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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding)
Special Title (Rule 1550(b)))
)
ANTELOPE VALLEY GROUNDWATER)
CASES)
)
Included actions:)
)
Los Angeles County Waterworks District No. 40 v.)
Diamond Farming Co., et al.)
Los Angeles County Superior Court, Case No. BC)
325 201)
)
Los Angeles County Waterworks District No. 40 v.)
Diamond Farming Co., et al.)
Kern County Superior Court, Case No. S-1500-CV-)
254-348)
)
Wm. Bolthouse Farms, Inc. v. City of Lancaster)
Diamond Farming Co. v. City of Lancaster)
Diamond Farming Co. v. Palmdale Water District)
Riverside County Superior Court, Consolidated)
Action, Case nos. RIC 353 840, RIC 344 436, RIC)
344 668)
)
AND RELATED CROSS ACTIONS)

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STATUTES

43 U.S.C. § 6662
Cal. Civ. Proc. Code § 4374

Cross-Defendant United States of America respectfully submits this response in opposition to the *Motion to be Excluded from the Antelope Valley Groundwater Adjudication Area or, in the alternative, for Recognition of its Prior Rights to the Waters of Sheep Creek*, that Defendant Sheep Creek Water Company (“SCWC”) filed on September 10, 2008. Upon stipulations of SCWC and a number of interested parties, the Court deferred previously scheduled hearings on the motion on October 3, 2008, December 18, 2008, and February 27, 2009. A hearing on the SCWC motion is now scheduled for May 28, 2009 in San Jose, California.

In moving to be excluded from this adjudication, SCWC focuses on 1.09 acres of land it purchased in 2004 in Los Angeles County with the intent to drill a well to supply water to its service area in San Bernardino County. *Memorandum of Points and Authorities in Support of Sheep Creek Water Co.’s Motion to be Excluded from the Antelope Valley Groundwater Adjudication Area or, in the Alternative, for Recognition of its Prior Rights to the Waters of Sheep Creek* (“SCWC Memo”), at 1-3. The SCWC well site is located just to the west of the Los Angeles/San Bernardino county line; this line also serves as a partial eastern boundary for the Antelope Valley Adjudication Area (“AVAA”).¹ SCWC argues that any groundwater pumped from this well site is not hydrologically connected to the AVAA aquifer. In moving for alternative relief, SCWC invokes rights that it alleges were conferred on it to waters of Sheep Creek under a 1931 stipulated judgment with the County of Los Angeles and other parties. Because reliable data demonstrates that water underlying SCWC’s well site is hydrologically connected to the rest of the AVAA, and because rights that SCWC alleges it possesses under the 1931 stipulated judgment do not take precedence over the rights of other parties to this action or

¹ Wells that SCWC presently or formerly pumped are outside of the AVAA (*see* SCWC Memo at 5).

exempt SCWC from participating in this adjudication, the Court should deny the motion.

I. BACKGROUND.

The Antelope Valley consists of a wedge-shaped depression situated between the San Andreas and Garlock fault zones in South-Central California. The Tehachapi Mountains, Rosamond Hills, and Bissell Hills border the Valley on the northwest and north; the San Gabriel Mountains border the Valley on the south and southwest; low hills separate the Antelope Valley from the upper Mojave and Harper valleys to the east, and Fremont Valleys to the north. The southeastern adjudication boundary for the AVAA borders San Bernardino County and the Mojave Basin Adjudication Area (“Mojave”), which includes the El Mirage Valley Groundwater Basin.

A. Procedural History

This multi-phase litigation is intended to comprehensively adjudicate all parties’ claims to groundwater rights within the AVAA. All overlying landowners within the geographical boundaries of the adjudication area (parties with correlative usufructuary rights), parties who produce water from the aquifer that the Court identified as the common source of groundwater in the jurisdictional area (parties with appropriative rights), and the United States (as owner of federal reserved water rights) are necessary parties to this action. The United States remains a party to this litigation because the Court decided that the adjudication, as currently structured, will be a comprehensive adjudication of all rights to groundwater in the aquifer. *See* 43 U.S.C. § 666(a); Phase I Order, Nov. 8, 2006 at 2 (“These boundaries are established for purposes of ensuring that the most reasonably inclusive boundaries will be used to ensure a complete and final adjudication of rights to the ground water.”).

The Court has tried Phases I and II of this multi-stage litigation. Phase I established the

“basic jurisdictional boundaries” of the AVAA as “the alluvial basin” described in California Department of Water Resources Bulletin 118-2003 (“Bulletin 118”). Phase I Order, at 2. Phase II was tried to decide whether areas with the AVAA basic jurisdictional boundaries could be declared distinct basins or sub-basins and excluded from the adjudication area on that basis. Phase II Case Management Order, Sept. 9, 2008 at 1, ¶ 2. “Specifically, the issue was whether there were any distinct groundwater sub basins within the valley that did not have hydrologic connection to other parts of the aquifer underlying the valley.” Phase II Order at 2.

Upon conclusion of the Phase II trial, the Court defined the criteria for excluding areas within the AVAA boundaries on the basis of lack of connectivity:

The court considers hydrologic connection within a groundwater aquifer for purposes of this adjudication to be that condition where ground water actually or potentially moves from one part of the basin to the other with the potential to affect the water status or condition of the other portion of the basin aquifer. If such connectivity is shown, then the area in question must be included within the adjudication of the valley. If there is no hydrologic connection, and there is no other basis for jurisdiction, then such an area should be excluded from the adjudication.

Phase II Order at 2. The Court found that none of the proponents of sub-basins demonstrated the requisite lack of connectivity and denied all requests to be excluded from this litigation. *Id.*

In ruling on the claims tried in Phase II, the Court deferred consideration of the effect that hydrologic connection will have on parties’ water rights pursuant to issues determined in a subsequent phase of this litigation. *Id.* The Court observed that “there are multiple claims to be adjudicated in this case, including declaratory relief, claims of prescription, claims of overlying owners to quiet title to water rights, [and] claims that portions of the basin should be treated as a separate area for management purposes in the event a physical solution to water use is established.” *Id.* The Court acknowledged that “[t]he resolution of many of these claims may

well be affected by the nature and extent of the hydrologic connectivity of water within various portions of the aquifer,” but explained that “it would be premature to make any such determination at this stage of the proceedings.” *Id.*

B. Standard of Review

In moving to be excluded from this litigation or to secure a declaration of its rights under the 1931 stipulated judgment, SCWC does not identify the procedural rule under which it seeks relief or frame its arguments to meet any particular standard of review. SCWC requests summary disposition of its claims seeking to have its well site excluded from this adjudication or declaring that it has vested rights to continue pumping under the 1931 stipulated judgment. In seeking such relief, SCWC relies upon declarations, maps, studies, reports and other materials to support its factual allegations. *See* SCWC Memo at iv-v (Table of Exs.). Although SCWC has not invoked the summary judgment rule, that is essentially the relief requested and that rule provides the most apt standard for considering its motion.

Summary judgment is proper only if the moving party can establish that there is no triable issue of material fact and the that it is entitled to judgment in its favor as a matter of law. *Arriaga v. CitiCapital Commercial Corp.*, 85 Cal. Rptr. 3d 143 (Ct. App. 5 Dist. 2008); Cal. Civ. Proc. Code § 437c(c). A defendant who seeks summary judgment must either negate a necessary element of the plaintiff’s cause of action or establish a complete defense to that cause of action. *Id.* The moving party must demonstrate there is no material question of fact under any possible hypothesis within the reasonable purview of the allegations before the Court. *Id.* Only if the moving party satisfies that obligation does the burden shift to the non-moving party to proffer evidence creating a triable issue of material fact. *Id.*; Cal. Civ. Proc. Code § 437c(o)(2). “A triable issue of material fact exists only if the evidence would allow a reasonable trier of fact to

find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” *Dominguez v. Wash. Mut. Bank*, 85 Cal. Rptr. 3d 705, 710 (Ct. App. 2 Dist. 2008). The courts scrutinize the moving party’s papers strictly, but construe the declarations of the party opposing summary judgment liberally to determine whether there are triable issues of fact. *Id.* Any doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. *Id.*

Sheep Creek’s motion was filed without the benefit of the Court’s Phase II ruling establishing the standard for determining hydrologic connectivity. *See* Phase II Order at 2. In part, SCWC seeks relief that would achieve the same result that the proponents of sub-basins sought at the Phase II trial - a ruling excluding an area within the AVAA jurisdictional boundaries established in Phase I. The Court’s Phase II ruling on hydrologic connectivity should be applied to Sheep Creek’s motion to ensure consistency and just results. Under the Phase II standard, SCWC must show that ground water does not actually or could not potentially flow between its Los Angeles county well site and the remainder of the AVAA and does not have the potential to affect the water status or condition of other portions of the AVAA aquifer. *See* Phase II Order at 2. Absent such a showing, Sheep Creek’s well site must continue to be included within the adjudication area and Sheep Creek’s rights to obtain water from its well site must be decided as a part of this adjudication. *See* Phase II Order at 2.

II. ARGUMENT

SCWC has not demonstrated a lack of hydraulic connection between its 1.09 acre well site and the Antelope Valley basin, and reliable data demonstrates the opposite to be true. Nor has SCWC established a legal right to pump from its Los Angeles County well site based on the 1931 stipulated judgment and the Division of Water Rights’ 1926 determination of the underlying

water right without regard for findings that have or will be adjudicated in this case.

A. An Abundance of Data Shows that the SCWC Well Site is Hydrologically Connected to the Antelope Valley Adjudication Area.

SCWC bases its exclusionary claims on the opinions that its retained expert, Dr. Ram Arora proffered. Dr. Arora has opined that: (1) faults in the vicinity of Sheep Creek’s well site “may impede movement of ground water flow and its direction,” Arora Decl. ¶ 7 (f); (2) ground water flows north toward the El Mirage Lake, east toward the Mojave River Basin and west toward the Antelope Valley Basin, *see id.* ¶ 7(g);, and (3) the SCWC well site does not lie “within the hydrologic unit of the Antelope Valley Basin,” *id.* ¶ 7(h). Notably, Dr. Arora does not opine that there is a lack of hydrologic connection between the SCWC site and the rest of the AVAA aquifer.

Dr. June Oberdorfer has reviewed Dr. Arora’s opinions and the data upon which Dr. Arora relies in reaching his conclusions. *See Declaration of Dr. June A. Oberdorfer in Opposition to the Sheep Creek Water Co.’s Motion to be Excluded from the Antelope Valley Groundwater Adjudication Area or, in the Alternative, for Recognition of its Prior Rights to the Waters of Sheep Creek dated December 2, 2008*, (hereinafter the “Oberdorfer Decl.”). Dr. Oberdorfer was qualified at the Phase I trial as an expert on hydrogeology, and the Court reaffirmed Dr. Oberdorfer’s expert qualifications at the Phase II trial. Dr. Oberdorfer has reviewed relevant materials, including United States Geological Survey (“USGS”) studies, California Department of Water Resources (“DWR”) Bulletin 118, and 215 drillers’ well logs that the DWR maintains to determine the geology and groundwater features in the vicinity of the SCWC well site. *See Oberdorfer Decl.*, attached Exhibit A, at 2, 4. Based on this review, Dr. Oberdorfer concludes that neither DWR maps, USGS data, nor well log information support Dr. Arora’s opinion that

the SCWC well site lies outside and is not hydrologically connected to the Antelope Valley Groundwater Basin. To the contrary, Dr. Oberdorfer's analysis indicates that those materials demonstrate that the SCWC site is "in good hydraulic connection with the rest of AVAA." *Id.* at 2.

As an initial matter, Dr. Arora incorrectly locates the SCWC well site in the area DWR and others identify as the El Mirage Valley Groundwater Basin. DWR Bulletin 118 clearly shows that the portion of the El Mirage Valley Groundwater Basin at issue here lies to the east of the Los Angeles/San Bernardino county line. Oberdorfer Decl., attached Exhibit A, at 4. Sheep Creek's well site, however, is located west of the Los Angeles/San Bernardino county line. *Id.* Accordingly, maps by the Department of Water Resources and others place the SCWC well site within the AVAA, not the El Mirage Valley Groundwater Basin.

Further, Dr. Oberdorfer found no evidence of bedrock highs or any other subsurface barriers to ground water flow in the vicinity of the SCWC well site. *See id.* at 2. Drillers' well logs revealed no subsurface barriers to ground water flow. *See id.* To the contrary, the data demonstrates that ground water flows freely between the SCWC well site and the rest of the surrounding AVAA. The bedrock in the vicinity of the SCWC well site lies 1,000 feet below the surface and is overlain by approximately 630 feet of saturated alluvium that extends, uninterrupted, over a considerable area in all directions. *See id.* A geologic log that SCWC cites for a test boring in San Bernardino County located approximately 3.5 miles southeast of the SCWC well site confirms this conclusion. The test boring contained alluvial material very similar to the material found at the SCWC site to a depth of at least 540 feet; this similarity is a strong indication that similar aquifer materials continue both east and west across the Los Angeles/San Bernardino county line that separates the Antelope valley and Mojave adjudication

areas. *See id.*

Likewise, while Dr. Arora opined that “faults in the area may impede” the movement and direction of groundwater flow, he did not name or specify the location of any such faults, state his basis for inferring that they “may exist,” or state the manner in which they might affect ground water flow. Arora Decl. ¶ 2(f). To the contrary, the available data do not support the existence of faulting that would impede or prevent hydrologic connection between the SCWC well site and the rest of the AVAA. USGS reports do not identify or map any faults in the vicinity of the SCWC site that could potentially impede ground water flow. Oberdorfer Decl., attached Exhibit A, at 2. Nor did Dr. Oberdorfer find any indication of faulting or barriers to ground water flow in water level data.

The water level data indicates hydrologic connectivity between the SCWC well site and the remainder of the AVAA. *Id.* at 3. The lack of any discontinuity in water levels indicates that there is no faulting that materially impedes ground water movement or creates a hydraulic separation between the AVAA and the SCWC well site or between the Antelope Valley and Mojave basins located on either side of the county line. *See id.* It is clear from the water level data that a well at SCWC’s Los Angeles County site would almost certainly draw water from the groundwater basins on both sides of the county line, pulling water from both the Antelope Valley and the Mojave adjudication areas. Oberdorfer Decl., attached Exhibit A, at 3.

While Dr. Arora opines that the SCWC well site does not lie “within the hydrologic unit of the Antelope Valley Basin” the physical evidence demonstrates that ground water actually or potentially moves freely across the AVAA and the SCWC well site location. Accordingly, judgment should be entered denying Sheep Creek Water Company’s motion.

B. Sheep Creek Water Company Should not be Excluded from the Antelope Valley Groundwater Adjudication Based on Prior Adjudicated Rights to Water in the Sheep Creek and Swartout Creek Watersheds.

SCWC also raises what it calls a “jurisdictional” argument. SCWC asserts that it “filed its [motion] based on two fundamental premises . . . the second of which is jurisdictional, i.e., that the Division of Water Rights and the Superior Court of Riverside County have already found that the Water Company has the right to take the waters it seeks to extract and export from the [1.09 acre well] Property.” *See Sheep Creek’s Reply to Public Waters Suppliers’ Opposition to Sheep Creek Water Co.’s Motion to be Excluded from the Antelope Valley Groundwater Adjudication* (hereinafter the “SCWC Reply Br.”) at 1. Essentially, SCWC argues that a 1926 Decision that the California Department of Public Waters, Division of Water Rights, issued and a subsequent 1931 stipulated judgment in *Pacific Southwest Trust & Savings Bank, v. Sheep Creek Water Co.*, No. 15583 Riverside County Super. Ct., created a right to extract water at its 1.09 acre well site in the Antelope Valley. SCWC asserts that the 1931 judgment is *res judicata* or collateral estoppel barring the relitigation of the rights to the water it claims in this proceeding. SCWC Mem. at 12-17.

SCWC’s argument fails for a number of reasons. First, the doctrines of *res judicata* and collateral estoppel apply to final judgment on the merits of a case as to the “concluding parties and those in privity with them.” *Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (quoting *Cromwell v. County of Sac*, 94 U.S. 351 (1876)). SCWC argues that the 1931 judgement is “*res judicata* not only [against] Los Angeles County, but also against the other related parties.” SCWC Mem. at 13. While it is not clear who SCWC defines as the “related parties,” it is clear that a private water rights adjudication is binding only upon parties and privies to that decree. *See, e.g., In re Waters of Long Valley Creek Stream Sys.*, 599 P.2d 656, 661 (Cal. 1979) (holding

that water rights determined through piecemeal adjudication that settle disputes among only a small number of those persons who claim a right to the use of water in a stream system are subject to legitimate claims that non-parties may raise subsequently). The United States -- and tens of thousands of other parties in the Antelope Valley groundwater adjudication -- were not privy to the 1931 lawsuit and stipulated judgment between the Sheep Creek Water Company, the Security-First National Bank of Los Angeles (successor to the Pacific Southwest Trust and Savings Bank), and the County of Los Angeles, and that decision cannot bind these new parties.

Second, contrary to Sheep Creek's description, the 1931 stipulated judgment does not "confirm[] the [Sheep Creek Water Company's] right to take the water it seeks to extract and export from the [water company's 1.09 acre well] Property." SCWC Reply Br. at 4.²

The 1926 Decision established, *inter alia*, the State Water Commission's jurisdiction over Sheep Creek Water Company's application to appropriate surface water and sub-surface flow of Sheep Creek. In order to invoke his jurisdiction over the claim, the Division Chief first noted that percolating groundwater that does "not form part of the body of the flow, surface or subterranean, of any stream" was not appropriable. *Id.* at 12 (quoting *Vineland Irr. Dist. v. Azusa Irr. Co.*, 58 P. 1057, 1059 (Cal. 1899)) Subterranean flow of the creek, however, was appropriable. In finding that Sheep Creek Water Company was entitled to appropriate 3000 acre feet per annum of water from the creek and the groundwater adjacent to the creek, the Division Chief found that the subterranean flow of the creek passes through a "known and definite channel . . . formed by the walls of the [Sheep Creek] canyon on either side," and thus was appropriable "underflow" of the

² The essence of SCWC's problem is that the source for its 1931 water right in Sheep Creek canyon has insufficient flow to satisfy the amount of water adjudicated. Insufficient stream flow at an authorized point of diversion, however, does not create a "right" to obtain any shortfall from another source to the detriment of other water users.

stream. SCWC Reply Br. at 11. Accordingly, in the 1931 stipulated judgment it was decreed that, as between the parties, Sheep Creek Water Company “shall have the perpetual right to take, divert and use all surface water flowing in Sheep Creek below the confluence of said Sheep Creek with Swartout Creek” (emphasis added). *See Agreement of Parties in Connection with Stip. for J.* (Dec. 7, 1931), Exhibit No. 7 to Sheep Creek’s Req. for Judicial Notice at 4-5.

Therefore, in 1931, the parties were arguing over a surface water right, defined as stream flow and underflow in the Sheep Creek and Swartout Creek canyons. Neither the 1926 Decision nor the 1931 stipulated judgment created any right to extract groundwater from a well on a 1.09 acre site approximately 12 miles northwest of the mouth of Sheep Creek canyon.³ Indeed, there is no basis to conclude that the court in 1931 had the power or jurisdiction to grant SCWC the right to access groundwater in a well site located on the desert floor approximately twelve miles northwest of the Sheep Creek canyon.

Third, SCWC argues that it will be prejudiced by a jurisdictional finding that its well site is located within the Antelope Valley area of adjudication because the water it produces will be exported into San Bernardino County for use in the adjacent Mojave basin area. *See SCWC Mem.* at 11 (“For established water law principles to be upheld, either the Water Company must be excluded from the Adjudication, or the area of the Water Company’s Property must be treated as a sub-basin with the Water Company being given permission to transport the water it produces on its Property to its Service Area [in San Bernadino County]”). This argument is without merit. Since SCWC has failed to establish hydrologic independence from the AVAA, it is or will be just

³ There is no definable bedrock channel from the mouth of Sheep Creek canyon to the well site 12 miles away. Oberdorfer Decl., attached Exhibit A, at 3-4. Thus, the groundwater at the well site can in no means be claimed as the surface waters of Sheep Creek under the 1926 Decision.

PROOF OF SERVICE

I, Karmen Robinson, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environmental and Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

On May 15, 2009, I caused the foregoing documents described as; **Federal Dependents' Response in Opposition to Sheep Creek Water Company's Motion to Be Excluded from the Antelope Valley Groundwater Adjudication, or in the Alternative, for Recognition of its Prior Rights to the Waters of Sheep Creek**, to be served on the parties via the following service:

BY ELECTRONIC SERVICE AS FOLLOWS by posting the documents(s) listed above to the Santa Clara website in regard to the Antelope Valley Groundwater matter.

BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By placing true copies thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

BY OVERNIGHT COURIER: I caused the above-referenced document(s) be delivered to FEDERAL EXPRESS for delivery to the above address(es).

Executed on May 15, 2009, at Denver, Colorado.

/s/ Karmen Robinson
Karmen Robinson
Paralegal Specialist