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SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

DIAMOND FARMING COMPANY, a California corporation,

Plaintiff,

vs.

CITY OF LANCASTER, et al.,

Defendants.

WM. BOLTHOUSE FARMS, INC., a Michigan corporation,

Plaintiff,

vs.

CITY OF LANCASTER, et al.,

Defendants.

CASE NO.: RIC 344436
[Consolidated w/Case Nos. 344668 & 353840]

OPPOSITION TO LOS ANGELES COUNTY WATERWORKS NO. 40's MOTION FOR LEAVE TO FILE CROSS-COMPLAINT AND DECLARATION IN SUPPORT OF OPPOSITION

Date: November 12, 2004
Time: 10:00 a.m.
Dept: 7

Action Filed: October 29, 1999

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EXHIBIT 1

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I.

INTRODUCTION

These actions are consolidated quiet title actions initiated by Diamond Farming Company . Wm. Bolthouse Farms. The Plaintiffs' claims are straightforward. They seek to quiet title to tl property and specifically the overlying right to pump groundwater to irrigate their crops.

> "Courts typically classify water rights in an underground basin as overlying, appropriative, and prescriptive. (*California Water Service Co., supra*, 224 Cal. App.2d at p. 725.) [Footnote omitted.] An overlying right, "analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." (*California Water Service Co., supra*, 224 Cal. App.2d at p.725.) One with overlying rights has rights superior to that of other persons who lack legal priority, but is nonetheless restricted to a reasonable beneficial use." *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 at p. 1240

The Defendants are all governmental entities except for one Defendant which is a for profit pul utility. Three other originally named Defendants have settled with Plaintiffs and disclaimed any adve claim. All remaining Defendants are "appropriators," pumping groundwater for municipal and indust use.

> "In contrast to owners' legal priorities, we observe that "[t]he right of an appropriator . . . depends upon the actual taking of water. Where the taking is wrongful, it may ripen into a prescriptive right. Any person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes . . . . Any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed [citation]. When there is a surplus, the holder of prior rights may not enjoin its appropriation [citation]. Proper overlying use, however, is paramount and the rights of an appropriator, being limited to the amount of the surplus [citation], must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the [adverse, open and hostile] taking of non-surplus waters. As between overlying owners, the rights, like those of riparians, are correlative; [i.e.,] each may use only his reasonable share when water is insufficient to meet the needs of all [citation]. As between appropriators, however, the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any [citation]." *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 at p. 1241

As will be set forth in more detail below, each Defendant appropriator has by its answer and affirmative defenses pled therein, asserted that the common law priority of water rights as betw themselves as appropriators and Plaintiffs as overlying landowners has been reversed due to tl affirmatively pled claim of a superior right acquired by prescription.

> "The facts or elements which are necessary to the existence of a prescriptive water right have been set forth in a veritable forest of cases. To perfect such right, the use of the water must be: (1) actual, (2) open and notorious, (3) hostile and adverse to the original owner's title, (4) continuous and uninterrupted for the statutory period, and (5) under a claim of title in the claimant, and not by virtue of another right. [Citation.] The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title." (*Peck v. Howard* (1946) 73 Cal.App.2d 308, 325-326 [167 P.2d 753].) A use is not adverse unless it deprives the owner of water to which he or she is entitled. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 927 [207 P.2d 17]; *Pabst v. Finmand, supra,* 190 Cal. at p. 128.)" *Pleasant Valley Canal Co. v. Borrow* (1998) 61 Cal.App.4th 742 at p. 784

> "Prescriptive rights are not acquired by the taking of surplus or excess water. [But] [a]n appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right." (*California Water Service Co., supra,* 224 Cal.App.2d at pp. 725-726.) Even these acquired rights, however, may be interrupted without resort to the legal process if the owners engage in self-help and retain their rights by continuing to pump nonsurplus waters. (**See** *Hi-Desert County Water Dist. v. Blue Skies Country Club,* Inc. (1994) 23 Cal.App.4th 1723, 1731 [28 Cal.Rptr.2d 909] *(Hi-Desert County Water Dist.).)*" *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 at p. 1241

The Defendant, Los Angeles County Waterworks District No. 40, has moved this Court for le to file the [Proposed] Cross-Complaint pursuant to Code of Civil Procedure section 428.50(c). T moving party did not assert the claims alleged in the [Proposed] Cross-Complaint by cross-complain the time it filed its answer to the Complaints, but raised the exact same issues by its positive averme and affirmative defenses set forth in its answers. (See Exhibits "A," "B," and "C" to Declaration of F H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complai The not transparent motive for this motion is the moving party's desire to expand this litigation to per it to litigate its alleged priority right based on a claim of prescription against 200-300 additional R cross-defendant overlying landowners and all other real property within the Antelope Valley. To t

extent the [Proposed] Cross-Complaint is permissive. Code of Civil Procedure section 428.50 provic in its entirety as follows:

> "§428.50. Time for Filing of Cross-Complaint.
>
> a) A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint.
>
> b) Any other cross-complaint may be filed at any time before the court has set a date for trial.
>
> c) A party shall obtain leave of court to file any cross-complaint except one filed within the time specified in subdivision (a) or (b). Leave may be granted in the interest of justice at any time during the course of the action."

As will be set forth more fully hereinafter, this Motion for Leave to File the [Proposed] Cr Complaint should be denied for the following reasons:

1. To the extent that the moving party now seeks to assert the affirmative claims set f in the [Proposed] Cross-Complaint as against this Plaintiff, Diamond Farming Company, the mo party has failed to proffer any rationale justification or excuse for the delay nor any explanation for the [Proposed] Cross-Complaint, as against the Plaintiff, Diamond Farming Company, was not file the same time as the moving party's Answer to the Complaint as is required by Code of Civil Proce section 428.50(a);

2. To the extent that moving party now desires to add 200 to 300 new party cross-defendants, improperly identified as ROE cross-defendants, moving party has offered no ratio justification or excuse for the delay nor any explanation for why the [Proposed] Cross-Complain against the ROE cross-defendants was not filed before this Court set a date for trial, as is require Code of Civil Procedure section 428.50(b);

3. Pursuant to an Order of bifurcation, a Phase 1 trial in these consolidated quiet title actions commenced on August 5, 2002, evidence was taken through Friday, August 9, 2002. On Au 9, 2002, a defendant made an oral motion to vacate the stipulation defining the Phase 1 trial issue. Court ordered the matter to be briefed and set a hearing on that motion for September 6, 2002. C

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September 6, 2002, the trial court vacated its prior Order bifurcating the trial and Ordered that all iss would be tried in a single trial with a continued trial date then set for April of 2003;

4. There are no claims advanced by the moving party in the [Proposed] Cross-Complain against this Plaintiff, Diamond Farming Company, which are not in issue by virtue of the specially p allegations and affirmative defenses of the moving party set forth in its Answer to the Quiet T Complaints; and,

5. To permit this belated filing of the [Proposed] Cross-Complaint would constitute a wa of the hundreds of thousands of dollars expended by this Plaintiff in preparing for and conducting partial Phase 1 trial which was suspended on August 9, 2002, and would not be in the "interest of justi as required by Code of Civil Procedure section 428.50(c).

II.

PROCEDURAL HISTORY

On October 29, 1999, Plaintiff Diamond Farming filed its Complaint to Quite Title in specific identified property located in Kern County, overlying and within the Antelope Valley. The matter in rem and properly venued in Kern County as Case #240090JES. On February 22, 2000, Plaintiff f a second Complaint to Quiet Title in a separate specifically identified property located in Los Ang County overlying and within the Antelope Valley. The matter was in rem and properly venued in Angeles County as Case #MC011330.[1]

On June 5, 2000, Case # 240090JES was ordered, pursuant to a noticed motion of Defenda transferred to the Superior Court of Riverside County and given the new case number RIC344436. June 8, 2000, Case #MC011330 was ordered, pursuant to a stipulation, transferred to the Superior Co of Riverside County and given the new case number RIC344668. On August 2, 2000, both ca RIC344668 and RIC344436, were consolidated for trial.

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[1] On page 8 of the moving papers, the Defendant, Los Angeles County Waterworks District 40 misrepresents ". . . plaintiffs (plural) have amended their complaints in 2000, 2001, and 2003 to new properties to their water rights claims." That statement is not true. This Plaintiff, Diamond Farm Company has sought and now seeks to quiet its title to only those two parcels, one situated in K County and the other in Los Angeles County, as stated. No "new properties" have been addec Diamond Farming Company.

Thereafter, Wm. Bolthouse Farms filed its complaint to Quiet Title to specifically identif property within the Antelope Valley. This action was also consolidated with case RIC344436 on J 25, 2001. Defendants and specifically Los Angeles County Waterworks No. 40 answered all compla separately and the consolidated case, RIC344436 was at issue. Discovery was commenced by all part

On June 13, 2001, the Defendant, Rosamond Community Services District, made a motio bifurcate the issues for trial. That motion was joined by Los Angeles Waterworks No. 40. That mo was opposed by both Plaintiffs. The motion was granted despite the Plaintiffs' oppositions on Au 20, 2001. Phase 1 of the trial commenced on August 5, 2002. The trial consumed four (4) court d and was suspended on August 9, 2002. This Court's docket confirms that the trial is "in Progress."

On August 9, 2002, prior to the conclusion of the trial of Phase 1, Defendants made an motion to vacate the joint stipulation defining the issue to be tried in Phase 1. On September 6, 2(the trial court vacated its prior bifurcation order. The court trial, which by the court's own recor still deemed to be in progress, was continued four times until it was eventually vacated on May 14, 2(when the case was reassigned.

III.

DEFENDANT HAS FAILED TO SHOW THAT GRANTING LEAVE TO NOW FILE A CROSS COMPLAINT IS IN THE INTEREST OF JUSTICE

Defendant has moved this court for leave to file the [Proposed] Cross-Complaint pursuar Section 428.50 of the Code of Civil Procedure. Section 428.50 provides in pertinent part: "A party s obtain leave of court to file any cross-complaint except one filed within the time specified in subdivi (a) or (b). The time limitations of subsections (a) and (b) were not met. In fact, trial has commen Leave may be granted only in the "interest of justice."

Defendant advances four reasons it believes waiting until the eleventh hour to file this cr complaint is in the interest of justice. These are:

1. There are new and changed facts since this Plaintiff filed its first Complaint in Octo 1999;

2. In the absence of a basin adjudication, Plaintiffs' cases will not solve the basin overdraft conditions;

3. There will be an adjudication, either by cross-complaint or a separate action filed later t moving party will attempt to coordinate with these actions;

4. There is a public policy of encouraging settlements that outweighs moving party's del

As will be shown below, this request for leave to file a cross-complaint at this late date and a trial has commenced is not in the interest of justice.

A. *Defendant has failed to identify any "new" facts in this motion or the propo cross-complaint, nor have they provided any admissible evidence showing any changed condition*

Defendant asserts three "facts" that it claims are "new and changed" warranting the filing cross-complaint five years after the original complaint was filed and more than two years after the commenced. None of the evidence of those "new and changed" facts is competent or admiss evidence. (See Plaintiff's Objections to Evidence Proffered in Support of Defendant's Motion for Le to File the [Proposed] Cross-Complaint, filed concurrently herewith.)

First alleged "New fact:" The basin is in overdraft and suffers from declining groundwater le and subsidence due to increased pumping. (Motion for leave page 7, lines 21-22.) Since commencement of this litigation and Defendant's first answer, Defendant has been asserting that the b was then in a state of overdraft as an element of its claim for priority prescriptive rights[2]. This alle occurrence of overdraft is not "new" information, but a condition Defendant alleged by answer affirmative defense to have persisted for "five consecutive years" before this Plaintiff's original compl was filed in October of 1999.

Second alleged "New Fact:" Three months ago, a report stated that there was increased farr in the Antelope Valley. (Motion for leave page 7, lines 23-26.) First, the evidentiary basis for this "n fact contains hearsay within hearsay, is not competent evidence, and should not be considered in ru on Defendant's motion. (See Plaintiff's Objections to Evidence Proffered in Support of Defenda Motion for Leave to File the [Proposed] Cross-Complaint, filed concurrently herewith.) Secon

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[2] See Exhibits "A," "B," and "C" to Declaration of Bob H. Joyce in Support of the Opposi to Motion for Leave to File the [Proposed] Cross-Complaint: Defendants Answers to the First Amer and Supplemental Complaint to Quiet Title Case #344436 paragraph 7; Answer to First Amended Supplemental Complaint to Quiet Title Case #344668 paragraph 5; Answer to Second Amer Complaint Case # 344436 paragraph 17.

evidenced by Defendant's statements contained in its motion, it was on notice and consciously awar the alleged increase in agriculture as early as the year 2000. (Motion for leave page 8, lines 1-4.) Furt in the summer of 2003, retired Judge, Leroy Simmons allegedly informed Defendant of the potential r for basin wide adjudication. (This statement is likewise inadmissable hearsay.) Yet, Defendant wa three years and at a minimum over a year and a half before seeking leave to file this [Proposed] Cr Complaint based on this alleged "new" information.

Third alleged "New Fact:" The United States Geological Survey predicts increased subsidence from groundwater pumping. (Motion for leave page 7, lines 27-28.) This is not a fact a inasmuch as it is a prediction of future events which has not or may not occur. This information, like newspaper article, is also objectionable as hearsay and should not be considered in ruling on Defenda motion. Subsidence is a by-product of "overdraft," and moving party by its answer to Plaint Complaint asserted the existence of an "overdraft" for five consecutive years before Plaintiff file Complaint in October 1999. Possibility of subsidence is not a new fact.

B. *Plaintiffs have sought to Quiet Title to Specific Property through their litiga*

Defendant continually overstates and without basis misstates and exaggerates Plaintiff's cl in this action. A review of the pleading in this matter evidences that Plaintiff has filed simple quite actions involving specifically described real property against specifically named individual entities had asserted adverse claims to Plaintiff's title to that property. The object of the action to quiet ti to finally settle and determine, as between the parties, all conflicting claims to the property in contro and to decree to each such interest or estate therein as he may be entitled to." (*Peterson v. Gibbs* (1 147 Cal. 1, 5.) The ultimate fact to be found is the ownership of the property or the interest i *Rahlves & Rahlves, Inc. v. Ambort* (1953) 118 Cal. App. 2d 465, 476.)

The title as to which a determination is sought is Plaintiff's right as an overlying landowne extract groundwater from beneath the surface of their properties for reasonable beneficial use or properties[3]. The right depends on one thing only—the ownership of the land by the Plaintiffs or lessors. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1237, fn. 7, & 1240.) T

[3] E.g., First Amended and Supplemental Complaint to Quiet Title (Feb. 28, 2000) ¶¶ 8 & 14 3:9–12 & 4:1–3; Complaint to Quiet Title (Feb. 18, 2000) ¶¶ 8 & 14, pp. 3:8–11 & 4:1–3.

Plaintiffs need only prove title to the overlying land. (*Pacific States Savings & Loan Co. v. Ware* (1941) 18 Cal.2d 757, 759; see Code Civ. Proc., § 764.010.) Once title is shown, there is a presumpt of ownership that shifts the burden to the Defendant to prove that it has a valid adverse claim. T burden of establishing each defendant's adverse claim of title is on the particular defendant. E defendant, including the moving party, Los Angeles County Waterworks District 40, sets up by ans and affirmative defense a claim of prescriptive rights adverse to the priority of Plaintiff's overlying rig

> "The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. The law will not allow the property of one person to be taken by another, without any conveyance or consideration, upon slight presumptions or probabilities. (*Niles v. Los Angeles*, 125 Cal. 572, 576 [58 P. 190]).

Despite having alleged by answer filed July 3, 2000 that the basin was overdrafted for the years preceding Plaintiff's Complaint, filed in October 1999, Defendant did not seek a full b adjudication of its alleged prescriptive rights against all other overlying landowners by cross-compl prior to the date set for trial as required by Code of Civil Procedure section 428.50(b). The moving p seeks leave of court to do now what it failed to do in July of 2000. Query: Why did moving party file a cross-complaint against all other overlying landowners, the 200-300 proposed ROE cr defendants, when it filed its answer or before the commencement of trial?

Defendant's references to a current overdraft in its motion, and the evidence presented in sup of that alleged overdraft, all reference alleged events occurring after Plaintiff filed its Complaints in matter.[4] Prescriptive rights are based on the "highest continuous annual production of water beneficial use in any five (5) year period subsequent to the commencement of overdraft and prior to filing of the Complaint. *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199, 283-284. Although ev postdating the filing of this Plaintiff's Complaint in October 1999 may be relevant to Defendant's alle prescriptive claims against the not yet sued 200-300 proposed overlying ROE cross-defendants, they not relevant to Defendant's prescriptive claim against this Plaintiff, since the relevant time frame is five (5) years preceding Plaintiff's Complaint which was filed in October 1999.

In this Plaintiff's Quiet Title actions, the Defendants have asserted a priority prescriptive righ

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[4] See Motion for Leave, page 1, lines 11-12; page 2, lines 18-24; page 4, lines 10; page 5 l 27-28; page 7, lines 21-28 page 9, lines 4-11; page 11, lines 24-28; page 5, lines 1-7

answer and affirmative defense. The Defendants will be required to prove at trial that their use of w was adverse to the legal priority of this Plaintiff. They will be required to prove that their pum resulted in an actual invasion of this Plaintiff's overlying priority right. "A use is not adverse unle deprives the owner of water to which he or she is entitled." *Pleasant Valley Canal Co., supra*, at p. It was made clear by the California Supreme Court in the most recent decision on the subject, *Ci Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, that if the overlying owner engages in self and continues its own pumping, even during times of overdraft, the overlying landowner retains t overlying priority rights by continuing to pump. *City of Barstow, supra*, at p. 1241.

Thus, in these Quiet Title actions, the ultimate factual inquiry to be litigated on the Defenda affirmatively pled claim of priority by prescription, will be whether or not the Defendant's groundw pumping prevented the Plaintiff's from exercising their priority overlying rights, and interfered with t ability to continue their groundwater pumping and thus the preservation of their priority through help." *City of Barstow, supra.* The Defendant will be required to prove that their pumping either lim or prevented the pumping of these Plaintiffs on the specific properties described in the Complaints. claimed interference with the pumping of other overlying landowners is not relevant.

C. *Defendant's are authorized and should file a separate action if they believe is needed to protect their rights or solve the basin's problems.*

As stated above, Defendant has cited to numerous events allegedly occurring in the basin s this Plaintiff filed its Complaint in October 1999. Defendant proposes to litigate its prescriptive cla against Plaintiff based upon an alleged overdraft during the five (5) years immediately preceding the fi of Plaintiff's Complaint (October 1999) and to litigate its prescriptive claims against the 200- proposed new overlying owner ROE cross-defendants based upon an alleged overdraft during the (5) years following the date Plaintiff filed its Complaint and immediately preceding the anticipated fi of the [Proposed] Cross-Complaint. (See para. 14 of [Proposed] Cross-Complaint.) If Defendant wis to litigate its prescription claims against the "other farming interests," "non-party persons and o entities" based upon events occurring in the last five (5) years after Plaintiff filed its Complaint, t should file a separate action. In fact, Defendant specifically states that it is authorized to and in fact file a separate complaint if this motion is denied further evidencing the fact that a denial of this mo

will not prejudice Defendant. (Motion for Leave page 6, lines 18-19; page 9, lines 13-21.)

D. *Waiting almost five years to file a cross-complaint is not in the interests of justice.*

Defendant subtly attempts to excuse its delay of "almost five years" in seeking leave to fi cross-complaint and the prejudicing effect it has on Plaintiff by blaming everyone except itself.

- the cross-complaint was not pleaded previously because the parties engaged in leng settlement discussions at the direction of the court. (Motion for Leave page 1, lines 10-11
- Defendant did not know there was a need for general adjudication of the basin until the medi told them in the summer of 2003. (Motion for Leave page 2, lines 27-28.)[5]
- The Los Angeles Board of Supervisors did not grant permission to pursue this action until September 2004. (Motion for Leave page 3, lines 15-18.)
- with the court's approval the parties engaged in a lengthy negotiation process. (Motion Leave page 9, lines 27-28.)

In support of the reasonableness of this five year delay, Defendant relies on *Silver Organizati Ltd. V. Frank* (1990) 217 Cal.App.3d 94, 100-101. However, *Silver* is distinguishable. In *Silver*, motion was based upon Code of Civil Procedure section 426.50 and not Code of Civil Procedure sect 428.50(c), which is relied upon by this moving party. In *Silver*, *supra*, the motion sought leave to a compulsory cross-complaint by defendants against that plaintiff and did not involve a permissive cro complaint by a defendant against identified or, as here, unidentified ROE third party cross-defenda A permissive cross-complaint must be filed prior to date the matter is set for trial under Code of C Procedure section 428.50(b). A conceded omission. In *Silver*, *supra*, defendants deferred retain

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[5] The moving party has been represented at all times by very competent counsel who specia in Water Law and water litigation. It is difficult to believe that counsel needed assistance before realiz an adjudication was needed given the pled claim of overdraft set forth in their answers. It is clain (hearsay) that during the mediation in the summer of 2003, that the mediator told "legal counsel" t "he believed the basin needed a general adjudication." (See Declaration of Jeffrey V. Dunn in Supp of Defendant's Motion, paragraphs 2 & 3.) Thereafter, the moving party, Los Angeles Cou Waterworks District No. 40, filed its answer to the Second Amended Complaint to Quiet Title of W Bolthouse Farms, Inc., on December 8, 2003 (see Exhibit "C" to the Declaration of Bob H. Joyce Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint), but did then, having the benefit of the mediator's admonition, attempt to file concurrently the [Proposed] Cro Complaint. Why?

counsel while they sought to dispose of the litigation by a negotiated settlement with plaintiff, a polic favored by the law and certainly an economically sensible decision. (*Finley v. Yuba County Water Dis* (1979) 99 Cal.App.3d 691, 699-700.) The defendants' efforts to secure counsel for representation at tri in the event settlement negotiations failed were patently without indicia of bad faith. Recognizing tha the contingency of trial might become a reality, defendants demonstrated reasonable diligence in seekin and securing legal representation. The attorney selected, appropriately and expeditiously, pursue investigation and formal discovery to familiarize himself with the subject matter of the litigation. Thi activity uncovered grounds to file the compulsory cross-complaint against the plaintiff and the motio was duly made before the commencement of trial. (*Silver Organizations Ltd. V. Frank* (1990) 21 Cal.App.3d 94, 100-101.)

Here, the moving Defendant has been represented by retained counsel throughout this litigatio the partial Phase 1 trial, and settlement efforts. As stated above, Defendant has by its answer to th Plaintiff's Complaint and its affirmative defenses claimed that the basin was for the five (5) yea preceding October 1999 in overdraft; that Defendant had a priority right to store water; that there wer other overlying landowners which were indispensable and necessary parties needed for the adjudicatio that it had acquired prescriptive rights; and, that it had priority rights to the return flows[6].

In its answer filed on July 3, 2000 to the Complaint of Diamond Farming Company, the movin party, Los Angeles County Waterworks District No. 40, alleged in paragraph 7:

> "The production of groundwater from the Lancaster Sub-basin by County Waterworks District began in 1919 and has been open, notorious and under claim of right hostile to any rights of Plaintiff and has continued for a period of more than five consecutive years, during which time, County Waterworks Districts are informed and believe, and thereon allege, included a period of five consecutive years during which the Lancaster Sub-basin was in a state of overdraft." (See Exhibit "A" to Declaration of Bob H. Joyce in Support of Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

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[6] See Exhibits "A" and "B" to the Declaration of Bob H. Joyce in Support of the Opposition t Motion for Leave to File the [Proposed] Cross-Complaint: Defendants Answers to the First Amende and Supplemental complaint to Quiet Title Case #344436 paragraphs 7, 8, 9, 3rd Affirmative Defense and 8th Affirmative Defense; Answer to First Amended and Supplemental complaint to Quiet Title Cas #344668 paragraphs 5, 6, 7, 3rd Affirmative Defense and 8th Affirmative Defense.

The condition of "overdraft," is not a "new fact," as suggested by the moving party, Waterworks District, in support of the Motion for Leave to File the [Proposed] Cross-Compla Additionally, as noted above, the moving party, Waterworks District No. 40, asserted every claim r set forth in the [Proposed] Cross-Complaint by affirmative averments and affirmative defenses in answers. (See Exhibits "A," "B," and "C" to Declaration of Bob H. Joyce in Support of the Opposit to Motion for Leave to File the [Proposed] Cross-Complaint.) These claims as reasserted in [Proposed] Cross-Complaint are not "new claims" and were affirmatively put into issue by mov party's answers filed on July 3, 2000, December 15, 2000, and December 8, 2003. The moving pa suggests that the addition of 200-300 additional overlying landowners is necessary to the adjudicat of this matter, but fails to advise this Court that the perceived necessity for the joinder of additic overlying landowners was known to and asserted by this moving party as early as July 3, 2000, whe filed its first answer. In its third affirmative defense, the moving party then asserted:

> "(Failure to join indispensable and necessary parties) Plaintiff has failed to join as parties to this action, all overlying landowners in the Lancaster Sub-basin, which persons are indispensable and necessary parties to this action." (See Exhibit "A" to Declaration of Bob H. Joyce in Support of Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

To the extent that this moving party now desires to litigate its claim of prescription and ot claims as against all other overlying landowners, the as yet unidentified ROE cross-defendants, mov party has not provided this Court with any explanation for its failure to file the now [Proposed] Cro Complaint against those ROE cross-defendants prior to the time that the Court set Plaintiff's action trial as is required by Code of Civil Procedure section 428.50(b). The proposed ROE cross-defendar were not then and are not now indispensable or necessary parties to Plaintiff's right to quiet its title the specifically identified property set forth in Plaintiff's Complaints. Those 200-300 ROE cro defendants are only indispensable and necessary parties to the moving parties now belated desire adjudicate its alleged claim of prescriptive priority as against all overlying landowners and not just the Plaintiffs in this action. Moving party must provide to this Court a plausible explanation for why it c not file the now [Proposed] Cross-Complaint on July 3, 2000, at the time that it filed its answer Plaintiff's Complaint! No plausible excuse exist and this motion should therefore be denied.

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IV.

DEFENDANT'S [PROPOSED] CROSS-COMPLAINT IS UNNECESSARY TO LITIGATE THE ISSUES BETWEEN THE PARTIES CURRENTLY BEFORE THE COURT

A cross-complaint allows a party against whom relief is sought to assert claims for affirmativ relief against the plaintiff (compulsory) or third parties (permissive). The reason for allowing cross complaints is to have a complete determination of a controversy among the parties in one action, thu avoiding circuity of action and duplication of time and effort. *City of Hanford v Superior Court* (198 208 Cal App 3d 580, 587-588.

It has been held that in a quiet title action, the complaint and the answer put the whole questio of plaintiff's ownership and right of possession in issue. Hence, a cross-complaint, insofar as it asser claims adverse to title, is surplusage and serves no purpose in the matter of defining the ultimate factu issue. Any special finding on the adverse claims of title of a defendant set up by way of cross-complair is unnecessary. (*Thornton v. Stevenson* (1960) 185 Cal. App. 2d 708, 714 *citing Bank of America* v *O'Shields* (1954) 128 Cal.App.2d 212, 218-219, *Wilson v. Madison* (1880) 55 Cal. 5, 8; *Miller v. Luc* (1889) 80 Cal. 257, 265.) Where the relief demanded by defendant can be had upon the denials an affirmative averments of his answer, a cross-complaint is unnecessary. (*Winter v. McMillan* (1890) 8 Cal. 256, 264.)

There is no issue tendered by the [Proposed] Cross-Complaint as against Plaintiffs which is no already before this Court on the complaints and the Defendant's answers. A thorough examination o the [Proposed] Cross-Complaint reveals that Defendant is not seeking to litigate any "new" or recently discovered causes of action against Plaintiffs. Defendant in the [Proposed] Cross-Complaint is seeking a ruling from the Court: 1) declaring it to have priority Prescriptive rights; 2) imposing a Physica Solution; 3) confirming a claimed Municipal Priority; 4) confirming an alleged priority for Storage o Imported Waters; 5) confirming a priority to Recapture Return Flows; and 6) confirming an allegec Unreasonable Use of Water.

In all versions of Defendant's answers to the various complaints it has made the same denials anc asserted by affirmative defense claims which are identical to the alleged "new" claims being asserted in the [Proposed] Cross-Complaint. This Defendant also incorporated all affirmative defenses filed by other

defendants into the Third Answer filed on December 8, 2003.[7] (See Defendant's Answer to Secon Amended Complaint, 23rd Affirmative Defense. Exhibit "C" to Declaration of Bob H. Joyce in Suppor of Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.) The affirmative claim made by moving party in its answers are as follows:[8]

Prescriptive rights: 8th Affirmative Defense contained in the First Answer; 8th Affirmative Defense contained in the Second Answer; 6th and 13th Affirmative Defenses in Defendant's Third Answer. (See Exhibits "A," "B," and "C" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

Physical Solution: 5th Affirmative Defense contained in the Third Answer. (See Exhibit "C" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

Municipal Priority: Paragraph 7 and the 6th Affirmative Defense contained in the First Answer; Paragraph 5 and the 6th Affirmative Defense contained in the Second Answer; Paragraph 17, 11th and 15th Affirmative Defenses contained in the Third Answer. (See Exhibits "A," "B," and "C" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

Storage of Imported Waters: Paragraph 9 and 10(b)(4) contained in the First Answer; Paragraphs 7 and 8(4) contained in the Second Answer; Paragraphs 19 and 20(4) contained in the Third Answer. (See Exhibits "A," "B," and "C" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

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[7] Defendant Rosamond Community Services District was the only other party who answered the Second Amended Complaint of Wm. Bolthouse Farms. It also asserted Prescriptive rights; Municipal Priority; and Unreasonable Use of Water.

[8] For Purposes of this section, the First Answer is Exhibit "A" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint: Defendant's Answer filed on July 3, 2000; the Second Answer is Exhibit "B"to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint: Defendant's Answer filed on December 15, 2000; the Third Answer is Exhibit "C" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint: Defendant's Answer filed on December 8, 2003.

Recapture of Return Flows: Paragraph 8 and 10(b)(2) and (3) contained in the First Answe Paragraphs 6 and 8(2) and (3) contained in the Second Answer; Paragraphs 18 and 20(2) and (3 contained in the Third Answer. (See Exhibits "A," "B," and "C" to Declaration of Bob H. Joyce i Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

Unreasonable Use of Water: 4th Affirmative Defense contained in the Third Answer. (See Exhibi "C" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File th [Proposed] Cross-Complaint.)

Further, the rights claimed by the district in paragraph 7 of the proposed cross-complaint are identical to the rights claimed in the first answer at paragraph 10 and the prayer for relief; are identical to the rights claimed in the second answer at paragraph 8 and the prayer for relief; and also identical to the rights claimed in the third answer at paragraph 20 and the prayer for relief. (See Exhibits "A," "B," and "C" to Declaration of Bob H. Joyce in Support of the Opposition to Motion for Leave to File the [Proposed] Cross-Complaint.)

In the ordinary quiet title action, a cross-complaint is permitted when the purpose of a cross-complaint is to prevent plaintiff from dismissing his action before trial. (*Thornton, supra*, 185 Cal. App. 2d at 714 *citing Sormano* v. *Wood* (1918) 179 Cal. 102, 104-105.) This is not the situation here. Trial has already commenced and plaintiff has no intention of dismissing this action short of a judgment quieting its title in its property.

Since the issues raised in the Plaintiff's complaints and the answers of this moving Defendant are identical to the claims sought to be litigated in the [Proposed] Cross-Complaint as against these Plaintiffs, the cross-complaint is unnecessary and therefore leave to file the cross-complaint should be denied. The conceded ulterior motive is that of the moving party to litigate its claim of priority based on prescription against other overlying landowners, the 200-300 ROE cross-defendants, presently non-parties, and against all other overlying real property apart from the specifically identified parcels described in Plaintiff's Complaints. Let moving party do that which it threatens, that is to file a separate action. This motion should be denied.

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V.

DEFENDANT'S PROPOSED CROSS COMPLAINT IS DEFECTIVE

Throughout Defendant's motion for leave it makes vague references to "other farming interests" and "other persons and entities" amounting to 200-300 new parties including 70 mutual water companies in the Antelope Valley, claiming they all have some type of interest in this action. (Motion for Leave, page 3, lines 3-7, page 6, lines 21-25 and page 8, lines 8-17.) Yet Defendant has not identified by name or named a single additional party in the proposed cross-complaint.

Defendant has improperly used the ROE designation. Code of Civil Procedure section 474, which governs the use of fictitious names, provides a plaintiff may use the DOE designation when he is truly ignorant of the name of a defendant (cross-defendant) and he must state the fact of ignorance in the complaint. The time at which a defendant has to be ignorant of the "DOES's" identity is at the time he filed the complaint (cross-complaint). (*Munoz v Purdy* (1979) 91 Cal App 3d 942, 946-947.) It does not allow a plaintiff to name a known defendant or cross-defendant in a fictitious manner hoping to surprise a defendant or cross-defendant by reviving a claim that has been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. (*Id.*)

Based on the affirmative statements in the motion for leave, Defendant is clearly not "ignorant" of the identities of the proposed ROE cross-defendants. Defendant has identified a group of farming interests who have retained counsel and already appeared and are expected to appear at the hearing of this motion (Motion for Leave, page 3, lines 3-7.) Clearly their identifies are known to Defendant, yet they are not named in the [Proposed] Cross-Complaint. They know the identity of the other appropriator defendants, know that in an adjudication the *inter se* rights amongst all appropriators must also be litigated, yet they are not named in the cross-complaint. (Motion for Leave, page 5, lines 3-5.) The identity of the seventy (70) plus municipal water companies is a matter of public record, yet they have not been identified. Further other "non-party persons and other entities" have told defendant's counsel that they intend to become involved in the matter. Presumably they had names and identities and yet they were not named. (Motion for Leave, page 8, lines 8-11.)

Defendant's omission renders its [Proposed] Cross-Complaint defective because Defendant is clearly aware of the names and identities of more than a few of the [Proposed] ROE cross- defendants.

This failure to name these defendants prevents the court form evaluating whether the addition of these parties is in fact necessary to a resolution of the issues between plaintiff and defendant.

VI.

DEFENDANT'S REQUEST FOR LEAVE MUST BE DENIED BECAUSE IT IS NOT IN THE INTEREST OF JUSTICE AND IS PREJUDICIAL TO PLAINTIFF. IF THIS COURT GRANTS LEAVE TO FILE THE CROSS-COMPLAINT IT SHOULD DO SO ON THE CONDITION THAT DEFENDANT PAY PLAINTIFFS THEIR REASONABLE TRIAL AND TRIAL PREPARATION EXPENSES.

Determination of the "interest of Justice" has been assessed under many different statutes. In addressing the terminology and its meaning the courts have noted that the same principles that govern the exercise of the court's discretion in allowing amendments to pleadings under CCP § 473, apply with respect to motions to modify or amend pretrial orders; any difference there may be between the meaning of the phrase "to prevent manifest injustice," as used in former Cal Rules of Court, rule 216, and the phrase "in furtherance of justice," as used in CCP § 473, is of no meaningful significance. *Universal Underwriters Ins. Co. v Superior Court of Los Angeles County* (1967) 250 Cal App 2d 722, 727 Superseded by statute as stated in *Guzman v. General Motors Corp.* (1984) 154 Cal. App. 3d 438, 443.) Allowing the cross-complaint that brings in additional parties will render previous work done to date useless and void. This Court should deny the motion for leave.

Assuming, for the sake of argument, that the Court finds good cause and therefore decides to grant the motion in whole or, in part, it will be necessary to retry that portion of the Phase I trial since Defendant anticipates adding some 200-300 new parties who will not be bound by any of the evidence thus far proffered given their lack of participation and opportunity to cross-examine the expert witnesses who have thus far testified. The Court has discretion "in the interest of justice" to grant relief "upon any terms as may be just ... ." (Code of Civil Procedure section 473, subd. (b).) At the time that the Phase I trial was suspended on September 6, 2002, these Plaintiffs had requested that the Trial Court condition its Order upon compelling the Defendants to reimburse these Plaintiffs for the expert witness fees, attorneys' fees, and related expenses incurred in prosecuting the Phase I trial to that point. Upon the hearing of the Motion, and Plaintiffs' request for reimbursement for the costs, attorneys' fees, expert witness fees, and expenses incurred in preparation for and the conducting of the Phase I trial to that point, the Honorable Joan F. Ettinger, Commissioner, held as follows:

"THE COURT: That's true. I think to the extent that I – I think I have authority at any time to – assuming due process is met. I think due process is met here – to change the ruling. Essentially, what I'm doing is I am now vacating my prior ruling on the motion to bifurcate. Once I do that, it kind of all falls in." Reporter's Transcript of Proceedings (Sept. 6, 2002) at p. 27, lines 20-25.

"THE COURT: It's unfortunate, though, and I don't know quite at this point how to deal with this. The end result is I'm going to grant the motion, whether we call it 473 or whether – there is no need for anyone to do any additional briefing. I don't think. I think everyone's due process right was met. Even if I'm not granting it under 473, I'm granting it on the basis that there was no meeting of the minds, and the net result of the stipulation is calling for some legal impossibility. I'm going to reserve your request for the sanctions and all of that so people can look at it a little bit more.

I truly feel this is a bad situation because of the amount of time that was spent. I think a lot of it can be salvaged because I do think what I have heard so far is not in any way wasted, and I would have needed that type of testimony anyway for the foundational opinions of these experts. You have to have some understanding of what their understanding is of the geography of the basin to even get to the math. The trial testimony wasn't a problem." Reporter's Transcript of Proceedings (Sept. 6, 2002) at p. 18, lines 1-19.

"THE COURT: On the other hand, I have enough concern about how this all came about that I don't want to dismiss lightly what they are asking for. I think it deserves more consideration than I can give it until I see what the end result is.

That's why, again, I think I will grant the motion reserving the jurisdiction – I'm reserving my jurisdiction to rule on their request for sanctions. The request can't go both ways. You have not noticed any sanctions." Reporter's Transcript of Proceedings (Sept. 6, 2002) at p. 26, lines 16-24.

The Trial Court then clearly contemplated that the expert testimony adduced through the date of suspension of the Phase I trial, would not be lost and would not need be duplicated at a later date. The Trial Court reserved jurisdiction and held in abeyance the Plaintiffs' then request for reimbursement, pending the outcome of the balance of the trial. If this moving party's Motion for Leave to File the [Proposed] Cross-Complaint is granted, all of the expert witness fees; attorney time spent for the Phase I trial preparation, attorney time for the participation in the Phase I trial; associated costs and travel expenses incurred in connection with the prosecution of the Phase I trial; will be wasted since this case will have to start over given the addition of the proposed 200-300 new cross-defendant parties. Consequently, it would only be in the "interest of justice" to grant this motion for leave to file this proposed cross-complaint if this Court were to condition its Order upon the Defendant being required

to reimburse the Plaintiffs for the reasonable costs and expenses they incurred in preparing for an participating in the aborted Phase I trial. If this Court grants this Defendant's Motion for Leave to Fil the [Proposed] Cross-Complaint, this Court should set a hearing date and order a briefing schedule t permit the Plaintiffs to submit, upon declaration, the amount of attorneys' fees, expert witness fees, an other related and associated costs and expenses, incurred and paid by Plaintiffs in preparation for and i the prosecution of the now aborted Phase I trial.

VII.

CONCLUSION

The Motion of the Defendant, Los Angeles County Waterworks District No. 40 for Leave to File the [Proposed] Cross-Complaint should, in the interest of justice, be denied. The moving party has not in the [Proposed] Cross-Complaint set forth any "new claims" as against these Plaintiffs which are not already pled and at issue by virtue of moving party's answers filed in response to the Complaints seeking to Quiet Title. Moving party did not file a cross-complaint at the time that it filed its answers as required by Code of Civil Procedure section 426.50(a), and proffers no plausible explanation for that omission. Moving party desires to now join 200-300 additional overlying landowners as ROW cross-defendants after trial has commenced, in violation of Code of Civil Procedure section 428.50(b), and offers no plausible excuse for the delay.

If this Court grants the moving party's Motion and permits the filing of the [Proposed] Cross-Complaint, the Court's order should condition leave to file that cross-complaint upon condition that the moving party reimburse the Plaintiffs for all attorneys' fees and expenses reasonably incurred in preparation for and the prosecution of what will then become an aborted Phase 1 trial. The Court should schedule a hearing date and order the Plaintiffs to brief and submit by declaration those fees and

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expenses and permit the moving party an opportunity to respond and challenge that request. Thes Plaintiffs should not suffer the significant financial consequences of this moving party's unexcused delay

Dated: November 2, 2004

LeBEAU • THELEN, LLP

By: _____
BOB H. JOYCE, ESQ.
Attorneys for Plaintiff,
DIAMOND FARMING COMPANY

PROOF OF SERVICE

DIAMOND FARMING COMPANY VS. CITY OF LANCASTER, et al.
RIVERSIDE COUNTY SUPERIOR COURT CASE NO. 344436
[CONSOLIDATED WITH CASE NOS. 344668 and 353840]

STATE OF CALIFORNIA, COUNTY OF KERN

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter Drive, Suite 300, Bakersfield, California 93309. On November 2, 2004, I served the within

OPPOSITION TO LOS ANGELES COUNTY WATERWORKS NO. 40's MOTION FOR LEAVE TO FILE CROSS-COMPLAINT AND DECLARATION. IN SUPPORT OF OPPOSITION

■ by placing ☐ the original ■ a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California, in the ordinary course of business.

■ **(OVERNIGHT/EXPRESS MAIL)** By enclosing a true copy thereof in a sealed envelope designated by United States Postal Service (Overnight Mail)/Federal Express/United Parcel Service ("UPS") addressed as shown on the above by placing said envelope(s) for ordinary business practices from Kern County. I am readily familiar with this business' practice of collecting and processing correspondence for overnight/express/UPS mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service/Federal Express/UPS in a sealed envelope with delivery fees paid/provided for at the facility regularly maintained by United States Postal Service (Overnight Mail/Federal Express/United Postal Service [or by delivering the documents to an authorized courier or driver authorized by United States Postal Service (Overnight Mail)/Federal Express/United Postal Service to receive documents].

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee(s). Executed on _____, 2004, at Bakersfield, California.

■ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that the foregoing was executed on November 2, 2004, in Bakersfield, California.

DONNA M. LUIS

DIAMOND FARMING COMPANY VS. CITY OF LANCASTER, et al.
RIVERSIDE COUNTY SUPERIOR COURT CASE NO. 344436
[CONSOLIDATED WITH CASE NOS. 344668 and 353840]

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