

1 ANYTHING THAT INTERFERES WITH SETTLEMENT IS INTERFERING WITH
2 THIS CASE MOVING FORWARD.

3 MR. ZLOTNICK, IF HE REPRESENTS BOTH PUMPERS AND
4 NONPUMPERS, IS GOING TO HAVE AN IMPOSSIBLE TIME PARTICIPATING
5 IN THE SETTLEMENT NEGOTIATIONS BECAUSE A CENTRAL ISSUE IN
6 THOSE NEGOTIATIONS IS HOW TO RECONCILE THE RIGHTS OF THE
7 PUMPERS VERSUS THE NONPUMPERS.

8 I REPRESENT PUMPERS. OUR BIGGEST CONCERN IS NOT
9 THE WATER PURVEYORS, IT'S THE NONPUMPERS. AND MOST OF OUR
10 PARTICIPATION IN THE SETTLEMENT NEGOTIATIONS -- WHICH ARE
11 UNDERWAY RIGHT NOW, THIS ISN'T SOMETHING IN THE FUTURE -- OUR
12 PRINCIPAL CONCERN IS TO GET A SETTLEMENT THAT PROTECTS US FROM
13 THE NONPUMPERS. IF WE CAN GET A SETTLEMENT, THEN THESE PHASES
14 OF TRIAL SUCH AS BASIN CHARACTERISTICS, PRESCRIPTION, ET
15 CETERA, MAY BECOME MOOT. MAYBE WE CAN AVOID THEM ALTOGETHER.
16 IF WE HAVE A PROPER SETTLEMENT IN THE WORKS, PERHAPS WE CAN
17 HAVE STIPULATIONS ABOUT THOSE THINGS; WE CAN REACH CONSENSUS.
18 BECAUSE IF PEOPLE KNOW WHERE THE RESOLUTION IS GOING, THEN
19 THEY CAN BE LESS CONCERNED ABOUT WHETHER WE HAVE SUBBASINS OR
20 NON-SUBBASINS.

21 THE COURT: HOW DO YOU HAVE STIPULATIONS WITH PARTIES
22 WHO ARE NOT PARTIES TO WHICH THE COURT HAS NOT OBTAINED
23 JURISDICTION?

24 MR. FIFE: RIGHT. SO THE QUESTION IS HOW TO GET THOSE
25 PEOPLE IN. AND THE POSITION THAT THE COURT HAS GOTTEN TO AT
26 THE END OF EVERY SINGLE ONE OF OUR PAST HALF DOZEN HEARINGS IS
27 THAT THERE SHOULD BE THE ZLOTNICK CLASS FOR THE NONPUMPERS --
28 AND THERE ARE ABOUT 3 HUNDRED THOUSAND PEOPLE IN THE ANTELOPE

1 VALLEY. ALMOST ALL OF THOSE ARE THE NONPUMPERS. SO WITH THE
2 CLASS OF NONPUMPERS, YOU GET ALMOST ALL THOSE PEOPLE, AND THEN
3 YOU INDIVIDUALLY NAME AND SERVE THE PUMPERS. THAT IS THE
4 POSITION WE GET TO AT THE END OF EVERY ONE OF THESE HEARINGS.
5 THAT IS THE ORDER THAT YOU ENTERED. THAT IS THE NOTICE THAT
6 MR. ZLOTNICK PREPARED.

7 IF WE HAD GONE AHEAD WITH THAT BACK WHEN THE
8 ORDER WAS ADOPTED, WE WOULD BE THROUGH THAT AND WE WOULD BE
9 THROUGH ALL THIS BY NOW. THE PROBLEM IS THAT EVERY TIME THE
10 WATER PURVEYORS -- THEY ARE REALLY THE ONES WHO OBJECT. MR.
11 ZLOTNICK PUTS OUT A NOTICE THAT CONFORMS TO THE COURT'S ORDER
12 THAT WORKS -- AND THE CURRENT NOTICE WORKS. WE HAD COMMENTS,
13 BUT THEY WERE REALLY DETAILS. WE THOUGHT IT COULD BE DONE A
14 LITTLE BIT BETTER. BUT THE NOTICE IN GENERAL WAS FINE.

15 THE PROBLEM IS THAT THE OBJECTION COMES FROM THE
16 WATER PURVEYORS WHO WANT A COMPLETELY DIFFERENT STRUCTURE FOR
17 THIS. AND THEY TRY TO TURN IT AROUND EVERY TIME. AND SO WE
18 COME BACK AND WE HAVE THIS SAME HEARING MONTH AFTER MONTH
19 AFTER MONTH.

20 THE COURT: HOW MANY NON -- STRIKE THAT. HOW MANY
21 SMALL PUMPERS ARE THERE?

22 MR. FIFE: I DON'T KNOW EXACTLY. THERE ARE -- THAT IS
23 A GOOD -- THAT IS A GOOD QUESTION, OF HOW WE GET TO THEM. AND
24 THAT'S THE STRUCTURE OF THE NOTICE THAT MR. ZLOTNICK CREATED
25 WHERE IT IS PUT UPON THEM TO SELF-IDENTIFY, TO COME FORWARD
26 AND SAY "I BELIEVE I HAVE WATER RIGHTS AND I WANT TO ASSERT
27 THOSE IN THIS CASE." THAT'S HOW WE IDENTIFY THEM.

28 THE COURT: OKAY. AND SUPPOSE THEY IGNORE IT?

1 MR. FIFE: AND THIS POINT THAT MR. DUNN HAS BROUGHT UP,
2 IT WOULD BE INTERESTING TO SEE THAT POINT FOR ONCE MADE IN
3 WRITING. I'M NOT AWARE OF ANY OF THE CASES, THE NUMEROUS
4 CASES HE SAYS ARE OUT THERE. IT WOULD BE GOOD TO SEE THIS IN
5 WRITING SO THAT WE COULD ACTUALLY RESPOND TO IT IN A COHERENT
6 WAY.

7 THE COURT: WELL, IT SEEMS TO ME PRETTY CLEAR THAT THE
8 COURT CANNOT SERVE SOMEBODY WHO IS A -- WHO IS NOT A MEMBER OF
9 THE CLASS WITH A CLASS NOTICE AND REQUIRE THEM TO DO ANYTHING.

10 MR. FIFE: AND AGAIN, THIS IS -- I WOULD LIKE TO -- I
11 WOULD LIKE THE OPPORTUNITY TO BRIEF THIS AND ACTUALLY GET TO
12 THINK ABOUT THIS ISSUE FOR MORE THAN FIVE MINUTES BEFORE
13 RESPONDING. THIS IS THE FIRST TIME IT HAS COME UP.

14 PREVIOUSLY, IT SEEMED THAT EVERYONE, INCLUDING
15 THE COURT, FELT THAT IF A PERSON DIDN'T BELONG IN THE CLASS,
16 THAT THEY OPTED OUT OF THE CLASS, THAT THEY EXCLUDED
17 THEMSELVES FROM THE CLASS, AND THAT THAT WORKED. AND THAT IF
18 THEY DIDN'T DO THAT, THEN THEY WERE ACTUALLY IN THE CLASS.
19 AND SO I DON'T -- YOU KNOW, I WOULD LIKE TO BE ABLE TO
20 ACTUALLY LOOK AT THESE CASES.

21 THE COURT: MY THOUGHTS THE LAST TIME WE WERE HERE
22 CONCERNING THAT WAS THAT WE DON'T KNOW WHO IS OR WHO IS NOT A
23 SMALL PUMPER. SOME MAY BE SPORADIC SMALL PUMPERS. WE JUST
24 DON'T KNOW. BUT IF WE SERVE A CLASS OF NONPUMPERS, AND
25 SOMEBODY SAYS "I DON'T BELONG TO THAT CLASS," IT SEEMS TO ME
26 THEY HAVE A BURDEN OF ESTABLISHING THAT.

27 MR. FIFE: UH-HUH.

28 THE COURT: AND A BURDEN OF GOING FORWARD ADVISING THE

1 COURT THAT THEY ARE NOT A MEMBER OF THAT CLASS. AND THAT
2 WAS -- CERTAINLY YOU CAN DO THAT WITH A DEFENDANT CLASS, CAN'T
3 YOU? IT SEEMS PERHAPS WITHOUT ANY DOUBT. BUT WE DON'T HAVE A
4 DEFENDANT CLASS HERE. WE ARE TALKING ABOUT A PLAINTIFF'S
5 CLASS. AND SOMEBODY IS PURPORTING TO REPRESENT SOMEBODY, AND
6 IT TURNS OUT THAT THEY ARE NOT A MEMBER OF THE CLASS. WELL,
7 OKAY. IS THAT ANY DIFFERENT THAN SOMEBODY WHO MOVES OR SELLS
8 THEIR LAND?

9 MR. FIFE: AGAIN, I'M NOT SURE THIS IS THE -- THIS IS
10 FIRST I'VE CONSIDERED THIS. WE WOULD LIKE THE OPPORTUNITY TO
11 BRIEF IT.

12 THE COURT: I SUPPOSE THE QUESTION THAT I'M REALLY
13 LOOKING TO GET ANSWERED HERE THIS MORNING IS CAN WE GO AHEAD
14 AND SERVE THE NOTICE, GET THE APPROVAL OF A FORM OF NOTICE,
15 SERVE THE NOTICE ON EVERYBODY WITHIN THIS VALLEY WITH THE
16 DESCRIPTION OF THE NONPUMPER CLASS, AND RESERVE THE ISSUE TO A
17 FURTHER HEARING IN TERMS OF A SMALL PUMPER CLASS AND WHETHER
18 THEY SHOULD BE INCLUDED AND COULD BE REPRESENTED BY THE SAME
19 PEOPLE. THAT WOULD CERTAINLY GET THE CASE MOVING FORWARD,
20 WOULDN'T IT?

21 MR. FIFE: YES. AND WE HAVE HAD NO OBJECTION TO
22 SERVING A NOTICE THAT CREATES A NONPUMPERS CLASS WHERE THE
23 NOTICE, AS WE SAID IN OUR PAPERS, WHERE THE NOTICE IS VERY
24 CLEAR THAT THIS IS A CLASS FOR NONPUMPERS AND THAT YOU SHOULD
25 ONLY BE IN THE CLASS IF YOU ARE A NONPUMPER, ET CETERA, ET
26 CETERA.

27 AND WE SUGGESTED -- MR. ZLOTNICK READ FROM THE
28 NOTICE, AND IT IS TRUE THAT THAT IS WHAT THE NOTICE SAYS. WE

1 THOUGHT, GIVEN THE IMPORTANCE OF THAT PARTICULAR ISSUE, IT
2 SHOULD BE REALLY REALLY CLEAR AND THAT IN OVERDOING IT WAS
3 BETTER TO ERR ON THE SIDE OF OVERDOING IT THAN UNDERDOING IT.
4 I DO BELIEVE THAT PUTTING THEM ALL IN THE SAME CLASS, THE WAY
5 MR. DUNN SUGGESTED, CAN -- IT JUST -- ONE, IT JUST DEFERS THE
6 PROBLEM. AND SINCE WE ARE DEALING WITH IT NOW, WE SHOULD DEAL
7 WITH IT NOW.

8 THE EXTENT OF THE ISSUES THAT ARE COMMON BETWEEN
9 THE PUMPERS AND NONPUMPERS ARE SO LIMITED THAT YOU ARE TALKING
10 MAYBE MARCH, YOU KNOW, THAT TYPE OF DEFERMENT.

11 THE COURT: WELL TO THE EXTENT THAT THE COURT WERE TO
12 SERVE AND AUTHORIZE SERVICE RATHER OF THE NOTICE ON THE
13 NONPUMPERS, AS A NONPUMPER CLASS, THERE IS NOTHING THAT WOULD
14 PRECLUDE A MOTION TO MODIFY, TO EXTEND THE CLASS, TO SEEK
15 FURTHER ADJUDICATION ON THOSE ISSUES, WITHOUT PREJUDICE TO THE
16 PREVIOUS CERTIFICATION.

17 CLASSES ARE VERY OFTEN MODIFIED, OR NOT. OR
18 DECERTIFIED, AS THE CASE MAY BE.

19 MR. FIFE: CORRECT. WE THINK THE MORE EFFICIENT
20 APPROACH IS SIMPLY TO NAME AND SERVE THE PUMPERS. AND WE
21 THINK THAT WOULD BE WHAT WOULD MOVE THE CASE FORWARD MORE
22 QUICKLY. BUT I ACKNOWLEDGE THAT WE ARE GOING TO HAVE MORE
23 DISCUSSIONS OVER THIS AS IT GOES FORWARD.

24 THE COURT: ALL RIGHT. THANK YOU.

25 BEFORE I TAKE YOU, MR. JOYCE, LET ME ASK, ON THE
26 TELEPHONE, IF ANYBODY WISHES TO BE HEARD?

27 [NO AUDIBLE RESPONSE].

28 THE COURT: ARE THEY STILL ON THE TELEPHONE?

1 AN UNIDENTIFIED SPEAKER: YES, YOUR HONOR.

2 AN UNIDENTIFIED SPEAKER: YES, WE ARE HERE, YOUR HONOR.

3 THE COURT: ALL RIGHT. DOES ANYBODY WISH TO BE HEARD?

4 MR. LEININGER? ANYBODY ELSE?

5 [NO AUDIBLE RESPONSE]

6 THE COURT: OKAY. MR. JOYCE.

7 MR. JOYCE: YOUR HONOR, BOB JOYCE ON BEHALF OF DIAMOND
8 FARMING AND CRYSTAL ORGANIC LLC.

9 THE ONE ISSUE I'LL ADDRESS INITIALLY IS THE ISSUE
10 OF POTENTIAL CONFLICT. MY ONLY OBSERVATION, YOUR HONOR, IS
11 THAT IS NOT ONLY A FUNCTION FOR THE COURT BUT THAT IS AN
12 INHERENT FUNCTION OF EACH COUNSEL TO ASSESS THEIR OWN
13 CIRCUMSTANCE OF WHETHER THEY PERCEIVE OR DO NOT PERCEIVE
14 WITHIN THE CONSTRAINTS OF OUR RULES OF ETHICS WITHIN THIS
15 STATE, IF THEY FEEL THEY HAVE BROUGHT THEMSELVES TO THAT
16 INEVITABLE POINT. AND THE CONSEQUENCES ARE RATHER CLEAR. AND
17 THAT RAISES ONE CONCERN AND THAT WOULD BE THE POTENTIAL FOR
18 THE NECESSITY OF DISQUALIFICATION GOING FORWARD AS TO ANY
19 PARTY IF THAT CONFLICT ONCE AROSE HAD PRE-EXISTED AND
20 MANIFESTED A WITHDRAWAL. THAT WOULD BE A CONCERN.

21 BUT TO MOVE BACKWARDS AND TO ADDRESS THE LAST
22 ISSUE THE COURT WAS ATTEMPTING TO WRESTLE WITH. THERE MAY
23 BE --

24 THE COURT: I WASN'T ATTEMPTING TO WRESTLE WITH IT, I
25 WAS WRESTLING WITH IT.

26 MR. JOYCE: MAYBE BETWEEN THE TWO OF US WE CAN PIN IT.

27 IT MAY BE THAT THE BEST INTERIM SOLUTION WOULD BE
28 TO REVERT BACK IN TIME TO THE POINT WHERE THE CLASS ACTION

1 CROSS-COMPLAINT WAS FILED BY THE PURVEYORS. AND TO SIMPLY
2 MOVE FORWARD WITH A CERTIFICATION MOTION DULY MADE BY THE
3 PURVEYORS TO CERTIFY A CLASS AS AGAINST ALL LANDOWNERS PERIOD;
4 THAT ARE NOT PRESENTLY IN THE LITIGATION; THAT ARE NOT
5 PRESENTLY REPRESENTED BY COUNSEL, OR NOT PUBLIC ENTITY
6 DEFENDANTS OR LIKEWISE IN THE LITIGATION. AND TO THEN PROCEED
7 WITH THE UTILIZATION OF THE FORM OF NOTICE PROPOSED BY THE
8 PURVEYORS, MR. DUNN, TODAY, REQUIRING ALL LANDOWNERS TO THEN
9 RESPOND AND IDENTIFY THEMSELVES AS EITHER A PUMPER OR
10 NONPUMPER, WITH THE CAVEAT THAT A FAILURE TO RESPOND WOULD BE
11 AN OPT IN TO THE NONPUMPERS CLASS. AND PRESUMABLY AT THAT
12 POINT MR. ZLOTNICK COULD REPRESENT PLAINTIFF-DEFENDANT. IT
13 REALLY DOESN'T ALTER THE REALITIES AT THE END OF THE DAY OF
14 THE NONPUMPERS.

15 AND THEN WE NOW HAVE THOSE WHO HAVE MADE THE
16 AFFIRMATIVE ELECTION THAT THEY ARE A PUMPER. AND HAVING DONE
17 SO, THEN AT LEAST, ONE, WE HAVE THE IDENTITY, TWO, WE MAY KNOW
18 WHAT THE PROPERTY DESCRIPTION WOULD BE, AND THEN THE DECISION
19 CAN BE MADE DO THE PURVEYORS THEN INDIVIDUALLY SERVE THEM
20 GIVING THEM THE OPPORTUNITY TO DEFEND AND/OR TO DEFAULT OR
21 ALTERNATIVELY APPOINT A CLASS REPRESENTATIVE FOR THE SMALL
22 NONPUMPER CLASS.

23 I'M AS EQUALLY INTERESTED IN MOVING THIS CASE
24 FORWARD AS THE COURT IS. I REMIND THE COURT THAT I'VE BEEN AT
25 THIS SINCE 1999. I MAY NOT BE AT IT AT THE END, THE WAY IT
26 SEEMS TO BE PROGRESSING. AND I WOULD LIKE TO THINK THAT I'LL
27 BE AROUND LONG ENOUGH.

28 SO IT MAY BE THAT THE BEST SOLUTION IS TO GO BACK

1 TO THE POINT WHERE WE STARTED FROM TO GET A CLASS AGAINST ALL
2 PRESENTLY NONPARTICIPATING LANDOWNERS. THEN I THINK THE COURT
3 COULD FORCE, THROUGH THE NOTICE MECHANISM, THE ELECTION THAT
4 IS CONTEMPLATED.

5 THE COURT: IF YOU SUE A CLASS OF INDIVIDUALS, YOU HAVE
6 TO HAVE COUNSEL REPRESENTING THAT CLASS.

7 MR. JOYCE: WELL, OBVIOUSLY --

8 THE COURT: AND YOU HAVE TO HAVE A CLASS
9 REPRESENTATIVE.

10 MR. JOYCE: I CONCUR WHOLEHEATEDLY. AND I WAS
11 OPERATING UNDER THE ASSUMPTION IN MY SUGGESTION THAT MR.
12 ZLOTNICK WOULD CERTAINLY, AT LEAST MINIMALLY, REPRESENT THE
13 PARTIES WITHIN THE CLASS WHO DID NOT AFFIRMATIVELY RESPOND,
14 IDENTIFY THEMSELVES AS PUMPERS.

15 THE COURT: I DON'T -- WELL, I'M INTERESTED IN HEARING
16 ANYBODY ELSE'S OBSERVATIONS ABOUT THAT. I HAVE SOME CONCERNS
17 ABOUT PROCEDURALLY HOW THAT WOULD FUNCTION.

18 BUT IT DOES SEEM TO ME THAT THE VAST MAJORITY OF
19 THE PEOPLE WHO OWN LAND ARE NOT PUMPING.

20 MR. JOYCE: THAT IS PROBABLY TRUE, YOUR HONOR.

21 THE COURT: AND IT SEEMS TO ME THAT THAT IS A
22 REASONABLY WELL-DEFINED CLASS OF INDIVIDUALS. AND THERE ARE
23 COMMON ISSUES OF FACT AND LAW. THE CLAIMS ARE TYPICAL. AND
24 IT IS AN APPROPRIATE PLAINTIFF'S CLASS AS ALLEGED BY MR.
25 ZLOTNICK. AND IT DOES SEEM TO ME THAT ESSENTIALLY HIS NOTICE
26 IS AN APPROPRIATE FORM OF NOTICE FOR THAT.

27 AND I THINK THAT THE OTHER ISSUES RAISED BY THE
28 PUBLIC WATER SUPPLIERS, PURVEYORS, ARE LEGITIMATE ISSUES OF

1 CONCERN. AND I'M NOT SO SURE THAT THERE SHOULD NOT BE A
2 SECONDARY CLASS OR SUBCLASS WITH ADEQUATE REPRESENTATION. BUT
3 I WOULD LIKE TO HEAR THAT ON MOTION.

4 BUT MY INCLINATION HERE THIS MORNING -- AND
5 OBVIOUSLY I'LL HEAR ANYTHING ELSE ANYBODY WANTS TO SAY -- IS
6 TO AUTHORIZE THE SERVICE OF THE NOTICE ON THE NONPUMPERS. AND
7 THAT MAY BE ON EVERYBODY. AND THERE WILL BE AN OPPORTUNITY
8 FOR PEOPLE WHO ARE SERVED WITH THOSE DOCUMENTS TO INDICATE
9 WHETHER OR NOT THEY ARE PUMPERS AS WELL. AND THAT WILL HELP
10 US, I THINK, TO MOVE THIS CASE DOWN THE ROAD.

11 MR. JOYCE: I UNDERSTAND.

12 THE COURT: AND THAT DOESN'T MEAN THAT MR. ZLOTNICK IS
13 GOING TO REPRESENT THE PEOPLE WHO ARE SMALL PUMPERS. BUT IT
14 MEANS THAT WE WILL HAVE SOME SENSE OF WHO THEY ARE, AT LEAST
15 SOME OF THEM.

16 MR. JOYCE: WELL, IN THAT REGARD, YOUR HONOR, I WOULD
17 ONLY ECHO THE OBSERVATION MADE BY MR. FIFE IN HIS FILING WITH
18 THE COURT, AND THAT IS THAT IF A LANDOWNER IS SERVED WITH THE
19 NOTICE, IDENTIFYING AND DEFINING THE NONPUMPER CLASS AS
20 PROPOSED BY MR. ZLOTNICK, IF THE NOTICE WOULD INCLUDE THE
21 SUGGESTED REVISION WHICH WOULD ESSENTIALLY ADVISE THE PERSON,
22 LANDOWNER, RECEIVING THAT NOTICE THAT A FAILURE TO RESPOND AND
23 AFFIRM THE FACT OF PUMPING WOULD RESULT IN THEM BEING TREATED
24 AS A NONPUMPER. BECAUSE OTHERWISE WE ARE GOING TO CREATE THAT
25 SHADOW --

26 THE COURT: I THINK THAT IS AN APPROPRIATE SUGGESTION.

27 MR. JOYCE: AND THEN THE LAST OBSERVATION, YOUR HONOR,
28 BEFORE I YIELD, WOULD BE THAT THE FACT THAT BOTH IN MR.

1 ZLOTNICK'S AS WELL AS IN THE PUBLIC WATER SUPPLIERS' PROPOSED
2 DEFINITION OF A CLASS, THEY FIX AN OPERATIVE DATE TIED TO THE
3 FACT OR THE NONFACT OF PUMPING. I'VE ALREADY HAD THIS
4 DISCUSSION WITH THE COURT. AS THE COURT IS AWARE, I HAD
5 PREVIOUSLY FILED AN OBJECTION TO THE CLASS CERTIFICATION
6 HEARING DUE TO THE LACK OF PREHEARING DISCOVERY. I THINK THIS
7 MANIFESTS THE VERY REASON I WAS TRYING TO GET DISCOVERY, AND
8 THAT IS THE DATE AS DEFINED AS TO THE FACT OR NONFACT OF
9 PUMPING BEARS NO RELEVANCY UNLESS AND UNTIL WE KNOW WHAT CLAIM
10 PRESCRIPTIVE PERIOD IS IN ISSUE. AND IT IS A PROBLEM. IT IS
11 A PROBLEM THAT HAS PERSISTED, AND WE ARE NO FURTHER -- NO
12 CLOSER TO AN ANSWER FOR THE COURT.

13 THE COURT: I UNDERSTOOD THE PERIOD WAS EXPRESSED BY
14 THE PLAINTIFF IN ATTEMPTING TO ESTABLISH WHAT THE CLASS
15 PARAMETERS WERE. AND IT SEEMS TO ME THAT IF IT IS FIVE YEARS
16 PRIOR TO THAT TIME, THEN THAT'S THE DEFINITION OF THE CLASS.

17 MR. JOYCE: WELL, IT VERY WELL MAY BE, YOUR HONOR, BUT
18 UNFORTUNATELY THE PERSON ASSERTING THE CLAIM IS THE ONE THAT
19 IS GOING TO ADVANCE THE TIME PERIOD WITHIN WHICH THEY PERCEIVE
20 THAT THEY ACQUIRED A RIGHT THROUGH PRESCRIPTION AS OPPOSED
21 TO --

22 THE COURT: THAT IS THE OTHER SIDE. AND THAT IS THE
23 PURVEYORS' CROSS-COMPLAINT. THAT IS NOT THE CLASS THAT IS
24 BEING DESCRIBED.

25 MR. JOYCE: I UNDERSTAND.

26 THE COURT: SO THAT THE COURT IS REALLY NOT IN A
27 POSITION TO DEAL WITH THAT ISSUE. AND IF THE CLASS IS AS
28 DESCRIBED BY THE PLAINTIFF, THAT IS WHAT IT IS GOING TO BE

1 LIMITED TO.

2 MR. JOYCE: I UNDERSTAND.

3 THE COURT: I DON'T KNOW WHY I WOULD TELL THEM THEY
4 CAN'T HAVE A CLASS FOR THE PERIOD THAT THEY ARE SEEKING.

5 MR. JOYCE: I'M NOT SUGGESTING EITHER WAY. I'M SIMPLY
6 SUGGESTING THE DATE MAY HAVE NO PARTICULAR PRACTICAL
7 SIGNIFICANCE DEPENDING UPON WHERE WE FIND OURSELVES WHEN THE
8 DISCLOSURE IS MADE AS TO WHEN THE OPERATIVE PRESCRIPTIVE
9 PERIOD WAS.

10 THE COURT: I SUPPOSE WE WILL FIND OUT.

11 MR. JOYCE: LET'S JUST HOPE IT DOESN'T HAVE A DELAYING
12 EFFECT.

13 THANK YOU, YOUR HONOR.

14 THE COURT: THANK YOU.

15 MR. ZIMMER, DID YOU HAVE SOMETHING YOU WANTED TO
16 ADDRESS THE COURT ABOUT?

17 MR. ZIMMER: GOOD MORNING, YOUR HONOR.

18 I THINK THAT THE BRIEFING HAS ILLUSTRATED ALL THE
19 POTENTIAL PITFALLS WE HAVE WITH WHATEVER PROCEDURE WE EMBARK
20 ON. I AGREE WITH A LOT OF WHAT MR. DOUGHERTY SAID, MR. JOYCE,
21 AND MR. FIFE.

22 I THINK THAT THE FARTHER WE GET AWAY FROM WHAT
23 THE CODE REQUIRES, THE MORE TROUBLE WE GET OURSELVES INTO
24 BECAUSE IT IS DIFFICULT TO FORESEE EVERYTHING THAT IS GOING TO
25 HAPPEN IN THE FUTURE. I THINK A STARTING POINT, THOUGH, IS
26 THAT WHAT IS AT ISSUE IN THE CASE IS THE LAND, THE IN REM
27 ASPECT OF THE LAND.

28 NOW IF WE DESIGNATE A CLASS BASED ON THE PERSONAL

1 ASPECT OF WHAT THE PEOPLE ARE DOING, I THINK WE ARE GETTING
2 AWAY FROM THAT BECAUSE WHAT WE NEED TO GET BEFORE THE COURT IS
3 ALL THE LAND.

4 THE COURT HAS -- I'M NOT A PERSONAL FAN OF CLASS
5 ACTIONS BECAUSE I THINK THERE IS MULTIPLE COMMONALITY OF
6 INTEREST ISSUES THAT ARE PROBLEMATIC AND NOTICE ISSUES. BUT
7 IF THE COURT IS OF THE BELIEF THAT AFTER THE INITIAL CLASS IS
8 FORMED THAT THE CLASS CAN THEREAFTER BE MODIFIED, OR THAT THE
9 CLASS CAN BE DECERTIFIED, THEN I THINK THAT IN LIGHT OF WHAT
10 THE COURT EXPRESSED IN TERMS OF PEOPLE NOT ANSWERING, AND
11 THEREFORE NOT BEING BOUND BY THE ACTION, THE BETTER WAY TO GO
12 WOULD BE TO MAKE THE CLASS VERY BROAD AT THE OUTSET SO THAT IT
13 IS CLEAR THAT ALL PROPERTY IN THE AREA OF ADJUDICATION IS
14 BROUGHT INTO THE ACTION.

15 SO RATHER THAN -- WHEN I WAS SITTING THERE I WAS
16 THINKING SIMILAR TO WHAT MR. JOYCE WAS. IF WE HAD ALL
17 PROPERTY OWNERS AS THE CLASS, NOTICE COULD THEN BE GIVEN IN
18 THE WAY THAT WE ARE TALKING ABOUT WHICH WOULD GIVE NOTICE TO
19 ALL CLASS MEMBERS. AND PERHAPS EVEN AT THAT POINT THERE COULD
20 BE SOME DISCOVERY, ONCE ALL PARTIES ARE IN THE ACTION, TO
21 DETERMINE WHETHER THEY ARE PUMPING OR NOT PUMPING. AT THAT
22 POINT THE COURT COULD APPOINT CLASS REPRESENTATIVES TO PUMPERS
23 OR NONPUMPERS OR HOWEVER THE COURT DECIDES TO DO THAT.

24 BUT THE PROBLEM WE HAVE HAD IS THE DIFFICULTY,
25 FROM A JUDICIAL STANDPOINT, IN GETTING OUR ARMS AROUND ALL THE
26 LAND AND ALL THE PEOPLE THAT OWN THE LAND.

27 SO IF WE CAN CHANGE IT, IF WE CAN MODIFY THE
28 CLASS, OR WE CAN DE-CERTIFY IT, I THINK WE ARE BETTER OFF, AS

1 WE HAVE DISCUSSED WITH OTHER ISSUES, STAYING AS BROAD AS WE
2 CAN GET IN TERMS OF HAVING ALL LANDOWNERS BEFORE THE COURT
3 BECAUSE THAT -- WE NEED ALL LANDOWNERS BEFORE THE COURT AND WE
4 NEED THE LAND IDENTIFIED. THEN WE DON'T HAVE ANY TRANSFEREE
5 ISSUES. WE KNOW THAT ALL PARTIES ARE IN THE ACTION. IF ALL
6 PARTIES ARE NOTICED SIMPLY BY BEING A LANDOWNER, THERE CAN'T
7 BE ANY CLAIM THAT THEY DIDN'T KNOW THAT THEY WERE IN A CLASS
8 BECAUSE THEY ARE EITHER A LANDOWNER OR NOT. AND AT A LATER
9 TIME WE CAN DETERMINE, EITHER BASED ON DISCOVERY OR OPT-OUT
10 PROVISIONS, WHAT CLASSES PEOPLE ARE GOING TO BE IN IF THE
11 COURT WANTS TO DO THAT.

12 I'M NOT SURE WE EVEN NEED CLASSES. IF WE GET
13 EVERYBODY BEFORE THE COURT AND WE GET ALL THE LAND BEFORE THE
14 COURT, MAYBE IT WOULD STILL BE A GOOD IDEA IN THE COURT'S
15 MIND. BUT THE ISSUE IS GETTING THE LAND AND THE PARTIES
16 BEFORE THE COURT. AND I THINK WE CAN DO THAT.

17 THE COURT: HOW DO YOU DO THAT IF YOU DON'T HAVE A
18 CLASS?

19 MR. ZIMMER: WELL, I THINK YOU MAKE YOUR CLASS ALL
20 LANDOWNERS.

21 THE COURT: OKAY. AND WHAT IS THE RELIEF YOU ARE
22 SEEKING?

23 MR. ZIMMER: ADJUDICATION OF THE WATER RIGHTS THAT ARE
24 ATTENDANT, APPURTENANT TO THE PROPERTY THAT IS OWNED. THAT IS
25 ESSENTIALLY WHAT THE PURVEYORS HAVE FRAMED UP IN THEIR KERN
26 COUNTY/L.A. ACTION, COORDINATED BEFORE THIS COURT AND BROUGHT
27 IN QUIET TITLE ACTION FROM RIVERSIDE.

28 THE COURT: WELL, IF THE CLASS IS CREATED FOR PURPOSES

1 OF ASCERTAINING THE CHARACTERISTICS OF THE LAND AND THE
2 VARIOUS INTERESTS THAT THE PARTIES HAVE, THERE OBVIOUSLY ARE
3 NOT COMMON OBJECTIVES AMONG ALL THE VARIOUS PARTIES OF
4 DIFFERENT INTERESTS. FOR EXAMPLE, YOUR CLIENTS ARE OWNERS.
5 THEY WOULD OBVIOUSLY BE EXCLUDED BECAUSE THEY FILED THEIR OWN
6 ACTION HERE.

7 MR. ZIMMER: I AGREE THAT THERE WOULD BE DIFFERENT
8 INTERESTS, THERE IS NO QUESTION. BUT IN ORDER TO GET THEM IN
9 IN THE CASE, NAMING THEM AS ALL LANDOWNERS, WE WILL GET THEM
10 IN THE CASE. AND WE CAN THEN SERVE THEM WITH NOTICE, THE WAY
11 THAT WE ARE TALKING ABOUT DOING IT.

12 NO MATTER WHAT WE DO, EVEN IF THE COURT DOES WHAT
13 IT HAS INDICATED IT WAS THINKING ABOUT DOING IN TERMS OF
14 NONPUMPERS, THEY ARE STILL -- EVEN BETWEEN NONPUMPERS THERE
15 WOULD BE DIFFERENCES AS TO HOW PARTIES WANT TO PROCEED. BUT I
16 THINK IT IS SAFER TO HAVE A CLASS OF ALL LANDOWNERS THAN IT IS
17 OF PUMPERS VERSUS NONPUMPERS. MAKING THOSE DISTINCTIONS NOW,
18 BECAUSE ONCE THE PARTIES ARE BEFORE THE COURT, THEN EITHER
19 THROUGH DISCOVERY OR FURTHER CLARIFICATION OF THE CLASS, THAT
20 THE COURT MODIFICATION OF THE CLASS, IF YOU WILL, WHICH THE
21 COURT THINKS IT CAN DO, OR EVEN DECERTIFICATION IF THE COURT
22 FELT THAT WE WERE IN THE WRONG PLACE, WOULD BE APPROPRIATE.
23 BUT I THINK THE COURT HAS MORE POWER TO DO THAT ONCE A CLASS
24 OF ALL LANDOWNERS IS NAMED AND IT KEEPS THE FOCUS ON THE LAND
25 AT THAT POINT. AND THEN PARTIES CAN BE REPRESENTED OR NOT.
26 THEY CAN OPT OUT OF THE ACTION COMPLETELY. WE STILL HAVE ALL
27 OF THE OTHER VEHICLES AVAILABLE TO US AND IT GIVES US THE
28 NOTICE WHICH WE ARE GRAPPLING WITH NOW.

1 THE COURT: WELL, DO YOU THINK THAT IT MAKES SOME
2 DIFFERENCE THAT THE WATER SUPPLIERS, THE PUBLIC WATER
3 SUPPLIERS, HAVE IN FACT ATTEMPTED TO IDENTIFY EVERY PUMPER OF
4 SIGNIFICANCE, AND THAT THE ONLY PARTIES WHO HAVE NOT BEEN
5 IDENTIFIED WOULD BE A VERY SMALL NUMBER OF NONCOMMERCIAL TYPE
6 WELL OWNERS?

7 MR. ZIMMER: I'M NOT SURE I UNDERSTAND WHAT THE COURT
8 IS DRIVING AT.

9 THE COURT: WELL, FROM WHAT I CAN GATHER HERE, FROM
10 WHAT HAS BEEN REPRESENTED TO THE COURT, THE PURVEYORS HAVE
11 ATTEMPTED TO IDENTIFY ALL OF THE MAJOR PUMPERS WITHIN THE
12 VALLEY. AND THEY HAVE SERVED THEM. AND THEY HAVE EITHER
13 ANSWERED OR A DEFAULT WOULD BE TAKEN. THERE IS A SMALL NUMBER
14 OF SMALL PUMPERS THAT HAVE NOT YET BEEN IDENTIFIED. AND TO
15 THE EXTENT THAT THE PURVEYORS CAN IDENTIFY THEM AND SERVE
16 THEM, IT SEEMS TO ME THAT WE COULD MOVE FORWARD WITH A CLASS
17 AS THE WILLIS CLASS OF NONPUMPERS.

18 MR. ZIMMER: MY RESPONSE IS, FIRST, I DON'T THINK WE
19 KNOW EXACTLY WHAT THE PURVEYORS HAVE DONE IN THAT REGARD.
20 THERE HAS BEEN NO, NOTHING PUBLISHED, PROVIDED TO OTHER
21 PARTIES, TO KNOW WHAT THEY HAVE DONE. I MEAN, I'VE HEARD THAT
22 THEY HAVE SERVED PEOPLE WITH MORE THAN A HUNDRED ACRES, I'VE
23 HEARD THAT THEY HAVE SERVED PEOPLE PUMPING A CERTAIN AMOUNT
24 OF WATER.

25 I THINK IT IS NOT ACCURATE THAT THERE IS ONLY A
26 SMALL NUMBER OF SMALL PUMPERS. I THINK WAY BACK WHEN,
27 PROBABLY A YEAR AGO, WE PRESENTED THE COURT WITH INFORMATION
28 THAT THERE ARE MANY MANY MANY TWO-AND-A-HALF-ACRE PARCELS IN

1 THE ANTELOPE VALLEY. THIS VALLEY IS FRAGMENTED IN SMALL
2 PARCELS PROBABLY LIKE NO OTHER AREA IN CALIFORNIA. THAT IS
3 ONE OF THE REASONS WHY EARLY ON, WHEN WE WERE TALKING ABOUT
4 CLASS CERTIFICATION, THAT WE WANTED TO HAVE AN EVIDENTIARY
5 HEARING ON THAT BECAUSE WE DIDN'T KNOW WHO THEY HAD SERVED,
6 WHAT THEY WERE TAKING INTO CONSIDERATION. THAT IS WHY WE
7 WANTED TO HAVE DISCOVERY BECAUSE OF EXACTLY THOSE ISSUES.

8 I DON'T EVEN THINK THE PURVEYORS PROBABLY KNOW
9 HOW GOOD A PICTURE THEY HAVE ON WHO THEY HAVE SERVED AND HOW
10 MANY ACRES THEY HAVE AND HOW MUCH WATER THEY HAVE SERVED AND
11 HOW MUCH WATER THEY ARE PUMPING. AND ALMOST ALL OF THOSE
12 ISSUES ARE POTENTIALLY EVIDENTIARY -- OF EVIDENTIARY
13 SIGNIFICANCE BOTH IN TERMS OF MAKING SURE ALL PROPER PARTIES
14 ARE BEFORE THE COURT, BUT IN TERMS OF ADJUDICATION OF THE
15 RIGHTS, PARTICULARLY OVERLYING CORRELATIVE RIGHTS THAT ARE
16 GOING TO NEED TO OCCUR LATER.

17 SO I DON'T SEE ANY DOWN SIDE TO HAVING A CLASS OF
18 ALL LANDOWNERS AND MODIFYING THE CLASS, IF THE COURT IS
19 INCLINED TO DO THAT, AT A LATER TIME. BECAUSE WE HAD THIS
20 DISCUSSION BEFORE WHERE WE ARE BETTER OFF STARTING BROAD AND
21 MAKING SURE WE HAVE EVERYBODY IN THE ACTION THAT WE NEED IN.
22 WE CAN HAVE THEM OPT OUT. WE CAN MODIFY THE CLASSES TO PROTECT
23 CONFLICT OF INTERESTS. ALL OF THAT CAN BE DONE AT A LATER
24 TIME, BUT WE NEED TO GET THE MATTER AT ISSUE AND PROPERLY
25 BEFORE THE COURT.

26 THE COURT: DO YOU THINK THAT THE WILLIS CLASS COULD
27 ENCOMPASS ALL LANDOWNERS?

28 MR. ZIMMER: IF THE COURT IS INCLINED TO DO A CLASS