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CASITAS MUNICIPAL WATER DISTRICT,
12 a California special district

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 FOR THE COUNTY OF LOS ANGELES - SPRING STREET COURTHOUSE

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

16 Petitioner,

17 v.

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

21 Respondents.

22 CITY OF SAN BUENA VENTURA, a
23 California municipal corporation,

24 Cross-Complainant,

25 v.

26 DUNCAN ABBOTT, et al.

27 Cross-Defendants.
28

Case No. 19STCP01176

Hon. William F. Highberger; Dept: 10

**STATUS CONFERENCE REPORT OF
CROSS-DEFENDANT CASITAS
MUNICIPAL WATER DISTRICT**

Further Status Conference Hearing:

DATE: March 15, 2021
TIME: 1:30 p.m.
DEPT.: 10

Date Action Filed: September 19, 2014
Trial Date: None Set

1 **STATUS CONFERENCE REPORT**

2 Cross-Defendant CASITAS MUNICIPAL WATER DISTRICT, a California special
3 district (“Casitas”), submits this Status Conference Report (“Report”) in advance of the Status
4 Conference scheduled for March 15, 2021.

5 **I. INTRODUCTION**

6 While the Brief of Proposing Parties Regarding the Physical Solution Doctrine (the
7 “Proposing Parties’ Brief”) provides a generally accurate overview of the physical solution
8 doctrine in California, a few additional points are worth emphasizing.

9 First, while it is true that a physical solution need not account for all existing water rights
10 within a basin, it must account for those with rights that might threaten the efficacy or future
11 workability of the solution, *e.g.*, pueblo rights or pre-1914 rights holders. (*Cf. California Am.*
12 *Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 482 [affirming a trial court’s rejection of a
13 water district’s environmental permitting requirements that would “conflict[] with the provisions
14 of the physical solution and thereby disrupt[] the carefully established groundwater production
15 rights of the parties to that solution”].) If the solution fails to do so, then water rights holders with
16 allegedly superior priority could effectively unwind the solution – to the surprise and frustration of
17 the stipulating parties – by asserting paramount entitlement.

18 Second, as to this case specifically, the physical solution must acknowledge Casitas’
19 ongoing obligation to maintain federal flow requirements imposed upon it by the National Marine
20 Fisheries Service to protect endangered steelhead trout. Should the solution fail to acknowledge
21 this critical obligation, federal stakeholders whose interests would be affected will necessarily
22 complicate this litigation, as the concurrent jurisdiction of this Court and State agencies is subject
23 to the overriding jurisdiction of federal authority.

24 Third, the public trust doctrine is an important consideration, but the doctrine is not
25 absolute. (*National Audubon Soc’y v. Super. Ct.* (1983) 33 Cal.3d 419, 426 [“The state must have
26 the power to grant nonvested usufructuary rights to appropriate water even if diversions harm
27 public trust uses.”].) Instead, that doctrine, as it relates to water in California, is limited by
28 constitutional principles of beneficial use. (*Id.* at p. 442 [noting that Article X, section 2 of the

1 California Constitution “established the doctrine of reasonable use as an overriding feature of
2 California water law”].)

3 Finally, costs assigned to support the physical solution must account for Propositions 26
4 and 218, and how those laws interact with the capability of all public agencies subject to the
5 physical solution to finance its costs.

6 **II. The Physical Solution Must Account for All Entities with Rights that Might Threaten**
7 **the Workability of the Solution.**

8 The Proposing Parties’ Brief correctly notes that a court “may impose a physical solution
9 without quantifying all the rights of all the parties.” (Proposing Parties’ Brief at p. 9 [citing *City*
10 *of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 299].) At the same time, however, “[t]he
11 solution must not . . . unreasonably or adversely affect the existing legal rights and respective
12 priorities of the parties.” (*California Am. Water, supra*, 183 Cal. App. 4th at p. 480; *see also City*
13 *of Barstow, supra*, 23 Cal.4th at p. 1250 [“a court may neither change priorities among the water
14 rights holders nor eliminate vested rights in applying the solution without first considering them in
15 relation to the reasonable use doctrine”].) As explained below, this Court must account for all
16 entities with paramount rights that may threaten the viability of the solution. Otherwise, the
17 solution risks becoming ineffective should a rights holder with allegedly superior entitlement
18 exercise its claims, to the disruption of the balance of other recognized rights that any physical
19 solution may strike.

20 Physical solutions are “designed to alleviate overdrafts and the consequential depletion of
21 water resources in a particular area, consistent with the constitutional mandate to prevent waste
22 and unreasonable water use and to maximize the beneficial use of this state’s limited resource.”
23 (*California Am. Water, supra*, 183 Cal.App.4th at p. 480 [citing Cal. Const., art. X, § 2].) Because
24 a court sits in equity when crafting a physical solution, it “possess[es] broad powers and should
25 exercise them to do substantial justice.” (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation*
26 *Dist.* (1935) 3 Cal.2d 489, 574.) “Each case must turn on its own facts, and the power of the court
27 extends to working out a fair and just solution, if one can be worked out, of those facts.” (*Rancho*
28 *Santa Margarita, supra*, 11 Cal. 2d at p. 560–61.)

1 Critical to the formulation of a physical solution here is this Court’s identification and
2 recognition of the extent of water resources available, and how these will be balanced among
3 municipal, agricultural, and environmental use demands. This includes the need to account for
4 any potential future assertion of superior rights, in derogation of the rights now being exercised by
5 current users in the watershed. So, while it may be true the Court need not quantify or determine
6 the precise rights of all the parties, any sustainable physical solution must account for any future
7 claim of rights, particularly pre-1914 or pueblo rights, whose priority could realign legal rights
8 among users, and threaten the long term workability of the solution, and the balances it strikes
9 based on current uses and currently-exercised rights.

10 This principle is illustrated in *California American Water v. City of Seaside, supra*. There,
11 the Court of Appeal considered whether a trial court exceeded its jurisdiction by preventing a
12 water management district from requiring environmental review pursuant to the California
13 Environmental Quality Act (“CEQA”) of permit applications by water producers subsequent to an
14 adjudicated physical solution. (*California Am. Water, supra*, 183 Cal.App.4th at p. 473–74.) The
15 trial court had found that “although the [water district] had authority to issue water distribution
16 permits, it ‘cannot exercise that authority in contravention of the Physical Solution’” (*Id.* at
17 p. 478.) As such, the trial court ruled that “the Physical Solution governs the environmental
18 aspects of Seaside Basin [groundwater] usage, and . . . no [p]arty to this adjudication can require
19 environmental review under [CEQA] with regard to such usage” (*Ibid.*) The Court of Appeal
20 affirmed, holding that the trial court “acted within its jurisdiction and properly exercised its
21 discretion in adhering to its prior rulings to minimize conflict with and frustration of the physical
22 solution. In so doing, it facilitated both the exercise of the parties’ water rights and the beneficial
23 use of the Seaside Basin.” (*Id.* at p. 481.) The Court of Appeal likewise agreed with the trial court
24 that “the District’s power must not be used in a way that conflicts with the provisions of the
25 physical solution and thereby disrupts the carefully established groundwater production rights of
26 the parties to that solution.” (*Id.* at p. 482.)

27 *California American Water* thus shows that courts must remain cognizant of potentially
28 frustrating, future-asserted interests, and how those interests interact with the physical solution.

1 While that case dealt with how CEQA permitting interacts with an already-established physical
2 solution, the principle applies with equal force in other contexts, including the definition of, and if
3 necessary advance allowance for, claims of the parties to water rights superior to those of other
4 rights holders within a basin.

5 **III. The Physical Solution Must Acknowledge Casitas' Obligation to Maintain Ongoing**
6 **Federal Flow Requirements to Preserve the Endangered Steelhead Trout.**

7 As concerns Casitas, neither this litigation, nor any physical solution to resolve it, writes
8 on a clean slate. As a practical matter, any physical solution here must acknowledge Casitas'
9 ongoing obligations to maintain certain federal flow requirements as required by the Biological
10 Opinion issued by the National Marine Fisheries Service ("NMFS") in connection with Casitas'
11 Robles diversion. (*Cf. Hillside Mem'l Park & Mortuary v. Golden State Water Co.*, 205
12 Cal.App.4th 534, 551 ["In exercising its broad equitable powers in seeking a physical solution, the
13 trial court may and should take into account environmental concerns raised by the opposing
14 parties."].) From Casitas' perspective, recognition and maintenance of these flow requirements is
15 critical not only to the protection and preservation of the endangered steelhead trout, but of the
16 justiciability of this case as presently postured, as well. If a physical solution affected Casitas'
17 ability to meet these obligations, federal stakeholders will necessarily become involved and further
18 complicate the litigation. Keeping Casitas free to meet these requirements should be considered a
19 "baseline" requirement of any prospective physical solution. This priority is particularly apt, since
20 through these measures Casitas is already contributing to the biological demands of the steelhead,
21 and has been for nearly twenty years.

22 In 1997, the NMFS listed the west coast steelhead trout as an endangered species under the
23 Endangered Species Act. Due to concerns over the incidental "take" of steelhead in connection
24 with its diversion canal (the "Robles Diversion Dam"), Casitas, with other local water agencies,
25 commissioned a study to identify potential mitigation measures to minimize the impact of its
26 facility on the steelhead population. The study concluded that a "fish passageway" and related
27 measures would restore the steelhead habitat and increase population size. On March 31, 2003,
28 NMFS issued a biological opinion (the "Biological Opinion"), finding that the proposed fish

1 passage facility would not jeopardize the continued existence of the steelhead, although it could
2 result in the incidental take of the fish. (*See*, Biological Opinion at p. 53. A copy is attached
3 hereto as Exhibit “A”. Judicial notice is requested under Evidence Code sections 452(c),(g).)

4 The Biological Opinion already requires Casitas to provide in-stream flows for the benefit
5 of the steelhead in the Ventura River. (*See generally id.* at pp. 6–13.) Although Casitas is
6 authorized under its State Board license to divert up to 107,800 acre feet per year (provided it
7 maintained downstream flows in the Ventura River at 20 cfs or higher), NMFS requires Casitas to
8 maintain downstream flows in the Ventura River at significantly higher volumes during the fish
9 passage augmentation season, from January 1st through June 30th. Specifically, Casitas may only
10 divert water for the first 10 days after every migratory storm event if downstream flows could be
11 maintained at 50 cfs. At no time during the fish passage augmentation season may Casitas divert
12 water if the diversion would reduce downstream flows to under 30 cfs. Only after the fish passage
13 augmentation season may Casitas’ diversions revert back to the State-Board-authorized “20 cfs
14 bypass.”

15 These federally-mandated flow rates must be maintained, and any physical solution must
16 acknowledge these continuing obligations. Not only are the measures protective of the
17 endangered steelhead trout, but if a physical solution hereunder impinges Casitas’ ability to
18 comply with the Biological Opinion, then federal stakeholders, and federal jurisdiction, may have
19 to be implicated.

20 **IV. The Public Trust Doctrine is Not Absolute, but is Instead Limited in Water-Related**
21 **Contexts by the Constitutional Principle of Beneficial Use.**

22 As discussed in the Proposing Parties’ Brief, the Court of Appeal has recognized that
23 “public trust interests, like other interests in water use in California, are not absolute.” (*Santa*
24 *Barbara Channelkeeper, supra*, 19 Cal.App.5th at p. 1186.) Indeed, the California Supreme Court
25 opining on the interaction between state water law principles and the public trust doctrine held that
26 Article X, section 2 of the California Constitution “established the doctrine of reasonable use as an
27 overriding feature of California water law.” (*National Audubon, supra*, 33 Cal.3d at p. 442.)
28 Accordingly, “[a]ll uses of water, including public trust uses, must now conform to the standard of

1 reasonable use.” (*Id.* at p. 443.)

2 In *National Audubon*, the plaintiffs alleged a violation of the public trust doctrine from
3 environmental degradation to Mono Lake as a result of permitted tributary diversion by the City of
4 Los Angeles. (*Id.* at pp. 424–25.) The parties took absolutist positions as to whether the public
5 trust doctrine or prior permitted use controlled. The plaintiffs argued that “the public trust is
6 antecedent to and thus limits all appropriative water rights,” an argument the court considered to
7 “impl[y] that most appropriative water rights in California were acquired and are presently being
8 used unlawfully.” (*Id.* at p. 445.) The City’s position was that “the recipient of a [state water]
9 board license enjoys a vested right in perpetuity to take water without concern for the
10 consequences to the trust.” (*Ibid.*) The Court disagreed with both and charted a third course,
11 stating that “[t]o embrace one system of thought and reject the other would lead to an unbalanced
12 structure, one which would either decry as a breach of trust appropriations essential to the
13 economic development of this state, or deny any duty to protect or even consider the values
14 promoted by the public trust.” (*Ibid.*)

15 Accordingly, the Court reached three conclusions: (1) the state “retains continuing
16 supervisory control over its navigable waters and the lands beneath,” which “prevents any party
17 from acquiring a vested right to appropriate water in a manner harmful to the interests protected by
18 the public trust”; (2) the state “has the power to grant usufructuary licenses that will permit an
19 appropriator to take water from flowing streams . . . even though this taking does not promote, and
20 may unavoidably harm, the trust uses at the source stream”; and (3) “[t]he state has an affirmative
21 duty to take the public trust into account in the planning and allocation of water resources, and to
22 protect public trust uses whenever feasible.” (*Ibid.*) Put another way, the *National Audubon*
23 Court balanced the two positions to reach its primary contention: “Just as the history of this state
24 shows that appropriation may be necessary for efficient use of water despite unavoidable harm to
25 public trust values, it demonstrates that an appropriative water rights system administered without
26 consideration of the public trust may cause unnecessary and unjustified harm to trust interests.”
27 (*Ibid.*)

28 In sum, the Supreme Court has cabined the public trust doctrine to conform to the dictates

1 of overarching constitutional principles of beneficial use. While the doctrine remains an important
2 consideration, it is not the sole or even primary inquiry. Instead, the lodestar is, as *National*
3 *Audubon* recognizes, whether the appropriated water is put to beneficial use. (*See also Fullerton*
4 *v. State Water Res. Control Bd.* (1979) 90 Cal.App.3d 590, 596 [noting that “[t]he constitutional
5 amendment was adopted to . . . apply the doctrine of reasonable use to all water rights enjoyed or
6 asserted in this state and every method of diversion”].)

7 **V. Costs Assigned to Support the Physical Solution Must Account for Propositions 26**
8 **and 218 as Those Laws Relate to Casitas’ Municipal Finance Structure.**

9 Last, Casitas offers a cautionary note that the costs of any physical solution that must be
10 borne by any public user themselves must have identifiable benefits to that entity’s users, and
11 ratepayers, to meet the limitations of Proposition 218 and Proposition 26. It is self-evident that
12 costs assigned to any municipal or special district participant will have to be recovered through
13 rates or charges. To the extent such costs are recouped from direct water service commodity
14 charges, they constitute “property related charges,” and must meet the requirements of California
15 Constitution Article XIII D Sec. 6. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39
16 Cal.4th 205, 214.) Among the showings required of rate setting in this context are that the charges
17 for service must actually be used by, or immediately available to, those subject to the charge, and
18 charges may not be imposed for general government services, available to the public in
19 substantially the same manner as it is to property owners. (Cal. Const., art. XIII D, § 6(b).) To the
20 extent such visited charges are passed through by groundwater sustainability agencies as
21 groundwater charges, they must still not exceed the costs of service, and must be reasonably
22 proportional to the benefit conferred on the property charged. (*City of San Buenaventura v.*
23 *United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214.)

24 To the extent any physical solution here imposes costs to water service providers or
25 groundwater management agencies that reflect general governmental services, or confer broader
26 public benefits not really relatable to specific properties bearing the charges to recoup them (like
27 devoting limited water supplies to public trust uses, for example), it may be institutionalizing a
28 finance problem. Absent discernible, proportionate benefit to such agencies’ property-based

1 payors, the physical solution could be stranding such costs on agencies without the means or legal
2 path to collect and remit them.

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Dated: March 10, 2021

RUTAN & TUCKER, LLP
DOUGLAS J. DENNINGTON
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By: 

David B. Cosgrove
Attorneys for Cross-Defendant
CASITAS MUNICIPAL
WATER DISTRICT,
a California special district

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18575 Jamboree Road, 9th Floor, Irvine, CA 92612. My electronic notification address is mslobodien@rutan.com.

On March 10, 2021, I served on the interested parties in said action the within:

**STATUS CONFERENCE REPORT OF CROSS-DEFENDANT
CASITAS MUNICIPAL WATER DISTRICT**

as stated below:

By transmission via E-Service to File & ServeXpress as listed on File & ServeXpress service list.

Executed on March 10, 2021, at Irvine, California.

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

Mia R. Slobodien

(Type or print name)



(Signature)