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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

**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 325201;

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, Case Nos.
RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

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

[Code Civ. Proc., § 382]

**PUBLIC WATER SUPPLIERS' NOTICE
OF MOTION AND MOTION FOR CLASS
CERTIFICATION; DECLARATIONS OF
MARK WILDERMUTH AND JEFFREY V.
DUNN**

Hearing:

Date: March 12, 2007

Time: 1:30 p.m.

Dept.: 1

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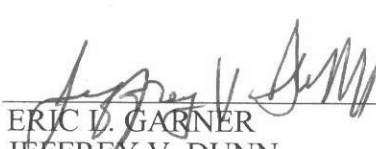
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1 This Motion is made pursuant to Code of Civil Procedure Section 382 and applicable
2 common law. This Motion is based upon this Notice of Motion, on the declarations of Mark J.
3 Wildermuth and Jeffrey V. Dunn, the attached Memorandum of Points and Authorities and any
4 other oral and documentary evidence presented at the hearing on the Motion.

5
6 Dated: January 10, 2007

BEST BEST & KRIEGER LLP

8
9 By 
10 ERIC D. GARNER
11 JEFFREY V. DUNN
12 STEFANIE D. HEDLUND
13 Attorneys for Cross-Complainants
14 ROSAMOND COMMUNITY SERVICES
15 DISTRICT and LOS ANGELES COUNTY
16 WATERWORKS DISTRICT NO. 40
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1 I. INTRODUCTION

2
3 California Water Service Company, City of Lancaster, City of Palmdale, County of Los
4 Angeles Waterworks District No. 40, Palmdale Water District, Rosamond Community Services
5 District and Quartz Hill Water District (collectively, the "Public Water Suppliers") request that
6 the court certify a class of property owners within the adjudication area of the Antelope Valley
7 Groundwater Basin. As established by the court, the adjudication area boundaries encompass an
8 area of approximately 1,000 square miles which include over 65,000 property parcels. Most
9 parcels are less than 10 acres and are believed to individually pump only a relatively small
10 amount of groundwater, if at all. The individual litigation cost for each parcel would be unduly
11 burdensome given both the parcel size and the minimal nature of its groundwater production.
12 Moreover, the litigation expense and delay for all parties, for the protection of the groundwater
13 resource, and the court is prohibitive without a property owner class for these many parcels.

14 As the court has previously observed, Code of Civil Procedure section 382¹ provides for a
15 class action when there are so many parties that they become "impracticable" for each one to
16 individually appear: "[W]hen the parties are numerous, and it is impracticable to bring them all
17 before the court, one or more may sue *or defend for the benefit of all*." (Emphasis added.) In this
18 case, there is no reasonable dispute that there are so many parties that it is impracticable to have
19 each one appear before the court. For this reason, the Public Water Suppliers request that the
20 court certify the following class: All owners of land within the adjudication area that is not
21 within the service area of a public entity, public utility, or mutual water company.

22
23 II. CALIFORNIA HAS A PUBLIC POLICY THAT ENCOURAGES USE OF
24 THE CLASS ACTION DEVICE EVEN IF CLASS MEMBERS HAVE
25 INDIVIDUAL CLAIMS

26
27 Over 150 years ago, the California Supreme Court applied Civil Code section 382's

28 ¹ All section references are to the Code of Civil Procedure unless otherwise stated.

predecessor and recognized an ongoing need for pragmatism and flexibility in class action use:

"[I]t is the duty of the Court to adopts its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases, which from the progress daily made making in the affairs of man, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy." (*Von Schmidt, et al. v. Huntington* (1850) 1 Cal. 55, 67.)

Since the *Von Schmidt* decision, the California Supreme Court has adapted and modified California class action law to meet the changing needs and issues confronting society and the courts.² To facilitate class actions there are now statewide rules class action rules; and suggested class action procedures in the California Judicial Council's *Deskbook of Complex Civil Litigation* (Mathew Bender). In its most recent decision on California class-action law, the California Supreme Court reaffirmed the importance of the class action device by stating "[t]his state has a public policy which encourages use of the class action device." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.)

The public policy favoring class actions is reflected in numerous California Supreme Court decisions holding that individual class member claims cannot bar class certification:

"We long ago recognized 'that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.' Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' Individual issues do not render class certification inappropriate so long as such issues may effectively be managed."

...

"It may be, of course, that the trial court will determine in subsequent proceedings that some of the matters bearing on the right to recovery require separate proof by each class member. If this should occur, the applicable rule . . . is that the maintenance of the suit as a class action is not precluded so long as the issues which

² Unlike most other states, California did **not** adopt Federal Rule of Civil Procedure 23. Instead, California's class action law has its origins in early American equity jurisprudence which, in turn, came from England common law. (See Scott D. Miller, *Certification of Defendant Classes Under Rules 23(b) (2)*, 84 Colum. L. Rev. 1371 (1984).

1 may be jointly tried, when compared to those requiring separate
2 adjudication, justify the maintenance of the suit as a class action."

3 ...

4 "Courts seeking to preserve efficiency and other benefits of class
5 actions routinely fashion methods to manage individual questions.
6 *For decades 'this court has urged trial courts to be procedurally
7 innovative in managing class actions, and 'the trial court has an
8 obligation to consider the use of . . . innovative procedural tools
9 proposed by a party to certify a manageable class.'*"

10 ...

11 "If the factual underlying class members' claims differ, or if class
12 members disagree as to the proper theory of liability, the trial judge,
13 through use of techniques like sub-classing, or [other judicial]
14 intervention, may incorporate the class differences into the litigative
15 process, and give all class members their due in deciding what is
16 the proper outcome of the litigation."

17 (*Sav-On, supra*, 34 Cal.4th at pp. 334-340 [citations omitted and
18 emphasis added].)

19 That property owners might have individual claims is no bar to their class certification,
20 and as shown below, courts have used the defendant property owner class-action device in water
21 rights cases.

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III. BOTH FEDERAL AND CALIFORNIA COURTS HAVE UTILIZED THE
CLASS ACTION DEVICE TO FACILITATE THE RESOLUTION OF
WATER RIGHTS CASES

The use of the class action device is not new to water rights disputes. There are at least
three California state court water rights cases with a property owner class.³ In *Orange County
Water Dist. v. City of Riverside* (1959) 173 Cal.App.2d 137, 168, the Court of Appeal recognized
the use of a property-owner class to adjudicate water rights to the Santa Ana River: "We do not
see why the owners of such overlying rights may not properly be treated as a class possessing

³ Cross-Complainants' legal counsel, Best Best & Kreiger, represented parties in each of these three cases. Best
Best & Krieger LLP was a defendant class counsel in the Putah Creek Adjudication.

1 such common interests as to justify the maintenance of a single action for their protection.”

2
3 In *City of Chino v. Superior Court* (1967) 255 Cal.App.2d 747, the Court of Appeal
4 opined that a property-owner class of overlying and riparian property owners could be used to
5 acquire jurisdiction over a large number of parties although appropriators and prescriptive rights
6 claimants could not be class members: “It is stated that there may be as many as 3,000 claimants
7 to the ownership of water within the boundaries of OCWD. The majority of these may well be
8 owners or overlying or riparian lands whose water rights are based solely on ownership of such
9 lands. Nothing that we have said precludes their being represented as a class or classes.” (255
10 Cal.App.2d at p. 763.)

11
12 In the *Putah Creek Adjudication*, Sacramento County Superior Court Case No. 2565, the
13 Superior Court granted plaintiffs’ motion for certification of a defendant class of riparian property
14 owners. A copy of the court’s order granting plaintiffs’ certification order is attached as Exhibit
15 A to the Declaration of Jeffrey V. Dunn.

16
17 Additionally, there is a reported federal case adjudicating California water rights with a
18 defendant class. In *United States v. Truckee-Carson Irrigation District* (D. Nev. 1975) 71 F.R.D.
19 10, 16, the District Court addressed the issue of a defendant class action in a water rights dispute
20 between the United States, the Pyramid Lake Paiute Tribe and defendant water rights holders.
21 The District Court noted that the defendant class members derived their water rights from a
22 common source of supply and that the diversions sought by the plaintiff United States would
23 diminish the water rights of all members of the defendant class: “For that reason, the Court found
24 that the “interests of each member of the class are identical in both law and fact.”

25
26 Thus, the issue is not whether a defendant class can be used to adjudicate water rights, but
27 whether the defendant class is appropriate here. As explained, the proposed class members have
28 predominate common questions of law and fact. They each allege an overlying right, derive their

1 water from a common groundwater supply, and because of diversions by appropriators faced
2 diminishment of the native water supply. Thus, the proposed landowner class meets the
3 requirements of California class-certification requirements explained below.

4
5 IV. DEFENDANT CLASS ACTIONS ARE DIFFERENT FROM PLAINTIFF
6 CLASS ACTIONS IN THAT THE DEFENDANT CLASS REPRESENTATIVE
7 IS SELECTED BY THE COURT OFTEN OVER THE OBJECTION OF THE
8 DEFENDANT CLASS REPRESENTATIVE

9
10 Although the requirements for defendant class certification are the same as those for the
11 more common plaintiffs' classes, defendant class actions are unique in that the defendant class
12 representative and its legal counsel are selected by the court usually over the objection of the
13 defendant class representative:

14 "Commentators have frequently criticized the potential for
15 inadequate representation of defendant classes. Because the named
16 defendant generally does not seek his representative status and
17 often vehemently opposes it, a court may fear that an unwilling
18 representative will necessarily be a poor one. [Citation omitted].
Related to this concern is the fear that the plaintiff will exercise his
power of selection to appoint a weak, ineffective opponent as class
representative. 'It is a strange situation where one side picks out the
generals for the enemy's army.'" [Citation omitted.]

19 "Upon closer examination, however, these concerns appear less
20 justified than some others. Ironically, the best defendant class
21 representative may well be the one who most vigorously and
22 persuasively opposes certification since he is the one most likely to
23 guarantee an adversary presentation of the issues. [Citation
24 omitted.] In fact, a court should be suspicious of a willing
25 defendant class representative because of the likelihood of collusion
with the plaintiff." Thus, the focus upon the defendant's desire to
represent his class is misplaced. The real concern with an unwilling
class representative should be his ability to carry the inevitable
added expense of class defense and the fairness of placing that
burden upon him."

26 (*In re the Gap Securities Litigation* (1978) 79 F.R.D. 283, 290 [citations omitted].)

27
28 One example of the Superior Court selecting existing defendant parties to serve as the

defendant class representatives and their legal counsel was the *Putah Creek Adjudication*, Sacramento County Superior Court Case No. 2565. In that case, the Superior Court granted plaintiffs' motion for certification of a defendant class of overlying property owners. Despite the objections by certain defendants, the Superior Court nonetheless selected those defendants and their legal counsel to serve as defendant class representative and legal counsel, respectively. (See Ex. A to the Declaration of Jeffrey V. Dunn.)

V. THE PROPOSED CLASS MEETS CALIFORNIA'S CLASS CERTIFICATION REQUIREMENTS

In *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, the California Supreme Court stated the two class certification requirements: (1) an ascertainable class; and (2) a well-defined community of interest among class members. (*Sav-On, supra*, at p. 326, citing *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) As shown below, the proposed class members (1) are all located within a court-defined area; (2) allege the same correlative, overlying right to the reasonable and beneficial use of a common supply of groundwater; and (3) need a physical solution to overdraft conditions which solution includes groundwater management and supplemental water supplies. Thus, class certification of landowner parties is both proper and necessary.

A. An Ascertainable Class

To determine whether the proposed class is ascertainable, the court examines the proposed class definition, size of the class, and the means for identifying class members. (*Sav-On, supra*, at p. 327, citing *Lockheed, supra*, 29 Cal.4th at pp. 1104-1107.) In this case, the proposed class is defined as: All owners of land (1) within the adjudication area, and (2) that do not receive water from a public entity, public utility or mutual water company.

The class is ascertainable because class members can be identified through public land

records. (See *Richmond v. Dart Industries, Inc.* (1987) 29 Cal.3d 462, 478 [California Supreme Court found an ascertainable class of property owners because there were public records showing land ownership; and that joinder of all of the potential plaintiff property owners was impracticable because there were over 2,600 lots.]) In the present case, there are approximately 65,000 parcels and they can be identified from public records. Moreover, there is no reasonable dispute that it would be impracticable to individually name and serve each parcel owner.

B. A Well-Defined Community of Interests

In *Sav-On*, the California Supreme Court explained "'the community of interest' requirement embodies three factors: (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 the class. (*Sav-On, supra*, at p. 326, citing *Lockheed, supra*, 29 Cal.4th at p. 1104.) The proposed class satisfies each of these requirements.

1. The Proposed Class Has Predominant Questions of Law and Fact

A well defined community of interests exists when there are predominant questions of law or fact, and that class representation with claims or defenses are typical of the class and that class representatives will adequately represent the class. (*Linder v. Thrifty* (2000) 23 Cal.4th 429, 435.)

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . ." (*Sav-On, supra*, at p.326, citing *Linder v. Thrifty Oil* (2000) 23 Cal.4th 429, 435-436.) "In determining whether there is substantial evidence to support a trial court's certification order, [reviewing courts] consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On, supra*, at p. 327 citing *Lockheed, supra*, at p. 1108.) "Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the . . . class to resolve

1 the question.'" (*Sav-On, supra*, at p. 327 quoting *Richmond v. Dart Industries* (1981) 29 Cal.3d
2 462, 478.)

3 The Public Water Suppliers represent over 100,000 residents and businesses all of whom
4 depend upon the Public Water Suppliers' rights to Antelope Valley Groundwater Basin for their
5 secure supply of water in an arid area. In addition to these homes and businesses, there are
6 numerous land parcels in the area encompassed by the court's established adjudication
7 boundaries. (See Declaration of Mark Wildermuth, ¶¶ 1- 8.)

8 Mr. Mark Wildermuth is one of California's most respected groundwater engineers. He
9 was asked by certain parties' experts' "Technical Committee" to determine the extent of
10 groundwater pumping within the adjudication area. Through the use of digital mapping of land
11 parcels in both Los Angeles and Kern Counties, he was able to identify those parcels within the
12 adjudication area but outside the water service areas of the Public Water Suppliers. As a result of
13 his work and analysis, Mr. Wildermuth estimates that there are approximately 65,000 land parcels
14 within the adjudication area that do not receive water service from a public entity, public utility,
15 or mutual water company. (Wildermuth Decl., ¶¶ 7-8.)

16 All class members own land parcels within the adjudication area. They each have the
17 right to allege an identical overlying right to take native groundwater for their reasonable and
18 beneficial use. As they each may seek a common right, they have predominantly common issues
19 of fact and law. Additionally, each class member will have common defenses against competing
20 water rights including a claim by the United States that it has a federal reserved right.

21 As explained above, the possibility that class members might have different pumping
22 histories is no reason not to certify the class: "In any event, 'a class action is not inappropriate
23 simply because each member of the class may at some point be required to make an individual
24 showing as to his or eligibility for recovery or as to the amount of damages.'" (*Sav-On, supra*, at
25 p. 332 quoting *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266.)
26 "We long ago recognized 'that each class member might be required ultimately to justify an
27 individual claim does not necessarily preclude maintenance of a class action.'" (*Sav-On, supra*, at
28 p. 332-333 quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

1 Should the interest of the class become contradictory at a later point, the court has the
2 power to decertify the class. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 477.)
3 Moreover, each class member has the right to opt out of the class, or the court may decide at a
4 later date based upon information unknown at this time whether there would be a severe
5 irreconcilable conflict and the class should be decertified. (*Sav-On, supra*, at p. 335.)
6

7 2. The State of California Is a Land Owner That Has Claims and Defenses Common
8 to the Class.
9

10 A class needs only one class representative with some claims and defenses that are typical
11 of the class. (*Richmond, supra*, 29 Cal.3d at p. 470.) As shown below, the claims and defenses
12 of landowner parties are similar and one of existing landowner parties is the State of California
13 who can adequately and vigorously represent the class.

14 Like the State, each class member is a landowner within the adjudication area. The allege
15 an overlying right to pump groundwater for the reasonable and beneficial use on their property.
16 (Cal. Const. art X, sec. 2.) As overlying landowners, the State and the class members each have
17 an identical correlative right to the native groundwater supply. Additionally, class members and
18 the State have the same interest in determining the safe yield of the adjudication area, as well as a
19 physical solution to the overdraft conditions.

20 The State and class members will have similar defenses. For example, class members
21 have a common interest in defending against competing claims that would reduce their correlative
22 right to the native yield including a common defense to Federal Reserve and prescriptive rights
23 claims.

24 It is important to note that the State has already demonstrated an active role and interest
25 the adjudication as the State actively participated in the court hearing on the adjudication area
26 determination. Finally, proposed class members and the State have a common interest in the
27 court determination and enforcement of a groundwater management plan as a physical solution to
28 overdraft conditions.

1 3. No Landowner Party Has the Depth of Experience or Expertise As Does the State
2 of California's Attorneys in Both Water Rights and Class Action Litigation

3
4 The State of California has the necessary legal resources and litigation experience to
5 adequately represent the landowner class. The State has attorneys experienced in both water
6 rights disputes and class action litigation. The Attorney General for the State of California is
7 authorized by statute to represent the public at large in various class action cases.

8 Additionally, the State of California has a vast number of experienced groundwater
9 engineers and other technical experts to represent the public as a class representative and class
10 counsel. For example, in the recent adjudication area hearing, the State provided extensive
11 testimony by Bob Pierotti, Supervising Engineering Geologist for the California Department of
12 Water Resources, Southern District.

13 Finally, the State has extensive experience in litigating land use and environmental issues
14 including water rights; and has significant experience in many types of class action litigation. No
15 other landowner party's legal counsel has the experience and expertise as does the State in both
16 water rights and class action cases.

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VI. CONCLUSION

For the reasons above, the Public Water Suppliers respectfully request that the Court grant their motion to certify a class in this proceeding.

Dated: January 10, 2007

BEST BEST & KRIEGER LLP

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 January 10, 2007, I served the within document(s):

PUBLIC WATER SUPPLIERS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; DECLARATIONS OF MARK WILDERMUTH AND JEFFREY V. DUNN



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 January 10, 2007, at Irvine, California.


Kerry V. Keefe