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3 R. LEE LEININGER
4 JAMES J. DUBOIS
5 United States Department of Justice
6 Environment and Natural Resources Division
7 Natural Resources Section
8 1961 Stout Street, Suite 800
9 Denver, Colorado 80294
10 lee.leininger@usdoj.gov
11 james.dubois@usdoj.gov
12 Phone: 303/844-1364 Fax: 303/844-1350

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Attorneys for the United States

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding)
Special Title (Rule 1550(b)))
Judicial Council Coordination
Proceeding No. 4408

ANTELOPE VALLEY GROUNDWATER CASES

Included actions:

Los Angeles County Waterworks District No. 40 v.
Diamond Farming Co., et al.
Los Angeles County Superior Court, Case No. BC 325-
201

Los Angeles County Waterworks District No. 40 v.
Diamond Farming Co., et al.
Kern County Superior Court, 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
Riverside County Superior Court, Consolidated Action,
Case nos. RIC 353 840, RIC 344 436, RIC 344 668

AND RELATED CROSS ACTIONS

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26 Cross-Defendant United States of America respectfully submits this response to
27 Richard Wood's *Motion for Appointment of Expert* ("Wood Motion"), filed February 9,
28 2009, and *Rebecca Willis's and the Class' Motion for Appointment of Expert Witness*;
Memorandum of Points and Authorities ("Willis Motion"), filed March 3, 2009. Mr.

1 Wood, as class representative for landowners who have pumped less than 25 acre-feet in
2 any year since 1946 (the “small pumpers class”), moved for a Court-appointed expert “to
3 advance the interests of the class members.” Motion at 6. Specifically, Mr. Wood seeks a
4 Court-appointed expert to defend against “defendants to this action, each of whom is a
5 public water supplier asserting prescriptive rights against the Class.” *Id.* at 3. The movant
6 further asks that the costs of the expert (estimated at \$155,000) be allocated among the
7 water supplier defendants. *Id.* Ms. Willis, as class representative for landowners who
8 have not pumped water (the “dormant overlying landowner class”), similarly requests
9 appointment of experts to “help counsel in (1) evaluating the work of other experts; (2)
10 preparing for and defending against a prescription trial that includes elements of safe yield
11 and overdraft; and (3) assisting counsel in negotiating a potential settlement or physical
12 solution.” Willis Motion at 2. Willis and the dormant overlying landowner class argue
13 that it is appropriate for the Court to require the Public Water Suppliers to bear the cost of
14 the class’ experts. *Id.*

15 The United States is not a public water supplier asserting prescriptive water rights
16 against the classes of small pumpers or non-pumping landowners in the Antelope Valley.
17 Consequently, the Wood and Willis proposal for Court-appointed experts and cost
18 allocation would not directly affect the Government. Further, assuming this proceeding
19 meets the general requirements for a waiver of federal sovereign immunity under the
20 McCarran Amendment, 43 U.S.C. § 666, the federal government would be immune from
21 such monetary exactions. *See, e.g., United States v. Idaho*, 508 U.S. 1, 5 (1993) (ruling
22 that the McCarran Amendment does not permit assessment of litigation costs against the
23 United States).

24 Even though the Wood and Willis proposals would not directly impose financial
25 burdens on the Government they could, nonetheless, unduly multiply and complicate these
26 proceedings and, thus, have an indirect adverse effect on the Government’s interests in
27 administrative efficiency. Moreover, Wood and Willis have not carried their burden to
28 justify the request for a court-appointed expert. Evidence Code § 730 permits a court to

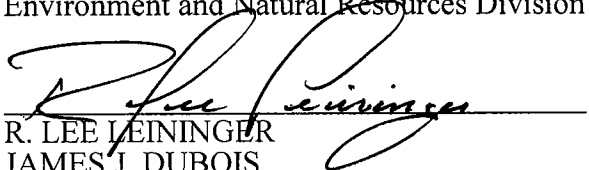
1 appoint an expert, but does not confer an absolute right upon a party in a civil action to the
2 appointment. Instead, the matter is left to the trial court's broad discretion. *See Laguna*
3 *Salada Union Elementary School Dist. v. Pacific Development Co.*, 119 Cal.App.2d 470,
4 474 (1953)(discussing predecessor statute).

5 An expert appointed under § 730 must be an independent and disinterested expert
6 “hired for the purpose of being impartial.” *Mercury Casualty Co. v. Superior Court*, 179
7 Cal.App.3d 1027, 1033 (1986). The disinterested and impartial expert may not advocate
8 on behalf of a party to the action. *In re Eric A.*, 73 Cal. App. 4th 1390, 1394 n. 4 (1999).
9 Contradicting the clear intent and purpose of Section 730, the small pumpers and the
10 dormant overlying landowners argue for the appointment of an expert to promote their
11 litigation claims and defend against adverse claims of prescription. The parties cite no
12 case law in support of their request for a Court-appointed expert who is also a party
13 advocate, in contravention to Section 730.

14 Consequently, because the parties have failed to carry their burden of showing
15 legal entitlement to a Court-appointed expert and in light of the potential prejudice to the
16 Government’s interests in this litigation, the United States respectfully requests the Court
17 exercise its discretion and deny both class motions.

18 Respectfully submitted this 4th day of March, 2009.

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20 JOHN C. CRUDEN
21 Acting Assistant Attorney General
22 Environment and Natural Resources Division

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24 R. LEE LEININGER
25 JAMES J. DUBOIS
26 United States Department of Justice
27 Environment and Natural Resources Division

28 *Attorneys for the United States*

PROOF OF SERVICE

I, Linda C. Shumard, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environmental and Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

On March 4, 2009, I caused the foregoing documents described as; **UNITED STATES' RESPONSE TO MOTIONS FOR APPOINTMENT OF EXPERT WITNESSES**, to be served on the parties via the following service:

☒

BY ELECTRONIC SERVICE AS FOLLOWS by posting the documents(s) listed above to the Santa Clara website in regard to the Antelope Valley Groundwater matter.

☐

BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By placing true copies thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

☐

BY OVERNIGHT COURIER: I caused the above-referenced document(s) be delivered to FEDERAL EXPRESS for delivery to the above address(es).

Executed on March 4, 2009, at Denver, Colorado.

/s/Linda C. Shumard
Linda C. Shumard
Legal Support Assistant