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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

**ANTELOPE VALLEY GROUNDWATER CASES**

Included Actions:
Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201;

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. City of Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

**PUBLIC WATER SUPPLIERS' RESPONSE TO OPPOSITION TO MOTION FOR CLASS CERTIFICATION**

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STATE STATUTES

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The Public Water Suppliers[1] submit this reply to various responses by certain parties to the motion for class certification. Certain responses were considered to be merely repetitious of other parties' responses or otherwise not need a reply.

## II. PUTATIVE PLAINTIFFS' CLASS MEMBER WILLIS

Since the filing of the Public Water Suppliers' Motion for Class Certification, a class action lawsuit was filed by Rebecca Lee Willis on behalf of herself "and all others similarly situated" (hereinafter, the "Willis Class Action") on January 11, 2007 in the Los Angeles County Superior Court. (Los Angeles County Superior Court Case No. BC364553.) On or about February 21, 2007, Willis filed a Petition for Coordination of Add-On Case to have this court coordinate the Willis Class Action with these coordinated adjudication proceedings.

At the direction of the court, legal counsel for the Public Water Suppliers conferred with legal counsel for putative class member Willis, and there is agreement on the following class definition and representation issues:

1. The Public Water Suppliers, who filed the motion for class certification of a defendant class of property owners, are willing to allow putative plaintiff class representative Willis and her current legal counsel to represent a plaintiffs' class of overlying property owners within the adjudication area subject to agreement on the scope of the class, i.e., class definition.

2. The plaintiffs' class will exclude (i) all persons and entities who are current parties except those who elect to "opt into" the class; (ii) all persons who own property that receives

[1] The Public Water Suppliers consists of California Water Service Company, City of Lancaster, City of Palmdale, Palmdale Water District, Rosamond Community Services District, Los Angeles County Water Works District No. 40, Quartz Hill Water District, Littlerock Creek and Palm Ranch Irrigation District.

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water service from a public entity, public utility, or mutual water company and that property does not have a well; and (iii) all public entities not yet parties to these coordinated proceedings.

The Public Water Suppliers further maintain that the plaintiffs' property owner class should exclude all persons who (1) own property within the service area of a public water supplier or mutual water company; and (2) who do not pump groundwater. These parties should be excluded because there are property owners within the retail water service areas that are applying and will apply for retail water service. With this further class definition refinement, the Public Water Suppliers respectfully request that the Court certify a plaintiffs' class of overlying property owners in lieu of a defendant class.

## III. ANTELOPE VALLEY GROUND WATER AGREEMENT ASSOCIATION

Like most responding parties, the Antelope Valley Ground Water Agreement Association agrees there could be a property owner class. They maintain, however, there should be two classes or subclasses: (1) overlying property owners who pump groundwater; and (2) overlying property owners who do not pump groundwater. To create two classes at this time would unnecessarily complicate and delay these proceedings; and there is no present need for the Court to create multiple sub-classes. Instead, the court should certify a single, plaintiffs' property-owner class with the right to amend or modify the class as needed.

California Rules of Court, Rule 1541 together with Rules 1853 through 1858, inclusive, give broad powers to this Court to manage a class action in these coordinated proceedings. The Court has the power to modify the class representation through party or issue severance, bifurcation, intervention by dissident class members, and the creation of sub-classes for particular issues. (See *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 479 [The California Supreme Court noted that differences between class members can be accommodated by intervention or sub-classing].) Thus, the Court can later amend or modify the class certification order as the Court manages the class action.

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Additionally, California public policy favoring class actions is reflected in numerous California Supreme Court decisions recognizing the court's broad powers to manage class actions to accommodate individual class member claims as well as differing positions amongst class members:

> "We long ago recognized 'that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.' Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' Individual issues do not render class certification inappropriate so long as such issues may effectively be managed."
>
> . . .
>
> "It may be, of course, that the trial court will determine in subsequent proceedings that some of the matters bearing on the right to recovery require separate proof by each class member. If this should occur, the applicable rule . . . is that the maintenance of the suit as a class action is not precluded so long as the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action.'"
>
> . . .
>
> "Courts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions. *For decades 'this court has urged trial courts to be procedurally innovative in managing class actions, and 'the trial court has an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class."*
>
> . . .

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> "If the factual underlying class members' claims differ, or if class members disagree as to the proper theory of liability, the trial judge, through use of techniques like sub-classing, or [other judicial] intervention, may incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation.'"
>
> (*Sav-On, supra,* 34 Cal.4th at pp. 334-340 [citations omitted and emphasis added].)

All members of the class have predominant common question of law and fact regardless of whether they have pumped water. Common questions include the determination of the safe yield, historical groundwater levels, historical pumping by appropriators and overlying property owners, and a physical solution to the overdraft conditions. To the extent there arises a need to make other determinations including competing claims between overlying landowners, the Court can use sub-classing, severance, and other case management techniques.

## IV. UNITED STATES

The United States concedes that class certification may be appropriate but raises three concerns: (1) the proposed class improperly includes public landowners; (2) the proposed class allows members to opt out of the class; and (3) the proposed class improperly excludes a majority of private landowners within the adjudication area. Each of the three arguments is addressed below.

### 1. The Proposed Class Now Excludes Public Entities.

As explained above, the common predominant questions for all landowners apply equally whether they be private or public. Additionally, public land owners could be subject to the class but may be allowed to opt out subject to continuing court jurisdiction.

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2. Class Members Have The Right to "Opt Out" of The Class and The Court Will Have Jurisdiction Over Former Class Members.

The Court can allow individual class members to decide whether to opt out of the class; and class members will receive notice that they may decide whether to remain members of the class and become bound by a settlement or judgment, whether to intervene in the action through counsel of their own choosing, or otherwise pursue their own individual remedy. (See *Home Sav. & Loan Ass'n v. Superior Court* (1974) 42 Cal.App.3d 1006, 1010.) Although a class member may opt out of the class, the Court can and should require the former class member to continue to be subject to the court's jurisdiction.

3. The McCarran Amendment Does Not Require The Inclusion of *De Minimis* Users Within The Service Area of a Public Water Supplier.

The United States argues that it is not properly joined under the McCarran Amendment unless each and every property owner sues or is sued in the adjudication. The United States has made and lost the same and similar arguments in both state and Federal Courts. (See *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (Ariz. 1993) 175 Ariz. 382, 394 ["A properly crafted *de minimis* exclusion will not cause piecemeal adjudication of water rights or in any other way run afoul of the McCarran Amendment."])

In the case of *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (Ariz. 1993) 175 Ariz. 382, 394, the Arizona Supreme Court stated that the McCarran Amendment does not require that each and every claimant be included but that the McCarran Amendment allows the state court to exclude well owners who pump minimal amounts of groundwater:

> The United States is a party to this case under the McCarran Amendment, which gives consent to suits against the United States

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in state court adjudications that embrace "rights to the use of water in a river system or other source." 42 U.S.C. § 666(a). The United States argues that unless this adjudication includes all water hydrologically connected to the Gila River system, it will not be comprehensive enough to satisfy the McCarran Amendment requirement that it embrace all rights to the use of water in the river system or other source. At oral argument, the United States also asserted that the trial court in this case cannot exclude wells having only a *de minimis* effect on the river system. We disagree.

. . .

We believe that the trial court may adopt a rationally based exclusion for wells having a *de minimis* effect on the river system. Such a *de minimis* exclusion effectively allocated to those well owners whatever amount of water is determined to be *de minimis*. It is, in effect, a summary adjudication of their rights. A properly crafted *de minimis* exclusion will not cause piecemeal adjudication of water rights or in any other way run afoul of the McCarran Amendment. Rather, it could simplify and accelerate the adjudication by reducing the work involved in preparing the hydrographic survey reports and by reducing the number of contested cases before the special master. Presumably, Congress expected that water rights adjudications would eventually end. It is sensible to interpret the McCarran Amendment as permitting the trial court to adopt reasonable simplifying assumptions to allow us to finish these proceedings within the lifetime of some of those presently working on the case.

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On several other occasions, the United States has made and lost similar arguments in the Federal Courts. For example, in *United States v. District Court for Eagle County* (1971) 401 U.S. 520, the Supreme Court rejected the United States' arguments that the McCarran Amendment required an adjudication of each and every claim to the Colorado River: "No suit by a State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States." (*Id.* at 523.)

Similarly, in *United States v. Oregon* (1994) 44 F.3d 758, the United States contended that because the Klamath Basin adjudication included only the Klamath River and not groundwater that was hydrologically connected to the Klamath River, the adjudication was not "comprehensive" for purposes of the McCarran Amendment. The Ninth Circuit rejected this argument, stating that the McCarran Amendment was intended to avoid "excessively" piecemeal litigation:

> [C]ontrary to the United States' assertions, the comprehensiveness requirement does not mandate that every hydrologically-related water source be included in the adjudication. While the adjudication must avoid *excessively* piecemeal litigation of water rights, it need not determine the rights of users of all hydrologically-related water sources. (*Id.*, [emphasis added])

Thus, courts have unilaterally and unequivocally held that a comprehensive adjudication under the McCarran Amendment need not include all water claimants but may exclude *de minimis* users.

There is no dispute that almost the entire Antelope Valley population resides within the incorporated cities of Lancaster and Palmdale, and to a lesser extent in unincorporated communities in Los Angeles and Kern Counties. Within these communities, residents get potable water from public entities and to a lesser extent from mutual water companies. The United

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States, however, would have the court include these retail water customer residents and businesses even though they do not pump groundwater. In other words, the United States would have the Public Water Suppliers sue their own constituents and customers all of whom depend upon the Public Water Suppliers for a reliable drinking water supply. Statutory interpretation rules do no lead to absurd results and thus, no case has interpreted the McCarrran Amendment to require municipal water suppliers to sue their own retail customers.

Moreover, the United States' arguments ignores the undisputed facts that urban residents do not have private wells because the well cost greatly exceeds the cost of receiving water from public water suppliers – which is the reason why public water suppliers throughout California provide retail water service to tens of millions of California residents and businesses. Even if a resident would install a well for domestic potable water needs, the amount by any single household is *de minimis* in the context of an adjudication area of approximately 1,000 square miles.

4. California Law Recognizes a *De Minimis* Exclusion in Surface Stream Adjudications.

Under the McCarran Amendment, the United States is subject to state court surface stream adjudications as well as groundwater adjudications. (*United States v. Oregon* (1994) 44 F.3d 758, 768.) In the context of a stream adjudication, the California Water Code permits the exclusion of *de minimis* producers who pump less than 10 acre-feet annually. (Wat. Code § 2503; § 2102.) Further, courts have held that *de minimis* users need not be named, and that their absence does not render the adjudication incomprehensive. (See *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, supra,* 175 Ariz. At 394 ["A properly crafted *de minimis* exclusion will not cause piecemeal adjudication of water rights or in any other way run afoul of the McCarran Amendment."].) Thus, to the extent *de minimis* producers are excluded from this adjudication, their exclusion does not affect the comprehensiveness of the adjudication

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for McCarran Amendment purposes.

This adjudication seeks a comprehensive, *inter se* determination of all water rights in the Basin. This adjudication will involve thousands of parties and could potentially be the largest groundwater adjudication ever conducted in the state of California. Unlike the cases relied upon by the United States, such as *Dugan et al v. Rank* (1963) 372 U.S. 609, 835 S.Ct. 999, 10 L.Ed.2d 15, *People of the State of California v. United States of America* (9th Cir. 1956) 235 F2d 647, 663, *Metropolitan Water District of Southern California v. The United States of America* (9th Cir. 1987) 830 F.2d 139 and *Turner v. Kings River Conservation Dist.* (9th Cir. 1966) 360 F.2d 184, 197, this case does not involve only a few known claimants seeking to establish water rights as against the United States. This case bears no resemblance to the "piecemeal, private water rights litigation" that is beyond the scope of the McCarran Amendment and there is no risk of "excessive piecemeal" legal proceedings.

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5. Concerns Over Comprehensiveness Can Be Addressed As Necessary At A Future Time And Are Not Relevant To The Court's Jurisdiction Over The United States

In *United States v. District Court for Eagle County*, the Supreme Court rejected an argument by the United States that the adjudication was not comprehensive because it was a "supplemental water adjudication" to determine the rights of those claiming to have acquired water rights since the last adjudication of the river system, and water rights determined in previous adjudications were not subject to re-determination. (*Eagle County*, *supra*, 401 U.S. at 525, 527, 529.) The Court noted that the exclusion of these parties did not relate to the "comprehensiveness standard" of the McCarran Amendment but was instead an issue that went to the merits of the adjudication:

> The absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States. All

> such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the [state] court. (*Id.* at 527.)

Similarly, in *United States v. Oregon*, the United States argued that the Klamath adjudication was not "comprehensive" for purposes of the McCarran Amendment because certain parties, such as those with water rights determined through a separate permit process, were not before the court as part of the adjudication. (*United States v. Oregon*, *supra*, 44 F.3d 758, 767-68.) Citing *Eagle County*, the court rejected the United States' argument. (*Id.* at 768.) The court likewise rejected the United States' argument that the adjudication was not "comprehensive" because the rights of claimants to groundwater were excluded. (*Id.*) Specifically, the United States argued that the use of groundwater in the Klamath Basin could have an impact on the availability of water to fulfill the United States' federal reserve water rights. (*Id.* at 770.) While the court acknowledged that there were "legitimate concerns about the relationship between federal reserve water rights in a river and the distribution of water rights in hydrologically related groundwater," the court found that "these concerns go to the merits of the adjudications." (*Id.*) The court ultimately concluded:

> [T]he Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United State to participate in when it passed the McCarran Amendment. Accordingly, federal sovereign immunity imposes no bar to the United States' participation in that process. (*Id.*)

## V. OTHERS

Only a few have opposed class certification. Their arguments were predictably erroneous and misleading but they can be generalized as a claim that class actions are inappropriate in water rights adjudications. Certainly, the United States has not taken that position as class actions have been used to adjudicate California water rights in adjudications under the McCarran Amendment.

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(See *Rank v. United States* (1956, DC Cal) 142 F. Supp. 1 affd in part and rev'd in part on other grounds (1961, CA9 Cal) 293 F.2d 340, mod on other grounds (1962, CA9 Cal) 307 F.2d 96, aff'd (1963) 372 US 627, 10 L.Ed 2d 28, 83 S. Ct. 996 (overruled as stated in *California ex rel. State Water Resources Bd. v. FERC* (1989 CA 9) 877 F.2d 743 [Suit was one for "adjudication of rights to use of water" within meaning of McCarran Amendment where rights of plaintiffs in class suit on behalf of riparian landowners downstream from government dam to common source of water depended upon judicial determination that plaintiffs had water rights superior to rights asserted by United States.])

The class certification opponents ignore fundamental legal principles governing California class actions in that where there are parties too numerous to individually come before the court and there is an ascertainable class, the ultimate issue becomes whether there are common predominant issues for the class members. (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 989.) As shown not only in the Public Water Suppliers' motion but also in the response briefs by most parties, class certification excluding *de minimis* users is necessary in order to "allow us to finish these proceedings within the lifetime of some of those presently working on the case." (*In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (Ariz. 1993) 175 Ariz. 382, 394.)

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## VI. CONCLUSION

For the foregoing reasons, the Public Water Suppliers respectfully request that the Court certify a plaintiff's class of overlying property owners as requested herein.

Dated: March 9, 2007

BEST BEST & KRIEGER LLP

By: _____
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## PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 5 Park Plaza, Suite 1500, Irvine, California 92614. On March 9, 2007, I served the within document(s):

**PUBLIC WATER SUPPLIERS' RESPONSE TO OPPOSITION TO MOTION FOR CLASS CERTIFICATION**

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

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. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on March 9, 2007, at Irvine, California.

Kerry V. Keefe

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