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EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

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	Judicial Council Coordination Proceeding No. 4408 **UNITED STATES' COMMENTS ON PUBLIC WATER SUPPLIERS' PROPOSALS FOR CLASS DEFINITIONS AND METHOD OF NOTICE** Hearing Date: April 16, 2007 at 10:00 a.m. Hearing Location: Los Angeles County Superior Court, Central District, Department 1, Room 534

The United States submits the following comments to the Public Water Suppliers' Proposals for Class Definitions and Method of Notice, filed March 16, 2007 (March 16 Proposal). The Public Water Suppliers propose a class defined as "a single class divided into two subclasses which include all property owners within the court-determined Adjudication Area." *Id.* at 3. Under their new proposal, one of the subclasses, titled Subclass A, consists of "dormant" landowners, i.e., landowners without groundwater wells (or wells that have not operated since October 29, 1994). The second subclass, Subclass B, consists of all landowners with groundwater wells on their land who are not members of Subclass A. Further, any class member who "connects to a Public Water Supplier's water service system and does not operate a groundwater well . . . will be dismissed from the litigation." *Id.*

The Public Water Suppliers propose that any class member should be permitted to opt out of the class and be separately represented, but that no member will be able to opt out of the litigation unless it connects to a public water supply and/or disclaims its right to pump groundwater from the land parcel. *Id.* The Public Water Suppliers also propose that public entities and parties individually joined in the adjudication be excluded from the class. *Id.* Finally, the Public Water Suppliers propose that notice to class members consist of publication in local and regional newspapers. *Id.* at 4.

In their March 16 proposal, the Public Water Suppliers have modified the description of a class of landowners originally presented in their *Notice of Motion and Motion for Class Certification; Declaration of Mark Wildermuth and Jeffery V. Dunn*, filed January 10, 2007. In the January 10 filing, the Public Water Suppliers proposed a class of "[a]ll owners of land within the adjudication area that is not within the service area of a public entity, public utility, or mutual water company." *Id.* at 5. As the United States understands the March 16 proposal, all owners of land within the adjudication area including those lands serviced by a public entity, public utility, or mutual water company will be, at least initially, a member of the class. In addition, public entities, such as the United States and the State of California, are expressly excluded from the class. These modifications resolve some, but not all, concerns the United States raised in its Response to Motion for Class Certification, dated March 5, 2007.

In our March 5 response, we argued that in order for the waiver of the United States' sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666, to be effective, the adjudication must include all claimants or owners of right within the basin. The Public Water Suppliers' January 10 proposal was deficient, we argued, because it would have excluded the area serviced by public water suppliers, thereby excluding approximately 65% of the overlying land parcels within the adjudication and, presumably, the majority of landowners.[1]/ We further argued that public entities should not be included in the class because of the non-typical nature of their rights as landowners. The Public Water Suppliers' March 16 proposal resolves the latter problem by excluding the public entities from the class, but does not address the problem of a non-comprehensive adjudication of all water rights.

Under the March 16 proposal, landowners connected to Public Water Suppliers' systems "will be dismissed from the litigation." *March 16 Proposal* at 3. The proposal for automatic dismissal of these class members is not authorized by the California rules of civil procedure. The Public Waters Suppliers' attempt to dismiss as much as 65% of class members should be required to become the subject of proper motion, with an opportunity to be heard by all affected persons, and authorized only upon a determination from the Court that such members are not necessary for a comprehensive adjudication of all water rights.[2]/

The Public Water Suppliers' proposal for the summary dismissal of the majority of landowners is not only procedurally dubious, it comes with no explanation of the merits of such an

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[1]/ As the Declaration of Mark Wildermuth in Support of Municipal Water Providers' Motion to Certify a Defendant Class, at ¶¶ 7-8 (attached to the Public Water Suppliers' Motion for Certification) attests, the adjudication area contains approximately 187,000 land parcels. *Id.* at ¶ 7. 65,000 parcels are estimated to be outside the municipal water provider service areas. *Id.* at ¶ 8. Therefore, assuming that most, if not all, of the 122,000 land parcels are connected to Public Water Supplier's water service systems, as much as 65% of all land parcels would, under this class action proposal, be excluded from this adjudication.

[2]/ The Public Water Suppliers use of the conjunctive in its proposal that "[n]o member will be able to opt out of the litigation unless it (1) connects to a public water supplier's system; **and**/or (2) disclaims its right to pump groundwater from the land parcel," *March 16 Proposal* at 3, suggests that an affirmative procedure by the landowner serviced by a public supplier to disclaim any interest in water may be warranted.

action. The Public Water Suppliers' March 16 proposal is presumably predicated on convenience or pragmatism. Though the costs in terms of time and money to Public Water Suppliers of allowing all landowners within their service areas to participate as class members may be high, "all individuals with a potential water right . . . must be brought into the process." *See* Eric L. Garner, et al., *Institutional Reforms in California Groundwater Law,* 25 Pac. L.J. 1021, 1047 (1994). While it may seem unlikely to Public Water Suppliers that landowners connected to their systems will ever drill a well, they nonetheless possess the right to withdraw groundwater and should be joined and bound by the decisions of this Court.[3]/

At the hearing on March 12, there were discussions concerning whether a landowner who receives water from a municipality or other water provider could legally drill a well on his or her land. A careful review of California statutes and regulations compels the conclusion that well drilling within the Antelope Valley is virtually unrestricted, subject only to public health considerations. *See e.g.*, Cal. Water Code §§ 13700-01 (enacted to protect the public health and welfare by preventing groundwater from being contaminated due to improperly constructed or abandoned wells); Los Angeles County Code, Title 11, Chapter 38 (regarding domestic well permitting for health and safety reasons).[4]/ Even within areas serviced by public water suppliers there do not appear to be restrictions on the right of a landowner to drill a well. *See e.g.*, *Valley View Mut. Water Co. v. Browne*, 104 Cal.App.2d 177, 230 P.2d 875 (Cal. Ct. App. 1951)(mutual water company did not have exclusive right to serve its stockholders, and could not enjoin stockholders from accepting water from another source.)

On the contrary, California has consistently protected the right of overlying landowners to perfect their rights. *See e.g.,* Cal. Water Code § 10753.9 (permitting the establishment of a groundwater management plan, but preventing the local agency from making a binding

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[3]/ Under California law, it is well settled that all landowners have a right in common to use the groundwater for reasonable and beneficial use of the basin's native safe yield. *See Hudson v. Dailey*, 156 Cal. 617, 105 P. 748 (1909)(correlative rights of overlying landowners, like riparian rights, do not depend upon use and are not lost by disuse, in absence of prescriptive rights against them.)

[4]/ The Los Angeles County water and sewer code is available at http://ordlink.com/codes/lacounty/index.htm

determination of the water rights of any person or entity.) Furthermore, in a non-statutory or private lawsuit concerning water rights, California courts have

> recognized that (1) the rights of a riparian owner are not destroyed or impaired by the fact that he has not yet used the water upon his riparian lands, and therefore that the riparian right exists, whether exercised or not; (2) a dormant riparian right is paramount to active appropriate rights; and (3) in resolving a dispute between a riparian who claims a prospective water right and other claimants, it may be proper for the trial court to retain jurisdiction over the matter so that the riparian's prospective right can be quantified at the time he decides to exercise it.

In re Waters of Long Valley Creek Stream System, 25 Cal.3d 339, 347, 599 P.2d 656, 660 (Cal. 1979)(citations omitted).[5]/ In such a non-statutory proceeding, "overlying landowners owning [] present rights to future use are entitled to notice and an opportunity to resist any interference with them." *Wright v. Goleta Water Dist*., 174 Cal.App.3d 74, 88 (Cal. Ct. App. 1985). Otherwise, "prospective rights of overlying landowners [may] be subject to the vagaries of an individual plaintiff's pleading without adequate due process protections." *Id.* at 89. The Antelope Valley groundwater adjudication is a private, non-statutory proceeding and therefore, consistent with state and federal law, should determine the interests of all individuals with potential water rights, and afford them an opportunity to participate.

Finally, Public Water Suppliers propose to notify class members by publication. *March 16 Proposal* at 4. The Public Water Suppliers do not explain how or whether publication notice provides "adequate due process protections," *Wright*, 174 Cal.App.3d at 88, for the class members. Where a proceeding may result in deprivation of property, the litigation must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).[6]/ In *Matter of Rights to Use of Gila River*, 171 Ariz. 230, 830 P.2d 442 (1992), the Arizona Supreme Court examined the sufficiency of notice and service of

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[5]/ The overlying owner has been held to have analogous rights to those of a riparian. *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal.2d 489, 525, 45 P.2d 972, 986 (1935)

[6]/ *Mullane* was not a class action lawsuit. The case concerned an adjudication of a common trust fund with a large number of potential beneficiaries. Nevertheless, the Court found that all interested beneficiaries could be bound provided they receive notice "reasonably calculated, under all the circumstance, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

process used in that state's massive general stream adjudication. The court ruled, *inter alia*, that publication notice is sufficient for those persons "'whose interests or whereabouts could not with due diligence be ascertained.'" *Id.* at 453 (*quoting Mullane* at 317). The Public Water Suppliers' new proposal does not explain why the interests and whereabouts of class members cannot be ascertained with due diligence, and therefore, does not establish that their proposed notice by publication comports with fundamental principles of due process in a general stream adjudication.

Respectfully submitted this 6th day of April, 2007.

/s/
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