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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' RESPONSE TO PUBLIC WATER SUPPLIERS' MOTION TO AMEND OR MODIFY SEPTEMBER 11, 2007 ORDER CERTIFYING PLAINTIFF CLASS** Hearing Date: March 3, 2007 at 10:00 a.m. Hearing Location: Los Angeles County Superior Court, Central District, Department 1, Room 534

The modified class presented in the Public Water Suppliers' Notice of Motion and Motion to Amend or Modify September 11, 2007 Order Certifying Plaintiff Class, dated January 30, 2008 (hereinafter the "PWS Motion"), fails to accomplish two basic goals. It does not include all remaining landowners not presently joined to the adjudication and inappropriately attempts to certify the class for reasons not common to all class members. The class should be defined as broadly as possible in order to make this a comprehensive adjudication, yet certified only for purposes where class members have no interests which are contrary to or in conflict with other class members.

1. The stated goal of including in the class all property owners not already joined as Defendants is defeated by the exclusion of persons served by the public water suppliers.

The PWS Motion proposes to expand the class by removing the exclusion of persons presently pumping water on their property. *See* PWS Motion at iii: 12-14 ("The class definition in Paragraph 1 of the Order is amended or modified to delete the phrase 'that are not presently pumping water on their property and did not do so at any time during the five years preceding January 18, 2006.'") The movants request this modification to "include all remaining property owners." *Id.* at 1. However, their motion does not remove the exclusion of landowners connected to a municipal water system, public utility, or mutual water company and, therefore, the class does not include all remaining property owners.[1/] This critical flaw casts doubt on the very subject matter jurisdiction alleged in the public water suppliers' Cross-Complaint.

The public water suppliers allege that the Antelope Valley Groundwater Adjudication will "comprehensively adjudicate the rights to all claimants to the use of a source of water located entirely within California, i.e., the [Antelope Valley Groundwater] Basin . . . ." Cross-

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[1/] The second paragraph in enumerated Paragraph number 1of the September 11, 2007 Order states:

> The Class also excludes all persons to the extent their properties are connected to a municipal water system, public utility, or mutual water company from which they receive or are able to receive water service, as well as owners of properties within the service areas of the foregoing water purveyors as to which there is a water system agreement or water service agreement providing for the provision of water service by such purveyors.

Complaint of Municipal Purveyors for Declaratory and Injunctive Relief and Adjudication of Water Rights, dated January 18, 2006, at ¶ 13. A comprehensive adjudication of the rights of all claimants, the public water suppliers allege, waives the United States' sovereign immunity and permits the joinder of the federal government in this action pursuant to the McCarran Amendment, 43 U.S.C. § 666. *Id.* at ¶¶ 14-17.[2/]

It is, therefore, surprising that the public water suppliers recognize that, in order for the waiver of the United States' sovereign immunity under the McCarran Amendment to be effective, the adjudication must include all claimants or owners of right within the basin, but they do not ask to remedy the exclusion of a large number of landowner claimants from the class. It is beyond question that a landowner, even one who receives water from a municipality or other water provider, has a right to access groundwater beneath his or her property for reasonable and beneficial use. *See Hudson v. Dailey*, 156 Cal. 617, 626-27, 105 P. 748, 752 (1909)(correlative rights of overlying landowners do not depend upon use and are not lost by disuse, in absence of prescriptive rights against them.) Further, 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

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[2/] The comprehensiveness requirement for a McCarran adjudication is well-established. *See e.g.,California v. United States,* 235 F.2d 647, 663 (9th Cir. 1956)(the type of adjudication required by the McCarran Amendment includes "all owners of lands on the watershed and all appropriators who use water from the stream"); *California v. Rank,* 293 F.2d 340, 347 (9th Cir. 1961) *rev'd on other grounds sub nom. Dugan v. Rank,* 372 U.S. 609 (1963)(a general adjudication is "one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated"); *Metropolitan Water Dist. of S. Cal. v. United States,* 830 F.2d 139, 144 (9th Cir. 1987) *aff'd sub nom. California v. United States*, 490 U.S. 920 (1989)("The McCarran amendment [authorizes] . . . only suits to adjudicate the rights of all claimants on a stream"); *United States v. Oregon*, 44 F.3d 758, 768 (9th Cir. 1994)(noting that "all existing water rights claims in the river system will have been determined when the adjudication is finished"); *Miller v. Jennings* (5th Cir. 1957) 243 F.2d 157, 159 (noting that there can be a McCarran adjudication "only in a proceeding where all persons who have rights are before the tribunal"); *In re Snake River Basin Water System*, 764 P.2d 78, 85 (Idaho 1988) (ruling that "in order for the United States to be subject to the jurisdiction of the trial court in the Snake River basin adjudication, the rights of all claimants on the Snake River and all of its tributaries within the state of Idaho must be included in the adjudication.")

contaminated due to improperly constructed or abandoned wells). Clearly, all overlying landowners are potential water right claimants.

In a private, non-statutory proceeding such as this one, "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, 87-89, 219 Cal. Rptr. 748, 749-50 (1985). This notice and opportunity must extend to landowners serviced by public water suppliers for the simple reason that they possess inherent rights to groundwater, and the public purveyors may not assert the overlying rights of their customers. *Orange County Water Dist. v. City of Riverside*, 173 Cal. App. 2d 137, 165-166, 343 P.2d 450, 464-465 (1959)); *City of San Bernardino v. City of Riverside*, 186 Cal. 7, 25, 198 P. 784, 792 (1921). While it may seem unlikely to public water suppliers that landowners connected to their systems will ever drill a well, such landowners nonetheless have the right to withdraw groundwater and should be joined and bound by the decisions of this Court.

2. The public water suppliers improperly attempt to certify the class for purposes not common to all class members.

The public water suppliers overreach when they request the following additional language after the last sentence in Paragraph 1 of the September 11, 2007 Order:

> The Court certifies the Class for the (1) determination of the Basin's characteristics including yield: (2) adjudication of the Public Water Suppliers' groundwater rights including prescriptive rights: (3) adjudication of the United States' groundwater rights including federal reserved rights: (4) determine a physical solution to water shortage conditions including all parties' rights to store and recover non-native water in the Basin; and (5) for all other purposes until such time the Court deems necessary to redefine the Class.

PWS Motion at iii. Of the expressly identified issues, only the first is common, similar and presents a question of law or fact that is unique to the class; the Basin's characteristics and safe yield are questions of fact in which landowners, including dormant overlying landowners and small pumpers, are likely to share a common interest.

The class is unlikely to share a common interest, on the other hand, in the adjudication of the public water suppliers' groundwater rights. The public water suppliers have asserted rights based upon prescription. Landowners who pump will assert rights of self-help which may

restrict the amount of water prescribed by and adjudicated to the public water suppliers. *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.*, 23 Cal. App. 4th 1723, 1731, 28 Cal. Rptr. 2d 909, 915 (1994). The doctrine of self help is individual to each pumper. *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 931, 207 P.2d 17, 31 (1949) (acquisition by prescription "can effectively be interrupted by self help on the part of the lawful owner of the property right involved.") Accordingly, amounts of water decreed to the public water suppliers based on prescription, if any, may only be deduced after determinations of individual pumpers' rights to self-help. In the adjudication of the specific rights of the public water suppliers, therefore, there is no commonality within a class of pumping landowners, and certainly no commonality across a class that includes dormant, i.e. non-pumping, landowners.

There is a question in common to the members of the modified class (and all other parties), but it is not the determination of <u>what</u> prescriptive rights to groundwater the public water suppliers may possess. Rather, it is <u>whether</u> they have a prescriptive right at all. An early determination of the existence of prescriptive rights will assist in the resolution of this case, and is likely to promote a quicker settlement. The determination of the existence of prescriptive rights, unlike a determination of specific rights of the public water suppliers, does involve questions common to the class, *e.g.*, adequacy of notice, the period of prescription, etc. Therefore, the class should be certified for a determination of whether prescription exists, not for the adjudication of the public water suppliers' express groundwater rights.

The public water suppliers also propose the class be certified for the adjudication of the United States' federal reserved water rights. The United States Supreme Court has defined the federal implied reserved rights doctrine. *See United States v. New Mexico,* 438 U.S. 696, 715 (1978); *United States v. Cappaert,* 508 F.2d 313, 320 (9th Cir. 1974). The doctrine reserves to the United States an amount of water necessary to meet federal purposes on federal enclaves. *Id.* Reserved water is not available for appropriation or other means of disposal under state laws including correlative or *pro rata* distribution. *See In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739, 748 (1999) ("A theoretically equal right to pump groundwater, in contrast to a *reserved* right, would not protect a federal reservation

from a total future depletion of its underlying aquifer by off-reservation pumpers.") Consequently, it is reasonable to litigate the United States' reserved water rights separately from state law based correlative or prescriptive rights.

However, it makes no sense for this class to litigate federal reserved water rights before it is determined whether class members (particularly dormant landowners who may not avail themselves of the doctrine of self-help) are or are not proscribed from accessing groundwater. Proscribed landowners may have no rights to groundwater and, therefore, no interest in an adjudication of federal reserved water rights. After the Court determines the Basin's characteristics and safe yield, and after the Court rules on prescription, it may be appropriate to revisit the question of adjudicating the federal reserved water right in the context of this class or subclasses, but not before.[3]/

Finally, the determination of a physical solution and apportioning rights to the finite supply of water available in the Basin will involve disparate interests of dormant landowners and pumping landowners. Landowner pumpers "retain their rights [to nonsurplus water without judicial assistance] by using them." *City of Barstow v. Mojave Water Agency,* 23 Cal. 4th 1224, 1248, 5 P.3d 853, 868 (2000)(quoting *Hi-Desert County Water Dist.*, 23 Cal. App. 4th at 1731, 28 Cal. Rptr. 2d at 915). Landowner pumpers (assuming they are not proscribed) will have an interest in limiting dormant landowners rights in order to protect or enhance their correlative share. A class with members inherently in conflict is not an appropriate class.

The public water suppliers appear to recognize this problem and propose that, "if [a conflict] arises, the Court has the discretion to create subclasses or implement other case management techniques to resolve the conflict." PWS Motion at 6-7. The public water suppliers have it backwards. Rather than certify the class for the determination of specific issues of

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[3]/ The public water suppliers ask that the Court certify the class for the "adjudication of the United States' groundwater rights including federal reserved rights," PWS Motion at iii, but argue that the commonality of the class extends "specifically [to] the federal reserved water right claims by the United States . . . ." *Id.* at 3. Accordingly, the United States does not interpret the public water suppliers request to include a determination of government rights as an overlying landowner in the Antelope Valley.

questionable commonality and dubious shared interest to the class members, the more prudent course would be to certify the class for the determination of issues certain to be common to the class, and reserve all other issues for a later time. Once the class has litigated Basin characteristics and safe yield and the existence of prescription, it may then be appropriate to reexamine the class to see if the factual claims of class members differ, or if class members disagree as to legal theory and defenses before proceeding with a determination of other rights, including federal reserved water rights and a physical solution.

Respectfully submitted this 15th day of February, 2008.

R. LEE LEININGER
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U. S. Department of Justice

PROOF OF SERVICE

I, Linda C. Shumard, 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 February 15, 2008, I caused the foregoing documents described as UNITED STATES' RESPONSE TO PUBLIC WATER SUPPLIERS' MOTION TO AMEND OR MODIFY SEPTEMBER 11, 2007 ORDER CERTIFYING PLAINTIFF CLASS, to be served on the parties via the following service:

[X] 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 February 15, 2008, at Denver, Colorado.

/s/Linda C. Shumard
Linda C. Shumard
Legal Support Assistant