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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES – CENTRAL DISTRICT
16

17 **ANTELOPE VALLEY**
18 **GROUNDWATER CASES**

19 Included Actions:
20 Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co., Superior
Court of California, County of Los
21 Angeles, Case No. BC 325201;

22 Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co., Superior
23 Court of California, County of Kern, Case
No. S-1500-CV-254-348;

24 Wm. Bolthouse Farms, Inc. v. City of
25 Lancaster, Diamond Farming Co. v. City of
Lancaster, Diamond Farming Co. v.
26 Palmdale Water Dist., Superior Court of
California, County of Riverside, Case Nos.
27 RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

**PUBLIC WATER SUPPLIERS' TRIAL
SETTING CONFERENCE STATEMENT**

Date: October 12, 2012
Time: 9:00 a.m.
Dept.: 1

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1 **I. INTRODUCTION**

2 The Antelope Valley Groundwater Basin ("Basin") is in overdraft and it requires a court-
3 approved physical solution. Without a physical solution, the Basin will continue to lose
4 groundwater in storage causing land subsidence and other harm to the public.¹

5 The primary component of the physical solution is balancing the Basin's supply and
6 demand through a court-ordered reduction in groundwater use to a level that does not exceed the
7 safe yield. Ultimately, each party's reduced groundwater use will depend upon the extent the
8 party can establish historical and present reasonable and beneficial groundwater use, as well as
9 the party's use, if any, of supplemental or imported water supplies augmenting the Basin's native
10 water yield. Only then can the court determine (1) how much of the Basin's native yield can be
11 used by a party in the physical solution; and (2) the allocation of the supplemental yield from
12 imported water sources.

13 As the court is aware, these coordinated and consolidated proceedings must be a
14 comprehensive judicial adjudication of groundwater rights under the McCarran Amendment.
15 Unless the court *quantifies* the federal reserve right held by the United States and then *quantifies*
16 the other parties' groundwater rights accordingly, there is no comprehensive adjudication under
17 the McCarran Amendment. Thus, to both satisfy the McCarran Amendment and to implement
18 the physical solution, trial needs to determine the following:

- 19 1. First, the federal reserve right must be *quantified* by the court as soon as possible.
- 20 2. Once the federal reserve right is quantified, each party's historical and existing
21 *reasonable and beneficial use* must be quantified by the court.
- 22 3. After each party's reasonable and beneficial use is quantified, the court must quantify
23 the return flow rights, the overlying rights and the Public Water Suppliers' prescriptive rights.
- 24 4. Once the court quantifies the federal reserve right and the other parties' rights, the
25 court must implement a physical solution that stops the overdraft conditions.

26
27 _____
28 ¹ Recent public statements by the United States Geological Survey are that there will be
additional land subsidence and loss of groundwater in storage unless the overdraft is stopped
immediately.

1 The quantification of groundwater rights occurs in groundwater adjudications and, with
2 appropriate case management, will not be the apocalyptic trial that some parties threaten. As
3 explained below, there are well-established methods for determining groundwater use, and much
4 of that use may not be contested if the court orders its disclosure in advance of the trial.

5 Finally, the court is on record that the existing trial date is “firm” and that there will be no
6 continuances. The Public Water Suppliers oppose any continuance. No party has filed the
7 necessary motion for a continuance of the existing trial date. Any additional delay will add to the
8 ongoing harm to the public. Parties seeking further delay will continue to pump without
9 limitation to the detriment of the public. When parties are ordered to reduce their pumping, some
10 will sell their water rights and then leave the basin in its further damaged condition.

11 Much has been written about how the trial may impact settlement discussions. Not all
12 parties will settle even under the most optimistic circumstances. More importantly, the trial will
13 not dissuade those who are interested and capable of settling. Whereas, further delay will insure
14 the decision to settle will be postponed by many. The best way to settle is to proceed to trial as
15 the existing trial date encourages parties to resolve their continuing disagreements including the
16 implementation of the physical solution as well as the allocation of the Basin’s groundwater. In
17 the event the parties reach a comprehensive settlement, they must establish their reasonable and
18 beneficial use of groundwater as part of the necessary court approval of the physical solution.

19 **II. A PHYSICAL SOLUTION MUST BE BASED ON THE PARTIES’ COURT-**
20 **DETERMINED WATER RIGHTS**

21 “A physical solution is an equitable remedy designed to alleviate overdrafts and the
22 consequential depletion of water resources in a particular area consistent with the constitutional
23 mandate to prevent waste and unreasonable water use and to maximize the beneficial use of this
24 state’s limited resource.”(*Cal. American Water v. City of Seaside* (2010) 183 Cal.App.4th 471,
25 480.) The physical solution, however, cannot completely disregard the legal priorities arising
26 from the parties’ respective historical groundwater uses - a mistake made in the physical solution
27 adopted by the trial court in the Mojave Basin. (*City of Barstow v. Mojave Water Agency* (2000)
28 23 Cal.4th 1224, 1247). As the *Mojave* court wrote: “Under such circumstances the 1928

1 constitutional amendment [making all water rights subject to the California Constitution
2 requirement of reasonable and beneficial use] . . . compels the trial court, before issuing a decree .
3 . . to ascertain whether there exists a physical solution of the problem presented that will avoid the
4 waste, and that will at the same time not unreasonably and adversely affect the prior
5 appropriator's vested property right." (23 Cal.4th at p. 1250 citing *City of Lodi v. East Bay*
6 *Municipal Utility District* (1936) 7 Cal 2d 316, 341).

7 The *Mojave* decision is consistent with a long line of California Supreme Court decisions
8 concerning physical solutions. (E.g., *City of Lodi v. East Bay Municipal Utility District*, *supra*, 7
9 Cal 2d 316.) For example, in *Peabody v. Vallejo* (1935) 2 Cal.2d 351, the court held that a
10 physical solution must protect the "substantial enjoyment" of prior rights. As explained below,
11 the court first determines the parties' respective reasonable and beneficial groundwater uses as the
12 starting point for determining the parties' water rights. Only when that process is complete can
13 the court evaluate a proposed physical solution.

14
15 **III. EACH PARTY'S GROUNDWATER USE DEPENDS UPON HOW MUCH**
16 **GROUNDWATER IS SUBJECT TO THE FEDERAL GOVERNMENT'S**
RESERVE RIGHT

17 The starting point for a physical solution is the determination of the parties' water rights
18 and their water rights are determined after the quantification of the federal government's reserve
19 right. As the federal reserve right is the highest priority use of groundwater, the parties cannot
20 know how much water is available for their reasonable and beneficial use until the court first
21 determines the federal reserve right.

22
23 **IV. EACH PARTY MUST FIRST PROVE ITS CURRENT REASONABLE AND**
24 **BENEFICIAL USE OF WATER**

25 As explained herein, the starting point for a physical solution is the determination of the
26 parties' water rights beginning with the quantification of the federal reserve right. For the rest of
27 the parties, their rights to the natural yield must be determined next by quantification of each
28 party's present reasonable and beneficial groundwater use as established by the California

1 Supreme Court in *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3
2 Cal. 2d 489.

3 First, the trial court determines the groundwater production for each party. The amount of
4 groundwater use alone is insufficient. This is because the reasonable and beneficial use of water,
5 as mandated in Article X, Section 2 of the California Constitution, is the cardinal principle of
6 California water law. (*United States v. State Water Resources Control Board* (1986) 182
7 Cal.App.3d 82, 105.) Stated simply, not only must the court determine the amount of
8 groundwater use, but how much of that use was for a reasonable and beneficial purpose under the
9 unique facts and circumstances in the case.

10 The California Supreme Court stated that, initially, the burden is upon all landowners to
11 first prove their respective reasonable and beneficial uses of water: "[P]lacing the burden on the
12 appropriator who seeks to take water from a particular water field to show that there is a surplus
13 does not relieve the ...[existing users] ...from the burden of proving the quantity of water that they
14 have been using, and that such amount is necessary for their reasonable and beneficial
15 purposes...[the] burden [on the appropriator] did not come into existence until after the...riparian's
16 first proved the amount required by them for reasonable beneficial purposes." (*Tulare Irrigation
17 District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 535.)²

18 **V. IF THERE IS NO SURPLUS NATIVE YIELD, EACH PARTY MUST PROVE ITS**
19 **HISTORICAL REASONABLE AND BENEFICIAL USE OF WATER DURING**
20 **THE OVERDRAFT PERIOD**

21 By all accounts groundwater use has exceeded the safe yield since at least 1945. During
22 the more than 50 years of overdraft conditions, many of the parties have established their
23 groundwater rights by pumping groundwater for a reasonable and beneficial use. For example,
24 the Public Water Suppliers have used groundwater for more than 50 years to meet the public's
25 need for a safe and reliable supply of water.

26 Here, each party will be required to establish its history of groundwater use during the
27 overdraft period. For some parties, they will have water meter records showing actual

28 ² Although riparian rights were involved in *Tulare, supra*, riparian rights are analogous to
overlying rights. (*City of Barstow, supra*, 23 Cal.4th 1224 at p. 1240.)

1 groundwater use. Other parties will have records of crops grown which can be used to estimate
2 the crop water requirement. Other parties will have electrical records for their groundwater
3 pumps.

4 The court can order the parties to disclose information before the trial so that parties can
5 determine whether or not to contest the reasonable and beneficial use of groundwater. It is
6 difficult to know for certain but it is believed that many parties' groundwater use evidence will
7 not be contested. Some parties, however, are expected to contest the groundwater claims by other
8 users. It is suggested that the court work with the parties to identify what groundwater use claims
9 are contested, and by whom, in order to determine how to best schedule the presentation of
10 groundwater use evidence. In the event there is no dispute over a party's groundwater use, it is
11 further suggested that the court consider the use of stipulations, declarations or another simplified
12 process for the effective introduction of uncontested groundwater evidence.

13 The following is a general plan for the determination of the various water rights claims:

14 Each party presents evidence of its current reasonable and beneficial groundwater use.

15 The court can require the parties to identify their evidence well in advance of the next trial phase
16 so that all parties can evaluate whether to contest any other party's evidence. Additionally, the
17 court can work with the parties to establish an efficient and orderly manner and schedule for the
18 presentation of evidence.

19 After hearing evidence of each party's groundwater use, the court will determines the
20 amount of water used for reasonable and beneficial use by each party. *"What is a beneficial use
21 depends upon the facts and circumstances of each case, and what would be a reasonable
22 beneficial use, where water is present in excess of all needs, may not be a reasonable beneficial
23 use in an area of scarcity and great need, and likewise what is a beneficial use at one time may
24 be, because of changed conditions, become a waste of water at a later time. (Tulare Irrigation
25 Dist., supra, 3 Cal 2d at p. 567 [emphasis added].)*

26 To determine the parties' respective groundwater rights, the court will hear evidence of
27 the parties' respective native yield water rights claims including evidence of historical
28 groundwater use by the United States, Public Water Suppliers and the private landowner parties.

1 The court can work with the parties on the effective introduction of evidence. It is anticipated
2 that the parties will provide legal memoranda or trial briefs to the court to facilitate its decisions.

3 In addition to the court's determination of the parties' rights to the native yield, the court
4 will determine rights to the supplemental yield from imported water. A significant amount of
5 evidence concerning the supplemental yield was admitted in the previous trial phase. The court
6 can work with the parties to identify evidence already admitted to avoid unduly time consuming
7 and repetitive evidence.

8 In order to quantify groundwater use by each party, the court must receive evidence
9 establishing such use from meters or other flow measuring devices, electrical energy consumption
10 records, time of usage records or other methods having equivalent accuracy including electrical
11 consumption records and pump test records maintained by electric utility providers. All parties
12 should disclose this information before the end of November.

13
14 **VI. THE COURT DETERMINES THE PARTIES' RESPECTIVE GROUNDWATER**
15 **RIGHTS AFTER THE PARTIES ESTABLISH THEIR REASONABLE AND**
16 **BENEFICIAL USES**

17 The court will have to resolve the disputes among parties that cannot reach an agreement
18 on how to allocate the Basin water. There are disputes as to the rights of the parties to the Basin's
19 groundwater. Some parties contest the rights of the federal government for its use of
20 groundwater. Other parties contest the rights of the Public Water Suppliers to continue to use
21 groundwater to meet the public's water needs. There are many disputes between the private
22 landowners as to their respective use of water including both the amount of water claimed and
23 whether it was a reasonable and beneficial use of water.

24 There has been an indication that, somehow, the presentation of evidence concerning the
25 Public Water Suppliers' prescriptive rights established in the long overdraft period would consist
26 entirely of an examination of each landowner party's groundwater levels during the overdraft
27 period. That is not true. For there to be a prescriptive right, parties must have had notice of
28 overdraft. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 282.) Here, there
is ample evidence of basin-wide notice of both overdraft and Public Water Supplier continuous

1 use of groundwater during decades of overdraft. Most, if not all, of the evidence cannot be
2 reasonably controverted or disputed and will take only a relatively short amount of time for its
3 introduction and admission. Evidence of local conditions is not relevant to this determination.

4 Additionally, most of the parties and most of the groundwater use is and has been
5 concentrated in a few areas of the Basin. Their chronic declines in groundwater levels have
6 already been presented to the court during the previous phase of trial and it would be wasteful to
7 repeat the evidence in the next phase of trial. It is suggested that the court work with the parties
8 to identify what additional evidence of groundwater levels would be needed in the next phase of
9 trial to avoid unduly repetitive or time consuming testimony.

10 **VII. THE COURT DETERMINES THE RIGHTS TO THE SUPPLEMENTAL YIELD**
11 **FROM IMPORTED WATER**

12 The court heard exhaustive evidence from both public water suppliers and landowners on
13 the amount of basin recharge from supplemental water sources, i.e., the importation of water from
14 the State Water Project that augments the Basin's natural yield. Most, if not all, of the evidence
15 on the amount of the supplemental yield was not in dispute. It would be both improper and
16 wasteful for the court to have the evidence repeated in the next phase of trial. The Public Water
17 Suppliers respectfully request the court enter findings on the rights to the supplemental yield
18 based on the substantial evidence presented in the previous phase of trial.

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1 **VIII. CONCLUSION**

2 The next trial phase must take place as indicated by the court. The Antelope Valley
3 Groundwater Basin continues to be harmed by overdraft and it is critical that this court implement
4 a physical solution as soon as possible. The starting point for a physical solution is determination
5 of the parties' respective water rights beginning with the federal reserve right. Thus, the next
6 phase must focus on all parties' water production from the Basin beginning with the
7 quantification of the federal reserve right followed by evidence of each party's groundwater use
8 for a reasonable and beneficial purpose.

9
10 Dated: October 8, 2012

BEST BEST & KRIEGER LLP

11
12
13 By 

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PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 5 Park Plaza, Suite 1500, Irvine, California, 92614. On October 8, 2012, I served the within document(s):

PUBLIC WATER SUPPLIERS' TRIAL SETTING CONFERENCE STATEMENT

- by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.
- by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on October 8, 2012, at Irvine, California.


Kerry V. Keefe