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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding Special title (Rule 1550(b)) **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 District Superior Court of California, County of Riverside, consolidated actions, case Nos. RIC 353 840, RIC 344 436, RIC 344 668 AND RELATED CROSS ACTIONS	Judicial Council Coordination Proceeding No.: 4408 Los Angeles Superior Court Case No.: 1-05-CV-049053 **STATE OF CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PUBLIC WATER SUPPLIERS' MOTION FOR CLASS CERTIFICATION** Date: March 12 Time: 1:30 p.m. Dept: 1, Room 534 Location: Los Angeles Superior Court, 111 North Hill Street Los Angeles, CA 90012

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The State of California (State) files this Opposition to Public Water Suppliers' Motion for Class Certification. The State does not oppose the creation of a defendant

class to expedite this action; the State *does* oppose the class as described, because the proposed class improperly includes public entity landowners in the class, which consists overwhelmingly of private landowners. The State also strongly objects to being named as class representative.

INTRODUCTION

A class should be certified only where the class members have a community of interest. Common questions of law and fact must predominate and the class representative must have claims and defenses typical of the class. The class representative must be free of conflicts which would preclude it from adequately representing the interests of absent class members.

The class proposed by the Public Water Suppliers does not meet this test because it includes both public and private entities, which do not share the required community of interest, and whose interests are in conflict on significant issues in the case. The proposed class representative, the State of California, does not have claims and defenses typical of the class. The primary claim by the Public Water Suppliers against the private landowners is prescription. As there can be no prescription against the State or other public entities, this claim is properly alleged against private parties only. Nor is there a commonality of defenses. The State's defense to claims of prescription is Civil Code section 1007; the private party defenses turn on rebutting the elements of prescription, such as open and notorious use with notice, adverse and hostile use, exclusive use, continuous and uninterrupted use, and claim of right. (Hutchins, *The California Law of Water Rights* (1956) pp. 301-318.) The State would not, on its own behalf, be required to present evidence on those matters. More importantly, the private parties may raise claims and defenses based on the assertion that prescription or attempted prescription by public entities constitutes a "taking" of private property. Such claims and defenses would create a conflict of interest for the State that would preclude it from adequately representing the class.

Fortunately, in a recently-filed related case in this court, *Willis* v. *Los Angeles*

County Waterworks District No. 40, Case No. BC364553, private landowner Rebecca Lee Willis has indicated a willingness to be class representative for the class of "private landowners in the Antelope Valley Groundwater Basin (excluding those actively participating in this litigation) seeking a judicial determination of their rights to use groundwater within the Antelope Valley Groundwater Basin ('the Basin')." (Willis Complaint, p. 1.) This class *does* appear to have the necessary commonality, and both Ms. Willis and class counsel, by filing that lawsuit, have indicated their willingness to represent the class. If the Court certifies a class of landowners in the Antelope Valley, it should name Ms. Willis as representative of the class, and not the State of California. Alternatively, the Antelope Valley Ground Water Agreement Association, made up of private overlying landowners, would be an appropriate representative of the class.

I. THE CLASS SHOULD NOT BE CERTIFIED AND THE STATE SHOULD NOT BE NAMED AS CLASS REPRESENTATIVE BECAUSE CLASS CERTIFICATION REQUIRES THAT COMMON QUESTIONS OF LAW AND FACT PREDOMINATE AND THE CLASS REPRESENTATIVE HAS CLAIMS AND DEFENSES TYPICAL OF THE CLASS.

Under California law, certification of a class is proper only where two requirements are met: (1) there must be an ascertainable class, and (2) the class members must have a well-defined community of interest in the questions of law and fact involved in the case. (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 913; see *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459-463 [abuse of discretion to certify class of landowners claiming nuisance and inverse condemnation due to airplane overflights because there was insufficient community of interest due to fact that each class member's right to recovery depended upon facts peculiar to his unique parcel of land].)

The "community of interest" prong of the certification test involves 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." (*Lockheed Martin Corporation v. Superior Court* (2003) 29 Cal.4th

1096, 1104, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) Common questions must not only exist, they must *predominate*, and the burden of establishing the that common questions predominate is on the party seeking certification of the class. (*Washington Mutual Bank, FA v. Superior Court*, *supra* , 24 Cal.4th at p. 913; *Lockheed Martin Corporation v. Superior Court, supra,* 29 Cal.4th at 1104 [class certification improper where plaintiff potential class members failed to demonstrate that common issues predominated].)

These tests are not met here. The proposed class consists of "[a]ll owners of land within the adjudication area that is not within the service area of a public entity, public utility, or mutual water company." (Suppliers' Motion Papers, p. 5) This proposed class consists of very few public agency landowners (for example, the State, the United States, and the City of Los Angeles) and predominantly private landowners. Common questions of fact and law do not predominate, because on the most important legal issue in the case, whether the Public Water Suppliers have prescribed against the landowner class members, the State and other public agencies have different interests from the private landowners, and the private class members will require proof of facts that are not required for the State.

Moreover, the Public Water Suppliers propose that the State be named as class representative. The claims against the State and the defenses it will assert are not typical of the class. In addition, the private landowners may have an interest in asserting claims and defenses based on inverse condemnation that the State will not raise, making it an inadequate representative for the class. For all these reasons, the class as described should not be certified, and in no event should the State be named as class representative.

A. The Proposed Class Should Not Be Certified Because it Includes Public Agencies as Well As Predominantly Private Landowners with The Result That Common Questions of Law And Fact Do Not Predominate.

The class proposed by the Public Water Suppliers, which includes all owners, public and private, of land within the adjudication area that is not within certain service

areas, fails to meet the requirements set forth above. Even assuming arguendo that the proposed class is actually ascertainable (and identifying the current owners of 65,000 parcels would seem to be a monumental undertaking), the proposed class lacks the required commonality of interest, insofar as it includes public entities, such as the State of California, the City of Los Angeles and the United States, as well as the private landowners that predominate in the class.

The first element of the "community of interest" test is that common questions of fact and law predominate. (*Lockheed Martin Corporation v. Superior Court*, *supra,* 29 Cal.4th at p. 1104.) The Public Water Suppliers fail to meet their burden of demonstrating that common questions *predominate*. (*Washington Mutual Bank FA v. Superior Court*, *supra*, 24 Cal.4th at 913; *Lockheed Martin Corporation v. Superior Court, supra,* 29 Cal.4th at 1104.) They allege that all members of the proposed class have a common interest because they all own land in the adjudication area and claim overlying rights to the native groundwater. (Suppliers' Motion Papers, p. 12.)

But the predominate issue in this case is not whether the landowners hold overlying water rights, but whether they have lost some or all of those rights to the Public Water Suppliers by prescription. With regard to that legal issue, and the factual proof needed to establish prescription against private parties, the interests of public entities such as the State are very different from and likely to be adverse to those of the private party landowners. The State's water rights are not subject to loss by prescription, (Civ. Code, § 1007; *City of Los Angeles v. City of San Fernando* , *(*1975*)*, 14 Cal.3d 199, 270-277), whereas those of the private party landowners are subject to loss, if all the necessary elements of prescription are proved. (See, generally, Hutchins, *supra* , pp. 301-318.) Thus, public entities should be excluded from the class, or the class should not be certified.

1. <u>Claims Against the Class</u>

In determining whether common questions *predominate*, courts look to the theory of recovery and the allegations in the complaint, in this case, the Public Water Suppliers'

Proposed First Amended Cross-Complaint ("Cross-complaint"). (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327.) An examination of the Cross-Complaint demonstrates that key claims are not alleged against the State or other public agency defendants, and are thus not in common with those claims against the private parties. The first cause of action in the Cross-complaint seeks declaratory relief regarding prescriptive rights and is alleged "Against all cross-Defendants *Except* the United States and *Other Public Entity Cross-Defendants*." (Suppliers' First Amended Cross-Complaint, p. 14, emphasis added.) Because the State is a public entity cross-defendant, this claim is not asserted against it. Nor could it properly be asserted against the State, because Civil Code section 1007 precludes the acquisition of prescriptive rights against water or water rights held by the State. This first cause of action is the primary contested issue between the Public Suppliers, as cross-complainants, and the cross-defendant landowner class.

In addition, the Seventh Cause of Action, unreasonable use of water, is asserted against all cross-defendants "Except Public Entity Cross-Defendants." (Suppliers' First Amended Cross-Complaint, p. 20.) Thus, this claim is also not common between the State and the private class defendants.

The Fourth Cause of Action, municipal priority, alleges on information and belief that the majority of the cross-defendants pump groundwater from the Basin for agricultural purposes (*id*. at p.18, Para. 62), and seeks a declaration that the suppliers' rights are paramount to the rights of cross-defendants to use Basin water for irrigation purposes (*id*. at Para. 63). The State's interest in this cause of action is also not in common with the private landowners. The State's uses and potential future uses are public uses, such as parks, prisons, highway rest stops, fairgrounds and uses associated with the California Aqueduct. There is a public policy in continuance of public uses, which is not common to private parties. (*Hillside Water Company v. City of Los Angeles* (1938) 10 Cal.2d 677, 688.)

2. Claims by the Class

Some private parties already in this case have asserted that certain public agencies, in prescribing or attempting to prescribe private water rights, have taken private property without just compensation in violation of the federal and state constitutions. (See, e.g., Cross-Complaint of Bolthouse Properties, LLC, filed January 2, 2007, Third Cause of Action, p.6, ¶¶ 15 and 16; Cross-Complaint for Equitable and Monetary Relief, filed by Diamond Farming Company on January 2, 2007, Thirteenth Cause of Action, pp. 20-21.) The State, itself a public agency, notes that properly-accomplished prescription by public agencies has long been recognized in California Water Law. (See *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926-27; *City of Los Angeles v. City of San Fernando*, *supra,* 14 Cal.3d at p. 293 and note 101 at p. 294 [cities cannot lose their water rights by prescription and may still acquire prescriptive rights, subject to limitations resulting from the owner's self help].) The existence of prescriptive rights is a well-established background principle of property law. (See Hutchins, *The California Law of Water Rights, supra,* p. 301 [prescription is long-established rule of property introduced into California water law in its early development].)

Moreover, some of the property owned by the State is served by the Public Water Suppliers. (Declaration of Warren Dingman, ¶6, filed concurrently with this Memorandum.) The State does not have an interest in raising damage claims against the Public Suppliers that might result in higher costs for the water the State obtains from them. The State will not make a takings claim, and is in conflict with the private class members who might wish to do so.

Given these differences and conflicts, the proposed class should not be certified. The proper class should be made up exclusively of *private* landowners. The State would not be a member of that class, nor a representative of it. In the alternative, should the Court decide to certify the class as described by the Public Water Suppliers, the State of California should be given the opportunity to opt out of the class. (See *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 474 [protection provided by provisions which

allow a class member to opt out of the class]; *United States v. Truckee-Carson Irrigation District* (1975) 71 F.R.D. 10, 17 [if any member of the class desires to participate in the case through his own counsel, he will be given that opportunity]; see also, Cal. Rules of Court, rule 3.766(b)(2), (c)(2) and (d)(2) [court will determine whether class members may exclude themselves].) In no event should the State of California be the class representative of a class made up predominately of private landowners.

B. The Class Should Not Be Certified and the State Should Not Be Named as Class Representative Because the Claims Against the State and its Defenses Are Not Typical of the Claims and Defenses of the Class.

The second element of the "community of interest" test is whether the class representative has claims and defenses typical of the class. (*Lockheed Martin Corporation v. Superior Court*, *supra,* 29 Cal.4th at p. 1104.) That element is not met here. The Public Water Suppliers propose that the State of California be the class representative. But, as explained in Section IA above, the *claims* against the State are not typical of the claims against the private members of the class. Moreover, the State's *defenses* are not common to the class.

The Suppliers allege that the State and class members would have a common interest in defending against claims that would reduce their correlative right to the native safe yield, including a common defense to prescriptive rights claims. (Suppliers' Moving Papers, p. 13.) The State and the private landowners do *not* have common defenses to prescriptive rights claims.

The State's defense to claims of prescription by any other party is based on Civil Code section 1007, which provides in part:

> no possession by any person, firm or corporation no matter how long continued of any land, *water, water right*, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or *owned by the state* or any public entity, shall ever ripen into any title, interest or right against the owner thereof.

(Emphasis added.) (See Answer of the State of California, et al, filed August 17, 2006, Second Affirmative Defense, p. 13.) This defense is not available to the private

landowner members of the class.

The private landowners will have to defend against claims of prescription by proving that Public Water Suppliers have not established all the elements of prescription, including use that was open and notorious, adverse and hostile, continuous and uninterrupted use for a period of five years, exclusive, and under a claim of right. (Hutchins, *The California Law of Water Rights, supra,* pp. 301-318; see also, *City of Los Angeles v. City of San Fernando*, *supra*, 14 Cal.3d at pp. 281-282.) In addition, private landowners might defend based on "self help" if they pumped what they needed during the prescriptive period. *(City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1253 [overlying pumpers retain their groundwater rights by pumping]; *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1731-32.) The facts regarding "self help" will require individual proof of pumping by each pumper, which may itself prevent common issues from predominating.[1/] (See *City of San Jose v. Superior Court, supra,* 12 Cal.3d at pp. 459-463 [abuse of discretion to certify class of landowners claiming nuisance and inverse condemnation where each class member's right to recovery depended upon facts peculiar to his unique parcel of land].) Because there is no prescription against the State, the State has no need to put on evidence of such matters on its own behalf. The State's position on the legal issue of prescription and the factual issues related to openness, adversity, and "self help" are not typical of the proposed class.

Thus, this case is not like *United States v. Truckee-Carson Irrigation District* , *supra,* cited by the Public Water Suppliers at page 8 of their brief. In that case, the court found

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1. In *City of Chino v. Superior Court* (1967) 255 Cal.App.2d 747, 759-60, the court quoted *State v. Rank*, (9th Cir. 1961) 293 F.2d 340, 348, for the proposition that it "may well be" that those claiming riparian and overlying rights could properly be treated as a class if their rights were dependent upon circumstances common to all. However, claimants of appropriative or prescriptive rights could not form a class of those "similarly situated", because their rights depend upon the circumstances of each individual case. (*Ibid.*) In the instant case, the "self-help" defense to prescriptive rights, like a claim of prescriptive rights itself, would depend on individual circumstances, so the issues and facts involved in this case are not, in fact, common to the class.

that the defenses of the class members would be "identical", (*id.* at p. 15), the irrigation district was formed for the purpose of representing its members and asserting their common interests (*id.* at p.13), and counsel for the district informed the court that they would "gladly" represent the class (*id.* at p. 15).

Public Water Suppliers cite *Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137, as saying that the court saw no reason why the owners of overlying land could not be properly treated as a class because of common interests. (Motion Papers, p. 7-8.) In fact, the court was addressing only the owners of overlying *agricultural* land. The court did not decide whether other overlyers were properly in the class. "Whether or not the overlying landowners using water for other purposes than agriculture. . . are properly to be included within the same class is another question." (*Id.*, at p. 168.) In water cases, as in other cases, the answer to that question will depend on whether the necessary commonality of interest is present.

In this case, because the State's claims and defenses are not typical of the class, the class as proposed should not be certified, and the State should in no event be class representative.

II. THE STATE SHOULD NOT BE NAMED CLASS REPRESENTATIVE BECAUSE IT CANNOT ADEQUATELY REPRESENT THE PRIVATE CLASS MEMBERS DUE TO CONFLICTING INTERESTS

In order to be an adequate class representative, the named representative must be able to adequately represent the class. (*J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212. This is the third element of the "community of interest" prong of the certification test. (*Lockheed Martin Corporation v. Superior Court*, *supra* , 29 Cal.4th 1096, 1104.) "'The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent.'" (*J.P. Morgan*, *supra*, at p. 212, quoting *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 625.) A finding of adequate representation is not appropriate where the named representative's interests are antagonistic to or inconsistent with the interest of the other members of the class. (*J.P.*

Morgan, *supra*, at p. 212.) In *J.P. Morgan*, the court held that the trial court had abused its discretion in certifying a class despite evidence of conflicts among class members. *(Id.* at p. 215.)

The State cannot adequately represent the private members of the proposed landowner class, because its interests are in conflict with those members of the class. For example, an affirmative defense asserted by some private landowner parties currently in this litigation is unlawful taking of property, apparently on the theory that public agencies may not acquire water rights by prescription from private parties, without violating the "takings" provisions of the State and Federal constitutions. (See, e.g. Bolthouse Properties, LLC's Answer to Cross-Complaints, filed January 2, 2007, Twenty-Third Affirmative Defense, p. 9.) The State not only does not have this defense in common with the private landowners, but is likely to dispute that contention. Moreover, the State's claims of water rights are adverse to the claims of the private owners, raising a conflict of interest between the State and the private members of the landowner class that precludes the State from serving as the class representative.

III. THE CALIFORNIA ATTORNEY GENERAL IS NOT THE APPROPRIATE CLASS ATTORNEY FOR THE PREDOMINATELY PRIVATE LANDOWNER CLASS

The Public Water Suppliers allege that the California Attorney General has the requisite experience in water rights and class action litigation to represent the landowner class. (Motion Papers, p. 14.) But the Suppliers fail to show that it is appropriate in this case for the Attorney General, who is the attorney for the State (Gov. Code, §§ 15204, 12511) to be required, over his objections, to serve as attorney for a group consisting predominately of private landowners. The Suppliers assert that the Attorney General is "authorized by statute to represent the public at large in various class action cases," but it provides no citation to any statutory provision that would require the Attorney General to

represent the private landowners here.[2/] The Attorney General may bring an action in the name of the people of the State of California for the protection of the natural resources of the state, (Gov. Code, § 12607), but the proposed landowner class is not the People of the State of California or the "public at large."

Most importantly, conflict of interest considerations make the Attorney General's representation of the private landowner members of the class improper. (See 5 *Newberg on Class Actions* (4th ed. 2002) § 15.24, pp. 84-85 [likelihood of conflicts of interest involving simultaneous representation may be enhanced in the class action context, particularly in complex litigation].) For the reasons given previously, the State is not a proper member of the class, nor a proper class representative. There is a potential conflict between the interests of the State, as a public entity, and the private class members on the issue of whether public entities may validly and legally prescribe water rights from private parties or whether such prescription constitutes an unlawful taking of property. The Attorney General cannot be asked to represent parties with conflicting interests. (See Cal. Rules of Prof. Conduct, rule 3-310 [a member shall not accept representation of more than one client in a matter in which the interests of the clients potentially conflict without the informed written consent of each client].)

Given the conflict on the inverse condemnation issue and the inherent adversity in the competition for water between public and private landowners, the Attorney General could not zealously represent both its State client agencies and the private landowners. (See *Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 856 [class divided into groups with different claims requires separate representation to eliminate conflicting interests of counsel] and at fn.31, p. 857 [inquiry into adequacy of representation is concerned not only with adequacy of named representative, but with ability and conflicts of class counsel].)

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2. Indeed, a judicial order requiring the Attorney General, an independent constitutional officer in the executive branch, to undertake representation of private parties absent a legislative mandate and without his consent, would raise serious separation of powers issues that should be avoided. (See Cal. Const., art. III, § 3.)

The Attorney General is not the appropriate class counsel.

IV. FORCING THE STATE TO ACT AS CLASS REPRESENTATIVE WOULD UNFAIRLY BURDEN THE STATE AND CONSTITUTE A GIFT OF PUBLIC FUNDS

Defendant class actions pose the unique danger of plaintiffs' calculated selection of defendant class representatives who might not fully and fairly represent the interests of the class, and for this reason courts tend to require more than bare compliance with the common interest requirements in such suits. 4 Witkin, *California Procedure* (4th Ed. 1997) §250(b), § 310.) Such calculation is not the problem here. The real problem is the one identified in *In re Gap Securities Litigation* (1978) 79 F.R.D. 283, 290, quoted on page 9 of the Public Water Suppliers' papers. In that case, the court stated that 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." (*Ibid*, emphasis added.)

Unduly burdening the class representative is one of the major risks of defendant class action suits. (Miller, Scott, *Note: Certification of Defendant Classes Under Rule 23 (b)(2)*, 84 Colum. L. Rev. 1371, 1385 (1984).)

> A plaintiff's designation of a party as class representative may excessively burden that representative and prejudice the rights of the absent class members. Designation as class representative often forces the class member to incur additional costs beyond those associated with individual litigation. Not infrequently, he must litigate or preserve defenses that he would not raise in an individual action. . . . . Imposing these additional costs on a defendant who does not directly benefit from his role and who has no reasonable hope of receiving reimbursement, may violate notions of fundamental fairness inherent in the due process clause.

(*Ibid.*, footnotes omitted.)

In this case, the State would be required, as class representative, to present evidence on many matters that it would not present on its own behalf. Requiring the State to manage a class of owners of 65,000 parcels of property, with whom it has no pre-existing representative relationship, to somehow communicate with them, and to present the claims and defenses of this vast class on such matters as prescription and inverse condemnation, would vastly increase the litigation costs to the state agencies on whose behalf the State of

California owns title to the land, for example, the Department of Parks and Recreation. These agencies are not budgeted to take on this additional burden. [See, e.g., Declaration of Warren Dingman, ¶ 7.)]

Indeed, an order of this court naming the State as class representative over its objection would violate the Gift Clause of the California Constitution, Article XVI, section 6. That section prohibits the "making of any gift, of any public money or other thing of value to any individual, municipal or other corporation whatever...." (Cal. Const., art XVI, § 6.) "[I]t is well established that even though a court is empowered to appoint counsel in certain situations, it cannot compel the government to compensate that attorney absent a statute authorizing such compensation." (*San Diego County Dept. of Social Services v. Superior Court* (2005) 134 Cal.App.4th 761, 766.)

Similarly, in this case, the court has the authority to appoint an appropriate class representative and class counsel for a proposed defendant class of overlying landowners. The court does not have the power, however, to require the state agency defendants and their counsel, the Attorney General, to expend public monies in excess of their individual litigation costs, in order to represent a large class of private landowners. Such an order would amount to a gift of public monies in violation of the State Constitution.

The Court may, however, avoid both the unfair burden and gift of public funds issues by naming a class representative who would represent the class merely by doing what it would do to protect its own interests. (See Miller, *supra*, 84 Colum. L. Rev. at pp. 1394-96 [dangers of burdening class representative are minimized where the class members are likely to assert the same claims and defenses and where by merely pursuing his own interests, the class representative adequately represents the absent members].)

For example, the order in the Putah Creek Litigation specifically provided: "The class representatives are not required to take any actions on behalf of the defendant class, other than any actions which the class representatives may decide to take to represent their own interests." (Putah Creek Adjudication, Order Granting Plaintiffs' Petition for Class Certification, submitted as Exhibit to Declaration of Jeffrey Dunn in Support of Municipal

Water Providers' Motion to Certify a Defendant Class, filed January 10, 2007.)

It would not be proper to certify the proposed class and to name the State of California as class representative in this case, where to adequately defend the class the State would have to participate in contested factual issues regarding notice, openness, adversity, and the other elements of prescription, as well as individualized determinations of self-help, whereas it would not participate in such issues on its own behalf. The appropriate class representative should be a private landowner who can represent others truly "similarly situated" merely by representing itself.

V. OTHER PARTIES WOULD BE SUITABLE REPRESENTATIVES FOR A CLASS OF DEFENDANT LANDOWNERS

Other parties to this action, or parties who may be brought into this action, would be appropriate class representatives for a class of defendant landowners. Those parties would have common issues of fact and law with the private landowners in the class.

In *Willis v. Los Angeles County Waterworks District No. 40*, Los Angeles County Superior Court Case No. BC364553, private landowner Rebecca Lee Willis has indicated a willingness to be class counsel for the class of "*private* landowners in the Antelope Valley Groundwater Basin (*excluding those actively participating in this litigation*)." (Complaint for Declaratory and Injunctive Relief seeking Adjudication of Water Rights; and for Compensation Pursuant to the Takings Clauses of the United States Constitution and the Constitution of the State of California, p. 1, ¶ 1 (Emphasis added.) The limitation of the class to private landowners would provide the commonality of interest that is absent in the Public Water Supplier's proposed class, which includes both public entities that own land and private landowners. Moreover, the exclusion of those already actively participating in the litigation effectively provides an opt-out provision for those who wish to represent their own interests separately. The class proposed in the *Willis* case is broader than the class requested by the Public Water Suppliers, inasmuch as it includes private landowners within as well as outside of the Suppliers' service areas, and thus the resulting class will lead to a more comprehensive adjudication for McCarran Amendment purposes. Most

importantly, both the class representative and class counsel are willing to serve in those capacities. The class counsel is a firm experienced in class action matters. (See website http://www.Krausekalfayan.com). If, for some reason, additional expertise is needed, the class counsel may associate a firm with such expertise. (Judicial Council of California, *Deskbook on the Management of Complex Civil Litigation* (2004) § 3.73 [court may condition class certification on the employment of other or additional counsel].)

Procedurally, the Willis case could be coordinated or consolidated with the existing Antelope Valley cases, and Ms. Willis could serve as the class representative of the private landowner class. Indeed, Plaintiff and Petitioner Willis has already filed a petition for coordination. (Petition for Coordination of Add-on Case, filed February 7, 2007.) Alternatively, the Public Water Suppliers could expand their proposed class to include all private landowners not already represented, name Ms. Willis as one of the Doe defendants in these actions, and serve her to bring her before the court in this action. The court could then name her as class representative.

As an additional alternative, the group of landowners collectively known as the Antelope Valley Ground Water Agreement Association (AGWA), could be named as class representatives for the landowner class. These private landowners have the necessary community of interest with the private members of the class. All the claims in the proposed First Amended Cross Complaint are asserted against the members of AGWA. AGWA is already a party to the action and is represented by Hatch and Parent, a law firm with extensive experience in California Water Law. (See website: http://www.hatchparent.com).

VI. IF A DEFENDANT CLASS ACTION IS CERTIFIED, CROSS-COMPLAINANTS PUBLIC WATER SUPPLIERS SHOULD BEAR THE COSTS OF IDENTIFYING AND NOTIFYING THE MEMBERS OF THE CLASS AND OTHER COSTS SHOULD BE SHIFTED IN THE INTEREST OF FAIRNESS

Public Water Suppliers estimate that there are more than 65,000 land parcels whose owners will fall in the class that they have proposed. (Suppliers' Motion Papers, p. 12; Declaration of Mark Wildermuth, ¶ 8.) Placing the obligation of representation of so many

landowners on the class representative will impose a tremendous burden on that representative.

The class action mechanism will benefit the Public Water Suppliers by relieving them of the duty of individually serving each of the class members. In fairness, the Suppliers should bear the burden of identifying and notifying class members. (See Cal. Rules of Court, rule 1856(b) [when a class is certified, court shall issue an order determining, among other things, "the parties responsible for the cost of notice"].) Courts have ordered the shifting of such costs to the plaintiffs in other water cases where a defendant class has been certified. For example, in *United States v. Truckee-Carson Irrigation Dist., supra,* 71 F.R.D. at p. 21, the court ordered that the cost of notice to the defendant class members was to be borne by plaintiff United States and plaintiff-intervenor tribe.

Similarly, in the Putah Creek case, the Order Granting Plaintiffs' Petition for Class Certification required the plaintiffs, not the class representatives, to prepare a notice to class members (paragraph 7), deliver the notice via first class mail to each class member (paragraph 9), cause the notice to be published three times in local newspapers (paragraph 10) and bear the cost of delivering the notice (paragraph 11). (Putah Creek Adjudication, Order Granting Plaintiffs' Petition for Class Certification, attached to Declaration of Jeffrey Dunn.)

Moreover, if the Court enters a certification order, it should contain a provision allowing the class representative to petition the court for the shifting of additional costs, such as costs of technical experts, to the Public Water Suppliers, when the interest of justice makes such shifting appropriate. (Cf. *In re Gap Securities Litigation* (1978) 79 F.R.D. 283, 290 [consider the added expense of class defense and the fairness of placing that burden on an unwilling defendant class representative].)

CONCLUSION

The State of California does not oppose the creation of a defendant class of landowners in order to bring now-absent water rights holders before the court. The State does, however, oppose the certification of the class proposed by the Public Water

Suppliers, which includes a few public agencies as well as predominately private property owners. The State urges the Court to exclude public entities from the class that it certifies and thus to certify a class that is made up of private landowners only. The State is not an appropriate class representative for class made up of predominately private landowners, and strongly objects to being named as such.

The Court and the parties should explore naming as class representative either a private landowner currently before the court, or a private landowner who can be brought into the adjudication. Consideration should be given to naming as class representative Rebecca Willis, who has already indicated a willingness to represent a landowner class in a related case, or AGWA, which already represents a group of private landowners.

Dated: February 22, 2007

Respectfully submitted,

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DECLARATION OF SERVICE

CASE: **ANTELOPE VALLEY GROUNDWATER CASES,**
LOS ANGELES COUNTY SUPERIOR COURT
JUDICIAL COUNCIL COORDINATED PROCEEDINGS NO. 4408

I, declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On February 22, I served the

1. State of California's Memorandum of Points and Authorities in Opposition to Public Water Suppliers' Motion for Class Certification;
2. Declaration of Warren Arthur Dingman in Support of State of California's Memorandum of Points and Authorities in Opposition to Public Water Suppliers' Motion for Class Certification.

_X_ Posting the document(s) listed above to the Santa Clara County Superior Court web site in regard to the Antelope Valley Groundwater matter on February 13, 2007.

_X_ by placing a true copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid using the overnight courier, Golden State Overnight Courier Service, addressed as follows:

(served original via over night courier to Presiding Judge on February 22, 2007)
Presiding Judge of the Superior Court of California, County of Los Angeles
County Courthouse
111 North Hill Street
Los Angeles, CA 90012-3014

Chair, Judicial Council of California
Administrative office of the Courts
Attn: Appellate and Trial Court Judicial Services (Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Honorable Jack Komar
Santa Clara County Superior Court
191 North First Street, Department 17C
San Jose, Ca 95113

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 22, 2007.

Declarant
Julie Gomez

Julie Gomez
(Signature)