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EXEMPT FROM FILING FEES UNDER GOVERNMENT CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550(b)) ANTELOPE VALLEY GROUNDWATER CASES Included actions: Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., et al. Los Angeles County Superior Court, Case No. BC 325 201 Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., et al. Kern County Superior Court, Case No. S-1500-CV-254-348 Wm. Bolthouse Farms, Inc. v. City of Lancaster Diamond Farming Co. v. City of Lancaster Diamond Farming Co. v. Palmdale Water District Riverside County Superior Court, Consolidated Action, Case nos. RIC 353 840, RIC 344 436, RIC 344 668 AND RELATED CROSS ACTIONS	Judicial Council Coordination Proceeding No. 4408 **UNITED STATES' RESPONSE TO MOTION FOR CLASS CERTIFICATION** Hearing Date: March 12, 2007 at 10:00 a.m. Hearing Location: Los Angeles County Superior Court, Central District, Department 1, Room 534

The United States hereby responds to the *Public Water Suppliers' Notice of Motion and Motion for Class Certification; Declaration of Mark Wildermuth and Jeffery V. Dunn* (hereinafter the "*PWS Motion*"), filed January 10, 2007. Pursuant to Section 382, Code of Civil Procedure, the Public Water Suppliers asked the Court to certify a class defined as all owners of land within the adjudication area that is not within the service area of a public entity, public utility, or mutual water company; and that the State of California be designated as the class representative. *PWS Motion* at 2. The United States opposes the *PWS Motion* because the proposed class (a) includes public landowners; (b) allows class members to opt out; and, (c) excludes the majority of private overlying landowners in the Antelope Valley Groundwater Adjudication.

While the United States recognizes the utility of class representation, the class described in the *PWS Motion* is both over- and under-inclusive. It is over-inclusive because it includes public entity landowners whose interests, claims and defenses are not typical of the larger class of private landowners. It is under-inclusive because it excludes the area serviced by public water suppliers, thereby excluding 65% of the overlying land parcels and, presumably, the majority of landowners. In addition, it allows members to opt out; potentially further reducing the class and creating a risk of inconsistent or varying adjudications of water rights.

The members of the overlying landowners class (combined with public entities, appropriators and water users who were personally served and individually appear before the Court) must comprise <u>all</u> claimants or owners of right within the basin. The class described in the *PWS Motion* comes up short. As a result, the proposed class does not meet the requirements for a waiver of sovereign immunity necessary in a McCarran Amendment ("McCarran"), 42 U.S.C. § 666 general stream adjudication.

1. <u>McCarran adjudications must involve all claimants to water rights along a given stream system</u>.

A fundamental requirement of a McCarran general stream adjudication is the determination of all rights to water within the adjudication boundary. *California v. United States*, 235 F.2d 647, 663 (9th Cir. 1956)(the type of adjudication required by the McCarran

Amendment includes "all owners of lands on the watershed and all appropriators who use water from the stream"); *California v. Rank,* 293 F.2d 340, 347 (9th Cir. 1961) *rev'd on other grounds sub nom. Dugan v. Rank,* 372 U.S. 609 (1963)(a general adjudication is "one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated"); *Metropolitan Water Dist. of S. Cal. v. United States,* 830 F.2d 139, 144 (9th Cir. 1987)("The McCarran amendment [authorizes] . . . only suits to adjudicate the rights of all claimants on a stream"); *United States v. Oregon*, 44 F.3d 758, 768 (9th Cir. 1994)(noting that "all existing water rights claims in the river system will have been determined when the adjudication is finished"); *Miller v. Jennings* (5th Cir. 1957) 243 F.2d 157, 159 (noting that there can be a McCarran adjudication "only in a proceeding where all persons who have rights are before the tribunal"); *In re Snake River Basin Water System*, 764 P.2d 78, 85 (Idaho 1988) (ruling that "in order for the United States to be subject to the jurisdiction of the trial court in the Snake River basin adjudication, the rights of all claimants on the Snake River and all of its tributaries within the state of Idaho must be included in the adjudication.")

The requirement that all rights to water be determined ensures that the final decree is not disturbed by later challenges from omitted parties, and that adjudicated parties are certain that their rights are binding on all who may affect their rights. The goal of binding all parties claiming rights in the water has long been recognized. The Supreme Court stated this objective over ninety years ago:

> 'The water is the *res* or subject- matter of the controversy. It is to be divided among the several claimants according to their respective rights. Each claimant is therefore directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims.'

Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 449 (1916)(quoting with approval from the district court opinion). The Congress referred to this Supreme Court decision in drafting the McCarran Amendment. Describing the character of water adjudications for which sovereign immunity shall be waived, Congress reported:

> All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relations to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights. . . .

S. Rep. No. 755, at 5 (1951) (*citing Pacific Live Stock Co.*, 241 U.S. at 447-448), *quoted in California v. Rank*, 293 F.2d at 347. In turn, the Supreme Court has held that the congressional policy underlying the McCarran Amendment "recogniz[es] the desirability of unified adjudication of water rights." *Colorado River Water Conservation Dist. v. United States* (1976) 424 U.S. 800, 801; *see also United States v. Oregon* (9th Cir. 1994) 44 F.3d 758, 769 ("the adjudication must include the undetermined claims of all parties with an interest in the relevant water source.") Binding all persons claiming rights to the *res* requires, first, that water right holders be made a party. "A court or agency must obtain jurisdiction over a party to bind him. Adjudications are not binding against water right holders or other interested parties not made a party to the proceeding." Tarlock, *L. of Water Rights and Resources* (2005), § 7:8.

2. Class action in a water rights adjudication is generally disfavored and, if utilized, must be carefully construed.

The Public Water Suppliers propose that, instead of individual joinder, the class action device be used to bind a certain class of claimants and potential claimants to decisions made in this adjudication.[1/] Class action is an equitable exception to the "'deep-rooted historic tradition that everyone should have his own day in court. . . .'" *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (*quoting* 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)). The Supreme Court "recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' " or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate." *Id.* at 762, n. 2 (citations omitted).

Here, the private interests affected are property interests. 93 C.J.S. Waters § 181 (1956 & Supp. 1991) ("although a water right may be incorporeal, and only a right to the use of the water,

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[1/] One of the results of a proper class action under section 382, Code of Civil Procedure, is that the judgment rendered therein becomes res judicata as to all members of the class represented. *Chance v. Superior Court*, 58 Cal.2d 275, 288, 373 P.2d 849 (1962).

it is, nevertheless, a private property right which will be treated and protected as such.") Therefore, the streamlining benefits of class action must be carefully weighed against the practical difficulties of applying a "representative parties" concept to a state general stream adjudication. The "representative parties" process presents difficult burdens in identifying water users or a subset of water users with "typical" claims or defenses and identifying a representative party that may fairly and adequately protect a typical water user's interest.[2/]

In *City of Chino v. Superior Court of Orange County,* 255 Cal.App.2d 747, 760 (Cal. Dist. Ct. App. 1967), the limits of class representation in a general stream adjudication were shown. A county water district sought an adjudication of all water users within the district, and certification of all water users in the district as one class. The United States objected and was granted a writ of prohibition from further involvement in the proceedings. The court ruled that the McCarran Amendment required the comprehensive adjudication of all rights to water in the stream system. *Id.* at 761. The water district's attempt to adjudicate only the rights within the district, and not all other users along the stream system, was found to violate the United States' waiver of sovereign immunity. The court also took up the question whether the adjudication was a proper class action. The court found the district's attempt to include only district members as members of the same class defective.

> [W]hile representation of a class of necessary parties to a general adjudication of water rights in a river system by a member or members of such class is not ruled out as satisfying the requirements of [the McCarran Amendment], there can be no class representation in such a suit of those who claim prescriptive or appropriative rights. In order that all owners and claimants be before the court, those whose rights are based upon prescription or prior appropriation must individually appear before the court; and their rights must be defined as among themselves as well as with regard to upstream appropriators.

[2/] Certification of a class is only proper where: (1) there is an ascertainable class, and (2) the class members have a well-defined community of interest in the the questions of law and fact involved in the case. *City of San Jose v. Superior Court,* 12 Cal.3d 447, 459 (1974). "The community of interest requirement [for class certification] embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Lockheed Martin Corp. v. Superior Court* 29 Cal.4th 1096, 1104 (2003), quoting *Richmond v. Dart Industries, Inc.* 29 Cal.3d 462, 470 (1981) .

Id. at 760 (emphasis added). In reaching its decision, the Court of Appeals relied extensively on the Ninth Circuit Court of Appeals' opinion in *California v. Rank,* 293 F.2d 340, 347 (9th Cir. 1961) *rev'd on other grounds sub nom. Dugan v. Rank,* 372 U.S. 609 (1963). In that case, the United States was made a party defendant pursuant to the McCarran Amendment for the adjudication of riparian and groundwater rights along a 60-mile stretch of the central San Joaquin River. The Ninth Circuit found that it was not a McCarran general adjudication of the water rights of a stream system because not all claimants had been joined. In so ruling the court noted:

> There can be little doubt as to the type of suit Congress had in mind [in a McCarran general stream adjudication]. . . : one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.

293 F.2d at 347. Within this framework requiring the comprehensive adjudication of all rights, the court remarked: "It may well be that those claiming riparian and overlying rights could properly be treated as a class, since the scope of their rights and the limitations imposed upon them by the physical solution decreed are dependent upon circumstances common to all." *Id.*

These cases, therefore, demonstrate that representation of a class of parties in a McCarran Amendment general stream adjudication, while not ruled out, must be crafted in a way to include (1) similarly situated overlying landowners, and (2) all those claiming overlying rights.

3. A class of water claimants must be a mandatory class.

Furthermore, should such a class be recognized, it must also comply with the congressional directive that, in a McCarran adjudication, "[a]ll claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim. . . ." S. Rep. No. 755, at 5. Accordingly, the class must be a mandatory or no-opt-out class. Mandatory class actions have been defined by the Supreme Court as where the persons objecting to the collective treatment

have no inherent right to abstain. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999). "The legal rights of absent class members . . . are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." *Id.* at 847.

The right to opt out is not addressed under Section 382, Code of Civil Procedure. "However, '[i]t is well established that in the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) for conducting class actions.'" *Bell v. American Title Ins. Co.*, 226 Cal.App.3d 1589, 1603 (Cal. Dist. Ct. App. 1991), *quoting Frazier v. City of Richmond*, 184 Cal.App.3d 1491, 1499 (Cal. Dist. Ct. App. 1986). California follows the rule established in federal courts that when classes are certified under Fed.R.Civ.Proc. 23(b)(1) or (b)(2), there is no right to opt out. *Id.* at 1603.

Rule 23(b)(1) applies where "the prosecution of separate actions by or against individual members of the class would create a risk of [¶] (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or [¶] (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . ."

The standards of subsection (b)(1)(A) would be met here, where a risk of inconsistent or varying adjudications of the rights of non-adjudicated individual water right holders, when considered together, could impair the uniform course of conduct which the United States and others seek; that is, to establish their respective water rights in a finite amount of groundwater. *See United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10 (D.Nev.1975) (ruling that the

standards of subsection (b)(1)(A) are met because compelling separate litigation against individual water right holders would create a risk of inconsistent or varying adjudications of the rights). Furthermore, subsection (b)(1)(B) is satisfied as the interests of non-parties may be substantially impaired or impeded should the adjudication court determine that the rights of non-parties have been generally prescribed by party claimants.[3]/

4. The class proposed by the Public Water Suppliers is deficient because it is not comprehensive, not typical, and not mandatory.

The class proposed by the Public Water Suppliers does not meet the standards necessary for class action in a McCarran general stream adjudication. First, the class will not bind all water right holders or interested parties because it does not include all landowners in the Antelope Valley Groundwater Adjudication.[4]/ The proposal expressly excludes all owners of land that are within the service area of a public water supplier. *PWS Motion* at 3. The number of parcels serviced by the public water suppliers, according to the declaration filed by the suppliers' expert,

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[3]/ Class actions under Rule 23(b)(1)(B) are traditionally "those involving 'the presence of property which call [ed] for distribution or management.'" *Ortiz*, 527 U.S. at 834, *quoting* J. Moore & J. Friedman, 2 Federal Practice 2240 (1938). One such suit is the limited fund class action, aggregating "claims . . . made by numerous persons against a fund insufficient to satisfy all claims." *Id.* The water rights adjudication is an analogue. A correlative share of the limited native groundwater supply will be distributed among overlying landowners.

[4]/ Movants' class proposal potentially falls short of the McCarran Amendment's prerequisites for the waiver of federal sovereign immunity in another respect. McCarran general stream adjudications are an *inter se* determination of all water users' rights to water. *See California v. Rank* 293 F.2d at 347 (a McCarran adjudication is "a 'general adjudication' of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.") A critical element in the *inter se* determination of the right is the specific quantity of water each claimant is entitled to. Here, Plaintiffs propose a determination of the correlative share of the *res* among a class of landowners who are pumping or who may pump water in the future. However, because the precise number of class member-pumpers will not be known, no definite quantity can be established for each class member's share. Nevertheless, the United States understands that this problem will be addressed by the Court or the State through administration of the class water rights in such a way that the class's share of the native safe yield of groundwater is not exceeded. Based on this understanding, the United States does not raise this as an additional grounds for opposing Movants' proposal.

include 122,000 of the 187,000 land parcels within the adjudication area. *See* Declaration of Mark Wildermuth in Support of Municipal Water Providers' Motion to Certify a Defendant Class, at ¶¶ 7-8 (attached to the PWS Motion).[5]/ Thus, the public water suppliers proposal is to exclude 65% of potential claimants.

The public water suppliers do not offer a reason for omitting 65% of the land parcels from the adjudication. They do, however, cite two reasons in support of certifying their proposed class consisting of 35% of the land owners. One, "[a]ll class members own land parcels." *PWS Motion* at 12. Two, "[t]hey each have the right to allege an identical overlying right to take native groundwater for their reasonable and beneficial use." *Id.* It is apparent that these reasons apply equally to the excluded 122,000 land parcels and their owners. These landowners, even though they may be receiving municipal water, still have a right in common to use the groundwater for reasonable and beneficial use of the basin's native safe yield. All overlying landowners hold this right, regardless of whether they withdraw groundwater.

Consequently, no legal basis for excluding the landowners within the municipal water service areas is presented.[6]/ The public water suppliers may argue that by providing potable water it is unlikely that the landowners will ever exercise their overlying rights to groundwater. This would, however, be mere speculation. It is more reasonable to assume that the owners of at

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[5]/ Mr. Wildermuth states that the adjudication area contains approximately 187,000 land parcels. *Id.* at ¶ 7. 65,000 parcels are estimated to be outside the municipal water provider service areas. *Id.* at ¶ 8. Therefore, 122,000 land parcels, or about 65% of all land parcels are within the public water suppliers service area and would, under this class action proposal, be excluded.

[6]/ The public purveyors of groundwater may not assert the overlying rights of their customers. *Orange County Water Dist. v. City of Riverside*, 173 Cal.App.2d 137, 165-166, 343 P.2d 450, 464 - 465 (Cal.App.1959)); *City of San Bernardino v. City of Riverside*, 186 Cal. 7, 25 (1921). However, this is not a reason for the public water suppliers to exclude the landowners that receive municipal water. Their proposal suggests that the State, not the public water suppliers, be made the class representative.

least a portion of the 122,000 serviced land parcels are exercising or may want to exercise their overlying right. There are reasons why landowners receiving municipal water may, in fact, wish to have wells on their property. For example, owners of more than 15,000 square feet (approximately one-third acre) of land within the city limits of Lancaster may raise horses and other livestock on their property.[7/] A groundwater well could service these animals at less expense than municipal water. Furthermore, no one can predict whether residential land use will remain residential land use. At some point in the future, residential land use may become industrial land use and the subsequent owner may decide to drill a well rather than rely upon a municipal provider for his industrial water needs.

Second, the proposed class contains landowners who are not similarly situated. The United States and the State of California, among other public entities, are landowners within the Antelope Valley. However, they do not have a common defense with private landowners. For example, there is no common interest between public and private landowners in defending against prescriptive claims that would reduce correlative rights to the safe yield. The government's water rights are not subject to loss by prescription. Cal.Civ.Code § 1007; *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199 (1975); *see also United States v. Stewart*, 121 F.2d 705 (9th Cir. 1941) (title by prescription cannot be acquired to property belonging to the United States); *United States v. California*, 332 U.S. 19 (1947)(same). Furthermore, Bolthouse Properties and Diamond Farming Company, have alleged that public agencies may assert prescriptive rights and, in so doing, may have taken their water rights without just compensation in violation of the United States and State constitutions. *See* Cross-Complaint of Bolthouse Properties, LLC, filed January ,2007, at ¶¶ 16 and 16; Diamond Farming Co.'s Cross-Complaint

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[7/] City of Lancaster Ord. No. 550, September 4, 1990, ¶ 17.08.310 (Animal regulations); attached as Exhibit 1.

for Equitable and Monetary Relief, filed on January 2, 2007, at 20-21. The governmental entities will be defending against these claims, not prosecuting them in common. Consequently, the United States and other public entities with divergent interests from private landowners should be excluded from the overlying landowners class.

Finally, the Public Water Suppliers have not designated their proposed class as a mandatory class. Rather, they affirmatively state that "each class member has the right to opt out of the class . . . ." *PWS Motion* at 13. We disagree. In order for the class to determine the rights of overlying users and comply with the McCarran Amendment, it must be a no-opt-out class.

In conclusion, the final decree (and eventual physical solution) must be lasting. It must bind all users or potential users of water. Otherwise, the decree is perpetually unsettled as overlying landowners that were not a party to this suit continue to exercise their rights and drill new wells. On the other hand, by making all overlying landowners parties, the adjudication may determine all rights to water and prevent future claims and intrusions of non-parties. Accordingly, should the Court exercise its discretion in certifying a class of overlying landowners, it should require that the class include all private landowners, and mandate that all members of the class participate in the determination of questions of law and fact typical of the class with no right to opt out.

Respectfully submitted this 1st day of March, 2007.

R. LEE LEININGER
Trial attorney
U. S. Department of Justice

PROOF OF SERVICE

I, Judy A. Tetreault, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environmental and Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

On March 1, 2007, I caused the foregoing documents described as UNITED STATES' RESPONSE TO MOTION FOR CLASS CERTIFICATION, to be served on the parties via the following service::

[X] BY ELECTRONIC SERVICE AS FOLLOWS by posting the documents(s) listed above to the Santa Clara website in regard to the Antelope Valley Groundwater matter.

[ ] BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By placing true copies thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

[ ] BY OVERNIGHT COURIER: I caused the above-referenced document(s) be delivered to FEDERAL EXPRESS for delivery to the above address(es).

Executed on March 1, 2007, at Denver, Colorado.

/ Judy A. Tetreault
Judy A. Tetreault
Paralegal Specialist