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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b))

ANTELOPE VALLEY GROUNDWATER CASES

Included actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company
Los Angeles Superior Court
Case No. BC 325201

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company
Kern County Superior Court
Case No. S-1500-CV 254348 NFT

Diamond Farming Company vs. City of Lancaster
Riverside County Superior Court
Lead Case No. RIC 344436 [Consolidated w/Case Nos. 344668 & 353840]

AND RELATED CROSS-ACTIONS.

Judicial Council Coordination No. 4408

Case No.: 1-05-CV-049053

DIAMOND FARMING COMPANY AND CRYSTAL ORGANIC FARMS' OPPOSITION TO WATER PURVEYOR BRIEF RE TRIAL PHASING AND JURY TRIAL

DATE: April 24, 2009
TIME: 9:00 a.m.
DEPT: 1

I

INTRODUCTION

Article I, section 16 of our Constitution guarantees litigants the right to a jury trial. This right, however, is not without limitation. "In California, the constitutional right to jury trial in civil cases is coextensive with the right as it existed under the common law of England in 1850, when the California Constitution was adopted." (*Hung v. Wang* (1992) 8 Cal.App.4th 908, 927.)

The Court in *Arciero Ranches v. Meza* (1993) 17 Cal. App. 4th 114, 123-124 observed:

> "As explained by our Supreme Court in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283: " ' "The right of trial by jury shall be secured to all, and remain inviolate." [Citation.] The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted (1850). [Citation.] . . . The common law respecting trial by jury as it existed in 1850 is the rule of decision in this state. [Citation.] . . . It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850.' " ..."

The right to a trial by jury is fundamental and to be zealously preserved by the courts. Any doubt should be resolved by preserving the right to a trial by jury. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 411.)

In determining whether an action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case--the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law. On the other hand, equitable issues are to be resolved by the court sitting without a jury. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 462.) It is common for an action to involve multiple claims, the gist of which are both "legal" and "equitable."

> "Where a "mixed bag" of legal and equitable claims is presented in a case, a court trial of the equitable claims first may obviate the necessity of a jury trial on the legal claims, but otherwise the plaintiff cannot be denied the right to a jury trial on the legal causes of action. [Citations.] If 'there are equitable and legal remedies sought in the same action, the parties are entitled to have a jury determine the legal issues unless the trial court's initial determination of the equitable issues is also dispositive of the legal issues, leaving nothing to be tried by a jury. [Citation]" (*DiPirro v. Bondo Corp., supra,* 153 Cal. App. 4th at pgs. 184-185.)

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The right to a jury trial may not be abrogated by the trial court's severance of equitable claims from legal claims that have been joined in the same action. (*Selby Constructors v. McCarthy* (1979) 91 Cal. App. 3d 517, 527.) "[T]he Legislature cannot 'by providing new remedies . . . in form equitable,' convert a legal right 'into an equitable one so as to infringe upon the right of trial by jury.'" (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 755.)

"The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising. . . . The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions. [Citation.]" (*DiPirro v. Bondo Corp.* (2007) 153 Cal. App. 4th 150, 179-180.)

The Purveyors by affirmative defense and by Cross-Complaint raise the claim of prescription as well as the prayed for remedy of a physical solution. The latter is and will be of necessity shaped by and dependent upon the proof or lack of proof of the former. "With respect to the establishment of an easement as a condition precedent to the granting of equitable relief, the law has been expressed as follows: 'If a complainant's right to an easement is clear, it is not necessary that it be first established before equity will grant relief. If, however, his right to an easement is involved in substantial dispute, no injunction will be granted until the claim has been established at law.'[Citation.]" (*Frahm v. Briggs* (1970) 12 Cal. App. 3d 441, 445.) In this action, no physical solution can be determined until the claim of prescription has been established or disproven at law.

"At common law the proper remedy in a court of law for interference with or the obstruction of a right of way was an action on the case[1]. [Citation.] The right of trial by jury existed with respect to the common law remedy of action on the case and, consequently, such right exists in a civil action under

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[1] In Bouvier's Law Dictionary (Rawle's Revision 1914) it is stated (p. 129) under the heading of "Action on the case": "This was a remedy given by the common law, but it appears to have existed only in a limited form and to a certain extent until the statute of Westminster 2d. In its most comprehensive signification it includes assumpsit as well as an action in form ex delicto; at present when it is mentioned it is usually understood to mean an action in form ex delicto." Under "Case" Bouvier states that the action lies for "Torts committed forcibly where the matter affected was not tangible; . . . as for obstructing a private way."

modern practice which formerly would have fallen within that common law form of action." (*Frahm, supra,* 12 Cal. App. 3d at 445.)

In *Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, the question was whether a party to an action involving a claimed prescriptive easement is entitled to a jury trial. The court determined that at common law an equitable action to quiet title to a nonpossessory interest, such as an easement, was generally not available. (*Id.* at pp. 124–125 at pp. 124–125.) However, the court stated that where the right to an easement is in substantial dispute, the right must be established by an action at law before an injunction will issue. (*Id.* at p. 124 at p. 124.) The court also stated that where the right to an easement is clear, it need not be established by an action at law as a prerequisite to an injunction. (*Ibid.*) The holding of the court in *Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114 is well reasoned, comprehensive, and dispositive of the issue.

II.

THE "GIST" OF THE PURVEYORS' PRESCRIPTION CLAIMS ARE LEGAL AND ARE NOT A "SPECIAL PROCEEDING"

The Purveyors argue that there is no right to a trial by jury in this action of the Purveyors' Prescription Claim because this is an "equitable" and "special proceeding." There does not appear to be any substantive disagreement as to the test to be applied and the rules established for resolution of the issue. The Purveyors cannot seriously challenge the controlling principles set forth in the Introduction above. Instead, the Purveyors argue that the "gist" of the action is "equitable" and that this action is a "special proceeding." The Purveyors cite to a number of earlier water rights cases and proffer the conclusion that:

> "In each instance, these cases are resolved by the court and not a jury. (Id.) The Public Water Suppliers can find no examples where a jury was called upon to decide these issues." *Water Purveyor Brief Re Trial Phasing and Jury Trial* at p. 4, lines 1-3.

However, the Purveyors have not directed this court to any prior case wherein a request for a jury on a claim of prescription was made and where an Appellate Court or the California Supreme Court concluded that no jury trial right existed for that claim of prescription. If that authority exist, then let the Purveyors cite that authority in their reply. On the other hand, the Appellate Courts in both *Arciero*

Ranches, supra, and *Frahm, supra*, confirm that when there exist a real and substantial dispute concerning a claim of prescription that the prescriptive claim must be established "at law," and by a jury, if demanded. The converse is equally true. That is, if the claim of the right of use is not seriously in dispute and is clear, then it need not be established by an action at law as a prerequisite to equitable relief. (See also, *Baugh vs. Garl* (2006) 137 Cal.App.4th 737, at p. 741.) In this adjudication, the most vigorously contested and disputed claim is the asserted claim of prescription advanced as an affirmative defense and affirmatively by Cross-Complaint by the Public Water Suppliers.

The Public Water Suppliers' reliance upon the proposition that no one has a private ownership interest in the corpus of water itself [*Big Rock Mutual Water Company vs. Valyermo Ranch Co., et al.* (1926) 78 Cal.App. 266, at pp. 5 & 6 of *Water Purveyor Brief*] is not controlling. It must be readily conceded that no landowner has an ownership interest in the air space above his real property, but equally conceded that despite the absence of ownership in the corpus of the air space itself, a landowner nonetheless has, as an incidence of ownership, the right to be protected against uses of that air space which diminish, impair or damage the property he owns. (*Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232.) The overlying water right is an interest in real property. One of the many straws in the bundle of rights which are an incident of ownership. In the *City of Barstow vs. Mojave Water Agency* (2000) 23 Cal.4th 1224, at p. 1240, the court confirms that the priority of the overlying water right " . . . is based on the ownership of the land and is appurtenant thereto."

The Appellate Court in *Alan F. Beyer vs. Tahoe Sands Resort* (2005) 129 Cal.App.4th 1458, at p. 1472, confirmed that an easement is a nonpossessory interest and does not create an ownership interest in the land itself, but does confer upon the holder the right to use the land of another or to prevent the lawful owner from using his land to the detriment of the easement holder. The California Supreme Court in *City of Barstow, supra*, reminds us that water rights priority is the central principle of California Water Law. The claims of prescription seek to reverse the priorities of the common law overlying right and that of the Purveyors. An equitable physical solution must preserve water right priorities subject to the reasonable use doctrine and that absent the predicate finding of prescription, appropriative use must yield to the priority of overlying use. *City of Barstow, supra,* p. 1243. Finally,

the court likewise confirms that the elements to establish a prescriptive water right are the same elements necessary to establish a prescriptive easement, both being a nonpossessory interest in the property of another. *City of Barstow, supra*, p. 1241. Thus, the Purveyors' claims of prescription, if disputed, must be established "at law," and by a jury, if demanded. *Arciero, supra*.

Contrary to the assertion made by the Public Water Suppliers, this action is not a "special proceeding" and there exist no statute defining it as such. First, it is conceded that "special proceedings" are statutory proceedings generally unavailable at common law or in equity. The right to a jury trial is defined within the statutory scheme governing the particular "special proceeding." See *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 725; *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 76; *Kinder v. Superior Court (Market Ins. Corp.)* (1978) 78 Cal.App.3d 574, 581. Nonetheless, having advanced the claim that this is a "special proceeding," the Public Water Suppliers have not cited to this court the statutory scheme which they contend establishes the claim of prescription as a "special proceeding." If that statutory scheme exist, then let the Purveyors specifically cite the code sections in their reply.

The reference to and string citation of cases dealing with the prohibition for the issuance of an injunction to restrain a public officer from performing a duty imposed on him by a valid law, is not dispositive. As is made clear by the California Supreme Court in *City of Barstow, supra,* the claim of prescription advanced by the Public Water Suppliers is not premised and could not be premised upon the performance of a duty imposed by a valid law. To the contrary and in order to support the claim of prescription, the Public Water Suppliers must concede and must prove that the taking of groundwater was not lawful but was instead "wrongful."

III

THE PURVEYORS CLAIM THAT THE OVERLYING OWNERS' INFRINGEMENT CLAIM IS ESTABLISHED BY STATUTE IS FALSE

First, the Purveyors by convoluted argument attempt to lead this court upon a twisting path to the conclusion that the overlying landowners' resistence to the claims of prescription are in reality inverse condemnation claims. Therefore and as such, the landowners are limited to a right to a jury trial

on the issue of damages only. The fallacy rest in the realization that as a predicate to an inverse condemnation claim, the Purveyors must have first tried their claims of prescription, failed to meet their burden of proof, and then assert the fact of an intervening public use to foreclose a prohibitory injunction. (*Hillside Water Co. v. City of Los Angeles* (1938) 10 Cal.2d 677; *Tulare Irrigation District v. Lindsey-Strathmore Irrigation District* (1935) 3 Cal.2d 489. It is precisely the interrelationship between the claim of prescription and inverse condemnation which compels a jury trial of the claim of prescription as a predicate. If prescription is proven, then the statute of limitations forecloses a damage claim in inverse condemnation. If there is a failure of proof, no prescription, and intervening public use, then damages are the only remedy available.

The prescriptive period on a claim asserted by a governmental subdivision of the state can never commence before and must in fact coincide with the accrual of a cause of action for damages. The Purveyors desire to acquire private property for public use, not as Constitutionally permitted by an eminent domain action and upon the payment of just compensation, but instead through prescription without payment of any compensation whatsoever. The Purveyors wish to affirm a wrongful taking from all overlying landowners under the plead theory of prescription that which the Federal and California State Constitutions mandate that it first pay for. "The law, however, is dedicated to the proposition that for every wrong there is a remedy." (*Desny* v. *Wilder* (1956) 46 Cal.2d 715, 734.) Given that the Purveyors have committed the water they pump to public use, an injunction will not lie.

Therefore, the same legal analysis used to fix the date of accrual of a cause of action in inverse condemnation must be, at the very least, applied to fixing the date upon which any prescriptive period asserted by the government as against private property can commence. The inquiry is fact intensive and amenable to resolution by a jury.

> "In determining the related question as to when a cause of action for inverse condemnation accrues, a 'taking' occurs 'when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property." (*Smith* v. *County of Los Angeles* (1989) 214 Cal.App.3d 266, 291; *Smart* v. *City of Los Angeles* (1980) 112 Cal.App.3d 232, 235.)
>
> "It is by focusing on the impact of the governmental activity upon the property owners actual use that the courts have determined a date of 'taking' in inverse condemnation actions." (*Smart*, *supra*, at p. 238.)

Diamond Farming and other farming interests pump groundwater for irrigation in the Antelope Valley. Additionally, there are virtually hundreds of landowners who do not have wells nor pump groundwater at all but who nonetheless have dormant unexercised overlying rights. The Purveyors likewise pump groundwater for municipal and industrial use. It is claimed that all pumping is from a common supply, however, there is not and never has been an actual trespass nor physical invasion by any purveyor onto any overlying landowner's property.

> "Where there is no direct physical invasion of the landowner's property and the fact of taking is not immediately apparent, the limitations period is tolled until 'the damage is sufficiently appreciable to a reasonable [person] . . .." (*Mehl* v. *People Exrel. Dept. Pub. Wks*. (1975) 13 Cal.3d 710, 717.)

Thus, it is evident that constitutionally sufficient notice of the adverse and hostile claim or appreciable damage and the identity and conduct of the governmental entity asserting that prescriptive right is a fundamental prerequisite to the commencement of the running of the statute of limitations for an inverse condemnation claim and thus the concurrent commencement of the same five year prescriptive period. The Purveyors must prove the facts of when each inverse condemnation claim accrued as to each affected landowner.

The Purveyors claim that the basin has been and is now in a condition of overdraft. Those claims are fatally uncertain in that they have not pled when in historical time the overdraft commenced or when in historical time the five year prescriptive period began or ended. It cannot be discerned whether or not the claim of prescription is premised upon the five years preceding the filing of these new coordinated actions in late 2004, or whether or not it embraces a distinct and different five year period of time which either immediately preceded the filing by Diamond Farming of its Quiet Title action in October 1999 or some earlier five year period as yet undefined and unspecified. It is clear, as a matter of law, that no period of time following the filing by Diamond Farming of its Quiet Title action can be considered for purposes of any prescriptive claim as against Diamond Farming. When did the prescriptive period commence and end?[2]

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[2] The omission and failure to declare the dates for the 5 year prescriptive period potentially implicates some or all "DOE" Defendants' rights to invoke Civil Code §§ 1107 and 1214.

There must exist congruence between the date upon which the prescriptive period commences and the date upon which a cause of action for inverse condemnation accrues. It is not coincidental that the prescriptive period is five years and the statute of limitations for inverse condemnation is that same five years. Thus, there must exist a congruence in time for the commencement of the prescriptive period and the simultaneous accrual of a cause of action for damages in inverse condemnation.[3]

The case of *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232, is more closely analogous to the issues at bench. In *Smart*, plaintiff, the owner of a vacant parcel of land located near Los Angeles International Airport, brought an action for inverse condemnation based on a reduction in value of the property from jet overflights. In 1972, Mr. Smart discovered his damages when a prospective buyer was refused financing because of the land's exposure to high levels of noise. *Ibid.* at 234-235.

The Trial Court held that the "date of stabilization" [here overdraft] of the aircraft noise occurred in 1966, and that the lawsuit, filed in July of 1973, was time-barred. The Court of Appeal reversed and rejected the argument that an actionable invasion of property rights necessarily occurred when the aircraft noise had stabilized. *Ibid.*

The City argued that the airport noise would have been "sufficiently appreciable to a reasonable person" by the year 1966. *Ibid.* at p. 238. The Court made clear that it is not a hypothetical interference

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[3] "To perfect a claim based upon prescription there must, of course, be conduct which constitutes an actual invasion of the former owner's rights *so as to entitle him to bring an action.*" (Emphasis added.) *City of Pasadena*, supra, p. 927.

"Generally, the limitations period on such inverse condemnation claims begins to run when the governmental entity takes possession of the property. (See *Ocean Shore R.R. Co. v. City of Santa Cruz, supra,* 198 198 Cal.App.3d at p. 272; see also *Williams v. Southern Pacific R.R. Co.* (1907) 150 Cal. 624, 627 [89 P. 599]; *Mosesian v. County of Fresno* (1972) 28 Cal.App.3d 493, 500-502 [104 Cal.Rptr. 655].) *Where, however, there is no direct physical invasion of the landowner's property and the fact of taking is not immediately apparent, the limitations period is tolled until 'the damage is sufficiently appreciable to a reasonable [person] ....'* (*Mehl v. People* ex rel. *Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717 [119 Cal.Rptr. 625, 532 P.2d 489].) *Otay Water District v. Beckwith* (1991) 1 Cal.App.4th 1041, 1048-1049 (Emphasis added.)

that determines taking, but rather a substantial interference with the property owner's actual use and enjoyment of the land. Accordingly:

> "In our opinion the aircraft overflight noise did not cause a substantial interference with plaintiff's *actual* use and enjoyment of the land until he attempted to sell it, thus his cause of action did not accrue until his discovery of the "red-lining" in 1972.
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> * * *
>
> It is by focusing on the impact of the governmental activity upon the property owner's *actual* use that the courts have determined a date of "taking" in inverse condemnation actions." (*Ibid.* at 238.) (Original emphasis.)

The Court of Appeal then concluded on the subject:

> "In our rejection of the 'date of stabilization' approach to the fixing of a date of taking in this particular case, we merely recognize that property owners may be damaged by a given governmental activity in different ways and at different times."

The foregoing compels a rejection of a hypothetical or "rote" concept of invasion of property rights, and accrual of claims. It is precisely the interrelationship between the claim of prescription and inverse condemnation which compels a jury trial of the claim of prescription as a predicate. If prescription is proven, then the statute of limitations forecloses a damage claim in inverse condemnation. If there is a failure of proof, no prescription, and intervening public use, then damages are the only remedy available.

IV

THERE HAS BEEN NO WAIVER

There has been no waiver of the right to a jury trial on the Purveyors' claims of prescription, inasmuch as the case is not now and was not during earlier proceedings "at issue." The Purveyors by new actions and the coordination proceedings sought to adjudicate in one proceeding all competing rights to groundwater within the Antelope Valley. Consequently, all parties' claims and rights, one as against each other and all, are to be determined in this action. Consequently, any substantive issue tried can only have a comprehensive binding effect once and only after the case is "at issue."

Neither of the two classes were certified prior to the commencement of the earlier trial phases, which were intended to be and were substantively procedural in nature. Since the certification and

notice process to all class members has not been completed prior to the conclusion of either of the earlier two phases, the law is clear that no class member could be bound by a determination on the merits, and the *res judicata* benefits of class certification accrue only after notice has been disseminated. *Civil Service Employees Ins. Co. vs. Superior Court* (1978) 22 Cal.3d 362 at 372-374.

V

CONCLUSION

The gist of the claim of prescription asserted by all Purveyors is legal and not equitable. Litigation of the prescription claims is necessary as a predicate to the equitable relief sought in the form of a "physical solution." The remedies available will be driven by whether or not the prescriptive claims are established at law or whether or not there is ultimately a failure of proof. In the former instance, the Purveyors will have succeeded in reversing the common law priorities and that determination will then be a predicate to the formulation of a physical solution. If however there is a failure of proof, then the remedies afforded to the overlying landowners will depend upon whether or not the Purveyors assert the doctrine of "intervening public use" to foreclose a prohibitory injunction. In either event, a determination of the prescriptive claims is a fundamental and core dispute which must be adjudicated before the ultimate remedy can be fashioned. The Appellate Court's rational and reasoning articulated in *Arciero Ranches, supra*, is persuasive and dispostive. We urge the court to carefully consider that court's holding juxtaposed against the arguments made by the Purveyors in an effort to distinguish that rational.

Dated: January 26, 2009

LeBEAU • THELEN, LLP

By: _____
BOB H. JOYCE
Attorneys for DIAMOND FARMING COMPANY, a California corporation, and CRYSTAL ORGANIC FARMS, a limited liability company

PROOF OF SERVICE

ANTELOPE VALLEY GROUNDWATER CASES
JUDICIAL COUNCIL PROCEEDING NO. 4408
CASE NO.: 1-05-CV-049053

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter Drive, Suite 300, Bakersfield, California 93309. On January 26, 2009, I served the within **DIAMOND FARMING COMPANY AND CRYSTAL ORGANIC FARMS' OPPOSITION TO WATER PURVEYOR BRIEF RE TRIAL PHASING AND JURY TRIAL**

■ (**BY POSTING**) I am "readily familiar" with the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org ; All papers filed in Los Angeles County Superior Court and copy sent to trial judge and Chair of Judicial Council.

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☐ (**BY MAIL**) 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 at Bakersfield, California, in the ordinary course of business.

■ (**STATE**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that the foregoing was executed on January 26, 2009, in Bakersfield, California.

Donna M. Luis

DONNA M. LUIS