Ralph B. Kalfayan, SBN133464
David B. Zlotnick, SBN 195607
KRAUSE, KALFAYAN, BENINK
& SLAVENS LLP
625 Broadway, Suite 635
San Diego, CA 92101
Tel: (619) 232-0331
Fax: (619) 232-4019

Attorneys for Plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES This Pleading Relates to Included Action: REBECCA LEE WILLIS, on behalf of herself and all others similarly situated, Plaintiff, vs. LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; CITY OF LANCASTER; CITY OF LOS ANGELES; CITY OF PALMDALE; PALMDALE WATER DISTRICT; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; QUARTZ HILL WATER DISTRICT; ANTELOPE VALLEY WATER CO.; ROSAMOND COMMUNITY SERVICE DISTRICT; MOJAVE PUBLIC UTILITY DISTRICT; and DOES 1 through 1,000; Defendants.	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408 CASE NO. BC 364553 **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES IN RESPONSE TO THE OPPOSITION FILED BY THE CITY OF LANCASTER AND ROSAMOND COMMUNITY SERVICES DISTRICT** Date: March 22, 2011 Time: 9:00 a.m. Dept: 15 (CCW) Judge: Hon. Jack Komar Coordination Trial Judge

I. INTRODUCTION

Rebecca Lee Willis ("Plaintiff" or "Willis") and the Willis Class respectfully submit this reply memorandum in support of their application for an award of attorney's fees and in response to the opposition submitted by the City of Lancaster (Lancaster) and Rosamond Community Services District (RCSD) (collectively, L&RCSD). Class Counsel have labored on this matter for over four years without any compensation and, indeed, without reimbursement for the roughly $85,000 in expenses they have incurred. In connection with the settlement of this matter, Willis and Class Counsel petitioned for an award of fees and expenses pursuant to Section 1021.5 of the Code of Civil Procedure (CCP § 1021.5). Because this matter satisfies all of the elements of Section 1021.5 and because the fees requested are reasonable given the complexities of this matter, the fee petition should be approved.

1. Contrary to Lancaster's and RCSD's arguments, Plaintiff is a prevailing party and the settlement achieved a "significant benefit" for the Class. As L&RCSD concede, the settlement "impose[s] a limit on the prescriptive rights that the settling Defendants will seek against the Willis Class;" indeed, as explained at greater length in our reply to the Littlerock Creek parties, the Settlement entirely releases any such claims of prescriptive rights – claims which threatened to deprive some 60,000 persons of any right to use the water underlying their properties. Moreover, the fact that the supposed issue of "whether the dormant landowners' rights may be subordinated" remains unresolved is irrelevant. The settling Defendants have abandoned any such claims by agreeing to respect the Class' correlative overlying rights, and no other parties have raised any such subordination claims against the Class. Surely, Class Counsel cannot be faulted for not spending time and money on claims that have never been asserted.

2. In addition, the evidence substantiates the fact that Counsel's hours and fees were reasonable and not excessive. L&RCSD complain that counsel spent substantial time "with

written discovery and reviewing documents," which they claim the Class attorneys "did not need to review." But Defendants' "Monday morning quarterbacking" is meritless. The documents at issue were produced by Defendants and were directly related to the issues raised in the litigation; and counsel reviewed those documents long before the settlement was agreed upon (even in general terms). The fact that this discovery "was [arguably] not required to effectuate the limited settlement" is irrelevant. Counsel cannot sit back and not litigate a case based on the assumption that they will reach an acceptable settlement.

3. L&RCSD's assertion that counsel's fee request is "shocking," ignores the dynamics of this litigation. The Public Water Suppliers, including RCSD, worked as a team – pooling their efforts and frequently filing joint pleadings and motions. The Willis Class had no such luxury. Rather, we were forced to go up against a team of lawyers representing some 10 public entities. Moreover, as the Court is aware, Class counsel could not rely on the efforts of other (pumping) landowners, as such landowners' interests were antagonistic, if not adverse, to those of the Class. Had we had the luxury of working as part of a team, our hours would undoubtedly have been lower. The simple fact is that we had to single-handedly fight off a team effort – whether put together in a single brief or, as here, in the five separate briefs opposing this application. It is telling in that regard that Defendants have steadfastly refused to disclose the hours that they spent on this litigation, choosing instead to argue without factual support that Class counsel's hours were excessive.

4. Class Counsel are entitled under the law to a significant risk multiplier given (1) the substantial risks associated with this ground-breaking case – which dealt with significant unresolved legal issues regarding the rights of "dormant" landowners – and (2) the delay in payment in a case where counsel have labored for over 4 years without compensation, while incurring substantial expenses. Defendants simply ignore these factors. Moreover, under the

circumstances of this case, the fact that public agencies will be required to pay the fees does not support the denial of a risk multiple. As Defendants concede, the payment will not fall on taxpayers, but rather on rate-payers. The equities do not support those rate-payers or the agencies that serve them. For years, those agencies have been taking thousands of acre feet of water every year from a Basin that they admit is over-drafted, based on dubious claims to prescriptive rights. By taking that water without payment, defendants have kept the rates that their users pay artificially low. It is only fair that these agencies and their ratepayers, which have benefitted for years by taking "free "water from this overdrafted Basin, pay the fees incurred by the Willis Class to defend their rights as overlying landowners. The Willis Class members are the only parties in this litigation who have not benefitted from abusing the Basin.

As the Supreme Court has regularly held, "[a] central function of the [private attorney general theory] is to call public officials to account and to insist that they enforce the law." *Serrano v. Unruh (Serrano IV)* (1982) 32 C3d 621, 632 (quotations and citations omitted). The simple fact is that Plaintiff Willis had to bring this litigation to contest the Defendants' baseless assertions that they had obtained prescriptive rights to the Basin's groundwater. Because Willis succeeded in protecting the constitutionally recognized rights of this large class of landowners from government overreaching, the action merits a substantial fee award under CCP Section 1021.5.

In viewing the equities of this case, the Court should also keep in mind that, though technically a plaintiff, Willis instituted this litigation to defend the Class' property rights against the Public Water Suppliers' prescription claims. She did not bring suit to gain anything, but rather simply to protect her rights against governmental overreaching. Defendants could have compromised those claims years ago, but refused to do so. Willis' counsel should be fairly compensated for protecting the Class' rights.

5. Finally, Lancaster should bear an appropriate share of any fee award. Willis does not care how the Defendants choose to apportion the fee award. But Lancaster wrongfully maintained prescription claims against the Class for years, though it belatedly conceded it has no prescriptive rights. By forcing Lancaster to drop its prescription claims, the Class is clearly a prevailing party as to the City. That Lancaster has refused to sign the settlement with the Class does not change that fundamental fact. Indeed, the fact that Lancaster asserted prescription claims that it later admitted were unsupportable, but still refuses to sign the Settlement Stipulation, shows that it has engaged in precisely the type of abusive governmental conduct that Section 1021.5 was adopted to remedy. *See Serrano, supra.*

II. ARGUMENT

A. Class Counsel Are Entitled to An Award of Fees Under CCP Section 1021.5.

As explained in our opening brief, this action satisfies all of the elements required for an award of fees under CCP Section 1021.5. Moreover, Defendants' various oppositions are noteworthy for their lack of any evidentiary basis. Plaintiff's counsel have put their time records before the Court. Not surprisingly, Defendants refuse to do so, even in summary form.

1. The Case Conferred a Significant Benefit.

Contrary to Defendants' argument, the Settlement conferred a significant benefit on the Class, which justifies a substantial fee award under CCP Section 1021.5. L&RCSD concede that the settlement "imposes a limit on the prescriptive right that the Defendants will seek against the Willis Class if prescription is ultimately proved to the satisfaction of the court …." The primary reason Willis brought this action was to defend against those prescription claims. Her success in getting Defendants to drop those claims provided a substantial benefit to the Class. The simple fact is that, absent this litigation, the Willis Class members faced the very real risk that they would lose their rights to use the Basin's groundwater, which would have rendered their

properties virtually worthless. The litigation preserved the Willis Class' rights to make correlative use of the Basin's groundwater, and the Suppliers have released their prescription claims as to the Class. In short, the Settlement accomplished Willis' major objectives in filing suit and provides a substantial benefit to the Class.

L&RCSD wrongly argues that the Settlement failed to resolve the "issue of subordination of the rights of the dormant landowners." That is not the case. The Stipulation of Settlement expressly recognized that the Willis Class Members have an "Overlying Right to a correlative share of 85% of the Federally Adjusted Native Safe Yield for reasonable and beneficial uses on their overlying land free of any Replacement Assessment." Stip at IV. D. 2. It further provided that the "Settling Defendants will not take any positions or enter into any agreements that are inconsistent" with those rights. *Id.* In short, the Settlement resolves the issue of subordination as to all parties to this action. As Defendants are well aware, none of the overlying landowners have filed any pleadings or motions seeking to subordinate the Willis Class' rights. The theoretical possibility that other parties may file such future claims does not negate the fact that the Settlement provides significant benefits vis-à-vis the Suppliers – the only parties who had asserted claims against the Class. A fee award here is fully appropriate.

B. Class Counsel's Hours Are Reasonable and Not Excessive.

The record demonstrates that the time that Class counsel has spent on this complex matter has been reasonable and not excessive. Counsel have handled this litigation as efficiently as possible given the (1) number of opposing parties, (2) the number and complexity of the issues raised in this matter in which the Court's docket shows some 4,335 filings (not including discovery) since late 2005, (3) the fact that the Class is composed of approximately 60,000 persons, many of whom contacted Class counsel for information regarding the case, some on a number of occasions; and (4) the fact that Class Counsel had neither sophisticated clients nor

experts to assist them. The latter point should not be underestimated. Defendants represent public entities that have in-house staffs that are knowledgeable about the factual issues underlying the litigation, as well as a team of experts assisting them. Class counsel have had no such support. Thus, while it may not have been necessary for Defendants' counsel to review the underlying documents from their clients, because they had clients and experts who could do so, it was necessary for Class counsel to review those records themselves.

Defendants characterize counsel's hours as "outrageous," but offer no evidence supporting their position. The fact that Mr. Zlotnick spent an average of only 27 hours per month on this complex matter, which necessitated frequent trips to Los Angeles and Palmdale and many court filings as well as numerous communications with other counsel, shows that the time he spent on this matter was reasonable, not excessive. Mr. Kalfayan's time was also reasonable. Defendants complain that Mr. Kalfayan spent numerous hours on written discovery and reviewing documents, when "he is not a hydrologist, hydrogeologist, or other expert," but they ignore the fact that, unlike them, Plaintiff's counsel had no team of experts to review documents. To be sure, we requested such an expert and offered to limit that expert's costs to a reasonable amount, but Defendants aggressively opposed that request. The larger legal fees that resulted were a foreseeable and unavoidable consequence of the Defendants' litigation positions. Moreover, the fact that, where possible, senior counsel delegated work to associates, paralegals and clerks is commendable, not a reason for complaint.

Further, Defendants' claim that "the settlement agreement now approved by this court could and should have been negotiated and finalized without any written discovery" is not only totally unsupported by evidence, it is contrary to the facts. For several years, Plaintiff tried to achieve a settlement of this matter, beginning with the Dendy mediation in 2008, but Defendants refused to agree to (or even negotiate meaningfully in response to) repeated settlement proposals

Plaintiff made that were in fact very similar to the agreement ultimately reached. March 15, 2011 Supplemental Declaration of David B. Zlotnick at ¶¶ 2-5. Notably, Lancaster has still not agreed to the Settlement, and RCSD did not execute the Stipulation until September 2010, 6 months after Plaintiffs completed negotiating the document with District 40's counsel and circulated it for approval. Given Defendants' refusal for years to make any settlement proposal, and their subsequent delays in agreeing to the Stipulation, Class counsel had no choice but to pursue motions, discovery and trial preparation. In large measure, the efforts that counsel spent over those years were caused by Defendants' litigation tactics, not by any excessive billing on the part of Plaintiff's counsel.

1. Counsel Can Recover For Pursuing Unsuccessful Causes of Action.

The fact that Plaintiff's counsel filed certain pleadings and motions that were not totally successful is irrelevant; counsel are still entitled to compensation for that time. The cases recognize that, in any litigation, a party will not be successful on all of the various positions it takes. Where, as here, Class counsel prevailed on the ultimate objectives of defending against the Suppliers' prescription claims and preserving the Class' correlative rights, counsel are entitled to be compensated for all reasonable efforts they expended in bringing about that result, regardless of whether they prevailed on any particular motion or claim. *Environmental Prot. Infor. Ctr v. California Dept. of Forestry* (2010) (*"EPIC"*) 190 Cal. App. 4th 217, 238-39.

It is remarkable that Defendants complain about Class counsel's work responding to their Demurrers, which ultimately resulted in the Amended Complaint being sustained. Given the fact that Defendants wanted the Class in the litigation, so as to have a comprehensive case, why did they file repeated Demurrers, which unnecessarily ran up everyone's fees and costs? Plaintiffs' efforts in this regard were reasonable and appropriate. Similarly, Plaintiff's efforts in filing a motion to strike Defendants' prescription claims were reasonable and appropriate. Had Plaintiff

succeeded in that effort, it would have obviated much of the discovery and other activities in which counsel were forced to engage. Moreover, Plaintiff's articulation of her arguments in the context of that motion helped achieve the settlement she ultimately obtained for the Class.

The cases recognize that, in any litigation, a party will not be successful on all of the various positions it takes. As the Court of Appeal explained *EPIC, supra,* "fees are not reduced when a plaintiff prevails on only one of several factually related and closely intertwined claims. . ." *Id.* at 238 (quotes and cites omitted). Where, as here, the Class prevailed on its ultimate objectives of defending against Defendants' prescription claims and preserving the Class' correlative rights, counsel are entitled to be compensated for all reasonable efforts they expended in bringing about that result, regardless of whether they prevailed on any particular motion or claim. Id. at 238-39.

C. A 1.5 Multiplier of the Lodestar Is Warranted Given the Litigation Risks.

It is undeniable that this matter involved extremely complex and novel issues as to the rights of a Class of "dormant" landowners in the context of a Basin-wide adjudication of groundwater rights. Further, groundwater cases are invariably complex and protracted and this case has been no exception. Moreover, it is equally clear that Class counsel performed quality work, resulting in a commendable settlement. But Counsel recognize that they practice in the field of complex litigation and that their rates, though below those of many in the community, reflect that fact. Plaintiff does not seek a multiplier because of those factors or to "punish Defendants, but simply to compensate counsel for the contingent risk and delay in payment associated with this litigation. The cases recognize that the primary rationale for the award of a multiplier is the contingent nature of the representation, a factor that was certainly present in this case. Indeed, Defendants' position that Class counsel are not entitled to a fee award even in the context of a successful settlement illustrates the risks that counsel undertook.

The reality is that Class counsel knew from the outset that (1) this litigation was extremely risky and could well have been lost after significant efforts; (2) it was unlikely that they would obtain a common fund from which to seek an award of fees; and (3) any fee petition would likely be contested. Messrs. Kalfayan and Zlotnick both had and have ongoing litigation in which they were much more certain of being paid for their efforts. Nonetheless, Plaintiff Willis prevailed upon counsel to undertake this representation in order to protect her property rights and those of the Class. Class counsel have succeeded in protecting those rights against determined opposition from multiple opposing parties. They are entitled to fair compensation that accounts for the very real risks that they could have invested thousands of hours and tens of thousands of dollars on this case and not been compensated at all.

Contrary to Defendants' arguments, the fact that the Defendants are public entities does not argue against the award of a reasonable risk multiplier. The fees here will not be borne by taxpayers; rather, they will be borne by the Suppliers' ratepayers, who have benefitted for many years from Defendants' pumping of large quantities of water from an overdrafted Basin – activities that damaged the Basin and the ability of the Willis Class to use their overlying rights in the future. The Defendants as well as the other landowners all took water from this Basin without paying replacement assessments. Only the Willis Class did not engage in mining this Basin. For that reason, the equities do not support Defendants' position. They have benefitted by extracting substantial amounts of water from a Basin they realize is overdrafted. It is only fair that they compensate Class counsel for the time and expense that counsel expended protecting the Class' rights to make use of the Basin's water in the future.

D. Lancaster Should Bear an Appropriate Share of the Fees and Costs.

Class Counsel have suggested that the fee award be apportioned among Defendants in proportion to their pumping from the Basin, which would impose a very small burden on the

City of Lancaster, which pumps small amounts from the Basin. Any such burden is warranted given that for almost two years Lancaster asserted prescription claims that it now concedes were without any basis. Lancaster states that it "has never claimed prescriptive rights," but its pleading unambiguously claimed such rights. The Class is a "prevailing party" as to Lancaster in that Lancaster eventually withdrew its prescription claims in September 2008, almost two years after Willis filed suit. Moreover, Lancaster has refused to this date to sign the Stipulation of Settlement, presumably because it seeks to avoid an award of fees. Because Lancaster has abandoned its prescription claims, however, the Class is a prevailing party and Lancaster should bear a share of Class Counsel's fees.

III. CONCLUSION

L&RCSD assert without factual support that Class counsel could have obtained the instant settlement without significant expenditure of effort. But Defendants never advised Class counsel of that purported fact. Rather, they spurned Class Counsel's early efforts to settle this matter, forcing counsel to engage in complex litigation for over four years. For all of the foregoing reasons, Plaintiff respectively requests that the Court approve her application for attorneys' fees and costs, as well as an incentive award.

Dated: March 15, 2011

KRAUSE KALFAYAN BENINK & SLAVENS LLP

/s/Ralph B. Kalfayan
Ralph B. Kalfayan, Esq.
David B. Zlotnick, Esq.
Attorneys for Plaintiff and the Class