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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES

10 ANTELOPE VALLEY ) RELATED CASE TO JUDICIAL  
11 GROUNDWATER CASES ) COUNCIL COORDINATION  
12 ) PROCEEDING NO. 4408  
13 This Pleading Relates to Included Action: ) The Honorable Jack Komar  
14 REBECCA LEE WILLIS, on behalf of herself ) Coordination Trial Judge  
and all others similarly situated, )  
15 Plaintiff, ) REBECCA WILLIS' AND THE CLASS'  
16 vs. ) MOTION FOR APPOINTMENT OF  
17 ) EXPERT WITNESSES; MEMORANDUM  
18 ) OF POINTS AND AUTHORITIES  
19 )  
20 LOS ANGELES COUNTY WATERWORKS )  
DISTRICT NO. 40; CITY OF LANCASTER; )  
21 CITY OF LOS ANGELES; CITY OF )  
22 PALMDALE; PALMDALE WATER ) DATE: April 24, 2009  
DISTRICT; LITTLEROCK CREEK ) TIME: 9:00 a.m.  
23 IRRIGATION DISTRICT; PALM RANCH ) PLACE: Dept. 1  
IRRIGATION DISTRICT; QUARTZ HILL )  
24 WATER DISTRICT; ANTELOPE VALLEY ) JUDGE: Hon. Jack Komar  
WATER CO.; ROSAMOND COMMUNITY )  
25 SERVICE DISTRICT; MOJAVE PUBLIC )  
UTILITY DISTRICT; and DOES 1 through )  
1,000; )  
26 Defendants. )

27 INTRODUCTION

28 The Willis Class moves the Court for the appointment of three experts under Evidence Code §730. Because expert witness fees are no longer recoverable costs under CCP §1021.5, it is impossible for the Willis Class to retain experts to help

1 defend against the Public Water Suppliers’ (“PWS”) claims of prescription. See  
2 *Olson v. Automobile Club of Southern California*, (2008) 42 Cal. 4<sup>th</sup> 1142. Although  
3 courts have not commonly used Evidence Code § 730 in civil cases, the statute  
4 confers such authority upon the court and the unique circumstances of this case  
5 compel its invocation. The requested experts will help counsel in (1) evaluating the  
6 work of other experts; (2) preparing for and defending against a prescription trial  
7 that includes elements of safe yield and overdraft; and (3) assisting counsel in  
8 negotiating a potential settlement or physical solution. The experts’ role will be  
9 circumscribed and their costs limited, i.e. they will not duplicate work of other  
10 experts but rather audit other experts’ reports and assist counsel prepare for  
11 deposition, cross examination at trial, and potential settlement of the case.

12 It is appropriate for the Court to require the PWS to bear the costs of the  
13 Class’ experts, since the Class’ position in this case is essentially defensive, and the  
14 Public Water Suppliers benefit from the Class’ presence in achieving a  
15 comprehensive adjudication. These experts will collectively cost less than 20% of  
16 the amount that the PWS have spent on their experts, so the financial burden on  
17 them is relatively modest, whereas the burden on the Class of retaining these  
18 persons makes it impractical to hire them. In the alternative, the Court, in its role  
19 as guardian of the Class, should appoint these individuals as Court experts to help  
20 the Court evaluate the conflicting positions being espoused by the various parties’  
21 experts.

## 22 ARGUMENT

23 The Class needs experts to address two key elements of prescription,  
24 hostility and adversity. Safe yield and overdraft are important components of those  
25 elements. The anticipated opinions of the PWS’ and landowners’ experts are  
26 significantly at odds with one another with respect to these matters.

27 The principal expert of the PWS is Joseph Scalmanini. Based on a review of  
28 his expert report, we believe he will likely opine as follows: Native recharge is

1 60,000 AFY, Return Flow from agricultural use is 23,000 AFY, Return Flow from  
2 imported water is 35,000 AFY, and Total Sustainable Yield is 118,000 AFY. Given  
3 these calculations, the PWS will argue that pumping **exceeded** Sustainable Yield  
4 each year from 1946 to the present and therefore that their taking of groundwater  
5 in an overdrafted basin was at all times adverse and hostile.

6 Expert Tom Sheehan, retained by landowner Bolthouse Farms, disputes  
7 these figures. We think it likely he will opine that: Native recharge is 106,000 AFY,  
8 Return Flow from agricultural use is 44,000 AFY, and Return Flow from imported  
9 water is 35,000 AFY. Total Sustainable Yield is 185,000 AFY. Based on his  
10 calculations, the landowners will argue that pumping did **not exceed** sustainable  
11 yield each year from 1946 to the present, and therefore that the requisite elements  
12 of prescription are missing.

13 Class counsel have no means to evaluate or verify the accuracy of these  
14 opinions. Without our own experts, we cannot effectively participate in a safe yield  
15 and overdraft trial. Yet the Willis Class members own the largest amount of  
16 acreage in the area of adjudication; they consist of the largest group of landowners  
17 in the Valley, over 60,000; and they are collectively exposed to a significant loss of  
18 property rights from the PWS' claim of prescription. The Class must have the aid of  
19 independent experts to, at least, consult with counsel, evaluate the opinions of other  
20 experts, and testify, if appropriate. In addition, they can help class counsel  
21 negotiate a resolution of the case.

22 Four factors make the appointment of such experts particularly appropriate  
23 here. First, because expert fees are not recoverable under Section 1021.5, there is  
24 no other practical means for the Class to retain such experts. Class Counsel has  
25 invested thousands of hours of time and substantial out-of-pocket costs in pursuing  
26 this matter on a wholly contingent basis. They cannot be expected to pay the  
27 substantial amounts needed to hire these experts especially where there is little, if  
28 any, likelihood they could ever recover those costs. Second, the importance of the

1 matters at issue makes it unfair to force the Class to proceed without experts.  
2 Third, the essentially defensive nature of the Class' position in this litigation, and  
3 the public benefits resulting from the Class' presence are significant. And, finally,  
4 the incremental costs to the PWS would be relatively modest.

5 The experts being offered by the Willis class are highly qualified and  
6 reasonable in cost. Mr. Harter is a groundwater hydrologist at University of  
7 California, Davis, and is renowned in his field. Mr. Grattan is a crop and irrigation  
8 expert also from University of California, Davis. He will help in evaluating recharge  
9 and reasonable and beneficial uses. Finally, Mr. Sunding is a groundwater  
10 economist at the University of California, Berkeley. He will assist counsel in  
11 developing an overall solution and in valuing the claim of prescription. A chart of  
12 each expert's tasks and budget is attached to this motion as Exhibit A. The  
13 declaration of each expert is also attached to this motion. Given the state of the law  
14 and the current posture of this case, there is no practical means for the Class to  
15 obtain the services of these experts other than through a Court Order appointing  
16 them and requiring the PWS to bear their cost. Evidence Code § 730 provides for  
17 the appointment of experts in ANY CASE and AT ANY TIME:

18 When it appears to the court, **at any time** before or during the trial of **an action**, that  
19 expert evidence is or may be required by the court **or by any party to the action**, the  
20 court on its own motion or on motion of any party may appoint one or more experts to  
21 investigate, to render a report as may be ordered by the court, and to testify as an expert  
22 at the trial of the action relative to the fact or matter as to which the expert evidence is or  
23 may be required. The court may fix the compensation for these services, if any, rendered  
24 by any person appointed under this section, in addition to any service as a witness, at the  
25 amount as seems reasonable to the court.

26 This statute confers inherent power on the trial judge to appoint experts in  
27 appropriate circumstances. It has been applied in civil cases. (See *California v.*  
28 *Superior Court (Woolsey)* (1998) 66 C.A.4th 421, 440, 78 C.R.2d 88 [in action for

1 refund of excessive vehicle license fees, trial judge properly sought expert advice on  
2 questions of class action management, including efficient means of notifying class  
3 members]. This case presents appropriate circumstances.

4         The Public Water Suppliers may argue that there are too many experts in  
5 this case already and adding more experts will not aid the court in its  
6 determination. However, that argument misses the mark. The Willis class should  
7 have its own experts. Relying on the PWS' experts is like asking the Class not to  
8 oppose the claim of prescription. It would effectively negate their ability to defend  
9 against that claim. Relying on the expert of the landowners may at first blush  
10 appear feasible but with a closer look one can see that it is fraught with  
11 complications. First, the class would have no ability to independently evaluate Mr.  
12 Sheehan's opinions. Second, Bolthouse has no interest in funding the cost of the  
13 Class in using their expert.

14         Third, there may be a conflict between the interests of the Class, which  
15 consists of non-pumping landowners who wish to preserve the viability of the basin,  
16 and Bolthouse's interests, which are in maximizing its ability to pump the water it  
17 presently needs.

18         Finally, the Public Water Suppliers may argue that they cannot afford to pay  
19 the cost of the Willis class experts. If affordability is a true concern, then the PWS  
20 should dismiss their claim of prescription. They should not be able to sue a class of  
21 60,000 landowners for prescription and deny them their right to experts. Class  
22 counsel is seeking their fees under CCP section 1021.5 and the present state of the  
23 law precludes any recovery of expert witness fees under that statute. Moreover, the  
24 projected costs of the proposed experts would be only about 10% of the amount that  
25 we estimate the PWS are already spending on their expert witnesses. Notably,  
26 much of Mr. Sunding's efforts and expenses relate to a settlement or potential  
27 physical solution.

28         In the alternative, the Court should appoint these individuals, or others it

1 deems appropriate, as Court experts, to assist the Court in evaluating the  
2 conflicting expert opinions.

3 CONCLUSION

4 Proceeding to trial without the experts will put the Willis Class at a severe  
5 disadvantage. The Willis class has a right to have its own experts at trial, and the  
6 PWS must pay for the costs of those experts. The Court should exercise its  
7 authority under Section 730 to appoint experts for the Class.

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Dated: March 3, 2009

KRAUSE KALFAYAN BENINK  
& SLAVENS LLP

/s/ Ralph B. Kalfayan  
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