EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b))

ANTELOPE VALLEY GROUNDWATER CASES

Included actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company
Los Angeles Superior Court
Case No. BC 325201

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company
Kern County Superior Court
Case No. S-1500-CV 254348 NFT

Diamond Farming Company vs. City of Lancaster
Riverside County Superior Court
Lead Case No. RIC 344436 [Consolidated w/Case Nos. 344668 & 353840]

Judicial Council Coordination No. 4408

Case No.: 1-05-CV-049053

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF DEFENDANT, DIAMOND FARMING COMPANY

Date: December 2, 2005
Time: 10:00 a.m.
Dept: 1, Rm 534

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I.

COUNT ONE FAILS TO STATE A CAUSE OF ACTION AND IS UNCERTAIN (CODE OF CIVIL PROCEDURE SECTIONS 430.10(a)(b)(e)(f))

A. *Waterworks' acquisition of title by prescription is not authorized, is Constitutionally prohibited, ultra vires, and void ab initio.*

The Plaintiff, Los Angeles County Waterworks District No. 40, is but a political subdivision of the County of Los Angeles. The county itself:

> ". . . is a creature of limited powers, having only those powers which are delegated to it by the Constitution or the Legislature. And when a county acts as it does here under authority derived from a statute, it must strictly follow the statutory provisions; the mode of the power is also the measure of the power. [Citations omitted.]" *Edward R. Richter v. Board of Supervisors of Sacramento County* ((1968) 259 Cal.App.2d 99.

> "The county board of supervisors possesses and can exercise only such powers as are expressly granted it by the Constitution or statutes, together with those powers as arise by necessary implication from those expressly granted. (Cal.Const., art. XI, § 1; art. XI, § 7 ½, subd. 4; Gov. Code, § 23003; *County of Modoc v. Spencer & Raker*, 103 Cal. 498 [37 P. 483.].)" *John R. Byers v. Board of Supervisors of San Bernardino County* ((1968) 262 Cal.App.2d 148.

> "Any reasonable doubt concerning the existence of a power is resolved by the courts against the municipality." *Von Schmidt v. Widber* (1894) 105 Cal. 151 at 157, 159, 38 P. 682.

The Plaintiff is a creature of statute. (See California Water Code §§ 55000 et seq.; See also *Crawford v. County of Los Angeles* (1932) 128 Cal.App. 368. Waterworks Districts are agencies of the state established by the Board of Supervisors pursuant to the Waterworks Act.) Thus, Plaintiff may exercise only those powers as are expressly granted by the Constitution or by Statute and the expressed mode of the power to be exercised is also the measure of that power. An act beyond the powers conferred is *ultra vires* and void *ab initio*.

> "An ultra vires act is one 'performed without any authority to act . . . [An] ultra vires act of a municipality is one which is beyond the powers conferred upon it by law.' Black's Law Dictionary 1522 (6th ed. 1990). [Citations omitted.]" *In re County of Orange v. Fuji Securities, Inc.* (1998) 31 F. Supp. 2d 768, 774.

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Both the mode and the measure of the power of Waterworks to acquire title to real property is expressly provided for and limited in California Water Code § 55370 which states:

> "Section 55370 title to property
>
> A district may acquire property by purchase, gift, devise, exchange, descent, and imminent domain. The title to all property which may have been acquired for a district shall be vested in the district."

Code of Civil Procedure § 1858.

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Water Code § 55370 is not by its express terms at all ambiguous. The authority for the acquisition of title to real property by Waterworks under a claim of prescription is not expressly granted by that statute. Waterworks must therefore argue the authority to acquire title to real property under a claim of prescription arises " . . . by necessary implication. . . ." *Byers, supra*. An implied power cannot diminish or otherwise vitiate a Federal or California State Constitutional provision or right.

> "It has long been the law that courts have inherent authority to determine whether statutes enacted by the Legislature transcend the limits imposed by either federal or state Constitutions. (*Marbury v. Madison*, 1 Cranch (U.S.) 137 [2 L.Ed. 60]. This power of the courts to pass on the constitutionality of legislative enactments is not derived from any specific constitutional provision, but is a necessary consequence of our system of government. It is the duty of courts to maintain supremacy of the Constitution. *(Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 92 [106 P. 404, 29 L.R.A. N.S. 213]*; Earle v. Board of Education of San Francisco*, 55 Cal. 489, 491.)" *John R. Byers v. Board of Supervisors of San Bernardino County* ((1968) 262 Cal.App.2d 148

The Federal Constitution, the 5th Amendment as applied to the States by the 14th Amendment, and the California State Constitution as originally drafted in 1849, Article I, Section 8, both provided by similar language that private property could not be taken for public use without just compensation. The original drafters of the California State Constitution, made no express provision as to when compensation must be paid in relationship to the timing of the taking. Nor did they address how or in what manner or under what procedures the necessity for the taking or the amount to be paid was to be determined. Both recognize the inherent power to take private property for public use.

"Under our system of government all powers not granted by the Constitution of the

United States to the federal government are reserved to the states, and the power of eminent domain is one of those reserved powers. It does not as a consequence, depend for its existence upon a specific grant in the constitution of a state. Instead, it is inherent in the sovereign state and founded upon the law of necessity. The power however, may be limited by constitutional provision, and it has been held that a constitutional provision for the payment of compensation is a limitation aimed by the Constitution at the power of eminent domain, limiting the exercise of that power by the public in favor of the individual owner of property. [Emphasis added.] (*Commonwealth v. Plymouth Coal Co.*, 232 Pa. 141 [81 Atl. 148] (Aff. 232 U.S. 531 [34 S. Ct. 359, 58 L. Ed. 713]); 18 Am. Jur. 635.)" *Mary V. Rose vs. State of California* (1942) 19 Cal.2d 713.

Since the first Constitutional Convention in 1849-1850, our State Constitution has undergone a series of wholesale amendments and revisions, the takings clause not excepted. It now reads:

"Section 19. Eminent Domain.

'Private property may be taken or damaged for public use only when just compensation ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The legislature may provide for possession by the condemner following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be amount of just compensation.'" [Emphasis added.] Cal. Constitution, Article I, § 19. (As Amended in 1974.)

The same rules of construction apply whether the court is construing a Statutory or Constitutional provision.

"Under California law, the rules of statutory construction are the same whether applied to the California Constitution or a statutory provision, *Winchester v. Mabury*, 122 Cal. 522, 527, 55 P. 393 (1898), and interpretation of these provisions is a question of law for the courts. *Culligan Water Conditioning v. State Bd. of Equalization*, 17 Cal. 3d 86, 93, 130 Cal. Rptr. 321, 550 P.2d 593 (1976). If the clear and unambiguous language can resolve a question of statutory interpretation, California law requires the court look no further to search for legislative intent. See *Delaney v. Superior Court*, 50 Cal. 3d 785, 798, 268 Cal. Rptr. 753, 789 P.2d 934 (1990); see also *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 724, 257 Cal. Rptr. 708, 771 P.2d 406 (1989). The words of the statute are given 'their usual and ordinary meaning,' *Lennane v. Franchise Tax Bd.*, 9 Cal. 4th 263, 268, 885 P.2d 976 (1994). Additionally, 'words must be construed in context, and statues must be harmonized, both internally and with each other, to the extent possible.' *Woods v. Young*, 53 Cal. 3d 315, 323, 279 Cal.Rptr. 613, 807 P.2d 455 (1991). 'Interpretations that lead to absurd results or render words surplusage are to be avoided.' Id." *In re County of Orange v. Fuji Securities, Inc.* (1998) 31 F. Supp. 2d 768, 774.

The temporal conditions and procedural aspects of the current takings clause have their genesis in the first efforts to amend the California State Constitution following statehood in 1879. (See former State Constitution, Article I, section 14, as amended and re-numbered in 1879, and as amended thereafter in 1911, 1918, and 1934.) In "An Overview of the History of the Constitutional Provisions Dealing With State Governance," the author, Pat Ooley, observed that in the post Civil War era leading up to the depression of 1873 through 1878 that cynicism had set in and that the power of the industrialists and

specifically in California the Southern Pacific Railroad Company resulted in a perception that both the federal and local governments were corrupt and the pawns of corporate interest. The author further observed that as a consequence reform movements were coalescing across the entire Nation and infested the California Constitutional Convention of 1878-1879.

> "The zealous revisionist of 1879, however, established a precedent for allowing statutory material to find its way into the Constitution. The reform-driven necessity to instruct and restrict the legislature, municipalities, local governments, and corporations repealed the canon of constitutional brevity." *An Overview of the History of the Constitutional Provisions Dealing With State Governance*, Pat Ooley, at www.library.ca.gov/Ccrc/reports/html/hs_state-governance.html.

From 1879 through 1934, the takings clause, in substance, retained its temporal and procedural conditions and texture. In 1923 the California Supreme Court considered the takings clause, then Article I, section 14, and concluded:

> "The Petaluma Municipal Water District is a public corporation organized solely to serve a public use. The only purpose for which it can acquire, hold, and use property is for such public use. The only means by which it can acquire such property without the owner's consent is through the exercise of the right of eminent domain. The only legal procedure provided by the constitution and statutes of this state for the taking of private property for a public use is that of a condemnation suit which the constitution expressly provides must *first* be brought before private property can be taken or damaged for a public use. (Const., art. I, sec. 14.) [Emphasis Added.] *Jacobsen v. Superior Court* (1923) 192 Cal. 317, 331.

The court then considered the 1918 Amendment which constitutionally authorized prejudgment immediate possession by the government under express conditions, and held:

> This exception only serves to emphasize the otherwise general rule that no court in any other action or proceeding than an action in eminent domain has jurisdiction to order the taking or damage of private property for a public use. This court in the cases above referred to and in the very recent case of *Weiler* v. *Superior Court*, 188 Cal. 729 [207 Pac. 247], has held upon application for writs of *certiorari* that the superior court has no jurisdiction in a condemnation suit to order the invasion of private property for a public use until just compensation has first been made therefor in such proceedings. It would seem to follow irresistibly that a superior court has no jurisdiction to make such an order in any other action or proceeding than the one to which it is limited in its power to make any order or decree at all directing the taking or damage of private property for a public use." *Jacobsen, supra*, 331.

From 1879 through 1974, California's taking clause, in its various iterations, imposed an express temporal condition, that is, that the taking could not occur ". . . without just compensation having been *first* made . . . ." See *City of Needles vs. Griswold* (1992) 6 Cal.App.4th 1881, 1893. When the

California State Constitution was reorganized in 1974 and former Article I, section 14 was renumbered, Article I, section 19, the text of the section itself was further amended. The drafters retained the temporal condition that compensation precede the taking and added the additional express delimiting term "only", in the first sentence. The same now reads: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." This author is aware of no post 1974 case wherein a court has construed or explained the unambiguous limitations in Article I, Section 19. The rules of construction do not require this Court to go beyond the plain language employed. *See, In Re County of Orange, supra.* In light of the express limitations contained within Article I, section 19, can Waterworks take private property for a public use by prescription without compensation? If so, from what Constitutional or Statutory authority does that power emanate? It cannot be reasonably implied when expressly limited. The effort is *ultra vires* and void *ab initio*.

In *City of Barstow v. Mojave Water Agency* (1998) 64 Cal.App.4th 737, the Fourth District held that overlying rights were not subject to a "physical solution" adjudicated over objection, affirming that acquisition by the government cannot happen without due process and just compensation.

> "In other words, we agree with the Cardozo Appellants that, if the public agencies desire to acquire the vested property rights of the Cardozo Appellants, they should use their eminent domain powers: '". . . If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain.'" (*Irrigation Dist. v. Mt. Shasta P. Corp. (1927) 202 Cal. 56, 66, 259 P. 444.* n14.)"[1]

B. *The complaints fail to state facts sufficient to state a cause of action and are uncertain because they plead by legal conclusion and do not plead facts of the "claim of right," "hostility," and "adversity," and do not plead any landowner had notice of those claims.*

This action is initiated by Waterworks to establish a right superior and adverse to Diamond's title to its property. It seeks to establish a prescriptive right in groundwater. However, Waterworks does not plead sufficient facts to establish that it has met its pleading burden in asserting its prescriptive claim.

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1 (Affirmed in all material respects in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224; See also, *United States v. State Water Resources Control Bd.* (1986) 182 Cal. App. 3d 82, 100- 101 ["It is a fundamental principle of water law that one may not withdraw water from its source without first acquiring 'water rights.' . . . It is equally axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation."].)

> "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."[2]
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> . . . . .
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> "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]."[3]

Plaintiff inferentially asserts that the ordinary priorities between it and overlying landowners, including Diamond, has been reversed due to its 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.

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2 (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.)

3 (*City of Barstow* at 1241.)

128.)"[Emphasis Added.][4]

Plaintiff claims its prescriptive rights based upon an insufficient conclusionary averment that it has pumped groundwater from the Basin " . . . *under a claim of right in an actual, open, notorious, exclusive, continuous, hostile and adverse manner* . . ." for more than five years and before the filing of the complaint. Plaintiff then pleads that Diamond has had "actual *and/or constructive notice*" of its "*pumping*" "*either of which is sufficient to establish*" Waterworks' prescriptive right.[5]

This special Demurrer for uncertainty should be sustained with leave to amend, and Waterworks should be directed to re-plead its causes of action, if any it has, consistent with the Quiet Title statutes pursuant to the concurrently filed motion pursuant to Code of Civil Procedure § 760.030. The general and conclusionary pleading by a string of adjectives intended to characterize the nature of its "pumping," is insufficient and devoid of underlying predicate facts of hostility, adversity and claim of right. The pled claim of exclusivity is contradicted by the express allegations of landowner pumping pled in the same Complaint. The pled claim that all Defendants had "actual and/or constructive notice" of District's "pumping" is uncertain and insufficient. The alleged notice of that "pumping" is not pled notice of its "claim of right," "claim of hostility," nor "claim of adversity," and is therefore insufficient to plead the notice requirement inherent in any prescriptive claim.

Waterworks does not plead that it has physically invaded or trespassed upon Diamond Farming's real property or that of any other "Doe" overlying landowner. Waterworks has not pled any conduct which would evidence or suggest that it has in any way interfered with Diamond Farming's use and enjoyment of its property. Waterworks has not alleged that it has by its pumping or any other conduct interfered with or limited in any way Diamond Farming's exercise of its overlying right nor prevented Diamond Farming from pumping nor that it has deprived Diamond Farming or any other overlying landowner of any water whatsoever. (See *Pleasant Valley Canal Co., supra*, p. 784.)

For well over a century, the California Supreme Court has held that prescription follows upon a presumption that the adversely affected landowner, with knowledge of the adverse claim, by

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4 (*Pleasant Valley Canal Co. v. Borrow* (1998) 61 Cal.App.4th 742, 784.)

5 (Both Complaints, ¶30 [emphasis added].)

acquiescence, impliedly granted an easement or license to the prescripting party.

> "Title by prescription is created in such cases only where the conduct of the party who submits to the use by another cannot be accounted for on any other hypotheses than that which raises the presumption of the grant of an easement. The conduct of the party claiming the benefit of the presumption must in all cases have been such in itself as to give the other party the right to complain." (*Lakeside Ditch Company* v. *Henry A. Crane, et al.* (1889) 80 Cal. 181; pp. 183-184.)

In *Peck* v. *Howard* (1946) 73 Cal.App.2d 308, at pages 325-326, the Second District Court of Appeals observed:

> "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.) (*Peck*, *supra*.)

That court, further held:

> "That owners are not affected by acts which do not bring to them knowledge of the assertion of an adverse right, and that the use by the adverse claimant was not hostile unless there was an actual clash with the rights of the actual owners, and that before a right by prescription is established the acts by which such establishment is sought must operate as an invasion of the rights of the parties against whom it is set up, was the holding in *Anaheim Water Co.* v. *Semi-Tropic Water Co.*, 64 Cal. 185, 192 [30 P. 623]; *City of San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 133 [287 P. 475]; *Churchill* v. *Louie*, 135 Cal. 608, 611 [67 P. 1052]; *Skelly* v. *Cowell*, 37 Cal.App. 215, 218 [173 P. 609]; *Faulkner* v. *Rondoni*, 104 Cal. 140, 147 [37 P. 883]; *Pabst* v. *Finmand*, 190 Cal. 124, 128, 129 [211 P. 11.]. To the same effect, was the holding in the well considered case of *Jobling* v. *Tuttle*, 75 Kan. 351 [89 P. 699, 9 L.R.A.N.S. 960, 965, 966], and *Dondero* v. *O'Hara* [***39] , 3 Cal.App. 633 [86 P. 985]."

Waterworks in its attempt to reverse the common law priority granted to overlying landowners, has the burden to plead facts not conclusions as to every element necessary to that claim of prescription. In all groundwater basins within the State of California, as well as the subject Antelope Valley, historically and currently groundwater pumping for agricultural irrigation purposes has co-existed with and occurred concurrently with groundwater pumping by appropriators for municipal and industrial use. In the absence of a manifested shortage, there is no adversity, and no overlying landowner could complain about the groundwater pumping by any municipality or appropriator. (*Wright* v. *Goleta* (1985) 174 Cal.App.3d 74.) Thus, at the outset, the pumping of any municipality or appropriator would be permissive and lawful. It is only at some undefined point in historical time thereafter that the appropriator's pumping could possibly become hostile or adverse. Before that pumping can ripen by

prescription into a priority right, each separate owner of each separate parcel having overlying rights must have been notified that the pumping by the one claiming the right based upon prescription ". . . is hostile to his claim, or the statute does not operate on his right." (See, *Unger* v. *Mooney, et al.* (1883) 63 Cal. 586; P. 592.)

The last cited case involved the analogous situation of co-tenants where one, through a claim of adverse possession, sought to oust the title held by the other co-tenant. The court held that the co-tenant's possession was *ab initio* lawful and could not alone support the claim. Petitioner's pumping of groundwater was *ab initio* in 1919, lawful also.

> "Hence there must be some conduct of the occupying tenant evidenced by acts or declarations, or both, in its nature and essence hostile to the title of the tenant out of possession, and imparting knowledge of such hostility to the latter, to affect his right." [Emphasis added.] (*Unger, supra*, at p. 592.)

Knowledge of the adverse and hostile claim must be first imparted to an affected landowner before the prescriptive period can commence to run. It is only upon notice & after notice and inaction and thus acquiescence for the statutory period that the prescriptive claim can be perfected.

> "This right [notice] of the injured party is a cardinal fact that must exist, else all statutes of limitation and all rules of prescription or of presumption, of license or grant, would be but rules of spoilation or robbery." [Bracket insert added.] See *Sullivan* v. *Zeiner* (1893) 98 Cal. 346; pp. 351-352.

The alleged fact of "pumping" alone, conjoined with the allegation that the Defendants had notice of its "pumping" is not a sufficient substitute for the required pleading that it imparted knowledge of its claim of right, adversity and hostility to each affected landowner. Permissive use alone is not sufficient to establish a prescriptive title. Waterworks "pumping" was *ab initio* permissive. Where the use is in the first instance permissive, it requires more than continued use for the statutory period; i.e., notice to the legal owner that the continued use was hostile and under a claim of right. See *Case v. Uridge* (1960) 180 Cal.App.2d 1, 7-8.

> "The law will presume that the land belongs to the owner of the paper title, and that the use was by permission or silent acquiescence. If this presumption is overcome by evidence showing the use to have been hostile, and that the owner new of such hostile claim, and took no steps to protect his property, for a period of five years, then the presumption changes. No injustice is done to the owner, if he knows the claim to be hostile, and that title is being asserted against him, but neglects for five

> years to avail himself of the right which the law gives him." [Emphasis added.] *Clark v. Clark* (1901) 133 Cal. 667, 670-671.

> "It is not sufficient that the claim of right exist only in the mind of the person claiming it. It must in some way be asserted in such manner that the owner may know of the claim." [Emphasis added.] *Rochex & Rochex, Inc. v. Southern Pacific Company* (1932) 128 Cal.App. 474, 479-480.

The District has not pled that any landowner had actual and/or constructive notice of its "claim of right" or its "claim of hostility and adversity" and that title was being asserted against them. See *Clark, supra*. Without pleading that each and every landowner had notice in fact of the District's claim of right, hostility and adversity, the District has not pled the requisite elements to support its prescriptive claim. The sole allegation of knowledge of the fact of its "pumping" alone is insufficient.

The California Supreme Court in *City of Los Angeles* v. *City of San Fernando* (1975) 14 Cal.3d 199, at page 1311 makes clear " . . . if the other party is not on notice that the overdraft exists, such adverse taking does not cause the commencement of the prescriptive period." That court continued:

> "The findings that the takings from the basin were open and notorious and were continuously asserted to be adverse does not establish that the owners were on notice of adversity in fact caused by the actual commencement of overdraft." [Emphasis added.] (*City of Los Angeles*, *supra*, at p. 1311.)

C. *Waterworks must plead that by its acts or declarations that it imparted constitutionally sufficient due process notice to each landowner.*

The Complaints must be amended. Upon amendment, Waterworks should be ordered to plead the fact of its acts and/or declarations which by their quality satisfy the Constitutional due process standard of notice. Under the 5th and 14th Amendment to the Federal Constitution, Waterworks is prohibited from depriving any person of property without due process of law, fundamentally Constitutionally sufficient due process notice. That is not to suggest that Waterworks must plead that actual notice was actually received, but the quality of the acts and declarations which it claims imparted notice must be such that it can be said that Waterworks consciously made a constitutionally sufficient attempt to provide actual notice.[6] Waterworks cannot explain its failure to provide due process notice by feigned ignorance of the existence of its prescriptive claim. In October of 1999, Diamond Farming filed its Complaint to Quiet Title. In response to that Complaint, Waterworks answered and asserted by

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6 See *Larry Dean Dusenbery vs. United States* (2002) 534 U.S. 161.

affirmative defense its prescriptive claim. The District did not thereafter undertake any affirmative acts to communicate its adverse claim of right to any of the other hundreds of potentially affected overlying landowners. Could it be that the District kept its knowledge of its prescriptive claim to itself so as to, over time, strengthen that claim as against all other Doe overlying landowners, and over time, increase the quantity of water in could claim?

D. *The facts pled fail to disclose when all or any landowner first had an accrued cause of action for inverse condemnation.*

Since prescription is premised upon conduct sufficiently hostile and adverse, such that they must give to the injured party a right of action, and given that petitioner is a governmental entity, invested with the power of imminent domain, petitioner's claimed taking constituted inverse condemnation.[7] The prescriptive period on a claim asserted by a governmental subdivision of the state can never commence before and must in fact coincide with the accrual of that cause of action for inverse condemnation.

Petitioner desires to acquire private property for public use, not as Constitutionally permitted upon the payment of just compensation, but instead without payment of any compensation whatsoever. The Petitioner wishes to steal from all overlying landowners under its plead theory of prescription that which the Federal and California State Constitutions mandate that it first pay for. "The law, however, is dedicated to the proposition that for every wrong there is a remedy." (*Desny* v. *Wilder* (1956) 46 Cal.2d 715, 734.) Given that the petitioner has committed the water it pumps to a public use, an injunction will not lie.

Therefore, the legal analysis used to fix the date of accrual of a cause of action in inverse condemnation must be applied to fixing the date upon which any prescriptive period asserted by the government as against private property can commence.

> "In determining the related question as to when a cause of action for inverse condemnation accrues, a 'taking' occurs 'when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property." (*Smith* v. *County of Los Angeles* (1989) 214 Cal.App.3d 266, 291; *Smart* v. *City of Los Angeles* (1980) 112 Cal.App.3d 232, 235.)
>
> "It is by focusing on the impact of the governmental activity upon the

7 This presupposes of course that the District can by Statute or Constitutionally acquire title by prescription.

> property owners actual use that the courts have determined a date of 'taking' in inverse condemnation actions." (*Smart*, *supra*, at p. 238.)

Diamond Farming and other farming interests pump groundwater for irrigation in the Antelope Valley. Additionally, there are virtually hundreds of landowners who do not have wells nor pump groundwater at all but who nonetheless have dormant unexercised overlying rights. The District likewise pumps groundwater for municipal and industrial use. It is claimed that all pumping is from a common supply, however, there is not and never has been an actual trespass nor physical invasion by the District onto any overlying landowner's property.

> "Where there is no direct physical invasion of the landowner's property and the fact of taking is not immediately apparent, the limitation's period is tolled until 'the damage is sufficiently appreciable to a reasonable [person] . . .." (*Mehl* v. *People Exrel. Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717.)

Thus, it is evident that constitutionally sufficient notice of the adverse and hostile claim and the identity and conduct of the governmental entity asserting that prescriptive right is a fundamental prerequisite to the commencement of the running of the statute of limitations for an inverse condemnation claim and thus the concurrent commencement of the prescriptive period. Upon amendment, Waterworks must plead facts of when the inverse condemnation claim accrued as to all affected landowners.

II.

COUNT ONE IS UNCERTAIN

Waterworks alleges that the basin has been and is now in a condition of overdraft. Waterworks' Complaint is fatally uncertain in that Waterworks has not pled when in historical time the overdraft commenced or when in historical time it claims that the five year prescriptive period began or ended. The First Cause of Action is uncertain and ambiguous in that it cannot be discerned therefrom whether or not the District's claim of prescription is premised upon the five years preceding the filing of these new Complaints in late 2004 or whether or not it embraces a distinct and different five year period of time which either preceded the filing by Diamond Farming of its Quiet Title action in October 1999 or some earlier five year period as yet undefined and unspecified. It is clear, as a matter of law, that no period of time following the filing by Diamond Farming of its Quiet Title action can be considered for purposes

of Waterworks' prescriptive claim as against Diamond Farming. When did the prescriptive period commence and end?[8] The Complaint is fatally uncertain in that respect, and this special Demurrer for uncertainty should be sustained with leave to amend.

III.

COUNT ONE FAILS TO STATE A CAUSE OF ACTION AS A MATTER OF LAW

In the First Cause of Action, Waterworks seeks to reverse the common law priority enjoyed by all overlying landowners. In both Complaints, it is conceded that all landowner Defendants have and are now pumping. The plead concession and fact of the pumping by Diamond Farming is fatal to Waterworks' First Cause of Action. It is pled and conceded that Diamond Farming has pumped and is pumping groundwater and has used and is using that groundwater for irrigation. The California Supreme Court in *City of Barstow v. City of Mojave Water Agency* (2000) 23 Cal.4th 1224 at p. 1248, affirmed the doctrine of "self-help," and the Appellate Court's recognition that overlying landowners retain their overlying priority by pumping. The California Supreme Court also relied in part upon the Appellate Court's decision in *Hi-Desert County Water District v. Blue Skies County Club, Inc.* (1994) 23 Cal.App.4th 1723. Therein the court held:

> "Hence, an overlying user may maintain rights to water by continuing to extract it in the face of an adverse appropriative use. Such is the doctrine of 'self-help.'" *Hi-Desert County Water District, supra*, p. 1731.

Thus, having conceded that Diamond Farming, has pumped and continues to pump groundwater and has used and continues to use that groundwater for irrigation, Waterworks cannot, as a matter of law, claim a priority by prescription, given that conceded "self-help."

IV.

COUNT TWO FAILS TO STATE A CAUSE OF ACTION AS A MATTER OF LAW

Waterworks' seeks judicial confirmation of its "Appropriative Rights." That right must presuppose pumping of surplus water. No justiciable controversy exists. This Court need not declare what the law already provides. Pumping of surplus water is appropriation and lawful. The Demurrer should be sustained without leave to amend.

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8 Districts' omission and failure to plead the dates for its 5 year prescriptive period potentially implicates some or all Defendants' rights to invoke Civil Code §§ 1107 and 1214.

V.

COUNT THREE FAILS TO STATE A CAUSE OF ACTION AS A MATTER OF LAW

In the Third Cause of Action, Waterworks seeks to invoke the equitable jurisdiction of this court. In substance, Waterworks attempts to procure an injunction, upon judgment. The District has failed to plead that it is without an adequate remedy at law. In fact, the District, as a governmental entity, is uniquely invested with the ultimate remedy at law, the power of imminent domain.

VI.

COUNT FOUR FAILS TO STATE A CAUSE OF ACTION AS A MATTER OF LAW

This count is a legal argument and not a proper claim for any relief. Water Code sections 106 and 106.5, are statements of policy, and may have application in the permitting and regulation of surface waters by the State Board under the Water Code, but do not alter the common law priorities affirmed by the California Supreme Court in the *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224. See Water Code § 103 and official comments.

VII.

CONCLUSION

WHEREFORE, AND FOR ALL OF THE FOREGOING REASONS, this Court should sustain this Demurrer as is appropriate under the law, and if leave to amend be granted, order that any subsequent amended pleading conform to the pleading and procedural requirements of California Code of Civil Procedure section 760.010.

Dated: October 27, 2005

LeBEAU • THELEN, LLP

By: _____
BOB H. JOYCE
Attorneys for DIAMOND FARMING COMPANY, a California corporation

PROOF OF SERVICE

ANTELOPE VALLEY GROUNDWATER CASES
JUDICIAL COUNSEL PROCEEDING NO. 4408
CASE NO.: 1-05-CV-049053

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 October 27, 2005, I served the within

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF DEFENDANT, DIAMOND FARMING COMPANY

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

■ PURSUANT TO THE SANTA CLARA SUPERIOR COURT E-FILING IN COMPLEX LITIGATION DEPARTMENT 17, A PROOF OF SERVICE IS GENERATED BY THE E-FILING SYSTEM

☐ (**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 _____, 2005, 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 October 27, 2005, in Bakersfield, California.

Donna M. Luis

DONNA M. LUIS