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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13
14 IN AND FOR THE COUNTY OF LOS ANGELES

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

Judicial Council Coordination No. 4408

17 ANTELOPE VALLEY GROUNDWATER
18 CASES

Case No.: 1-05-CV-049053

19 Included actions:

**DIAMOND FARMING COMPANY'S
OBSERVATIONS IN RESPONSE TO
THE PLAINTIFF WILLIS' MOTION
FOR CLASS CERTIFICATION**

20 Los Angeles County Waterworks District No.
21 40 vs. Diamond Farming Company
22 Los Angeles Superior Court
23 Case No. BC 325201

24 Los Angeles County Waterworks District No.
25 40 vs. Diamond Farming Company
26 Kern County Superior Court
27 Case No. S-1500-CV 254348 NFT

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

Date: August 20, 2007
Time: 9:00 a.m.
Dept: 1

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I

INTRODUCTION

Diamond Farming Company hereby offers the following observations in anticipation of and concerning the certification of the plaintiff class proposed by counsel for Rebecca Lee Willis. This memorandum should not be construed as an objection to the certification of the proposed class proffered by counsel for Ms. Willis, but is intended to provide this court with observations concerning and emphasizing both pleading and proof problems which will nonetheless exist post-certification.¹

II

THE CLAIM OF MS. WILLIS AND THE PROPOSED CLASS

In substance, it appears that the claim of Ms. Willis and the proposed plaintiff class is intended to embrace the unexercised overlying rights of all landowners, not otherwise named and served by the Public Water Suppliers in the Amended Cross-Complaint filed by the Public Water Suppliers. The class definition also excludes landowners possessing unexercised overlying rights but whom are nonetheless within the service area of any of the identified Public Water Suppliers. We do not concede that those excluded landowners are not indispensable parties. The overlying right, even though presently unexercised and dormant, is based upon the ownership of the land and is appurtenant thereto. It is neither impaired nor lost through non-use alone. It is a correlative right shared with all overlying landowners, including those presently exercising the overlying right and actively pumping groundwater. Absent proof of all elements necessary to support a finding of a prescriptive right, by clear and convincing evidence, the right in the future to exercise the presently dormant and unexercised overlying right asserted by Ms. Willis and held by all members of the proposed class, have priority over all appropriative rights asserted by any Public Water Supplier.

Thus, as to the affirmative claim pled by Ms. Willis, and presumably that of all members of the proposed class, proof of fee ownership of the owned parcel of real property will be sufficient to establish a prima facie case establishing that priority and correlative overlying right. Query, will the class

¹ The Objection to hearing of any Motion for Certification of any Defendant Class is not withdrawn, and will be renewed if any Public Water Supplier affirmatively asserts by answer a claim of prescription or asserts by cross-complaint the same claim. The possible renewal of that Objection will be dictated by the then status of the pending discovery dispute.

1 representative, Ms. Willis, be compelled at trial to identify each parcel and prove fee ownership of every
2 class member as ultimately defined? It is respectfully submitted that although Ms. Willis may be called
3 upon to prove her own fee ownership of her own involved parcel, that the Public Water Suppliers be
4 called upon by this court to acknowledge, confirm, and stipulate that proof of fee ownership of all other
5 parcels owned by each nominally represented class member need not be affirmatively proven, and that
6 the correlative overlying right is an incidence of that ownership and is an appurtenance to that title. It
7 would be inequitable to permit the Public Water Suppliers to litigate a claim of prescription, and argue
8 that the overlying right possessed by absent and nominally represented landowners is subordinate to or
9 impaired by that claim of prescription, not because the claim of prescription was proven on a parcel by
10 parcel, landowner by landowner basis, but instead on the basis that the appurtenant overlying right failed
11 for a lack of proof of title and ownership by and/or in each nominally represented class member. The
12 Public Water Suppliers must be precluded from moving for a judgment by way of a motion for a non-suit
13 based upon a claimed failure of proof. In the absence of the proposed stipulation and order, the Public
14 Water Suppliers will have shifted the burden to identify all legal parcels and the owners of all legal
15 parcels which they themselves would otherwise be required to identify, name, and sue individually in
16 order to preserve this court's jurisdiction over the United States, otherwise sue all indispensable parties,
17 and proceed as necessary to prosecute the prescription claims alleged by the Public Water Suppliers *in*
18 *rem* against all real property within the adjudication boundary as claimed in the Amended Cross-
19 Complaint.

20 III

21 INCONGRUITY IN PROPOSED CLASS DEFINITIONS

22 The Class Definition proposed by the Plaintiff, Willis, is as follows:

23 “All private (i.e., non-governmental) persons and entities that own real property within
24 the Basin, as adjudicated, that are not presently pumping water on their property and have
25 not done so within the last two (2) years (“the Class”). The Class excludes the
26 defendants herein, any person, firm, trust, corporation, or other entity in which any
27 defendant has a controlling interest or which is related to or affiliated with any of the
28 excluded party. The Class also excludes all persons to the extent their properties are
connected to a municipal water system from which they receive or are able to receive
water service.”

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1 It is apparent that it is the intent to define a class of landowners who presently hold presently
2 unexercised overlying rights to use groundwater.

3 On March 16, 2007, the Public Water Suppliers proposed a definition for a similar class of
4 landowners holding unexercised overlying rights as follows:

5 “Subclass A: (1) All landowners with land that does not have a groundwater well; and
6 (2) all landowners with land that has or did have a groundwater well but it did not
7 operate at any time during the five years immediately before October 29, 1999 or anytime
8 since that date. If any class member owns land that connects to the Public Water
9 Supplier’s water service system and does not operate a groundwater well, then such land
ownership will no longer be a member of the class and will be dismissed from the
litigation. For purposes of this Subclass A definition, a “Public Water Supplier” includes
any public entity, state regulated water company or mutual water company as organized
and operating under applicable California law.”

10 It is apparent that the Public Water Suppliers by implication intend to assert that the prescriptive
11 period was the five (5) years immediately preceding October 29, 1999, the date upon which Diamond
12 Farming Company filed its Quiet Title action. It is equally clear that it was the intent of the Public Water
13 Suppliers, by the definition then proposed, to eliminate any potential for an asserted right of self-help
14 in any of the unnamed landowners as therein defined. The Proposed Definition proffered by the Public
15 Water Suppliers presupposed that there would have been no active groundwater pumping during the five
16 (5) years immediately preceding October 29, 1999, and therefore, *ipso facto*, no self-help during that
17 prescriptive period.

18 The Class Definition proposed by Ms. Willis, is limited to a two (2) year period and is not co-
19 extensive with the prescriptive period alluded to in the Proposed Class Definition proffered by the Public
20 Water Suppliers. It is possible that a proposed Willis class member may have actively pumped
21 groundwater at some point during, or for the whole period of the alleged five (5) year prescriptive period,
22 but ceased pumping before the Willis two (2) year cutoff, and thus, that nominally represented class
23 member would possess a right to assert the defense of self-help in the face of the prescription claims
24 asserted. It is hereby suggested that the incongruity in the Proposed Definitions be reconciled by
25 compelling the Public Water Suppliers to identify the prescriptive period in issue, and then reformulating
26 the Class Definition so as to eliminate any potential for any nominally represented class member to
27 possess a right to assert the defense of self-help. Such a modification will eliminate the possibility for
28 a conflict of interest given that there may be different legal rights arising as between the correlative rights

1 of overlying landowners who actively engaged in self-help during the prescriptive period as opposed to
2 those landowners who held unexercised and dormant underlying rights, as against one and the other,
3 when faced with the same claim of prescription asserted.

4 IV

5 **THE PUBLIC WATER SUPPLIERS' ANTICIPATED RESPONSE TO THE PLAINTIFF'S**
6 **CLASS ACTION COMPLAINT, IF CERTIFIED**

7 It is anticipated that if the plaintiff's class action is certified, that the Public Water Suppliers will
8 respond to that class action complaint by Answer and/or Cross-Complaint, but in either event, assert
9 either as an affirmative defense, or as an affirmative claim for relief, the prescription claims alleged in
10 the Amended Cross-Complaint. If those anticipated responses are forthcoming, a further Defendant
11 Class Certification hearing will be necessitated. As this court is aware, and as Diamond Farming has
12 previously briefed, proof of notice to each separate affected landowner of the prescriptive claim asserted
13 by each Public Water Supplier will ultimately be necessitated if any prescriptive claim is to be affirmed
14 against any single, some, or all landowners within the adjudication boundary. On the assumption that
15 the Public Water Suppliers stipulate that fee title of each class member need not be proven, that the
16 overlying right is an incidence of that ownership, and that no motion for a non-suit will be made, proof
17 of notice to each and every one of those nominally represented landowners will still be required. If the
18 Public Water Suppliers intend to proceed and to assert a prescriptive right by affirmative defense and/or
19 affirmatively by Cross-Complaint, the fact of and quality of individual notice will still be an issue of
20 proof. The clash between the overlying right and the asserted prescriptive rights advanced by various
21 political subdivisions of this state, is a core issue in this litigation, therefore Constitutionally protected
22 private property rights under both the Federal and California State Constitutions are manifestly
23 implicated. Likewise, given that the central issue framed by the claims of prescription involve the taking
24 of private property for a public use, both procedural and substantive due process concerns cannot be
25 ignored.

26 As observed by the appellate court in *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74,
27 at page 89, "adequate due process protections. . . ." are essential to any private water rights adjudication.
28 In *Wright, supra*, the Water District argued that nonjoined and absent landowners' rights were

1 determined by and thereafter no different than the rights of joined landowners possessing unexercised
2 overlying rights, and thus their absence should not render that judgment void. The court in *Wright*,
3 *supra*, observed as follows:

4 “Although it is theoretically possible that judicial determination may provide complete
5 resolution of water rights in an underground basin this action did not purport to do so.
6 District indicates that, ‘to the best of its knowledge,’ all overlying owners, governmental
7 entities, appropriators and public utilities with a potential interest in using water from the
8 Central basin were joined herein, and even if a nonjoined landowner, not yet taking water
9 from the basin, were to later come forth, he would have no greater rights than the
10 nonusing landowners actually before the court. District argues further that since the
11 action does not attempt to allocate the landowner’s share of the safe yield among
12 themselves, a later suit by a nonjoined landowner would not upset the judgment in any
13 way. This reasoning is not persuasive.” *Wright, supra*, at p. 88.

14 “Thus, even though article X, section 2 applies to ground water as well as stream water
15 and courts have enjoyed concurrent jurisdiction with the Board to enforce it (cf.
16 *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183,
17 199-200 [161 Cal.Rptr. 466, 605 P.2d 1], absent a statutory scheme for comprehensive
18 determination of all ground water rights, the application of *Long Valley* to a private
19 adjudication would allow prospective rights of overlying landowners to be subject to the
20 vagaries of an individual plaintiff’s pleading without adequate due process protections.”
21 *Wright, supra*, at p. 89.

22 An extension of that court’s reasoning confirms that the unexercised and prospective overlying
23 right of any nominally represented landowner should not be subjected to the vagaries of an individual
24 plaintiff’s pleading and/or proof and/or trial tactical decisions without ensuring or providing for adequate
25 Constitutionally sufficient due process protections. In the instant case, and as an example, all and/or
26 any overlying landowner, given the asserted prescription claims made by the Public Water Suppliers,
27 have the constitutional right to insist upon a trial by jury. It is presently unclear as to what is intended
28 by the proposed class representative, Ms. Willis, in that regard. If Ms. Willis, in her individual capacity
elects to waive that constitutional right, can she waive that right on behalf of the entire class? If so, then
that election must be made now, so that any notice provided to the absent class members, can sufficiently
apprise those class members of that valuable constitutional right which will be surrendered by the class
representative. Any pled claim of prescription, whether by affirmative defense or Cross-Complaint, as
against any nominally represented class member, implicates both substantive and procedural
Constitutional issues which cannot be ignored if we are to ultimately secure an unassailable judgment.
Thought and caution are required.

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V

CONCLUSION

It is conceded and observed that this court is desirous of formulating procedures and mechanisms to expedite and facilitate moving this case towards a conclusion. No party is more interested in bringing this litigation to a prompt end than is Diamond Farming Company. However, due to the inescapable fact that this litigation concerns asserted claims made by the various governmental entities that they have taken valuable property rights and have committed them to a public use, not under the power of eminent domain constitutionally invested in each, but instead, without compensation, through a theory of prescription, the Constitution and its implications mandate that we proceed cautiously.

Dated: August 2, 2007

LeBEAU • THELEN, LLP

By: 
BOB H. JOYCE
Attorneys for DIAMOND FARMING COMPANY,
a California corporation

PROOF OF SERVICE

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

4 I am a citizen of the United States and a resident of the county aforesaid; I am over the age
5 of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter
6 Drive, Suite 300, Bakersfield, California 93309. On August 2, 2007, I served the within **DIAMOND**
7 **FARMING COMPANY’S OBSERVATIONS IN RESPONSE TO THE PLAINTIFF WILLIS’**
8 **MOTION FOR CLASS CERTIFICATION**

9 (BY POSTING) I am “readily familiar” with the Court’s Clarification Order.
10 Electronic service and electronic posting completed through www.scefilings.org ; All papers filed
11 in Los Angeles County Superior Court and copy sent to trial judge and Chair of Judicial Council.

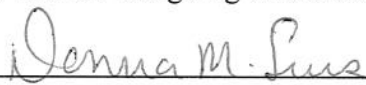
12 Los Angeles County Superior Court
13 111 North Hill Street
14 Los Angeles, CA 90012
15 Attn: **Department 1**
(213) 893-1014

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordinator)
Carlotta Tillman
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Fax (415) 865-4315

16 (BY MAIL) I am "readily familiar" with the firm's practice of collection and
17 processing correspondence for mailing. Under that practice it would be deposited with the U.S.
18 Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California, in
19 the ordinary course of business.

20 (OVERNIGHT/EXPRESS MAIL) By enclosing a true copy thereof in a sealed
21 envelope designated by United States Postal Service (Overnight Mail)/Federal Express/United
22 Parcel Service ("UPS") addressed as shown on the above by placing said envelope(s) for ordinary
23 business practices from Kern County. I am readily familiar with this business' practice of
24 collecting and processing correspondence for overnight/express/UPS mailing. On the same day
25 that the correspondence is placed for collection and mailing, it is deposited in the ordinary course
26 of business with the United States Postal Service/Federal Express/UPS in a sealed envelope with
delivery fees paid/provided for at the facility regularly maintained by United States Postal Service
(Overnight Mail/Federal Express/United Postal Service [or by delivering the documents to an
authorized courier or driver authorized by United States Postal Service (Overnight Mail)/Federal
Express/United Postal Service to receive documents]).

27 (STATE) I declare under penalty of perjury under the laws of the State of
28 California that the above is true and correct, and that the foregoing was executed on August 2,
2007, in Bakersfield, California.



DONNA M. LUIS