RESOLUTION NO. R-19-13

ADOPTING MARCH 15, 2019 MEMORANDUM FROM GENERAL COUNSEL CONCERNING SMALL PUMPER CLASS WATER RIGHTS

WHEREAS, the Antelope Valley Watermaster, formed by the Antelope Valley Groundwater Cases Final Judgment ("Judgment"), Santa Clara Case No. 1-05-CV-049053 signed December 23, 2015, is to administer the Judgment; and

WHEREAS, issues have arisen on how the Judgment should be implemented in relation to the Small Pumper Class whose rights, duties and responsibilities are set forth in the Judgment; and

WHEREAS, at the Watermaster's direction, General Counsel for the Watermaster prepared a memorandum dated March 15, 2019 concerning Small Pumper Class water rights that addresses various issues in relation to the Small Pumper Class and that March 15, 2019 memorandum has been reviewed and commented upon by the Advisory Committee at its March 21, 2019 meeting and public comment on that March 15, 2019 memorandum has been taken and considered at the March 27, 2019 meeting of the Watermaster Board and again at the April 24, 2019 meeting of the Watermaster Board; and

WHEREAS, the Watermaster wishes to adopt the March 15, 2019 memorandum of its General Counsel and to direct that it be incorporated into the final set of Rules and Regulations that are being prepared for adoption by the Watermaster Board and approval by the Court.

NOW, THEREFORE, BE IT RESOLVED, that the Wastermaster Board unanimously adopts the March 15, 2019 Memorandum of its General Counsel concerning Small Pumper Class water rights and directs that the memorandum be incorporated into the final set of Rules and Regulations being prepared for Board adoption and approval by the Court.

I certify that this is a true copy of Resolution No. R-19-13 as passed by the Board of Directors of the Antelope Valley Watermaster at its meeting held May 22, 2019, in Palmdale, California.

Date: MAY 22, 2019

Robert Parris, Chairman

ATTEST: Patricia Rose

Patricia Rose – Secretary

PRICE, POSTEL & PARMA LLP

MEMORANDUM

TO:	Antelope Valley Watermaster Board	DATE:	March 15, 2019
FROM:	Craig A. Parton General Counsel to the Watermaster	FILE NO.:	23641-1
Cc:	Watermaster Engineer		
SUBJECT:	Small Pumper Class Water Rights – "Households" and/or "Parcels"		

I. Introduction

The Watermaster has recently encountered Small Pumper Class Members who own multiple parcels, only some of which are improved with a well and/or a house. These Parties take the position that each of their parcels should be allowed to pump up to 3 acre-feet per year, per Paragraphs 5.1.3 of the Judgment. Likewise, Small Pumper Class Members owning a parcel improved with multiple wells or multiple houses, or even multiple improved parcels, may take the position that they should be allowed to pump up to 3 acre-feet per house and/or per well. Whereas in the past Small Pumper Class Members have demonstrated that each parcel they own is improved with either a well or a house, this presents a new scenario that the Watermaster must address on a consistent basis moving forward. The Small Pumper Class Members with unimproved parcels are generally outliers within the Small Pumper Class, as they tend to be agricultural operators and not representative of the class majority of residential users.

II. Question Presented

What does the Judgment mean when it says that each Small Pumper Class "household" or "parcel" may produce up to 3 acre-feet per year? In particular, what is the result when a Small Pumper Class Member owns multiple parcels, but not all of the parcels are improved with a well and/or a house? May each parcel owned by the Small Pumper Class Member pump up to 3 acre-feet per year, or only those parcels improved with a well and/or a house as of the date of the Judgment? What if a single parcel is improved with multiple wells and/or houses, or a Small Pumper Class Member owns multiple improved parcels?

III. Brief Answer

The plain language of the Judgment is ambiguous, although the most reasonable interpretation is that Small Pumper Class Members' rights to produce groundwater only attach to parcels improved with a well and/or a house. Completely unimproved parcels, even if

contiguous to a Small Pumper Class parcel improved with a well or a house, do not also have water rights.

IV. Legal Analysis

The plain language of the Judgment discussing Small Pumper Class water rights provides very little clarity, as different sections suggest different conclusions. Most sections of the Judgment reference only "household(s)," suggesting that water rights attach only to homes using groundwater as of the date of the Judgment. Some sections reference only "parcel(s)" on which water is pumped, indicating that the parcel must have been improved with an active well as of the date of the Judgment. Other sections refer to "household(s)" or "parcel(s)." The below analysis provides a recommended interpretation of each section of the Judgment that references Small Pumper Class water rights.[1]

A. DEFINITIONS (3.5)

The Small Pumper Class is defined as those persons and entities that historically pumped less than 25 acre-feet per year "on their property." (3.5.44.) "[W]here two or more Small Pumper Class Members reside in the same household, they shall be treated as a single Small Pumper Class Member for purposes of determining water rights." (3.5.45.)

This language demonstrates that Small Pumper Class water rights attach to the household (or the "property") rather than the individual Small Pumper Class Members, but does not clarify when and how water rights attach to a parcel owned by a Small Pumper Class Member. This language does suggest that Small Pumper Class water rights are overlying water rights (*i.e.*, historical pumping "on their property"), which are defined as "the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1240.) Viewed as an overlying right, a Small Pumper Class water right only attaches to a parcel if the water is actually pumped on that particular parcel. Other parcels owned by a Small Pumper Class Member, but not improved with a well or a household, would unlikely hold an exercised overlying groundwater right under California law. This may also explain the use of the term "household," which was likely intended to ensure that each Small Pumper Class house would also receive water rights despite no well existing on the parcel, or when a single well on a parcel serves multiple homes thereon.

B. SMALL PUMPER CLASS PRODUCTION RIGHTS (5.1.3)

"Allocation of water to the Small Pumper Class is set at an average Small Pumper Class Member amount of 1.2 acre-feet per existing *household or parcel* based upon the 3172 known Small Pumper Class Member parcels at the time of this Judgment." (5.1.3 (emphasis added).)

[1] All citations are to Paragraphs of the Judgment unless otherwise indicated.

"Any Small Pumper Class Member may Produce up to and including 3 acre-feet per Year per existing household for reasonable and beneficial use on their *overlying* land." (*Ibid* (emphasis added).) This language again supports the position that Small Pumper Class water rights are overlying water rights, and therefore attach only to a parcel improved with a house or a well that was using or pumping groundwater as of the date of the Judgment (*City of Barstow*, 23 Cal. 4th at 1240), not to unimproved neighboring parcels to which water is transported but on which no water is pumped. Unfortunately, the fact that the average Small Pumper Class amount is based on existing households or parcels, whereas only Small Pumper Class households may produce up to 3 acre-feet per year, adds to the ambiguity on the face of the Judgment.

"A Small Pumper Class Member who is lawfully, by permit, operating a shared well with an adjoining Small Pumper Class Member, shall have all of the same rights and obligations under this Judgment without regard to the location of the shared well, and such shared use is not considered a prohibited transfer of a pumping right under Paragraph 5.1.3.3." (5.1.3.) This language suggests that a Small Pumper Class Member who owns a parcel with a house but not a well may hold a Small Pumper Class water right based solely on water pumped from an adjoining Small Pumper Class parcel owned by a third party

"Should the Watermaster develop a reasonable belief that a Small Pumper Class Member household is using in excess of 3 acre-feet per Year, the Watermaster may cause to be installed a meter on such Small Pumper Class Member's well at the Small Pumper Class Member's expense." (5.1.3.2 (emphasis added).) This language, combined with the language in Paragraph 5.1.3, suggests that no single Small Pumper Class household may pump in excess of 3 acre-feet per year, period. If each parcel owned by a Small Pumper Class Member were allowed to pump up to 3 acre-feet per year, and a member owned three parcels but only one with a well, then the Small Pumper Class Member household could technically pump up to 9 acre-feet per year without being subject to Replacement Water Assessment. This interpretation does not align with the language in the Judgment limiting each household to up to 3 acre-feet per year. The omission of the word "parcel" from this language also indicates that the Judgment was intended to limit each Small Pumper Class Member's water rights, rather than broaden the water rights by allowing each parcel to pump up to 3 acre-feet per year regardless of the existence of a well or a house.

"The pumping rights of Small Pumper Class Members are not transferable separately from the *parcel of property* on which the water is pumped." (5.1.3.3 (emphasis added).) This implies that it would be impossible to transfer a water right from a parcel that does not pump water. Thus, the logical interpretation of this language is that parcels not improved with a well were not intended to receive water rights, as the language focuses specifically on the parcel of property "on which the water is pumped." Because of the provisions of Paragraph 5.1.3 discussed above, this interpretation should not impact parcels that are improved with a house (or houses) but pump water from a well on another parcel.

Furthermore, "a Small Pumper Class Member may move their water right to another parcel owned by that Small Pumper Class Member with approval of the Court." (5.1.3.3.) This again indicates that the Small Pumper Class Member's ability to pump up to 3 acre-feet per year is only associated with the parcel from which water is pumped, not other parcels owned by the Small Pumper Class Member that are not improved with a well (or a house). In other words, if Small Pumper Class Members' contiguous parcels were each given water rights, why would a Small Pumper Class Member need to utilize this water rights transfer procedure?

"The pumping rights of Small Pumper Class Members may not be aggregated for use by a purchaser of more than one Small Pumper Class Member's property." (5.1.3.3.) This clearly indicates that Small Pumper Class water rights attach to the land rather than the person or entity, but does not clarify the household/parcel distinction. In other words, a Small Pumper Class parcel cannot transfer its right to pump up to 3 acre-feet per year to another, separately owned, parcel so as to increase the water rights on the second separately owned parcel.

"[A]ny additional household constructed on a Small Pumper Class Member parcel after the Class Closure Date is not entitled to a Production Right as set forth in Paragraphs 5.1.3 and 5.1.3.1." (5.1.3.5.) This language implies that Small Pumper Class parcels may have multiple households, with each household allowed to pump up to 3 acre-feet per year as long as the houses existed as of the date of the Judgment. Likewise, Unknown Small Pumper Class Members are defined as, *inter alia*, "any unidentified households existing on a Small Pumper Class Member parcel prior to the Class Closure Date" (5.1.3.6.), which also implies that a Small Pumper Class parcel may contain more than one household, each allowed to pump up to 3 acre-feet per year.

C. MISCELLANEOUS PROVISIONS (20.4)

"A Party simultaneously may be a member of the Small Pumper Class and hold an Overlying Production Right by virtue of owning land other than the parcel(s) meeting the Small Pumper Class definition." (20.4.) This language implies the obvious conclusion that a Small Pumper Class Member may own multiple Small Pumper Class Parcels, but again does nothing to clarify whether each Small Pumper Class parcel must be improved with a well and/or a house in order to receive a water right.

V. Discussion

The majority of the sections of the Judgment support allowing only households or parcels with wells and/or houses to pump up to 3 acre-feet per year. However there is little clarity regarding these water rights for Small Pumper Class parcels with multiple houses and/or wells, or Small Pumper Class Members who own multiple improved parcels.

First: the most reasonable interpretation of the Judgment is that unimproved parcels do not have water rights. Given the Small Pumper Class's allocation of the Native Safe Yield, it does not appear that Small Pumper Class Members were intended to receive an additional water right for unimproved parcels they may also own. An important question arises, for example, in the case of Long Valley Road LP, which owns five parcels, one improved with two wells, and four unimproved parcels using water pumped from the wells on the improved parcel. May Long Valley pump up to 3 acre-feet per year for the single improved parcel (*i.e.*, up to 3 acre-feet per year total), or may each of its wells pump up to 3 acre-feet per year (for a total of up to 6 acre-feet per year)? Depending upon the interpretation of the Judgment, Long Valley could pump up to anywhere from 3 to 6 acre-feet per year, but does not have water rights associated with any of the four unimproved parcels.[2]

Second: although Long Valley is an outlier within the Judgment, its raises the question as to how much a Small Pumper Class Member may pump per year without incurring a Replacement Water Assessment if it owns a parcel improved with multiple homes and/or wells, or if it owns multiple parcels each improved with a well and/or a home. The hypotheticals below should help address these scenarios moving forward.

Third: assuming unimproved Small Pumper Class parcels do not have water rights, one likely result is that such parcels may belong to the Non-Pumper Willis Class. In this situation, the Small Pumper Class Members who own such "Willis Class" parcels would be required to submit an application for New Production for each parcel, which should be addressed on a case-by-case basis as the issue arises.

VI. Hypotheticals

A. Single Parcel

i. Well Only

Entity, a Small Pumper Class Member, owns Parcel X, which is improved with a well but not a house, and which otherwise satisfies the Small Pumper Class historical production requirement.

It is clear that Entity may pump up to 3 acre-feet per year from Parcel X without incurring a Replacement Water Assessment. If Entity sells Parcel X to Individual, the right to pump up to 3 acre-feet per year clearly remains with Parcel X and is transferred to Individual as the subsequent owner. Finally, if Entity also owns Parcel Y, which is not contiguous to Parcel X

[2] For Parties like Long Valley, this does not mean that they will limit their groundwater production to less than 3 acre-feet per year, but rather impacts the amount of Replacement Water Assessment the Party will pay, because the Party will likely continue to pump in excess of the threshold for incurring a Replacement Water Assessment.

and is unimproved with a well or a house, Entity may clearly transfer the right to pump up to 3 acre-feet per year on Parcel X to Parcel Y with approval of the Court.

If, however, Parcel Y is improved with a well and otherwise satisfies the Small Pumper Class historical production requirement, may Entity transfer its right to pump up to 3 acre-feet per year on Parcel Y to Parcel X, in which case it will have the right to pump up to 6 acre-feet per year from the well on Parcel X without incurring a Replacement Water Assessment? The Judgment only prohibits the aggregation of Small Pumper Class water rights "for use by a purchaser of more than one Small Pumper Class Member's property."

ii. Well & House

Same facts as hypothetical VI.A.i, except Parcel X is improved with both a well and a house. May Entity pump up to 3 acre-feet per year for to the house *and* up to 3 acre-feet per year for the well, or just up to 3 acre-feet per year for Parcel X total? The Judgment is unclear, but given the language limiting each household to 3 acre-feet per year before incurring a Replacement Water Assessment, the likely result is that Parcel X may pump up to 3 acre-feet per year total.

iii. Multiple Houses

Same facts as hypothetical VI.A.i, except Parcel X is improved with one well and two separate houses. Is each house considered a "household" and therefore allowed to pump up to 3 acre-feet per year each, or is Parcel X just allowed to pump up to 3 acre-feet per year total? The term "household" was possibly included in the Judgment to account for circumstances like this, such that multiple households on a single parcel as of the date of the Judgment would each be allowed to pump up to 3 acre-feet per year. The Judgment is unclear on this issue, and the Watermaster should make a decision regarding the water rights of multiple houses on the same parcel that existed as of the date of the Judgment. The second definition of Unknown Small Pumper Class Members in paragraph 5.1.3.6 supports allowing each such household to pump up to 3 acre-feet per year.

iv. House Only

Same facts as hypothetical VI.A.i, except Parcel X is improved with a house but no well, and the house receives its water from a well on a neighboring property, also owned by a Small Pumper Class Member. Assuming there is a shared well agreement, Paragraph 5.1.3 clearly allows the house on Parcel X to pump up to 3 acre-feet per year, and the well on the adjoining parcel may pump up to 3 acre-feet per year for the benefit of Parcel X. Even if there is no shared well agreement, and the neighboring parcel is not owned by a Small Pumper Class Member, Parcel X is still likely allowed to pump up to 3 acre-feet per year for its household.

v. Two Wells

Same facts as hypothetical VI.A.i, except Parcel X is improved with two wells. Entity may claim it is entitled to pump up to 6 acre-feet per year. Given that the Judgment very clearly allows each parcel (or household) to pump up to 3 acre-feet per year, the likely result is that Parcel X may only pump up to 3 acre-feet per year for both wells combined.

B. Multiple Contiguous Parcels

i. Both Improved

Entity, a Small Pumper Class Member, owns Parcel X, which is improved with a well but not a house, and also owns contiguous Parcel Y, which is improved with a house but not a well. Assume both Parcel X and Parcel Y otherwise satisfy the Small Pumper Class historical production requirement.

Entity may claim that Parcel X is allowed to pump up to 3 acre-feet per year, and Parcel Y is also allowed to pump up to 3 acre-feet per year. Given that the Small Pumper Class was intended to apply primarily to small residential users, a reasonable interpretation of the Judgment would allow Entity to pump up to 3 acre-feet per year total, despite the fact that both parcels it owns are "improved." Situations like this may need to be addressed on a case-by-case basis.

ii. One Improved & One (or More) Unimproved

Same facts as hypothetical VI.B.i, except Parcel X is improved with both a well and a house, and Parcel Y is unimproved (no well and no house) but uses water pumped from Parcel X for agricultural or other purposes on Parcel Y. Parcel X satisfies the Small Pumper Class historical production requirement, and Entity alleges that Parcel Y has always used water pumped from the well on Parcel X. May Parcel Y pump up to 3 acre-feet per year without incurring a Replacement Water Assessment? May Entity pump up to 6 acre-feet per year from Parcel X, some of which will benefit Parcel Y, just because the historical production on Parcel X always benefitted Parcel Y, and despite the fact that no water has ever been pumped from Parcel Y?

As set forth above, the reasonable interpretation of the Judgment and California law related to overlying groundwater rights indicate that Parcel Y may not pump any water without incurring a Replacement Water Assessment because it has not demonstrated an exercised right to pump groundwater on the overlying parcel. If this is the result, Entity could seek approval of the Court to transfer its right to pump up to 3 acre-feet per year from Parcel X to Parcel Y.

VII. Conclusion

The likely result is that unimproved parcels do not have Small Pumper Class water rights, period. An internal discussion of the policy impacts related specifically to the above hypotheticals will be an important first step in determining how the Watermaster should treat applications for Small Pumper Class Members who own multiple parcels improved with a well and/or a house, or a parcel improved with multiple houses and/or wells. Some scenarios will need to be addressed on a case-by-case basis.