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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

**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
325 201 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. City of Lancaster Diamond
Farming Co. v. Palmdale Water Dist. Superior
Court of California, County of Riverside,
consolidated actions, Case No. RIC 353 840,
RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding
No. 4408

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

AGWA's PHASE 5 TRIAL BRIEF

Trial Date: February 10, 2014
Time: 9 am
Dept: TBD

I. INTRODUCTION

The Phase 5 trial is limited to the issues of any federal reserved water right and rights to return flows from imported water.

With regard to the claimed federal reserved right, the Court will need to address multiple legal issues about the scope of such right. In particular, the Court will need to determine the effect of the limitation contained in all of the federal reservations that the reservations are “subject to valid existing rights.” While one such effect relates to the quantity of such right, an equally important issue concerns the priority of the reserved right. The United States has suggested that the right has a “super priority” which would have the effect of subordinating the priority of landowners under California law. The Court will also need to determine the effect of the factual reality that approximately one-half of the area of the federal property was acquired through purchase or condemnation and not through reservation, and the effect that overdraft of the Basin during the time of the reservations has on the ability of the United States to reserve water.

According to the Case Management Order for Phase 5: “As to return flows from imported water, the trial will determine who has the right to recapture and use return flows that result from water imported into the Antelope Valley Area of Adjudication, as well as the amount or percentage of return flows that augment the groundwater basin due to the imported water.” (Case Management Order for Phase 5 and Phase 6 Trials (Oct. 22, 2013), ¶ 2.) AGWA will present evidence from Dr. Jan Hendrickx, its designated expert, on return flow percentages in the Basin from municipal and industrial use, including indoor use and outdoor irrigation. The purveyors claim that return flows from imported water constitute nearly a quarter of the safe yield of the Basin. AGWA contests this claim and will present evidence that the actual percentages of imported water return flow are much lower.

II. BURDENS AND STANDARDS OF PROOF

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code, § 500.) In other words, where, under the substantive law, a fact is essential

1 to the plaintiff's claim for relief, the burden of pleading and proof of that fact is on the plaintiff. (1
2 Witkin California Evidence § 7 at 159 (4th ed.).)

3 **A. Burden as to Amount of and Rights to Return Flows**

4 Although prescriptive claims are not directly at issue in this Phase 5 trial, to the extent any
5 of the evidence will be foundational to Phase 6 concerning prescriptive rights, then the same
6 standard of proof that will apply to those prescriptive claims must apply to Phase 5.

7 In attempting to perfect prescriptive rights in the Basin, the purveyor parties in this action
8 must do more than meet the usual "preponderance of the evidence" standard that applies in most
9 civil cases. Prescription claims must be proved by clear and convincing evidence. (*Weller v.*
10 *Chavarria* (1965) 233 Cal. App. 2d 234; *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228,
11 235; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708.) "Clear and convincing evidence" is
12 evidence that is clear, explicit and unequivocal. "The evidence must be so clear as to leave no
13 substantial doubt and strong enough to command the unhesitating assent of every reasonable
14 mind." (Wells, California Forms of Jury Instruction (1997), Section 1.26A, p. 1-42.1; *Copp v.*
15 *Paxton* (1996) 45 Cal.App.4th 829, 846; see also *Mattco Forge, Inc. v. Arthur Young & Co.*
16 (1997) 52 Cal.App.4th 820, 847.)

17 Even though this phase of the trial is not about prescription per se, a determination of the
18 amount of the total safe yield that is composed of supplemental yield (ie., return flows from
19 imported water) will be foundational to a determination of the amount of historic pumping that is
20 adverse to the rights of landowners. Where the consequences of an outcome on important
21 property or individual rights are high, a higher burden of proof than a preponderance of the
22 evidence will apply. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 365;
23 *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24, cert. denied,
24 549 U.S. 1178 (2007).)

25 **B. Burden as to United States Federal Reserved Rights**

26 In establishing the existence of federal reserved water rights, federal law applies with
27 regard to the burden of proof. (*Colville Confederated Tribes v. Walton* (9th Cir. 1985) 752 F.2d
28 397, 400.) The party alleging the existence of a federal reserved water right has the burden of

1 proof and must prove it by a preponderance of the evidence. (*Zannaras v. Bagdad Copper Corp.*
2 (9th Cir. 1958) 260 F.2d 575, 577; *U.S. v. Washington* (W.D. Wash. 2005) 375 F.Supp.2d 1050,
3 1076, vacated pursuant to settlement by *U.S. ex rel Lummi Indian Nation v. Washington* (W.D.
4 Wash. 2007). As discussed in AGWA's Motion in Limine to Establish Burden of Proof for Any
5 Reserved Water Rights, filed January 24, 2014 ("AGWA MIL"), the United States must meet its
6 burden of proof in relation to each reservation, and cannot assert a single right that accumulates
7 all of them. (AGWA MIL, at pp. 4-5.) The United States' burden of proof also concerns the
8 amount of available water, whether each reservation overlies the Basin, each reservation's
9 primary purpose, and the minimum amount of water necessary to serve that purpose. (AGWA
10 MIL, at pp. 6-7.)

11 **III. FEDERAL RESERVED RIGHTS ISSUES**

12 Any federal reserved water right is subject to the priority of overlying rights existing at the
13 time each of the federal reserved rights vested. A federal reserved water right is the right to the
14 use of water sufficient to accomplish the primary purpose of the land that has been reserved from
15 the public domain. (*Winters v. United States* (1908) 207 U.S. 564; *United States v. Rio Grande*
16 *Dam & Irrigation Co.* (1899) 147 U.S. 690.) In general, the amount of a federal reserved right is
17 quantified based on the amount of water reasonably necessary to fulfill the primary purpose of the
18 reservation. (*Cappaert v. United States* (1976) 426 U.S. 128, 141 [The federal reserved water
19 right "reserves only that amount of water necessary to fulfill the purpose of the reservation, no
20 more."], citing *Arizona v. California I* (1963) 373 U.S. 546, 600-01; *United States v. New Mexico*
21 (1978) 438 U.S. 696, 700, 705-11 [the purpose of the reservation is determined as of the date of
22 its establishment].) However, not only is the quantity of the federal reserved right determined by
23 the intent and purpose of the reservation, the quantity is additionally subject to the availability of
24 water at the time of the reservation: "The issue is whether the Government intended to reserve
25 unappropriated and thus available water. Intent is inferred if the previously unappropriated
26 waters are necessary to accomplish the purposes for which the reservation was created."
27 (*Cappaert, supra*, 426 U.S. at 139.)

28 In withdrawing land from the public domain, the United States "reserves appurtenant

1 water **then unappropriated** to the extent needed to accomplish the purpose of the reservation
2 [and] acquires a reserved right in **unappropriated** water which vests on the date of the
3 reservation....” (*Cappaert, supra*, 426 U.S. at 138 (emphasis added).) Such water rights are
4 subject to the priority of water rights that pre-date the reservation. (See Jungreis, “*Permit*” *Me*
5 *Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated*
6 *Riparian East* (2005) 29 Harv. Envtl. L. Rev. 369, 376-77 [prior to reservation of land from
7 public domain, private water rights vested under state law, recognized as enforceable against
8 other users, including the federal government] (citing *United States v. New Mexico, supra*, 438
9 U.S. 696, 713 n.21).)

10 This case presents a unique situation in the context of federal reserved water rights
11 because while the modern trend in state courts is to recognize that reserved rights apply to
12 groundwater, as far as AGWA is aware, no Federal or California appellate court has ever issued a
13 ruling on application of the federal reserved rights doctrine in the context of a correlative rights
14 situation. (See Goldsby, *The McCarran Amendment and Groundwater: Why Washington State*
15 *Should Require Inclusion of Groundwater in General Stream Adjudications Involving Federal*
16 *Reserved Water Rights* (2011) 86 Wash. L. Rev. 185, 190-91.)

17 The Antelope Valley has long been settled, and land within the Basin has long been held
18 in private ownership. Under California law, each of the owners of properties overlying the Basin
19 held an overlying right to the native yield of the Basin, arising solely due to the fact that they
20 overlie the Basin. Accordingly, any federal reserved right is subject to the overlying rights
21 existing at the time of the reservation, each of which entitles the owner of such property to a
22 correlative share of the Basin’s supply. (*Katz v. Walkinshaw* (1903) 141 Cal. 116.) Each of the
23 ten reservations at issue state that the reservations are “subject to existing rights,” or “subject
24 to...all valid existing rights....”¹ The fundamental legal issue to be resolved with respect to the
25 scope of the federal reserved rights is therefore the meaning of this language. A central factual
26 issue to be resolved at trial is additionally whether the Basin was in overdraft – that is whether

¹ See USAF001653; USAF001655; USAF001656; USAF001657; USAF001658; USAF001661; USAF001663-1664;
USAF001666; USAF023436-37; USAF023438-39.

1 there was any water available for reservation – at the time of each of the ten reservations.

2 The issue of the vested rights of the overlying landowners concerns not just the quantity of
3 any federal reserved right, it also affects how such rights mesh with the priority hierarchy under
4 California law. “Water right priority has long been a central principle in California water law.”
5 (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243.) AGWA believes that
6 the United States will claim a “super priority” for any reserved right, thereby attempting to
7 subordinate the priority of overlying landowners. Whatever the Court finds with regard to the
8 quantity of any reserved right, it cannot assign it such a “super priority” without effecting a taking
9 of the overlying priority, which is a central feature of such rights. Such a taking is expressly
10 forbidden by the language of each of the ten federal reservations.

11 AGWA believes that the United States will also claim a “reserved right” associated with
12 property acquired through purchase and/or eminent domain. The prevailing position in case law
13 and literature is that any rights the United States may have acquired in association with those
14 lands are as an “ordinary proprietor” and are limited to the rights possessed by the predecessors in
15 title of those properties. (See Jungreis, “*Permit” Me Another Drink: A Proposal for*
16 *Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East* (2005) 29 Harv.
17 *Envtl. L.Rev.* 369, 388-89, citing to *California v. United States* (9th Cir. 1956) 235 F.2d 647.)
18 This is consistent with the rights of the United States associated with properties it acquired from
19 private landowners for Marine Corps Base Camp Pendleton. (*California v. United States* (9th
20 Cir. 1956) 235 F.2d 647.) As the rights associated with those properties at the date of acquisition
21 are dependent upon state law (*id.*, at 653-654), the rights associated with acquired properties are
22 overlying rights. (See *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240
23 (describing basis for overlying rights).) To find otherwise would require the Court to find that the
24 United States is able to acquire rights in excess of those possessed by its predecessor in interest.

25 **IV. QUANTIFICATION AND RIGHTS TO RETURN FLOWS**

26 As stated by AGWA in its Opposition to Los Angeles County Waterworks District No.
27 40’s Motion in Limine Number One, (January 31, 2014), the issue of amount and rights to return
28 flows were not decided in the Phase 3, which only took a rough “snapshot” of the Basin for

1 purposes of determining whether the Basin was in overdraft sufficient for the court to exercise
2 jurisdiction.

3 The purveyors have advocated a very high return flow rate. They claim that the return
4 flow rate is nearly 30%. AGWA will present evidence and findings from its designated expert
5 witness, Dr. Jan Hendrickx, that the figures for return flows relied upon by the purveyors
6 contained in the Summary Expert Report are too high.

7 Dr. Hendrickx will testify that based on recent analysis that takes into account updated
8 studies, recent data from municipal water suppliers, field tests on leach fields, and accounting for
9 variables such as leaking, the percent of total input into the system that becomes return flow is
10 less than 10%. Dr. Hendrickx will testify regarding a comprehensive study of urban water use
11 practices sponsored by the California Department of Water Resources and published in 2011, and
12 will offer an analysis based on current Antelope Valley monitoring data that was not available
13 during the period that was the subject of testimony in Phase 3. Of particular importance, AGWA
14 will show that Los Angeles County Waterworks District No. 40 currently believes that 70% of
15 water delivered to homes in the Antelope Valley is used outdoors. This number differs
16 significantly from the 55% percent figure used in the Summary Expert Report. This change alone
17 produces a significantly different return flow percentage. The Court cannot assign water rights to
18 return flows from imported water based upon information that is known to be inaccurate.

19 Finally, the majority of the return flows from imported water claimed by the purveyors are
20 derived from partially treated and raw sewer water. The recharge of urban wastewater into the
21 groundwater has historically caused significant water quality problems over large areas in the
22 Antelope Valley. In addition to the question of the quantity of return flows, the Court also must
23 consider whether the return flows that do enter the groundwater basin truly augment the supply,
24 or rather contaminate the supply and make this supply unavailable for potable use. The
25 significance of this issue for ongoing management of the Basin is of sufficient weight that the
26 Court should consider all issues associated with return flows from imported water in greater detail
27 than the "very general" analysis that was appropriate for Phase 3.

1 **V. CONCLUSION**

2 AGWA will demonstrate that the return flow percentages claimed by the purveyors are
3 excessive, particularly considering current conditions in the Basin. AGWA will also demonstrate
4 that the federal reserved right is limited by the existing rights of overlying landowners in the
5 Basin at the time of reservation, and that the United States cannot have obtained reserved rights in
6 acquired properties.

7
8 Dated: January 31, 2014

BROWNSTEIN HYATT FARBER SCHRECK, LLP



9
10 By: _____

MICHAEL T. FIFE
BRADLEY J. HERREMA
ATTORNEYS FOR AGWA

PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

I 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: 1020 State Street, Santa Barbara, California 93101.

On January 31, 2014, I served the foregoing document described as:

AGWA's PHASE 5 TRIAL BRIEF

on the interested parties in this action.

By posting it on the website by 5:00 p.m. on January 31, 2014.

This posting was reported as complete and without error.

(STATE) 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 January 31, 2014.

**LINDA MINKY
TYPE OR PRINT NAME**


SIGNATURE