SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordinated Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

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

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
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.

Judicial Council Coordination
Proceeding No. 4408

ORDER AFTER HEARING RE MOTION BY THE UNITED STATES FOR JUDGMENT ON THE PLEADINGS

Hearing Date: September 21, 2006
Time: 9:00 a.m.
Department: 1, Room 534

Judge: Hon. Jack Komar

This motion for Judgment on the Pleadings by the United States came on for hearing on September 21, 2006. The court having reviewed the papers and heard oral argument thereon, now makes the following order:

These coordinated actions involve a determination of the rights of the parties to use the groundwater within the Antelope Valley Groundwater Basin. On January 18, 2006, parties variously known as "Municipal Purveyors," "Public Water Suppliers," or "Municipal Water Providers"[1] filed a Cross-Complaint for declaratory and injunctive relief. The motion specifically addresses the Cross Complaint.

The Municipal Purveyors ". . . seek[] a judicial determination of rights to all water within the Antelope Valley Groundwater Basin . . . ." (Municipal Purveyors' Cross-Complaint, ¶ 1.) The Municipal Purveyors seek to limit pumping in the basin due to the alleged declining groundwater levels, diminished groundwater storage, and land subsidence damage in the Basin. (*Id.*, ¶ 25.) The relief sought includes declarations regarding (1) prescriptive rights, (2) appropriative rights, (3) a physical solution, (4) municipal priority, (5) storage of imported water, (6) recapture of return flows, (7) unreasonable use of water, and (8) the boundaries of the basin, and appropriate injunctive orders.

The United States is named as one of the cross-defendants in light of its ownership of real property within the Antelope Valley and because it is a major water producer within the valley.

---

[1] The public water entities variously refer to themselves by different names and at times include different parties. (*See* Municipal Purveyors' Cross-Complaint, at caption of pleading [referring to the Cross-Complaint of the "Municipal Purveyors"], at 7:14-17 [eight entities defined as "Public Water Suppliers"], at ¶¶ 2-10 [nine entities identified as Cross-Complainants]; *see also* Municipal Water Providers' Mem. Opp. United States Mot. J. Pleadings, at 3:27-28 fn. 5 [defining "Municipal Water Providers," who oppose motion for judgment on the pleadings, as including only five entities].)

The United States moves for judgment on the pleadings on the ground of sovereign immunity. The United States contends that the Cross Complaint fails to meet the requirements of the McCarran Amendment, 43 U.S.C. § 666, without which there is no waiver of sovereign immunity, and the United States must be dismissed as a party to the Cross-Complaint.

Oppositions, "responses," or "position statements" have been filed by the following parties: (1) Municipal Purveyors, (2) Tejon Ranchcorp, (3) Diamond Farming, (4) State of California parties, (5) Bolthouse Properties, (6) the Van Dams, and (7) Antelope Valley-East Kern Water Agency.

Diamond Farming also filed a joinder to the response by the State of California parties. The City of Palmdale has filed a joinder to the Municipal Water Providers' opposition.

A motion for judgment on the pleadings may be granted if the complaint fails to state a cause of action. (Cal. Civ. Proc. Code § 438, subd. (c)(1)(B)(ii).) The motion may be made as to the entire complaint or as to any of the causes of action stated therein. (*Id.*, § 438, subd. (c)(2)(A).) The grounds for the motion must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (*Id.*, § 438, subd. (d).)

"The United States, as sovereign, is immune from suit save as it consents to be sued [citations], and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. [Citations.]" (*United States v. Sherwood* (1941) 312 U.S. 584, 586-587.) As explained by the United States Supreme Court:

> The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.

(*Block v. North Dakota* (1983) 461 U.S. 273, 287.) Thus, ". . . statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." (*McMahon v. United States* (1951) 342 U.S. 25, 27.)

Through the McCarran Amendment, Congress has waived sovereign immunity of the United States in suits involving the adjudication of water rights. The McCarran Amendment states in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(43 U.S.C.S. § 666(a).)

The Ninth Circuit has provided the context in which the McCarran Amendment was passed:

> By the time the McCarran Amendment was passed, most Western states had adopted some statutory procedure for the mass adjudication of water rights. [Citation.] While these statutory adjudications seemed to promise an end to the confusing and conflicting adjudication of water rights in multiple cases, the system was impaired by the refusal of the federal government to participate. Since the United States had large landholdings and extensive reserved water rights in the West, its claims of sovereign immunity significantly diminished the value of the comprehensive state adjudications. Congress sought to remedy this problem by enacting the McCarran Amendment in 1952. *See* S. Rep. No. 755, 82d Cong., 1st Sess. 4-6 (1951).

(*United States v. Oregon, Water Resources Dep't* (9th Cir. 1994) 44 F.3d 758, 765.)

In discussing the intent behind the McCarran Amendment, the United States Supreme Court has stated:

> The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. *See Pacific Live Stock Co. v. Oregon Water Bd.* [(1916) 241 U.S. 440], at 449. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

(*Colorado River Water Conservation Dist. v. United States* (1976) 424 U.S. 800, 819.) The Supreme Court has also quoted Senator McCarran, Chairman of the Committee reporting on the bill, who made this statement in response to another senator:

> "S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

(*See United States v. District Court of County of Eagle* (1971) 401 U.S. 520, 525 [*quoting* S. Rep. No. 755, 82d Cong., 1st Sess., 9.].)

In *United States v. Oregon, Water Resources Dep't* (9th Cir. 1994) 44 F.3d 758, the Ninth Circuit addressed the scope of the adjudication necessary under the McCarran

Amendment. *Oregon* involved surface water in the Klamath River Basin. The United States argued the adjudication needed to include groundwater. The Ninth Circuit disagreed, reasoning as follows:

> Because the Klamath Basin adjudication does not attempt to determine the rights of claimants to groundwater in the Basin, the United States argues that the proceedings are not an "adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). Arguing that the ground and surface waters of the region are hydrologically interrelated, the United States contends that the failure to include groundwater claims deprives the adjudication of the comprehensiveness intended by Congress.
>
> The text of the Amendment lends little support to the United States' position. On its face, the statute applies to the "water of a river system or other source." Groundwater may be included as an "other source," but the use of "or" strongly suggests that the adjudication may be limited to either a river system or some other source of water, like groundwater, but need not cover both. For the United States' argument to succeed, we must read "river system" to include not only the water of the river, but hydrologically-related groundwater systems as well.
>
> In support of this interpretation, the United States refers to cases stating that the Amendment's waiver is limited to "general" or "comprehensive" adjudications. *See, e.g., United States v. Idaho*, [123 L. Ed. 2d 563, 113 S. Ct. 1893, 1894 (1993)]; *Dugan v. Rank*, 372 U.S. 609, 618, 10 L. Ed. 2d 15, 83 S. Ct. 999 (1963). These cases make clear that the adjudication must include the undetermined claims of all parties with an interest in the relevant water source. However, these cases do not address the proper definition of the relevant water source and do not decide if groundwater must be included in an adjudication of a "river system." The United States can point to no other case law, statutory text or legislative history that specifically requires groundwater to be adjudicated as part of the comprehensive adjudication of a "river system."
>
> The United States argues instead that the purposes of the Amendment are best served by an interpretation that requires the adjudication of all hydrologically-related water sources. We agree that the McCarran Amendment was motivated in large part by the recognition of the interconnection of water rights among claimants to a common water source and the desire to avoid piecemeal adjudication of such rights. However, we do not believe that Congress intended to carry the requirement of comprehensiveness as far as the United States would have us do.

The Supreme Court addressed the scope of the comprehensiveness requirement in *Eagle County*, where the State of Colorado attempted to adjudicate the water rights of claimants to the Eagle River and its tributaries. [*United States v. District Court for Eagle County*, 401 U.S. 520, 521, 28 L. Ed. 2d 278, 91 S. Ct. 998 (1971).] The Eagle River is itself a tributary of the Colorado River. *Id*. The United States argued that because the Eagle was hydrologically related to the Colorado, a comprehensive adjudication under the McCarran Amendment must include an adjudication of the entire Colorado River. The Court rejected this contention as "almost frivolous." *Id*. at 523. "No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The 'river system' must be read as embracing one within the particular State's jurisdiction." *Id*. This discussion suggests that, contrary to the United States' assertions, the comprehensiveness requirement does not mandate that every hydrologically-related water source be included in the adjudication.

We conclude that while the adjudication must avoid excessively piecemeal litigation of water rights, it need not determine the rights of users of all hydrologically-related water sources. As one authority has noted:

> scientists have long delighted in pointing out to lawyers that all waters are interrelated in one continuous hydrologic cycle. As a result, it has become fashionable to argue that an effective legal regime should govern all forms and uses of water in a consistent and uniform manner. The law is otherwise.

1 [Robert E. Beck, Waters and Water Rights § 6.02 (1991)] (footnotes omitted).

One of the ways in which the law has traditionally ignored the exhortation of the scientists is by treating ground and surface water as distinct subjects, often applying separate law to each. While rights to surface water in the Western states have generally been allocated under the appropriation doctrine, the rights to groundwater were traditionally riparian. *See* 3 Beck, supra §§ 20.03-20.04; 2 [Samuel C. Wiel, Water Rights in the Western States §§ 1039-42 (3d ed. 1911)]. Under the traditional groundwater doctrines of absolute dominion, the American reasonable use rule, and the correlative rights rule, the priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater. *See* 3 Beck, supra § 20.07(b)(2). Thus, a major function of the statutory comprehensive adjudications is made unnecessary - there is no need to establish the relative priority of all users' claims in order to define each user's rights. The United States is correct in arguing that an increased recognition of the relationship between ground and surface water has lead some states to attempt better coordination between the allocation of surface and groundwater rights, *see*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

> 3 Beck, supra § 24.01(b), but that recognition was still emerging at the time the McCarran Amendment was passed.[2] *See id*; 2 Hutchins, supra at 634-53. While the trend has been toward a greater legal recognition of the connection between ground and surface waters, that recognition is too recent and too incomplete to infer that Congress intended to require comprehensive stream adjudications under the McCarran Amendment to include the adjudication of groundwater rights as well as rights to surface water.
>
> The Tribe and the United States note that the use of groundwater in the Klamath Basin may have a direct effect on the availability of water to fulfill the reserved water rights guaranteed to them under federal law. They note that the State's distribution of groundwater rights may have the effect of interfering with these federal water rights. The appellants raise legitimate concerns about the relationship between federal reserve water rights in a river and the distribution of water rights in hydrologically related groundwater. However, these concerns go to the merits of the adjudications. As the Supreme Court has noted, in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court. *See Eagle County*, 401 U.S. at 525-26.
>
> For these reasons, we hold that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment. Accordingly, federal sovereign immunity imposes no bar to the United States' participation in that process.

(*United States v. Oregon, Water Resources Dep't* (9th Cir. 1994) 44 F.3d 758, 768-770.)

There is no case directly addressing whether an adjudication of water rights with respect to only groundwater constitutes a "river system" or "other source" within the meaning of 43 U.S.C. § 666(a) of the McCarran Amendment.

---

[2] "It appears that in 1952, the doctrine of prior appropriation was applied to percolating groundwater in Idaho, Kansas, Nevada, Oklahoma, and Utah, while riparian doctrines were applied to groundwater in Arizona, California, Colorado, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, and Wyoming. 2 Hutchins, supra at 634-53."

The United States relies on cases involving surface streams for the general proposition that all landowners on the watershed and all other potential claimants to the stream must be joined in a lawsuit in order for the McCarran Amendment to apply. The United States contends in this case that the groundwater in the basin is the "residue" of surface water, including surface water that originated from outside the basin but within the "watershed." Because all surface water in the watershed is related or part of a river system, the United States contends all owners of lands on the watershed and all appropriators who use water from the river must be joined in this action. Adjudication of only groundwater claims would result in piecemeal resolution of water rights in the watershed, according to the United States.

In support of this argument, the United States offers two examples of where it would be subject to piecemeal litigation if the instant action is not enlarged to include (a) the entire watershed (not just the basin), and (b) surface water (not just groundwater). First, regarding land outside the basin but within the watershed, the United States asserts that it manages large tracts of land in the San Gabriel mountains in the southeast corner of the watershed, and controls land in the northern region of the Antelope Valley watershed. The United States contends that rights to use the water in these areas may be subject to piecemeal adjudication in future separate actions. (*See* United States' Mem. Supp. Mot. J. Pleadings, at 8:20-26.)

Second, the United States contends the use of surface water in the watershed may affect its rights to water based on federal law. For instance, diversion of surface water could impact the recharge of groundwater used by Edwards Air Force Base and reserved to the United States under the doctrine of implied federal reserved water rights. To protect those rights, the United States contends it may need to pursue separate injunctive suits against such adverse water use. (*See* United States' Mem. Supp. Mot. J. Pleadings, at 8:27-9:9 [*citing In re The General Adjudication Of All Rights To Use Water In The Gila River System And Source* (Ariz. 1999) 195 Ariz. 411, 420 [989 P.2d 739, 748] [". . . we hold that the trial court correctly determined

that the federal reserved water rights doctrine applies not only to surface water but to groundwater."]].)

In opposition to the United States' emphasis on the interrelationship between surface water and groundwater, some of the opposing parties contend the water rights to the two sources of water may be adjudicated separately, particularly given the separate bodies of law that have developed regarding the two types of water. Nonetheless, California law recognizes that there may be a circumstance where a party's right to use one type of water improperly interferes with another party's right to use the other type of water. For example, if groundwater usage depletes a surface stream, the party claiming water rights to the surface stream may seek damages or restrict the usage by the party claiming groundwater rights. (*See O'Leary v. Herbert* (1936) 5 Cal.2d 416 [plaintiffs entitled to damages for the cessation of the flow of water from a spring on their lands caused by a tunnel, dug and driven by Hastings Quicksilver Mining Company, piercing an underground reservoir which fed the spring on plaintiffs' property; water from the underground reservoir was allowed to run to waste through the tunnel, and the underground reservoir supplying it had been drained to a point below the level of the spring, thereby causing the water to cease to flow]; *Verdugo Canon Water Co. v. Verdugo* (1908) 152 Cal. 655, 663-664 ["It is obvious that the continued presence in the soil, sand, and gravel, composing the bed of the canon, of a sufficient quantity of water to supply and support these surface streams in their natural state, is essential to their existence and preservation, and that the parties have as clear a right to have this quantity remain underground for that purpose as they have to the stream upon the surface. Neither party should be permitted to decrease this necessary quantity of underground water to the depletion of the surface stream and the injury of those to whom it has been assigned. This much is clear from the previous decisions of this court. [Citations.]"]; *see also Hudson v. Dailey* (1909) 156 Cal. 617, 628 [a stream, percolating waters feeding the stream and necessary to its continued flow, and waters in the gravels immediately beneath and directly supporting the surface flow are part of a "common supply" of water]; *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 555-556 ["Respondent takes the

position that it, as a lower riparian, is entitled to its portion of the surface flow of the stream regardless of the needs of the upper riparians, regardless of the quantity of water available in the underground basins fed by the river, and regardless of the ease with which water can be extracted from these basins, and that it cannot be compelled as against appellants to resort to its underground basins to fill, in whole or in part, its reasonable needs. Stated in another way, respondent contends that the underground basins filled to the brim serve a reasonable beneficial purpose in supporting the surface flow. We cannot say as a matter of law, applicable to every case, that the use of underground basins simply to support the surface flow in order that use may be made of the surface flow, is or is not a reasonable beneficial use. That is a question of fact that must be passed upon in each case."].)

Thus, to extent the use of groundwater in the basin affects the groundwater supply in other parts of the watershed, or affects the surface stream within the basin or within the entire watershed, then the adjudication of groundwater rights in the basin should be expanded to include those with (a) an interest in water rights in the entire watershed, not just the basin, and (b) an interest in surface streams in the entire watershed.

Of course, without evidence as to the how water flows underground and on the surface in the watershed, and the extent to which the groundwater in the basin affects or is affected by the availability of water in other parts of the watershed, it is impossible to determine the identity of those individuals, landowners, etc. who might claim a sufficiently significant interest in the basin groundwater adjudication such that the time, effort, and expense of including them in this action is worthwhile.

Compounding the problem is the parties' (particularly the United States') failure to clearly set forth the legal theory or theories that might be asserted (to the groundwater to be adjudicated) by individuals not already included in this action. For example, do surface stream users located outside the basin (*e.g.*, in the mountains and hills surrounding the basin) have an

interest in the groundwater at issue in this action? If so, under what theory? They are not overlying owners, nor are they apparently appropriators pumping groundwater from the basin. Further, if they are upstream from the basin, how would a reduction in the groundwater in the basin, or an adjudication of the water rights pertaining to the groundwater in the basin, affect them? (The only theory asserted by the United States in this regard pertains to federal reserve water rights. However, because the United States is already included in this action, it may assert whatever reserve water rights it believes it has in order to claim greater water rights to groundwater in the basin.) A further issue to be considered is what rights, if any, ground water users have as against surface water riparian owners, both within the Basin and in the watershed.

Do groundwater users outside the basin, but within the watershed, have an interest in the basin groundwater to be adjudicated? For example, would a reduction in the basin groundwater affect the groundwater supply in areas outside the basin but within the watershed? Then perhaps the groundwater in the entire watershed should be included if taking water from one necessary reduces an equivalent amount available in the other. Alternatively, should the groundwater outside the basin area be considered another, independent source of water that is separate from the basin area? If the basin groundwater levels operate relatively independently from the groundwater quantities outside the basin, then it may be proper to treat them as separate systems.

In sum, evidence is needed regarding (1) the hydrology of the basin, including regarding surface water and groundwater, (2) the hydrology of the area outside the basin but within the watershed, and (3) the extent of the interrelationship between the two. With this evidence, a determination may be made as to whether there are sufficiently interlocking or correlative rights between those who are already a part of this action, and those who the United States contends should be joined in the action, *e.g.*, those claiming rights in the surface streams and in the watershed as a whole. To the extent the hydrology supports an assumption that there may be interlocking or correlative rights regarding groundwater in the basin and other water,

this action should be expanded as suggested by the United States. Based solely on the allegations of the Municipal Purveyors' Cross-Complaint, however, it is impossible to make this determination at this point.

In effect, then, this motion is premature. The court cannot determine whether or not the McCarran Amendment is satisfied based solely on the pleadings; evidence as indicated above is required for that purpose. Accordingly, the motion for judgment on the pleadings by the United States is **DENIED** but without prejudice to the United States raising the issue at a later time based upon the evidence.

SO ORDERED.

Dated: ____________________

____
Hon. Jack Komar
Judge of the Superior Court

this action should be expanded as suggested by the United States. Based solely on the allegations of the Municipal Purveyors' Cross-Complaint, however, it is impossible to make this determination at this point.

In effect, then, this motion is premature. The court cannot determine whether or not the McCarran Amendment is satisfied based solely on the pleadings; evidence as indicated above is required for that purpose. Accordingly, the motion for judgment on the pleadings by the United States is **DENIED** but without prejudice to the United States raising the issue at a later time based upon the evidence.

SO ORDERED.

Dated: SEP 22 2006

Hon. Jack Komar
Judge of the Superior Court