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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY of LOS ANGELES – CENTRAL DISTRICT**

COORDINATION PROCEEDING SPECIAL
TITLE (RULE 1550(b))

**ANTELOPE VALLY GROUNDWATER
CASES**

INCLUDED ACTIONS:

Los Angeles County Waterworks District No. 40
vs. Diamond Farming Company, a corporation,
Superior Court of California, County of Los
Angeles Case No. BC 325201;

Los Angeles County Waterworks District No. 40
vs. Diamond Farming Company, a corporation,
Superior Court of California, County of Kern, Case
No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. vs. City of Lancaster,
Diamond Farming Company, a corporation vs. City
of Lancaster, Diamond Farming Company, a
corporation vs. Palmdale Water District, Superior
Court of California, County of Riverside, Case
Nos. RIC 353840, RIC 344436, RIC 344668.

Judicial Council Coordination
Proceeding
No. JCCP 4408

SANTA CLARA CASE NO.: 1-05-CV-
049053

Honorable Jack Komar, Presiding

**REPLY BRIEF IN SUPPORT OF
MOTION FOR APPROVAL OF
RULES AND PROCEDURES FOR
APPOINTMENT/ELECTION OF
WATERMASTER BOARD
MEMBERS**

Date: September 8, 2016
Time: 10:00 a.m.
Dept.: Room 222, Los Angeles
Judge: Jack Komar, Presiding

This Reply Brief is submitted by Private and Public Landowners in response to
Public Water Suppliers' Opposition to Private and Public Landowners' motion for
approval of proposed rules and procedures for appointment and election of Watermaster
Board members (a copy of which is attached as Exhibit 1 to the motion).

I. INTRODUCTION

Not content with two seats on the 5-member Watermaster Board (as provided for in the Judgment), the Public Water Suppliers (PWS) also seek the ability to vote on the election of the Board's two landowner representatives, and thereby obtain complete control of the Watermaster. That would undermine, and perhaps destroy, the delicate balance of voting power established in the Judgment between the PWS appropriators and overlying landowners.

The PWS object to the provision in the proposed rules and procedures that precludes the PWS from participating in the election of the two landowner seats on the Watermaster Board, arguing that the Judgment does not preclude a PWS from voting on the landowner seats, and expressly provides that a PWS may be a successor in interest to an overlying landowner right. In making that and related arguments, the PWS make erroneous assumptions and mischaracterize important provisions of the Judgment, to wit:

- The Judgment expressly "conditions" and "limit[s]" overlying landowners' use of Exhibit 4 water solely "for use on land they own or lease." Accordingly, although a PWS may acquire Exhibit 4 water from a landowner, a PWS cannot be a "successor in interest" to an Exhibit 4 landowner (as provided in section 18.1.1.) because PWS are not limited to using Exhibit 4 transfer water only on land they own or lease but, instead, are allowed to use transfer water anywhere within their respective service areas; and
- Contrary to the PWS's claim, the Judgment does not expressly provide that a PWS may be a "successor in interest" to an overlying landowner right. The opposite is true.

II.

THE PUBLIC WATER SUPPLIERS SEEK TO UNDERMINE THE DELICATE BALANCE OF VOTING POWER THAT WAS SO CAREFULLY NEGOTIATED AND AGREED UPON FOR THE WATERMASTER BOARD

As the Court is fully aware, these coordinated proceedings largely involved and continue to involve the competing claims and interests of two distinct groups, i.e., public

1 water suppliers exercising appropriative groundwater rights, on the one hand, and
2 overlying landowners exercising overlying groundwater rights (landowners), on the
3 other hand. Exhibit 3 of the Judgment lists the respective water allocations granted to the
4 appropriative Non-Overlying Production Right holders (PWS), while the respective
5 water allocations granted to the stipulating Overlying Production Right holders
6 (landowners) are listed on Exhibit 4.

7 The composition of the Watermaster Board was intentionally structured and
8 agreed upon so as to establish and preserve a balance of power between the PWS (which
9 had previously asserted prescription claims against the landowner parties), on the one
10 hand, and the landowner parties, on the other hand. This concept and compromise
11 accepted by all parties provided for establishment of a 5-member Watermaster board,
12 with the PWS controlling two seats, and the landowners controlling two seats. This
13 balance of voting power was necessary due to the vastly differing interests of
14 appropriator parties versus landowner parties. AVEK was, and remains, positioned as a
15 neutral entity answerable to all parties in the adjudication area, so it fills the fifth seat,
16 which was envisioned as a tie-breaker.

17 If the PWS are allowed to vote for the election of the two landowner seats on the
18 Watermaster Board, the essential balance of voting power between the PWS and
19 landowners will be fatally undermined. If, through their purchase of Exhibit 4 water
20 rights, the PWS are allowed to control or influence the election of even one of the two
21 landowner seats, the PWS will then control three out of five seats, and thereby be able to
22 dictate the outcome on any issue requiring a majority vote. That is not what the
23 landowner parties bargained for when they stipulated to the global settlement and the
24 proposed Judgment and Physical Solution, and this is not what the Judgment provides.
25 Watermaster decisions are as critical to landowners as they are to appropriators, and the
26 balance of voting power must be preserved. The landowner parties, based on their
27 overlying rights, bargained for and were promised two seats on a five-seat Watermaster
28

1 Board, with the understanding that landowner representation would not be diluted over
2 time.

3 Maintaining that balance of power is absolutely essential based upon the parties'
4 agreement and for the proper functioning of the Watermaster. The landowners could
5 have demanded that voting for ALL Watermaster seats be based solely upon the
6 percentage of the Native Safe Yield allocated to each landowner and each appropriator.
7 However, there is no more logic in allowing landowners to vote for and control the PWS
8 seats, than to allow the PWS to vote for and control the landowner seats.

9 III.

10 A PUBLIC WATER SUPPLIER CANNOT BE A “SUCCESSOR IN INTEREST” 11 TO AN EXHIBIT 4 LANDOWNER.

12 Section 18.1.1 provides in part that the Watermaster Board’s two landowner
13 representatives “shall be . . . selected by majority vote *of the landowners* identified on
14 Exhibit 4 (or their successors in interest) based on their proportionate share of the total
15 Production Rights identified in Exhibit 4.” To determine who may properly be
16 characterized as a “successor in interest”¹ to Exhibit 4 landowners, it is necessary to
17 contrast the “interest” possessed by Exhibit 4 landowners with the significantly different
18 interest that arises when a PWS acquires Exhibit 4 water. Section 5.1.1 provides:

19 **5.1.1 Overlying Production Rights.** The Parties listed in Exhibit 4 . . . have
20 Overlying Production rights. . . .

21 **5.1.1.1** . . . Each [Exhibit 4] Party’s Overlying Production Right *is subject to the*
22 *following conditions and limitations:*

23 **5.1.1.2** . . . the Parties listed on Exhibit 4 have the right to Produce their
24 Overlying Production Right *for use on land they own or lease* . . .

(Emphasis added.)

25 Thus, Exhibit 4 landowners, as Overlying Production Right holders, may only

26
27 ¹ Black’s Law Dictionary, Eighth Edition, defines “successor in interest” as “[o]ne who follows another in ownership
28 or control of property,” where “[a] successor in interest retains the same rights as the original owner, *with no change in substance*” (italics added).

1 “use” Exhibit 4 water “on land they own or lease.” It follows that, to be a “successor in
2 interest” to an Exhibit 4 landowner (as described in section 18.1.1), one who acquires
3 Exhibit 4 water must be subject to the same “conditions and limitations” on use of
4 Exhibit 4 water use (i.e., only “for use on land they own or lease”).²

5 Section 16.2 addresses “Transfers to Non-Overlying Production Right Holders”
6 and provides that “Overlying Production Rights that are transferred to Non-Overlying
7 Production Right holders shall remain on Exhibit 4 and be subject to adjustment as
8 provided in Paragraph 18.5.10, but may be used anywhere in the transferee’s service
9 area.” (Emphasis added.) Thus, if a PWS were to purchase Exhibit 4 water from a
10 landowner, the purchasing PWS would not be a “successor in interest” for purposes of
11 section 18.1.1 voting rights, because the purchasing PWS is not subject to the same
12 “conditions and limitations.” Instead, the purchasing PWS may market and use acquired
13 Exhibit 4 water anywhere within its respective service area — unlike Exhibit 4
14 landowners, whose interest in Exhibit 4 water is limited to use “on land they own or
15 lease.”

16 The phrase “*the landowners* identified in Exhibit 4 (or their *successors in*
17 *interest*)” refers only to persons whose right to use Exhibit 4 water is similarly
18 conditioned and limited, i.e., an Overlying Production Right for “use . . . on land they
19 own or lease.” A PWS that acquires Exhibit 4 water may not vote for the Watermaster
20 Board’s two landowner seats.

21 **IV.**
22 **THE PUBLIC WATER SUPPLIERS’ OBJECTIONS LACK MERIT AND**
23 **SHOULD BE OVERRULED.**

24 As set forth in the Declarations filed concurrently herewith, in the negotiations
25 which culminated in the parties’ Stipulation for entry of the Judgment and Physical
26 Solution, the landowner parties demanded representation on the Watermaster Board

27 ² A landowner successor in interest would logically share the common concerns of other landowners who use water
28 on properties they own or lease and, accordingly, be motivated to preserve the critical balance of power for landowner
interests that was negotiated and agreed to by the stipulating parties.

1 equal to the representation sought by the PWS, in order to establish a balance of voting
2 power that would protect the landowners' overlying rights and common interests. As the
3 Declarations further confirm, in those negotiations the PWS did not request or negotiate
4 for an opportunity to influence the election of the landowner representatives on the
5 Watermaster Board. Such a request would have been unacceptable to the landowner
6 parties. Now, for the first time, the appropriators claim the right to vote in the election
7 for the two landowner seats, in hopes of changing the status quo and undermining the
8 critical balance of voting power which the parties agreed to and is mandated by the
9 Judgment.

10 In their Opposition Brief, the PWS make various arguments, each of which lacks
11 merit, to wit:

12 **a. Section 16.2 Does Not State That A Public Water Supplier Gains**
13 **Voting Rights When It Acquires An Exhibit 4 Right.**

14 The PWS misleadingly argue that "Section 16.2 *expressly provides* that when a
15 Non-Overlying Production Right holder acquires Overlying Production Rights . . . *the*
16 *holder of the acquired rights [is entitled] to vote under Section 18.1.1.*" (PWS Opp., 2:6-
17 9, italics added). Not true. Section 16.2 says nothing about voting rights.

18 Moreover, Section 16.2 shows that when an Exhibit 4 water right is transferred to
19 a PWS, the water right changes and ceases to be an Overlying Production right. That is
20 so because Section 16.2 provides that transferred water "*may be used anywhere in the*
21 *transferee's service area.*" Because Section 16.2 allows Exhibit 4 water acquired by a
22 PWS is not subject to the place-of-use limitation that defines Overlying Production
23 Rights (as stated in Section 5.1.1.2). Accordingly, an Exhibit 4 water right changes
24 materially upon acquisition by a PWS and does not confer the right to vote for
25 landowner seats on the Watermaster Board.

26 **b. When An Exhibit 4 Water Right Is Purchased By A Public**
27 **Water Supplier, The Permissible Use Changes.**

28 The PWS next argue that, "the transferred right remains *unequivocally* an
'Overlying Production Right' even though it is held by an Exhibit 3 party" (PWS Opp.,

3:18-19, italics added). Not true. As explained above, when an appropriating PWS purchases Exhibit 4 water, the place-of-use limitation for that water is no longer “conditioned” and “limited” to use on land owned or leased by the right holder but, instead, may be used anywhere within the PWS’ service area.

Although Section 16.2 provides that Exhibit 4 water transferred to a Non-Overlying Production Right holder “shall remain on Exhibit 4,” that is for purposes of preserving the ramp-down needed to bring the groundwater basin into sustainable yield and does not state that the transferred water right shall continue to be identified on Exhibit 4 as an Overlying Production Right, or that an acquiring PWS may vote for landowner seats on the Watermaster Board. The PWS fail to cite any language in the Judgment supporting their contention. Nor do they address the conflict their characterization creates with Section 5.1.1.2’s “conditions” and “limitations” mandated for all Overlying Production Rights.

The PWS fail to acknowledge that an Overlying Production Right is not simply a right that appears on Exhibit 4, but for landowner voting purposes is a right that remains in use for overlying purposes — subject to the conditions and limitations specified in Sections 5.1.1.1 through 5.1.1.4. Ignoring those conditions and limitations, the PWS erroneously conclude that if a transferred right “remains on Exhibit 4” it must be an Overlying Production Right entitled to vote for the Watermaster’s landowner seats. But for the reasons explained above, the transferred water right ceases to be an Overlying Production Right, because it is freed of the conditions and limitations mandated for Overlying Production Rights.

Confirming that point, water treatise of Littleworth and Garner notes that a basic tenet of groundwater law is that “public agencies such as cities and water districts that operate their own water systems and pump groundwater do not exercise the overlying rights of their customers.” (California Water, Littleworth and Garner (1995), at 51.)

c. A Public Water Supplier Does Not Assume The Same Obligations And Duties Of An Overlying Production Right Holder.

1 The PWS next argue that, “when the Public Water Suppliers . . . acquire
2 ‘Overlying Production Rights,’ *they assume the obligations, duties,* and rights of those
3 acquired rights . . .” (PWS Opp., 2:26-28, italics added). That claim also is not true
4 because, as explained above, the “obligations and duties” of Overlying Production Right
5 holders include the requirement that transferred Exhibit 4 water be used only on land
6 owned or leased by the Overlying Production Right holder (Section 5.1.1.2) – whereas
7 an appropriating PWS is free to change the point of extraction and use transferred
8 Exhibit 4 water anywhere within its service area (Section 16.2).

9 Therefore, contrary to the PWS’ claim, a PWS that acquires an Exhibit 4 water
10 right does **not** assume the same explicit “obligations” and “duties” of an Overlying
11 Production Right Holder.

12 **d. That A Public Water Supplier Might Possibly Decide To Use**
13 **Exhibit 4 Water On Land It Owns Means Nothing.**

14 The PWS next argue that one of its members might “potentially” decide to use
15 Exhibit 4 water “for exclusive use on its property similar to other public agencies and
16 landowners listed on Exhibit 4 . . .” (PWS Opp., 3:20-25). Such speculation is irrelevant
17 because, as explained above, the right a PWS obtains at the moment it acquires an
18 Exhibit 4 water right is materially different than, and inconsistent with, an Overlying
19 Production Right. Therefore, regardless of its intentions for use of the transferred water,
20 a PWS can never be deemed to be a “successor in interest” to a “landowner” who holds
21 an Overlying Production Right.

22 Even if a PWS decided to use Exhibit 4 water on property it owns or leases, it
23 could decide not to do so the next day. Accordingly, the theoretical possibility that a
24 PWS, at some point in time, might decide to use Exhibit 4 water on property owned by it
25 does not change the fact that PWS are not constrained to do so, and they may exercise
26 that right to change the point of extraction and use acquired Exhibit 4 water anywhere
27 within their respective service areas — which fundamentally changes the nature of the
28

1 water right.³

2 **e. The Public Water Suppliers Would Be Empowered To Control**
3 **the Watermaster Board, Thus Undermining The Delicate Balance Of**
4 **Power Negotiated, Agreed Upon, And Implemented In The Judgment.**

5 The PWS argue that if they had the right to vote for the two landowner seats, they
6 still would be unable to control the Watermaster Board because “they cannot be Exhibit
7 4 [landowner] board members” and they cannot elect “themselves to be the Exhibit 4
8 board members” (PWS Opp., p. 4:1-9). While the PWS cannot themselves hold either of
9 the two landowner seats, with enough voting power they could easily elect straw persons
10 to fill one or both of the landowner seats – and then influence that elected member or
11 members to promote PWS’s interests on the Watermaster Board. That probable result
12 would undermine landowner interests and the delicate balance of voting power between
13 appropriators and landowners negotiated, agreed upon, and established in the Judgment.

14 **f. Preventing Non-Overlying Production Right Holders From**
15 **Participating in the Election of Landowner Watermaster**
16 **Representatives is Equitable and Fundamentally Fair.**

17 The PWS frame their equity and fairness arguments in the context of the
18 landowner Watermaster representatives only, without considering the composition and
19 selection of the Watermaster representatives as a whole. When the rules for selection of
20 the landowner Watermaster representatives are considered in the context of the full
21 Watermaster Board, it is clear they are fair and equitable.

22 This can be illustrated using a hypothetical example of a landowner Party
23 acquiring an Exhibit 3 Non-Overlying Production Right. Such a transfer is consistent
24 with the Judgment, which provides that “Parties may transfer all or any portion of their
25 Production Right to another Party so long as such transfer does not cause Material
26 Injury” (Section 16.1). The acquiring landowner Party would “assume the duties and
27 obligations” associated with the Exhibit 3 Non-Overlying Production Right. However,

28 ³ The PWS can purchase all the Exhibit 4 water they want. They just cannot influence the landowner election process. The PWS and the landowners clearly have divergent interests, and those interests need to be equally represented on the Watermaster Board – without either side being able to take over and control the Watermaster.

1 because the landowner Party is not a PWS specifically listed in Section 18.1.1, it would
2 not seem to be entitled to participate in the selection of the PWS Watermaster
3 representative, even though an Exhibit 3 production right was acquired. That limitation
4 is consistent with preserving the carefully crafted balance of power on the Watermaster.

5 The restriction on PWS participating in the election for the landowner seats
6 because the PWS are not “successors in interest” to an Overlying Production Right
7 parallels the apparent restriction on landowner Parties from voting for the PWS
8 representative because they are not PWS. That restriction serves the same purpose of
9 preserving the balance of voting power on the Watermaster, and is fair and equitable. To
10 allow PWS to participate in the election of the landowner Watermaster representatives,
11 but not provide a parallel right to landowner Parties to participate in the selection of the
12 PWS Watermaster representative, would be unfair.

13 To support their “equity” argument, the PWS also offer a hypothetical which
14 assumes that, at some time in the future, the PWS might obtain 75% of Exhibit 4 water
15 rights. Even that hypothetical, however, disproves the PWS’s “equity” claim. That is
16 because, at present, the PWS are allocated 12,345 acre-feet, or only 17% of the Adjusted
17 Native Safe Yield, and are assigned two seats on the 5-member Watermaster Board. The
18 private and public landowners, on the other hand, are allocated about 58,322 acre-feet,
19 or about 83% of the Adjusted Native Safe Yield, and also are assigned only two seats on
20 the Watermaster Board. Manifestly, that equal allocation of Watermaster seats between
21 appropriators and overlying landowners is not “equitable” based solely on the amount of
22 water allocated to the two groups. It does, however, maintain and preserve the balance
23 of power between the appropriators and the overlying landowners that was negotiated,
24 agreed upon, and is an essential component of the parties’ Stipulation.

25 Moreover, in the PWS’ hypothetical, the PWS would be allocated 75% of the
26 Adjusted Native Safe Yield on Exhibit 4 (about 43,700 acre-feet), which together with
27 the allocation of Exhibit 3 water would total about 56,000 acre feet of the Adjusted
28

1 Native Safe Yield. The landowners would retain a bit more than 14,000 acre feet of the
2 Adjusted Native Safe Yield (which is more than the PWS currently hold). If, in the PWS
3 hypothetical, the PWS were allowed to vote, the PWS would clearly be able to elect the
4 two landowner representatives, thereby controlling 4 seats (the 2 PWS seats plus the 2
5 landowner seats) on the 5-member Watermaster Board. This would unfairly deprive
6 landowners of ANY representation on the Watermaster Board.

7
8 **V.**

9 **CONCLUSION**

10 The proposed rules and procedures correctly implement the Judgment and
11 maintain the delicate balance of voting power on the Watermaster Board — which was
12 essential to obtaining the landowners' agreement to the global settlement. The
13 declarations filed herewith demonstrate that a permanent balance of power on the
14 Watermaster between the appropriators and the landowners was specifically negotiated
15 by the settling landowners, and the PWS did not express any claimed right to vote on the
16 election of landowner representatives to the Watermaster Board.

17 For all of the preceding reasons, the undersigned private and public overlying
18 landowners respectfully ask the Court to overrule the PWS's objection and to approve
19 the proposed rules and procedures attached as Exhibit 1 to the pending motion.

20 Dated: August 31, 2016

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