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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

DIAMOND FARMING COMPANY'S REPLY TO PUBLIC WATER SUPPLIERS' OPPOSITION TO MOTION IN LIMINE

Date: May 21, 2007
Time: 10:00 a.m.
Dept: 1

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I

INTRODUCTION

In their Opposition, the Public Water Suppliers have dismissed the Motion In Limine as follows:

> "Diamond Farming cites no authority for its claim that the Public Water Suppliers have a heightened notice standard. In the absence of case law supporting such a claim, Diamond Farming relies on a series of inapposite eminent domain cases. As demonstrated above, California Water Law allows for actual or constructive notice for prescriptive rights claims." (See Public Water Suppliers' Opposition, page 8.)

The Public Water Suppliers' dismissive Opposition seems not grounded in ignorance, but seems, instead, a conscious decision to ignore the issue entirely. The assertion that in "Water Law" cases the Constitution may be ignored and that there exist no authority for its application is wrong.[1]

A ruling upon the Motion In Limine is required at this time, given the Court's current consideration of the Public Water Suppliers' request to certify the action as a defendant class action. If certification is granted, the property rights of virtually thousands of landowners and the impact of the claims of prescription pled in the First Cause of Action upon the title to thousands of parcels of real property, will be adjudicated through an as yet unidentified nominal class representative. The Motion In Limine puts squarely before the Court the core inquiry: What evidence will be required of the Public Water Suppliers as to the "notice" element of the prescriptive claims pled in the First Cause of Action of the class action cross-complaint? What clear and convincing evidence can the Public Water Suppliers proffer which would support a factual finding by this Court that each and every landowner within the area of the adjudication boundary, as established, knew, on or before October 28, 1994, of each Public Water Suppliers' adverse claim, and that title was being asserted against each and all of them? What clear and convincing evidence can the Public Water Suppliers proffer which would support a factual finding that each and every landowner once armed with that knowledge, nonetheless, singularly and collectively and without exception, knowingly neglected for the following five (5) years to avail

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1 See *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."]

themselves of the right which the law gives to each of them? (See *Clark v. Clark* (1901) 133 Cal. 667, 670-617, quoted and cited on page 7 of the Motion In Limine.) [2]

The request for certification of a defendant class as to the First Cause of Action claiming rights acquired by prescription, requires that each Public Water Supplier now make an offer of proof of that evidence which they contend will justify this Court in making the factual finding that every landowner had actual knowledge or legally implied actual knowledge (Civil Code section 19) of each separate purveyors adverse claim on or before October 28, 1994, and nonetheless through inaction and acquiescence during the following five (5) year period, knowingly neglected their own title and property rights.

In the Motion In Limine we challenged the Public Water Suppliers as follows:

> "The cross-complaining public entities do not intend to prove that any landowner had actual and/or constructive notice of its "claim of right" or its "claim of hostility and adversity" or that title was being asserted against them. They will offer proof of "overdraft" and proof of their pumping, and then on that proof alone assert that each landowner was charged with a duty to discover their hostile and adverse claim of right. If that is not their intent, then let them make an "offer of proof."

In the dismissive Opposition to the Motion In Limine, the Public Water Suppliers are silent.

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.)

In *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, at p. 90, that court held that cooperation in or knowledge of a public entities taking of water for a public purpose did not equate with or constitute knowledge that individual overlying rights were in jeopardy.

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2 In the Public Water Suppliers' proposals for Class Definitions and Method of Notice filed on March 16, 2007, the Public Water Suppliers make clear in the proposed Definition of "Subclass A" that the operative prescriptive period is the five (5) years immediately before October 29, 1999. October 29, 1999, is the filing date of the Quiet Title Complaint by Diamond Farming Company.

II

CERTIFICATION OF A DEFENDANT CLASS AS TO THE FIRST CAUSE OF ACTION FOR PRESCRIPTION DEPENDS UPON WHETHER OR NOT THE FACTUAL ELEMENT OF "NOTICE" WILL BE ASSESSED *EX ANTE* OR *POST HOC*

Each Public Water Supplier is a subdivision of State government. Each is seeking to secure a judgment against the private property rights of every landowner within the adjudication boundary. It is conceded by silence that no Public Water Supplier claims that it has physically trespassed upon any real property of any landowner. It is conceded that none have interfered with any landowner's use and enjoyment of its property. It is conceded that none have interfered with or limited in any way the exercise of the overlying right nor prevented any groundwater pumping by any overlying landowner. It is conceded that at the outset, the groundwater pumping by each Public Water Supplier was permissive and lawful. However, the Public Water Suppliers ignore and do not acknowledge that when the offending activity, whether it be possession or use, is *ab initio* permissive or lawful, that the continued possession or use alone after the onset of adversity is in itself insufficient to commence the prescriptive period. More is required. The user must, by act or declaration, or both, impart knowledge of its hostile claim to each landowner against whom it thereafter seeks to secure a prescriptive right. (See *Unger v. Mooney, et al.* (1883) 63 Cal. 586, 592.) It is only after notice of adversity in fact and the passage of the statutory time and the knowing inaction and acquiescence by the affected landowner, that a prescriptive claim can be perfected. (See Section IV of Motion In Limine.)

Under the common law and in litigation as between private citizens involving adverse possession and/or prescription, if the possession or use was, as here, at the outset permissive or lawful, the law requires an affirmative act and/or declaration by the possessor or user, imparting knowledge of hostility. Thus, under the common law in these circumstances, the evidentiary assessment is *ex ante* rather than *post hoc*.

> "Where possession and use is permissive at the beginning, one cannot acquire title by adverse possession unless he gives clear and actual notice to the owner of the adverse nature of his subsequent possession. *Southern Pacific Co. v. City & County of San Francisco*, 62 Cal.2d 50, 56." *(Axel v. Johnson, et al., vs. Ocean Shore Railroad Company* (1971) 16 Cal.App.3d 429.)

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The *ex ante* assessment looks to the evidence of the acts or declarations, or both, of the party asserting the right acquired by adverse possession or continued use. Landowners ". . . are not affected by acts which do not bring to them knowledge of the assertion of an adverse right," (See *Peck* v. *Howard* (1946) 73 Cal.App.2d 308, at pages 325-326, cited on p. 5 of the Motion In Limine.) This Court's affirmance of an evidentiary assessment and thus standard for the "notice" element of the prescription claims *ex ante* rather than *post hoc* will properly focus upon the acts and/or statements of each Public Water Supplier which each contends provides notice to all landowners of the adverse nature of its continued use. An affirmance of the proper *ex ante* evidentiary standard will permit class certification as to the First Cause of Action of the Cross-Complaint.

A *post hoc* assessment would, on the other hand, require evidence of the state of mind, state of knowledge, the timing of the acquisition of that knowledge, and its legal effect, upon a parcel by parcel, owner by owner, basis. A *post hoc* assessment precludes class certification since that inquiry cannot be limited to the nominal class representative only but of necessity requires an examination of the evidence of notice unique to each owner at the time that the prescriptive period is claimed to have commenced. Proof that any single landowner possessed sufficient knowledge at a given point in time to support a finding that the prescriptive period commenced at that time and as against that landowner would not be sufficient to support a finding that the same prescriptive period likewise commenced against all other owners. Proof of prescription against absent but nominally represented landowners would violate those landowner's constitutional due process rights. (See *Wright, supra.*) When one or more factual issues predominate requiring individual adjudication, class certification is not proper.[3]

III

WHEN THE ACTIONS AND/OR OMISSIONS OF THE GOVERNMENT WHICH AFFECT THE PROPERTY RIGHTS OF PRIVATE CITIZENS ARE IN ISSUE, THE GOVERNMENT'S ACTIONS OR FAILURE TO ACT MUST BE SCRUTINIZED AND FILTERED THROUGH THE PRISM OF BOTH THE FEDERAL AND CALIFORNIA STATE CONSTITUTIONS

As set forth above, under the common law and in suits as between private citizens, involving adverse possession and/or prescription, it is clear that in those cases where the possession or use was at

3 See *Lockheed Martin Corp v. Superior Court* (2003) 29 Cal.4th 1096; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 461- 462; *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 911; *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 38.

the outset permissive or lawful, more is required than the mere continued use for the statutory period. The user must, after the onset of adversity, give clear and actual notice to the owner of the adverse nature of its continued and subsequent use. (*Unger, supra*, and *Axel v. Johnson, et al., supra*.) When notice from the government is a person's due, the means employed must be such as one desirous of actually informing might reasonably adopt to accomplish it. We will not reiterate the law and argument set forth in the Motion In Limine, but would direct the Court to Section V of the Motion In Limine. However, we note that the Public Water Suppliers argue:

> "There is no authority requiring public agencies acquiring prescriptive rights to water to satisfy Diamond Farming's fictional "actual notice." In the absence of legal authority to support Diamond Farming's arguments, it misinterprets *Walker v. City of Hutchinson* (1956) 352 U.S. 112, *Schroeder v. City of New York* (1962) 371 U.S. 208, and *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306 as they have nothing to do with prescriptive rights."

Generally, the Public Water Suppliers assert in their Opposition that there is something special and/or unique about "Water Law," which somehow alters or precludes the consideration of the Federal and California State Constitutions. The suggestion is arrogant to the extreme. In both *Walker, supra*, and *Schroeder, supra*, those suits were filed after the statute of limitations had run, the plea of the statute was sustained by the trial court, but the absence of due process notice resulted in a reversal by the United States Supreme Court. As observed by the California Supreme Court in *Alhambra Addition Water Company v. Solomon Richardson, et al.* (1887) 75 Cal. 598, at p. 601:

> ". . . so far, as the title to real property is concerned, – prescription and limitation are convertible terms; ... ."

Every Public Water Supplier ignores footnote 5 appearing on page 9 of the Memorandum of Points and Authorities in Support of the Motion In Limine. The United States Supreme Court in *Schroeder, supra*, at pp. 213-214 stated:

> "The majority opinion in the New York Court of Appeals seems additionally to have drawn support from an assumption that the effect of the city's diversion of the river must have been apparent to the appellant before the expiration of the three-year period within which the statute required that her claim be filed. 10 N.Y. 2d, at 526-527, 180 N. E. 2d, at 569-570. [Constructive notice.] There was no such allegation in the pleadings, upon which the case was decided by the Trial Court. But even putting this consideration aside, knowledge of a change in the appearance of the river [here, the gradual lowering of well water levels] is far short of notice that the city had diverted it and that the appellant had a right to be heard on a claim for compensation for damages resulting from the diversion.

> That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant – an obligation which the mailing of a single letter would have discharged. (*Schroeder, supra*, pp. 213-214. [Bracket inserted.])

In both *Walker, supra*, and *Schroeder, supra*, as well as in the pronouncement by the United States Supreme Court in *Jones v. Flowers* (2006) 547 U.S. 220, the government in each case was attempting to lawfully take private property. In each, the court affirmed that constitutionally sufficient due process notice was required of the government. Here, each Public Water Supplier seeks to confirm by judgment the unlawful taking without compensation of private property for a public use and ignore the lawful means provided by the California State Constitution, Article 1, § 19. Does the Constitution require less of the government when it acts unlawfully against private property?

In *Jones, supra*, the United States Supreme Court makes clear that Constitutionally sufficient notice is traditionally evaluated by the court on an *ex ante* and not a *post hoc* basis. The assessment focuses upon the sufficiency of the method, manner, or procedure used to impart notice and is not constitutionally dependent upon the result achieved. Proof that actual notice was received is not required. The means, method or procedure employed need only be such as one desirous of actually informing might have reasonably adopted to give notice. This Court's affirmance of the constitutionally required standard of notice will permit certification of the First Cause of Action of the Amended Complaint as against a defendant class, since the issues of proof will concern the acts and declarations of each Public Water Supplier, and the constitutional sufficiency of those acts and declarations, rather than multiple mini-trials wherein the state of mind, state of knowledge, the timing of the acquisition of that knowledge and its legal effect, on a parcel by parcel, owner by owner basis, would otherwise be required.

In the Opposition, the Public Water Suppliers make the bold assertion that prescription is proven on a basin-wide basis. However, the element of "notice" (other than constitutionally sufficient due process notice) cannot be proven on a basin-wide basis. As the California Supreme Court made clear in *City of Los Angeles, supra*, notice of adversity in fact must first have been imparted to each separate landowner before such adverse taking could cause the commencement of a prescriptive period as against each separate owner and each parcel of real property.

As anticipated in the Motion In Limine, the Public Water Suppliers argue, but do not make an offer of proof, that proof of the "notice of adversity" element of the prescriptive claim is proven through falling basin water levels. As the evidence submitted in connection with this Court's consideration of the request to certify a defendant class demonstrate, there are virtually thousands of parcels of real property and owners of that real property which do not have water wells and from which groundwater is not pumped. Thus, as to those owners holding unexercised overlying rights, there were no wells to be monitored nor any wells from which any observations could be made or knowledge obtained. Likewise, as the evidence demonstrates, a significant number of the landowners do not live or work in the area and are truly absentee owners, many residing in different cities and different states. How did those absentee owners know of each Public Water Suppliers' adverse claim? The Public Water Suppliers' argument that falling water levels is all that is required to satisfy the "notice of adversity" element of prescription presupposes a factually overly simplistic view of the hydrogeology of the region. The argument assumes a simplistic view of the basin as being similar to a bathtub wherein, once the plug has been pulled, the water level begins to decline and continues to decline uniformly throughout. That simplistic view does not comport with the real world nor the real conditions within the area of the adjudication boundary. As this Court is aware, Diamond Farming, on February 26, 2007, filed the "Declaration of Steven B. Bachman, Ph.D., in Support of Opposition to Public Water Suppliers' Motion to Certify a Defendant Class." That Declaration went unchallenged and uncontradicted. Therein, Dr. Bachman states:

> "It would be an error and an extreme over simplification to suggest that historically or currently, groundwater conditions within the adjudication area manifest themselves uniformly throughout the entire area embraced within the adjudication boundary."

Dr. Bachman continued and concluded:

> "Due to the complexity of the geology and hydrology of the entire area, evidence of adverse conditions did not and do not manifest themselves in the same way or uniformly, either temporally or through groundwater level measurements, throughout the area embraced within the adjudication boundaries."

As a convenience to this Court, a copy of that Declaration of Steven B. Bachman, Ph.D, in Support of Opposition to Public Water Suppliers' Motion to Certify a Defendant Class is attached to this Reply Memorandum of Points and Authorities as Exhibit "A." The observations made by Dr. Bachman,

are graphically illustrated by a plate from the USGS Water-Resources Investigations Report 98-4022. That plate is attached hereto as Exhibit "B." Diamond Farming hereby requests this Court to take judicial notice of said plate from the USGS report. It is patently obvious that water well levels within the area of the adjudication boundary do not respond to the complex hydrogeologic conditions within the area on an uniform basis, and thus, some landowners pumping groundwater may observe declining well levels while at the same time, others would be observing increasing well levels. Most significantly, how does any given landowner know that any observed decline in well levels is the product of the commencement of "overdraft," rather than the onset of a dry period, a temporary drought and thus the product of the natural and normal wet and dry cycles existent within the region? Finally, the Public Water Suppliers' claims of prescription implicates the defense of "self-help." How is that defense adjudicated by or on behalf of a nominally represented defendant class?

IV

CONCLUSION

This Motion In Limine should be granted, and this Court should confirm that the standard of proof will require an *ex ante* assessment of the acts and/or declarations relied upon by each Public Water Supplier as proof that each imparted knowledge of its adverse claim to each landowner as against which it asserts its prescriptive right. A *post hoc* assessment will preclude class certification as to the First Cause of Action for prescription. Given that the Public Water Suppliers' use was at the outset permissive and lawful, evidence of notice must be assessed under a Constitutional standard, and proof of more than just continued use after the onset of adversity will be required of each Public Water Supplier. The sufficiency of that proof must be assessed *ex ante* and not *post hoc*.

Dated: May 17, 2007

LeBEAU • THELEN, LLP

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

PROOF OF SERVICE

ANTELOPE VALLEY GROUNDWATER CASES
JUDICIAL COUNCIL 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 May 17, 2007, I served the within **DIAMOND FARMING COMPANY'S REPLY TO PUBLIC WATER SUPPLIERS' OPPOSITION TO MOTION IN LIMINE**

■ **(BY POSTING)** I am "readily familiar" with the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org ; All papers filed in Los Angeles County Superior Court and copy sent to trial judge and Chair of Judicial Council (courtesy copy sent to Judge Komar).

**Los Angeles County Superior Court
111 North Hill Street
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Attn: **Department 1**
(213) 893-1014

**Hon. Jack Komar
Judge of the Superior Court, County of Santa Clara
191 North First Street
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*Chair, Judicial Council of California
Administrative Office of the Courts
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■ ***(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].

■ (**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 May 17, 2007, in Bakersfield, California.

Donna M Luis

DONNA M. LUIS