

BEST BEST & KRIEGER LLP  
ERIC L. GARNER, Bar No. 130665  
JEFFREY V. DUNN, Bar No. 131926  
STEFANIE D. HEDLUND, Bar No. 239787  
JESSICA L. HIRSCH, Bar No. 254703  
5 PARK PLAZA, SUITE 1500  
IRVINE, CALIFORNIA 92614  
TELEPHONE: (949) 263-2600  
TELECOPIER: (949) 260-0972

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OFFICE OF COUNTY COUNSEL  
COUNTY OF LOS ANGELES  
JOHN F. KRATTLI, Bar No. 82149  
SENIOR ASSISTANT COUNTY COUNSEL  
MICHAEL L. MOORE, Bar No. 175599  
SENIOR DEPUTY COUNTY COUNSEL  
500 WEST TEMPLE STREET  
LOS ANGELES, CALIFORNIA 90012  
TELEPHONE: (213) 974-1951  
TELECOPIER: (213) 617-7182  
Attorneys for Defendant  
LOS ANGELES COUNTY WATERWORKS  
DISTRICT NO. 40

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

RELATED CASE TO JUDICIAL  
COUNCIL COORDINATION PROCEEDING  
NO. 4408

The Honorable Judge Komar  
Coordination Trial Judge

**PUBLIC WATER SUPPLIERS'  
OPPOSITION TO REBECCA WILLIS'  
MOTION FOR APPOINTMENT OF  
EXPERT WITNESS**

Date: August 17, 2009  
Time: 9:00 a.m.  
Dept: Dept. 1

1     **I.     INTRODUCTION**

2             The Willis Class has filed a Motion for Appointment of an Expert Witness (hereafter the  
3     “Motion”), requesting that this Court appoint its own expert to assist in the determination of the  
4     Antelope Valley Basin’s (“Basin”) yield and asking that the Public Water Suppliers assume all  
5     costs associated therewith. This Motion should be denied for the reasons that follow:

- 6             • A number of private landowners have retained expert witnesses and thus, contrary to  
7             the Willis Class’ assertions, the issue of safe yield is not based solely on expert  
8             testimony propounded by the Public Water Suppliers;
- 9             • The addition of another expert, even a neutral expert, is not necessary for the yield  
10            determination because, among the many experts already involved in this matter,  
11            the Court will be well-equipped, after all of the evidence has been presented at  
12            trial, to make findings on safe yield;
- 13            • There is no authority that requires a civil litigant to pay the adverse party’s expert  
14            witness fees pending resolution of the case;
- 15            • The Court’s role as a fiduciary for absentee class members does not contemplate  
16            the appointment of independent experts, and the appointment of an expert absent a  
17            demonstration that one is needed would contravene the Court’s role as a neutral  
18            arbiter in this action;
- 19            • Adding another expert would introduce an unwarranted expense to the already  
20            substantial costs of these proceedings – an expense that is particularly hard-felt  
21            during a very challenging economic time for public agencies.

22     **II.   THE WILLIS CLASS AND OTHER PRIVATE LANDOWNERS HAVE**  
23     **ALREADY RETAINED EXPERT WITNESSES AND THUS ALL CLASS**  
24     **MEMBERS ALREADY HAVE OR SHOULD HAVE ACCESS TO EXPERT**  
25     **WITNESS OPINION AND ANALYSIS**

26             The Willis Class asks this Court to appoint an expert to assist in the Court’s determination  
27     of safe yield on the grounds that it would be financially impractical for the “Class(es)” and the  
28     “numerous parties” involved to retain their own experts. (See Motion at pp. 2-3.) The Willis  
Class maintains that a court-appointed expert is therefore necessary “to protect their interests in  
this determination.” (Motion at p. 3.) The Willis Class’ argument for an expert clearly  
contemplates that this expert will further the interests of the Willis Class and other similarly

1 situated parties. The Willis Motion relies upon Evidence Code section 730, which authorizes a  
2 court to appoint an expert “when the court sees the need for an assessment by a disinterested and  
3 impartial expert who is not advocating on behalf of a party to the action.” (Evid. Code, § 730; *In*  
4 *re Eric A.* (1999) 73 Cal.App.4th 1390, 1394 fn. 4, *citing Mercury Casualty Co. v. Superior Court*  
5 (1986) 179 Cal.App.3d 1027, 1032-1033.) However, Section 730 does not allow a court to  
6 appoint an expert for the use of only one party. Indeed, “Section 730 ...does not authorize the  
7 appointment of experts whose work will be kept confidential. Instead, it contemplates that any  
8 expert appointed will be available for either party to call and examine as a witness.” (*People v.*  
9 *Angulo* (2005) 129 Cal.App.4th 303, 313-314, *modified, rehearing denied* Cal.App.LEXIS 755  
10 (Cal.App.4th Dist., 2005.) An appointment of an expert for the reasons advanced by the Willis  
11 Class is simply not authorized under Section 730. The Motion must therefore be denied.

12 Moreover, a number of private landowner parties have already retained expert witnesses.  
13 These experts have participated in technical committee discussions and/or have otherwise been  
14 retained to provide expert witness opinions on the issues at trial. Given that the Willis Class, and  
15 other overlying private landowners have identical or substantially similar interests, there is no  
16 need for another expert in this case. Therefore, contrary to the Willis Class’ assertion, there will  
17 be expert evidence pertaining to the issue of safe yield representing many different perspectives,  
18 and not just the Public Water Suppliers’. Their argument is therefore tenuous given Class  
19 Counsels’ ability to avail themselves of available expert witness opinion and analysis on the  
20 issues before this Court. The Motion should be denied.

21 **III. A CIVIL LITIGANT DOES NOT PAY THE ADVERSE PARTY’S EXPERT**  
22 **WITNESS COSTS PENDING RESOLUTION OF THE CASE AND THIS**  
23 **EXPENSE WOULD BE SIGNIFICANTLY FELT BY THE PUBLIC WATER**  
**SUPPLIERS**

24 The Willis Class urges this Court to authorize an additional \$85,000 to pay for the  
25 services of an expert witness. (Motion at pp. 3, 6.) The Willis Class argues that this cost should  
26 be borne by the Public Water Suppliers because it would be impractical for the Class to front the  
27 “significant costs” of such an expert, particularly when the Class cannot recover those costs under  
28

1 Section 1021.5 of the Code of Civil Procedure. (Motion at p. 3.)

2 First, and as already mentioned in Section II *supra*, Section 730 of the Evidence Code  
3 does not authorize a court to hire an expert to advance the interests of one party – the Willis  
4 Class. Instead, the role of a court-appointed expert is an impartial one; the expert must ensure  
5 that the interests of all of the parties in the action are equally attended to.

6 Second, Section 730 merely authorizes the court to appoint an expert and “fix the  
7 compensation ... at the amount as seems reasonable to the court.” (Evid. Code, § 730.) Section  
8 730 does not allow the court to impose expert witness costs upon the adverse party, and no case  
9 authority exists to require an adverse party to bear such costs pending resolution of the case.

10 Third, the Willis Class suggests that because the cost of an expert is modest, the \$85,000  
11 is an expense that the Public Water Suppliers should assume. (Motion at pp. 3, 6.) The Willis  
12 Class supports this argument by providing its estimate of the total amount paid by the Public  
13 Water Suppliers on expert witnesses to date, intimating that the additional appointment will be  
14 less than 10 percent of the expert witness expenses and is therefore a cost that the Public Water  
15 Suppliers can afford to pay. (Motion at p. 6.) But the costs incurred by the Public Water  
16 Suppliers on experts in this proceeding are completely irrelevant. As the Court no doubt  
17 understands, public agencies have been particularly hard-hit by California’s economic recession.  
18 The Public Water Suppliers, like other local government entities in California, are laboring under  
19 very tight budgets and simply do not have unlimited financial resources to take on additional,  
20 unneeded expenses.

21 The Public Water Suppliers recognize that the interests in this litigation are vital to all of  
22 the parties involved. For this reason, there have been a number of experts retained to opine on the  
23 critical issues at stake throughout the entirety of this proceeding. Adding another expert is  
24 unnecessary. Finally, the Willis Class’ own characterization of the expense as a “modest” one is  
25 disingenuous. As the Willis Class fully acknowledges, the cost is “significant” (Motion at p. 3.)  
26 and it would be impractical at this point to require any party in this action to involuntarily take it  
27 on.

**IV. COURTS EXERCISE THEIR POWER TO APPOINT EXPERT WITNESSES  
VERY SPARINGLY AND THE WILLIS CLASS HAS FAILED TO  
DEMONSTRATE A PROPER BASIS TO ADD ANOTHER EXPERT TO OPINE  
ON THE SCIENCE INVOLVED IN THIS PROCEEDING**

The Willis Class correctly observes that the safe yield determination is a technical decision that involves a large amount of scientific evidence. (Motion at p. 3.) The Willis Class seems to suggest, however, that the technical nature of this evidence warrants the appointment of a technical advisor, and not an expert witness.<sup>1</sup> As the Ninth Circuit observed in *Federal Trade Comm. v. Enforma Natural Prods., Inc.* (9th Cir. 2004) 362 F.3d 1204, 1213 - a case cited to by the Willis Class in support of this argument - a trial court may appoint a technical advisor when outside technical expertise can be helpful in deciding fairly complex issues. As the Ninth Circuit explains,

the role of a technical advisor is to organize, advise on, and help the court understand relevant scientific evidence. A technical advisor is a tutor who aids the court in understanding the 'jargon and theory' relevant to the technical aspects of the evidence. A technical advisor may not assume the role of an expert witness by supplying new evidence; nor may an advisor usurp the role of the judge by making findings of fact or conclusions of law.

(*Ibid.*) (emphasis added.) However, the Ninth Circuit instructs trial courts to proceed with an abundance of caution before utilizing a technical expert, noting that at times, "technical advisors may impermissibly influence a [lower] court's ultimate findings or impinge upon the court's role as finder of fact." (*Ibid.*)

Although there are complex technical issues involved in this proceeding, this case does not warrant the appointment of an additional expert, even one hired for the sole purpose of explaining technical matters to the Court. There are already a number of experts that have been

<sup>1</sup> Although the Willis Motion is predicated on Evidence Code section 730, which authorizes a court to appoint an expert witness to "investigate, to render a report ..., and to testify as an expert at the trial ... (Evid. Code, § 730), the cases cited to by the Willis Class in Section II of the Motion address the circumstances under which a technical advisor may be brought in to aid a court in understanding highly complex subject matters (*Federal Trade Comm. v. Enforma Natural Prods., Inc.* (9th Cir. 2004) 362 F.3d 1204) or the grounds upon which a physician expert may be brought in to examine a plaintiff in a personal injury case and provide the court with an assessment that is partial to the defense (*Mercury Casualty Co. v. Superior Court* (Cal. App. 2d Dist. 1986) 179 Cal. App. 3d 1027, 1032). It is therefore unclear if the Willis Class is arguing for a technical advisor or an expert witness as the two roles are entirely different.

1 retained for the purpose of providing expert opinion and analysis of the science and factual  
2 circumstances surrounding the issues that are the subject of this dispute, including that of safe  
3 yield. Moreover, this Court has the ability to direct questions to the experts testifying at trial for  
4 the purpose of elucidating difficult concepts or explaining terms of art. Further, this Court has  
5 substantial experience in adjudicating groundwater rights and is fully capable of understanding  
6 the terms and concepts involved in this proceeding, including the evidence on the issue of safe  
7 yield. Thus, contrary to the Willis Class' assertion, this Court is more than capable of obtaining  
8 needed expert testimony and making a determination of safe yield. The appointment of a  
9 technical advisor here is superfluous and therefore not within the scope of Evidence Code section  
10 730.

11 **V. THE WILLIS CLASS HAS NOT PROVIDED ANY CREDIBLE EVIDENCE TO**  
12 **DEMONSTRATE A GAP IN THE EXPERTS' SAFE YIELD ANALYSES AND**  
13 **HAS THEREFORE NOT PROPERLY SHOWN THAT AN IMPARTIAL EXPERT**  
14 **IS REQUIRED**

15 The Willis Class asserts, without any evidentiary support, that Mr. Scalmanini and Mr.  
16 Sheehan have reached "widely differing opinions as to the Basin's yield." (Motion at p. 4.) The  
17 Willis Class then argues that the "widely disparate nature of their opinions" is reason enough for  
18 the Court "to obtain independent expert assistance" on the issue of safe yield. (*Ibid.*) In support  
19 of this argument, the Willis Class offers only unsubstantiated estimates of figures that it  
20 "anticipates" Mr. Scalmanini and Mr. Sheehan will apply to reach their determination of Total  
21 Sustainable Yield. (Motion at p. 4.) With no evidentiary basis for this argument, it cannot be a  
22 basis to grant the Motion.

23 Further, even if such differing evidence will be submitted to the Court for determination,  
24 the Willis Class has failed to establish that the conflicting testimony renders this Court unable to  
25 make a finding of fact. To the contrary, this Court has substantial capability in this area, and has  
26 demonstrated judicial skill to all of the parties in both of the prior phases of the present action.  
27 Absent the requisite showing of need by the Court, the Motion should be denied.  
28

**VI. THE COURT'S ROLE AS A NEUTRAL ARBITER DOES NOT INCLUDE APPOINTING AN INDEPENDENT EXPERT WHERE NO SHOWING HAS BEEN MADE THAT ONE IS NEEDED.**

The court's role as a fiduciary of absentee class members is a limited one. The court assumes a fiduciary responsibility in connection with the certification of the members of a class (*Cervantez v. Celestica Corp.* (C.D. Cal. 2008) 253 F.R.D. 562) and in the context of settlement negotiations (*Rodriguez v. West Publ'g Corp.* (2009) 563 F.3d 948; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116). In all other instances, the court wears the hat of a neutral arbiter. This requires equal and impartial treatment of all parties to an action. The appointment of an expert witness is not within the scope of the Court's limited fiduciary obligations owed to Class members and the Motion should be denied.

The Willis Class claims that the appointment is necessary to ensure the public's perception of a fair and appropriate determination of safe yield. (Motion at pp.4- 5.) However, the public's perception relative to a finding of safe yield would hardly be influenced by the appointment of an additional expert in this matter. To the contrary, the appointment of another expert witness will increase this cost of this action, something not likely to be viewed favorably by the taxpaying public.

In sum, none of the reasons advanced by the Willis Class warrant the appointment of an additional expert. Indeed, courts rarely appoint their own expert witnesses, especially in civil cases. (Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2009) ¶ 8:722.) A court will make the exception in limited circumstances, however, as when justice requires the appointment of an expert to assist an indigent defendant in a criminal trial. (*Torres v. Municipal Court* (1975) 50 Cal.App.3d 778.) Circumstances here are not the kind generally considered to warrant a court-appointed expert.

**VII. CONCLUSION**

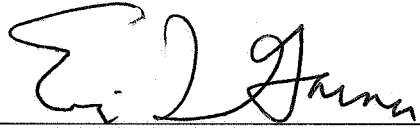
For the reasons stated above, the Motion should be denied. Alternatively, if the Court is inclined to appoint an independent expert at the request of the Non-Pumpers (the Willis Class),

1 then, because an independent expert's role is to assist the Court and all parties involved in this  
2 action, the cost of this expert should be shared among all of the parties in this action. However,  
3 we respectfully ask the Court to delay its ruling on this Motion until after settlement negotiations  
4 have concluded, and also request the opportunity to brief the issue of costs if necessary.

5  
6 Dated: August 4, 2009

BEST BEST & KRIEGER LLP

7  
8 By

  
ERIC L. GARNER  
JEFFREY V. DUNN  
STEFANIE D. HEDLUND  
JESSICA L. HIRSCH  
Attorneys for Cross-Complainants  
ROSAMOND COMMUNITY SERVICES  
DISTRICT and LOS ANGELES  
COUNTY WATERWORKS DISTRICT  
NO. 40



**PROOF OF SERVICE**

I, Lynda A. Kocis, 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, 3750 University Avenue, 4<sup>th</sup> Floor, Riverside, California 92501. On August 4, 2009, I served the within document(s):

**PUBLIC WATER SUPPLIERS' OPPOSITION TO REBECA WILLIS' MOTION FOR APPOINTMENT OF EXPERT WITNESS**

- ☒ 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 4, 2009, at Irvine, California.

  
Lynda A. Kocis