

1 RICHARDS, WATSON & GERSHON
A Professional Corporation
2 JAMES L. MARKMAN (43536) (jmarkman@rwglaw.com)
STEVEN R. ORR (136615) (sorr@rwglaw.com)
3 ERIN L. POWERS (245148) (epowers@rwglaw.com)
355 South Grand Avenue, 40th Floor
4 Los Angeles, CA 90071-3101
Telephone: (213) 626-8484
5 Facsimile: (213) 626-0078

6 Attorneys for Defendant, Cross-Complainant,
and Cross-Defendant CITY OF PALMDALE
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

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11 Coordination Proceeding
Special Title (Rule 1550(b)),

12 **ANTELOPE VALLEY**
13 **GROUNDWATER CASES**

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Judicial Council Coordination Proceeding
No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to the Hon. Jack Komar
Dept: D17

**COMBINED REPLY BRIEF IN
SUPPORT OF PUBLIC WATER
SUPPLIERS' DEMURRER TO
SECOND AND THIRD CAUSES OF
ACTION AND MOTION TO STRIKE**

Date: May 21, 2007
Time: 10:00 a.m.
Dept: 1

Defendants City of Palmdale, City of Lancaster, Los Angeles County Waterworks
District No. 40, Palmdale Water District, Quartz Hill Water District, Littlerock Creek
Irrigation District, Palm Ranch Irrigation District, Rosamond Community Services
District, and California Water Service Company, successor in interest to Antelope Valley
Water Company¹ (collectively "Public Water Suppliers") respectfully submit this

¹ California Water Service Company joins in this demurrer to the extent plaintiff
alleges California Water Service Company is a public entity. However, California Water
Service Company is an investor-owned public utility regulated by the California Public
(...continued)

1 combined reply brief in further support of their demurrer to the second and third causes
2 of action for inverse condemnation set forth in the complaint of plaintiff Rebecca Lee
3 Willis and their concurrent motion to strike.

4
5 **I. OVERVIEW**

6 Stymied by the cases directly on point, Rebecca Lee Willis attempts to shift the
7 focus of her claims in opposition to the Public Water Suppliers’ demurrer and motion to
8 strike. She concedes that any claim for inverse condemnation would be time-barred were
9 the Public Water Suppliers actually to have obtained rights against her by prescription
10 (Opp. 5:8-11).² She now contends that she may nevertheless recover damages for inverse
11 condemnation if the Public Water Suppliers sought, but did not obtain, prescriptive rights
12 against her.

13 Willis’ arguments in opposition are fatally flawed. The Public Water Suppliers’
14 demurrer to the second and third causes of action should be sustained without leave to
15 amend for the following reasons:

16 First, assuming Willis’ “no prescription” scenario *arguendo*, she has not lost any
17 of her priority overlying groundwater rights because the Public Water Suppliers would
18 have failed to obtain any rights by prescription that could limit her groundwater
19 production.

20 Second, Willis does not allege that she has attempted to produce or actually
21 produced any groundwater from her property. Willis, accordingly, cannot claim that the
22 Public Water Suppliers have somehow physically interfered with her *usufructuary* right
23 to produce groundwater on her property.

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25 _____
26 (...continued)
Utilities Commission.

27 ² References to “Opp. __: __” are to pages and lines of Willis’ memorandum of
28 points and authorities submitted in opposition to the instant demurrer.

1 Third, as explained in the opposition, Willis’ “Takings Claims are predicated on
2 the fact that the [Public Water] Suppliers have been depleting the Basin’s groundwater
3 without a legal ownership right to that water, *i.e.* based on a false claim of right.” (Opp.
4 5:18-20). Neither Willis nor the Public Water Suppliers own the groundwater in the
5 Basin. *People v. Shirokow* (1980) 26 Cal.3d 301, 307. Groundwater rights in California
6 are “usufructuary only.” *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th
7 1224, 1237 n.7 (“*Mojave*”).

8 Fourth, since her state and federal takings claims are barred as a matter of law, and
9 she is acting in her own private interest, Willis’ prayer for attorney’s fees under 42
10 U.S.C. § 1988 and Code of Civil Procedure (“CCP”) § 1021.5 should be stricken.

11 For these reasons, the Public Water Suppliers’ demurrer to the second and third
12 causes of action should be sustained without leave to amend, and the accompanying
13 motion to strike should be granted.

14
15 **II. ASSUMING NO PRESCRIPTION, WILLIS’ OVERLYING RIGHTS REMAIN**
16 **PARAMOUNT AND SHE CANNOT HAVE SUFFERED DAMAGES**
17 **COMPENSABLE THROUGH INVERSE CONDEMNATION**

18 Now conceding that her claims for inverse condemnation would be time-barred *if*
19 the Public Water Suppliers had successfully obtained groundwater production rights by
20 prescription, Willis seeks money damages from the Public Water Suppliers to the extent
21 that any of their claims for prescriptive rights are unsuccessful. Such a claim is without
22 support in law, and should be rejected.

23 Overlying rights are special rights to use groundwater under the owner’s property.
24 *Mojave*, 23 Cal.4th at 1237 n.7, *citing California Water Service Co. v. Edward*
25 *Sidebotham & Son* (1964) 224 Cal.App.2d 715, 725. “One with overlying rights has
26 rights superior to that of other persons who lack legal priority ...” *Id.* at 1240. Such
27 rights may be lost by prescription. *City of Pasadena v. City of Alhambra* (1949) 33
28 Cal.2d 908, 927.

1 Willis’ opposition fails to appreciate the priority position of her groundwater
2 rights in relation to those of the Public Water Suppliers. To the extent the Public Water
3 Suppliers act as appropriators, Willis’ groundwater rights are superior. While overlying
4 rights may be lost by prescription, “... if no prescriptive rights had been acquired, the
5 rights of the overlying owners would be paramount ...” *Id.*

6 As a result, Willis’ theory fails as a matter of law. If the Public Water Suppliers
7 sought to obtain prescriptive rights against Willis, but failed in so doing, Willis’
8 groundwater rights retain their priority position in relation to appropriators.³
9 Accordingly, Willis has suffered no diminution in the value of her property.
10

11 **III. WILLIS DOES NOT ALLEGE THAT THERE HAS BEEN ANY PHYSICAL**
12 **INTERFERENCE WITH HER GROUNDWATER PRODUCTION**

13 Willis does not allege that she has attempted to produce any groundwater from her
14 property. Instead, she merely alleges that she “... owns approximately 10 acres of
15 property ... within in the Basin, on which she intends to build a home and landscape
16 nursery.” (Complaint, ¶ 5). She further alleges that her “... property overlies percolating
17 groundwater, the precise extent of which is unknown.” (*Id.*).

18 As a result, Willis does not allege any physical interference by the Pubic Water
19 Producers with her right to produce groundwater. Indeed, Willis (or her unidentified
20 predecessor in interest) could have exercised self-help to interrupt the running of the
21 prescriptive period (*Mojave*, 24 Cal.4th at 1241) or obtained an injunction against the
22 Public Water Suppliers’ production of non-surplus water (*Pasadena*, 33 Cal.2d at 927-
23 928).

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26 _____
27 ³ Of course, the Public Water Suppliers have overlying water rights to extract
28 groundwater from the Basin for use on their own property. Such rights are correlative to
those of Willis.

1 Since she does not allege that she has suffered any physical interference with
2 pumping and does not claim to have lost any water rights, she has suffered no
3 compensable harm.

4
5 **IV. WILLIS DOES NOT OWN THE GROUNDWATER BENEATH HER**
6 **LAND; SHE MAY NOT PREDICATE A CLAIM FOR INVERSE**
7 **CONDEMNATION ON SUCH OWNERSHIP**

8 As explained in her opposition papers, Willis’ “Takings Claims are predicated on
9 the fact that the [Public Water] Suppliers have been depleting the Basin’s groundwater
10 without a legal ownership right to that water, *i.e.* based on a false claim of right.” (Opp.
11 5:18-20). Such a contention is without basis in law, and may not serve as the predicate
12 for her second and third causes of action.

13 It is well-settled that neither Willis nor the Public Water Suppliers own the
14 groundwater in the Basin. As the California Supreme Court explained in *Mojave*:

15 “Overlying rights are special rights to use groundwater under the owner's
16 property ... [O]verlying water rights are usufructuary only, and while conferring
17 the legal right to use the water that is superior to all other users, confer no right of
18 private ownership in public waters.” 23 Cal.4th at 1237 n.7 (citations omitted).

19 The Court of Appeal made the same point in *State of California v. Superior Court*
20 (2000) 78 Cal.App.4th 1019, 1025:

21 “It may be true that, at least prior to the 1928 adoption of the predecessor to
22 section 2 of article X [of the California Constitution], one could speak of
23 “ownership” of water itself (*Lux v. Haggin, supra* at p. 392, 4 P. 919), and there
24 obviously remains a sense in which discrete quantities of water can be “owned.”
25 For example, one who purchases a container of Arrowhead Puritas water then
26 “owns” five gallons of California water. (*See Lewis v. Scazighini* (1933) 130
27 Cal.App. 722, 724, 20 P.2d 359, recognizing that water severed from the land
28 becomes personal property which may be bought and sold like any other

1 commodity.) But in its natural state, water is certainly not subject to ownership by
2 an individual.”

3 Willis alleges that the Basin is in a state of overdraft (Complaint, ¶ 1), and
4 attempts to suggest that pumping by the Public Water Suppliers from an overdrafted
5 basin somehow entitles her to just compensation under the state and federal constitutions.
6 Willis, however, cites no authority for this proposition. Her position, however, is
7 completely at odds with California water law, including Article X, Section 2 of the
8 California Constitution, which provides in pertinent part:

9 “It is hereby declared that because of the conditions prevailing in this State
10 the general welfare requires that the water resources of the State be put to
11 beneficial use to the fullest extent of which they are capable, and that the waste or
12 unreasonable use or unreasonable method of use of water be prevented, and that
13 the conservation of such waters is to be exercised with a view to the reasonable
14 and beneficial use thereof in the interest of the people and for the public welfare
15 ...”

16 Under the allegations of her complaint, Willis does not state facts sufficient to
17 constitute a cause of action for inverse condemnation under state or federal constitutional
18 law. She seeks to base a claim for inverse condemnation on the pumping of non-surplus
19 water by the Public Water Suppliers where that pumping (1) never ripens into a
20 prescriptive right, thus her priority overlying right is never diminished, and (2) is
21 nowhere alleged to interfere with her pumping because she nowhere alleges that she has
22 pumped or attempted to pump groundwater from the Basin.

23
24 **V. AS A MATTER OF LAW PLAINTIFF IS NOT ENTITLED TO AN AWARD OF**
25 **ATTORNEY’S FEES**

26 With regard to her federal takings claim, Willis’ claim for attorney’s fees is
27 predicated on 42 U.S.C. §§ 1983 and 1988. Inasmuch as she cannot state a cause of
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1 action for inverse condemnation under federal law, her prayer for attorney’s fees under
2 42 U.S.C. § 1988 should be stricken.

3 While her complaint is silent as to basis for her claim for attorney’s fees under
4 state law, the opposition indicates that her claim for attorney’s fees under California law
5 is predicated on Code of Civil Procedure (“CCP”) section 1021.5, which provides:

6 “Attorney fees are recoverable under section 1021.5 (1) by a successful
7 party, (2) in an action that has resulted in the enforcement of an important right
8 affect the public interest, (3) if a significant benefit has been conferred on the
9 general public or a large class of persons, and (4) the necessity and financial
10 burden of private enforcement are such as to make the award appropriate. The
11 statute’s purpose is to encourage public interest litigation that might otherwise be
12 too costly to pursue.”

13 *Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 176; *see also Woodland Hills*
14 *Residents Association, Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 934-
15 935; *Baggett v. Gates* (1982) 32 Cal.3d 128, 142.

16 Assuming *arguendo* that Willis ultimately prevails on her first cause of action, she
17 is nevertheless not entitled to an award of attorney’s fees under CCP §1021.5.

18 **A. Willis Only Seeks to Enforce Private Rights Which Do Not Confer a**
19 **Benefit to the General Public**

20 The Willis complaint fails to allege the assertion of any important public right or
21 benefit that would justify an award of attorney’s fees pursuant to CCP §1021.5. Instead,
22 Willis’ complaint only seeks to enforce private rights for herself and the proposed class
23 of overlying landowners.

24 In the first paragraph, the complaint states that this action seeks to determine
25 plaintiff’s *private* rights to groundwater within the Basin, and to recover individual or
26 *private* compensation for any “takings” of such rights by the Public Water Suppliers.
27 (Complaint, ¶1). The complaint does not allege any public interest or benefit in such
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1 determinations, nor explains how her desired private use of water for a house and
2 landscape nursery would benefit the public generally.

3 Nevertheless, Willis implies that a successful class allegation is all that is required
4 to establish a public interest under CCP §1021.5. (Opp. 8:11-15, citing *Graham v.*
5 *DaimlerChrysler* (2005) 34 Cal.4th 553.) However, this proposition is not supported by
6 *Graham*.

7 Plaintiff must prove more than just the existence of a class in order to recover
8 under §1021.5. Awarding attorney’s fees to a class pursuant to §1021.5 “requires both a
9 finding of a significant benefit conferred on a substantial number of people *and a*
10 *determination that the ‘subject matter of the action implicated the public interest.’”*
11 *Graham*, 34 Cal.4th at 578 (emphasis added), citing *Beasley v. Wells Fargo Bank* (1991)
12 235 Cal.App.3d 1407. Willis has not alleged that the subject matter of her suit implicates
13 any public interest.

14 Willis thus cannot satisfy the first two prongs of the test justifying an award of
15 attorney’s fees pursuant to CCP §1021.5 and accordingly, the Court should sustain the
16 demurrer without leave to amend.

17 **B. Willis’ Private Financial Interest in the Litigation Precludes an Award**
18 **of Attorney’s Fees Pursuant to CCP §1021.5**

19 An award of attorney’s fees under the ‘private attorney general’ theory “is
20 appropriate when the cost of the claimant’s legal victory transcends his personal
21 interest...” *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 558 (denying
22 plaintiff’s request for attorney’s fees after he obtained a writ of mandate ordering the city
23 to conduct an environmental assessment, where court found plaintiff initiated the suit to
24 prevent the threat of damage or depreciation of his property and attorney’s fees incurred
25 were not out of proportion to his individual stake in the matter and did not transcend his
26 personal interest.); *see also Williams v. San Francisco Board of Permanent Appeals*
27 (1999) 74 Cal.App.4th 961, 967 (denying plaintiff’s request for attorney’s fees under CCP
28 §1021.5 even though the court found that the ultimate result of requiring defendant city to

1 comply with its own planning code was admirable, it was incidental to plaintiff’s desire
2 not to have a proposed structure erected next to his residence). If an action is not
3 premised on the public interest but is for personal interest only, a party is not entitled to
4 an award of attorney’s fees under CCP §1021.5. *Schwartz*, 155 Cal.App.3d at 558-559.
5 Moreover, if the enforcement of the public interest is merely “coincidental to the
6 attainment of...personal goals’ [citation] or is ‘self-serving,’ [citation], then this
7 requirement is not met.” *Bowman*, 131 Cal.App.4th at 181.

8 Stated otherwise, “the private attorney general doctrine... was not intended to
9 reward litigants motivated by their own pecuniary interest who only coincidentally
10 protect the public interest. Pearl, *Cal. Attorney Fee Awards* (Cont. Ed. Bar 2d ed. (2006))
11 §4.34, p. 123.

12 Here, Willis does not bring this action in a representative capacity simply for the
13 purpose of benefiting the public at large. Rather, Willis is motivated by her own personal
14 and financial interests related to the use and value of her overlying property, as affected
15 by the extent of water rights determined thereon. Willis alleges no public benefit that
16 transcends her own personal interest in this case.

17 Furthermore, Willis cannot truthfully amend her complaint to allege that she is
18 suing to protect a public interest that “transcends” her own personal interest in the
19 litigation. Any alleged public benefit in the general judicial determination of water rights
20 to the Basin, is merely “coincidental” to the attainment of Willis’ personal goals, and
21 therefore does justify an award of attorneys fees pursuant to CCP §1021.5. Accordingly,
22 the Court should strike her prayer for attorney’s fees.

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VI. CONCLUSION

For the foregoing reasons, this demurrer to Willis' second and third causes of action should be sustained without leave to amend and the motion to strike should be granted.

DATED: May 14, 2007

LEMIEUX & O'NEILL
WAYNE LEMIEUX

LAGERLOF, SENECA, GOSNEY & KRUSE
THOMAS BUNN III

BEST, BEST & KRIEGER LLP
ERIC L. GARNER
JEFFREY V. DUNN
STEFANIE D. HEDLUND

STRADLING, YOCCA, CARLSON & RAUTH
DOUGLAS J. EVERTZ

CALIFORNIA WATER SERVICE COMPANY
JOHN TOOTLE

RICHARDS, WATSON & GERSHON
A Professional Corporation
JAMES L. MARKMAN
STEVEN R. ORR
ERIN L. POWERS

By: 

STEVEN R. ORR
Attorneys for Defendant, Cross-Complainant
and Defendant
CITY OF PALMDALE

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PROOF OF SERVICE

I, Kelley Herrington, declare:

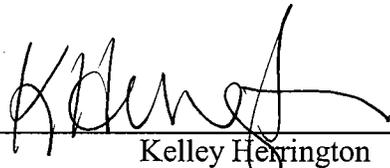
I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Richards, Watson & Gershon, 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071. On May 14, 2007, I served the within documents:

COMBINED REPLY BRIEF IN SUPPORT OF PUBLIC WATER SUPPLIERS' DEMURRER TO SECOND AND THIRD CAUSES OF ACTION AND MOTION TO STRIKE

- by causing facsimile transmission of the document(s) listed above from (213) 626-0078 to the person(s) and facsimile number(s) set forth below on this date before 5:00 P.M. This transmission was reported as complete and without error. A copy of the transmission report(s), which was properly issued by the transmitting facsimile machine, is attached. Service by facsimile has been made pursuant to a prior written agreement between the parties.
- 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 and affixing a pre-paid air bill, and causing the envelope to be delivered to an agent for delivery, or deposited in a box or other facility regularly maintained by , in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed 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.
- by causing personal delivery by First Legal Support Services, 1511 West Beverly Boulevard, Los Angeles, California 90026 of the document(s) listed above to the person(s) at the address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 14, 2007.



Kelley Herrington