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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

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 325 201 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, 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 OBJECTION TO MOTIONS FOR CLASS CERTIFICATION** **Date: March 12, 2007** **Time: 9:00 A.M.** **Dept: 1**

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I. Summary

The Antelope Valley Groundwater Agreement Association ("AGWA") opposes the establishment of a defendants' class as proposed by the public water suppliers in their January 10, 2007 Motion for Class Certification, and opposes the establishment of a plaintiffs' class as proposed by Rebecca Willis in her February 22, 2007 Response to the public water suppliers' Motion. Both of these classes as proposed are inappropriately broad and would be impossible for any one class representative to adequately represent. Instead, there must be, at a minimum, two classes of landowners: one for those who possess presently-exercised overlying rights, and one for those who possess dormant overlying rights.

Furthermore, the purposes of using the class action structure (whether a defendants' class or a plaintiffs' class), do not justify the inclusion of *all* landowners within the classes. Due process and the interests of justice will be better satisfied if the public water suppliers are required to individually name and serve all landowners above a certain acreage threshold. AGWA recommends that an appropriate threshold is the ownership of 20 acres or more. Any classes that are certified should be composed only of landowners who own land below the 20 acre threshold.

Finally, individual notice must be provided by the public water suppliers to all members of any class that is certified.

II. Discussion

A. Defendants' Class Actions are Authorized in California But Only Pursuant to Strict Due Process Protections Which Suggest hat the Class Mechanism Posses Significant Procedural Risk

There is precedent in California for the use of a defendants' class. (Code of Civ. Pro. § 382; *Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 844 [199 Cal.Rptr. 134]; *see also Rosicrucian Fellow. v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121, 139-40 [245 P.2d 481]; *Wheelock v. First Presb. Church* (1897) 119 Cal. 477, 481.)

At least one California trial court has certified a defendants' class action in a water rights adjudication. (*See* Solano Irrigation Dist. v. The Names of All Appropriative Water Rights Holders

in Upper Basin (Sup. Ct., County of Sacramento, 1993, No. 2565).) However, defendants' class actions are rare, in part because of special due process concerns. As explained in the *Simons* opinion:

> "in theory a class suit is permissible against defendants too numerous to be joined, where there is a common interest and common relief is sought. But a court may refuse to entertain it, or, in a later collateral attack refuse to hold the judgment binding on the absent parties, if it concludes that the persons made defendants did not sufficiently represent the class."
>
> . . .
>
> "A defendant class should be certified and such an action tried only after the most careful scrutiny is given to preserving the safeguards of adequate representation, notice and standing. (Citation.) Failure to insure any one of these essentials would require reversal of a judgment against a defendant class."

(*Simons*, 151 Cal.App.3d at 844-45.)

Thus, certification of a defendants' class requires many of the same showings as a plaintiffs' class (e.g., numerous parties, community of interest, typical claims (defenses), etc.), but with a special emphasis on the adequacy of representation. "[D]efendants' class actions involve the serious danger of fraudulent or calculated selection of defendants who might not fully and fairly represent the interests of the class." (*Id.* at 844.) Greater scrutiny is further justified by the fact that a defendants' class stands to lose a right they already have from the action, as opposed to gaining some benefit. (*See Thillens, Inc. v. Community Currency Exchange Association of Illinois* (1983) 97 F.R.D. 668 (N.D.Ill) [36 Fed.R.Serv.2d 657].)

However, because of the nature of the present case, even the members of a plaintiffs' class face the risk of losing a right through a finding of prescription if the case is not adequately prosecuted by the class representative. Thus, in this case, a plaintiffs' class is deserving of the same careful scrutiny as is a defendants' class.

The careful scrutiny that is given to the use of the class action structure suggests that there is a fair degree of procedural risk associated with this approach. Whether the class is a plaintiffs' class

or a defendants' class, due process concerns create the risk that the approach will be invalidated at a later time, and thus that the approach should be applied sparingly. For this reason AGWA believes it would be in the best interests of the case if any class that is certified includes only landowners who own land below a certain acreage threshold. While AGWA does not have precise landowner statistics available to it at this time, based on information and belief we believe that a threshold of 20 acres or more would be a reasonable threshold above which landowners must be individually named and served. The use of such a threshold would minimize the procedural risk by including in the litigation all of the major landowners in the Antelope Valley through normal direct service, while still providing significant procedural benefits to the public water suppliers by including the many tens of thousands of parcels that exist below the 20 acre threshold through the class action mechanism.

B. Dormant Overlying Rights and Presently-Exercised Overlying Rights Are Two Distinct Classes That Cannot be Represented by a Single Class Representative.

1. Nature of the Claims

The pool of overlying rights in the Antelope Valley consists of dormant and presently-exercised overlying rights spread amongst agricultural interests, developers, industrial water uses such as aggregate operations, and municipal use through mutual water companies. Different legal claims will be applied against each.

For example, prescriptive claims have been brought against both dormant and presently-exercised rights, but with different consequences between the two forms should the claim succeed. Subordination of the dormant overlying rights pursuant to Article X, Section 2 of the California Constitution may be the outcome on the one hand, while for presently-exercised overlying rights self help will serve to mitigate the effects of a showing of prescription. (*See In re Long Valley Creek Stream System* (1979) 25 Cal.3d. 339 [599 P.2d 656]; *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74 [219 Cal.Rptr. 740].)

If dormant overlying rights may be exercised in the future because they are not bound to the judgment, they can potentially upset the careful balance of pre-existing rights. In fact, the California Supreme Court has recognized that unexercised riparian rights (analogous to dormant

overlying rights) are a principal source of uncertainty, which disrupts proper water management. (*See In re Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 355 [599 P.2d 656].) *Long Valley's* solution to this problem was to allow subordination of unexercised riparian rights within an over-appropriated stream system pursuant to Article X, Section 2.

In *Wright v. Goleta*, an effort was made to extend *Long Valley's* precedent to groundwater to subordinate unexercised overlying rights. Although the *Wright* court recognized that the same perverse consequences attached to unexercised overlying rights as they do to unexercised riparian rights, it did not subordinate the unexercised overlying rights, in part, because the action did not seek to join all necessary parties within the basin. (*Wright v. Goleta Water Dist.* (1985) 174 Cal. App.3d 74 [219 Cal.Rptr. 740].) Certification of a class of dormant overlying rights will eliminate this concern in an efficient manner by properly joining all interests in a single action. *Long Valley's* approach could then be extended to judicial groundwater basin adjudications.

Accordingly, the creation of a class that includes dormant overlying rights makes it very likely that the interests of the presently-exercised overlying rights will come in to conflict with the dormant overlying rights because the presently-exercised right holders will have an opportunity to cure the deficiency in *Wright* and seek to apply the *Long Valley* approach to the Antelope Valley. This distinction thus calls for the use of multiple classes or subclasses within the overlying owners class. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473 [174 Cal.Rptr. 515] (subclasses justified to ensure representation of differing viewpoints within full class); *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821 (court may divide class into subclasses for expediency); *Osborne v. Subaru of America, Inc.* (1988)198 Cal.App.3d 646 (court has obligation to consider the use of subclasses and other innovative procedural tools proposed by a party to certify a manageable class).)

2. The Classes of Dormant Overlying Owners and Presently Exercised Overlying Owners are Each Ascertainable Classes and Each Have Community of Interests but Only Within Their Separate Classes

To sustain any class action there must be: (1) an ascertainable class, and (2) a well-defined

community of interest in the questions of law or fact. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 [97 Cal.Rptr.2d 179]; *Richmond*, 29 Cal.3d at 470; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 [63 Cal.Rptr.724].) In other words, the class must be substantially similarly situated. The element of ascertainable class is satisfied in a plaintiffs' class where all members have a similar cause of action against the defendant. (*In American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291 [4 Cal.Rptr.2d 526].) By analogy, a defendants' class is ascertainable where all members of the class can utilize a common defense.

The community of interest element is satisfied where there are: 1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent class. (*Reese v. Wal-Mart Stores* (1999) 73 Cal.App.4th 1225, 1234, [87 Cal.Rptr.2d 346]; *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 542, 76 [Cal.Rptr.2d 567].) Moreover, the common claims or defenses must predominate over individual claims. (*Block*, 65 Cal.App.4th at 544.) Common issues are predominant when they would be the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 667-68 [22 Cal.Rptr.2d 419].) However, there is not commonality of interest if each member of the class would be required to litigate numerous and substantial issues affecting his individual right to recover damages after the common questions have been determined. (*Rose v. Medtronics*, Inc. (1980) 107 Cal.App.3d 150, 154-55 [Cal.Rptr. 16].)

As noted above, a defendants' class was certified in the Putah Creek adjudication. (*See* Solano Irrigation Dist. The Names of All Appropriative Water Rights Holders in Upper Basin (Sup. Ct., County of Sacramento, 1993, No. 2565).) There, the plaintiff irrigation district sued all overlying owners and appropriators to determine its own obligations to release water into Putah Creek. The plaintiff argued that the sole issue to be determined was how much water was required to be released to mimic the state of nature, thereby satisfying an earlier court decree requiring such releases. Because this question of fact was common to all defendants, the plaintiffs argued that no individual relief was sought against any particular defendant, and therefore, a defendants' class was an efficacious means to adjudicate the issue.

The primary claims in this case are for prescription against all overlying owners, and potentially, subordination of the priority of dormant overlying rights pursuant to Article X, Section 2 of the California Constitution. (*See City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 [123 Cal.Rptr. 1]; *City of Pasadena v. City of Alhambra*, (1949) 33 Cal.2d 908 [207 P.2d 17] (prescription); *In re Long Valley Creek Stream System* (1979) 25 Cal.3d. 339 [599 P.2d 656]; *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74 [219 Cal.Rptr. 740] (subordination pursuant to Article X, Section 2.) To be amenable to class status, the defenses available against these claims must be the same for all defendants. More precisely, the legal outcome must be substantially similar among each member of the class, and therefore, can not be dependent on the individual circumstances of fact or law. (*See State of California v. Rank* (1961) 293 F.2d 340, 348 (9th Cir.) and discussion below.) As previously discussed, because of the differences between dormant overlying rights and presently-exercised overlying rights there is no commonality between these two classes of landowners.

3. Adequacy of Representation

As noted by the *Simons* opinion, adequacy of representation is usually given greater scrutiny in defendants' class actions than plaintiffs' class actions because of the danger that plaintiffs will strategically choose defendants who will not adequately defend the class. (*Simons*, 151 Cal.App.3d at 844.) However, because of the nature of the present litigation, even a plaintiffs' class will run the risk of losing a significant property right if the class is not adequately represented. The Court should give great scrutiny also to the adequacy of representation of a plaintiffs' class.

In *Simons,* the trial court's judgment against a defendants' class was overturned because there was: (1) no evidence that any of the members of the class were actually served with class notification, and (2) the only two defense counsel that appeared in court expressly disclaimed any intention to represent the class, did not present any defense, and instead stipulated to a judgment for their own clients that was substantially more favorable to them than the defendants' class. (*Id.* at 846-47.)

A defendants' class was attempted in two subsequent opinions following *Simons*, but because the cause of action brought against the defendants' class was found to be without merit,

these courts did not address the merits of certifying the requested classes. (*Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, 1436-37 [37 Cal.Rptr.2d 778]; *Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 Cal.App.3d 1476, 1494 [252 Cal.Rptr. 67].)

Only one California opinion has been found that actually approved of a suit against certain named defendants as representatives for a broader class. (*See Wheelock v. First Presb. Church* (1897) 119 Cal. 477, 481 [51 P. 841].) *Wheelock* allowed an action to be brought by certain representatives of one church against certain representatives of another church. (*Id.*) The interest of the defendants' class members was clearly homogenous, and the court did not analyze the issue of adequate representation.

Since there is limited California precedent on this issue, it is appropriate to look elsewhere for guidance. (*See* Vasquez v. Superior Court (1971) 4 Cal.3d 800, 821 (federal class action relevant where California authority is lacking).) Federal precedent pursuant to Rule 23 of the Federal Rules of Civil Procedure has held that an adequate representative must have: (1) a sufficient stake in the outcome to cause the representative to vigorously defend the common interest and raise all available defenses, and (2) have the financial resources and skills to pursue those defenses. (*See Thillens, Inc. v. Community Currency Exchange Association of Illinois* (1983) 97 F.R.D. 668 (N.D.Ill.) [36 Fed.R.Serv.2d 657].) Where these standards are met, due process requirements are satisfied. (*Sam Fox Publishing Co. v. United States* (1961) 366 U.S. 683, 691 [81 S.Ct. 1309]. Res judicata may then be applied against any subsequent challenge to any judgment entered against the defendants. (*Id.*; *see also Chance v. Superior Court* (1962) 58 Cal.2d 275, 288 [23 Cal.Rptr. 761] (res judicata in a plaintiffs' class).)

(1) Sufficient Stake to Vigorously Defend Outcome

The plaintiffs' class representative Rebecca Willis appears to be a dormant overlying landowner. The pleadings filed on her behalf have indicated that she owns ten-acres on which she *intends* to build a nursery. (Willis Response 3:7.) Thus, this plaintiff has a sufficient stake in the outcome that she will vigorously defend the rights of dormant overlying landowners. However, because of the very nature of her claim, it is highly unlikely that she will vigorously press the claim that dormant overlying rights should be subordinated pursuant to Article X, Section 2.

(2) Financial Resources and Skill to Pursue Defenses

As described above, the purpose of a class action is to enable the joinder of numerous parties where individual service of process would be unnecessarily burdensome. It is not, however, intended as a means to allow prescriptive rights to be asserted against an entire community without any burden whatsoever. The classes proposed by both the public water suppliers and Rebecca Willis are all-encompassing classes composed of *all* landowners who do not choose to opt-out. This leaves essentially no one to shoulder the financial burden of class representation. The public water suppliers attempt to remedy this situation by nominating the State of California as class representative – a choice that is fraught with numerous inadequacies fully briefed by the State in its response to the public water suppliers' Motion.

The Willis Response proposes that Rebecca Willis will represent that class. The proposal described in the Willis Response is troubling to the members of AGWA because the Willis Response is clear that the plaintiffs' class representative will be relying upon the skills and financial resources of the other landowner attorneys to adequately defend the case. The Willis Response acknowledges that Ms. Willis' attorneys are inexperienced in water law, but believes that this inexperience is, ". . . . ameliorated by the fact that there are several more experienced firms representing large overlying landowners . . . ." (Willis Response 6:17-18.) Beyond the obvious inequity of, in effect, placing the burden of representing the class on the shoulders of the other parties who are not class representatives, it is highly unlikely that any of the existing landowner parties will present defenses that will be adequate for the defense of dormant overlying claims.

A more fruitful approach that would ensure adequate resources for both classes to pursue the case would be to limit the members of the class to the vast numbers of small landowners in the Valley. By comparison to the number of small land holdings, there are likely a limited number of large landowners. By individually naming and serving these parties, class representatives of both dormant overlying right holders as well as presently-exercised right holders will be provided. While AGWA does not have precise landowner statistics available to it, based on information and belief we believe that a threshold of 20 acres of more would provide for a manageable number of potential class representatives sufficient to provide the resources to defend the different classes while still

providing significant benefits for the litigation by including well over 150,000 parcels that would not need to be individually brought in to the litigation.

C. Secondary Interests in the Land Should be Considered as Class Members.

Plaintiffs are typically free to chose which parties to name in water rights adjudications, but those not named will not be bound by any judgment entered. (*See Long* Valley, 25 Cal.3d at 347-48; *Wright*, 174 Cal.App.3d at 87-9.) However, where the action seeks to adjudicate and fix all rights amongst all users of the water system, all users should be deemed indispensable parties because their interests, rights, and duties will inevitably be affected by any decree entered. (Code of Civil Procedure § 389; *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 521 [106 P.2d 879].) Entities holding security interest in the subject lands and other secondary interests may be considered necessary parties since they possess interests that will undoubtedly be affected by the resolution of the action. (*Bowles v. Superior Court of City and County of San Francisco* (1955) 44 Cal.2d 574 [283 P.2d 704].) Indeed, a lien is a compensable property interest protected by the Fifth Amendment. (*Carson Redevelopment Agency v. Adam* (1982) 136 Cal.App.3d 608, 613 [186 Cal.Rptr. 615] (deed of trust); *People Ex Rel.Dept. of Transportation v. Redwood Baseline Ltd.* (1978) 84 Cal.App.3d 662, 670 [149 Cal.Rptr. 11].) (deed of trust); *Armstrong v. United States,* (1960) 364 U.S. 40, 44 [80 S.Ct. 1563] (materialman's lien).)

However, it is relevant to note that the procedure provided by Water Code, sections 2500 et seq., for comprehensive adjudication of surface water rights does not require individual notice to such secondary property interests, but nonetheless results in a final determination of all rights to the system. (*See* discussion below.) Presumably, the statute's requirement for publication of the notice of the adjudication is intended to notify any interested party not already notified by the requirements for notice by mail. (*See* Water Code § 2527.) Accordingly, it could be argued that while these secondary property interests should be made parties to the action, notice by publication akin to that required by the statutory adjudication procedure is sufficient. (*See* discussion below.)

D. Notice Must be Provided to all Members of the Defendants' Class

1. Individual Notice is Likely to be Required in Our Action

In order to satisfy the due process protections of any class (plaintiffs' or defendants'), meaningful notice must be provided to all members of the class. (*See City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454-55 [115 Cal. Rptr. 797].) Notice to the class members should be made as soon as possible after the court determines the class action appropriate. (*Id.*) The acceptable method for providing such notice is unclear under California precedent. Reviewing an action brought pursuant to Rule 23, the United States Supreme Court has held that class members must be provided the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable efforts. (*Eisen v. Calisle & Jacquelin* (1974) 417 U.S. 156, 173 [94 S.Ct. 2140]; *see also Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812 [105 S.Ct. 2965]; *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314 [70 S.Ct. 652].)

This rule is partly at odds with certain state opinions. (*See Cooper v. American Sav. & Loan Assn.* (1976) 55 Cal.App.3d 274, 285 [127 Cal.Rptr. 579].) *Cooper* explained that where the class is huge and the damages are minimal, service by publication may be adequate. (*Id.*) On the other hand, it also provided that "where members of a class have a substantial claim, individual notice is required because it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; or whether to 'opt out' and pursue their independent remedies." (*Id.*) California courts have further held that "the representative plaintiff in a California class action is not required to notify individually every readily ascertainable member of his class without regard to the feasibility of such notice; he need only provide meaningful notice in a form that 'should have a reasonable chance of reaching a substantial percentage of the class members.'" (*Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 861 [126 Cal.Rptr. 811] citing *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974 [124 Cal.Rptr. 376].)

More recently, the California Supreme Court acknowledged the tension between the federal

precedent and the more liberal standards set forth in these state opinions:

> "Thrifty contends that *Eisen,* [citation] and *Phillips Petroleum Co. v. Shutts* [citation] support the Court of Appeal's conclusion that the putative class members here are readily identifiable and therefore must be given notice by first class mail in order to satisfy constitutional due process concerns. Conversely, Linder relies on California authorities to argue that notice by publication may be constitutionally permissible whether or not the names and addresses of class members are readily ascertained."

(*Linder v. Thrifty Oil Co.* (2000) 23 Cal.App.4th 429, 444 [97 Cal.Rptr.2d 179].) Ultimately, the *Linder* Court held that it did not have to resolve the issue because the issue remained factually undeveloped regarding the necessity, feasibility and costs of any particular form of notice. (*Id.*) It therefore declined to speculate whether or not notice by first class mail may be constitutionally required. (*Id.*)

Although this issue remains outstanding, it is likely that constitutional due process protections indeed require individual notice where the names are readily ascertainable. The U.S. Supreme Court's reasoning does not appear to be limited to an interpretation of Rule 23, but extends to due process concerns in general. In *Eisen*, the court acknowledged an earlier opinion, which held that "publication notice [can] not satisfy due process where the names and addresses of the beneficiaries are known. In such cases, 'the reasons disappear for resort to means less likely than the mails to apprise them of [an action's] pendency.'" (*Eisen*, 417 U.S. at 175 citing *Mullane,* 339 U.S. 306, at 318.) The *Eisen* Court also dismissed an argument that the costs of individual notice should be taken into consideration in such circumstances: "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." (*Id.* at 176.)

2. Individual Notice is Required Under Statutory Stream Adjudications Pursuant to Water Code §§ 2500, Et Seq.

A relevant comparison concerning this issue of notice is the procedure adopted by Water Code, section 2527, as used to notice claimants of surface water rights in a statutory stream

adjudication brought by the State Water Resources Control Board (SWRCB) to determine and fix surface water rights pursuant to Water Code, section 2500, et. seq. Section 2527 provides as follows:

> "The notice shall be published at least once a week for four consecutive weeks, commencing within 20 days of the date of issuance of the notice, in one or more newspapers of general circulation published in each county in which any part of the stream system is situated, and, within the same 20-day period, the notice shall be mailed to all persons known to the board who own land that appears to be riparian to the stream system or who divert water from the stream system."

(Water Code § 2527.) The statute originally only required a system of publication, but was amended in 1976 to require individual mailing to known riparians.

The procedure required by section 2527 is relevant to our analysis because our defendants' class action seeks similar results through a similar procedure, albeit by the courts instead of the SWRCB. (*See City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 [99 Cal.Rptr.2d 294] (f.n. 13); *Long Valley,* 25 Cal.3d at 359; and *Wright*, 174 Cal.App.3d at 88.) Accordingly, the comparison suggests that individual notice to the owners of the subject parcels will be required. However, section 2527 does not require individual notice to secondary interests. Thus, should it be decided to create a separate class of secondary interests, the class proponents might rely on the procedure in section 2527 to argue that notice by publication is adequate for noticing the secondary interests. Still, this approach is susceptible to a counter argument based on the issues of due process and substantial property interest, as discussed above.

Ultimately, the court will decide and instruct what method and form of notice will be required. (*See Simons*, 151 Cal.App.3d at 839, 846.) The form of the notice must be approved by the court and be of neutral content, explaining the right of each member to opt out of the class. (*See Gainey v. Occidental Land Research* (1986) 186 Cal.App.3d 1051, 1057-58 [231 Cal.Rptr. 249].) The order issued in the Putah Creek adjudication required individual notice to all class member that could be determined by the county tax assessor's records as well as publication in local newspapers

of general circulation.

3. The Public Water Suppliers Must Provide An Accounting of Their Success in Notification to Class Members

On December 11, 2006, the public water suppliers posted a list of the names and addresses of those landowners who have been named and served in the case so far so that AGWA, as liaison counsel, could communicate with those parties. AGWA attempted to communicate via letter with these parties and 17% of those letters were returned as undeliverable. (*See* Declaration of Rachel Robledo attached hereto.) If this is the return rate on parties who have actually already been served, AGWA is concerned that the mass notification to the classes will fail to notify a significant percentage of the landowners.

III. Conclusion

For the reasons stated above, AGWA respectfully requests the Court to:

1. Find that the defendants' class proposed by the purveyors and the plaintiffs' class proposed by Rebecca Willis, are both overbroad.

a. Find that, at a minimum, there must be two classes of landowners: those who possess presently -exercised overlying rights and those who possess dormant overlying rights.

b. Find that the purposes of using the class action structure (whether a defendants' class or a plaintiffs' class), do not justify the inclusion of *all* landowners within the classes. Due process and the interests of justice will be better satisfied if the public water suppliers are required to individually name and serve all landowners who own greater than 20 acres of property.

2. Find that since the names and addresses of all landowners are readily ascertainable through public records, all class members must be individually notified of the class action, at least through first-class mail by the public water suppliers with the content of the notice approved in advance by the Court. The public water suppliers must supply the Court and the parties with a list of the names and addresses of those who are so notified, and must provide the Court and the parties

with statement of which of these notices are returned as undeliverable.

3. Find that any party can opt-out of the class within six months of class certification and adopt specific opt-out procedures.

Dated: February 27, 2007

HATCH & PARENT, A LAW CORPORATION

By: _____

MICHAEL T. FIFE
BRADLEY J. HERREMA
ATTORNEYS FOR AGWA

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 27, 2007, I served the foregoing document described as:

ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION'S OBJECTION TO MOTIONS FOR CLASS CERTIFICATION AND DECLARATION OF RACHEL ROBLEDO IN SUPPORT OF ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION'S OBJECTION TO MOTIONS FOR CLASS CERTIFICATION

on the interested parties in this action.

By posting it on the website at 4:00 p.m./a.m. on February 27, 2007.

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 27, 2007.

Rachel Robledo
TYPE OR PRINT NAME

Rachel Robledo
SIGNATURE