

“EXHIBIT H”

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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF LOS ANGELES—CENTRAL DISTRICT**

18 **ANTELOPE VALLEY**
19 **GROUNDWATER CASES**

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

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

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

Judicial Council Coordination No. 4408

CLASS ACTION

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

PUBLIC WATER SUPPLIERS'
STATEMENT OF SUPPORT FOR A
MODIFIED CLASS AS PROPOSED BY
REBECCA LEE WILLIS

Hearing:

Date: August 20, 2007
Time: 9:00 a.m.
Dept.: 1

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PUBLIC WATER SUPPLIERS' STATEMENT OF SUPPORT FOR A MODIFIED CLASS AS PROPOSED BY
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1 I. INTRODUCTION

2
3 The Public Water Suppliers¹ generally support the Willis Motion for Class Certification.
4 The class definition, however, should be modified to include private landowners presently
5 pumping and those who have done so within the last two years.² Additionally, the class definition
6 of "municipal water system" should be defined as a public entity, regulated water company, or a
7 mutual water company.

8
9 The Court should modify the class definition to eliminate any distinction between
10 landowners who pump and those who do not pump.³ All private landowners have predominate
11 common issues of law and fact: Determination of the basin yield, present and historical pumping
12 stresses, a physical solution to basin water shortage conditions and land subsidence. Moreover,
13 all landowners have the predominate common issue of whether public water suppliers acquired
14 prescriptive rights to basin water.

15
16 Although some parties might question whether a non-pumper and a pumper landowner
17 should be put in a single class, the class members' potential future conflict depends upon later
18 court findings. There is no conflict between landowners who pump and those who have not pumped
19 until there arises, if ever, a need to determine landowner "self-help" pumping during a court-
20 determined prescriptive period. In other words, until such time as the public water suppliers
21 establish a case for prescriptive rights, landowners will not have to show their "self-help"
22 pumping, if any.

23
24 Finally, as explained below, potential conflicts amongst class members do not prevent

25 ¹ The Public Water Suppliers include the cities of Lancaster and Palmdale, Palmdale Water District, Quartz Hill
26 Water District, Palm Ranch Irrigation District, Little Rock Creek Irrigation District, California Water Service
Company, Rosamond Community Service District and Los Angeles County Water Works District No. 40.

27 ² The Willis Motion's proposed class definition excludes these absent parties.

28 ³ The court is empowered to make class definition changes as needed to ensure that the class remains ascertainable.
(See *Woosley v. State of California* (1992) 3 Cal.4th 758, 766 [court subdivided into two classes the single class
proposed by plaintiff's complaint].)
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1 class certification of the class. If an actual conflict should arise, the court can create subclasses or
2 implement other case management techniques. (*Daniels v. Centennial Group* (1993) 16
3 Cal.App.4th 467, 471-472.)
4

5 II. THE COURT HAS BROAD POWERS TO MANAGE THE CLASS SHOULD AN
6 ACTUAL CONFLICT ARISE
7

8 In a leading California case on class certification, the California Supreme Court observed
9 that because a trial court could later decertify a class if actual conflicts arose, a court should not
10 consider potential conflicts before they had actually occurred. (*Richmond v. Dart Industries, Inc.*
11 (1981) 29 Cal.3d 462, 476-477.) Courts are to consider practical case management procedures
12 including bifurcation and sub classing to preserve class actions as the superior method of
13 adjudicating disputes involving numerous parties with common issues of law or fact. (*Rosack v.*
14 *Volvo of America Corp.* (1982) 131 Cal.App.3d 741, 762.)
15

16 Even if certain landowners who have pumped groundwater claim priority water rights as
17 against those landowner parties who have not pumped, their conflict is potential and not actual.
18 Such a conflict will not occur until after the court determines basin yield, historical and present
19 pumping, and whether public water suppliers established prescriptive rights. After these court
20 determinations, parties who have pumped groundwater will be in a position to claim priority
21 water rights over landowner parties who did not pump during prescriptive periods.
22

23 Finally, class notice and discovery would allow the court to subdivide the property owner
24 class, if necessary. Court-approved class notice to all absent class members will advise each
25 landowner of the class issues and any absent class member who opposes class certification may
26 opt out of the class to individually litigate its claim. (*Richmond v. Dart Industries*, 29 Cal.3d at
27 471.) Class members' responses to court-approved class discovery would allow the court and the
28 parties to divide landowners into pumper and non-pumper subclasses.

1 III. ALL OVERLYING LANDOWNERS HAVE COMMON INTERESTS

2
3 All overlying landowners in the Adjudication Area, whether they pump or not, have
4 predominate common interests and issues of law and fact. They all share predominate factual
5 interests and issues in determining the characteristics of the groundwater basin, the safe yield of
6 the groundwater basin and the general rights to the yield of the groundwater basin including
7 prescriptive rights held by public water suppliers. (Scalmanini Decl., ¶ 25.) As a matter of law,
8 they all have predominate legal issues in that each landowner has a correlative overlying right to
9 pump from the basin. Therefore, all landowners have certain predominate common factual and
10 legal issues and interests.

11
12 A. Landowners Within the Adjudication Area Have a Predominate Common Issue as
13 to the Extent and Reliability of the Ground Water Yield

14 All landowners, whether they pump or not, should participate as class members because
15 they share a common ground water supply. (Scalmanini Decl., ¶ 6.) Although, the aquifer
16 system is not uniform throughout the entire Adjudication Area, the aquifer system underlies the
17 entire Adjudication Area and represents a common water supply for all overlying owners.
18 (Scalmanini Decl., ¶ 6.)

19 As shown by Exhibits C through E, inclusive, to the attached Declaration of Joseph C.
20 Scalmanini, while there are localized circumstances that contribute to varying groundwater
21 conditions, such as water levels, water quality and well yields, the groundwater basin below the
22 Adjudication Area represents a common water supply to all overlying landowners. (Scalmanini
23 Decl., ¶ 10.)

24
25 B. Landowners With the Adjudication Area Have a Common Issue Concerning
26 the Basin's Limited Basin Yield

27 All members of the proposed modified class are limited in their use of groundwater by a
28 limited basin yield. This limited yield is the amount of recharge that occurs naturally from

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1 surface water runoff into the Antelope Valley. Various sources have estimated this number, prior
2 to 1972 when the implementation of supplemental water began. (Scalmanini Decl., ¶ 11.) These
3 sources estimate that the average natural yield for the Antelope Valley is between 40,000 acre
4 feet annually ("afy") and 75,000 afy. (Scalmanini Decl., ¶ 11; Exhibit F.) Furthermore, historical
5 pumping records indicate that the rate of groundwater pumping has been much larger than the rate
6 of estimated natural yield. (Scalmanini Decl., ¶ 12.) Attached as Exhibit G to the Declaration of
7 Joseph C. Scalmanini, is a graph which depicts historical pumping from the early 1950's to 2006.
8 The graph shows that the estimated historical groundwater pumping in the Adjudication Area has
9 ranged from a high of almost 360,000 afy to a low of 80,000 afy. (Scalmanini Decl., ¶ 12;
10 Exhibit G.) Finally, the graph indicates that on average during the last ten years, total
11 groundwater pumping from the Adjudication Area is estimated to be approximately 135,000 afy.
12 (Scalmanini Decl., ¶ 12.)

13 All members of the proposed modified class, share their predominate problem of limited
14 groundwater supply when compared to the historical and current pumping in the Adjudication
15 Area. (Scalmanini Decl., ¶ 13.) The preceding paragraph shows that groundwater pumping
16 during the last 60 years has been greater than the overall estimates of natural water supply that
17 contribute to the groundwater recharge in the Adjudication Area. (Scalmanini Decl., ¶ 13.)

18 19 C. Subsidence

20 All members of the proposed class share in the effects of over pumping the groundwater
21 basin, such as subsidence. As a result of the disparity between groundwater recharge and
22 pumping, a significant amount of groundwater has been removed from storage in the aquifer
23 system. Land subsidence in the Adjudication Area has been measured as much as six feet in
24 some areas. The causes and contributions to subsidence are complex; however, they are known to
25 extend beyond the finite extent of the fine-grained materials that ultimately physically
26 consolidate, resulting in subsidence of the overlying land surface. As all overlying landowners
27 can the common groundwater basin supply, they similarly share, to varying degrees, in the effects
28 that derive from the limited groundwater supply when compared to the amount of pumping that

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1 has occurred, and continues through the present. (Scalmanini Decl., ¶ 14.)

2
3 D. Reliance on Imported Water

4 Due to estimated yield and the historical pumping records, coupled with the future
5 projections of water demands in the Adjudication Area, all members of the proposed modified
6 class will have to rely on imported water to meet pumping demands. As shown by Exhibit H
7 attached to the Declaration of Joseph C. Scalmanini, estimates of total water requirements over
8 the next 20 years in the Adjudication Area are expected to reach or exceed the highest historical
9 water demand in the Adjudication Area, which ranged from 300,000 afy to 350,000 afy.
10 (Scalmanini Decl., ¶ 15; Exhibit H.) These estimates show that water demand substantially
11 exceeds all historical runoff estimates. It is clear that all members of the proposed modified class
12 will have to rely on imported water to meet their water needs.

13
14 IV. THERE IS NO REASONABLE METHOD FOR DISTINGUISHING CLASS
15 MEMBERS WHO DO NOT PUMP FROM THOSE WHO DO PUMP UNTIL THE
16 COURT APPROVES CLASS NOTICE AND/OR DISCOVERY TO ALL PROPERTY
17 OWNERS

18
19 Putative class representative Willis' motion fails to establish or otherwise explain how she
20 would identify landowners who do not pump from those who presently pump or pumped within
21 the last two years. California courts have declared that a showing of class ascertainability is a
22 fundamental prerequisite to class certification. (E.g., *American Suzuki Motor Corp. v. Superior*
23 *Court* (1995) 37 Cal.App.4th 1291, 1294.) Class ascertainability generally requires (1) that the
24 class members be clearly identifiable; and (2) the class members be located and identified of the
25 class action through a reasonable expenditure of time and money. (*Reyes v. Board of Supervisors*
26 (1987) 196 Cal.App.3d 1263, 1274-1275.)

27 An important aspect of ascertainability is a showing that there will be a reasonably
28 available means of identifying class members at the appropriate time. (*Reyes v. Board of*

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1 *Supervisors*, 196 Cal.App.3d at 1271.) Class members need not be presently identified for the
2 class to be certified, as long as there is a reasonable means of identifying the class members later.
3 (See, e.g., *Daar v. Yellow Cab* (1967) 67 Cal.2d 695, 706 [class members may come forward after
4 class certification to prove their damages claims].)

5
6 As shown below, there is no reasonable method to separate landowners who pump from
7 those who do not pump without the landowner itself providing that information to the Court and
8 the parties. This information can be provided by class members after the court certifies the class
9 in responses to court-approved class action notice and their responses to court-approved
10 discovery asking each class member to state whether it presently pumps or has pumped
11 groundwater. Although different methods have been suggested to determine whether pumping is
12 occurring on property, all of the proposed methods have been reviewed and it has been
13 determined that none is reasonably sufficient or accurate to identify everyone who pumps and
14 those who do not. (Scalmanini Decl., ¶ 17.)

15
16 Three sources of public records were consulted to attempt to determine pumpers and non-
17 pumpers: State Water Resources Control Board ("SWRCB") filings pursuant to Water Code
18 Section 5001; Well logs filed with the Department of Water Resources ("DWR"); and Los
19 Angeles County well drilling permits. Each of the above sources do not provide sufficient
20 information to adequately identify all those overlying landowners that are currently pumping.

21
22 A. State Water Resources Control Board Filing Requirements

23 Water Code Section 5001 requires landowners in certain counties, that pump 25 or
24 more to file an annual report with the SWRCB. Los Angeles County is one of the specified
25 reporting counties but Kern County does not have a similar reporting requirement. (Scalmanini
26 Decl., ¶ 18.) While a majority of the Adjudication Area lies in Los Angeles County, there
27 remains a large portion located in Kern County. Therefore, the SWRCB records would be limited
28 to Los Angeles County.

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1 After a review of the Los Angeles County records there were approximately potential 416
2 wells identified in the Adjudication Area. (Scalmanini Decl., ¶ 18.) However, thousands of wells
3 have been identified from the DWR records. (Scalmanini Decl. ¶ 18) As the SWRCB filing
4 requirement is self-regulated, meaning that it is not enforced by the SWRCB, and given the
5 discrepancies in reports from the number of wells identified by DWR, the SWRCB filings are an
6 incomplete and inadequate way to reliably define all pumpers and segregate them from non-
7 pumpers. (Scalmanini Decl., ¶ 18.)

8
9 **B. Department of Water Resources Well Logs**

10 The Department of Water Resources logs describe well drilling and construction. Well
11 log information can include the well's location, its owner, the date of construction, a description
12 of materials encountered in the subsurface, and a description of the materials of construction and
13 their depth placement in the well. (Scalmanini Decl., ¶ 19.) Well logs do not provide any record
14 of whether permanent pumping equipment was installed in a well, or what size pumping
15 equipment might have been installed. (Scalmanini Decl., ¶ 19.) More importantly, well logs
16 provide no ongoing record, beyond the original date of construction, about the use of a well for
17 water supply. (Scalmanini Decl., ¶ 19.) Therefore, the DWR well logs are not an accurate source
18 of information to determine all pumpers in the Adjudication area. (Scalmanini Decl., ¶ 20.)

19
20 **C. County Well Permit Records**

21 Both Los Angeles County and Kern County through their respective Departments of
22 Health and Safety require well permit applications. The primary focus of county permitting has
23 been to ensure that wells are constructed with adequate sanitary seals to prevent the entry of
24 contaminants into the well at the ground surface; and that focus has expanded in some areas as a
25 function of local physical conditions. (Scalmanini Decl., ¶ 21.) Ultimately, however, local
26 county permitting involves well construction only and does not extend to follow-up permitting or
27 recording whether permanent pumping equipment was installed in a well, or what size pumping
28 equipment might have been installed. (Scalmanini Decl., ¶ 21.) More importantly, county well

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1 drilling permits provide no ongoing record, after initial construction and sealing, about the use of
2 a well for water supply. (Scalmanini Decl., ¶ 21.) Thus, county well drilling permits cannot be
3 used to accurately identify active pumpers throughout the area of adjudication, and to definitively
4 segregate them from non-pumpers. (Scalmanini Decl., ¶ 21.)

5
6 V. CONCLUSION


7 The court has the power to certify a class of all landowners for the specified predominate
8 common issues of law and fact above. As shown above, the putative class representative Willis
9 and her legal counsel can adequately represent a class of landowners regardless of whether absent
10 class members presently pump or have pumped within the last two years. There is no showing by
11 moving party Willis or by any other party to the contrary.

12 The Court should certify a class of all remaining private property owners as requested and
13 explained herein. Without such class certification, there will be significant cost and delay in
14 effectuating service of process. After class certification as requested, the Court can approve class
15 notice and discovery for absent class members to allow the court to later subdivide the class, if
16 necessary. For these reasons, the Public Water Suppliers respectfully request that the Court grant
17 putative class member Willis' motion for class certification as modified by the requests herein to
18 further include private property owners presently pumping and those who have done so within the
19 last two years.

20 Dated: August 9, 2007

BEST BEST & KRIEGER LLP

21
22
23 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 August 9, 2007, I served the within document(s):

PUBLIC WATER SUPPLIERS' STATEMENT OF SUPPORT FOR A MODIFIED CLASS AS PROPOSED BY REBECCA LEE WILLIS

- 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 August 9, 2007, at Irvine, California.


Kerry V. Keefe

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