

E-RECEIVED

12/16/16

1 BRADLEY J. HERREMA (State Bar No. 228976)
ELISABETH L. ESPOSITO (State Bar No. 300983)
2 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**
2049 Century Park East, Suite 3550
3 Los Angeles, CA 90067
Telephone: 310.500.4600
4 Facsimile: 310.500.4602

5 Attorneys for
FS LAND HOLDING COMPANY, LLC

6
7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**
9

10 **ANTELOPE VALLEY**
11 **GROUNDWATER CASES**

12 **Included Actions:**

13 Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co. Superior
14 Court of California County of Los Angeles,
Case No. BC 325201;

15 Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co. Superior
16 Court of California, County of Kern, Case
No. S-1500-CV-254-348;

18 Wm. Bolthouse Farms, Inc. v. City of
Lancaster, Diamond Farming Co. v. City of
19 Lancaster, Diamond Farming Co. v.
Palmdale Water Dist. Superior Court of
20 California, County of Riverside, Case Nos.
RIC 353 840, RIC 344 436, RIC 344 668

21 RICHARD WOOD, on behalf of himself
22 and all other similarly situated v. A.V.
Materials, Inc., et al., Superior Court of
23 California, County of Los Angeles, Case
No. BC509546
24
25
26
27
28

Judicial Council Coordination Proceeding
No. 4408

CLASS ACTION

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

**FS LAND HOLDING COMPANY, LLC'S
NOTICE OF MOTION AND MOTION FOR
LEAVE TO INTERVENE IN JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Proposed Order and Declaration of Kevin Peters
filed concurrently]

Date: January 13, 2017

Time: 10:00 a.m.

Dept.: Dept. 222

[Hearing to be conducted by CourtCall]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 13, 2017 at 10:00 a.m., or as soon as the above-entitled court located at 111 North Hill Street, Los Angeles, California (Department 222), may hear the matter telephonically by CourtCall, with the parties to appear by CourtCall, FS Land Holding Company, LLC ("First Solar"), will and hereby does move the Court for an order granting it leave to intervene in the December 23, 2015 Judgment and Physical Solution ("Judgment and Physical Solution") in the above captioned action under Section 20.9 of the Judgment and Physical Solution and Code of Civil Procedure section 387. This notice and motion is based on the attached memorandum of points and authorities, the concurrently-filed Declaration of Kevin Peters, and on all papers filed and records in this action, and on any evidence received at the hearing.

The grounds for granting this Motion are as follows:

1. This Court retained continuing jurisdiction over the above captioned action to ensure the reasonable, beneficial, and efficient use of the Antelope Valley Area of Adjudication's ("Basin") water resources in accordance with the provisions of the Judgment and Physical Solution and the requirements of Article X, Section 2 of the California Constitution. (Judgment and Physical Solution § 6.5.)

2. Section 20.9 of the Judgment and Physical Solution authorizes any party proposing to acquire Production Rights from the Basin that is not already party to the Judgment and Physical Solution to intervene in the Judgment through a noticed motion to intervene prior to commencing production of groundwater from the Basin and after consulting with the Antelope Valley Watermaster ("Watermaster") Engineer and seeking the Watermaster's stipulation to the proposed intervention.

3. First Solar's intervention in the Judgment is proper under Section 20.9 of the Judgment and Physical Solution because it owns 736.44 acre-feet per year ("AFY") of Overlying Production Rights (1,520 AFY of the total 2,000 AFY of Pre-Rampdown Production) originally allocated to Landinv, Inc. in Exhibit 4 to the Judgment and Physical Solution. (Judgment and Physical Solution §§ 3.5.26, Exh. 4.) On July 21, 2016, North Rosamond Solar, LLC acquired

1 four parcels from Landinv, Inc. (APNs 359-051-01, 358-030-03, 359-051-02, and 359-011-28)
2 subject to the Judgment and Physical Solution along with 736.44 AFY of the total 969.00 AFY of
3 Overlying Production Rights (1,520 AFY of the total 2,000 AFY of Pre-Rampdown Production)
4 allocated to Landinv, Inc. in Exhibit 4 to the Judgment and Physical Solution. (Judgment and
5 Physical Solution §§ 3.5.26, Exh. 4.) On December 15, 2016, North Rosamond Solar, LLC
6 deeded the 736.44 AFY of Overlying Production Rights (1,520 AFY of the total 2,000 AFY of
7 Pre-Rampdown Production) to First Solar, making First Solar the owner of the water rights.

8 4. First Solar complied with the prerequisite for filing this Motion under Section 20.9
9 of the Judgment and Physical Solution on December 15, 2016, when First Solar initiated
10 consultation with Watermaster, requesting Watermaster's stipulation to First Solar's proposed
11 intervention in the Judgment and Physical Solution and Watermaster's agreement that it is
12 appropriate to allow First Solar to intervene in the Judgment and produce groundwater from the
13 Basin in accordance with the Judgment and Physical Solution because First Solar's production
14 will add no amount of additional demand upon the Basin nor result in Material Injury as defined
15 by Section 3.5.18 of the Judgment and Physical Solution.

16 5. First Solar's intervention in the Judgment is proper under California Code of Civil
17 Procedure section 387 because it owns property subject to the Judgment and Physical Solution,
18 intervention is necessary to protect First Solar's interest in that property and its ability to produce
19 groundwater in accordance with the Judgment and Physical Solution, and First Solar's interests
20 are not adequately represented by any existing parties to the Judgment and Physical Solution.

21 Dated: December 16, 2016

BROWNSTEIN HYATT FARBER SCHRECK, LLP

22
23 By: Bradley J. Herrema (ELÉ)
24 BRADLEY J. HERREMA
25 ELISABETH L. ESPOSITO
26 ATTORNEYS FOR FS LAND HOLDING
27 COMPANY, LLC
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

FS Land Holding Company, LLC (“First Solar”), a subsidiary of First Solar Development, LLC, brings this Motion to Intervene in the December 23, 2015 Judgment and Physical Solution (“Judgment and Physical Solution”) in the above-captioned action pursuant to Section 20.9 of the Judgment and Physical Solution. Section 20.9 authorizes any party proposing to acquire Production Rights within Antelope Valley Area of Adjudication (“Basin”) that is not already party to the Judgment and Physical Solution to intervene in the Judgment and Physical Solution through a noticed motion prior to commencing production of groundwater and after initiating consultation with the Antelope Valley Watermaster (“Watermaster”) Engineer and seeking Watermaster’s stipulation to the proposed intervention. First Solar is now the owner of 736.44 acre-feet per year (“AFY”) of Overlying Production Rights (1,520 AFY of the total 2,000 AFY of Pre-Rampdown Production) subject to the Judgment and Physical Solution, and seeks to intervene in order to exercise its water rights.

Prior to filing this Motion, on December 15, 2016, First Solar initiated consultation with the Watermaster Board of Directors and requested Watermaster’s stipulation to the proposed intervention, as required by Section 20.9 of the Judgment and Physical Solution. Intervention is appropriate, in accordance with the Judgment and Physical Solution, because First Solar is presently proposing only a change in ownership of the Overlying Production Rights and production under the rights will add no amount of additional demand upon the Basin or result in Material Injury as defined by Section 3.5.18 of the Judgment and Physical Solution. Accordingly, it is proper for this Court to exercise its continuing jurisdiction to permit First Solar to intervene because First Solar’s intervention will cause no additional demand on the Basin nor result in an adverse impact to the Basin’s condition or on parties to the Judgment and Physical Solution. Rather, permitting First Solar’s intervention would further the reasonable, beneficial, and efficient use of the Basin’s water resources in accordance with the provisions of the Judgment and Physical Solution and the requirements of Article X, Section 2 of the California Constitution.

1 **II. STATEMENT OF FACTS**

2 On July 21, 2016, pursuant to a 2009 option agreement, North Rosamond Solar, LLC, also
3 a subsidiary of First Solar Development, LLC, acquired four parcels from Landinv, Inc. (APNs
4 359-051-01, 358-030-03, 359-051-02, and 359-011-28) subject to the Judgment and Physical
5 Solution along with 736.44 AFY of Landinv, Inc.'s total 969.00 AFY of Overlying Production
6 Rights (1,520 AFY of the total 2,000 AFY of Pre-Rampdown Production) allocated to Landinv,
7 Inc. in Exhibit 4 to the Judgment and Physical Solution. (Declaration of Kevin Peters, ¶¶ 1, 2,
8 Exh. A; Judgment and Physical Solution §§ 3.5.26, Exh. 4.) On December 15, 2016, North
9 Rosamond Solar, LLC deeded the 736.44 AFY of Overlying Production Rights (1,520 AFY of
10 the total 2,000 AFY of Pre-Rampdown Production) to First Solar, making First Solar the owner
11 of these water rights subject to the Judgment and Physical Solution. (Declaration of Kevin Peters,
12 ¶ 3, Exh. B.)

13 Also on December 15, 2016, pursuant to Section 20.9 of the Judgment and Physical
14 Solution, First Solar initiated consultation with the Watermaster Board of Directors by
15 transmitting a letter via email, attaching the proposed Stipulation in Support of First Solar's
16 Motion for Leave to Intervene in Judgment ("Stipulation"), and requesting Watermaster's
17 concurrence that: (i) it is appropriate to allow First Solar to intervene in the Judgment and
18 Physical Solution, acquire Overlying Production Rights and produce groundwater from the
19 Antelope Valley Area of Adjudication ("Basin") in accordance with the Judgment and Physical
20 Solution; (ii) First Solar's future groundwater production pursuant to the water rights obtained
21 through the transactions with North Rosamond Solar, LLC and Landinv, Inc. will add no amount
22 of additional demand upon the Basin; and (iii) that First Solar's production pursuant to its water
23 rights and in accordance with the Judgment and Physical Solution will result in no Material Injury
24 as defined by Section 3.5.18 of the Judgment and Physical Solution. (Declaration of Kevin Peters,
25 ¶ 4, Exh. C.) First Solar will appear at the December 19, 2016 meeting of the Watermaster Board

of Directors¹ to request the Board's consideration of the Stipulation at that time. (Declaration of Kevin Peters, Exh. C.)

First Solar's intervention is proper because First Solar has complied, to the best of its ability, with all requirements under the Judgment and Physical Solution, First Solar's production will add no amount of additional demand upon the Basin, and its intervention will not result in Material Injury as defined by Section 3.5.18 of the Judgment and Physical Solution. Further First Solar's intervention is necessary under California Code of Civil Procedure section 387 to protect First Solar's interest in its property and its ability to produce groundwater in accordance with the Judgment and Physical Solution, and because First Solar's interests are not adequately represented by any existing parties to the Judgment and Physical Solution.

III. FIRST SOLAR IS ENTITLED TO INTERVENE IN THIS ACTION

A. First Solar's Application for Intervention is Timely

A party seeking to intervene must make a "timely" application to the court. (Code Civ. Proc., § 387(a).) Timeliness depends upon the circumstances of each situation and leave to intervene may be granted at any time, even after judgment has been rendered. (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437.)

First Solar's intervention is timely. On December 15, 2016, North Rosamond Solar, LLC deeded the 736.44 AFY of Overlying Production Rights (1,520 AFY of the total 2,000 AFY of Pre-Rampdown Production) to First Solar, making First Solar the owner of these water rights subject to the Judgment and Physical Solution. (Declaration of Kevin Peters, ¶ 3, Exh. B.) On the same day, First Solar initiated consultation with Watermaster and sought Watermaster's stipulation to the proposed intervention in accordance with Section 20.9 of the Judgment and Physical Solution. (Declaration of Kevin Peters, ¶ 4, Exh. C.) Section 20.9 does not impose a deadline for seeking intervention except that the proposed intervenor must seek intervention prior

¹ Section 20.9 of the Judgment and Physical Solution requires that prior to filing the noticed motion to intervene in the Judgment, the proposed intervenor "shall consult with the Watermaster Engineer and seek the Watermaster's stipulation to the proposed intervention." First Solar initiated consultation with the Watermaster Board of Directors on December 15, 2016, rather than the Watermaster Engineer, because as of that date, the Watermaster Board had not yet selected the Watermaster Engineer.

1 to commencing production from the Basin. Therefore, intervention is timely because First Solar
2 has not yet commenced production from the Basin. (Declaration of Kevin Peters, ¶ 5.)

3 **B. First Solar Has an Absolute Right to Intervene in the Judgment**

4 “Upon timely application, any person, who has an interest in the matter in litigation, or in
5 the success of either of the parties, or an interest against both, may intervene in the action or
6 proceeding.” (Code Civ. Proc., § 387(a).) The intervention statute is designed to promote fairness
7 and to ensure maximum involvement by all responsible, interested and affected parties. (*Mary R.*
8 *v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 314.) “Section 387 should be liberally construed in
9 favor of intervention.” (*Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499, 1505.)

10 California law provides for two types of intervention: “mandatory” and “permissive.”
11 (Code Civ. Proc., § 387.)

12 **1. First Solar is Entitled to Mandatory Intervention to Protect Its Direct**
13 **Interests Property Subject to the Judgment**

14 Code of Civil Procedure section 387(b), which governs “mandatory” intervention,
15 provides a right to intervene if (i) “the person seeking intervention claims an interest relating to
16 the property or transaction which is the subject of the action”; (ii) “that person is so situated that
17 the disposition of the action may as a practical matter impair or impede that person’s ability to
18 protect that interest; and (iii) “that person’s interest is [not] adequately represented by existing
19 parties.”

20 **a. First Solar Has an Interest in Property Subject to the**
21 **Judgment**

22 Pursuant to the December 15, 2016 water rights grant deed, North Rosamond Solar, LLC
23 deeded to First Solar 736.44 AFY of the total 969.00 AFY of Overlying Production Rights (1,520
24 AFY of the total 2,000 AFY of Pre-Rampdown Production) originally allocated to Landinv, Inc.
25 in Exhibit 4 to the Judgment and Physical Solution. (Declaration of Kevin Peters, ¶ 3, Exh. B;
26 Judgment and Physical Solution §§ 3.5.26, Exh. 4.) Therefore, First Solar now holds water rights
27 adjudicated by this Court and quantified in Exhibit 4 to the Judgment and Physical Solution.
28 Accordingly, First Solar has a direct interest in the property subject to the Judgment.

b. Intervention is Necessary to Protect First Solar's Property Interest

Section 20.9 of the Judgment and Physical Solution requires First Solar to intervene in the Judgment before acquiring a Production Right and producing groundwater from the Basin. Accordingly, intervention is necessary to allow First Solar to exercise its water rights subject to the Judgment and Physical Solution. Further, the water produced pursuant to these rights is necessary to accomplish First Solar's objectives for the use of the real property overlying the Basin. (Declaration of Kevin Peters, ¶ 5.)

c. First Solar's Interests are not Adequately Represented by the Existing Parties to the Judgment

First Solar's interests are not adequately represented in this action by parties to the Judgment, including Landinv., Inc. Landinv, Inc. does not adequately represent First Solar's interests because it has no remaining interest in the four parcels or in the 736.44 AFY of Overlying Production Rights (1,520 AFY of Pre-Rampdown Production) that it conveyed to North Rosamond Solar, LLC on July 21, 2016. (Declaration of Kevin Peters, ¶ 2, Exh. A.) Accordingly, intervention in the Judgment and Physical Solution is necessary to represent First Solar's interests.

2. Alternatively, First Solar Is Also Entitled to Permissive Intervention

Even if it is determined that First Solar does not meet the requirements for intervention as a matter of right, it satisfies the three requirements for permissive intervention. Under Section 387(a) of the Code of Civil Procedure, "[a] third party may intervene in an action if (1) the party has a direct and immediate interest in the action; (2) the intervention will not enlarge the issues in the litigation; and (3) the reasons for the intervention outweigh any opposition by the parties presently in the action." (*US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 139.)

a. First Solar, as a Holder of Overlying Production Rights, has a Direct and Immediate Interest in Producing Groundwater Pursuant to the Judgment

California courts have adopted a broad interpretation of the "interest" necessary for a party to intervene pursuant to section 387(a) of the Code of Civil Procedure. Although the interest

1 must be “direct” and not “consequential,” an intervenor “need neither claim a pecuniary interest
2 nor a specific legal or equitable interest in the subject matter of the litigation.” (*Simpson*
3 *Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1200.) Nor must the intervenor
4 show that its interests “will inevitably be affected by the judgment. It is enough that there be a
5 substantial probability that [those] interests will be so affected.” (*Timberidge Enterprises, Inc. v.*
6 *City of Santa Rosa* (1978) 86 Cal.App.3d 873, 881 [emphasis omitted].)

7 As explained above, First Solar has a direct interest in the Judgment because First Solar
8 owns water rights adjudicated by this Court and quantified in Exhibit 4 to the Judgment and
9 Physical Solution. (Declaration of Kevin Peters, ¶ 3, Exh. B.)

10 **b. First Solar’s Intervention Will Not Enlarge the Issues in**
11 **This Matter**

12 First Solar does not seek to modify the Judgment or Physical Solution, except to reflect
13 the joinder of First Solar as a party to the Judgment and to reflect that First Solar is the successor
14 to 736.44 AFY of the total 969.00 AFY of Overlying Production Rights (1,520 AFY of the total
15 2,000 AFY of Pre-Rampdown Production) originally allocated to Landinv, Inc. in Exhibit 4 to the
16 Judgment and Physical Solution. (See Declaration of Kevin Peters, ¶¶ 3, 4, Exh. C [Stipulation ¶¶
17 F, G].) Further, First Solar’s future groundwater production pursuant to the subject water rights
18 will add no amount of additional demand upon the Basin, and when produced consistent with the
19 Judgment and Physical Solution, will not result in Material Injury as defined by Section 3.5.18 of
20 the Judgment and Physical Solution. (Declaration of Kevin Peters, ¶ 3, Exh. B [Stipulation ¶ I].)

21 **c. The Reasons Favoring Intervention Outweigh Reasons**
22 **in Opposition.**

23 The existing parties to the Judgment do not have a reasonable or good faith basis to
24 oppose First Solar’s request to intervene as set forth above. First Solar’s interest as an owner of
25 Overlying Production Rights is significant and its intervention will not cause delay, increase the
26 scope of the Judgment, or otherwise affect the efficient administration of the Judgment.
27 Permissive intervention is proper under such circumstances. (See, e.g., *Lincoln National Life Ins.*
28 *Co. v. State Bd. of Equalization* (1994) 30 Cal.App.4th 1411, 1422–23.)

1 **C. First Solar Has Complied, to the Extent Possible, With the Prerequisites**
2 **Under Section 20.9 of the Judgment and Physical Solution**

3 Section 20.9 sets forth one prerequisite for intervention in the Judgment — consultation
4 with Watermaster regarding the proposed intervention. On December 15, 2016, pursuant to
5 Section 20.9 of the Judgment and Physical Solution, First Solar initiated consultation with the
6 Watermaster Engineer by transmitting a letter via email, attaching the proposed Stipulation, and
7 requesting Watermaster's concurrence that: (i) it is appropriate to allow First Solar to intervene in
8 the Judgment and Physical Solution, acquire Overlying Production Rights and produce
9 groundwater from the Basin in accordance with the Judgment and Physical Solution; (ii) First
10 Solar's future groundwater production pursuant to the water rights obtained through the
11 transactions with North Rosamond Solar, LLC and Landinv, Inc. will add no amount of additional
12 demand upon the Basin; and (iii) that First Solar's production pursuant to its water rights and in
13 accordance with the Judgment and Physical Solution will result in no Material Injury as defined
14 by Section 3.5.18 of the Judgment and Physical Solution. (Declaration of Kevin Peters, ¶ 4, Exh.
15 C.)

16 Further, this motion shall be served pursuant to Section 20.7 of the Judgment and Physical
17 Solution by e-filing on the Court's website, as required by Section 20.3.2.

18 **IV. CONCLUSION**

19 For the foregoing reasons, First Solar respectfully requests that this Court grant First
20 Solar's motion to intervene in the Judgment and Physical Solution. For the Court's convenience,
21 a proposed order is filed concurrently herewith.

22 Dated: December 16, 2016

BROWNSTEIN HYATT FARBER SCHRECK, LLP

24 By: Bradley J. Herrema (ELS)
25 BRADLEY J. HERREMA
26 ELISABETH L. ESPOSITO
27 ATTORNEYS FOR FS LAND HOLDING
28 COMPANY, LLC

PROOF OF SERVICE

I, Olga Rittershaus, am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: Brownstein Hyatt Farber Schreck, LLP, 1020 State Street, Santa Barbara, California 93101.

On December 16, 2016, I served the foregoing document described as:

**FS LAND HOLDING COMPANY, LLC'S NOTICE OF MOTION AND MOTION FOR
LEAVE TO INTERVENE IN JUDGMENT; MEMORANDUM OF POINTS AND
AUTHORITIES**

on the interested parties in this action.

BY ELECTRONIC TRANSMISSION. I caused such document(s) to be electronically served, via One Legal, to all parties appearing on the www.scefilings.org electronic service list for the Antelope Valley Groundwater Cases; proof of electronic-filing through One Legal is then printed and maintained with the original documents in our office. Electronic service is complete at the time of transmission. My electronic notification email address is orittershaus@bhfs.com

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

Executed in Santa Barbara, California, on December 16, 2016.


OLGA RITTERSHAUS

013527\0022\14971722.7