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In Pro. Per.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

SANTA BARBARA CHANNELKEEPER,
A California non-profit corporation,
Petitioner/Plaintiff,

v.

STATE WATER RESOURCES CONTROL
BOARD, a California State Agency,
CITY OF SAN BUENAVENTURA, a California
municipal corporation.

Respondent/Defendant

) Case No. 19STCPO1176

) Judge: Honorable William F. Highberger

) **OBJECTIONS TO THE PROPOSED
PHYSICAL SOLUTION AND STIPULATED
JUDGEMENT**

) Date: June 14, 2021

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

CITY OF SAN BUENAVENTURA, a California
municipal corporation, incorrectly named as
CITY OF BUENA VENTURA,

Cross-Complainant

v.

Duncan Abbott, an individual. et al.,
Cross-Defendants

1 **I. PLAYING BOTH SIDES AGAINST THE MIDDLE**

2
3 The Physical Solution, as presented to the court by the CITY OF SAN
4 BUENAVENTURA, in terms of water rights claims for this entire charade is a
5 complicated catastrophe. In addition to providing the background and leadership
6 for this incredibly costly and impactful enterprise, the CITY OF SAN
7 BUENAVENTURA has enlisted many of the smaller water producers in the
8 Ventura River Watershed to partner with them in a fantasy scheme that has
9 convinced the partners that leaning in with the CITY OF SAN BUENAVENTURA
10 would somehow be beneficial to them. This tactic provides the CITY OF SAN
11 BUENAVENTURA with allies for one side of the conflict.

12
13 The CITY OF SAN BUENAVENTURA somehow convinced the consumptive
14 users’ group to allow the insertion of language in the Physical Solution that lets the
15 City ultimately reserve all the major claims found in the Third Amended Cross-
16 Complaint, which benefit only the CITY OF SAN BUENAVENTURA. Then, in
17 the future, one can only presume, the City will ask the court to rule on those claims
18 when the Physical Solution fails to keep the Southern California Steelhead Trout
19 population in “good condition.”

20
21 The Cross-Defendants and roes in opposition to the Physical Solution and
22 Comprehensive Adjudication represent the other side. And right in the middle of
23 both of those sides is the entity that began this fiasco, the CITY OF SAN
24 BUENAVENTURA. The entity that used water from the Ventura River in a
25 manner that could “wink out,” or help to extirpate an endangered species the CITY
26 OF SAN BUENAVENTURA. The CITY OF SAN BUENAVENTURA gets
27 protected by the Proposing Parties from the legal jeopardy placed on the CITY OF
28 SAN BUENAVENTURA from the Santa Barbara Channel Keeper litigation.

1 When the Physical Solution fails there is the possibility of raising the water rights
2 issue from the Third Amended Cross-Complaint to Declaratory and Injunctive
3 Relief to bring home the long-awaited prize of all the water the Ventura River can
4 produce. These facts should not be in dispute because the Physical Solution speaks
5 for itself.

6
7 **II. CONTINUING JURISDICTION FOR THE COURT**

8
9 Code of Civil Procedure § 852 states *“The court shall have continuing jurisdiction*
10 *to modify or amend a final judgement in a comprehensive adjudication in response*
11 *to new information, changed circumstances, **the interests of justice, or to ensure***
12 ***that the criteria of subdivision (a) of Section 850 are met.** If feasible, the judge*
13 *who heard the original comprehensive adjudication shall preside over actions or*
14 *motions to modify or amend the final judgement.”* (Emphasis added)

15
16 Code of Civil Procedure § 850(a)(1) states that the court may enter a judgement if
17 the court finds that the judgement is consistent with Section 2 of Article X of the
18 California Constitution.

19
20 One question needs to be clearly answered. The question before the court is: Why
21 is the reservation of all the water rights claims in the Third Amended Cross-
22 Complaint a part of this Physical Solution plan to rescue the Southern California
23 Steelhead Trout from extinction, or why is it a part of this stipulated judgement?
24 What relevance does this reservation of water rights have to do with keeping fish
25 in “good condition?” The answer to that question is that it has no relevance at all
26 to keeping the fish in “good condition” or to the plan. The plan with the water
27 rights claims reserved, can only be to retain access to all the water from the
28 Ventura River for the CITY OF SAN BUENAVENTURA.

1
2 The court may have at least two options in dealing with this issue: (1) requiring the
3 litigation of the Third Amended Cross-Complaint causes of action related to water
4 rights to take place first, or (2) by utilizing the continuing jurisdiction the court has
5 in its authority to amend the Physical Solution, in the name of equity and justice, to
6 remove the reservation of water rights causes of action from the Physical Solution,
7 which include the first, second, third, fourth, fifth, seventh, eighth and ninth claim
8 for relief. The only legitimate overarching relief in this convoluted endeavor is the
9 relief sought for the endangered species the Southern California Steelhead Trout
10 and other species resident in the habitat of the Ventura River. Judicial relief should
11 not be accounted to or sought for a water starved municipality attempting to find a
12 legal way to bend justice.

13
14 Article X, Section 2 of the California Constitution contains many provisions that
15 restrain and control one of the most contentious and controversial dual regulatory
16 issues in our state: appropriative and riparian rights. The black letter law of the
17 Constitution makes it clear that it requires the use of water to be (1) usufructuary;
18 (2) that it be limited to only beneficial uses; (3) that the water use must be
19 reasonable; (4) that there must not be any unreasonable method of use, and (5) that
20 there shall not be any waste of water. Finally, nothing in this Section shall be
21 construed to deprive any landowner of riparian/overlying water rights to use the
22 water to which they are entitled. Given these facts, it would be impossible to make
23 the Comprehensive Adjudication comply with the Article X, Section 2 of the
24 Constitution and CCP Section 850(a). If the Pueblo, Treaty, Prescriptive and
25 Appropriative claims in the Physical Solution remain intact, the CITY OF SAN
26 BUENAVENTURA would be playing both ends against the middle.

1 **III. WHICH GROUNDWATER IS SUBJECT TO A COMPREHENSIVE**
2 **ADJUDICATION AND WHICH IS NOT?**

3 According to the California State Department of Water Resources groundwater is
4 only found in saturated alluvium confined or unconfined by impervious bedrock.
5 This is the official definition of a groundwater basin in the State of California.
6 Groundwater flowing in a subterranean stream within a known and definite
7 channel is not groundwater according to the state definition of a groundwater
8 basin. The other type of groundwater is known as percolating groundwater. The
9 later type is not subject to State Water Resources Control Board regulations.

10
11 The court will note on page three (3) of the Physical Solution at the bottom of the
12 page there is a footnote that reads as follows: “*Groundwater means water beneath*
13 *the surface of the earth within the zone below the water table in which the soil is*
14 *completely saturated with water, but not including water that flows in known and*
15 *definite channels.*” (emphasis added)

16
17 The definition of groundwater is extremely important in this case. In determining
18 the legal classification of groundwater, the State Water Resources Control Board
19 (SWRCB) has relied on the California Supreme Court decision in *Los Angeles v.*
20 *Pomeroy (Pomeroy) (1899) 124 Cal. 597 5 [57 p. 585]*, which established the
21 distinction between subterranean streams and percolating groundwater. (For more
22 evidence see SWRCB Decisions 119 (1926), 1639 (1999) (citing *Pomeroy*)). In
23 *Pomeroy*, the court noted that proof of the existence of a subterranean stream is
24 shown by evidence of a subterranean stream that the water flows through a known
25 and defined channel. (*Pomeroy, supra.* 124 Cal. 3rd. at 633-634 [57 P. at 598].)

26
27 There are four criteria developed by the SWRCB for identifying subterranean
28 streams flowing through known and definite channels, (1) a subsurface channel

1 must be present, (2) the channel must have relatively impermeable bed and banks,
2 (3) the course of the channel must be known or capable of being determined by
3 reasonable inferences and, (4) groundwater must be flowing in the channel.

4 There are three such subterranean streams flowing in the Ventura River Watershed.
5 The groundwater flowing in those underground streams are not groundwater to be
6 included in this comprehensive adjudication because that groundwater is not in a
7 groundwater basin in saturated alluvium. Their locations are as follows:

8 **San Antonio Creek**

- 9 1. Following the pathway of the Santa Ana Fault, the San Antonio Creek forms
10 a channel bounded by impermeable bed and banks.
- 11 2. San Antonio Creek forms a channel bounded by impermeable bed and
12 banks.
- 13 3. Geologists recognize the existence of these known and definite channels but
14 do not spend time identifying them in reports because they are so obvious. It
15 would be equivalent to identifying the sky as blue on a sunny day.

16 **Lion Canyon Creek**

- 17 1. Following the pathway of Lion Canyon Creek from the Upper Ojai Basin
18 forms a channel bounded by impermeable bed and banks.
- 19 2. Upper Ojai Basin forms a channel bounded by impermeable bed and banks.
- 20 3. Geologists recognize the existence of these known and definite channels but
21 do not spend time identifying them in reports because they are so obvious.

22 **Ventura River**

- 23 1. Following the pathway of the Ventura River out of Matilija Canyon to south
24 of Robles Diversion Facility forms a channel bounded by impermeable bed
25 and banks.
- 26 2. The channel is bounded by impermeable bed and banks.
- 27 3. Geologists recognize the existence of these known and definite channels but
28 do not spend time identifying them in reports because they are so obvious.

1 The groundwater associated with these subterranean streams are not “groundwater”
2 that can be adjudicated from a groundwater basin.

3
4 Should the court approve the motion to approve the Scientific Advisor, the
5 existence of these channels can be quickly corroborated.

6
7 **IV. THE FRAILTY OF THE PHYSICAL SOLUTION – NEGATIVE**
8 **FACTORS IN THE ENVIRONMENT THAT CAN CAUSE FAILURE OF**
9 **THE PHYSICAL SOLUTION**

10
11 The preponderance of qualitative, not quantitative, information resident in the
12 Physical Solution renders it relatively useless as a plan with any reliance on real
13 scientific data. The reliance on only the physical observation of *Oncorhynchus*
14 *mykiss* (*O. mykiss*) (Endangered Southern California Steelhead Trout) in waters
15 within the reaches of the Ventura River as a primary determining factor without a
16 count, without critical observation points, without comparisons, and without life-
17 stage notations little or nothing can be revealed about the species’ condition.
18 Science has its protocols, but observation is only one of them.

19
20 Absent from the Physical Solution are adaptive management actions that take
21 direct action to protect the endangered species. For example, the estuary will
22 become dramatically changed by climate change. Rising ocean levels within the
23 planning horizon of the Physical Solution will transport the benthic and surface life
24 forms within the estuary that are beneficial to *O. mykiss* trout further north on the
25 river. This will change the sandbar that helps form the estuary. When storms
26 breach the sandbar the Steelhead Trout can begin their migration upstream to
27 spawn. Changes in the estuary will take an unknown amount of time to form
28 suitable habitats for all lifeforms to survive.

1
2 Climate change will also bring longer lasting droughts to the watershed. The
3 likelihood for increased wildfires will be present. The resultant run-off of ash and
4 debris can, and will, clog the river's physical benthic surface with a substance
5 similar to cement. This ash laden material can prevent *O. mykiss* females from
6 forming a spawning redd (nest or bed) and propagating the species.

7
8 Also forecast for the future are more intense storm events causing more flooding.
9 This flooding and scouring of the river, from the banks to the thalweg, causes a
10 change in river braiding and river dynamics which is detrimental to the survival of
11 the fish.

12
13 Currently there are signs of disease in the Ventura River Watershed in the native
14 fish population (rainbow trout) brought about by avian predation, specifically by
15 the Great Blue Heron. The malady is called Black Spot Disease and it is
16 transmitted by the herons as they hunt for food.

17
18 The Southern California Steelhead Trout (*O. mykiss*), as an endangered species,
19 presents difficult management possibilities. "Take" (Endangered Species Act
20 nomenclature for killing, touching, harassing, etc. the species) prevents endangered
21 *O. mykiss* from being rescued when stranded in pools most of the time. When trap
22 and truck methods are allowed by the National Marine Fisheries Service for *O.*
23 *mykiss* trapped in pools that are drying out, the rescue teams that I have witnessed
24 in the past were prohibited by the California Department of Fish and Wildlife from
25 removing non-native fish from the stream, such as large-mouth bass, catfish, and
26 carp. These non-native species which prey on steelhead fry present problems for
27 managing the fish.
28

1 There are many difficulties involved in attempting to keep the fish in “Good
2 Condition,” and because of these difficulties the Physical Solution may fail; in fact,
3 it is likely to fail. If the Physical Solution fails it should demonstrate to the court
4 the need to prevent the CITY OF SAN BUENAVENTURA from playing both
5 ends against the middle. It should prove to the court that using the continuing
6 jurisdiction power will prevent the City from playing the “failure” card. That
7 action only produces the access to water rights claims reserved in the Physical
8 Solution. These claims have absolutely no relevance in providing help for the
9 Southern California Steelhead Trout to survive. The reservation of water rights
10 claims only provides the ability to usurp all the water from the Ventura River for
11 the sole benefit of the CITY OF SAN BUENAVENTURA.

12
13 **V. ARTICLE X SECTION 2 CALIFORNIA CONSTITUTION –**
14 **REASONABLE USE DOCTRINE – BENEFICIAL USE DOCTRINE**

15
16 In 1870 the Roman Catholic Bishop, Thaddeus Amat, resident of Monterey and
17 Los Angeles, sold appropriated water rights to the Santa Ana Water Company
18 (who was contracted with the CITY OF SAN BUENAVENTURA as a water
19 purveyor). The amount of water was 2000 miners’ inches, however, only a small
20 amount was ever put to beneficial use and the public trust values were never
21 reviewed or conditioned. The greater majority, or amount, of the appropriated
22 water wasted to the ocean.

23
24 Santa Ana Water Company, filed for the appropriation of 500 miners’ inches in
25 1872 and subsequently filed again for 1500 miners’ inches in 1874. The full
26 amount was never put to beneficial use, the public trust values were never
27 reviewed and protected, and the largest quantity of appropriated water wasted to
28 the ocean. This 4000 miners’ inches appropriation represents more flow than the

1 Ventura River produces on an annual average. The Doctrines of Reasonable Use
2 and Reasonable Method of Use, Public Trust, Prescription upstream and harming
3 all other water users in the watershed should be considered according to 23 CCR
4 780, which sets forth the state's authority to condition water rights. This authority
5 is further strengthened by the California Supreme Court in 1983:

6
7 *"The state is not confined by past decisions and has the power to reconsider*
8 *allocations, even though such decisions were made after due considerations of*
9 *their effect on the public trust. Decisions which failed to weigh and consider public*
10 *trust uses present an even stronger case for reconsideration."* **33 3d 419. National**
11 ***Audubon Society v. Superior Court.***

12
13 The CITY OF SAN BUENAVENTURA acquired the 4000 miners' inches from
14 the Southern California Edison Company (SCE) for \$10.00. SCE had previously
15 purchased the water rights from the Santa Ana Water Company. SCE sold the
16 water rights to the CITY OF SAN BUENAVENTURA in **1923** (nine years after
17 December 19, 1914, which established modern water rights law). Neither the
18 original appropriators or the successor CITY OF SAN BUENAVENTURA has put
19 the full appropriated water amount to beneficial use and further, no construction
20 projects able to put the appropriated water too beneficial use was ever built. The
21 water use by the CITY OF SAN BUENAVENTURA is much greater now than
22 prior to December 19, 1914, when the new water laws were enacted. This larger
23 amount of water use should require the CITY OF SAN BUENAVENTURA to
24 seek a new water right under the existing State Water Code. The *Statements of*
25 *Diversion and Use* that have been filed with the Water Boards clearly show that
26 the full amount of appropriated water has not been put to beneficial use and the
27 remainder is unreasonably allowed to waste to the ocean. This water waste has
28 been the case for 150 years.

1
2 Compliance with Article X, Section 2, according to the black letter law of our
3 Constitution, would be difficult if not impossible to prove.
4

5 **VI. SECTION 7, PHYSICAL SOLUTION – MANAGEMENT**
6 **COMMITTEE**
7

8 The Proposing Parties have designed the Physical Solution as a model of how to
9 fail. The selection of five competing representatives from public and private water
10 agencies is a classic example of creating never-ending conflict and litigation
11 because of the precious resource known as water. And, the method of funding
12 found in Section 7.7.2, *Assessment to Fund Plan Development and*
13 *Implementation*, is sophomoric in its approach.
14

15 Casitas Municipal Water District removed itself from the Consumptive Users
16 Group for good reasons. The Group continued its development of the plan without
17 Casitas. While CMWD was absent from the plan development the Proposing
18 Parties decided to place the burden of funding on Casitas. CMWD's share is nearly
19 60% of the costs associated with funding the Physical Solution. While it is correct
20 to assume that Casitas Municipal Water District (CMWD) has the greatest interest
21 because Casitas has the water and the most to lose if the Physical Solution is
22 adopted as written. This court of equity should utilize its power to amend the
23 Physical Solution, to remedy inequity. And there is good reason for this caution.
24 Any loss of water right, or water development, that could be imposed on other
25 parties in the watershed to provide water for the Physical Solution, would cause
26 those parties to automatically rely on CMWD water in Lake Casitas and Ojai Basin
27 water. However, climate change, extreme weather and this Physical Solution
28 could place the water resource in Lake Casitas in continual jeopardy. This, of

1 course, is an unreasonable use and unreasonable method of use noted dramatically
2 in the California Constitution at Article X, Section 2.

3
4
5 **VII. CONCLUSION**

6
7 Our hope for this court is for equity and justice to be the guiding factors in
8 deliberations and rulings. The Physical Solution explicitly contains most of the
9 elements of a “long con.” It is an undisputed fact that the reservation of water
10 rights claims is in the Physical Solution. If the Physical Solution fails to keep the
11 fish in good condition these water rights will come before the court again. The
12 reservation of water rights claims in the Physical Solution by the CITY OF SAN
13 BUENAVENTURA are diametrically opposed to the success of the Physical
14 Solution. The gift of this long con is to claim all the water in the Ventura River for
15 the CITY OF SAN BUENAVENTURA. This fact should not be in dispute because
16 it is a real possibility.

17
18 The Code of Civil Procedure Section that provides the court the power to amend
19 the Physical Solution in favor of equity and fairness. Justice is the remedy. Please,
20 on your own motion, remove the reservation of claims under the authority of Code
21 of Civil Procedure Section 852 in the Physical Solution which include the first,
22 second, third, fourth, fifth, seventh, eighth, and ninth claim for relief.

23
24 Dated: June 14, 2021

Claude R. Baggerly & Patricia E. Baggerly
Cross-Defendants In Pro. Per.