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16 Stathatos, Savas Stathatos as Trustee for the Stathatos Family Trust, Dennis L. & Marjorie E.
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18 Paul S. & Sharon R. Kindig, Jose Maritorena Living Trust, Richard H. Miner, Jeffrey L. & Nancee J.
19 Siebert, Barry S. Munz, Terry A. Munz and Kathleen M. Munz, Beverly Tobias, Leo L. Simi, White
20 Fence Farms Mutual Water Co. No. 3., William R. Barnes & Eldora M. Barnes Family Trust of
21 1989, Healy Enterprises, Inc., John and Adrienne Reca, Sahara Nursery, Sal and Connie L. Cardile,
22 Gene T. Bahlman, **collectively known as the Antelope Valley Ground Water Agreement**
23 **Association ("AGWA")**

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF SANTA CLARA**

17 **ANTELOPE VALLEY**
18 **GROUNDWATER CASES**

19 Included Actions:

20 Los Angeles County Waterworks District No.)
21 40 v. Diamond Farming Co. Superior Court of)
22 California County of Los Angeles, Case No. BC)
23 325 201 Los Angeles County Waterworks)
24 District No. 40 v. Diamond Farming Co.)
25 Superior Court of California, County of Kern,)
26 Case No. S-1500-CV-254-348Wm. Bolthouse)
27 Farms, Inc. v. City of Lancaster Diamond)
28 Farming Co. v. City of Lancaster Diamond)
Farming Co. v. Palmdale Water Dist. Superior)
Court of California, County of Riverside,)
consolidated actions, Case No. RIC 353 840,)
RIC 344 436, RIC 344 668)

Judicial Council Coordination Proceeding
No. 4408

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

ANTELOPE VALLEY GROUNDWATER
AGREEMENT ASSOCIATION'S
RESPONSE TO MOTIONS TO AMEND
CLASS DEFINITION

RESPONSE TO MOTIONS TO AMEND CLASS DEFINITION

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2 The Antelope Valley Groundwater Agreement Association (“AGWA”) hereby responds to
3 the Public Water Suppliers’ Motion to Amend or Modify September 11, 2007 Order Certifying
4 Plaintiff Class (“Motion to Modify”) and Rebecca Willis’ Motion for Leave to File Second
5 Amended Complaint (“Motion to Amend”).

6 The Court has previously certified a plaintiff class in this action through its September 11,
7 2007 Order. The Motion to Modify proposes to reconstitute the plaintiff class in this action to
8 include all private landowners within the Basin not presently named as defendants in this action,
9 excluding those landowners provided water by or within the service territory of a water purveyor.
10 The Motion to Amend would expand the class definition in Ms. Willis’ Complaint to include all
11 private landowners within the Basin not presently represented by counsel. The changes proposed in
12 the Motion to Modify and the Motion to Amend will have the effect of expanding the class to
13 include all private non-party landowners within the Basin outside the service territory of a water
14 purveyor, and will additionally remove from the Class definition any reference to the groundwater
15 pumping histories of those parcels.

16 Members of the Modified Class, as proposed, will have irreconcilable conflicts in this action.
17 The proposed Class Counsel has acknowledged as much and has stated that, for this reason, he could
18 not ethically represent the Modified Class in this action. The Modified Class’s exclusion of
19 overlying owners within the service territories of municipal water systems, public water utilities or
20 mutual water companies – landowners whose water rights are at issue in this case – will prevent the
21 adjudication of all rights to the waters of the Basin and jeopardize the Court’s ability to enter a
22 binding judgment in this case.

23 AGWA requests that the Court maintain a non-pumpers class in this action and that it require
24 the purveyors to individually name and serve all landowners known to be pumping from the Basin.
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1 **I. MEMBERS OF THE MODIFIED CLASS HAVE IRRECONCILABLE CONFLICTS**

2 **A. Pumpers and Non-Pumpers Have Irreconcilably Conflicting Interests**

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4 No party denies that a conflict exists between representation of the pumpers and the non-
5 pumpers. AGWA has articulated many times¹ the conflict among landowners within the Basin
6 based on their pumping histories: when an appropriator claims prescriptive rights within a basin,
7 landowners who have pumped water from their properties during the prescriptive period are situated
8 much differently than those who have no pumping history.

9 The water purveyors can not and do not dispute the existence of the conflict, but take the
10 position that it just does not matter. In their zeal to minimize participation by landowners in the
11 lawsuit, they are willing to ignore the future train wreck that they are engineering, both for future
12 proceedings before this Court, as well as in the settlement process. The purveyors dismiss the issue
13 of conflicts by alluding to the Court's, "discretion to later implement subclasses or implement other
14 case management techniques" (October 16, 2007 Hearing transcript, pp. 6-7), but ignore the details
15 of such a scenario – What will be the impact of deferring the creation of subclasses until a sufficient
16 conflict arises? What will happen to those members of the Modified Class suddenly left without
17 counsel when the conflict can no longer be ignored? Will it be easier to find a second class
18 representative at that time than it has proven to be at present? Will the case then grind to a halt?
19 The purveyors are well aware of these issues now, but ask the Court to defer addressing them until
20 the impossibility of "implementing a subclass or other case management technique" will leave the
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23 ¹ See Statement of Clarification; Statement of Support for Plaintiff Willis' Withdrawal of Motion for
24 Class Certification; Joinder in Objections by Diamond Farming Company, filed August 15, 2007;
25 Response to Public Water Suppliers' Proposals for Class Definition and Method of Notice, filed
April 6, 2007; Antelope Valley Groundwater Agreement Association's Objection to Motions for
Class Certification, filed February 27, 2007.

26 As can be seen, the concerns raised by AGWA in this Response are not new, but have been before
27 the Court for the last year. Due to the purveyors' refusal to name and serve the proper parties to this
28 action, the members of AGWA have been forced to needlessly expend their time and resources in
order to do nothing more than tread water.

1 court and the parties no other option but to look past the legal conflict and possible due process
2 violations of those class members who will have no idea that the conflict has even arisen.

3 The Motion to Modify attempts to deflect any concern regarding intra-class conflicts through
4 analogy to other, more traditional, class action cases in which the plaintiffs within the class may
5 have differing rights of recovery against a common defendant. (Motion to Modify, pp. 4, 6.) The
6 cases cited by the purveyors are simply irrelevant in this case, because in this case the members of
7 the Modified Class not only have differing interests against common defendants, but also have
8 differing interests *against one another*.

9 The Motion to Modify additionally erroneously asserts that all overlying landowners allege a
10 common correlative and overlying right to the waters of the Basin. (Motion to Modify, p. 3, lines
11 23-25 [“modified Class members allege a predominate common correlative and overlying right to
12 the Basin’s native groundwater for class members’ reasonable and beneficial use on their land”].)
13 AGWA has repeatedly made clear that those landowners with pumping histories will claim a priority
14 right to the Basin’s safe yield and that the rights of those landowners with no pumping history
15 (dormant overlayers) have been subordinated or lost altogether.

16 **B. Proposed Class Counsel Cannot Represent the Conflicting Interests of the**
17 **Proposed Modified Class**

18 The Motion to Modify does not even attempt to explain how the Class Counsel will
19 participate in settlement negotiations if he must represent the Modified Class.

20 The Class Counsel for the Modified Class cannot represent the conflicting interests within
21 the class in settlement negotiations. He has himself admitted that the irreconcilable conflict posed
22 by representing the Modified Class ethically precludes him from such representation:
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24 Although they recognize that the class as proposed by Willis is not
25 ascertainable, the Purveyors proposed that the Court certify a broader
26 class composed essentially of all landowners with certain defined
27 exceptions. Counsel, however, face an irreconcilable conflict that
28 ethically precludes them from representing such an expansive class.
To be sure, all landowners have certain common interests. But those

1 common interests are largely overshadowed by the fact that active
2 pumpers can assert “self-help” claims that not only differ from but
3 conflict with the claims of the dormant group. The Purveyors argue
4 that such conflicts are only “potential;” but, the reality is that there are
5 ongoing settlement discussions in which the interests of these disparate
6 groups are presently in conflict. Counsel cannot ethically represent
7 both groups in this situation and should not be forced to do so.

8 (Plaintiff Willis’ Notice of Withdrawal of Motion for Class Certification; Memorandum of Points
9 and Authorities, pp. 3-4.)

10 The purveyors are unable to explain how Class Counsel could represent all members of the
11 proposed Modified Class. At the January hearing, counsel for AGWA raised the question of how the
12 Class Counsel would be able to participate in the settlement negotiations if he was forced to
13 represent both pumpers and non-pumpers when they have conflicting interests. The Court
14 specifically asked the purveyor representative to address this issue, and he was unable to do so.

15 (January 14, 2008 Hearing Transcript, p. 51, Mr. Dunn: “Yeah, I – Well, I don’t want to be flippant
16 or whatever, but I haven’t seen that in any pleading raised by Mr. Fife’s clients, so I suppose if there
17 is that type of adversity I suppose it would have to be pled at some point.”) This issue was similarly
18 ignored in the Motion to Modify filed by the purveyors. They continue to pretend that the conflict
19 does not exist because it has not been framed in papers filed by Ms. Willis or by the other
20 landowners:

21 The Class does not allege any claims against other private landowner
22 party (sic), and no private landowner has filed a pleading against the
23 Class. Thus, there is no class conflict between class members who
24 pump and those who do not pump groundwater.

25 (Motion to Modify, p. 6, lines 24-27.) The purveyors’ point in this regard is simply disingenuous
26 obfuscation. The conflict exists and will continue to exist whether any presently filed papers
27 disclose it or not.²

28 ² The purveyors’ argument in this regard begs the question as to how any such papers could be
expected to have been filed as the proposed class does not yet exist. Similarly, the purveyors do not
explain how it will even be possible for landowners with pumping histories to assert claims against
only the dormant members of a mixed class.

1 Essentially, the purveyors do not care how the Class Counsel will cope with this conflict, and
2 unfortunately, despite his earlier recognition of the ethical conflict inherent in representation of a
3 mixed class, the proposed Class Counsel now appears to under-appreciate the difficulties that he will
4 face. The Class Counsel will be forced to simultaneously advocate for the rights of two groups –
5 each of whom wishes to restrict the groundwater rights of the other. Though many parties to this
6 case believe the best avenue for resolution of this action is through a negotiated settlement, this will
7 be virtually impossible. All parties will be prostrate to the whim of the Class Counsel – as he will be
8 unable to enter into any settlement which favors the rights of one contingent of the Modified Class at
9 the expense of the other.

10 If the Court allows certification of the Modified Class, the notice of Class Action – already
11 the subject of considerable debate in this action – must be recast to explain the Class Counsel’s
12 divided loyalties. Due process demands that the notice inform all potential class members that the
13 Class Representative herself is a landowner with no history of groundwater pumping from her
14 property, and that the primary focus of the Class Counsel will be advocating on behalf of such
15 parties and not on behalf of (and perhaps at the expense of) those parties with established pumping
16 histories on their properties.

17 AGWA continues to believe that the purveyors should be required to individually name and
18 serve all landowners pumping from the Basin, as has been done in every other adjudication
19 throughout the state. While the purveyors state that the, “thousands of landowners who have
20 groundwater wells on relatively small-sized properties,” are too numerous to individually serve
21 within a reasonable period of time (Motion to Modify, p. 1, lines 17-23), this Court has never held an
22 evidentiary hearing to receive evidence in support of such factual assertions. There has been no
23 evidence supporting the purveyors’ claims, showing how many landowners are believed to be
24 pumping from the Basin or that those landowners are too numerous to name and serve within a
25 reasonable period of time. Indeed, the presently existing Class was certified by the Court despite the
26 Class Representative’s withdrawal of her motion for certification and over Class Counsel’s argument
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1 that there is not an ascertainable class in this matter. (Plaintiff Willis' Notice of Withdrawal of
2 Motion for Class Certification; Memorandum of Points and Authorities, p. 3.)

3 It is not unreasonable to expect that the purveyors could accomplish such service. The
4 County has access to all County records describing wells drilled within the County. The purveyors
5 have the resources necessary to determine which landowners in the Basin are pumpers and to
6 effectuate service. If the purveyors had acted to begin this process when the discussion of the class
7 action began over a year ago, it is likely they would be done by now and the entire issue would be
8 resolved.³

9 **II. THE MODIFIED CLASS' EXCLUSION OF WATER CUSTOMERS WILL**
10 **FRUSTRATE RESOLUTION OF THE RIGHTS AT ISSUE IN THIS CASE**

11 The use of a class structure in this case was intended to provide an orderly mechanism
12 through which to satisfy the McCarran Amendment requirement for a comprehensive adjudication
13 by bringing in small parties and dormant landowners who would normally be left out of the
14 adjudication. As AGWA has pointed out in its prior pleadings, it has instead morphed into an
15 opportunity to conduct a basin adjudication with minimal landowner participation by avoiding direct
16 service on landowners and by having virtually all landowners "represented" by counsel with
17 questionable expertise to be responsible for protecting a fundamental property right of many
18 thousands of landowners.⁴

19 In this case, the benefit of adhering to the McCarran Amendment's requirements will inure to
20 all parties who wish to have their water rights determined by the Court in this action – through
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22 ³ Ironically, by defining the class as those parties not currently represented by counsel in the case,
23 the class certification process will have the effect of curing the purveyor's failure to diligently name
and serve the parties who they were supposed to name and serve.

24 ⁴ It is interesting to note that Class Counsel appears to have become unusually cooperative with the
25 purveyors in this action – amending Ms. Willis' complaint to suit the purveyor's Motion to Modify,
26 admitting to the existence of the major element of their prescriptive rights case – overdraft, and, as
27 evidenced by the purveyor's representative comments at the January 14, 2008 hearing, meeting and
28 conferring extensively with purveyor counsel, though not at all with counsel for other landowners
(January 14, 2008 Hearing Transcript, pp. 11-12, Mr. Dunn: "I should probably start out by thanking
Mr. Zlotnick publicly for his efforts to meet and confer with counsel. It wasn't an easy task over this
relatively short period of time since the last hearing including the holiday season. But he has made
himself available and has worked diligently...").

1 settlement, physical solution or otherwise. The United States Government has substantial interests
2 in the Basin through its ownership of Edwards Air Force Base. It is anticipated that the United
3 States Government will claim a certain amount of water as part of a "federal reserved right" in
4 relation to the Air Force Base, and the effect of having McCarran Amendment compliance in this
5 case will be to hold the U.S. Government to the amount claimed in this proceeding and not allow it
6 to make a larger claim at a later date – to the detriment of all other pumpers in the Basin – by then
7 claiming that this Court did not have jurisdiction over the Federal Government in this case due to
8 failure to comply with the McCarran Amendment requirements. McCarran Amendment jurisdiction
9 cannot be maintained while excluding from the case a segment of the potential water right holders
10 within the Basin.⁵

11 The inclusion within the Class of Landowners within the service territories of Basin water
12 providers will also provide finality to the Court's determination as to rights to the Basin. The failure
13 to include all non-party landowners could result in future litigation regarding the rights to the waters
14 of the Basin. For this reason, among others, the Court has specifically requested these parties'
15 inclusion in the class.⁶

16 ⁵ While the U.S. Government is free to claim that the Court in this case is without jurisdiction at any
17 time, it has indicated that it would view a class including *all* landowners within the Basin as
satisfying the requirements of the McCarran Amendment:

18 The members of the overlying landowners class (combined with public
19 entities, appropriators and water users who were personally served and
20 individually appear before the Court) must comprise all claimants or
21 owners of right within the basin. The class described in the [Public
22 Water Suppliers' Notice of Motion and Motion for Class Certification,
23 filed January 10, 2007] comes up short. As a result, the proposed class
does not meet the requirements for a waiver of sovereign immunity
necessary in a McCarran Amendment ("McCarran"), 42 U.S.C. § 666
general stream adjudication.

24 (United States' Response to Motion for Class Certification, March 1, 2007, p. 1 (emphasis in
25 original).)

26 So I think that I would like to revise the Order for Certification. And I
27 hope that counsel can agree as to proper definitions of each of the
28 respective classes. And I would like to include everybody that is a
nonpumper, irrespective of whether they are within the water service
district or not. (October 16, 2007 Hearing Transcript, p. 31.)

RESPONSE TO MOTIONS TO AMEND CLASS DEFINITION

1 One can imagine the public water purveyors' fear of being required to serve their customers
2 with a notice stating that they are attempting to prescript the customers' groundwater rights from
3 them. However, for the reasons described above, they should not be excluded from this case, and
4 the Court, should it dismiss AGWA's comments above regarding the conflicts of the members of the
5 Modified Class, should approve a Modified Class only with the inclusion of **all** landowners not
6 already a party to this action.

7 **III. CONCLUSION**

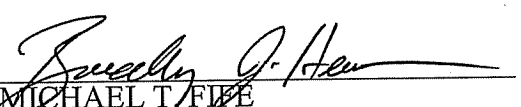
8 For the reasons described above, AGWA requests that the Court maintain a non-pumpers
9 class in this action, that it require the purveyors to individually name and serve all landowners
10 known to be pumping from the Basin, and that the Court require that the notice of class action
11 provide a pumper the opportunity to indicate such status, allowing the purveyors to name and serve
12 that landowner. This will allow a full adjudication of the issues in this case and preserve the
13 McCarran Amendment jurisdiction necessary for a final judgment in this case, absent the legal and
14 ethical conflicts described herein.

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23 I think there are potentials for future litigation if we don't get it
24 resolved in this litigation. And that doesn't mean that it is likely to
25 happen, but it is possible. We are talking about ownership rights.
26 There are rights that go along with the ownership of land, whether they
27 be mineral rights, or water rights, or other rights. And I just think that
28 I would like to get those all dealt with, all the water rights issues dealt
with in this litigation. And I think that it is possible for us to do that.
It may cost a little bit more money. It may slow it down just a little
bit, but we will have some certainty in the ultimate resolution of the
case, and that is something that the law strives to give to people who
are within this society. (October 16, 2007 Hearing Transcript, pp. 35.)

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Dated: February 15, 2008

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: 
MICHAEL T. FEE
BRADLEY J. HERREMA
ATTORNEYS FOR AGWA

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PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On February 15, 2008, I served the foregoing document described as:

**ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION'S RESPONSE
TO MOTIONS TO AMEND CLASS DEFINITION**

on the interested parties in this action.

By posting it on the website at 1:40 p.m./a.m. on February 15, 2008. This posting was reported as complete and without error.

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

Executed in Santa Barbara, California, on February 15, 2008.

Rachel Roberto

TYPE OR PRINT NAME

Rachel Roberto

SIGNATURE