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 11 Water Storage, LLC and WDS California II, LLC

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF LOS ANGELES**

14 Coordination Proceeding  
 15 Special Title (Rule 1550(b))

16 **ANTELOPE VALLEY**  
 17 **GROUNDWATER CASES**

18 Included Actions:

19 Los Angeles County Waterworks District  
 20 No. 40 v. Diamond Farming Co.  
 21 Superior Court of California  
 22 County of Los Angeles, Case No. BC  
 23 325201

24 Los Angeles County Waterworks District  
 25 No. 40 v. Diamond Farming Co.  
 26 Superior Court of California, County of  
 27 Kern, Case No. S-1500-CV 254348

28 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, consolidated actions,  
 Case Nos. RIC 353840, RIC 344436, RIC  
 344668

Judicial Council Coordination Proceeding  
 No. 4408

SC Case No. 105CV 049053  
 Assigned to Hon. Jack Komar

**OPPOSITION TO LOS ANGELES  
 COUNTY WATERWORKS DISTRICT  
 NO. 40's MOTION FOR LEGAL  
 FINDINGS ON WATER CODE  
 REQUIREMENTS TO REPORT  
 EXTRACTIONS ON GROUNDWATER  
 IN LOS ANGELES COUNTY**

Date: February 14, 2012

Time: 9:00 a.m.

Room: 1515

1 **I. Introduction**

2 This opposition to the “Motion for Legal Findings on Water Code Requirements to  
3 Report Extractions of Groundwater in Los Angeles County” filed by Los Angeles County  
4 Waterworks District No. 40 (the “District”) is filed on behalf of Antelope Valley Water Storage,  
5 LLC, WDS California II, LLC, and the Van Dam parties. The District argues in its Motion that  
6 failure to file a “Notice of Extraction and Diversion of Water” (a “Notice”) with the State Water  
7 Resources Control Board (the “Board”) in any given year results in a loss of overlying ground  
8 water rights pursuant the plain language of California Water Code section 4999 *et seq.* (the  
9 “Recordation Statutes”). The District’s interpretation of the Water Code is incorrect for the  
10 reasons set forth in this opposition.

11 **II. The Recordation Statutes Are Limited In Scope**

12 The Recordation Statutes require that each person who extracts ground water in Los  
13 Angeles County (after 1955) in excess of 25 acre-feet in any year shall file with the Board a  
14 notice in the form provided by the Board. (Water Code §§5001-5002) A review of the plain  
15 language of these provisions demonstrates that they concern appropriative claims, both as to  
16 surplus water and prescription. They are not authority for either the extinguishment or reduction  
17 of overlying water rights established by common law.

18 **a. Overlying Groundwater Rights Not Affected**

19 The Recordation Statutes are recognized to have a savings provision that indicate that  
20 they “have no impact on any water rights other than as expressly provided.” (California Water  
21 Law And Policy, Scott S. Slater, Section 11.12, p. 11-54.) Specifically, Section 5005 states  
22 “[e]xcept as specified in Section 5004, failure to file . . . *shall not cause the loss of rights to*  
23 *groundwater which existed on January 1, 1956* [the effective date of the Recordation Statutes.]”  
24 (Emphasis added.) The existence of an overlying landowner’s correlative water right to the  
25 reasonable and beneficial use of native ground water, regardless of actual, recorded extraction  
26 and use, is a mainstay of California water law. (See *Katz v. Walkinshaw* (1903) 141 Cal. 116,  
27 134-135, 143-145; *Tehachapi-Cummings County Water District v. Armstrong* (1975) 49  
28 Cal.App.3d 992, 1001-1002; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4<sup>th</sup> 1224,

1 1242; Hutchins, *The Law of California Water Rights* (1956) pp. 431-454.) There is no language  
 2 in section 5004 (or elsewhere in the Recordation Statutes) authorizing the extinguishment,  
 3 reduction, or other alteration of overlying water rights.

4 **b. Provisions Addressing Prescriptive Rights**

5 One of the key provisions in the Recordation Statutes, Section 5003, addresses  
 6 exclusively prescriptive rights. Specifically, the section states in part,

7 no *prescriptive right* that may otherwise accrue to extract ground water shall arise or  
 8 accrue to, nor shall any statute of limitations operate . . . in favor of any person required  
 9 to file a notice of extraction and diversion of water, until that person files with the board.  
 10 . . . As to each person who fails to file that notice . . . it shall be deemed for the period  
 11 from that time until the first notice of the person is filed, that no claim of right to the  
 12 extraction of ground water . . . (Emphasis added.)

13 Thus “the penalties for failure to file may be significant *for appropriators and overlying*  
 14 *owners attempting to obtain prescriptive rights*. Water Code section 5003 states that no  
 15 prescriptive right to extract ground water can accrue unless the person claiming the right has first  
 16 filed a Notice.” (*California Water Law And Policy*, Scott S. Slater, Section 11.12, p. 11-53.)  
 17 (Emphasis added.) Thus, for an appropriator seeking to establish a prescriptive right the filing is  
 18 an essential element and pre-requisite to the right. So too would be the case of an overlying  
 19 landowner seeking to establish a prescriptive right. In contrast, Section 5003 does not provide  
 20 that such a notice is a prerequisite to the exercise or preservation of an overlying water right.

21 **c. Provisions Addressing Appropriative Rights**

22 “[T]he failure to file the requisite notice for five consecutive years may *deprive an*  
 23 *appropriator* of his or her *claim of appropriative rights by nonuse*.” (*California Water Law And*  
 24 *Policy*, Slater, Section 11.12, p. 11-53. citing Water Code section 5004.) (Emphasis added.)  
 25 It is well understood that the rights of overlying owners are neither established nor “dependent  
 26 upon continuous use to maintain their paramount priority over appropriative uses. . . .  
 27 Consequently, the determination of nonuse created by failure to file under Water Code section  
 28 5004 would appear to have little impact on these inchoate priorities.” (*Id.*)

In all western states, nonuse is a legal doctrine applied to the “loss by forfeiture of  
 appropriative rights only”, never riparian or overlying correlative rights. (Hutchins, *The Law of*

1 *California Water Rights* (1956) pp. 291-297.) “The riparian right, in contrast with appropriative  
 2 right, is not gained by use nor lost by disuse.” (*Id.*, at 291.)<sup>1</sup> For example in California, nonuse  
 3 has only been applied to appropriative water rights. (See *Smith v. Hawkins* (1895) 110 Cal. 122,  
 4 126-127; *Smith v. Hawkins* (1898) 120 Cal. 86, 88; *Duckworth v. Watsonville Etc. Co* (1907) 150  
 5 Cal. 520, 531-533); *Lindblom v. Round Valley Water Co* (1918) 178 Cal. 450, 454-455; *Bazet v.*  
 6 *Nugget* (1931) 211 Cal. 607, 617; *Wright v. Best* (1942) 19 Cal.2d 368, 380; *Erickson v. Queen*  
 7 *Valley Ranch Co.* (1971) 22 Cal.App.3d 578,582; *Pleasant Valley Canal co. v. Borrer* (1998) 61  
 8 Cal.App. 4<sup>th</sup> 742, 754; *Barnes v. Hussa* (2006) 136 Cal.App.4<sup>th</sup> 1358, 1371; *North Kern Water*  
 9 *Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4<sup>th</sup> 555, 581.) The  
 10 determination about whether there has been a continuous nonuse for purposes of forfeiture  
 11 requires an assessment of the beneficial use for which the water was appropriated. (See *Davis v.*  
 12 *Gale* (1867) 32 Cal. 27; *Hesperia Land etc. v. Rogers* (1890) 83 Cal. 10, 11; *Montgomery &*  
 13 *Mullen L. Co. v. Quimby* (1912) 164 Cal. 250; *Witherill v. Brehm* (1925) 74 Cal.App. 286, 294.)

14 Previously, when the Legislature attempted to terminate riparian rights for ten years of  
 15 continuous nonuse the courts held the provision (California Stats. 1913, ch. 586, sec. 11)  
 16 unenforceable on constitutional grounds. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*  
 17 (1935) 3 Cal.2d 489, 530-531, citing *Herminghaus v. Southern California Edison Co.*, (1926)  
 18 200 Cal. 81, 115-116; *Scott v. Fruit Growers’ Supply Co.*, (1927) 202 Cal. 47, 54; *Fall River*  
 19 *Valley Irr. Dist. v. Mt. Shasta Power Corpn.* (1927) 202 Cal. 56, 67-69.) Likewise, such a  
 20 provision seeking to extinguish riparian rights for nonuse was held contrary to the 1928  
 21 amendment to the California constitution. (*Id.*, at p. 530-531.) The proposal that the  
 22 Recordation Statutes must be interpreted to authorize the loss of a landowner’s overlying water  
 23 right based on a failure to file a notice with the Board would likewise be unenforceable on  
 24 constitutional grounds.

25 Furthermore, the doctrine of forfeiture by nonuser is uniformly narrowly applied in the  
 26 law and is never construed to exist by mere implication. Specifically, the law abhors a forfeiture

27  
 28 <sup>1</sup> Likewise, the correlative right “does not depend upon use and is not lost by disuse, in the  
 absence of a prescriptive right against it.” (*Id.*, at p. 438.)

1 and when a statute calls for the forfeiture of a recognized property interest, it must be given a  
 2 fair, reasonable construction in order to avoid harsh results. (*Contra Costa Water Co. v. Breed*  
 3 (1932) 139 Cal. 432, 441 (overruled in part on other grounds in *Miller v. McKinnon* (1942) 20  
 4 Cal.2d 83, 90.)) It is not disputed that Water Code section 5004 states in part, “failure to file a  
 5 notice with the board . . . within six months after the close of calendar year shall be deemed  
 6 equivalent for all purposes to be *nonuse* for such year of any ground water . . . by each person  
 7 failing to so file a notice. . . .” (Emphasis added.) However, it is equally clear that this provision  
 8 makes no express mention of overlying water rights let alone a directive that such valuable  
 9 property rights be terminated.

10 **d. District’s Interpretation is Contrary to Basic Tenets of California Law**  
 11 **Concerning Self-Help**

12 Any argument that Water Code section 5003 may be a legal impediment to an overlying  
 13 landowner’s engagement of self-help to preserve an overlying right does not appear to be  
 14 consistent with case law. The common law doctrine of “self-help” does not require that an  
 15 overlying landowner asserting a correlative water right must file any notice recording water use.  
 16 Again, the Recordation Statutes neither mention nor impose such a requirement as a requisite to  
 17 the self-help defense.<sup>2</sup> Instead, case law confirms that “overlying users retain their rights against  
 18 potential prescription by virtue of their own pumping. *Los Angeles v. San Fernando* (1975) 14  
 19 Cal. 3d 199, 293 fn 101; *Hi-Desert County Water District v. Blue Skies County Club* (1994) 23  
 20 Cal. App. 4<sup>th</sup> 1723, 1731; *Barstow v. Mojave Water Agency* (2000) 23 Cal. 4<sup>th</sup> 1224, 1241.”,  
 21 Garner, California Water II, p. 78.) Specifically, in *Hi-Desert* the court stated,

22 [A]n overlying user may maintain rights to water by continuing to extract it in the face of  
 23 an adverse appropriative use. Such is the doctrine of ‘self help’. . . *Private defendants*  
 24 *should be awarded the full amount of their overlying rights, less any amounts of such*  
 25 *rights lost by prescription . . . That is, overlying users retain priority but lose amounts not*  
 26 *pumped. . . . [That is] overlying rights have been prescribed and are thereby limited to*  
 27 *the extent of such maximum annual self help by production during the prescriptive*  
 28 *period.” (Hi-Desert, supra, at 1731-2.) (Emphasis original.)*

<sup>2</sup> To the contrary, Water Code section 5003 imposes conditions on the establishment of prescriptive claims, not defenses intended to defeat prescriptive water right claims.

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**e. Lack of Precedent**

Finally, the conclusion reached by Eric Garner in *California Water* (Littleworth & Garner) that “no case has determined the validity of this section [5004], nor of late but retroactive filings” (pg. 78) appears to be correct. Significantly, the District has failed to cite to the court a single California court or Board decision which has ever interpreted and enforced the Recordation Statutes in the manner advocated in the pending motion.

**III. Conclusion**


The District’s misguided interpretation of the Recordation Statutes is contrary to the statute and fundamental principles of California water law. The Recordation Statutes make no mention of overlying water rights and manifests no intent to deprive a landowner of its overlying water right for failure to file forms with the Board.

Given that no landowner is asserting appropriative or prescriptive water right claims in this case is not legally significant whether a landowner submitted annual filings under the Recordation Statutes. Likewise, neither the Recordation Statutes nor case law requires that the assertion of the “self-help” defense depends on such filings.

The District’s motion should be denied in its entirety.

Dated: January 31, 2012

THE LAW OFFICES OF YOUNG WOOLDRIDGE, LLP

By:   
SCOTT K. KUNEY, Esq., Attorneys for Gertrude J. Van Dam, Delmar D. Van Dam, Craig Van Dam, Gary Van Dam, Antelope Valley Water Storage, LLC and WDS California II, LLC

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**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF KERN

I, ERIN L. LINDSEY, declare: I am and was at the times of the service hereunder mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business address is The Law Offices of Young Wooldridge LLP, 1800 30th Street, Fourth Floor, Bakersfield, CA 93301.

On January 31, 2012, I caused the foregoing document(s) entitled as: **OPPOSITION TO LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40's MOTION FOR LEGAL FINDINGS ON WATER CODE REQUIREMENTS TO REPORT EXTRACTIONS ON GROUNDWATER IN LOS ANGELES COUNTY** to be served on the parties via the following service:

X (BY POSTING) I posted the document listed above to the Santa Clara Superior Court website regarding the Antelope Valley Groundwater matter pursuant to the Court's Clarification Order. Electronic service posting completed through [www.scefilings.org](http://www.scefilings.org).

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

Executed on January 31, 2012, at Bakersfield, California.

  
ERIN L. LINDSEY