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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	)	Judicial Council Coordination
Special Title (Rule 1550(b))	)	Proceeding No. 4408
)	
ANTELOPE VALLEY GROUNDWATER CASES)	
	)	UNITED STATES' RESPONSE TO
Included actions:	)	LOS ANGELES COUNTY
	)	WATERWORKS DISTRICT NO. 40
<u>Los Angeles County Waterworks District No. 40 v.</u>	)	NOTICE OF MOTION AND
<u>Diamond Farming Co., et al.</u>	)	MOTION FOR LEGAL FINDINGS
Los Angeles County Superior Court, Case No. BC 325	)	ON WATER CODE
201	)	REQUIREMENTS TO REPORT
	)	EXTRACTIONS OF
<u>Los Angeles County Waterworks District No. 40 v.</u>	)	GROUNDWATER IN LOS
<u>Diamond Farming Co., et al.</u>	)	ANGELES COUNTY
Kern County Superior Court, Case No. S-1500-CV-)	
254-348	)	Date: February 14, 2012
	)	Time: 9:00 am
<u>Wm. Bolthouse Farms, Inc. v. City of Lancaster</u>	)	Room: 1515
<u>Diamond Farming Co. v. City of Lancaster</u>)	
<u>Diamond Farming Co. v. Palmdale Water District</u>)	
Riverside County Superior Court, Consolidated Action,)	
Case nos. RIC 353 840, RIC 344 436, RIC 344 668)	
)	
AND RELATED CROSS ACTIONS)	
)	

The United States hereby responds to the Los Angeles County Waterworks No. 40 ("Waterworks No. 40") motion regarding filing of annual notices with the State Water Resource Control Board (SWRCB) pursuant to Water Code §§ 5003 and 5004, and the effect of a party's failure to file such notice. *See Los Angeles County Waterworks District No. 40 Notice of Motion*

1 *and Motion for Legal Findings on Water Code Requirements to Report Extractions of*
2 *Groundwater in Los Angeles County; Declaration of Jeffery V. Dunn; Exhibit*, (hereinafter the
3 “Waterworks No. 40 Mtn.”), filed January 17, 2012. Waterworks No. 40 argues that “[a]ll
4 parties who used more than 25 afy in Los Angeles County are subject to Water Code section
5 4999 et seq, unless exempted by Water Code Section 5001” and “[a] party's failure to file the
6 Notice as required by Water Code section 5001, is deemed to be a non use of groundwater, a non
7 use of ground water for reasonable and beneficial use, and a loss of ground water right for each
8 year in which the Notice was required.” *Id.* at 5.

9 Waterworks No. 40 overreaches. Water Code sections 4999 through 5005 do not declare
10 that water rights are forfeited when a party fails to provide the Notice of Extraction and
11 Diversion of Water required by section 5001. The Code does not equate the failure to file the
12 Notice with the loss of any water rights. “Forfeiture for failure to report might be appropriate if .
13 . the Water Code provided clear warning that failure to report is grounds for forfeiture, but the
14 Water Code does not.” Andrew H. Sawyer, *Improving Efficiency Incrementally: The Governor's*
15 *Commission Attacks Waster and Unreasonable Use*, 36 McGeorge L. Rev. 209, n. 94 (2005). In
16 this law review article, a discussion of the statute’s legislative history is provided:

17 If forfeiture occurred automatically, as the Governor's Commission
18 recommended, the SWRCB could revoke the permit or license administratively,
19 without any prior notification to the permit or license holder. But the factual basis
20 for revocation may legitimately be subject to dispute. There may be an issue as to
21 whether water was in fact put to use or whether forfeiture has occurred.
22 Erroneous revocations based on factual errors would be inevitable. Inspections
23 might overlook evidence of use, or reports of use by the permittee or licensee
24 might be lost, misinterpreted, or found unreliable. As a practical matter, many
25 revocations would occur not because the permit or license holder failed to put any
26 water to beneficial use, but simply because the permit or license holder failed to
27 report that use.

23 The Legislature modified the Governor's Commission's proposal to require notice
24 and an opportunity for a hearing if requested. This modification came in response
25 to concerns that it would be unfair for revocation to occur without these
26 procedures. With this modification, forfeiture of permitted and licensed rights is
27 more like forfeiture of pre-1914 rights than would have been the case if the
28 Governor's Commission's recommendation for automatic forfeiture had been
enacted. Under the enacted provision, forfeiture occurs as a result of non-use over
the forfeiture period, but not without an opportunity for a hearing before the
appropriator is found to have forfeited the right.

Id. at 223-24. Waterworks No. 40 argues for automatic forfeiture of property rights without due

1 process and opportunity to be heard on the facts and whether actual beneficial use of the
2 groundwater occurred.^{1/} It was never the intent of the legislature to impose such a harsh
3 penalty.^{2/} Accordingly, Waterworks No. 40 motion should be denied.

4 Dated this 1st day of February 2012.

6 /s/ R. Lee Leininger
7 R. LEE LEININGER

23 ^{1/} “[A] water right itself has been considered an interest in real property.” *State v. Superior*
24 *Court of Riverside County*, 78 Cal.App.4th 1019, 1025 (Cal.App. 4 Dist. 2000).

25 ^{2/} United States also notes that its “federal reserved water right constitutes property, not just
26 from the time the right is quantified, but from the time the reservation is created.” *High Country*
27 *Citizens' Alliance v. Norton*, 448 F.Supp.2d 1235, 1248 (D.Colo. Sept. 11, 2006). “Only Congress.
28 . . . can authorize the disposition of federal property.” *Id.* (citing *Gibson v. Chouteau*, 80 U.S. 92,
99 (1871); *United States v. Steinmetz*, 763 F.Supp. 1293, 1298 (D.N.J. June 3, 1991) *affd*, 973 F.2d
212 (3rd Cir. 1992) (“only Congress and those persons authorized by Congress may dispose of
United States property pursuant to appropriate regulations”).

PROOF OF SERVICE

I, Amber Petrie, 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, Environment and Natural Resources Section, 999 18th Street, South Terrace - Suite 370, Denver, Colorado 80202.

On February 1, 2012, I caused the foregoing document(s) described as: **United States' Response to Los Angeles County Waterworks District No. 40 Notice of Motion and Motion for Legal Findings on Water Code Requirements to Report Extractions of Groundwater in Los Angeles County**, to be served on the parties via the following service:

BY ELECTRONIC SERVICE AS FOLLOWS by posting the document(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 February 1, 2012 at Denver, Colorado.

/s/ Amber Petrie
Amber Petrie
Legal Assistant