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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))	Judicial Council Coordination No. 4408
ANTELOPE VALLEY GROUNDWATER CASES	Case No.: 1-05-CV-049053
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]	**CASE MANAGEMENT CONFERENCE STATEMENT** Date: February 17, 2006 Time: 9:00 a.m. Dept: To Be Assigned (Filed in Dept 1)

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I.

INTRODUCTION

As of the date of this Memorandum, this author has not yet received the proposed Order arising out of the Case Management Conference held by this Court on December 2, 2005. It was this author's understanding that this Court had directed counsel for Waterworks District No. 40 to prepare and circulate for review and comment that proposed Order. Nonetheless, it is the intent to address herein, both legal and procedural issues necessary to an ordering of and scheduling of the future course and conduct of this litigation. Initially, we intend to address general observations which are believed to be crucial to a fair consideration and formulation of any procedural order and necessary if the property rights of a large number of landowners is to be fairly adjudicated and not impaired only because of the shear complexity and cost of this litigation. Secondly, we intend to address procedural and legal issues in need of early resolution in order to properly focus and frame this litigation for both pre-trial discovery and subsequent trial proceedings.

II.

GENERAL OBSERVATIONS

As will be more fully discussed below, it is extremely important for this Court to both appreciate and realize that any order addressing consolidation for trial, bifurcation and/or the future order of these proceedings, should be considered and structured with the realization that prolonged litigation will likely result in a significant and large number of landowners simply abandoning their property rights because the cost of litigation itself makes defending those rights prohibitive. Very few, if any, single parcel of real property has sufficient economic value to justify and/or support the anticipated cost of litigation in cases of this nature. It is firmly believed that it is both the intent and desire of the Purveyor Parties to make this litigation extremely complex, and to seek by bifurcation to break it up into numerous discrete pieces so as to prolong and by temporal and economic attrition wear down and thus outlast the Landowner Parties and thereby acquire advantages not otherwise justified. This Court should strive to ensure that any order addresses and ensures that the valuable property rights of all overlying landowners are not forfeited by default or due to the lack of opposition, simply because the economics of litigation do not permit a given landowner to resist the claims made by the Purveyor Parties. This litigation pits

the might and funding resources of the government against the separate individual property rights of hundreds of separate landowners. A governmental entity attempting to take private property for a public use without compensation under a theory of prescription, engages in a form of theft, not sanctioned by the Federal nor State Constitution. The government should not be permitted to use litigation and the judicial system to aid in that effort, and thus, any procedural order should be structured to ensure a quick and efficient

final resolution.

III.

LEGAL AND PROCEDURAL ISSUES IN NEED OF AN EARLY DETERMINATION IN ORDER TO SHAPE THE FUTURE OF THESE PROCEEDINGS

A. **Diamond Farming's Quiet Title action should not be consolidated for trial with all other actions.**

Los Angeles Waterworks District No. 40, and the purveyors generally will suggest to this Court that there are factual issues with global application which should of necessity be tried in one action, bifurcated into multiple pieces. That assertion is and will be an over simplification and not true. The legal but not factual concept common to all actions is the claim by Waterworks, and prospectively that of all of the other appropriators/purveyors, that they have perfected prescriptive water rights as against Diamond Farming Company, as well as against all other "DOE" overlying landowner defendants. It is conceded that the same legal principles regarding "prescriptive" claims will apply in all actions, however, there is not and will not be any predominating common question of fact.

The Purveyors will not discuss and will ignore the pleading and the factual reality that in the consolidated Riverside County Superior Court actions, the time frame in issue for the prescriptive claims asserted therein is the five years immediately preceding the filing of the Complaint to Quiet Title by Diamond Farming Company on October 29, 1999. (See, *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, p. 283, fn. 88.) In the new actions filed by Waterworks in Kern County and Los Angeles County, Waterworks alleged that it has continuously and for more than five years preceding the date of those new actions," . . . pumped water from the basin for reasonable and beneficial purposes and have done so under a claim of right in an actual, open, notorious, exclusive, continuous, hostile and adverse manner." i.e. that during the immediately preceding five years, before November 29, 2004 in

Los Angeles County and before December 1, 2004 in Kern County, that it had obtained "prescriptive" water rights. Thus, if complete coordination for trial is ordered of all actions, there will nonetheless be two distinct, independent, and different five-year time periods in issue for the determination of the claimed prescriptive rights of Waterworks, i.e., two distinct fact specific and expert witness intensive trials within that one trial.

Diamond Farming has no interest in nor desire to participate in a lengthy, factual and expert intensive trial concerning the five year period which followed the date of its actions and immediately preceded the filing of the two new actions. All of the anticipated evidence to prove that prescription accrued during that second and later 5 year period is and will be irrelevant as to all issues joined in the Quiet Title actions. We properly assume that the other overlying "DOE" landowners in the two new Kern County and Los Angeles County actions would prefer to not participate in a fact specific and expert witness intensive trial concerning the earlier five year period which preceded the filing of the original Complaint filed by Diamond Farming Company on October 29, 1999. Thus, consolidation for trial of all actions is not appropriate and does not satisfy the predominating common question of fact standard of Code of Civil Procedure section 1048. Common questions of fact may be present in the two new actions filed by Waterworks, however, there is no common question of fact between those actions and the earlier filed Riverside Superior Court actions, given the two wholly distinct and separate five year periods for prescription.

Given all five (5) elements necessary to prove prescription, virtually hundreds of separate mini trials within the one consolidated trial will result. The trial of the issues in the Diamond Farming Quiet Title actions would be but one of hundreds of separate and distinct mini trials, but significantly would be factually dependent upon and limited to the facts and circumstances existent during and peculiar to the first and earlier five year period. It is axiomatic that the consolidated Quiet Title actions of Diamond Farming are *in rem* actions concerning only the title (priority) tied to the specific properties identified by legal description in those actions. Although stylized as a cause of action for Declaratory Relief, Waterworks' prescriptive claims, as pled as against all other overlying landowners, the "DOE" defendants, in the two new actions are nonetheless likewise *in rem*.

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It is the apparent intent of Waterworks and all other appropriators/purveyors to prove the existence of an "Overdraft" to satisfy the single element of "Adversity," only one element of the five elements required to support their prescriptive claims. The Purveyors will assert that the issue of "Overdraft" is common to all three actions and that the "prescriptive" period commences upon the commencement of "Overdraft." It will be suggested that "Overdraft" is the *sine qua non* of these actions. Petitioner ignores the additional four elements which it must prove co-existed as against Diamond Farming during the first and earlier five year period, and yet again against all other overlying "DOE" defendants during the second five year period which preceded the two new actions. In the new actions filed by Waterworks, evidence in support of all five elements of prescription during the second and later five year period must be proffered separately as to each new "DOE" overlying landowner. Given that the new actions involve that later, different, and distinct five year period, it will be different evidence. Petitioner will of necessity have to prove the existence of an "Overdraft" during the five years preceding the filing of the Complaint by Diamond Farming, October 29, 1999. As to the "DOE" overlying landowner defendants sued in the two new actions, Petitioner must prove the existence of a second period of "Overdraft" for the five years preceding the filing of those two new actions, November 29, 2004 in Los Angeles County and December 1, 2004 in Kern County.

If Diamond Farming's actions are consolidated for trial with the new actions, there will nonetheless be two different and distinct mega mini trials within that trial, involving different time frames and different complex meteorological and hydrologic events and evidence. Waterworks must concede that the prescriptive period as to the consolidated Plaintiffs in the Riverside County Superior Court actions has been suspended as of the date of the filing of those actions. Diamond Farming has no interest in nor should it be compelled to participate in a trial involving the complex hydrologic and factual issues necessary to an attempt to prove "Overdraft" for the second and new five-year prescriptive period put into issue in each of the new actions. For that reason alone, there is not a sufficient predominating common question of fact so as to justify complete consolidation for trial which would include the Riverside actions. Complete consolidation for trial would prejudice Diamond Farming in both time and money, and would substantially lengthen the time it would be required to spend in trial to vindicate its rights.

Given that Diamond Farming's actions involve a wholly distinct, different, and separate five year period which immediately preceded the filing of those actions, and that the new actions involve a second distinct, different and separate later five year period, there will not be and could not be any predominating common question of fact. There is not even any overlap between the two different five year periods. Even if Waterworks were to prevail on its prescriptive claims in all actions, those claims would be measured as against Diamond Farming with reference to the quantity of groundwater pumped by Waterworks only in the five years immediately preceding the initiation of the Quiet Title actions. With respect to the prescriptive claims asserted in the two new actions, those prescriptive claims would be measured and quantified, as against the "DOE" overlying landowner defendants, with reference to the pumping of groundwater in the later five years immediately preceding the initiation of those two new actions. It would be foolish to suggest that municipal pumping has remained stagnant during recent rapid urban growth in the area, or that upon quantifying the prescriptive claims for each of the two different five year periods that the end computed sum would be the same.

Additionally, the litigation of prescriptive claims will of necessity result in multiple mini trials which will be uniquely fact specific as to each separate parcel of overlying real property and each separate owner of each separate parcel of overlying property. What will suffice as notice to one landowner may be insufficient as to others. Within the area in controversy, there are hundreds of tracts of overlying land with no present active groundwater pumping. The owners of that real property have dormant, unexercised overlying rights to future use which cannot be constitutionally extinguished without due process of law, specifically NOTICE. (See *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, pp. 88-89.) Even if one were to assume that observed lowering of water levels in one's water well was sufficient to constitute notice, which is not conceded, as to those owners of those tracts of real property overlying the basin which have no current pumping, they would have no gradually lowering water levels to observe. Many owners of overlying land with unexercised and dormant overlying rights to future use neither live in the area nor have access to nor exposure to local news, rumors or gossip. Thus, as to those overlying landowners possessing unexercised and dormant overlying rights to future use, some other sufficient quantum and proof of notice will be necessitated. In short, each prescriptive claim of each appropriator asserting such will have to be proven separately and

independently, and separately and independently as against each separate owner of each separate parcel of overlying real property. As to some they may prevail, but as to many they will likely lose. There is simply no potential for inconsistent factual rulings because each parcel by parcel mini trial will be unto itself factually unique. Consolidation for trial of Diamond Farming's actions with the new actions should not be ordered.

B. **Even if consolidated for trial, the consolidated actions should not be bifurcated into discrete parts**.

If the Court were to discern that consolidation for trial of all actions was both proper and appropriate, and that sufficient common questions of fact predominated, this Court should nonetheless decline to bifurcate these actions into discrete subparts. Bifurcation of these actions into discrete subparts will only serve to further the intent and objective of the Purveyor Parties and ensure that this litigation is protracted and complex and thus, wear down and wear out individual landowners, impairing property rights without a full and fair opportunity to fully adjudicate those claims. Secondly, it is anticipated that the Purveyors will argue that the cases need to be bifurcated with the issue of the "basin boundaries" being the first issue to be tried. The logic advanced in support of that argument will be that the Purveyors need to know the area in issue so as to be able to complete service of process upon landowners within that defined area. However, as this Court should be aware, based upon the record of the earlier actions taken in the Diamond Farming Quiet Title actions, the Purveyors have already, through their experts, defined the boundary of what they claim to be the "basin." In fact, four (4) days of expert witness testimony was elicited in the aborted trial of that issue in the Riverside County Superior Court. The Purveyors do not need a bifurcated basin boundary trial in order to identify those landowners upon whom they need to effect service of process. They have already formulated a basin boundary line. The Purveyors should be directed to complete service of process as soon as reasonably practical and this Court should immediately thereafter set this matter for trial on all issues.

C. **If bifurcation is ordered, "adversity in fact" and "NOTICE" should be tried in the first phase**.

If both consolidation of all actions for trial and bifurcation is deemed just and proper, then this Court should bifurcate and try first the issue of the existence of "adversity in fact" and the issue of

"NOTICE" of that claim of adversity as to each overlying landowner, both actively pumping, and dormant. Both are legally necessary predicates to any prescriptive claim. If this Court concludes that bifurcation is proper, then a first phased trial compelling the Purveyors to prove the existence of "adversity in fact" during the claimed prescriptive periods, and NOTICE of that claim of adversity, would likely dispose of the core claim of prescription in its entirety. In the absence of evidence of any impairment of the ability of a given overlying landowner to pump and use for beneficial purposes groundwater, no Purveyor can assert a reversal of priority based on prescription as against that landowner given the existing doctrine of "self-help." Additionally, the commencement of any prescriptive period must, of legal necessity, coincide with the commencement of the affected landowner's statute of limitations for a claim in inverse condemnation.

Since prescription is premised upon conduct sufficiently hostile and adverse, such that they must give to the injured party notice of the adverse claim and 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.[1] 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.)

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

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

> 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.)
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> "It is by focusing on the impact of the governmental activity upon the 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 without interference 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. There is no evidence that any pumping of groundwater by the District has interfered with or prevented pumping by any landowner and thereby prevented any landowner from preserving their priority by "self-help."

> "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. Waterworks must prove facts of when the inverse condemnation and the prescriptive claim accrued as to each and all affected landowners.

It is abundantly clear, that the party claiming acquisition of a water right by prescription must be able to prove the existence of "adversity in fact," and more importantly prove that the affected landowner had NOTICE of that claim of adversity in fact. The Purveyors will advocate that the commencement of the prescriptive period coincides with the commencement of overdraft. Not so. The California Supreme Court in *City of Los Angeles vs. City of San Fernando* (1975) 14 Cal.3d 199, at p.

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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." The 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." (City of Los Angeles, supra, at p. 1311.)

Thus, if bifurcation is ordered, the issue of "adversity in fact," and NOTICE of that claim of adversity should be tried first.

IV.

CONCLUSION

Ultimately, the most significant task for this Court in the short-term, is to formulate an Order governing the future proceedings of this litigation which ensures a quick and complete resolution of all issues. Any such Order should avoid prolonging the pendency of this litigation and strive towards an early and complete trial of all issues. Any substantive delay will only result in serving the purposes of the Purveyor Parties in attempting to, through protracted and expensive litigation, achieving that which they should pursue politically, and give them judicially an outcome which the law and facts themselves would not otherwise support nor warrant.

Dated: January 17, 2006

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