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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

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COORDINATION PROCEEDING)	Judicial Council Coordination Proceeding
SPECIAL TITLE (Rule 1550(b)))	No. 4408
)	
ANTELOPE VALLEY GROUNDWATER	)	CASE NO. 1-05-CV-409053
CASES	)	<i>Trial Date: 02/11/13</i>
)	
INCLUDED ACTIONS:)	
)	
LOS ANGELES COUNTY)	
WATERWORKS DISTRICT NO. 40 v.)	
DIAMOND FARMING COMPANY, et al.,	)	BOLTHOUSE PROPERTIES, LLC'S
Los Angeles Superior Court Case No.	)	AND WM. BOLTHOUSE FARMS,
BC325201	)	INC.'S TRIAL SETTING
	)	CONFERENCE STATEMENT AND
LOS ANGELES COUNTY	)	REQUEST FOR JURY TRIAL ON
WATERWORKS DISTRICT NO. 40 v.	)	PRESCRIPTIVE CLAIMS
DIAMOND FARMING COMPANY, et al.,)	
Kern County Superior Court Case No. S-)	
1500-CV-254348)	
)	
DIAMOND FARMING COMPANY, and	)	DATE: November 9, 2012
W.M. BOLTHOUSE FARMS, INC., v.	)	TIME: 9:00 a.m.
CITY OF LANCASTER, et al.,	)	DEPT: 1
Riverside Superior Court)	
Case No. RIC 344436 [c/w case no. RIC)	
344668 and 353840])	
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1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 BOLTHOUSE PROPERTIES, LLC and WM. BOLTHOUSE FARMS, INC.
3 (hereinafter collectively referred to as "Bolthouse") provide the following Trial Setting
4 Conference Statement.

5 **INTRODUCTION**

6 The parties continue to work towards settlement. The Court previously set a trial for
7 February 11, 2013, however, what will be tried in this fourth phase of trial has not yet been
8 determined. The Court requested a comprehensive Trial Setting Conference Statement to
9 address the subject matter of the Phase IV trial. This Trial Setting Conference Statement will
10 evaluate what should be tried in Phase IV based upon the pleadings and procedural history of
11 the case, based upon California law. This Trial Setting Conference Statement also will discuss
12 important considerations for the Court in determining what should be tried in the Phase IV trial.

13 **THE PLEADINGS**

14 In approximately 2005, Los Angeles County, District 40, filed two actions, one in Los
15 Angeles County and one in Kern County, seeking adjudication of the water rights of all parties
16 in the Antelope Valley Groundwater Basin and seeking an injunction to prohibit pumping in
17 excess of the safe yield. These actions ultimately were consolidated as a complex litigation
18 case. Thereafter, the Willis Class of non-pumpers and the Wood Class of small pumpers,
19 joined the lawsuit. Various Cross-Complaints have been filed as well. Although an exhaustive
20 review has not been conducted, it is not believed that any Cross-Complaints have been filed by
21 overlying landowners seeking to enjoin the pumping of any other party or any other landowner
22 or seeking any particular share of the correlative native supply.

23 **PROCEDURAL HISTORY**

24 In Phase I, a geographic area of adjudication was determined. In Phase II, the Court
25 determined that the area of adjudication was underlain by a single hydraulically connected
26 water basin. However, the Court has explained that the extent of hydraulic communication
27 may be different in different areas of the basin. In Phase III, the Court determined that the
28 conservative safe yield of the basin is 110,000 acre feet per year.

1 **THE PROPONENT OF A CAUSE OF ACTION HAS THE BURDEN OF PROOF**

2 The proponent of a cause of action has the burden of proving the cause of action. A
3 party claiming overdraft and seeking an injunction to prevent pumping by other parties above
4 the safe yield of the basin, has the burden of proving an appropriate legal basis for this
5 injunction.

6 District 40 and the other purveyors claiming overdraft and requesting an injunction to
7 prohibit pumping beyond safe yield, have the burden of proving overdraft, proving their legal
8 rights to any portion of the safe yield, the volume of such rights and their reasonable and
9 necessary exercise of such rights, the volume and extent of other pumping in the basin as well
10 as the relative priorities of all other rights.

11 The Court determined that the conservative safe yield of the basin is 110,000 acre feet.
12 The safe yield consists of all water available for use in the water basin including return flows
13 from imported water and the native water supply.

14 **THE PURVEYORS MUST PROVE THE LEGAL BASIS FOR AND VOLUME**
15 **OF ANY CLAIMS THEY MAKE TO THE SAFE YIELD AND IN ORDER TO**
16 **OBTAIN AN INJUNCTION**

17 The purveyors claim rights to the safe yield based upon appropriative rights, return
18 flows from imported water and prescriptive rights. It is not clear whether they claim any other
19 legal basis to a share of the safe yield. In any event, a trial and determination of purveyor water
20 rights to the safe yield, and the amount thereof, is necessary to determine the amount of the safe
21 yield which is available on a correlative basis to overlying landowners. Additionally, the
22 purveyors must prove the nature, priority and extent of their claims to the safe yield, and their
23 reasonable and beneficial use thereof, in order to obtain an injunction of the pumping of other
24 parties. *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489.

25 **FEDERAL RESERVED RIGHT**

26 The United States is an overlying landowner. However, the United States claims a
27 federal reserved right priority. The United States claims this reserved right priority against the
28 safe yield of the basin. The federal reserved right may be asserted against purveyor priority

1 claims and/or against other correlative shares to the native supply since the claim is against the
2 safe yield. Although some of the purveyor parties have taken the position that the federal
3 reserved right only has a bearing on the native supply, as a federal reserved right, an argument
4 may be made that other priority claims such as appropriation, return flows and/or prescription,
5 also must yield to this federal reserved right priority claim.

6 **OVERLYING RIGHTS TO CORRELATIVE SHARE OF THE NATIVE SUPPLY**

7 Since safe yield is comprised of all available water in the water basin, the correlative
8 availability of native supply cannot, as both a factual and legal matter, be determined until
9 purveyor claims of appropriative rights, rights to return flows and prescriptive rights, or any
10 other priority rights, have been determined. Likewise, these correlative rights to the native
11 supply cannot be determined until the federal reserved right priority, if any, is determined. If
12 the remaining share of the safe yield is insufficient to satisfy the needs of overlying
13 landowners, or if they are unable to agree upon how to share this correlative supply, then and
14 only then, would a trial be necessary of these rights.

15 **IMPORTANT CONSIDERATIONS OF WHAT MUST BE TRIED IN**

16 **THE NEXT PHASE OF TRIAL**

17 **A. Appropriative Rights.**

18 Appropriative rights must be determined before prescriptive rights can be determined.
19 This is because a party pumping appropriative rights is not pumping unlawfully. In the absence
20 of unlawful pumping, such pumping of appropriative rights can never ripen into a prescriptive
21 right. Additionally, depending upon the amount of available surplus water within the safe
22 yield, and the amount of pumping by any particular party, some parties may be lawfully
23 pumping appropriative rights, whereas some other parties may be unlawfully pumping
24 appropriative rights. For example, if the safe yield is sufficient to meet the needs of some
25 appropriates but not others, only those appropriators with appropriative rights acquired later in
26 time would be pumping unlawfully.

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1 Likewise, parties may be lawfully pumping return flows from imported water. To the
2 extent that parties are lawfully pumping return flows from imported water, they are not
3 pumping unlawfully and accordingly have no basis to claim prescriptive rights.

4 Therefore, both appropriative rights and return flow rights must be litigated before
5 prescription.

6 Finally, it is important to note that appropriative rights could be litigated in a relatively
7 short period of time. The Court has two weeks scheduled for trial in February which probably
8 would be sufficient for this trial on appropriative rights to occur. Additionally, an appropriative
9 rights trial would focus on pumping, and the time frame within which such rights were created.
10 This information already is in the hands of those claiming appropriative rights. Accordingly, it
11 is doubtful any significant discovery would be necessary in advance of this trial. Therefore a
12 trial on appropriative rights would be appropriate for a trial in February

13 **B. Return Flow Rights.**

14 A trial on return flow rights may involve several issues. *City of Los Angeles v. City of*
15 *Glendale* (1943) 23 Cal.2d 68 and *City of Los Angeles v. City of San Fernando* (1975) 14
16 Cal.3d 199, are the two guiding cases on the issue of return flows. Both cases recognize that in
17 order to claim return flows from water imported from outside the watershed, a party importing
18 such water must have the physical ability to recover these return flows. As the court noted:

19 “Plaintiff contends that in delivering this imported water in the
20 San Fernando Valley, it intended that the water would return to
21 the ground after use and thereby become available for recapture
22 in its wells in the southeastern part of the valley where it had
23 been extracting water since the turn of the century. [*San*
Fernando at p. 211] . . . Los Angeles Aqueduct had been
planned and located to facilitate the availability and recapture of
such return waters.” (*San Fernando* at p. 215.)

24 Comingling of return flows with other water in the basin raises additional issues.
25 Pursuant to *Water Code* § 1203, municipalities may not accumulate water and any unused
26 water may be used by any party. Additionally, claiming the right to pump return flows from
27 imported water is subject to the no injury rule. Pursuant to the no injury rule, significant
28 questions arise as to whether a party is entitled to pump return flows from an area were

1 subsidence is occurring, which is occurring in the present case. Likewise, pursuant to the no
2 injury rule, contamination issues may also exist. Comingling and pumping return flows from
3 imported water from areas where subsidence is occurring, also raises net augmentation issues.
4 The question arises whether pumping more water from an area than net augments the supply,
5 which then results in subsidence, is legally a net augmentation to the water supply. Pumping
6 more water in an area of subsidence than is being recharged reveals insufficient net
7 augmentation to meet extraction. There also is a variability of net augmentation depending
8 upon a wide variety of issues including hydrogeology, water use patterns and infrastructure.

9 Additionally, there is a significant issue regarding ownership of imported water return
10 flows. The term importer has not been defined in case law. Further, contractual issues may
11 also affect a party's right to claim return flows. Finally, *Water Code* § 1210, which gives a
12 party treating water the right to exercise dominion and control over the corpus of that water
13 once it is treated, cuts off the rights of the importer to such water.

14 A trial on return flows would require litigation of several legal issues, some of which
15 are discussed above. However, a return flow trial would be less factually driven than a
16 prescription trial. Accordingly, the extent of discovery which would need to be accomplished
17 before trial would be less for a trial on return flows than for a prescription trial as discussed
18 below. Finally, it is notable that return flows are a hotly contested issue which probably will
19 need to be tried based upon the status of current settlement negotiations.

20 **C. Prescriptive Rights Trial.**

21 Numerous parties, including Wm. Bolthouse Farms, Inc. and Bolthouse Properties,
22 LLC, have requested, and hereby again request, a trial on any claims of prescription.
23 Accordingly, this trial probably will need to be separated from other phases of trial. Because
24 the purveyor parties are unwilling to voluntarily limit the time frame within which they claim
25 prescription, and claim prescription over a sixty-five (65) year period, this Court has noted that
26 such a trial could take years to complete. Accordingly, it is not suitable at present for a trial
27 within a period of two weeks as set in February. Additionally, it would be unfair to a jury to
28 break such a trial up into non-contiguous time frames. It would also be unfair to require a jury

1 to sit for a trial which could take years, without significant legal challenges, as discussed
2 below, occurring first to narrow the time frame within which the purveyors are legally entitled
3 to claim prescription.

4 In order to prepare for a trial on prescription over a period of sixty-five (65) years,
5 which the purveyor parties so far refuse to limit, extensive discovery will be necessary.
6 Discovery between hundreds of parties in this case, consisting of written discovery, depositions
7 of witnesses and expert depositions, to say the least would be daunting and in fact would take
8 years. Fortunately, there are legal issues which may be determinative on the time frame within
9 which the purveyor parties may properly claim prescription. These issues include the
10 following.

11 The affect of *Code of Civil Procedure* § 315, which requires that the People of this state
12 bring an action “in respect to any real property” within ten (10) years of when such right
13 accrued, may in fact limit the purveyor claims to a period of ten (10) years following when the
14 alleged prescription was perfected. This clearly would limit the scope of discovery, analysis
15 and trial which will be necessary. Likewise, a claim of laches, that the purveyors delayed
16 sixty-five (65) years to bring an action resulting in extreme prejudice to the parties against
17 whom the claim is brought, may well limit the time frame for which discovery and trial is
18 necessary.

19 Also important may be *Civil Code* § 811 which provides that “a servitude is
20 extinguished when the servitude was acquired by enjoyment, by disuse thereof by the owner of
21 the servitude for the period prescribed for acquiring title by enjoyment.” The Fourth District
22 Court of Appeal is currently considering this issue in the Santa Maria case as a potential bar to
23 stale claims.

24 Other potential bars to the prescription claims include constitutionally based arguments
25 that a governmental entity may not prescribe against its citizens or that a prescription claim
26 against a citizen is an unreasonable use of water. Unclean hands and estoppel likewise may
27 provide a legal basis to bar prescription claims by the purveyors.

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1 Also necessary in a prescription trial will be both legal and factual litigation of notice
2 issues including the requirement in *San Fernando* that the party against whom prescription is
3 sought, have notice of the specific conditions of overdraft. No court has determined what
4 specific conditions are sufficient. *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908,
5 which involved stipulations to adversity and overdraft, suggested that water levels may be some
6 evidence of notice. Some parties argue that merely overdraft of a water basin is sufficient.
7 Dispute also exists as to the extent writings and/or public knowledge may be considered as a
8 sufficient basis for notice.

9 The scope of a prescriptive right and what is required to prove the scope of a
10 prescriptive right in the context of groundwater, also raises significant questions.

11 Needless to say, alleged prescription is a hotly contested issue. This issue probably will
12 have to be tried. Hopefully the issue can be narrowed with appropriate legal rulings prior to
13 discovery and trial. In any event, based upon the current sixty-five (65) year prescription claim,
14 it is clear that discovery could not possibly be accomplished, nor could legal challenges to the
15 sixty-five (65) year claim period occur, in order to prepare for a trial in February.

16 **D. Federal Reserved Right Trial.**

17 Based upon current settlement negotiations, a federal reserved right trial may not be
18 necessary. A federal reserved right trial could be tried in a shorter period of time and would
19 primarily be based upon legal arguments with more limited factual issues. However, a trial of
20 the federal reserved right could be somewhat disruptive of settlement discussions since most of
21 the parties seem to be making progress toward resolution of this issue as part of an overall
22 settlement of the case, by most of the parties.

23 **E. Overlying Rights To Correlative Share Of The Native Supply.**

24 As noted above, correlative rights to the native supply share of the safe yield has not,
25 and cannot, be determined until the purveyor parties litigate and prove, or fail to prove, both the
26 nature and extent of their claims to the safe yield. Likewise, determination of the federal
27 reserved right will be necessary to determine whether the federal government has a priority
28 right to groundwater which makes up the safe yield and/or the native supply. Only at this

1 point, will the landowner parties be able to consider whether a trial is necessary to determine
2 each landowners claim to a correlative share or a portion of the native supply.

3 Having a trial to determine the historical pumping of thousands of landowners in the
4 Antelope Valley to evaluate their pumping and to determine their potential correlative share of
5 the native supply would require voluminous discovery and expert analysis. Additionally, such
6 a trial likely would take a long period of time, perhaps years to complete. Overlying
7 landowners have discussed potential allocation of water rights as between overlying
8 landowners as a part of a potential settlement. Therefore, it is likely that once the amount of
9 water available to correlative rights holders is established, that these correlative rights holders
10 probably will agree to a method of correlative sharing of the native supply rather than to litigate
11 these issues. Likewise, it is unlikely that any landowner would spend the time and resources
12 necessary to prove the pumping and rights of all other parties necessary to obtain an injunction
13 against another landowner.

14 In any event, litigation of rights to the correlative native supply cannot occur until
15 claims to the safe yield have been litigated. Litigation of these claims against the safe yield is
16 necessary to determine the amount of the native supply to be apportioned by the overlying
17 landowners.

18 CONCLUSION

19 Based upon the pleadings and the procedural context of this case, and under California
20 law, it is clear that the Phase IV trial should include some or all of the purveyor groundwater
21 claims in the safe yield of the groundwater basin. A prescription trial requires a jury and
22 accordingly is best handled as a separate phase of trial. Regardless, the parties could not
23 possibly be afforded sufficient time to conduct discovery and prepare for trial on an alleged
24 sixty-five (65) year prescription claim. This claim must be evaluated legally in hopes of
25 narrowing the time frame of alleged prescription. Only then can discovery be meaningfully
26 accomplished in a time frame which will allow the parties sufficient time to conduct discovery
27 and prepare for trial.

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1 If any of the purveyors are claiming appropriative rights, it is clear they must prove
2 these claims to the safe yield. All of the parties which may claim appropriative rights have
3 possession of their pumping records. Accordingly, no specific discovery is necessary to prove
4 their first in time, first in right, appropriative rights. Appropriative rights could be tried in the
5 time frame reserved in February.

6 Purveyor claims to return flows also potentially could be tried in February.

7 Based upon the foregoing, it is suggested that appropriative rights and return flows be
8 set for trial in Phase IV beginning on February 11, 2013.

9 Thank you for consideration of these issues.

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11 DATED: November 3, 2012

Respectfully submitted.

12 CLIFFORD & BROWN

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14 By: 

15 RICHARD G. ZIMMER, ESQ.

16 Attorneys for BOLTHOUSE PROPERTIES,
17 LLC and WM. BOLTHOUSE FARMS, INC.
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