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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES Included Actions: Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201; Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348; Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. Lancaster, 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	Judicial Council Coordination No. 4408 Santa Clara Case No. 1-05-CV-049053 Assigned to Hon. Jack Komar PHASE II TRIAL BRIEF OF CROSS-DEFENDANT COPA DE ORO LAND COMPANY VIA FAX FILING Date: October 6, 2008 Time: 9 a.m. Dept.: 1 Judge: Hon. Jack Komar

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PHASE II TRIAL BRIEF

As the Court has directed, cross-defendant Copa de Oro Land Company ("Copa de Oro") is coordinating with, and relying on, cross-defendant Tejon Ranchcorp ("Tejon") in Tejon's presentation of evidence that the Antelope Valley's Western and Eastern units – as defined by Tejon's expert testimony – contain substantially distinct water supplies and are separate for water-right purposes. Copa de Oro presents this brief in favor of the Court accepting Tejon's position.

In their First-Amended Cross-Complaint of Public Water Suppliers for Declaratory and Injunctive Relief and Adjudication of Water Rights, filed March 13, 2007 ("Cross-Complaint"), the public water suppliers have alleged that the Antelope Valley is all one basin for water-right purposes. (Cross-Complaint, ¶ 22.) The parties, however, do not dispute that a bedrock ridge in the area of the Antelope and Little Buttes separates two deep sediment basins in the Western and Eastern units and that a relatively small amount of water flows between them. These facts demonstrate that, under 50 years of consistent California decisions, the two units are distinct for the purpose of determining whether prescription has occurred and other water-right purposes. The ideas that there theoretically could be significant flow between the units, or that such flow might have existed in a state of nature, are irrelevant. Article X, section two, of the California Constitution requires that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable" and thus that the legal character of basins' sub-units be evaluated based on conditions that include use of their groundwater and other human interventions. The Court should hold that, under the applicable legal standards, the Antelope Valley's Western and Eastern units are distinct for water-right purposes.

I. Consistent California Law Indicates That, Under The Facts of This Case, The Court Should Hold That The Antelope Valley's Western and Eastern Units Are Distinct For Water-Right Purposes

The experts do not dispute that there are important distinctions between the Antelope Valley's Western and Eastern units. There is no dispute that: (a) a subsurface bedrock ridge exists in the area of the Antelope Buttes and the Little Buttes; (b) the sedimentary deposits on either side of the ridge are thousands of feet deep, while only several hundred feet of sediment overlie the ridge

and contain a smaller band of saturated alluvium approximately 200 to 300 feet deep that can transmit water; (c) land subsidence has occurred in the Eastern unit due to the effect of groundwater pumping on subsurface clay-like lake deposits, while such deposits – and therefore subsidence – do not exist in the Western unit. Tejon's experts will demonstrate that a relatively insignificant amount of water flows across the bedrock ridge and the Western and Eastern units have little influence on each other. These facts demonstrate that the Court should hold that those units are separate sub-basins and are distinct for prescriptive claims and other water-right purposes.

A. Where A Subsurface Structure Essentially Divides Groundwater Aquifers, Separate Water Rights Exist On Either Side of The Structure

Three published appellate cases indicate that, where a subsurface structure reduces groundwater flow between the aquifers on either side to insignificant levels, the water rights in those aquifers are distinct.

In *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, the Supreme Court addressed prescriptive claims in only the Western Unit of the Raymond Basin, describing the basin as follows:

> The Raymond Basin Area [is] a field of ground water located at the northwest end of San Gabriel Valley . . . The area comprises 40 square miles and is separated from the rest of the valley along its southern boundary by the Raymond Fault . . . a natural fault in the bedrock constituting a [b]arrier in the alluvium which greatly impedes the sub-surface movement of water from the area, although it does not entirely stop it . . .
>
> [¶] Natural underground formations divide the area into two practically separate units. The Western Unit . . . consists of the Monk Hill Basin, which is to the northwest, and the Pasadena Subarea. The Eastern Unit . . . lies immediately to the east of the Pasadena Subarea. At present water table elevations movement of ground water from the Western to the Eastern Unit is so small as to be immaterial but it might be increased by an overdraft in the Eastern Unit.

(*Id.* at p. 921 (emphasis added).)

The Court rejected an argument that certain underground streams were the appropriate units within which to determine the parties' water rights, deciding instead that the Western Unit was the right one. (*Id.* at p. 923.) The entire San Gabriel Valley apparently constituted one drainage basin and the Raymond Basin was a distinct groundwater basin with that Valley. The Court, however, held that the Raymond Basin's Western Unit – a sub-unit of a sub-unit of a valley – was the right area

within which to determine water rights because, "[a]t present water table elevations," geologic formations limited groundwater flow between that Unit and the Raymond Basin's "Eastern Unit."

In *Orchard v. Cecil F. White Ranches, Inc.* (1950) 97 Cal.App.2d 35, the Court of Appeal held that a landowner acquired prescriptive rights in a groundwater basin because it had pumped water from that basin and conveyed it for use outside of the basin. The Court of Appeal held that the area of pumping and the area of use were distinct for water-right purposes because geological formations separated the two areas' aquifers, finding that substantial evidence supported the following trial-court finding:

> Finding (4): That the material and geological structural formation within Dagany Gap is sufficiently resistant to the movement of underground percolating water so as to separate the field of underground percolating water within McClure Valley from the field of underground percolating waters in Kettleman Plains and Kettleman Valley lying East of McClure Valley and East of Dagany Gap.

(*Id.* at pp. 38-41 (quote at p. 38).)

The Court of Appeal affirmed this finding, even though evidence indicated that 40 to 50 feet of alluvium existed over the subsurface geological structures and water percolated through that alluvium. (*Id.* at pp. 40-41.) Based on the above finding, the Court of Appeal affirmed a judgment that a water user in the Kettleman Plains area had acquired prescriptive rights of 11,040 acre-feet by pumping that amount in the McClure Valley and conveying it over the boundary between the two areas. (*Id.* at pp. 42-45.) Because the water was not used in the McClure Valley and that Valley's aquifer was overdrafted when the pumping occurred, the water was pumped adversely to overlying rights in that Valley and that pumping created a prescriptive right. (*Id.*)

In *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, the Supreme Court addressed many issues concerning groundwater rights in the Upper Los Angeles River Area (the "ULARA"), which was "the entire watershed of the Los Angeles River and its tributaries" above a particular gauging station. (*Id.* at pp. 207-209.) The ULARA included several groundwater "subareas," specifically the San Fernando, Sylmar, Verdugo and Eagle Rock subareas. (*Id.* at p. 209.) Los Angeles claimed a first-priority right to the groundwater in not only the San Fernando area, but also the Sylmar and Verdugo areas because the Los Angeles River drains the surface of

those areas and Los Angeles holds a Mexican-law-based pueblo right in that river. (*Id.* at pp. 247-248.) The Supreme Court, however, affirmed the trial court's finding that "the Sylmar, Verdugo and San Fernando subareas each contain separate underground reservoirs or basins with no significant amount of underground flow between them . . . ." (*Id.* at p. 247.) The Supreme Court described the physical situation as follows:

> All water from wells in the Sylmar subarea is drawn from confined aquifers, that is, bodies of ground water cut off from free hydraulic connection with overlying ground water except at intake. These aquifers reach 12,000 feet in depth, compared to the maximum of 1,000 feet of depth reached by the water-bearing materials beneath the San Fernando subarea. Between 1928-1929 and 1957-1958 there was an average underflow of 560 acre feet of water per year through the Pacoima and Sylmar notches from the Sylmar subarea to the San Fernando subarea and it is estimated that in the absence of the Pacoima submerged dam constructed at Pacoima notch in 1888, this average underflow would have been 750 acre-feet. However, the flow did not emanate from the confined aquifers which supply the wells but from the ground waters which supply those aquifers.
>
> The Verdugo subarea, located east of the Verdugo Hills and not contiguous to any subarea of the ULARA other than the San Fernando subarea, contains a large aquifer capable of furnishing a substantial water supply. From 1928-1929 to 1957-1958 there was no significant underflow of ground water between the Verdugo and San Fernando subareas. This lack of underflow was apparently due to the extraction of water from wells in Verdugo and the confining effect of a submerged dam constructed part way cross the mouth of Verdugo Canyon in 1895 and reconstructed by defendant City of Glendale in 1935.

(*Id.* at p. 249.)

The Court rejected Los Angeles's argument that its pueblo right extended to the Sylmar and Verdugo subareas because "in a state of nature with no extractions, the Verdugo and Sylmar basins would in effect be filled to overflowing, causing water . . . to enter the San Fernando basin which supplies the Los Angeles River." (*Id.* at p. 250.) After reviewing the scope of Los Angeles' historical use of that River's water and of previous assertions of its pueblo right, the Court stated that it would not extend that right to aquifers that were "hydrologically independent" from the Los Angeles River. (*Id.* at p. 251.)

As in *Pasadena* and *Orchard*, *San Fernando* did not strictly define a test for determining what a sub-basin is. As in *Pasadena* and *Orchard*, however, *San Fernando* determined the water-right issue before it by identifying structures that reduced the connection between adjacent aquifers

to insignificance – manmade structures, in *San Fernando* – and then defining separate water rights in those aquifers. In fact, another Court of Appeal decision suggest that even the presence of a subsurface structure is not required to separate aquifers for water-right purposes if there is an insignificant relationship between them. In *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, the Court of Appeal affirmed the Superior Court's calculation of the safe yield of the Central sub-basin of the Goleta Groundwater Basin over the argument that there was no "boundary between the Central and West sub-basins." (*Id.* at p. 89.) The Court of Appeal held that substantial evidence supported this conclusion, citing an expert declaration as saying, "although a sharp boundary may not exist between sub-basins, very little groundwater migrates between the two sub-basins and there were sufficient differences between the two to consider their safe yields separately." (*Id.*)

The evidence that Tejon's experts will present will demonstrate that the characteristics of the Antelope Valley's Western and Eastern units justify separate treatment of water rights within them consistent with *Pasadena*, *Orchard* and *San Fernando*. The bedrock ridge identified by those experts forms a boundary apparently more significant than the boundary between the sub-basins recognized in *Wright*. It is particularly noteworthy that land subsidence has occurred in the Antelope Valley's Eastern unit, but not in its Western unit. Moreover, the evidence will show that the bedrock ridge between those units forms a boundary area similar to an area through which the Court has already drawn a boundary in this case, namely the Antelope Valley's southeastern area, where, in Phase I, the Court accepted the Los Angeles-San Bernardino County line as the adjudication area's outer boundary. Both that area and the bedrock ridge identified by Tejon's experts feature sediments several hundred feet thick through which groundwater can flow. The Court should not adopt one such area as a boundary for the basin as a whole and then refuse to accept a similar area as dividing the basin's Eastern and Western units.

Based on the evidence to be presented by Tejon's experts, the Court should hold that the Antelope Valley's Western and Eastern units are distinct in adjudicating water rights.

B. A Standard Under Which Water Supplies Are Considered Unified Because They May Have Had A Significant Natural Connection Would Be Inconsistent With California Decisions And Contrary To Article X, Section Two, Of The California Constitution

As discussed above, in *Pasadena* and *San Fernando*, the Supreme Court held that groundwater supplies were distinct for water-right purposes where there was some hydrologic connection between them and where human activities had reduced whatever natural hydrologic connection that had existed. In *Pasadena*, the Supreme Court stated that the Raymond Basin's Western and Eastern Units were distinct for water-right purposes, stating:

> At present water table elevations movement of groundwater from the Western to the Eastern Unit is so small as to be immaterial but it might be increased by an overdraft in the Eastern Unit.

(*Id.* at p. 922 (emphasis added).)

The "present water table elevations" in *Pasadena* resulted from the parties' prior groundwater pumping. (*Id.* at pp. 922, 929-930.) *Pasadena* therefore indicates that human activities can be sufficient to divide aquifers for water-right purposes.

San Fernando made this point explicitly. As discussed above (see pp. 3-4 *ante*), in *San Fernando*, the Supreme Court recognized that the construction of subsurface dams and groundwater pumping had separated the Sylmar and Verdugo aquifers from the San Fernando aquifer more distinctly than had occurred in a state of nature. Moreover, the Supreme Court explicitly rejected Los Angeles' argument that it had a priority right in the Sylmar and Verdugo aquifers because they could have spilled into the San Fernando aquifer in a state of nature. (*San Fernando*, *supra*, 14 Cal.3d, at pp. 250-251.)

In light of *Pasadena* and *San Fernando*, any expert testimony that indicates that the Antelope Valley's Western and Eastern units should not be considered separately because they were hydrologically connected in a state of nature is based on an incorrect legal standard and is irrelevant to the issues presented in this trial.

Any other conclusion would be inconsistent with Article X, section two, of the California Constitution, which states, in relevant part:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of this State be put to beneficial use to the fullest extent of which they are capable . . . .

Article X, section two, states the "basic principles defining water rights," while "carefully preserv[ing] riparian and overlying rights." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242.) As the Supreme Court recognized in *San Fernando*, the argument that water rights should be based on natural conditions would present a question of whether the maintenance of such conditions was a reasonable use of water under Article X, section two. (*San Fernando*, *supra*, 14 Cal.3d, at p. 250 (citing *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 556-558 (discussing Art. X, § 2)).)[1] Such an argument would not comply with that constitutional provision, which was enacted specifically to overturn *Herminghaus v. So. Cal. Edison* (1926) 200 Cal. 81, in which the Supreme Court held that riparian water-right holders were entitled to have the entirety of a stream's flood flows wash sediment over their property rather than allow high flows to be stored upstream for beneficial use. (See *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 688-690, 699-700, 706.) An argument that the Court's determination about the existence of sub-basins in the Antelope Valley should be based on natural conditions would be analogous to the holding in *Herminghaus* that Article X, section two, was enacted to overturn. Article X, section two, expressly mandates that California's waters be put to "beneficial use to the fullest extent of which they are capable." The Court has an independent duty to uphold that mandate (*City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 338-341), and therefore should not judge the existence of sub-basins in this case based on "state of nature" conditions.

II. The Public Water Suppliers Have The Burden Of Proving, By Clear And Convincing Evidence, That Their Pumping Is Adverse To The Rights Of Every Landowner They Have Sued And Therefore Have That Burden In This Trial

The public water suppliers have asserted, as the first cause of action in their First Amended Cross-Complaint, a claim of prescription against every landowner in the Antelope Valley. (Cross-Complaint, ¶¶ 41-45.) In relation to the Antelope Valley itself, that Cross-Complaint alleges:

[1] *Rancho Santa Margarita* refers to the constitutional provision as Article XIV, section 3, which was later renumbered. (See *City of Barstow*, *supra*, 23 Cal.4th, at p. 1241.)

> Various investigators have studied the Antelope Valley and some have divided the Basin into "sub-basins." According to the Public Water Suppliers' information and belief, to the extent the Antelope Valley is composed of such "sub-basins," they are sufficiently hydrologically connected to justify treating them as a single source of water for purposes of adjudicating the parties' water rights.

(Cross-Complaint, ¶ 22.)

The public water suppliers' cause of action for prescription relies on this allegation (Cross-Complaint, ¶ 41.) Those parties therefore have the burden of proving that allegation under prescription law and Evidence Code section 500, which states:

> Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.

Black-letter prescription law states that: (a) the party claiming prescription has the burden of proving all of prescription's elements, including that its activities are adverse to the defendant's rights; and (b) the burden of proof is clear and convincing evidence in recognition of the fact that the prescription claimant seeks to take the defendants' property rights. (See *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 235; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708.) In a 2008 decision, the Court of Appeal applied the "clear and convincing" standard specifically to claims of prescriptive water rights. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 938.) In order to prove adversity, the prescription claimant must prove that it has invaded the defendant's legal interest. (See *Dieterich Int'l Truck Sales v. J. S. & J. Services, Inc.* (1992) 3 Cal.App.4th 1601, 1608-1611.) For example, it is not possible to prescribe an easement against a fee title owner whose lessee is in possession of the property because an easement is a possessory interest, not a fee interest. (*Id.*)

The interest against which the public water suppliers seek prescriptive rights is the landowners' interests in pumping from the groundwater that underlies their specific properties. As the Supreme Court stated in *City of Barstow*, *supra*, "[a]n overlying right . . . is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." (23 Cal.4th, at p. 1240 (quotation and citation omitted).) In order to prove that they have invaded each overlying landowner's interest in pumping the water under his, her or its land, the public water suppliers therefore must prove at least

that the water supplies under the landowner's land derives from the same supply as the water that those suppliers pump. This conclusion is supported by Supreme Court decisions concerning claims of prescriptive surface water rights, in which the Court has held that it is not possible for a party to prescribe rights in one fork of a creek against a nearby landowner where that landowner's lands are only riparian to a different fork of the creek. (*Pabst v. Finmand* (1922) 190 Cal. 124, 127-128.)

Because the public water suppliers must establish that they are pumping from the same water source as the landowners against whom they seek prescription, that fact is "essential to the claim for relief" that the public water suppliers assert and they have the burden of proof – proof by clear and convincing evidence – in this trial. (See Evid. Code, § 500.) Proving that the parties' properties are all located within one groundwater basin will not be sufficient because California law recognizes that there can be distinct groundwater supplies, and therefore distinct water rights, within a particular basin. (See pp. 2-5 *ante*.) Because the testimony of Tejon's experts will demonstrate that the Antelope Valley's Western and Eastern units contain substantially independent groundwater supplies, the public water suppliers will not be able to meet their burden of proof in this trial.

CONCLUSION

For the reasons above, and based on the evidence to be presented at trial, cross-defendant Copa de Oro Land Company respectfully requests that the Court: (1) find that the Antelope Valley basin contains Western and Eastern units, as described by Tejon's experts; and (2) hold that the Western and Eastern units are distinct for water-right purposes.

Dated: October 1, 2008

Respectfully submitted,

BARTKIEWICZ, KRONICK & SHANAHAN
A Professional Corporation

By: _____
Ryan S. Bezerra

Attorneys for Cross-Defendant Copa de Oro Land Company

PROOF OF SERVICE

I, Terry Olson, declare as follows:

I am a citizen of the United States and a resident of Sacramento County. I am over the age of 18, not a party to this action and am employed at Bartkiewicz, Kronick & Shanahan, 1011 Twenty-Second Street, Sacramento, California 95816. On October 1, 2008, I served, in the manner described below, the enclosed documents:

1. **PHASE II TRIAL BRIEF OF CROSS-DEFENDANT COPA DE ORO LAND COMPANY**

I posted that document to the Court's World Wide Web site located at www.scefiling.org

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

Executed at Sacramento, California on October 1, 2008.

Terry Olson