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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

**REPLY TO OPPOSITION TO MOTION IN LIMINE FOR AN ORDER ESTABLISHING THE EVIDENTIARY STANDARD FOR NOTICE FOR PROOF OF PRESCRIPTION BY THE WATER PURVEYORS.**

DIAMOND FARMING COMPANY, CRYSTAL ORGANIC FARMS, GRIMMWAY ENTERPRISES, INC., and LAPIS LAND COMPANY, LLC hereby submit their Reply to Opposition to Motion in Limine for an Order Establishing the Evidential Standard for the Notice for Proof of Prescription by the Water Purveyors.

## I.

## THERE IS AUTHORITY FOR THIS MOTION IN LIMINE.

The purpose of this motion is to establish the burden of proof at trial which is a proper basis for a motion in limine. Numerous cases discuss the use of pretrial motions to assess evidence before presenting it to the jury. (See, e.g., *Cherrigan v. City etc. of San Francisco* (1968) 262 Cal.App.2d 643, 646; *Sacramento, etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed* (1963) 215 Cal.App.2d 60, 66-68, modified, 217 Cal.App.2d 611.) A court has inherent equity, supervisory and administrative powers, as well as inherent power to control litigation and conserve judicial resources. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377.) Here, the determination of what evidence is necessary to establish notice as part of the Public Water Purveyors' prescription claim is necessary to assess the evidence before presenting it to the jury. Furthermore, courts can conduct hearings and formulate rules of procedure where justice so demands. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267-268; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 287.) Here, the complexity of the issues necessitated bringing this motion in limine and establishing the burden of proof is part of the court's inherent power to control litigation.

## II.

## A CONDITION OF OVERDRAFT IS NOT SUFFICIENT IN ITSELF TO ESTABLISH CONSTRUCTIVE NOTICE OF ADVERSITY.

This current motion is brought to establish the necessity of this Court to evaluate the adequacy of the method, manner, and procedure by which each Public Water Purveyor imparted notice before extinguishing each property owner's interest without compensation. This does not mean that actual notice must be shown, but rather that mere pumping when the basin is in an overdraft is insufficient to perfect a claim of prescription by a public entity.

The Public Water Purveyors are attempting to create a bright line rule that when a basin is in a condition of overdraft that this is sufficient to put the parties on notice. However, this is not the law. Proof of pumping alone, even if the common supply is overdrafted is not sufficient. Each owner must know of the adverse claim, (i.e. "adversity in fact") and knowingly acquiesce and thus neglects his title. (*Los Angeles v. San Fernando* (1975) 14 Cal.3d 199, 282.)

If overdraft is shown, there still must be evidence to have put the landowners on notice so as to meet that prerequisite requirement of prescription. Knowledge of who is causing the overdraft would likewise be required. Knowledge of the adverse and hostile claim of right by the purveyor must have first been imparted to an affected landowner before the prescriptive period can commence to run as against that landowner. (*See City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 293.)

The Public Water Purveyors rely on three cases, *Pasadena v. Alhambra, Los Angeles v. San Fernando,* and *City of Santa Maria v. Adam*, to support their contention "that constructive notice of an overdraft condition is sufficient to establish prescriptive rights." (Opposition p3 ln28- pg 4 ln1.) In each of those cases the court did not stop its analysis after finding a condition of overdraft; instead, the court engaged in a factual determination of whether there was notice based on the particular circumstances of each case.

The court in *Los Angeles v. San Fernando* explained as follows:

> "[t]he commencement of overdraft provides the element of adversity which makes the first party's taking an invasion constituting a basis for injunctive relief to the other party. [Citation.] But if the other party is not on notice that the overdraft exists, such adverse taking does not cause the commencement of the prescriptive period." (Los Angeles v. San Fernando (1975) 14 Cal.3d 199, 282.)
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> "Thus in the present case the trial court erred in basing an award of prescriptive rights on the running of a prescriptive period whose commencement coincided with the commencement of overdraft <u>without making any determination of the time at which the owners of the rights being lost by such prescription were first chargeable with notice of the overdraft</u>. The findings that the takings from the basin were open and notorious and were continuously asserted to be adverse does not establish that the owners were on notice of <u>adversity *in fact* </u>caused by the actual commencement of overdraft." [Emphasis added.] (*Id.* at 283.)

In *Pasadena v. Alhambra*, the court found that the lowering of the water levels in the appellant's wells was sufficient notice because the appellants were groundwater pumpers. (*Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 930 [207 P.2d 17, 31].)

The court in *City of Santa Maria v. Adam* held as follows:

> "To perfect a prescriptive right the adverse use must be 'open and notorious' and 'under claim of right,' which means that <u>both the prior owner and the claimant must know that the adverse use is occurring</u>. In

> the groundwater context that requires evidence from which the court may fix the time at which the parties 'should reasonably be deemed to have received notice of the commencement of overdraft.'"(*City of Santa Maria v. Adam, supra,* 211 Cal.App.4th 266, 293, citing *Los Angeles v. San Fernando, supra*, 14 Cal.3d 199, 277.)

In *City of Santa Maria*, the court found that there was sufficient notice of the wide fluctuation in the water wells and "by virtue of the fluctuating well levels, the actions of political leaders, the Acts of Congress, and the public notoriety surrounding the need and the construction of the Twitchell project." (*Id.* at 293-294.) In addition the court stated that "[a]t the local level, the SBCWA was formed in 1945 specifically to respond to persistent water shortage problems. This fact is sufficient on its own to support the conclusion that landowners were, by then, on notice that the Basin was in overdraft." (*Id.*) The court's conclusions were based on the particular facts found in that particular groundwater basin. The proof of pumping alone did not establish that the landowners were on notice that the Basin was in overdraft.

Significantly, in none of the cases cited was either the California Supreme Court or the Appellate Courts asked to consider the implications arising from the identify of the prescriptive claimant as a public entity and thus the constraints and mandates of both the U.S. Constitution and the California Constitution.

## III.

## THE DUE PROCESS NOTICE STANDARD APPLIES TO PUBLIC ENTITIES.

Neither the California Supreme Court nor any Appellate Court has as yet been asked to assess the status of a public entities claim of prescription against the backdrop of the Federal and State of California Constitutions, and specifically the Due Process Clauses and the Taking Clauses of both constitutions. When the actions of the government impair the property interest of a private citizen, both the Federal and California State Constitutions are of necessity implicated. The Public Water Purveyors must present evidence of notice of their adverse claims necessary to the prescriptive claims of each Cross-Complainant to establish that it was constitutionally sufficient due process notice. This means that the proof required of each public entity must be proof of acts or declarations, or both, that were *intended and reasonably calculated* to impart actual knowledge of its "adverse claim" to each affected landowner. This does not mean that actual notice was required, it means that Public Water Purveyors

had an affirmative duty to at the very least attempt to give actual notice. The Public Water Purveyors provide no reason for why the same standard of due process notice should not apply to all cases involving the taking of private property for a public use. Instead the Public Water Purveyors make a conclusory statement that "[e]minent domain and prescription are entirely different legal theories with entirely different legal standards." (*Opposition* pg 5 ln28 - pg6 ln1.) The Public Water Purveyors' seek to gloss over the fact that both eminent domain and prescription claims both involve the *taking of private property*. It is notable that the Public Water Purveyors do not cite any case that has addressed the issue of whether due process notice standards apply to a public entities prescription of water rights. That is because none yet exist. It is a question of first impression.

The United States Supreme Court in *Mullane* held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [Emphasis added.] (*Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.) However, "the notice required will vary with circumstances and conditions." (*Walker v. City of Hutchinson* (1956) 352 U.S. 112, 115.)

In both *Los Angeles v. San Fernando* and in *Pasadena v. Alhambra*, the issue of whether a public entity's prescription of water rights required due process notice was not in front of the court, because the appellant in both cases was a public water supplier. The Public Water Purveyors stated in their Opposition that the *Los Angeles v. San Fernando Court* did "not limit a public entity's prescription against private persons." (*Opposition* pg 4 ln 9-12.) However, that court had no reason to discuss a public entity's prescription against private persons because that was not the issue before the court. However, the court did hold that pursuant to Civil Code section 1007, public water entities are deprived of "the power to take away the property rights of their fellow public entities through adverse possession." (*Los Angeles v. San Fernando* (1975) 14 Cal.3d 199, 277.) It is important to note that in discussing the limitations of Civil Code section 1007 on prescription, the court did not make a distinction between prescription of water rights as opposed to other property rights. (*Id.*) Again, the issue raised in this motion was not then before the California Supreme Court.

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In *Schroeder v. City of New York* (1962) 371 U.S. 208, the U.S. Supreme Court applied the *Mullane* rule, holding that the statute of limitations (five years for prescription) did not bar a claim for compensation because the riparian property owner was not given adequate due process notice of the City's eminent domain proceedings to divert upstream waters, when notice was attempted only by postings and publication. (*Schroeder v. New York* (1962) 371 U.S. 208, 213.) The court further held that a mere change in the appearance of downstream flows [here the alleged lowering of water well levels] was not sufficient to put the landowner on notice, and that some good faith effort to give actual notice to property owners was required, if their names were reasonably ascertainable from public records. (*Id.*) As explained above, this does not mean that actual notice must be given, it means that some good faith steps must be taken to give the landowners actual notice.

The California State Constitution Takings Clause provides in relevant part as follows[1]:

> "Private property may be taken or damaged for public use and only when just compensation ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The legislature may provide for possession by the condemner following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be amount of just compensation." (Cal. Constitution, Article I, § 19.)

Let us assume that in this case Los Angeles Water Works 40 had posted throughout the Antelope Valley bulletins and a publication in local newspapers that its pumping was taxing the basin and if an individual had a claim for compensation to please respond to a given address. Let us further assume that after five years a landowner learns of the "adversity in fact" and Water Works 40's adverse claim, and responds. Can Water Works 40 under the facts and the holding of *Schroeder* supra prevail under a claim that they had prescripted the water rights in issue? Why should the due process standards of notice required for a constitutionally valid taking of private property for a public use by the government be less compelling when the government consciously steals what the constitution requires that it "first" pay for?

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[1] The California State Constitutional Takings Clause was amended in 1974 by adding the limiting term "only." In 2008 another amendment to this provision was approved by voters with passage of Proposition 99. The 2008 amendment added the term "and" before the word only.

## IV.

## CONCLUSION

For these reasons, as well as the reasons set forth in the initial moving papers and those to be offered at the hearing of this motion, the Court should grant Diamond's Motion in Limine to establish the evidentiary standard for notice for proof of prescription by the Public Water Purveyors and find that the due process notice standard applies.

Dated: March 24, 2014

LeBEAU • THELEN, LLP

By: _____
BOB H. JOYCE
Attorneys for DIAMOND FARMING COMPANY, a California corporation, CRYSTAL ORGANIC FARMS, a limited liability company, GRIMMWAY ENTERPRISES, INC., and LAPIS LAND COMPANY, LLC

**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 March 24, 2014, I served the within **REPLY TO OPPOSITION TO MOTION IN LIMINE FOR AN ORDER ESTABLISHING THE EVIDENTIARY STANDARD FOR NOTICE FOR PROOF OF PRESCRIPTION BY THE WATER PURVEYORS**

■ **(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.

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
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
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Fax (415) 865-4315

☐ **(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.

☐ **(OVERNIGHT/EXPRESS MAIL)** By enclosing a true copy thereof in a sealed envelope designated by United States Postal Service (Overnight Mail)/Federal Express/United Parcel Service ("UPS") addressed as shown on the above by placing said envelope(s) for ordinary business practices from Kern County. I am readily familiar with this business' practice of collecting and processing correspondence for overnight/express/UPS mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course 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].

■ **(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 March 24, 2014, in Bakersfield, California.

Lequetta Hansen

**LEQUETTA HANSEN**