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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

**ANTELOPE VALLEY GROUNDWATER
CASES**

Judicial Council Coordination
Proceeding No. 4408

**REPLY BRIEF IN SUPPORT OF
DEMURRER TO REBECCA LEE
WILLIS' SECOND AMENDED
CROSS-COMPLAINT**

DATE: August 11, 2008
TIME: 9:00 a.m.
DEPT: 1

Phase 2 Trial: October 6, 2008
(Hon. Jack Komar)

[Exempt from Filing Fees Pursuant to Govt. Code
§6103]

The City of Palmdale, City of Lancaster, Littlerock Creek Irrigation District, Palm
Ranch Irrigation District, Desert Lake Community Services District, North Edwards
Water District, Rosamond Community Services District, and Los Angeles County
Waterworks District No. 40 (collectively “Public Entity Demurring Parties”) respectfully

submit this reply brief in further support of their demurrer to the third and fourth causes of action of Rebecca Lee Willis’ the Second Amended Complaint (“SAC”).¹

I. OVERVIEW

Plaintiff Rebecca Lee Willis has filed two documents in opposition to the demurrer – an “Opposition to Demurrer” and a “Memorandum of Points and Authorities/Opposition.” Through these documents, Willis clarifies several ambiguities in her complaint, and sets up summary resolution of her “takings” claims against the “appropriators” through this demurrer. Taken together, Willis’ opposition papers demonstrate the Public Entity Demurring Parties’ entitlement to a dismissal of the third and fourth causes of action.

First, on the merits, Willis fundamentally misunderstands California water law. She does not own the water beneath her land, but rather, has a usufructuary interest in pumping groundwater consistent with the constitutional limitation of reasonable and beneficial use – which, by her own admission, she has yet to do, and may never do. As set forth in moving papers, if the Public Water Producers obtained prescriptive rights against her, settled law bars an inverse condemnation claim – the right is automatically lost or reduced by operation of law and time-barred at that instant. If the Public Water Producers (or the hundreds of other active pumpers in the Antelope Valley) did not in fact obtain prescriptive rights against her, then Willis’ usufructuary right to produce groundwater has not been affected, and she can have no claim for that which has not been taken.

Second, Willis admits that she does not seek damages for “takings” against the City of Palmdale and the City of Lancaster (Opp. 1, n.1), as these parties do not pump and are thus not appropriators. Her second amended complaint did not specially define

¹ The Private Entity Demurring Parties are submitting a separate reply brief. The Public Entity Demurring Parties join in that brief.

the term Appropriators, and appeared to include the City of Palmdale and the City of Lancaster in the group of defendants against whom the third and fourth causes of action were pleaded. Their demurrers should accordingly be sustained without leave to amend.

Third, as a matter of procedure, Willis contends Los Angeles County Waterworks District No. 40 and Rosamond Community Services District somehow waived their rights to demur by filing an all-purpose answer. Such has not been the practice or intent of the parties or Court in this matter, and these parties never intended to waive their rights to demur to subsequently filed pleadings, but only to have the option of not burdening the Court with duplicative responsive pleadings.²

Fourth, despite Willis’ efforts to apply the general language of the takings jurisprudence to California water law, there simply are no cases holding that a public entity that acquires water rights through prescription must pay takings damages to a private party, and for good reason. The California Constitution (Art. 10, Sec. 2) recognizes the importance of the limited groundwater resource, and mandates reasonable and beneficial use. If such use takes place in the context of the decades-long overdraft in the Antelope Valley, and under such conditions as otherwise required by law, then rights may be acquired by prescription. Any attempt to state “takings” claim in that context is time-barred as a matter of law. If, on the other hand, prescription is not obtained, then Rebecca Lee Willis’ unexercised overlying rights have not been affected.

For these reasons, the demurrer should be sustained without leave to amend.

II. WILLIS MISCONSTRUES CALIFORNIA WATER LAW TO ATTEMPT TO STATE A CLAIM FOR TAKINGS

As the California Supreme Court has explained, “overlying water rights are usufructuary only, and while conferring the legal right to use the water that is superior to

² Willis is correct (Opp. 1:28) that Palmdale Water District and Quartz Hill Water District have not demurred to the Second Amended Complaint,

all other users, confer no right of private ownership in public waters.” *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1237; *see also Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, 905 (“there is no private ownership of groundwater”); *State v. Superior Court* (2000) 78 Cal.App.4th 1019, 1023 (“... there is no private ownership of ground or flowing water ...”). Water rights, in other words, carry no specific property right in the corpus of the water itself. *Big Rock M.W. Co. v. Valyermo Ranch Co.* (1926) 78 Cal.App. 266, 275. *See also People v. Shirokow* (1980) 26 Cal.3d 301, 307 (“Both riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse.”).³

As an overlyer, the Willis class has the legal right to use basin groundwater. The right is exercised by extracting and putting such water to reasonable and beneficial use. By class definition, Rebecca Lee Willis has never exercised that right; in other words, she is a dormant overlyer.

The overlying right to produce groundwater, like another right, may be lost through prescription. As provided in Civil Code section 1007, “[o]ccupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all ...” The requisite time period is five years. *Mojave*, 23 Cal.4th at 1241.

“An appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse

³ As the Court of Appeal explained in *State v. Superior Court*, 78 Cal.App.4th at 1025: “... [T]here obviously remains a sense in which discrete quantities of water can be ‘owned.’ For example, one who purchases a container of Arrowhead Puritas water then ‘owns’ five gallons of California water. (See *Lewis v. Scazighini* (1933) 130 Cal.App. 722, 724, 20 P.2d 359, recognizing that water severed from the land becomes personal property which may be bought and sold like any other commodity.) But in its natural state, water is certainly not subject to ownership by an individual.”

1 to the original owner, continuous and uninterrupted for the statutory period of five years,
 2 and under claim of right. Appropriative and prescriptive rights to ground water are
 3 subject to loss by adverse user. Adverse user commences when the overdraft first occurs.
 4 Each taking of water in excess of the safe yield, whether by subsequent appropriators or
 5 increased use by prior appropriators, is wrongful because the overdraft, from its very
 6 beginning, operates progressively to reduce the total available supply.” *California Water*
 7 *Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 725.

8 As set forth in the moving papers, upon the running of the prescriptive period,
 9 under the required conditions, the prescriptive right is acquired by operation of law. In
 10 that instance, a takings claim, if one would lie, is barred by the five year statute of
 11 limitations. *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1048; CCP §§
 12 318, 319; *see also Institoris v. Los Angeles* (1989) 210 Cal.App.3d 10, 16-18.

13 If, on the other hand, the parties seeking to establish prescription fail to do so, for
 14 whatever reason, Willis’ heretofore unexercised overlying right is not affected. Such
 15 failure could result from a finding of “no overdraft” or any number of other situations.
 16 The Willis class, in that instance, would be in the same position as it was before the
 17 initiation of suit – each would be the owner of real property overlying the basin, who had
 18 yet to extract groundwater, and who enjoy whatever rights a dormant overlyer *may* hold
 19 in the context of a long overdrafted basin. In that instance, their unexercised rights will
 20 not have been affected, and no takings claim could be stated.

21 Willis’ shotgun citations to published authority notwithstanding, there is not a
 22 single controlling decision in groundwater rights holding that a public entity that acquires
 23 water rights by prescription is required to pay damages under the “takings” clause of the
 24 United States or California constitutions, or that a failed attempt to obtain prescriptive
 25 rights results in “takings” claims against the unsuccessful public entity.

III. A PARTY NEED NO RESERVE THE RIGHT TO DEMUR IN ITS MODEL ANSWER

Willis briefly argues that Los Angeles County Waterworks District No. 40 and Rosamond Community Services District have somehow waived their rights to demur by not expressly doing so in the model answer on file herein. Such contention should be summarily disregarded.

The Court, which has broad discretion to administer these complex coordinated proceedings (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367; CCP §§ 128 and 187), previously authorized the parties to file a single answer that may serve as a pleading responsive to subsequently filed complaints or cross-complaints. A party with such an answer on file, pursuant to the Court’s prior rulings, remains free to demur or to file a different answer. Willis’ hyper-technical arguments should be rejected, as neither Los Angeles County Waterworks District No. 40 nor Rosamond Community Services District ever intended to waive their right to demur to Willis’ “takings” claims. *In re Sheena K.* (2007) 40 Cal.4th 875, 881, fn. 1 (“a waiver is the intentional relinquishment or abandonment of a known right or privilege.”).

IV. WILLIS DOES NOT SEEK “TAKINGS” DAMAGES FROM THE CITIES OF PALMDALE OR LANCASTER

The City of Palmdale and the City of Lancaster do not pump groundwater, and do not make claims of prescription against the Willis class. In response to the demurrer, Willis acknowledges that the City of Palmdale and the City of Lancaster are not “appropriators” and that their “takings” claims are not made against of the City Palmdale and the City of Lancaster (Opp. 1, n.1).

V. CONCLUSION

For the foregoing reasons, this demurrer to Willis' third and fourth causes of action should be sustained without leave to amend.

Dated: August 4, 2008

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PROOF OF SERVICE

I, Kelley Herrington, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Richards, Watson & Gershon, 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071. On August 4, 2008, I served the within documents:

REPLY BRIEF IN SUPPORT OF DEMURRER TO REBECCA LEE WILLIS' SECOND AMENDED CROSS-COMPLAINT

- ☐ by causing facsimile transmission of the document(s) listed above from (213) 626-0078 to the person(s) and facsimile number(s) set forth below on this date before 5:00 P.M. This transmission was reported as complete and without error. A copy of the transmission report(s), which was properly issued by the transmitting facsimile machine, is attached. Service by facsimile has been made pursuant to a prior written agreement between the parties.
- ☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.
- ☐ by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an agent for delivery, or deposited in a box or other facility regularly maintained by , in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth below.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ by causing personal delivery by First Legal Support Services, 1511 West Beverly Boulevard, Los Angeles, California 90026 of the document(s) listed above to the person(s) at the address(es) set forth below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 4, 2008.


Kelley Herrington