOPHER M. PISANO, Bar No. 192831
christopher.pisano@bbklaw.com
SARAH CHRISTOPHER FOLEY, Bar No. 277223
sarah.foley@bbklaw.com
PATRICK D. SKAHAN, Bar No. 286140
patrick.skahan@bbklaw.com
Best Best & Krieger LLP
300 South Grand Avenue, 25th Floor
Los Angeles, California 90071
Telephone: (213) 617-8100
Facsimile: (213) 617-7480

Attorneys for Respondent and Cross-Complainant
CITY OF SAN BUENAVENTURA

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ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SANTA BARBARA CHANNELKEEPER, a California non-profit corporation,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, etc., et al.,

Respondents.

CITY OF SAN BUENAVENTURA, etc.,

Cross-Complainant

v.

DUNCAN ABBOTT, an individual, et al.

Cross-Defendants.

Case No. 19STCP01176

Judge: Hon. William F. Highberger

BRIEF OF PROPOSING PARTIES REGARDING THE PHYSICAL SOLUTION DOCTRINE

[*concurrently filed with Request for Judicial Notice*]

Action Filed: Sept. 19, 2014
Trial Date: Not Set

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

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ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
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BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

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ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
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BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

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BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

BRIEF OF PROPOSING PARTIES REGARDING THE PHYSICAL SOLUTION DOCTRINE

Defendant and Cross-Complainant the City of San Buenaventura ("City") and Cross-Defendants the Ventura River Water District, Meiners Oaks Water District, the Wood-Claeyssens Foundation, and the Rancho Matilija Mutual Water Company (all collectively "Proposing Parties") submit this brief regarding the physical solution doctrine:

I. INTRODUCTION

At the February 9, 2021 Status Conference, the Court granted the Proposing Parties' request to submit this brief on the physical solution doctrine. The purpose of this brief is to provide the Court with a neutral overview of the analytical framework used by trial courts to evaluate physical solutions.[1] This brief also provides numerous examples of adopted physical solutions. The analytical framework used by trial courts to evaluate physical solutions is grounded in Article X, section 2 of the California Constitution and eighty-five years of consistent common law precedent. This Court will have the opportunity to consider the Proposing Parties' Physical Solution[2] through the application of this framework. Because the Court has not yet reviewed the proposed Physical Solution, this brief focuses on a trial court's constitutionally derived authority, duties, and constraints when considering physical solutions. The Proposing Parties will provide the Court with a more detailed briefing in the future regarding how this general law applies to the specifics of the proposed Physical Solution, after objections to the Court's receiving it have been resolved and in the context of a noticed motion to set trial dates.[3]

In accordance with the schedule set by the Court at the Status Conference, on March 1, 2021, the Proposing Parties served an initial version of this brief on all parties who have appeared

[1] The cases cited herein are provided to illustrate the range of examples of the application of the physical solution doctrine. The Proposing Parties reserve all rights regarding the applicability of the cases, and the contentions therein, to this matter.

[2] This brief uses "proposed Physical Solution" or "Physical Solution" to refer to the document proposed by the Proposing Parties. It uses "physical solution" as a generic term to refer to the legal concept of a physical solution or to specific examples of physical solutions from other cases.

[3] As explained in Section III of this brief, the Proposing Parties do not address here the issues that parties have raised regarding the application of Code of Civil Procedure sections 833, subd. (d), 850, subd. (a) and 850, subd. (b). Those issues are more properly addressed in the context of a noticed motion and are beyond the scope of this brief.

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

in the action. The Proposing Parties received comments from counsel for Santa Barbara Channelkeeper ("Channelkeeper") and counsel for the State Water Resources Control Board, Department of Fish and Wildlife, and State Parks (collectively "State Agencies"). These comments are addressed throughout the brief, mostly in footnotes. The Court has also authorized parties to respond to this brief in their status conference reports due March 10, 2021.

II.
GENERAL SUMMARY OF THE PHYSICAL SOLUTION DOCTRINE

A. Physical Solutions are an Integral Part of California's Complex Water Law

Article X, section 2 of the California Constitution mandates the maximum application of the waters of this state to reasonable and beneficial uses. The term "physical solution" is used in California water law to describe an agreed-upon or judicially-imposed resolution of conflicting claims (an equitable remedy) designed to maximize the reasonable and beneficial use of water. (*Cal. American Water Co. v. City of Seaside* (2010) 183 Cal.App.4th 471, 480; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287 (*Santa Maria I*)[4].) The California Supreme Court has declared that since the adoption of Article X, section 2, "it is not only within the power, but is *also the duty,* of the trial court to admit evidence relating to possible physical solutions, and, if none is satisfactory to it, to suggest on its own motion such physical solution." (*City of Lodi v. East Bay Municipal Util. Dist.* (1936) 7 Cal.2d 316, 341 (*City of Lodi*), emphasis added; *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d. 489, 574.) Accordingly, understanding the physical solution doctrine and its role in maximizing the reasonable and beneficial use of water requires an understanding of California's complex water law and the conflicting claims among competing beneficial uses that the physical solution may be used to resolve.[5]

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[4] As cited to and explained in this brief, there are three reported decisions in the Santa Maria litigation, which are commonly referred to as *Santa Maria I*, *Santa Maria II*, and *Santa Maria III*. Footnote 14 on page 27 of this brief provides the citations to these case, and *Santa Maria III* is separately cited in other portions of the brief.

[5] The State Agencies in their comments suggested that this summary of the law on physical solution is incomplete in light of Code of Civil Procedure section 850. As noted above in footnote 3, the application of Section 850 will be addressed through noticed motion and separate briefing. However, as explained throughout this brief, the trial court's power and duty to consider a physical solution derives from the Constitution and cannot be preempted by statute. In addition, as explained in Section II.G of this brief, Code of Civil Procedure section 849 expressly

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

In this case, the Court of Appeal has already provided a useful summary of that complex law. (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1183-86 (*Santa Barbara Channelkeeper*).) The Court of Appeal's summary from *Santa Barbara Channelkeeper* is set forth verbatim below[6] to frame the discussion of the physical solution doctrine that is the focus of the rest of this brief. This summary is lengthy but provides important context for understanding the physical solution doctrine.

> California's water belongs to the people of this state, but the right to use surface water may be acquired, either pursuant to the doctrine of riparian rights or by appropriation. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100-101 (*United States*).) The riparian doctrine, a legacy of the English common law, "confers upon the owner of land the right to divert the water flowing by his land for use upon his land, without regard to the extent of such use or priority in time." (*Id.* at p. 101.) When water is scarce, "all riparians must reduce their usage proportionately." (*Ibid.*) The appropriation doctrine is a legacy of the California Gold Rush. It "confers upon one who actually diverts and uses water the right to do so" for beneficial uses. (*Ibid.*) An appropriator's rights are subordinate to riparian rights, and to those of all earlier appropriators. (*Id.* at pp. 101-102.) This is the "rule of priority" that determines allocations in times of shortage. (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961 (*El Dorado*).) It means that an appropriator—especially one who is comparatively junior—may not be able to take any of the water to which it would otherwise be entitled.
>
> Before 1914, one who sought to acquire water rights by appropriation had simply to divert and use that water to perfect a claim. Since 1914, a statutory scheme has required would-be appropriators to apply to the [State Water Resources Control] Board first for a permit. In reviewing permit applications, the Board examines existing riparian and appropriative rights and determines whether surplus water is available. (*United States, supra,* 182 Cal.App.3d at p. 102.) If the Board issues a permit, the permit holder can take the water subject to the terms of the permit (and subject to the rights of riparian users and senior appropriators), and a license will then issue confirming appropriative rights. (*Ibid.*)
>
> Similar principles govern rights to water in an underground basin.

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recognizes a trial court's power and duty to consider and impose a physical solution, and Code of Civil Procedure section 830, subdivision (b)(7) expressly preserves the common law. Therefore, while Section 850 is important for a trial court's consideration of the final judgment, it does not alter the law described in this brief regarding physical solutions.

[6] Because the decision in *Santa Barbara Channelkeeper* is law of the case as between the parties to the appeal, the Proposing Parties quote the summary of California water law from that case to avoid any disputes about these foundational concepts. In addition to this summary, most of the other cases cited in this brief provide similar summaries of these key principles.

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

First priority goes to the landowner whose property overlies the ground water. These "overlying rights" are analogous to riparian rights in that they are based on ownership of adjoining land, and they confer priority. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240 (*Barstow*).) Surplus groundwater also may be taken by an appropriator, and priority among "appropriative rights" holders generally follows the familiar principle that "the one first in time is the first in right." (*Id.* at p. 1241.) With groundwater there is an exception, however, that gives rise to a third category of rights. Under certain circumstances, an appropriator may gain "prescriptive rights" by using groundwater to which it is not legally entitled in a manner that is "'actual, open and notorious, hostile and adverse to the original owners, continuous and uninterrupted for the statutory period of five years, and under claim of right.'" (*Ibid.*) The permit and licensing requirements that apply to certain in-stream water rights do not apply to groundwater. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 933-934.)

Whatever their derivation, "once rights to use water are acquired, they become vested property rights." (*United States, supra,* 182 Cal.App.3d at p. 101.) These property rights are not absolute, however.

.....

Superimposed on the dual system for defining water rights are two limiting principles. First is the rule of reasonableness: "the overriding constitutional limitation that water be used as reasonably required for the beneficial use to be served." (*United States, supra,* 182 Cal.App.3d at p. 105.) Second is the public trust doctrine. Both apply to limit all water rights, regardless of their legal basis. (*Barstow, supra,* 23 Cal.4th at pp. 1241-1242.)

The rule of reasonableness was added to the California Constitution by amendment in 1928. (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1479 (*Light*).) The amended Constitution declares: "The right to water or to the use or flow of water in or from any natural stream or water course in this State is . . . limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., art. X, § 2.) "Beneficial use" and "reasonable use" are two separate requirements, both of which must be met. (*Joslin* [*v. Marin Municipal Water Dist.* (1967)] 67 Cal.2d [132,] at p. 143 ["*Joslin*"].)

Beneficial uses are categories of water use. For Reaches 3 and 4 of the Ventura River, the designated beneficial uses are: "municipal and domestic supply, industrial service supply, agricultural supply, ground water recharge, freshwater replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare, threatened, or endangered species, migration of aquatic organisms, spawning, reproduction, and/or early development, and wetland habitat,"

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

according to the Complaint. All beneficial uses are not created equal. The California Legislature has declared that "water for domestic purposes is the highest use," and that agricultural uses comes second. (Wat. Code, § 106.)

What constitutes reasonable use is case-specific. "California courts have never defined . . . what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular use depends largely on the circumstances." (*Light, supra,* 226 Cal.App.4th at p. 1479.) Conformity with local custom is one factor to consider in determining whether a use of water is reasonable, but custom is not dispositive. (Wat. Code, § 100.5.) The inquiry is fact-specific, and the answer may change over time. "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567 (*Tulare*).) Because reasonableness is a question of fact, it generally is not resolvable on the pleadings. (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 754 (*Forni*).) But courts have on some occasions determined that a given use of water is, as a matter of law, unreasonable. For example, for farmers to flood their fields during winter solely for the purpose of drowning gophers and squirrels is not a reasonable beneficial use. (*Tulare*, at p. 568.) So, too, is it unreasonable for a riparian landowner to rely on a creek to deliver in suspension continuing supplies of rock, sand, and gravel, when water from that stream could instead be diverted for municipal use. (*Joslin, supra*, 67 Cal.2d at pp. 134-135, 140-141.)

Another important limitation on water rights in California derives from the public trust doctrine, an ancient legal principle that California courts have used to protect environmental values. (See *Natl. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 425 (*Natl. Audubon*).) The doctrine finds its origin in the Roman law principle that mankind shares ownership in the sea, the seashore, the air, and (most importantly for our purposes) running water. (*Id.* at pp. 433-434; *Zack's Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1175, fn.5.) The doctrine arrived in California via the English common law, and was often applied in cases involving public rights to navigation, commerce, and fishing in tideland areas, or on navigable lakes and streams. (*Natl. Audubon,* at pp. 434-435.) But in 1983 our Supreme Court held that the doctrine also protects navigable waters, such as Mono Lake, "from harm caused by diversion of nonnavigable tributaries." (*Id.* at p. 437.) The State of California as trustee has a broad "duty . . . to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases." (*Id.* at p. 441.) As a consequence, those "parties acquiring rights in trust property," such as water flowing in a stream, "generally hold those rights subject to the trust, and can assert no vested rights to use those rights in a manner harmful to the trust." (*Id.* at p. 437.)

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ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

> But public trust interests, like other interests in water use in California, are not absolute. "As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing . . . the state must bear in mind its duty as trustee . . . to preserve, so far as consistent with the public interest, the uses protected by the trust." (*Natl. Audubon, supra,* 33 Cal.3d at p. 446.) In short, "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (*Id.* at p. 443.)

(*Santa Barbara Channelkeeper*, *supra*, 19 Cal.App.5th at pp. 1183-86.)

As discussed above, beneficial uses are categories of water use although they are not necessarily "water rights." For example, California does not recognize appropriative rights for instream use. (*Fullerton v. SWRCB* (1979) 90 Cal.App.3d 590, 604-605.) However, California does expressly account for fisheries and instream uses as "beneficial uses," which are subject to the same reasonable use requirements imposed by Article X, section 2 of the Constitution. (Wat. Code, § 1257.)[7] As summarized below, courts have developed the physical solution doctrine to help avoid and resolve disputes that arise within this complex legal framework.

B. A Physical Solution is a Common Sense Way of Resolving Complex Water Problems That is Rooted in the Reasonable Use Mandate of Article X, Section 2

As reflected in the Court of Appeal's summary above, the overriding feature of California water law is the mandate in Article X, section 2 of the California Constitution that the water resources of the state must be put to their fullest beneficial use and that all water use must be reasonable. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442 (*Audubon*).) Reasonableness of water use is the governing standard and "cardinal principle" of California water law. (*U.S. v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105.) A trial court has concurrent jurisdiction with the legislatively established administrative agencies, such as the State Water Resources Control Board, to implement this "reasonable use mandate" of Article X, section 2. (*Environmental Defense Fund v. East Bay Municipal Utility Dist.* (1980) 26

[7] Both the State Agencies and Channelkeeper commented that they believe the brief does not adequately address how the public trust doctrine applies to the law of physical solutions. Proposing Parties believe that the summary from the Court of Appeal in this matter directly addresses this point when it quotes from the leading public trust case, *National Audubon Society v. Superior Court* that "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (*Santa Barbara Channelkeeper*, *supra*, 19 Cal.App.5th at p. 1186.) Public trust considerations are therefore part of and subject to the reasonable use analysis from which the physical solution doctrine derives. The law on physical solutions therefore includes public trust considerations as part of its basic structure. The summary of the law in Section II.B below emphasizes this point.

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655 WEST BROADWAY, 15TH FLOOR
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Cal.3d 183, 200 (*EDF II*).) That is, a party seeking to address claims regarding the reasonableness of water use may turn to the original jurisdiction of the courts. (*Ibid.*) *Audubon* confirmed *EDF II* and explained that this concurrent jurisdiction applies in the public trust context because the "public trust doctrine and the appropriative water rights system are parts of an integrated system of water law." (*Audubon*, *supra*, 33 Cal.3d at p. 452.)[8]

Rooted in the constitutional mandate to use water reasonably is the obligation of a trial court to "ascertain whether there exists a physical solution of the problem presented that will avoid the waste, and that will at the same time not unreasonably and adversely affect" prior and paramount vested property rights. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250 (*City of Barstow*).) "The phrase 'physical solution' is used in water-rights cases to describe an agreed upon or judicially imposed resolution of conflicting claims in a manner that advances the constitutional rule of reasonable and beneficial use of the state's water supply." (*Santa Maria I, supra,* 211 Cal.App.4th at p. 286.). The California Supreme Court has "encouraged the trial courts to be creative in devising physical solutions to complex water problems to ensure a fair result consistent with the constitution's reasonable-use mandate." (*Id.* at p. 288.) The "power of the court extends to working out a fair and just solution, if one can be worked out . . . ." (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560-561.) A physical solution may be imposed even without a current state of overdraft and even without quantifying

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[8] Channelkeeper commented that the brief should provide examples of how the State Board analyzes public trust issues under its statutory authority. Because this case is brought within the Court's concurrent jurisdiction and is subject to the law on physical solution summarized in this brief, and not subject to statutes that outline the State Board's authority, the Proposing Parties believe that examples of State Board proceedings are not germane to the scope of this brief. *EDF II* (and its related cases and procedural history) is instructive here. *EDF II* confirms that even though the State Board has statutorily-granted jurisdiction over certain water management activities, it does not deprive the superior court of jurisdiction. (*EDF II*, *supra*, 26 Cal.3d at p. 200.) *Environmental Defense Fund v. East Bay Municipal Utility District*, Superior Court Alameda County, 1990, No. 425955 has a long judicial history. Over a period of seventeen years before trial started, the case went before the California Supreme Court twice (*Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1977) 20 Cal.3d 327 (*EDF I*); *Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal.3d 183 (*EDF II*) and the U.S. Supreme Court once (*Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1978) 439 U.S. 811). The trial court ultimately entered a statement of decision in 1990 that implemented a physical solution to accommodate competing consumptive and instream or environmental uses, including 41 species of fish. The trial considered the public trust and found that balancing was essential in the application of Article X, section 2 of the Constitution and the public trust doctrine. The trial court found that public trust values can be protected in a variety of ways and do not hold first priority in the allocation of water resources. The physical solution provides for diversion amounts, instream flow requirements, retains continuing jurisdiction of the court to implement and modify the physical solution, and appoints a special master to oversee studies pertaining to the fishery and habitat. No party appealed this final decision.

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all existing overlying or appropriative rights to the native supply. (*Santa Maria I*, *supra*, 211 Cal.App.4th at p. 299.)[9]

As illustrated in Section II.F of this brief, trial courts have used the flexibility inherent in the physical solution doctrine in a variety of very different factual situations to address a wide range of complex water problems.

C. A Trial Court has the Power and the Duty to Consider a Physical Solution Under Its Equitable Powers

Prior decisions of the California Supreme Court and Courts of Appeal, as well as statutes, confirm that a trial court not only has the authority to consider a physical solution, but also has the duty to do so. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383-384; *Santa Maria I, supra,* 211 Cal.App.4th at p. 288; Code Civ. Proc., § 849, subd. (a) ["The court shall have the authority and the duty to impose a physical solution on the parties in a comprehensive adjudication where necessary and consistent with Article 2 of Section X of the California Constitution."].) The Supreme Court has stated that "it is the duty of the trial court to ascertain whether there is a physical solution of the problem that will avoid waste and which will not unreasonably or adversely affect the rights of the parties." (*Rancho Santa Margarita v. Vail, supra,* 11 Cal.2d at pp. 558-559.)

"It must be remembered that in this type of case the trial court is sitting as a court of equity, and as such, possesses broad power to see that justice is done in the case." (*Rancho Santa Margarita v. Vail, supra,* 11 Cal.2d at p. 560.) "A trial court exercises its equitable powers in approving a physical solution and entering the judgment, and review of that judgment is under the abuse of discretion standard of review." (*Hillside Memorial Park v. Golden State Water Co.* (2011) 205 Cal.App.4th 534, 549; *Cal. American Water v. City of Seaside*, *supra*, 183 Cal.App.4th at p. 481.)

[9] In the *Santa Maria* cases, the rights of parties who objected to the physical solution were determined, but other rights were not quantified.

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D. A Trial Court May Impose a Physical Solution On Objecting Parties, Including the Imposition of Reasonable Expenses, With or Without Quantification of Individual Water Rights

The California Supreme Court has repeatedly held that a trial court can enforce a physical solution without a party's agreement, both as a defense to an injunction and as an equitable remedy, so long as the physical solution does not unreasonably burden any party. (*City of Barstow*, *supra*, 23 Cal.4th at p. 1250; *City of Lodi*, *supra*, 7 Cal.2d at p. 341; see also, Code Civ. Proc., § 849, subd. (a) [authorizing the court to "impose" a physical solution on the parties].) A trial court may impose a physical solution without quantifying all the rights of all the parties. (*Santa Maria I, supra*, 211 Cal.App.4th at p. 299.) Prior to imposing the physical solution, a trial court must find that the solution does not cause material or substantial injury to any water rights that a party may have. (*Peabody v. City of Vallejo*, *supra*, 2 Cal.2d at p. 383; *City of Lodi*, *supra*, 7 Cal.2d at p. 340.) A court may impose a physical solution that requires the parties, including senior water rights holders, to assume a "reasonable expense." (*Rancho Santa Margarita v. Vail*, *supra*, 11 Cal.2d at p. 561; *Peabody v. City of Vallejo*, *supra*, 2 Cal.2d at p. 376.)

The physical solution does not need to address all issues but can leave issues that are unnecessary or not ripe for future decision, including, but not limited to, quantification of all water rights. (*City of Santa Maria v. Adam* (2019) 43 Cal.App.5th 152, 163-165 (*Santa Maria III*).) However, a trial court "may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution *without first considering them in relation to the reasonable use doctrine*." (*City of Barstow*, *supra*, 23 Cal.4th at p. 1250, emphasis added.) As *City of Barstow* illustrates, the Constitution's reasonable use mandate is the overarching principle governing a trial court's consideration of a physical solution. (*Ibid.*)

E. A Trial Court Must Generally Maintain Continuing Jurisdiction Over the Implementation of a Physical Solution

After adoption, a trial court must generally maintain continuing jurisdiction to determine the physical solution's effectiveness and to order any necessary adjustments. (*Peabody v. City of Vallejo*, *supra*, 2 Cal.2d at p. 380; Code Civ. Proc., § 852.) "The trial court should by its judgment preserve its continuing jurisdiction to change or modify its orders and decree as

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occasion may require." (*City of Lodi*, *supra*, 7 Cal.2d at p. 344.) Retaining jurisdiction allows a trial court to consider how the physical solution is working, permits the future exercise of the court's equity powers, and helps in "carrying out the policy inherent in the water law of this state to utilize all water available." (*Allen v. Cal. Water and Telephone Co.* (1946) 29 Cal.2d 466, 488.) Continuing jurisdiction also alleviates the needs to address all issues at one time, and allows issues to be deferred for future decision when they are ripe and necessary for resolution. (*Santa Maria III, supra*, 43 Cal.App.5th at pp. 163-165.)

F. Trial Courts Have Adopted Physical Solutions to Address a Wide Range of Complex Water Problems[10]

Numerous reported cases provide examples of how trial courts have used physical solutions or how higher courts have required trial courts to consider them. These cases generally arise in two contexts: (1) as a defense to a prayer for injunction and (2) as an equitable remedy among multiple competing water right claimants, most commonly in an adjudication, which might also include the former.

There are also several examples of physical solutions adopted by trial courts in Southern California that help illustrate the application of the physical solution doctrine. As these cases illustrate, courts use the physical solution doctrine to solve a wide variety of water problems that but for the physical solution, would result in greater harm, unreasonable use, and less efficient use. These cases show that trial courts have a duty to consider physical solutions and have significant discretion in adopting them, including by requiring parties to accommodate improvements in the efficient capture, distribution, and use of water under the physical solution, as long as the courts apply concepts of reasonable use and do not unfairly burden paramount rights with substantial burdens. (*Santa Maria I, supra*, 211 Cal.App.4th at p. 288 ["The only restriction is that, absent the party's consent, a physical solution may not adversely affect that

[10] The State Agencies commented that all the cases discussed in the brief involved a bench trial or stipulation by all the parties. Channelkeeper commented that the brief implies that a physical solution may be imposed through motion practice. As described below in Section F.13, the trial court has a duty to hold an evidentiary hearing on a physical solution, if the evidence is disputed, and the Proposing Parties do not suggest that the law permits the imposition of a physical solution without such an evidentiary hearing. The Proposing Parties also recognize that the cases discussed herein involve a wide range of situations, including bench trials and in some cases, after disputes were resolved, by the stipulation of all parties. The cases illustrate that there is no one path to the development of a physical solution but that the path always culminates in the court exercising its duty to consider whether to confirm or impose it.

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party's existing water rights"]; *City of Barstow*, *supra*, 23 Cal.4th at p. 1251.) To provide the Court with examples of how courts have used the physical solution doctrine, key reported and trial court cases from the last eighty-five years are briefly summarized below:

1. *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351:

In this case, downstream riparian landowners sued to enjoin the City of Vallejo, an appropriator, from storing the waters of a creek. The trial court permanently enjoined the city from storing any water from the creek, but stayed the injunction on certain conditions pending an appeal. The California Supreme Court held that the trial court should have considered whether a physical solution could have avoided the need for a permanent injunction, stating that, "if a physical solution be ascertainable, the court has the power to make and should make reasonable regulations for the use of the water by the respective parties, provided they be adequate to protect the one having the paramount right in the substantial enjoyment thereof and to prevent its ultimate destruction, and in this connection the court has the power to and should reserve unto itself the right to change and modify its orders and decree as occasion may demand, either on its own motion or on motion of any party." (*Id.* at pp. 383-384.) The Supreme Court explained that if such a physical solution could be found, it may be "a solution of many of the difficulties and uncertainties in safeguarding the rights of the parties." (*Id.* at p. 380.)

2. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489:

In this case, a large number of individual landowners and other entities sued to enjoin an irrigation district from exporting groundwater to lands outside the watershed. The trial court issued the injunction. However, the California Supreme Court reversed and ordered the trial court to consider whether a physical solution could be used to better achieve the reasonable use mandate of the Constitution. The Supreme Court offered the trial court the following guidance regarding physical solutions:

> Moreover, the trial court should not lose sight of the fact that this is an equity case. The equity courts possess broad powers and should exercise them so as to do substantial justice. Heretofore, the equity courts, in water cases, apparently have not seen fit to work out physical solutions of the problems presented, unless such solutions have been suggested by the parties. But it should be kept in mind

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> that the equity court is not bound or limited by the suggestions or offers made by the parties to this, or any similar, action. For purposes of illustration, if the trial court, on the retrial, comes to the conclusion, based upon proper evidence, that a substantial saving can be effected at a reasonable cost, by repairing or changing some of the ditches, as above mentioned, it undoubtedly has the power regardless of whether the parties have suggested the particular physical solution or not, to make its injunctive order subject to conditions which it may suggest and to apportion the cost thereof as justice may require, keeping in mind the fact that respondents have prior rights and cannot be required lawfully to incur any material expense in order to accommodate appellant. Other physical solutions, such as the possible impounding of some of the water during periods, if any, when it is not needed by respondents, whereby some water can be made available to appellant without injury to respondents may suggest themselves.

(*Id.* at p. 574.)

3. *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal.2d 316:

In this case, the City of Lodi sued the East Bay Municipal Utility District, which operated the Pardee Dam upstream of the city on the Mokelumne River. The trial court issued a decree that required the district to make large releases from the dam so that the groundwater table below the city would not be lowered. The California Supreme Court reversed, finding that the very large releases required of the district were a wasteful and inefficient way of maintaining the city's groundwater supply. The Supreme Court required the trial court, "before issuing a decree entailing such waste of water, to ascertain whether there exists a physical solution of the problem presented that will avoid the waste . . . ." (*Id.* at p. 339.) The Supreme Court held that the "court possesses the power to enforce such solution regardless of whether the parties agree." (*Id.* at p. 341.) The Court provided the following summary of its instructions to the trial court:

> In our opinion the cause should be sent back to the trial court to permit it to take evidence as to the levels, to which plaintiff's wells may be lowered without substantial danger to the city's water supply. In fixing this danger level an adequate safety factor in favor of the city should be allowed . . . . The decree should then be reframed to provide that the duty rests upon the District to maintain the levels of the plaintiff's wells above the danger level so fixed by the trial court; that in the event the levels of the wells reach the danger points, the duty be cast upon the District to supply water to the city, or to raise the levels of the wells above the danger mark; and if the District does not comply with this order within a reasonable time, then the injunction decree already framed, or upon a proper showing as modified by the court under its continuing jurisdiction, shall go into effect. The trial court should by its

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> judgment preserve its continuing jurisdiction, to change or modify its orders and decree as occasion may require.

(*Id.* at p. 344.)

4. *Hillside Water Company v. City of Los Angeles* (1938) 10 Cal.2d 677:

In this case, the Hillside Water Company alleged that the City of Los Angeles's withdrawals and diversion of water from a groundwater basin deprived the company of water necessary for its use. Other parties, including the Bishop Union High School District, intervened in the case. The trial court found that the city's pumping and diversion caused water levels under the company's property to be lowered to the extent that it had been impossible to properly irrigate the lands. The trial court required the underground water table to be maintained in its natural state, without influence from the pumping operations of the city. The California Supreme Court reversed, finding that the trial court's order would prevent the beneficial use of water beneath 98 percent of the area in order that the water table beneath 2 percent of the area be maintained in its natural condition. (*Id.* at p. 685.) With regard to the school district, the Supreme Court held that a physical solution might be more appropriate than an injunction, since the Constitution requires that these waters be put to beneficial use to the fullest extent possible. (*Id.* at pp. 688-689.)

5. *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501:

In this case, two large ranches, one upstream and one downstream on the Santa Margarita River, sought a determination of their respective rights to the river. The upstream user (Vail) had diverted water for irrigation for many years. The downstream user (Rancho Santa Margarita) claimed that these diversions impaired its rights. The trial court found that Rancho Santa Margarita was entitled to three-quarters of the flow of the main stream and Vail to one-quarter, and issued an injunction to that effect.

On appeal, the California Supreme Court held that before issuing an injunction "it is the duty of the trial court to ascertain whether there is a physical solution of the problem that will avoid waste and which will not unreasonably or adversely affect the rights of the parties." (*Id.* at pp. 558-559.) The Supreme Court stressed the small quantity of water available in the area at issue, noting that in "a case like the present one, with a relatively small quantity of water

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available far insufficient to meet all the needs therefor, the court should not grant an injunction until every reasonable physical solution, and every reasonable source of supply, has been thoroughly investigated." (*Id.* at p. 556.) The Supreme Court made specific suggestions to aid the trial court in fashioning a physical solution. Among other things, the Supreme Court suggested that Vail might be able to divert and store winter waters that were previously being wasted, with releases from the reservoirs regulated in the summer months, or install pumping plants to provide drinking places for cattle. The Supreme Court also suggested that improvements to the Rancho Santa Margarita property might be made to improve winter storage for summer use. The Supreme Court stated that: "With the small quantity of water available in the stream in summer months, the trial court should thoroughly investigate the possibility of some physical solution, before granting an injunction that may be ruinous to either or both parties." (*Id.* at p. 560.)

6. *Allen v. California Water and Telephone Company* (1946) 29 Cal.2d 466:

In this case, overlying land owners sued to enjoin the construction of a large pipeline to convey water for use outside of the watershed. The trial court held that the defendant was not entitled to take any water from the basin for exportation, except when the water was not reasonably required for use by those with paramount rights. Defendant appealed, alleging the existence of surplus water for exportation and stressing the need for a physical solution.

The California Supreme Court observed that the defendant had presented a feasible physical solution to the trial court. The defendant had agreed to pay for any deepening of plaintiffs' wells, or any replacement or equipment necessitated by its taking water from the basin. The Supreme Court thus found the trial court's order too restrictive. (*Id.* at p. 486.) The Supreme Court held that the trial court should retain jurisdiction to consider the effect of this added source of water, and its dependability, in working out a physical solution. (*Id.* at p. 488.)

7. *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715:

In 1945, plaintiff water companies and the City of Torrance filed an action against several hundred defendants to determine the groundwater rights within the West Coast Basin and to enjoin an alleged overdraft to prevent depletion and saltwater intrusion. Certain parties owning

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more than eighty (80) percent of the prescriptive rights in the basin entered into an agreement and stipulation for judgment that restricted total production, provided for an exchange pool arrangement, and reserved jurisdiction and continuing supervision. The court confirmed "[t]here can be no question that the trial court had authority" to protect the supply and prevent the depletion of water in the basin. (*Id.* at p. 724.) Further, the court found that the judgment adjudicated the rights of all the parties among themselves and was appropriately based on the parties' rights when the amended complaint was filed and that there was no necessity for distinguishing between overlying users and appropriators when the judgment protected the resource without so doing. (*Id.* at p. 730-31.) The court found that the physical solution was "completely in accord with the rule of reasonable and beneficial use of water" and was consistent with the trial court's duty to impose a physical solution. (*Id.* at pp. 731-32.)

8. *Central Basin Municipal Water District v. Fossette* (1965) 235 Cal.App.2d 689:

This case involves a challenge to the implementation of a stipulation for judgment and physical solution that settled very complex disputes over water in the San Gabriel River System.[11] Although the procedural posture of the decision is somewhat unusual, it contains important statements regarding the physical solution doctrine. The decision also contains a copy of the stipulation and judgment, which has examples of standard elements of physical solutions.[12]

The San Gabriel River System provides water to a very large portion of Los Angeles County, extending from the San Gabriel Mountains to the City of Long Beach, passing on its way through a constriction known as the Whittier Narrows, which divides the watershed into an upper and lower area. (*Id.* at pp. 695-696, 720-724.) As reflected in both the decision and in the attached stipulation and judgment, by at least the 1960s, the water demands on the system were exceeding the natural supply. (*Id.* at p 708.) This resulted in litigation brought by representatives of the lower area, such as the Cities of Long Beach and Compton and the Central Basin

[11] The State Agencies commented that in this case all the parties stipulated to the physical solution. This is true. As the court explains, in "the present action all parties thereto have agreed to the proposed physical solution." (*Id.* at p. 700.) Although all parties stipulated to the proposed physical solution, its implementation was challenged, leading to the important statements of law summarized in this brief.

[12] In fact, certain parties asserted that the physical solution offered "an acceptable prototype consent judgment for use by the parties in other similar river adjudication actions." (*Id.* at p 697.)

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Municipal Water District, against users of the upper area. (*Id.* at 719.)

After years of negotiations, all parties stipulated to a judgment, recognizing "a need for a physical solution to the complex water problems which have given rise to this action." (*Id.* at p. 719.) The physical solution declared that the lower area parties had a right to receive from the upper area a fixed amount of water over a long-term period of normal rainfall. (*Id.* at p. 723.) It created various options by which the upper area users would provide this fixed amount of water to the lower area users. (*Id.* at pp. 724-732.) The physical solution established a "watermaster" to implement the terms of the judgment, required annual reports and budgets, and established a system to fund the physical solution. (*Id.* at pp. 732-738.) The physical solution did not fix the water rights of all the parties and instead provided for the trial court's continuing jurisdiction to consider such disputes and other issues in the future. (*Id.* at p. 739.)

After entering the stipulation, the Central Basin Municipal Water District adopted certain resolutions to implement the stipulation, including designating its nominee who would serve as its representative on the watermaster. However, the District's secretary refused to certify the resolutions, contending that the stipulation exceeded the authority of the parties, impaired rights of private parties, or was otherwise unlawful. (*Id.* at p. 694.) The District brought a petition to compel its secretary to certify the resolutions and permit the stipulation and physical solution to be implemented, and the Court of Appeal agreed. Although arising in this unusual procedural context, the decision provides important examples of the law on physical solutions.

First, the court rejected the contention that the physical solution deprived private citizens of their property rights. The court held that the "documents do not purport to deprive any individual of a property right, but on the contrary disclose a careful and concerted effort on the part of the litigants to conserve and protect the individual rights to the use of water within the watershed, where the need for such water is growing and the supply is limited." (*Id.* at p. 698.) The court explained that through the trial court's reservation of continuing jurisdiction, "a determination of individual rights is deferred or suspended so long as the physical solution shall continue in effect." (*Id.* at p. 699.) The court also pointed to paragraph 4 of the judgment as an additional provision that "tends to preserve to an individual the privilege to establish, in a proper

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case, his right to use a specified quantity of water, rather than to destroy such a right." (*Id.* at 700). Collectively, the court found that the "adoption by the parties of a reasonable physical solution to the complicated problems relating to their respective rights in the use of the water within the San Gabriel River system is in accord with the rule laid down in *City of Lodi v. East Bay Municipal Utility District* . . . ." (*Id.* at p. 699.)

Second, the decision is an example of the flexibility of a physical solution and how courts will uphold such solutions over highly technical arguments that create apparent obstacles to solving the fundamental problems such solutions are trying to address. The court recognized that the litigation and its resolution through the physical solution had a broad aspect that went to the heart of the continuing ability of people to use the water in the watershed. In light of the urgency of the issues and the importance of efficiently resolving these complex water disputes, the court held that the "efforts of the parties to the action pending in the trial court to compromise and settle their differences by entering into the stipulations for judgment is in full accord with the policy of the law, and we find no legal obstacle which would stand in the way of the parties entering into and being bound by their agreement of compromise as evidenced by such stipulation." (*Id.* at p. 705.)

9. *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199:[13]

This case involves the adjudication of the Upper Los Angeles River Area (ULARA), including the watershed and tributaries of the Los Angeles River and four groundwater basins. This case began in 1955 when the City of Los Angeles brought suit against the Cities of San Fernando, Glendale, Burbank, and other pumpers to declare that it had a prior right to all groundwater in the ULARA, where continued overdraft pumping threatened the parties' water supply. (*Id.* at p. 207.) Los Angeles relied upon its "pueblo right," to assert superior priority of its water rights, and that pueblo right was upheld and reaffirmed on appeal. (*Id.* at p. 246.) Los Angeles was deemed the successor to all rights, claims, and powers of the Spanish Pueblo de Los Angeles regarding water rights and the owner of a prior and paramount pueblo right to surface

[13] Disapproved on other grounds by *City of Barstow v. Mojave Water Agency*, *infra*, (2000) 23 Cal.4th 1224 at p. 1248 ["to the extent [San Fernando] could be understood to allow a court to completely disregard California landowners' water priorities, we disapprove it."].

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waters of the Los Angeles River and the native ground waters of the San Fernando Basin to meet its reasonable and beneficial needs for its inhabitants. (*Id.* at p. 254.) The final judgment provided for a court-appointed hydrologist "watermaster", approved by the public agency parties, to enforce a physical solution and also established an administrative committee consisting of voting members from the municipal water agencies to advise and review actions of the watermaster. (*Id.* at p. 224.) The physical solution required, among other things, metering, reporting, and accounting and payments for extractions.

10. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224:

This case involved the adjudication of the Mojave River system, which consists of surface water and several large interconnected groundwater basins, extending over 90 miles. This system was treated as a common water supply. The case involved several hundred pumpers, including several municipal water suppliers, farmers exercising overlying rights, diversions for a state fish hatchery, uses for recreational lakes, industries, cooling for electric generation facilities and pumping water to create ponds for the commercial raising of fish.

The trial court ultimately approved a physical solution that had been developed and approved by the overwhelming majority of all pumpers, including farmers. The key aspect of the physical solution was to establish a production right for each party based on actual pumping before the action was filed, reduce that right by 20 percent over five years, and to charge a replenishment assessment for excess pumping. Those assessments were to be used to purchase other sources of water to replenish groundwater supplies.

The trial court imposed this physical solution on a small number of dairy farmers who exercised overlying rights, and who had not agreed to the judgment. On appeal, the California Supreme Court held that it was error "to disregard legal water rights in order to apportion on an equitable basis water rights to all producers in an overdrafted groundwater basin." (*Id.* at pp. 1239-40.) The Supreme Court noted that a trial court "may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine." (*Id.* at p. 1250.) Because the physical solution in *Barstow* required a 20 percent reduction of the production rights of the owners who did not agree

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to the physical solution, it was error for the trial court to impose the physical solution without first considering those rights and the amount of the reduction in relation to the reasonable use doctrine, and whether or not the amount of the reduction unreasonably or adversely affected those rights.

The physical solution in the *Mojave* case was ultimately adjusted to address the Supreme Court decision and has governed this interconnected, common water source for decades.

11. *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471:

This case involved a challenge to a trial court's implementation of a physical solution that was not originally subject to appeal. It provides a good example of the trial court's authority and duty to consider a physical solution and its power to enforce it.

The original case and physical solution addresses the Seaside Basin, located in the Salinas Valley near Monterey Bay. The basin underlies approximately 20 square miles of hilly coastal plains, including parts of Sand City, Monterey, Seaside, Del Rey Oaks and unincorporated Monterey County. An investor-owned public utility commenced an adjudication of the basin, and the majority of water users in the basin reached a stipulated physical solution and asked the trial court to impose it over objections by two parties, the Monterey Peninsula Water Management District and the County of Monterey. The trial court issued a judgment and a physical solution that incorporated parts, but not all, of the stipulated agreement.

The physical solution established a method for calculating allocations, a schedule for reducing extractions, and a "watermaster," made up of thirteen voting positions from nine water producers, to administer and enforce the court's orders. It also provided for recapture, storage and recovery in the basin, transfer of allocations, and utilization of reclaimed water. The trial court retained jurisdiction to make further or supplemental orders and to modify, amend or amplify the decision as necessary. The judgment and physical solution were never appealed by any of the parties. However, the Court of Appeal in the reported case summarizes the physical solution and addresses the trial court's implementation of the physical solution under its continuing jurisdiction. (*Id.* at pp. 474-477.)

In the reported decision, the Monterey Peninsula Water Management District challenged a decision of the trial court that determined that the District had acted in a manner inconsistent with

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the physical solution when the District denied an application for a permit to pump water from the Seaside Basin until further environmental review was conducted to determine the impacts of the pumping on the basin. The Court of Appeal rejected this contention and upheld the trial court's authority to implement the physical solution. The Court of Appeal found that the "court acted within its jurisdiction and properly exercised its discretion in adhering to its prior rulings to minimize conflict with and frustration of the physical solution. In so doing, it facilitated both the exercise of the parties' water rights and the beneficial use of the Seaside Basin." (*Id.* at p. 481.)

12. *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266[14]:

This case involves the Santa Maria Valley Groundwater Basin, which underlies 290 square miles in Santa Barbara and San Luis Obispo counties. The basin contains three hydrologically-connected subareas. In 1997, the Santa Maria Valley Conservation District commenced an adjudication of the basin. After initial phases of the case determined the basin boundaries and determined that the basin was not currently in overdraft, the majority of the parties reached a stipulated judgment and physical solution. Following the guidance of *City of Barstow*, one of the remaining phases of the trial considered and determined the water rights of two landowner groups that did not agree to the physical solution.[15] In 2008, the trial court entered the judgment and physical solution.

Although the water rights of the non-stipulating landowners were determined in relation to the prescriptive rights of the public water suppliers, the physical solution did not quantify all existing overlying or appropriative rights to the native supply. The physical solution was also entered even though the basin was not in a current state of overdraft. The Court of Appeal upheld both of these aspects of the physical solution over challenge. (*Id.* at pp. 288-289.) The physical

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[14] As has been noted in other portions of this brief, there are three reported cases involving this adjudication. The other two cases are *City of Santa Maria v. Adam* (2016) 248 Cal.App.4th 504 (*Santa Maria II*) and *Santa Maria III, supra,* 43 Cal.App.5th 152.

[15] The State Agencies commented that the *Santa Maria* cases and physical solution involved bench trials, including a bench trial as to the rights of the parties that did not stipulate to the physical solution. The Proposing Parties agree and believe that the summary above expressly reflects this fact. However, it is equally true that the right of the stipulating parties were not determined, and that, as explained, the Court of Appeal found that all rights did not need to be determined for the physical solution to be entered. Consistent with the decision in *City of Barstow*, the Proposing Parties believe that the *Santa Maria* cases stand for the proposition that when the physical solution does not alter rights, there is no need to determine all rights prior to entry of the physical solution.

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

solution is implemented through monitoring and management programs specific to each of the basin's three subareas. Each subarea is required by the physical solution to monitor supply and demand, submit annual reports and establish protocol for addressing potentially severe and severe water shortages. The entities responsible for carrying out these requirements, the funding mechanisms for the programs, and the voluntary and mandatory measures triggered by the two levels of water shortages vary by subarea. The trial court retained jurisdiction over the matter, acknowledging "the exercise of the court's equity powers" would likely be necessary in the future. (*Santa Maria Valley Water Conservation Dist. v. City of Santa Maria, et al.* (Sup. Ct. County of Santa Clara, Jan. 25, 2008, No. CV 1-97-770214), at *5:9-11.)[16]

13. *Hillside Memorial Park & Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th 534:

This case involves the proposed amendment to a judgment dating back to 1961, which itself imposed a physical solution on the West Coast Groundwater Basin, a basin which includes 101,000 acres in Los Angeles County. Through the original judgment and physical solution, the parties agreed to allocate groundwater, restrict total production, and provide for an exchange pool arrangement. The original judgment had been amended on multiple occasions before this case.

In 2009, certain parties to the judgment moved to amend and restate it to allow for 120,000 acre-feet of "dewatered" or unused space to be utilized for water storage. The moving parties and other basin water right holders executed a stipulation agreeing to seek amendment of the judgment in order to avoid the time, expense, and uncertainty of renewed litigation. Certain other parties objected to the motion to amend the judgment, and the trial court denied the motion to amend without holding an evidentiary hearing.

The Court of Appeal reversed. The Court held that because the trial court "unquestionably denied the motion to amend the judgment without holding an evidentiary hearing aimed at establishing a physical solution," the court "did not fulfill its duties of holding an evidentiary hearing, and if the parties could not agree, suggesting a physical solution which the

[16] The Proposing Parties have submitted a Request for Judicial Notice associated with the trial court decisions discussed in this brief.

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

court could impose upon the parties over their objection." (*Id.* at pp. 549-550.)[17] The duty to hear the physical solution or to suggest one applied even when certain parties contended that the proposed physical solution was inconsistent with environmental laws such as the California Environmental Quality Act. The Court of Appeal noted that in "exercising its broad equitable powers in seeking a physical solution, the trial court may and should take into account environmental concerns raised by the opposing parties." (*Id.* at p. 551.) However, because the trial court is implementing the reasonable and beneficial use mandate of the Constitution when considering a physical solution, "the constitutional provision must prevail and the court must hold an evidentiary hearing to resolve the issues presented by the motion to amend the judgment." (*Id.* at p. 550.)

14. *Antelope Valley Groundwater Cases (Superior Court Santa Clara County*, Dec. 23, 2015, No. CV 049053) and *Antelope Valley Groundwater Cases* (2020) 59 Cal.App.5th 241, 272 Cal.Rptr.3d 517, reh'g denied (Jan. 7, 2021):

The Antelope Valley Basin area was in overdraft for over fifty years and faced subsidence and falling water levels. The first lawsuits involving the groundwater resources were filed in 1999, and the trial court entered a judgment and physical solution in 2015. A recent Court of Appeal decision upheld the physical solution. The trial court made determinations regarding the geographical areas of the basin area and that the water resources had sufficient hydrologic interconnectivity and conductivity to be defined as a single aquifer to adjudicate claims and impose a physical solution to protect the water resource. Additional trial determinations included safe yield and quantification of pumping. A determination of federal reserved rights and return flow rights was interrupted by settlement discussions that ultimately produced an agreement among the vast majority of parties to a physical solution. Before approving the physical solution, the trial court held a trial as to the water rights of the objecting party in relation to the physical solution, as well as a trial on the rationale and efficacy of the proposed physical solution, which it approved after determining that it was reasonable, fair and beneficial as to all parties, and served the public interest in protecting the water resource. The physical solution provided an allocation

[17] This case makes clear that an evidentiary hearing on disputed facts and law is required on a physical solution and that the court had abdicated its duty to hold an evidentiary hearing and consider the physical solution in this case.

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

of the safe yield to bring the basin back into balance and imposed assessments.

The Court of Appeal, in this first of what will likely be several reported decisions on this judgment, held that substantial evidence supported the conclusion that the physical solution was an effective remedy for the challenges the basin faced.[18] The Court of Appeal further held that single water rights holders cannot be allowed to bar the adoption of proposed physical solutions, by asserting their groundwater pumping has a limited impact on the water resources at issue because there is

> no authority that a court lacks evidentiary support for a Physical Solution merely because any *one* party regulated thereunder can argue that exempting its pumping from its terms would only minimally diminish the effectiveness of the Physical Solution.... Indeed, we believe this argument (if credited) would eviscerate the ability of a court to adopt *any* basin-wide physical solution: if any single water rights holder could bar adoption of a proposed physical solution unless it was exempted from it by asserting its specific unconstrained pumping would have limited impact on the effectiveness of its remaining regulations, *any* proposed physical solution could be exposed to a "death by a thousand cuts" because each objecting water claimant could likewise claim exemption from its regulation under the 'individual de minimus impacts' argument.

(*Antelope Valley Groundwater Cases* (2020) 59 Cal.App.5th 241, 272 Cal.Rptr.3d 517, 538, original emphases.)

15. *Orange County Water District v. City of Chino, et al.* (Sup. Ct. County of Orange, April 17, 1969, No. 117628):

In 1963, the Orange County Water District brought suit against all upstream pumpers and diverters taking water from the Santa Ana River water system. Approximately 2,500 defendants were served, including all the major cities, water districts, water companies, and individual pumpers or diverters within Riverside and San Bernardino counties. Ultimately, approximately 4,000 parties were brought into the case. The action sought a general adjudication of water rights within the Santa Ana River system, including groundwater and surface rights. The area covered by the litigation extended from the base of the San Bernardino Mountains to the Pacific Ocean, a

[18] Other portions of this case are subject to a pending separate appeal. A decision in that separate appeal is anticipated soon (oral argument occurred on February 17, 2021). The Proposing Parties will update the Court when a decision in the separate appeal is issued.

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

distance of some 75 miles and involving a total annual production of approximately 600,000 acre feet.

A settlement was ultimately reached in the case in the form of a physical solution. The physical solution did not define individual rights of claimants within the watershed; rather, it guaranteed a certain flow of water in the Santa Ana River, measured at Prado Dam, the point where the river entered Orange County. The guarantee was underwritten by a complex series of agreements and judgments among the upstream districts. The physical solution included the appointment of a Watermaster Committee to administer it, and required annual reports to the court, who maintains continuing jurisdiction over the physical solution. The physical solution was not appealed and continues to govern the watershed.

16. *Chino Basin Municipal Water District v. City of Chino, et al.* (Sup. Ct. County of San Bernardino, Jan. 27, 1978, No. 51010):

This case involved a general adjudication of the water rights of the Chino Basin, a large basin involving many hundreds of pumpers. Ultimately, the case was resolved through a negotiated physical solution, which was not appealed.

The unique feature of this judgment is that pumpers were divided into three groups or "pools." These pools consisted of agricultural pumpers, overlying industrial pumpers and appropriative pumpers serving water for municipal use. The physical solution applied a replenishment assessment to certain extractions of the industrial and appropriative pumpers. The funds from this assessment are used to purchase supplemental water and to finance other water management activities. Each pool has a separate management structure, representatives of which report to a Watermaster. The trial court retains continuing jurisdiction and the physical solution has governed the basin since its adoption.

17. *Western Municipal Water District of Riverside County, et al. v. East San Bernardino County Water District, et al.,* (Sup. Ct. County of Riverside, April 17, 1969, No. 78426):

This case involved a separate physical solution that helps implement the judgment in the Orange County Water District litigation. This judgment imposes a physical solution in the upper

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

portion of the watershed in order to implement the entire watershed program. Under the physical solution, parties agree to purchase replenishment water when certain pumping restrictions are exceeded. The court retains jurisdiction to adjust pumping limits and a Watermaster Committee keeps track of all local pumping and makes an annual report to the court, which has been done since 1969.

G. The Comprehensive Adjudication Statute Acknowledges the Common Law of Physical Solutions

In 2014, the California State Legislature enacted the Sustainable Groundwater Management Act (SGMA), found at Water Code sections 10720 and following.[19] A year later, the Legislature enacted the Comprehensive Adjudication Statute (Stats. 2015, ch. 672, A.B. 1390), found at Code of Civil Procedure sections 830 and following, to complement SGMA by establishing new civil procedures for the initiation and judicial management of groundwater basin adjudications. With one express exception regarding evidence of prescription under Water Code section 10720.5(a), both SGMA[20] and the Comprehensive Adjudication Statute explicitly leave common law water rights in place. (Wat. Code, § 10720.5 [stating that "[n]othing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights"]; Code Civ. Proc., § 830, subd. (b)(7) [stating that "[e]xcept as provided in this paragraph, this chapter shall not alter groundwater rights or the law concerning groundwater rights"].)

Consistent with the common law, the Comprehensive Adjudication Statute acknowledges and implements the physical solution doctrine. Code of Civil Procedure section 849, subdivision (a) provides that the "court shall have the authority and the duty to impose a physical solution on the parties in a comprehensive adjudication where necessary and consistent with Article 2 of

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[19] SGMA was passed as three separate bills in 2014, SB 1168, SB 1319, and AB 1739.

[20] The State Agencies commented that the brief did not address how SGMA might affect the adoption of a physical solution. Because both SGMA and the Comprehensive Adjudication Statute preserve the common law, SGMA does not directly alter the law on physical solutions. In addition, as pointed out in this brief, SGMA, the Comprehensive Adjudication Statute, and the physical solution doctrine all work together to help achieve the mandate of maximizing the reasonable and beneficial use of water.

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

Section X of the California Constitution." Code of Civil Procedure section 849, subdivision (b) provides that before "adopting a physical solution, the court shall consider any existing groundwater sustainability plan or program." This latter provision is consistent with Code of Civil Procedure section 830, subdivision (a)(4), which makes clear that comprehensive adjudications must be conducted "in a manner that is consistent with the achievement of groundwater sustainability within the timeframes of the Sustainable Groundwater Management Act." Thus, the law of physical solution is expressly integrated into the Comprehensive Adjudication Statute, which in turn is consistent with the requirements of SGMA.

III.
CONCLUSION

A physical solution is rooted in both pragmatism and ingenuity. It shifts a court's inquiry away from the granular determination of priority among competing claims and beneficial uses and towards operating plans that will equitably accommodate all beneficial uses to the greatest extent possible. The court's authorization and duty derives directly from the reasonable and beneficial use requirements of Article X, section 2 of the California Constitution. Under the physical solution doctrine, trial courts are imbued with Constitutional power and the duty to consider and impose a physical solution, even over the objection of some or all beneficial users, where it can order a more efficient distribution of water among beneficial uses without causing substantial injury.

If water right holders and beneficial uses are being satisfied, there is no further conflict that requires immediate resolution among the parties as the remedy has resolved the matter. Consequently, a trial court does not need to determine the water rights of all parties before imposing a physical solution as the solution preempts the requirement. Nor does the trial court need to find a condition of shortage or overdraft exists as a predicate to the exercise of its Constitutional authority.

A physical solution may impose reasonable costs to pay for implementation. A physical solution does not need to resolve each issue that may be presented, but, through the trial court's continuing jurisdiction, may defer issues until they are ripe for resolution or necessary to be

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

resolved. This spares the court, the parties, and the public of the need and expense of undergoing the oft-times Herculean effort of completing a comprehensive adjudication of water rights. Moreover, the public interest is not undermined and the parties are not prejudiced as the trial court maintains continuing jurisdiction to admit new evidence and adjust the physical solution over time to address a change in circumstances in the form of adaptive management.

The Proposing Parties appreciate this opportunity to submit this brief on the physical solution doctrine. The Proposing Parties will be available at the March 15, 2021 Status Conference to answer any questions the Court may have about this doctrine. The Proposing Parties intend to file a noticed motion for the Court to set a discovery schedule and trial date to hear the Physical Solution prepared by the Proposing Parties. The Proposing Parties will address issues that have been raised regarding Code of Civil Procedure section 833, subdivision (c), 850, subdivision (a), and 850, subdivision (b) in connection with that motion and request that the Court defer consideration of those issues until those matters are fully briefed.

Dated: March 8, 2021

BEST BEST & KRIEGER LLP

By: _____

SHAWN D. HAGERTY
CHRISTOPHER MARK PISANO
SARAH CHRISTOPHER FOLEY
Attorneys for Respondent and Cross-Complainant
CITY OF SAN BUENAVENTURA

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

SHAWN HAGERTY, Bar No. 182435
shawn.hagerty@bbklaw.com
BEST BEST & KRIEGER LLP
655 West Broadway, 15th Floor
San Diego, California 92101
Telephone: (619) 525-1300
Facsimile: (619) 233-6118

CHRISTOPHER M. PISANO, Bar No. 192831
christopher.pisano@bbklaw.com
SARAH CHRISTOPHER FOLEY, Bar No. 277223
sarah.foley@bbklaw.com
PATRICK D. SKAHAN, Bar No. 286140
patrick.skahan@bbklaw.com
Best Best & Krieger LLP
300 South Grand Avenue, 25th Floor
Los Angeles, California 90071
Telephone: (213) 617-8100
Facsimile: (213) 617-7480

Attorneys for Respondent and Cross-Complainant
CITY OF SAN BUENAVENTURA

Exempt From Filing Fees Pursuant to Cal.Gov't Code § 6103

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SANTA BARBARA CHANNELKEEPER, a California non-profit corporation,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, a California State Agency;

Respondents.

CITY OF SAN BUENAVENTURA, a California municipal corporation,

Cross-Complainant

v.

DUNCAN ABBOTT, an individual, et al.

Cross-Defendants.

Case No. 19STCP01176

PROOF OF SERVICE

Action Filed: September 19, 2014
Trial Date: Not Set

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the action herein; my business address is Best Best & Krieger LLP, 2001 N. Main St. Suite 390, Walnut Creek, CA 94596. On March 8, 2021, I served the following document(s):

BRIEF OF PROPOSING PARTIES REGARDING THE PHYSICAL SOLUTION DOCTRINE;

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF BRIEF OF PROPOSING PARTIES REGARDING THE PHYSICAL SOLUTION DOCTRINE

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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Daniel Cooper
Sycamore Law
1004 O'Reilly Ave.
San Francisco CA 94129
Tel: (415) 360-2962
daniel@sycamore.law

Attorneys for Petitioner and Plaintiff
Santa Barbara Channelkeeper

Matthew Bullock
Deputy Attorney General
California Department of Justice
Natural Resources Law Section
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
Tel: (415) 510-3376
matthew.bullock@doj.ca.gov

Attorneys for Respondent and Defendant State Water Resources Control Board

Marc N. Melnick
Deputy Attorney General
Attorney General's Office
1515 Clay Street, 20th Floor
P.O. Box 70550

Eric M. Katz
Supervising Deputy Attorney General
Noah Golden – Krasner
Deputy Attorney General
Carol Boyd

Oakland, CA 94612-0550
Tel: 510-879-0750
Marc.melnick@doj.ca.gov

Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Tel. (213) 269-6343
Fax (213) 897-2802
Eric.Katz@doj.ca.gov
Noah.goldenrasner@doj.ca.gov
Carol.boyd@doj.ca.gov

Attorneys for Respondent and Defendant State Water Resources Control Board

Edward J. Casey
Alston & Bird LLP
333 South Hope Street, 16th Floor
Los Angeles, CA 90071
Tel: 213.576.1000
ed.casey@alston.com

Attorneys for Cross-Defendants Bentley Family Limited Partnership; AGR Breeding, Inc.; and Southern California Edison Company

Attorneys for Proposed Intervenor California Department of Fish & Wildlife

Paul Blatz
Ryan Blatz
Blatz Law Firm
206 N. Signal St. Suite G
Ojai, CA 93023
Tel: (805) 646-3110
blatzlawfirm@gmail.com
ryan@ryanblatzlaw.com

Attorneys for Cross-Defendants Troy Becker and Jeri Becker; Janet Boulton; Michael Boulton; Michael Caldwell; Joseph Peter Clark, successor in interest to the Joseph Clark and Linda Epstein Family Trust; Linda Louise Epstein, successor in interest to the Joseph Clark and Linda Epstein Family Trust; Michael I. Cromer and Jody D. Cromer; Michel A. Etchart, Trustee of the Michel A. Etchart Separate Property Trust, and Mark W. Etchart, Trustee of the Mark W. Etchart Sepertate Property Trust; Lawrence Hartmann; Ole Konig; Krotona Institute of Theosophy; Stephen Michtell and Kathleen Reid Mitchell, Trustees of the Stephen Mitchell and Byron Katie Trust; North Fork Springs Mutual Water Company; Stephen Robert Smith, Trustee of the Charles R. Rudd and Lola L. Rudd Trust, dated May 20, 2976; Shlomo Raz; Sylvia Raz; Senior Canyon Mutual Water Company; Siete Robles Mutual Water Company; Soule Park Golf Course, Ltd.; Telos, LLC; Victor C. Timar, Jr. Trustee of the Timar Family Trust; John Town; Trudie Town; Asquith Family Limited Partnership, Ltd.; Burgess Ranch; Cary Cheldin; Cynthia Daniels; Wayne Francis; David Friend; The Larry & Pat Hartmann Family Trust; The John N. Hartmann Trust; Gary Hirschkron; Cheryl Jensen; Lutheran Church of the Holy Cross of Ojai, California; Janice Sattler (Mineo); Eitan Sloustcher; Rogers-Cooper Memorial Foundation; Robert Norris (not yet appeared); Patricia Norris; Old Creek Road Mutual

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Water Company (not yet appeared); Margaret Vanderfin; Telos Ojai, LLC (not yet appeared); Jennifer Ware; The Walker Jr. Living Trust; David Altman, Trustee of the 1190 El Toro Trust ; Babtiste Foundation; Sean A. Bennett and Leslie Bennett, Trustees of the Bennett Family Trust; Dwayne A. Bower and Marilyn E. Bower Trustees of the Bower Family Trust; Mark Terry Cline and Bonnie Burreson Cline, Trustees of the Mark Terry Cline and Connie Burreson Cline Revocable Trust; Robert R. Daddi and Darlene J. Daddi; Lucille A. Elrod, Trustee of the John and Lucille Elrod Family Trust; Friend's Stable & Orchard Inc. Daniel Hultgen, Trustee of the Hultgen Living Trust; Ojai Golf, LLC; Three Oaks, LLC, Erica J. Abrams, Trustee of the Erica J. Abrams Trust; Raul E. Alvarado and Hildegard M. Alvarado, Trustees of the Alvarado Family Trust; William Armstrong and April Nardini; Joseph Lynn Barthelemy and Elvira Lilly Barthelemy, Trustees of the Joseph Lynn Barthelemy and Elvira Lilly Barthelemy 2002 Family Trust; James S. Bennett and Carolyn D. Bennett, Trustees of the Bennett Family Trust; Sumeet Bhatia and Michael McDonald; John Joseph Broesamle and Katharine Sue Broesamle, Trustees of the Broesamle Family Trust; Richard Aaron Carlson, Trustee of the Richard Aaron Carlson Trust and Michelle Larson, Trustee of the Michelle Larson Family Trust; Thomas D. Carver and Cynthia L. Carver; Dana Ceniceros, Trustee of the Dana and Dawn Ceniceros Revocable Living Trust; Deborah Lys Martin Crawford; Frank Clay Creasey Jr.; Debra Joy Reed, Trustee of The Debra Joy Reed Revocable Trust Dated November 3, 1994; Frederic Devault; Diana Syvertson, Trustee of the Diana Syvertson Living Trust; Dive Deep L.L.C.; Douglas Roy Parent and Ann Marie Parent; William Erickson; Gelb Enterprises, L.P.; Jan Stephen Granade and Priscilla K. Granade, Trustees of the Granade Family Revocable Living Trust; Margot J. Griswold; Brian C. Haase and Marie Haase, Trustees of the B&M Haase Trust Dated October 8, 2019; Thomas Lann Harper and Jadona Collier-Harper; Ojai-Jackman L.L.C.; Kevin Rainwater and Marianne Ratcliff; Keith M. Nightingale and Victoria V. Nightingale, Trustees of The Nightingale Family Trust; Heide C. Kurtz, Trustee of The Kurtz Family Trust Dated January 19, 2019; Randall Leavitt, Trustee of

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

The Randall B. Leavitt 2010 Trust; Edward C. Leicht and Jacqueline M. Leicht, Trustees of The Leicht Family 2013 Revocable Trust Dated March 1, 2013; Paul Lepiane and Bengtson Bo; Robert Levin and Lisa Solinas, Trustees of The Levin Family Living Trust; Francis Longstaff and Shauna Longstaff, Trustees of The Longstaff Trust Dated October 11, 2018; Mandy Macaluso, Trustee of The Living Trust of Mandy Macaluso; Marilyn Wallace, Trustee of The Marilyn Wallace Separate Property Trust; Daniel J. McSweeney and Yoko McSweeney; Wendell M. Mortensen and Laura L. Mortensen, Trustees of The Mortensen Family Revocable Trust; Timothy Jerome Murch and Jody Caren Murch, Trustees of The Jodim Family 2007 Trust Dated July 31, 2007; Chris E. Platt and Hanh H. Platt; Robert Erickson, Trustee and Ronald Wilson; Michael D. Robertson and Kimberly A. Robertson, Trustees of The Robertson Family Trust; James P. Robie, Trustee of the Robie Family Trust; Petter Romming and Kimi Romming, Trustees; Marc Saleh, Trustee of The Saleh Family Trust; Konrad Stefan Sonnenfeld, Trustee of The Konrad Stefan Sonnenfeld Living Trust; Mark Sutherland, Trustee of The Sutherland Marital Trust; John H. Thacher and Caroline H. Thacher, Trustees of The Thacher Family Trust Dated January 2004; Gilbert G. Vondriska and Carolyn J. Vondriska, Trustees of The Vondriska Living Trust; William D. Rusin, Sr., Trustee of the William D. Rusin Sr. Revocable Trust; Oscar D. Acosta, Trustee of the Acosta Trust

William G. Short, Esq.
Law Offices of William G. Short
Post Office Box 1313
Ojai, California 93024-1313
Tel: (805) 490-6399
Fax: (805) 640-1940
billshortesq@me.com

Anthony Lee Francois
Jeremy Talcott
David Deerson
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814-1802
Tel: (916) 419-7111
Fax: (916) 419-7111
alf@pacificlegal.org
TFrancois@pacificlegal.org
jtalcott@pacificlegal.org
ddeerson@pacificlegal.org

Attorney for Cross-Defendant Robin Bernhoft

Attorney for Cross-Defendant Robin Bernhoft

Robert N. Kwong
Dennis O. La Rochelle
Arnold Larochelle Mathews Vanconas & Zirbel, LLP
300 Esplanade Dr Ste 2100
Oxnard, CA 93036
Tel: (805) 988-9886
rkwong@atozlaw.com

Attorneys for Cross-Defendant Casitas Municipal Water District

Patrick Loughman
Cristian Arrieta
Lowthorp, Richards, McMillan, Miller & Templeman
300 Esplande Drive, Suite 850
Oxnard, CA 93036
Tel: 805.804.3848
Ploughman@lrmmt.com
Carrieta@lrmmt.com

Attorneys for Cross-Defendants Ernest Ford, Tico Mutual Water Company, and Betty Withers and Betty Bow Withers Trust

Gregory J. Patterson
Musick, Peeler & Garrett LLP
2801 Townsgate Road, Suite 200
Westlake Village, CA 91361
Tel: (805) 418-3103
Fax: (805) 418-3101
g.patterson@musickpeeler.com

Attorneys for Cross-Defendants Robert C. Davis, Jr.; James Finch; Topa Topa Ranch Company, LLC; The Thacher School; Thacher Creek Citrus, LLC; Ojai Oil Company; Ojai Valley School; Sharon Hamm-Booth and David Robert Hamm, Co-Trustees of The Hamm 2004 Family Trust Dated April 29, 2004; and Reeves Orchard, LLC

Lindsay F. Nielson
Law Office of Lindsay F. Nielson
845 E Santa Clara Street
Ventura, CA 93001
Tel: 805-658-0977
nielsonlaw@aol.com

Attorneys for Cross-Defendant Meiners Oaks Water District and Ventura River Water District

Jeanne Zolezzi
Herum Crabtree Suntag
5757 Pacific Avenue, Suite 222
Stockton, CA 95207
Tel: (209) 472-7700
Fax: (209) 472.7986
jzolezzi@herumcrabtree.com

Attorneys for Cross-Defendant Meiners Oaks Water District and Ventura River Water District

Neal P. Maguire
Ferguson Case Orr Patterson LLP
1050 South Kimball Road
Ventura, CA 93004
Tel: (805) 659-6800
nmaguire@fcoplaw.com

Attorneys for Cross-Defendants Rancho Matilija Mutual Water Company; Bettina Chandler, Trustee of the Bettina Chandler Trust; Martin Gramckow and Linda Gramckow individually; Martin Gramckow, Trustee of the Monika G. Huss Irrevocable Trust, Trustee of the Karin W. Gramckow Irrevocable Trust, and Trustee of the Kurt J. Gramckow Irrevocable Trust

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Thomas S. Bunn III
Elsa Sham
Lagerlof Senecal Gosney & Kruse LLP
301 N. Lake Avenue, 10th Floor
Pasadena, CA 91101-5123
Tel.: (626) 793-9400
Fax: (626) 793-5900
tombunn@lagerlof.com
esham@lagerlof.com

Attorneys for Cross-Defendant St. Joseph's Associates of Ojai, California, Inc. and St. Joseph's Health and Retirement Center, Janis Long Nicholas, John Jay Nicholas, Jess Earl Long (aka Jess E. Long), Johana Rae Long, and Mary Margaret Long, Janis Long Nicholas and Jess E. Long as Trustees of the Long Family Trust

Michael J. Van Zandt
Nathan A. Metcalf
Sean G. Herman
Hanson Bridgett LLP
425 Market Street, 26 Floor
San Francisco, CA 94105
Tel: 415-777-3200
Fax: 415-541-9366
mvanzandt@hansonbridgett.com
nmetcalf@hansonbridgett.com
sherman@hansonbridgett.com

Attorneys for Cross-Defendant Ventura County Watershed Protection District and County of Ventura

Alberto Boada
Karen V. Marble
Ventura County Counsel's Office
800 South Victoria Avenue
Ventura, CA 93009-1830
Tel.: (805) 654-2590
Fax: (805) 654-2185
alberto.boada@ventura.org
karen.marble@ventura.org

Attorneys for Cross-Defendant Ventura County Watershed Protection District and County of Ventura

Scott Slater
Bradley Herrema
Christopher Guillen
Brownstein Hyatt Farber Schreck LLP
1021 Anacapa Street, 2nd Floor
Santa Barbara, CA 93101
Tel: (805) 963-7000
Fax: (805) 965-4333
sslater@bhfs.com
bherrema@bhfs.com
cguillen@bhfs.com

Attorneys for Cross-Defendant The Wood-Claeyssens Foundation

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Joseph C. Chrisman
Hathaway, Perrett, Webster, Powers,
Chrisman & Gutierrez
5450 Telegraph Road
Ventura, CA 93003
(805) 644-7111
jchrisman@hathawaylawfirm.com

Attorneys for Cross-Defendant Wood-Claeyssens Foundation

David B. Cosgrove
Jeffrey M. Oderman
Douglas J. Dennington
Jeremy N. Jungreis
Rutan & Tucker, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626-1931
Tel: 714-641-5100
Fax: 714-546-9035
dcosgrove@rutan.com
joderman@rutan.com
ddennington@rutan.com
jjungreis@rutan.com

Attorneys for Cross-Defendant Casitas Municipal Water District

Thomas E. Jeffry
Debra J. Albin-Riley
Stefan Bogdanovich
Arent Fox LLP
555 West Fifth Avenue, 48th Floor
Los Angeles, CA 90013-1065
(213) 629-7400
(213) 629-7401
Thomas.jeffry@arentfox.com
Stefan.bogdanovich@arentfox.com

Attorneys for Cross-Defendant Community Memorial Health System

Andrew Brady
DLA Piper LLP (US)
550 South Hope Street, Suite 2400
Los Angeles, CA 90071-2618
Tel. (213) 330-7700
Fax: (213) 330-7701
andrew.brady@us.dlapiper.com

Attorneys for Cross-Defendant Integritas Ojai, LLC

Jennifer T. Buckman
Andrew J. Ramos
Holly Jacobson
Bartkiewicz Kronick & Shanahan, PC
1011 Twenty-Second Street
Sacramento, CA 95816-4907
Tel. (916) 446-4254
Fax (916) 446-4018
jtb@bkslawfirm.com
hjj@bkslawfirm.com

Attorneys for Cross-Defendant City of Ojai

David R. Krause-Leemon
BEAUDOIN & KRAUSE-LEEMON LLP
15165 Ventura Blvd., Suite 400
Sherman Oaks, CA 91403
Tel. (818) 205-2809
Fax (818) 788-8104
david@bk-llaw.com

Attorneys for Cross-Defendant RDK Land, LLC

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Eric J. Schindler
Michelle J. Berner
Kroesche Schindler LLP
2603 Main Street, Suite 200
Irvine, CA 92614
Tel. (949) 387-0495
Fax (888) 588-0034 Fax
eschindler@kslaw.legal
mberner@kslaw.legal

Attorneys for Cross-Defendant Oak Haven, LLC

Brian A. Osborne
Osborne Law Firm
674 County Square Drive, Suite 308
Ventura, CA 93003
Tel. (805) 642-9283
Fax (805) 642-7054
osbornelawyer@gmail.com

Attorney for Cross-Defendants Brian A. Osborne; Ronald W. Rood and Susan B. Rood, Trustees of the Rood Family Trust

Adam D. Wieder
Barry C. Groveman
Ryan Hiete
Groveman Hiete LLP
35 East Union Street, Suite B
Pasadena, CA 91103
Tel (626) 747-9383
Fax (626) 747-9370
awieder@grovemanhiete.com
bgroveman@grovemanhiete.com
rhiete@grovemanhiete.com

Attorneys for Cross-Defendant Michael Bradbury; Heidi Bradbury; and The Heidi Gramkow Trust

Peter A. Goldenring
Mark R. Pachowicz
Pachowicz | Goldenring A Professional Law Corporation
6050 Seahawk Street
Ventura, CA 93003-6622
Tel. (805) 642-6702
Fax (805) 642-3145
attorneys@gopro-law.com

Attorneys for Cross-Defendant The Manfred Krankl and Elaine V. Krankl Living Trust

Ernest J. Guadiana
Elkins Kalt Weintraub Reuben Gartside LLP
10345 W. Olympic Boulevard
Los Angeles, CA 90064
Tel. (310) 746-4425
eguadiana@elkinskalt.com

Attorneys for Michael Lombardo and Charles L. Ward III, as Co-Trustees of the Ward-Lombardo Living Trust

Justin M. Alvarez
Lamdien T. Le
The Alvarez Firm, A Law Corporation
24005 Ventura Boulevard
Calabasas, CA 91302
Tel. (818) 224-7077
Fax (818) 224-1380
jalvarez@alvarezfirm.com
dle@alvarezfirm.com

Attorneys for Cross-Defendant Rancho Sueño, LLC

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Patrick L. Rendon
Lamb and Kawakami LLP
333 South Grand Avenue, Suite 4200
Los Angeles, CA 90071
Tel. (213) 630-5500
Fax: (213) 630-5555
prendon@lkfirm.com

Attorneys for Real Party in Interest Emily V. Brown

David A. Ossentjuk
Ossentjuk & Botti
2815 Townsgate Road, Suite 320
Westlake Villge, CA 91361
Tel: (805) 557-8081
Fax: (805) 456-7884
DOssentjuk@oandblawyers.com

Attorney for Cross-Defendant Robert Martin

Julie A. Baker
2193 Maricopa Hwy
Ojai, CA 93023
(805) 646-8700
Jandjbaker2@gmail.com

T&D Nevada Trust
Dennis and Antoinette Mitchell
Mitchell Homes Inc.
P.O. Box 360
Ojai, CA 93024
(805) 340-2890
amitc74383@aol.com

Anthonie M. Voogd
918 Palomar Road
Ojai, CA93023
Tel. (805) 646-1512
avoogd@stanfordalumni.org

Karen A. Feld
Daniel S. Roberts
Cole Huber LLP
3401 Centrelake Drive, Suite 670
Ontario, CA 91761
Tel: (909) 230-4209
Fax: (909) 937-2034
kfeld@colehuber.com
droberts@colehuber.com

Attorneys for Cross-Defendant Ventura Unified School District

Hermitage Mutual Water Company, and Santa Ana Ranch, Inc.

Attn: J. Roger Essick
2955 Hermitage Road
Ojai, CA 93023
Tel. (805) 320-1406
rogeressick@gmail.com

The Joseph Fedele 1995 Living Trust,
Oriana Marie Fedele, Trustee
Attn. Oriana Fedele
P.O. Box 298
Lahaina, HI 96767
Tel. (818) 601-3161
orianafedele@gmail.com

Michaela Boehm
12293 topa Lane
Santa Paula, CA 93060
Tel. (323) 493-3737
micboehm@me.com

Lawrence S. Mihalas
Trustees of the Mihalas Family Trust
419 21st Place
Santa Monica, CA 90402
Tel. (310) 739-0700
lmihalas@gmail.com
lmihalas@ucla.edu

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Heather Blair
556 So. Fair Oaks Ave., Ste 101
Box 356
Pasadena, CA 91105
Tel. (626) 755-6566
Hblair1946@gmail.com

Martin Hartmann
Whitney Hartmann
430 S. Carrillo Road
Ojai, CA 93023
Tel. (805) 798-2253
earthbuilding@gmail.com

Robert K. Cartin
Cartin Family LLC
505 Estremoz Ct.
Oceanside, CA 92057
Tel. (760) 429-4738
bob.cartin@dvm.com

Loa E. Bliss
Loa E. Bliss 2006 Revocable Trust
9030 Ojai Santa Paula Road
Ojai, CA 93023
Tel: (617) 750-8500
loabliss@hotmail.com

Del Cielo LLC
Attn. Tim Carey, Managing Member
22410 Hawthorne Boulevard, Suite 5
Torrance, CA 90505
Tel. (310) 787-6569
tim@calvoterguide.com

Joyce Syme, and
The Joyce A. Syme Living Trust
1760 Ocean Avenue
Santa Monica, CA 90401
Tel. (310) 403-1760
seaviewmotel@hotmail.com

Janice and Jesse Hillestad
9611 N. Ventura Ave.
Ventura, CA 93001
Tel. (310) 614-8438
janicehillestad@icloud.com
jessehillestad@gmail.com

Dale and Patricia Givner
12617 Koenigstein Rd.
Santa Paula, CA 93060
Tel. (805) 525-9524
dalegivner@gmail.com

Carlos A Mejia
Sophie A Wenzlau
Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Tel. (916) 210-6379
Fax: (916) 327-2319
sophie.wenzlau@doj.ca.gov

Attorneys for California Department of Parks and Recreation

Dennis and Nadine Corte
12812 MacDonald Drive
Ojai, CA 93023
Tel. (805) 701-1950
dwcorte@outlook.com

Jacob Slujter
Rabindra Singh
1070 McAndrew Road.
Ojai CA 93023; Tel.
(805) 646-2726
ED@KFA.ORG

In Propria Persona for Krishnamurti Foundation of America

David R. Greifinger
Law Offices of David R. Greifinger
15515 West Sunset Blvd., No. 214
Pacific Palisades, CA 90272
Tel. (424) 330-0193
tracklaw@me.com

Attorney for Cross-Defendants Danny Everett and Tiarzha Talyor

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Kelton Lee Gibson
878 Oak Grove Court
Ojai, CA 93023
Tel. (805) 701-9318
kgibson@mwgjlaw.com
kgibson878@gmail.com

Kelton Lee Gibson, Trustee of the Gibson Family Trust, dated June 6, 2006

George and Sigrid Bressler
340 Longhorn Lane
Ojai, CA 93023
Tel. (805) 646-1221
andybsail@gmail.com

Rebecca C. Collins
Thomas M. Collins, Jr.
241 Longhorn Lane
Ojai, CA 93023
Tel. 805-312-5894
tominojai@gmail.com
collinst3@sbcglobal.net

Peter Duchesneau
Sigrid R Waggener
Mannat, Phelps & Phillips, LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
Te.l (415) 291-7400
Fax (415) 291-7474
pduchesneau@manatt.com
swaggener@manatt.com

Attorneys for Cross-Defendant Aera Energy, LLC

Claude R. and Patricia E. Baggerly
119 S. Poli Avenue
Ojai, CA 93023-2144
Tel. (805) 646-0767
Tel. (805) 766-7317
russ.baggerly65@gmail.com

Judith L. Mercer
c/o of Jason Goldman
Mercer Family Trust Agreement of 1992
1175 Grand Avenue
Ojai, CA 93023
Tel. (310) 625-7795
jgoldman@begroup.com

Matthew Haffner
Haffner Law Group
86 S. Laurel Street
Ventura, CA 93001
Tel. (805) 641-9334
Fax (805) 980-5014
mhaffner@haffnerlawgroup.com

Brian Moskal,
Greenberg Glusker Fields Claman & Machtinger LLP
2049 Century Park East, Suite 2600
Los Angeles, CA 90067
Tel. (310) 785-6833
Fax (310) 201-2368
bmoskal@greenbergglusker.com

Attorneys for Cross-Defendant Susan Moll

Attorneys for Ginnetti Living Trust

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Harry D. Sims and Raymond P. Sims
P.O. Box 1870
Ojai, CA 93024
Tel. (805) 646-0167
1978simsfamilytrust@gmail.com

Tristan F. Mackprang
David J. Farkas
Coleman Frost LLP
201 Nevada Street, Smoky Hollow
El Segundo, CA 90245
Tel. (424) 277-1650
Fax (31) 648-9739
tristan@colemanfrost.com
david@colemanfrost.com

Attorneys for Cross-Defendants Housing Authority of the City of San Buenaventura, Triad Properties, Inc., Encanto Del Mar Apartments, L.P., Villages at Westview I LP, Vista Del Mar Commons, LP, and Soho Associates, L.P.

Andrew K. Whitman
821 N. Signal Street
Ojai, CA 93023
Tel. (805) 444-5671
sfreberg@scr-legaliner
.com

In pro per and Atty for Cross-Defendants Andrew K. Whitman and Heidi A. Whitman; Nancy L. Whitman; John R. Whitman and Nancy L. Whitman Family Trust

Christopher Danch
16200 Maricopa Highway
Ojai, CA 93023
Tel. (805) 640-8534
chrisdanch@gmail.com

Attorney for Cross-Defendants Angie Marie Genasci and Christopher Paul Danch, Trustees of the Genasci-Danch Family Trust; and Donald and Wendy Givens

Paul R. Huff
The Huff Law Firm APC
21 S. California Street, Suite 205
Ventura, CA 93001
Tel. (805) 667-8940
Fax (805) 850-7399
phuff@hufffirm.com

Attorneys for Barnard Properties, LLC

Alessandro (Alex) Lobba
Alessandro Lobba and Mary E. Jackson, individually as Trustees of the Lobba-Jackson Family Trust
947 Casitas Vista Road
Ventura, CA 93001
Tel. (805) 895)-7056
alobba@gmail.com

Christine Steiner
2560 Ladera Road
Ojai, CA 93023
Tel. (31) 600-3220
csteiner@csteinerlaw.com

William Slaughter
Slaughter, Reagan & Cole, LLP
625 East Santa Clara Street, Suite 101
Ventura, CA 93001
Tel. (805) 658-7800
Fax (805) 644-2131
slaughter@srllplaw.com

Attorneys for The Boyd S. Dron and Karin Dron Joint Living Trust, and Sisar Mutual Water Company

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Julia Taft-Whitman, President CEO
Taft Corporation'
111 West Topa Topa Street
Ojai, CA 93023
Tel. (805) 794-2837
juliawhitman@gmail.com

Jaide Whitman, President
Julia Whitman, Director
Conservation Endowment Fund
P.O. Box 6
Oak View, CA 93022
Tel. (805) 649-2333
Tel. (805) 804-7005
jaide.whitman@gmail.com
TaftGardensOffice@gmail.com

Kelley M. Rasmussen, Trustee
2420 Park Road
Lake Oswego, OR 97034
Tel. (805) 798-7125
kelleyras@gmail.com

Angela Small Booth, Attorney
2175 Valley Meadow Drive
Oak View, CA 93022
Tel. (805) 765-5413
angie@angiesmall.org

William E. Colborn, Jr.
13183 Ojai Road
Santa Paula, CA 93060
Tel. (805) 795-1909
jake@colbornandassociates.com

Rebecca Tickell
350 Verano Drive
Ojai, CA 93023
Tel. (323) 559-5700
rebecca@bigpictureranch.com

Joshua Beckman
913 Oso Road
Ojai, CA 93023
Tel. (323) 404-0465
joshbfbp@gmail.com

Gregg S. Garrison and Rosanna Garrison
Garrison Law Corporation
12986 MacDonald Drive
Ojai, CA 93023
Tel. (650) 726-1111 / Fax: (805) 669-3168
gsgarrison@garrisonlawcorp.com

Robert L. Smith
12777 Tree Ranch Road
Ojai, CA 93023
Tel. (805) 558-6322
treeranch@ymail.com

Susan M. Glennon
292 Cruzero Street
Ojai, CA 93023
Tel. (805) 646-4816
theglennonnest@aol.com

Robin Schwartzburd
411 Franklin Drive
Ojai, CA 93023
Tel. (805) 272-5877
robin.schwartzburd@gmail.com

Melinda Hass
11947 Koenigstein Road
Santa Paula, CA 93060
Tel. (213) 713-4360
mlynnbooking@gmail.com

Malinda K. Vaughn
Mitchell B. Vaughn
12283 Ojai Santa Paula Road
Ojai, CA 93023-9323
Tel. (805) 890-6616
vaughmb@aol.com

Rebecca D. Schwermer
P. O. Box 174
Santa Paula, CA 93061
Tel. (805) 551-3494
octoberbabies2@verizon.net

Cross-Defendant Duncan Abbott

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596

Jennifer Jordan Day and Joel Fox
909 North Rice Road
Ojai, CA 93023
Tel. (213) 321-5253
jenniferjordanday@gmail.com

Brigitte Lovell, Trustee of Lovell Living Trust
295 Encino Drive
Oak View, CA 93022
Tel. (915) 227-9412
loveb9@gmail.com

Catherine Ferro &
Catherine Eileen Ferro Inter Vivos Trust
312 Montana Road
Ojai, CA 93023
Tel. (805) 326-1686
cepharoah@gmail.com

Susan C. White
Steven J. White
2 Shorewood Drive
Bellingham, WA 98225
Tel. (425) 891-9249
curranwhite1@hotmail.com

Susan Capper
12870 Tree Ranch Road
Ojai, CA 93023
Tel. (805) 794-6421
chelsue@aol.com

Lindy & Karen C. Goetz
12338 Linda Flora
Ojai, CA 93023-9721
Tel. (805) 649-2526; (805) 794-2312
lindygoetz@roadrunner.com

Joyce L. Heath
Joyce Heath, Trustee of the Heath Family Living Trust,
P.O. Box 1323
Ojai, CA 93024
Tel. (805) 290-6231
mamaheath55@gmail.com

Thomas M. German
301 N. Drown Avenue
Ojai, CA 93023
Tel. (805) 646-2130
kittycatgirl214@gmail.com

Via First Class Mail

Via First Class Mail

Warren W. Green
Bonnie M. Green
985 E. Main Street
Ventura, CA 93001
Tel. (805) 652-1080
Fax (805) 652-0400

Robert Kyle
The Robert Kyle Living Trust
715 Sunset Place
Ojai, CA 93023
Tel. (626) 260-5509

Via First Class Mail

Salvatore Scarpato
106 Calhoun Lane
Georgetown, TX 78633
(805) 797-8767

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 8, 2021 at Walnut Creek, California.

Irene Islas

LAW OFFICES OF
BEST BEST & KRIEGER LLP
2001 N. MAIN STREET, SUITE 390
WALNUT CREEK, CALIFORNIA 94596