

1 EDGAR B. WASHBURN (BAR NO. 34038)
Email: EWashburn@mofo.com
2 WILLIAM M. SLOAN (BAR NO. 203583)
Email: WSloan@mofo.com
3 MORRISON & FOERSTER LLP
425 Market Street
4 San Francisco, California 94105-2482
Telephone: 415.268.7000
5 Facsimile: 415.268.7522

6 Attorneys for U.S. BORAX INC.
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

10
11 Coordination Proceeding
Special Title (Rule 1550(b))

12 **ANTELOPE VALLEY GROUNDWATER CASES**

13 Included Actions:

14 **Los Angeles County Waterworks District No. 40 v.**
15 **Diamond Farming Co.**
Superior Court of California, County of Los Angeles,
16 Case No. BC 325 201

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

19 **Wm. Bolthouse Farms, Inc. v. City of Lancaster**
20 **Diamond Farming Co. v. City of Lancaster**
21 **Diamond Farming Co. v. Palmdale Water Dist.**
Superior Court of California, County of Riverside,
Case Nos. RIC 353 840, RIC 344 436, RIC 344 668
22 (Consolidated Actions)

Judicial Council Coordination
Proceeding No. 4408

Assigned to The Honorable
Jack Komar

**U.S. BORAX'S BRIEFING RE
PHASE 3 TRIAL ON ENTIRE
CAUSE OF ACTION VERSUS
SAFE YIELD AND
OVERDRAFT**

Date: April 24, 2009
Time: 9:00 a.m.
Dept: 1 (Los Angeles Superior)

1 **I. INTRODUCTION**

2 At the last case management conference on January 9, 2009, the Court indicated that it was
3 considering limiting the next phase of trial to only two of the issues involved in the Public Water
4 Suppliers’ cause of action for prescription—namely safe yield and overdraft. U.S. Borax submits that
5 such a trial, without trying the entire claim of prescription, would be inadvisable for the following
6 reasons.

7 **II. SAFE YIELD AND OVERDRAFT MUST BE DETERMINED “UNDER A
8 GIVEN SET OF CONDITIONS” OF A PARTICULAR TIME PERIOD**

9 To begin, the questions of “safe yield” and “overdraft” in this action are only relevant in the
10 context of the causes of action that are alleged. The California Supreme Court has defined safe yield
11 as “the maximum quantity of water which can be withdrawn annually from a ground water supply
12 *under a given set of conditions* without causing an undesirable result.” *City of Los Angeles v. City of*
13 *San Fernando*, 14 Cal. 3d 199, 278 (1975) (emphasis added). Even with respect to native safe yield,
14 conditions such as land use and climate will change over time, which will affect the amount of water
15 that naturally enters the aquifer. Overdraft is subject to the same temporal changes. Indeed, the *San*
16 *Fernando* decision involved certain periods of time where overdraft existed, but not others. *See id.* at
17 222-23. Since *San Fernando*, other courts have observed that the temporal aspect is pertinent. For
18 example, in *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.*, the native safe yield was
19 recognized as the average annual native supply of water “under cultural conditions *of a particular*
20 *year.*” 23 Cal. App. 4th 1723, 1727 (1994) (emphasis added). The only way to establish the “given
21 set of conditions” “of a particular year” is to hold trial on the entire claim of prescription and require
22 a showing of the alleged actual, open, notorious, adverse pumping for a specific prescriptive period.

23 **A. THE CLAIM OF PRESCRIPTION IN THIS CASE INVOLVES CONDITIONS DATING
24 BACK APPROXIMATELY HALF A CENTURY**

25 With respect to the prescriptive claim, “safe yield” and “overdraft” must be determined during
26 the prescriptive period—the claimant must have taken nonsurplus water for a statutory period of five
27 years. The Supreme Court in the *Mojave* decision explained:

28 ///

1 “[A]n appropriative taking of water which is not surplus is wrongful
2 and may ripen into a prescriptive right where the use is actual, open and
3 notorious, hostile and adverse to the original owner, continuous and
4 uninterrupted for the statutory period of five years, and under claim of
5 right.” [Citation.] Even these acquired rights, however, may be
6 interrupted without resort to the legal process if the owners engage in
7 self-help and retain their rights by continuing to pump nonsurplus
8 waters.

9 *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1241 (2000). Any finding of overdraft
10 that falls outside of the alleged prescriptive period would be irrelevant. In this case, the public water
11 suppliers have so far eluded stating directly when they allege the prescriptive period occurred, but
12 they have asserted that it occurred at least in the middle of the last century. As revealed by the
13 relevant discovery responses (excerpted below), the public water suppliers are asserting that they
14 acquired prescriptive rights as early as 1951.

15 **Special Interrogatory No. 20:** If YOU contend that YOU have
16 acquired a prescriptive right to use groundwater within the Basin, when
17 was that prescriptive right acquired?¹

18 Palmdale Water District Response: Without waiving the foregoing
19 objections, *the District responds that it has pumped groundwater from*
20 *the Basin since 1918 and the Basin has been in an overdraft since at*
21 *least 1946.* The District further responds that it will further supplement
22 its response to this Interrogatory at a reasonable time after the Phase 2
23 trial. Without waiving the foregoing objections, *the District first*
24 *acquired a prescriptive right five years after pumping groundwater*
25 *from the Basin in its overdraft condition which is no later than 1951,*
26 the right has continued and continues to the present time.

27 Los Angeles County Waterworks District No. 40 Response: Without
28 waiving the foregoing objections, the District responds that *it has*
29 *pumped groundwater from the Basin since 1921 and the Basin has*
30 *been in an overdraft since at least 1946.* The District further responds
31 that it will further supplement its response to this Interrogatory at a
32 reasonable time after the Phase 2 trial. Without waiving the foregoing
33 objections, *the District first acquired a prescriptive right five years*
34 *after pumping groundwater from the Basin in its overdraft condition,*
35 the right has continued and continues to the present time.

36 Rosamond Community Services District Response: Without waiving
37 the foregoing objections, the District responds that *it has pumped*
38 *groundwater from the Basin since 1966 and the Basin has been in an*
39 *overdraft since at least 1946.* The District further responds that it will

40 ¹ Excerpted from Plaintiff Rebecca Willis’ First Set of Special Interrogatories Propounded on
41 Each Cross-Complaining Public Water Supplier.

1 further supplement its response to this Interrogatory at a reasonable
2 time after the Phase 2 trial. Without waiving the foregoing objections,
3 *the District first acquired a prescriptive right five years after pumping*
4 *groundwater from the Basin in its overdraft condition*, the right has
5 continued and continues to the present time.

6 Littlerock Creek Irrigation District Response: Without waiving the
7 foregoing objections, LCID responds that *it has pumped groundwater*
8 *from the Basin since approximately 1890 and the Basin has been in*
9 *an overdraft since at least 1946*. LCID further responds that it will
10 further supplement its response to this Interrogatory at a reasonable
11 time after the Phase 2 trial. Without waiving the foregoing objections,
12 *LCID first acquired a prescriptive right five years after pumping*
13 *groundwater from the Basin in its overdraft condition*, the right has
14 continued and continues to the present time. (Emphasis added.)

15 Cal. Water Company Response: Without waiving the foregoing
16 objections, *the Company responds that it has pumped groundwater*
17 *from the Basin since prior to 1965 and the Basin has been in an*
18 *overdraft since at least 1946*. The Company further responds that it
19 will further supplement its response to this Interrogatory at a reasonable
20 time after the Phase 2 trial. Without waiving the foregoing objections,
21 *the Company first acquired a prescriptive right five years after*
22 *pumping groundwater from the Basin in its overdraft condition*, the
23 right has continued and continues to the present time.²

24 (Emphases added.) Identical responses were provided to the next interrogatory which asked: “If
25 YOU contend that YOU have any prescriptive rights to the use of groundwater in the Basin, state
26 when the five year prescriptive period commenced?” Therefore, as to the cause of action claiming
27 prescriptive rights, the public water suppliers are alleging they obtained those rights approximately
28 half a century ago. The trial on that time period will require the examination of a very different body
of evidence than the evidence relevant to the cause of action seeking a physical solution.

29 **B. THE REQUEST FOR A PHYSICAL SOLUTION INVOLVES PRESENT AND**
30 **FORESEEABLE CONDITIONS**

31 The cause of action seeking a physical solution concerns present and foreseeable conditions—
32 not those that existed half a century ago. As the Supreme Court has stated, a party seeking a physical
33 solution,

34 is not entitled to relief against extractions which have no immediate or
35 long-range effects on available supply. If extractions which affect

36 _____
37 ² Excerpted from public water supplier responses to Willis’ Special Interrogatories. True and
38 correct copies can be submitted on request if necessary.

1 plaintiff's rights nevertheless preserve water for beneficial use that
2 would otherwise go to waste, the trial court should endeavor to arrive at
a physical solution which would avoid such waste.

3 *San Fernando*, 14 Cal. 3d at 291-92. Necessarily, the cause of action seeking a physical solution will
4 need to look at recent extractions, not extractions from 1951. Whether the basin was in overdraft
5 more than fifty years ago will be virtually irrelevant to this cause of action. What is relevant to the
6 physical solution is whether the public water suppliers have established a prescriptive right. *See, e.g.*,
7 *Mojave*, 23 Cal. 4th at 1250 (“In ordering a physical solution, therefore, a court may neither change
8 priorities among the water rights holders nor eliminate vested rights in applying the solution . . .”).

9 The foregoing discussion illuminates exactly why the trial should proceed on specific causes
10 of action, not conceptual issues that are not tied to claims for relief. For example, if the Court
11 determined the safe yield as of 1990 (perhaps when some of the most robust evidence is available),
12 that number could be meaningless both to the prescriptive period and the physical solution. In
13 contrast, if the Court orders a trial on the entire prescriptive claim, the public water suppliers will
14 have to establish that they openly, notoriously, adversely and with a claim of right pumped
15 nonsurplus waters during a specific five year period. The requisite “set of conditions” “of a particular
16 year” discussed in *San Fernando* and *Hi-Desert* will be at issue in the trial and, frankly, all of the
17 parties will have a better sense of how to prepare. Moreover, the rights, if any, would be established
18 so that a physical solution may then be ordered.³

19 **III. CONCLUSION**

20 For all the aforementioned reasons, in addition to the prior reasons stated in U.S. Borax's case
21 management conference statements (regarding bifurcation and judicial efficiency), U.S. Borax
22

23 _____
24 ³ The public water suppliers in their brief on a jury trial suggested that the questions of safe
25 yield and overdraft could be tried solely in the context of the request for a physical solution. Brief at
26 10:1-6. In fact, the suppliers expressly state that they want to avoid any trial on prescription—“The
27 court can avoid the need for a jury trial in Phase III by simply not including any issue involving
28 prescription in this phase of trial. Accordingly, this court should limit the third phase of trial to issues
directly germane [sic] to the physical solution . . .” *Id.* This puts the cart before the horse as the
relevant rights must first be established before ordering a physical solution, as the Supreme Court
recognized in *Mojave*.

1 respectfully requests that the Phase 3 trial involve a trial on the public water suppliers' entire cause of
2 action seeking prescriptive rights.

3 Dated: January 26, 2009

4 EDGAR B. WASHBURN
5 WILLIAM M. SLOAN
6 MORRISON & FOERSTER LLP

7 By: /s/ William M. Sloan
8 William M. Sloan
9 Attorneys for U.S. BORAX INC.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is
3 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I
4 am over the age of eighteen years.

5 I further declare that on January 26, 2009, I served a copy of:

6 **U.S. BORAX'S BRIEFING RE PHASE 3 TRIAL ON CAUSE OF
7 ACTION VERSUS SAFE YIELD AND OVERDRAFT**

8 **BY ELECTRONIC SERVICE** by electronically posting a true copy thereof to Santa Clara County Superior
9 Court's electronic filing website for complex civil litigation cases (Judge Jack Komar, Dept. 17C -
10 <http://www.scefilng.org>) with respect to Judicial Council Coordination Proceeding No. 4408 (Antelope
11 Valley Groundwater matter).

12 **BY U.S. MAIL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully
13 prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San
14 Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices.
15 I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence
16 for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster
17 LLP's business practice the document(s) described above will be deposited with the United States Postal
18 Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully
19 prepaid for collection and mailing.

20 **BY FACSIMILE** by sending a true copy from Morrison & Foerster LLP's facsimile transmission telephone
21 number 415.268.7522 to the fax number(s) set forth below, or as stated on the attached service list. The
22 transmission was reported as complete and without error. The transmission report was properly issued by the
23 transmitting facsimile machine. I am readily familiar with Morrison & Foerster LLP's practice for sending
24 facsimile transmissions, and know that in the ordinary course of Morrison & Foerster LLP's business practice
25 the document(s) described above will be transmitted by facsimile on the same date that it (they) is (are) placed
26 at Morrison & Foerster LLP for transmission.

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

Executed at San Francisco, California, January 26, 2009.

Catherine L. Berté
(typed)

/s/ Catherine L. Berté
(signature)