

Attorneys for Plaintiff and the Class

ANTELOPE VALLEY GROUNDWATER CASES

Plaintiff,

vs.

Defendants.

1 JUDGE: Hon. Jack Komar

In its February 24, 2009 Motion seeking the appointment of expert witnesses, the Willis Class requested in the alternative that the Court appoint its own expert to assist it in determining the Basin's yield. Given the various concerns expressed

1 by the Court and parties, Willis now limits her motion to that requested relief. The
2 Court should appoint its own expert to assist it in determining the Basin's yield, the
3 cost of which should be borne by the Public Water Suppliers. That is appropriate
4 for the following reasons:

5 (1) The yield determination is a critical aspect of this trial, which will affect
6 the rights of numerous parties and Class members who cannot
7 meaningfully participate.

8 (2) The yield determination is highly technical and involves a massive
9 amount of scientific evidence. The Court should use its authority to get
10 appropriate expert assistance in making this critical determination as
11 accurately as possible.

12 (3) The primary experts who are expected to testify as to the Basin's yield
13 are both highly qualified persons, but they have reached dramatically
14 varying opinions. This shows the need for an impartial expert.

15 (4) The Court has a fiduciary duty to protect the interests of the classes as
16 well as a duty to the public to protect the Basin. Further, the
17 appointment of an independent expert will increase public perception that
18 the yield decision has been fairly and carefully reached.

19 (5) The incremental costs to the Public Water Suppliers will be modest.

20 Finally, we suggest that the Court appoint Professor Thomas Harter as its
21 expert.

22 ARGUMENT

23 **1. The Yield Determination Is a Critical Aspect of This Trial, Which** 24 **Will Affect the Rights of Numerous Parties and Class Members** 25 **Who Cannot Meaningfully Participate in that Determination.**

26 The importance of the yield determination cannot be overestimated. In many
27 respects, this is the fundamental issue in this case. That determination will
28 significantly affect the interests of the parties for years to come as well as the future
of the Antelope Valley Basin. It is no exaggeration to say that the livelihood and

1 future of thousands of persons may depend on this finding. Moreover, as explained
2 in Willis' opening papers, there is no practical way for the Class(es) to participate
3 meaningfully in this determination. This critical issue should not be decided solely
4 based on expert testimony propounded by the Public Water Suppliers ("PWS") and
5 large agricultural interests. Rather, the Court should appoint its own expert.

6
7 **2. The yield determination is highly technical and involves a large**
8 **amount of technical scientific evidence. The Court should use its**
9 **authority to get appropriate expert assistance in making this**
10 **critical determination accurately.**

11 It is incontrovertible that the yield determination is highly technical and
12 will involve review of a massive amount of scientific evidence. This is precisely the
13 type of situation where a trial court should exercise its authority to appoint an
14 expert to assist it in its determination. *Manual for Complex Litigation* Section 11.51
15 (4th ed. 2006). *See Federal Trade Comm. v. Enforma Natural Prods., Inc.* 362 F.3d
16 1204, 1213 (9th Cir. 2004); *Mercury Cas. Co. v. Superior Court* (1986) 179 Cal. App.
17 3d 1027, 1032-33. Notably, the appointment of such experts is not uncommon in
18 condemnation cases, where, as here, government entities are asserting property
19 claims against private persons. *See Contra Costa County Flood Dist. v. Armstrong*
20 (1961) 193 Cal. App. 2d 206, 210.

21 Of course, the Court must ultimately decide this highly technical issue based
22 on the evidence presented to it. But given the critical nature of this issue and the
23 complexity and voluminous nature of the evidence, the Court should have the
24 guidance of a truly independent expert.

25 **3. The primary experts who are expected to testify as to the Basin's**
26 **yield are both highly qualified persons, but they have reached**
27 **dramatically varying opinions, which shows the need for an**
28 **impartial expert.**

It is noteworthy that Messrs. Scalmanini and Sheehan – the primary experts
expected to testify as to yield -- are both highly qualified, but have come to widely
differing opinions as to the Basin's yield. Both of these experts have studied the

1 Basin at great detail, but they have come to widely varying conclusions about its
2 yield. The widely disparate nature of their opinions is another reason why the
3 Court should take advantage of its authority to obtain independent expert
4 assistance.

5 We anticipate that the PWS' expert, Joseph Scalmanini, will likely opine that
6 the Basin's native recharge is approximately 60,000 AFY and that return flows from
7 agricultural use and imported water are approximately 58,000 AFY, resulting in a
8 Total Sustainable Yield of approximately 118,000 AFY. By contrast, we anticipate
9 that Bolthouse Farms' expert, Thomas Sheehan, will opine that the Basin's native
10 recharge is approximately 106,000 AFY and that return flows from agricultural use
11 and imported water are approximately 79,000 AFY, resulting in a Total Sustainable
12 Yield of approximately 185,000 AFY. In short, his estimate of the Basin's yield is
13 approximately 57% greater than that of Mr. Scalmanini.

14 These are significantly varying numbers, the determination of which will
15 have a major impact on the future course of these proceedings as well as the
16 economic and other interests of the parties and Class members. Based on historical
17 rates of pumping, if **Mr. Scalmanini's estimates are correct, the Court will**
18 **likely find that the Basin is and has been in a state of overdraft. By**
19 **contrast, if Mr. Sheehan's estimates are correct, the Court will likely not**
20 **find overdraft.** Equally important, their varying analyses are based on a number
21 of technical factors, each of which they have studied extensively. Because of the
22 importance of this decision, the highly technical nature of the evidence, and the
23 widely disparate views of well regarded experts, the Court should avail itself of the
24 guidance of an independent expert.

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1 **4. The Court has a fiduciary duty to protect the interests of the**
2 **classes as well as a duty to the public to protect the Basin.**
3 **Further, the appointment of an independent expert will increase**
4 **public perception that the yield decision has been fairly and**
5 **carefully reached.**

6 The appointment of an independent expert should satisfy AGWA's concerns
7 that its members not be treated disparately, but also have the benefit of expert
8 analysis (though we note that AGW's leader, Dr. Nebeker, is himself a trained
9 scientist and participated in many of the technical committee meetings). Further,
10 the Court should recognize that it has a fiduciary duty to protect the interests of the
11 Willis and Wood Classes that distinguishes its role militates for the appointment of
12 an independent expert. *See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App.
13 4th 116, 129.

14 Moreover, the Willis Class has no interest in maximizing or
15 minimizing the Basin's yield. Rather, the Class' interest is in protecting the
16 viability of the Basin without inappropriately encroaching on the parties' ability to
17 use the Basin's groundwater. Thus, the Class' interests are coextensive with the
18 Court's interest in making a just and appropriate finding. Unless the Court
19 appoints an expert, the Classes will be powerless to defend against the PWS' claim
20 that the Basin is in overdraft. By appointing an expert, the Court will enhance its
21 ability to reach an appropriate result on this critical issue and fulfill its fiduciary
22 obligation to protect the Class.

23 Although the PWS question the Court's authority to appoint an independent
24 expert for the benefit of the Class, it is clear that the Court may appoint such an
25 expert to assist it in making its determinations. Evidence Code 730 provides:

26 When it appears to the court, at any time before or during the trial of an action, that
27 expert evidence is or may be required by the court or by any party to the action, the
28 court on its own motion or on motion of any party may appoint one or more experts to
 investigate, to render a report as may be ordered by the court, and to testify as an
 expert at the trial of the action relative to the fact or matter as to which the expert
 evidence is or may be required. The court may fix the compensation for these
 services, if any, rendered by any person appointed under this section, in addition to
 any service as a witness, at the amount as seems reasonable to the court.

1 Finally, the appointment of an independent expert will increase public
2 perception that the critical yield decision has been made in a careful, just,
3 and fair manner. That alone justifies such an expert.

4 **5. Professor Harter Is an Appropriate Independent Expert.**

5 It cannot be disputed that Professor Harter is a qualified expert to assist the
6 Court, and we suggest that the Court appoint him to assist its determination of the
7 basin's yield. Professor Harter has a PhD in Hydrology and holds the Robert M.
8 Hagan Endowed Chair in Water Management and Policy at the University of
9 California, Davis. As his c.v. shows, he has extensive experience analyzing large
10 groundwater basins.

11 Although Willis Class counsel has had some preliminary conversations with
12 Professor Harter, we have not had any substantive communications with him
13 regarding his proposed work; nor has he expressed any opinions on the Basin's
14 yield. He is an unbiased and well-qualified academic who can ably assist the Court
15 in reaching a fair and just determination of this vital issue.

16
17 **6. The Incremental Costs to the Public Water Suppliers Will Be Modest.**

18 It is appropriate for the Court to require the PWS to bear the costs of the
19 Class' experts, since the Class' position in this case is essentially defensive, and the
20 Public Water Suppliers benefit from the Class' presence in achieving a
21 comprehensive adjudication. Moreover, the incremental cost to the PWS will be
22 modest.

23 Professor Harter has estimated that he can analyze the existing experts'
24 reports and opinions, including reviewing relevant underlying data, and provide his
25 opinions with respect thereto for some \$85,000. While not insignificant, that
26 amount is less than 10% of the amount that we estimate the PWS have collectively
27 incurred for their experts -- an amount that cannot and has not been matched by
28 any of the other parties. Under these circumstances, it is appropriate to impose the

1 costs of an independent expert, such as Professor Harter, on the PWS.

2 The Public Water Suppliers' argument that there are already sufficient
3 experts in this case misses the mark. The PWS are large governmental entities who
4 have hired many experts to assist in presenting their case. Given the vital interest
5 at stake and the greatly disparate expert opinions, the parties and the Court need
6 the services of a truly impartial expert to ensure that justice is done.

7 **CONCLUSION**

8 For the reasons stated above, the Court should exercise its authority under
9 Section 730 of the Evidence Code and appoint an independent expert to assist the
10 Court in determining the Basin's yield.

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12 Dated: April 17, 2009

KRAUSE KALFAYAN BENINK
& SLAVENS LLP

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10

11 REBECCA LEE WILLIS, on behalf of herself)
and all others similarly situated,)
12 Plaintiff,)

13 vs.)

14 LOS ANGELES COUNTY WATERWORKS)
DISTRICT NO. 40; CITY OF LANCASTER;)
CITY OF LOS ANGELES; CITY OF)
15 PALMDALE; PALMDALE WATER)
DISTRICT; LITTLEROCK CREEK)
16 IRRIGATION DISTRICT; PALM RANCH)
IRRIGATION DISTRICT; QUARTZ HILL)
17 WATER DISTRICT; ANTELOPE VALLEY)
WATER CO.; ROSAMOND COMMUNITY)
18 SERVICE DISTRICT; MOJAVE PUBLIC)
UTILITY DISTRICT; CALIFORNIA)
19 WATER SERVICE COMPANY; DESERT)
20 LAKE COMMUNITY SERVICES)
DISTRICT; NORTH EDWARDS WATER)
21 DISTRICT; and DOES 4 through 1,000,)

22 Defendants.)
23)
24)

JUDICIAL COUNCIL COORDINATION
PROCEEDING No. 4408
Santa Clara Case No. 1-05-CDV-049053
Assigned to The Honorable Jack Komar

PROOF OF SERVICE

25 I, Ashley Polyascko, declare:

26 I am a resident of the State of California and over the age of eighteen years, and not a
27 party to the within action; my business address is 625 Broadway, Suite 635, San Diego,
28 California, 92101. On **April 17, 2009**, I served the within document(s):

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