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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES: 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 Nos. 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 **TEJON RANCHCORP'S (1) OPPOSITION TO UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS; AND (2) CASE MANAGEMENT CONFERENCE STATEMENT** Date: September 21, 2006 Time: 10:00 a.m. Department: 1

TABLE OF CONTENTS

I. *UNITED STATES V. OREGON* REQUIRES DENIAL OF THIS MOTION. 1

II. THE CASES CITED BY THE UNITED STATES DO NOT SUPPORT THIS MOTION.....5

III. OMITTING WATERSHED LANDOWNERS WILL NOT RESULT IN PIECEMEAL ADJUDICATION OF GROUNDWATER RIGHTS, INCLUDING THE UNITED STATES' ALLEGED RESERVED RIGHTS. 7

IV. THE COURT SHOULD NOT REQUIRE JOINDER OF "DE MINIMIS" PARTIES. 8

V. CONCLUSION. 10

I. *UNITED STATES v. OREGON* REQUIRES DENIAL OF THIS MOTION.

The United States' Motion misconstrues both the McCarran Amendment and the Ninth Circuit case that compels denial of this Motion: *United States v. Oregon* (9th Cir. 1994) 44 F.3d 758, 768-70, *cert. denied*, 516 U.S. 943 (1995). The McCarran Amendment waives the United States' sovereign immunity as follows:

> "Consent is given to join the United States as a defendant in any suit (1) for the **adjudication of rights to the use of a river system or other source**, or (2) for the administration of such rights . . ." (43 U.S.C. § 666(a).) (Emphasis added.)

In *United States v. Oregon*, the Ninth Circuit held that even though groundwater and surface water are hydrologically connected, groundwater is an "other source" from the surface water of a river system, so the McCarran Amendment does not require that they both be adjudicated together. As explained by the Ninth Circuit, the U.S. Supreme Court also held, in *United States v. District Court for Eagle County* (1971) 401 U.S. 520, 523, that McCarran did not require adjudication of the Colorado River with the Eagle River, even though they are hydrologically connected, because it would be impractical to adjudicate them together. Consequently, the Ninth Circuit rejected the United States' argument that the adjudication of surface water rights in the Klamath River Basin must also include adjudication of groundwater rights, in order to satisfy the McCarran Amendment. (44 F.3d at 768-70.)

Before rejecting the United States' arguments, the Ninth Circuit explained that the Congressional purpose of the McCarran Amendment was to require the United States to participate in state water rights adjudications:

> "By the time the McCarran Amendment was passed, most Western states had adopted some statutory procedure for the mass adjudication of water rights. See [Hutchins] at 302-03. While these statutory adjudications seemed to promise an end to the confusing and conflicting adjudications of water rights in multiple cases, the system was impaired by the refusal of the federal government to participate. Since the United States had large landholdings and extensive reserved water rights in the West, its claims of sovereign immunity significantly diminished the value of the comprehensive state adjudications. Congress sought to remedy this problem by enacting the McCarran Amendment in 1952." (44 F.3d at 765.)

See also 44 F.3d at 767, footnote 8 (The "problem" that Congress intended to solve by the McCarran Amendment "was the United States' refusal to participate in the proceedings"). In addition, although

the McCarran Amendment contains no language requiring that the adjudications be "general" or "comprehensive," the cases often add those requirements because "Congress was concerned that the United States not be subjected to piecemeal, private water rights litigation. See *Eagle County*, 401 U.S. at 525." (44 F.3d at 768.)

The Ninth Circuit then explained its holding that the McCarran Amendment does not require the simultaneous adjudication of ground and surface water rights:

> "Because the Klamath Basin adjudication does not attempt to determine the rights of claimants to groundwater in the Basin, the United States argues that the proceedings are not an 'adjudication of rights to the use of water of a river system or other source.' 43 U.S.C. § 666(a). Arguing that the ground and surface waters of the region are hydrologically interrelated, the United States contends that the failure to include groundwater claims deprives the adjudication of the comprehensiveness intended by Congress.
>
> **The text of the Amendment lends little support to the United States' position. On its face, the statute applies to the 'water of a river system or other source.' Groundwater may be included as an "other source," but the use of 'or' strongly suggests that the adjudication may be limited to *either* a river system *or* some other source of water, like groundwater, but need not cover both.** For the United States' argument to succeed, we must read 'river system' to include not only the water of the river, but hydrologically-related groundwater systems as well.
>
> In support of this interpretation, the United States refers to cases stating that the Amendment's waiver is limited to 'general' or 'comprehensive' adjudications. *See, e.g.*, *United States v. Idaho*, 113 S.Ct. at 1894; *Dugan v. Rank*, 372 U.S. 609, 618, 10 L.Ed.2d 15, 83 S.Ct. 999 (1963). These cases make clear that the adjudication must include the undetermined claims of all parties with an interest in the relevant water source. However, these cases do not address the proper definition of the relevant water source and do not decide if groundwater must be included in an adjudication of a 'river system.' The United States can point to no other case law, statutory text or legislative history that specifically requires groundwater to be adjudicated as part of the comprehensive adjudication of a 'river system.'
>
> The United States argues instead that the purposes of the Amendment are best served by an interpretation that requires the adjudication of all hydrologically-related water sources. We agree that the McCarran Amendment was motivated in large part by the recognition of the interconnection of water rights among claimants to a common water source and the desire to avoid piecemeal adjudication of such rights. However, we do not believe that Congress intended to carry the requirement of comprehensiveness as far as the United States would have us do.

> The Supreme Court addressed the scope of the comprehensiveness requirement in *Eagle County,* where the State of Colorado attempted to adjudicate the water rights of claimants to the Eagle River and its tributaries. 401 U.S. at 521. The Eagle River is itself a tributary of the Colorado River. *Id.* **The United States argued that because the Eagle was hydrologically related to the Colorado, a comprehensive adjudication under the McCarran Amendment must include an adjudication of the entire Colorado River. The Court rejected this contention as 'almost frivolous.'** *Id.* at 523. 'No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The 'river system' must be read as embracing one within the particular State's jurisdiction.' *Id.* This discussion suggests that, **contrary to the United States' assertions, the comprehensiveness requirement does not mandate that every hydrologically-related water source be included in the adjudication.**
>
> **We conclude that while the adjudication must avoid excessively piecemeal litigation of water rights, it need not determine the rights of users of all hydrologically-related water sources**." (44 F.3d at 768-69.) (Emphasis added.)

While the cases relied upon by the United States do not support its arguments (see Part II below), *United States v. Oregon* is dispositive of this issue, and the United States fails to distinguish it from this case.

First, the United States argues that the Ninth Circuit's ruling was based "primarily on its assessment that a determination of surface water rights did not, in the case before it, require consideration of the groundwater, 'because all existing water rights claims in the *river system* will have been determined when the adjudication is finished.'" (Motion at page 6.) Not so:

(1) The language quoted by the United States does not even appear in the relevant section of the ruling – it is part of the discussion of "Absent Parties" on page 768; it is not part of the Court's discussion of separate adjudication of "Groundwater" rights on pages 768-70.

(2) More importantly, as in *United States v. Oregon*, where all surface water rights in the river system were determined, in this case, all groundwater rights in the basin will be determined by the Municipal Purveyors' Cross-Complaint and other parties' pleadings. (See, e.g., Cross-Complaint ¶ 1: "This cross-complaint seeks a judicial determination of rights to **all** water within the Antelope Valley Groundwater Basin"; Cross-Complaint ¶ 12, naming as Roe defendants all parties claiming water rights in the basin; and ¶ 13, seeking to adjudicate the rights of all claimants to the basin groundwater.) Accordingly, with

respect to groundwater, which is the "other source" from surface water in the watershed, this adjudication is "comprehensive" – it need not be extended to include a thousand additional square miles and thousands of additional parties who cannot and have not made any claim to the groundwater of the Antelope Valley Groundwater Basin. The United States has not presented any legal or factual theory by which the riparian landowners of this mountainous watershed could possibly assert a claim to Antelope Valley groundwater that they do not overlie and cannot pump. Consequently, this adjudication is no more "piecemeal" by omitting surface water rights of the watershed, than was the adjudication in *United States v. Oregon*, by omitting the hydrologically-related groundwater rights.

Second, the United States contends that *United States v. Oregon* did not hold "that groundwater can constitute a 'river system' or 'other source' within the meaning of 43 U.S.C. § 666(a)." (Motion at page 7.) On the contrary, that is precisely what the Ninth Circuit held:

> "Groundwater may be included as an 'other source' but the use of 'or' strongly suggests that **the adjudication may be limited to *either* a river system *or* some other source of water, like groundwater**, but need not cover both. For the United States' argument to succeed, we must read 'river system' to include not only the water of the river, but hydrologically-related groundwater systems as well." (*Id.* at 768.) (Emphasis added.)

Since groundwater and river systems are different "sources," the Ninth Circuit rejected each of the United States' arguments for requiring simultaneous adjudication of ground and surface water rights.

Third, the United States argues that unlike Oregon, which has "**different legal regimes**" for groundwater and surface water rights, California regulates groundwater and surface water rights similarly. (Motion, page 7.) The opposite is true. "California is the only western state that still treats surface water and groundwater under separate and distinct legal regimes." (*North Gualala Water Company v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1590.) Since 1914, parties seeking to appropriate surface water must submit a formal application to the State Water Resources Control Board. (Water Code §§ 1225 et seq.; Water Code § 1605; *Environ. Defense Fund v. East Bay Mun. Utilities Distr.* (1980) 26 Cal.3d 183, 195). In contrast, parties seeking to extract groundwater are not subject to the State Board's permitting process. (Water Code § 1200). Groundwater may be used on overlying lands and surplus groundwater may be appropriated for other purposes without State permission. (Water Code § 1221 ("This article shall not be construed to

authorize the board to regulate groundwater in any manner").) Regulation of groundwater extraction has traditionally been left to California courts under common law principles. (*City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597; *Katz v. Walkinshaw* (1903) 141 Cal. 116, 134-135).

Finally, the United States attempts to distinguish *United States v. Oregon* by making unsupported and inaccurate factual contentions (forbidden in pleading motions) about the relationship between groundwater and surface water. The United States contends that while surface water "may or may not be affected by nearby or underlying groundwater," groundwater "emanates from surface water." (Motion at page 7.) The first claim is inconsistent with the United States' contentions in *United States v. Oregon*, where the United States contended that the ground and surface waters "are hydrologically interrelated" (44 F.3d at 768), and the Ninth Circuit accepted this contention but nonetheless held that the McCarran Act does not require simultaneous adjudication of "all hydrologically-related water sources." (44 F.3d at 769.) Also, while groundwater can "emanate" from surface water, it can also emanate from rainfall, underflow of groundwater, or other sources. The United States' conclusion that groundwater is not a source "unto itself" and is part of a larger hydrological system that includes surface water is obvious but unavailing, because the McCarran Amendment does not require these "hydrologically-related water sources" to be adjudicated together (*Id.* at 779), and California law governs them separately.

II. THE CASES CITED BY THE UNITED STATES DO NOT SUPPORT THIS MOTION.

Since the cases cited by the United States preceded the 1994 ruling in *United States v. Oregon*, we begin with the Ninth Circuit's conclusion that "these cases [cited by United States] do not address the proper definition of the relevant water source and do not decide if groundwater must be included in an adjudication of a 'river system.' The United States can point to no other case law, statutory text or legislative history that specifically requires groundwater to be adjudicated as part of the comprehensive adjudication of a 'river system.'" (44 F.3d at 769.) Likewise, the District Court in *United States v. Oregon* concluded:

> "Finally, the United States and the Tribe argue that because the adjudicative procedures of the State of Oregon do not call for simultaneous adjudication of rights to surface water and rights to groundwater within a given river system, the adjudication is not comprehensive within the meaning of the McCarran Amendment. The

> language of the McCarran Amendment does not support this construction, and the United States and the Tribe point to no provision in the legislative history and no case precedent, state or federal, in support of this construction of the McCarran Amendment." (*United States v. Oregon Water Resources Department* (D.Ore. 1991) 774 F.Supp. 1568, 1578.)

The Arizona Supreme Court quoted the above paragraph and concluded: "This correctly states the law." (*In Re General Adjudication of All Rights to Use Water in the Gila River System* (1993) 175 Ariz. 382, 394.)

Therefore, it is no surprise that none of the cases cited by the United States holds or even suggests that McCarran requires that adjudication of groundwater rights in a basin requires simultaneous adjudication of surface water rights in the surrounding watershed. For example, the first case relied upon by the United States, *California v. United States* (9th Cir. 1956) 235 F.2d 647, does not even mention, much less interpret, the McCarran Amendment. Also, this case adjudicated only surface water rights to the Santa Margarita River system, and the Ninth Circuit held that the parties with "rights on a stream" should be included in the adjudication (235 F.2d at 663). But the Ninth Circuit did not require, under McCarran or any other law, that an adjudication of surface water rights must include adjudication of groundwater rights in the same watershed. Our Antelope Valley cases do not seek to adjudicate surface rights to any stream system – they seek adjudication of groundwater rights in this groundwater basin; whereas the watershed landowners, who are outside of the groundwater basin and do not overlie it, have not made and cannot make any claims to that basin groundwater. Moreover, owners of lands that extend from inside the basin to the watershed are already defendants to the Municipal Purveyors' Cross-Complaint.

The second case cited by the United States, *California v. Rank* (9th Cir. 1961) 293 F.2d 340, likewise merely requires that "the rights of all claimants on a stream system" be adjudicated together. (293 F.2d at 347.) The same limited requirement appears in the third Ninth Circuit case cited by the United States, *Metropolitan Water District v. United States* (9th Cir. 1987) 830 F.2d 139, 144 (McCarran authorizes suits to adjudicate the rights of "all claimants on a stream.") The *United States v. Oregon* Court was aware of these cases when it concluded that "no other case law . . . requires groundwater to be adjudicated as part of the comprehensive adjudication of a 'river system.'" (44 F.3d at 769.)

III. OMITTING WATERSHED LANDOWNERS WILL NOT RESULT IN PIECEMEAL ADJUDICATION OF GROUNDWATER RIGHTS, INCLUDING THE UNITED STATES' ALLEGED RESERVED RIGHTS.

The United States makes two arguments as to why excluding the landowners in the San Gabriel and Tehachapi Mountains surrounding the Antelope Valley could result in piecemeal adjudication of the United States' water rights: First, the United States fears that it could be subjected to multiple individual actions to determine water rights in the watershed. (Motion at page 8.) But the United States can present no tenable legal or factual basis for any watershed landowner to sue the United States for a determination of groundwater rights in the Antelope Valley basin – the issue in our cases. By definition, these landowners are outside of the groundwater basin and not pumping its groundwater, so they cannot have any overlying, appropriative, or prescriptive rights. Any party who does claim or exercise any groundwater rights in the Antelope Valley is already a party defendant to the Municipal Purveyors' Cross-Complaint (see ¶¶ 12-13). Finally, in the unlikely event that any watershed landowners sue the United States regarding their riparian rights to their mountain streams, they too will be required by McCarran to include in that adjudication all of the claimants to that stream system, so even that hypothetical litigation could not be piecemeal.

Second, the United States fears that diversions of surface water in this watershed could reduce groundwater used by Edwards Air Force Base, in violation of the United States' alleged reserved water rights. But if the United States believes that any watershed riparians are diverting surface water in derogation of the United States' water rights, the United States is perfectly capable of suing them in this action and seeking to limit their diversions. Indeed, the United States may be the only party with any legal basis to sue them. The United States does not need this Court's help, or the McCarran Amendment, to stop itself from promulgating piecemeal litigation.

The United States made, and the Ninth Circuit rejected, this very argument in *United States v. Oregon*:

> "The Tribe and the United States note that the use of groundwater in the Klamath Basin may have a direct effect on the availability of water to fulfill the reserved water rights guaranteed to them under federal law. They note that the State's distribution of groundwater rights may have the effect of interfering with these federal water rights. The appellants raise

> legitimate concerns about the relationship between federal reserve water rights in a river and the distribution of water rights in hydrologically related groundwater. **However, these concerns go to the merits of the adjudications.** As the Supreme Court has noted, in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court. See *Eagle County*, 401 U.S. at 525-26.
>
> For these reasons, we hold that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment. Accordingly, federal sovereign immunity imposes no bar to the United States' participation in that process." (44 F.3d at 770.) (Emphasis added.)

Similarly, this comprehensive groundwater adjudication is the sort of adjudication Congress required the United States to join when it passed the McCarran Amendment, and federal sovereign immunity is not a defense in these actions. The United States' Motion for Judgment on the Pleadings must therefore be denied. If the United States believes that there are watershed riparians or other parties who should be in this adjudication, the United States has every right to join them under California Rules of Civil Procedure.

IV. THE COURT SHOULD NOT REQUIRE JOINDER OF "DE MINIMIS" PARTIES.

The United States' Motion fails to discuss a key aspect of the "comprehensiveness" requirement of the McCarran Amendment – it discusses the "source" of water to be adjudicated, but not the type of parties who must be joined. In particular, the United States does not discuss the size of landholdings or quantity of water use that require joinder of a party. This crucial issue should be decided promptly as a matter of essential case management, to determine who are "necessary parties" and join them before the Court begins making substantive rulings, and to avoid future disputes about the McCarran Amendment.

Under the McCarran Amendment, California law, and efficient case management principles, this Court should not require joinder of "de minimis" parties, i.e., parties whose land and water usage are too small to materially affect groundwater supplies in this basin. The one appellate case we have found on this issue clearly holds that the McCarran Amendment and common sense allow a court to exclude from a water rights adjudication those parties who have a de minimis effect on the water supply: *In Re General Adjudication of All Rights to Use Water in the Gila River System and Source* (1993) 175 Ariz. 382, 394. There, the United States argued that the comprehensiveness

requirement of the McCarran Amendment required joinder of all owners of wells, including those having only a de minimis effect on the river system. The Arizona Supreme Court disagreed, and its explanation could not be more applicable here:

> "We believe that the trial court may adopt a rationally based exclusion for wells having a de minimis effect on the river system. Such a de minimis exclusion effectively allocated to those well owners whatever amount of water is determined to be de minimis. It is, in effect, a summary adjudication of their rights. A properly crafted de minimis exclusion will not cause piecemeal adjudication of water rights or in any other way run afoul of the McCarran Amendment. Rather, it could simplify and accelerate the adjudication by reducing the work involved in preparing the hydographic survey reports and by reducing the number of contested cases before the special master. Presumably, Congress expected that water rights adjudications would eventually end. **It is sensible to interpret the McCarran Amendment as permitting the trial court to adopt reasonable simplifying assumptions to allow us to finish these proceedings within the lifetime of some of those presently working on the case.**" (175 Ariz. at 384.) (Emphasis added.)

In this case, depending on which expert's testimony carries the day, the size of the Antelope Valley Groundwater Basin will be approximately 900-1,500 square miles. If the United States has its way and adds its proposed watershed area, the total size of the jurisdictional boundary will be approximately 2,500 square miles. (See United States' Map entitled "Antelope Valley Adjudication Area – Proposed Adjudication Boundary" filed 6/29/06 as Attachment A to Williams Decl., Court Website Document #419.) Without a de minimis exception, this adjudication would drag into court every landowner in the basin, including hundreds of thousands of homeowners in Palmdale, Lancaster, and other cities – even if they have no wells, even if they are served by water purveyors, even if they own only a paltry parcel of this parched paradise.

Requiring inclusion of every landowner in the basin, much less the watershed, would bog this litigation down in an endless morass of procedural and substantive battles of no practical significance. Omitting de minimis parties, as explained by the Arizona Supreme Court, will simplify and accelerate the adjudication in many ways. That is permitted by the McCarran Amendment, and it is mandated by common sense.

The question is where to draw the "de minimis" line – how much water and how much land is de minimis? As to the quantity of water that is de minimis, California statutes are instructive. In

statutory adjudications of stream systems and actions to protect groundwater quality, the Legislature has defined as "Minor quantities of water" diversions or extractions that do not "exceed 10 acre-feet of water annually." (Water Code §§ 2102, 2503.) Given that current pumping in the Antelope Valley Groundwater Basin is estimated to exceed 100,000 acre feet, annual extractions of less than 10 acre feet are negligible and not worth the costs of litigation. The more difficult question is what size parcels without wells should be included. We think that the de minimis line for parcels without wells should be approximately 20-50 acres.

V. CONCLUSION.

> "The United States has been steadfastly pecking away at the language of the McCarran Amendment to avoid waiving immunity. By looking at the plain language of the Amendment, the underlying purpose and legislative history of the Amendment, the United States Supreme Court and lower courts have uniformly quashed these attempts." (Case Note Re McCarran Amendment and *United States v. Oregon*, 33 Idaho L.Rev. 215 (1996).)

The language of the McCarran Amendment, the holding of *United States v. Oregon*, and sound case management principles require denial of this Motion. In addition, the Court should order that the Municipal Purveyors promptly join in these consolidated actions all landowners and other water users who pump at least 10 acre feet per year from the Antelope Valley Groundwater Basin, as well as owners of more than 20-50 acres of land overlying the basin.

Dated: September 1, 2006

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By:_____
HENRY S. WEINSTOCK
Attorneys for Tejon Ranchcorp

PROOF OF SERVICE

The undersigned declares:

I am employed in the County of , State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Nossaman, Guthner, Knox & Elliott, LLP, 445 S. Figueroa Street, 31st Floor Los Angeles, California 90071-1602.

On **September 1, 2006**, I served the foregoing **TEJON RANCHCORP'S: (1) OPPOSITION TO UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS; AND (2) CASE MANAGEMENT STATEMENT** on all interested parties:

(X) (By U.S. Mail) On the same date, at my said place of business, said correspondence was sealed and placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Los Angeles, California, addressed to:

Honorable Jack Komar
Judge of the Superior Court of California
County of Santa Clara
191 North First Street, Department 17C
San Jose, CA 95113

(X) (By E-Filing) I posted the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter in compliance with the Court's electronic posting instructions and the Court's Clarification Order dated October 27, 2005.

( ) (By Federal Express) I served a true and correct copy by Federal Express or other overnight delivery service, for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

Executed on **September 1, 2006** at Los Angeles, California.

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

( ) (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

_____
Mitchi Shibata