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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. Superior Court of California, County of Los Angeles, Case No. BC 325 201 Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., et al. Superior Court of California, County of Kern, 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 Dist. Superior Court of California, County of Riverside, consolidated actions, Case nos. RIC 353 840, RIC 344 436, RIC 344 668	Judicial Council Coordination Proceeding No. 4408 **UNITED STATES' REPLY TO RESPONSES TO THE MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM IN SUPPORT** Hearing Date: September 21, 2006 at 10:00 a.m. Hearing Location: Los Angeles County Superior Court, Central District, Department 1, Room 534

1. The waiver of sovereign immunity contained in the McCarran Amendment is not satisfied when a suit for the adjudication of rights to the use of water fails to be comprehensive and results in piecemeal determinations.

Only the Municipal Water Providers, Tejon RanchCorp and the City of Palmdale filed in opposition to the United States' position that this water rights adjudication is not a proper McCarran Amendment proceeding.[1/] Significantly, the California "State defendants agree with

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[1/] *See* Municipal Water Providers' Opposition to United States' Motion for Judgment on the Pleadings and Memorandum in Support (hereinafter the "MWP Brf.") and Tejon RanchCorp's (1) Opposition to United States' Motion for Judgment on the Pleadings; and (2) Case Management

the United States that the present action is not at this time a complete stream adjudication for purposes of the McCarran Amendment . . . because not all of the owners of water rights in the streams which supply a substantial portion of the native supply of the groundwater basin have been joined."[2/]

The "clear federal policy" underlying the consent to jurisdiction provided for under the McCarran Amendment is "the avoidance of piecemeal adjudication" of water rights. *Colorado River Water Conservation Dist. v. United States* (1976) 424 U.S. 800, 819. This policy "recogniz[es] the desirability of unified adjudication of water rights." *Id.* at 818. Consequently, courts have consistently held that McCarran adjudications must involve all of the claimants to water rights along a given stream system. *Dugan v. Rank* (1963) 372 U.S. 609, 618-19; *Miller v. Jennings* (5th Cir. 1957) 243 F.2d 157, 159; *In re Snake River Basin Water System* (1988) 764 P.2d 78, 83. The comprehensiveness requirement assures that all rights on a stream system are determined so that the final decree is not disturbed by later challenges from omitted parties, and that adjudicated parties are certain that their rights to water are binding on all who may affect their rights.

The Municipal Water Providers and Tejon RanchCorp argue for a different interpretation of McCarran's comprehensiveness requirement. MWP acknowledges the "possib[ility] that parties who have rights to divert surface supplies outside the Basin boundaries may intercept water that would otherwise reach the Basin," but argues that this possibility is irrelevant to the question whether this adjudication is sufficiently comprehensive to satisfy the requirements under the McCarran Amendment to confer jurisdiction to sue the United States. MWP Brf. at 2; *see also* TR Brf. at 7-8. Thus, these water users urge the Court to ignore the potential claimants who are hydrologically 'upstream' of the present parties to this adjudication. To use a legal

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Statement (hereinafter the "TR Brf."). The City of Palmdale did not file a memorandum, but joined in the Municipal Water Providers' opposition brief.

2/ *See* Response of State of California, Santa Monica Mountains Conservancy and State of California 50th District Agricultural Association to United States' Motion for Judgment on the Pleadings (hereinafter the "State Defendants' Brf."), at 2.

metaphor, these water users would have the United States litigate the size of the present parties' respective slices of pie without the ability in this litigation to establish the actual size of the pie – a fundamental issue that cannot be adjudicated without joining the other claimants. The McCarran Amendment cannot be construed so loosely. The obvious result would be piecemeal adjudication through numerous lawsuits of related and interrelated rights to water, contrary to McCarran's intent.

Tejon RanchCorp even embraces this potential for piecemeal litigation. The United States, Tejon RanchCorp suggests, could sue "any watershed riparians . . . diverting surface water in derogation of the United States' water rights." *Id.* at 7. Furthermore, Tejon RanchCorp argues that a landowner in the Antelope Valley watershed who is excluded from this adjudication could initiate a McCarran lawsuit encompassing water rights to the nearby mountain streams. *Id.* This is precisely the type of piecemeal adjudication of related water interests that the McCarran Amendment was intended to prevent.

The Municipal Water Providers' and Tejon RanchCorp's reliance on *United States v. District Court In and For Eagle County, Colo.* (1971) 401 U.S. 520, for their argument limiting the scope of a McCarran adjudication, is misplaced. In that case, the United States argued that the adjudication of water in the Colorado River must include the entire extent of the river from Colorado to California, and all states in between. The Supreme Court disagreed, stating that the reference to a "river system" in the McCarran Amendment "must be read as embracing one within the particular State's jurisdiction." *Id.* at 769. Thus, it was sufficient for purposes of McCarran that the adjudication encompass the entire Colorado River hydrologic system within Colorado. The United States does not propose expanding this adjudication to include other states' jurisdictions. The Antelope Valley river system covers a distinct and limited geographic area that is entirely within the State of California.

Furthermore, *Eagle County*, was predicated on the particular system of adjudication and administration of water rights in the State of Colorado. Under the Colorado statute in effect at the time of the *Eagle County* decision, there was a single continuous proceeding for adjudication

of all water rights affecting areas of Colorado in the drainage basin of Colorado River system. "That proceeding 'reaches all claims, perhaps month by month but inclusively in the totality.' Additionally, the responsibility of managing the State's waters, to the end that they be allocated in accordance with adjudicated water rights, is given to the State Engineer." *Colorado River Water Conservation Dist. v. United States* (1976) 424 U.S. 800, 819-820 (quoting *United States v. District Court for Water Div. 5* (1971) 401 U.S. 527, 529. Because the proceeding reached all claims within the hydrologic basin of the Colorado River system within the state of Colorado in their totality and the water rights tributary to that system are administered in a unified whole, the Court found that the Colorado suit was within the McCarran Amendment's scope giving consent to join United States as defendant in a suit for adjudication of rights to use water of a river system. *Id.* This case does not attempt to adjudicate the totality of water rights in the Antelope Valley river system within California, and therefore does not comply with McCarran's comprehensiveness requirement.

2. The Municipal Water Providers and Tejon RanchCorp ignore the fact that the surface water in the watershed recharges the native groundwater in the basin and is therefore a relevant source necessary to be included in a comprehensive adjudication.

As noted by the State of California in its brief, the Department of Water Resources has identified surface water in the watershed as the primary source of recharge to the Antelope Valley Groundwater Basin. *See* State Defendants' Brf. at 5 (citing DWR Bulletin No. 118). Neither the Municipal Water Providers nor Tejon RanchCorp contests this essential fact.[3/] Further, no party disputes that the tributary surface water that is the primary source of recharge of the native groundwater in this basin has been excluded from this adjudication.

Despite this certainty, the Municipal Water Providers maintain that a failure to join parties who may divert surface water that would otherwise reach the groundwater basin is "a

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[3/] Tejon RanchCorp states that groundwater can also "emanate from rainfall, underflow of groundwater and other sources," but the party recognizes that groundwater is part of a larger hydrological system that includes surface water and apparently does not contest the fact that surface water in the watershed is the primary source of recharge of native groundwater in the basin. *See* TR Brf. at 5.

factual issue that can be addressed in the adjudication." MWP Brf. at 2. This puts the cart before the horse. The McCarran Amendment clearly requires joining all parties who may assert claims or objections that affect other parties' rights and uses of water. Further, the Municipal Water Providers do not explain how the Court can adjudicate the factual issue of the effects of diversions of surface water by users who have not been joined. Those absent surface water users are the very parties in possession of the facts that must be adjudicated. Until such users are joined and given an opportunity to assert their claims and objections, the Court lacks the basis for adjudicating their diversions or other rights.

The cases cited by the Municipal Water Providers for their argument that the scope of jurisdiction should be addressed at a latter phase in the adjudication, and after a factual examination of surface water impacts, do not support such a proposition. MWP at 2, n. 3 In *Eagle County*, 401 U.S. at 525, the United States argued, *inter alia*, that the suit was a supplementary adjudication and the absence of owners of previously decreed rights would hamper the determination of federal reserved water rights. The Supreme Court stated that the necessity of including owners of previously decreed rights goes to the merits of the United States' claim, citing the underlying Colorado decision wherein the state supreme court reserved judgment on the existence of federal reserved rights and whether such rights have priority over previously adjudicated rights.[4/] *Id.* at 525-526. The issue presented here, on the other hand, is whether owners of unadjudicated rights to the surface water that supplies the source of native groundwater in the Antelope Valley basin should be joined. If applicable at all, the holding in *Eagle County* indicates that owners of all unadjudicated rights in the river system must be joined. *See Id.* at 524 (the McCarran statute is "all-inclusive" and has "no exceptions and which, as we

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[4/] The federal reserved water rights doctrine reserves only water that has not already been appropriated at the time of the reservation of land. *See e.g., Cappaert v. United States* (1976) 426 U.S. 128, 138 ("This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.")(citations omitted). Implicit in the *Eagle County* decision, therefore, was the need for the trial court to examine the extent of prior appropriation before ruling on the merits of the United States' claim to federal reserved water rights.

read it, includes appropriate rights, riparian rights, and reserved rights.")

United States v. Oregon (9th Cir. 1994) 44 F.3d 758, also cited by the Municipal Water Providers, is similarly inapposite. There, the relevant issue presented was whether Oregon's statutory adjudication process violates the McCarran Amendment because it does not allow parties to challenge the water rights certificates issued through the state's permit system. The Ninth Circuit, in rejecting this argument, stated that, "[a]s was true in *Eagle County,* all existing water rights claims in the river system will have been determined when the adjudication is finished. . . . The comprehensiveness standard requires the consolidation of existing controversies, not the reopening of settled determinations." *Id.* at 768. The adjudication of rights to water in the Antelope Valley does not involve settled determinations.[5/] To meet the McCarran Amendment's comprehensiveness standard, however, it must involve consolidation of all rights to the use of water.

3. *United States v. Oregon* is distinguishable from the instant case.

The Municipal Water Providers and Tejon RanchCorp point to other language in *Oregon* for support of their argument that an adjudication consisting solely of groundwater rights satisfies the McCarran Amendment. MWP Brf. at 3-4; TR Brf. at 3.[6/] *Oregon* can be distinguished because in Oregon, unlike California, there was no legal relationship between rights to use

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[5/] No parties have asserted that rights to the use of water in the Antelope Valley watershed have been previously adjudicated.

[6/] The Ninth Circuit Court of Appeals stated that "the [McCarran] statute applies to the 'water of a river system or other source.' Groundwater may be included as an 'other source,' but the use of 'or' strongly suggests that the adjudication may be limited to *either* a river system *or* some other source of water, like groundwater, but need not cover both." *Oregon*, 44 F.3d at 768. Here, however, the surface water is the primary source of the native groundwater in the Antelope Valley. Given this condition, the principle announced in *Oregon* that "the adjudication must include the undetermined claims of all parties with an interest in the relevant water source" weighs in favor of including the surface water in this adjudication. *Id.* at 769. As the State of California points out in its response brief, "a groundwater adjudication should include surface water flows that substantially affect the amount or quality of the groundwater. . . . Otherwise, there is a risk that later diversions from those upstream sources will diminish the amount of water reaching and recharging the basin, possibly requiring additional and subsequent lawsuits to protect the rights of the groundwater users, including the United States and the State defendants." State Defendants' Brf. at 4, 6.

surface water and rights to use groundwater. Surface water in Oregon is allocated under the prior appropriation doctrine, while rights to groundwater follow the reasonable use rule. 44 F.3d at 769. The priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater. *Id.* "Thus, a major function of the statutory comprehensive adjudications is made unnecessary-there is no need to establish the relative priority of all users' claims in order to define each [surface water and groundwater] user's rights." *Id.*

The Antelope Valley Groundwater Basin adjudication, on the other hand, claims to be an adjudication of appropriative rights to groundwater (as well as deciding overlying landowner [riparian] rights and prescriptive rights). *See, e.g.*, Cross-Complaint at ¶¶ 14 and 36. The Municipal Water Providers "seek a judicial determination . . . as to the priority and amount of water they and each cross-defendant is entitled to pump." Cross-Complaint at ¶ 43. The adjudication of groundwater in the Antelope Valley, therefore, will establish relative priorities, at least to appropriative water use. Consequently, there is a need in this case to determine relative priorities between the groundwater use and the surface water source of the groundwater use.[7/]

4. Restrictions in the adjudication of water rights under the state Water Code are not applicable to this non-statutory adjudication of rights to water.

The Municipal Water Providers argue that this court action is the sole method to comprehensively determine groundwater rights because statutory surface water adjudications in California exclude groundwater, other than subterranean stream flows. This argument misses the point in several ways. First, the limitation under the California Water Code generally excludes groundwater from statutory surface water adjudications, not vice versa. *See* Cal. Water Code §§ 2500, 2501. The issue in this case is whether surface water may be excluded from a groundwater adjudication. Second, this provision of the Water Code does not even apply to this adjudication because this is a court adjudication, not a "statutory adjudication" by the California Water

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7/ The Municipal Water Providers and Tejon RanchCorp misconstrue the United States' interpretation of *Oregon* as ignoring California's regulatory scheme that treats surface water and groundwater under different "legal regimes." MWP Brf. at 5; TR Brf. at 4. This is a straw man. As discussed in section 4, below, the different administrative schemes California uses for surface water and groundwater have nothing to do with the scope of jurisdiction under the McCarran Amendment.

Resources Control Board. As noted by the State of California in its brief, "The State Water Resources Control Board has the authority to conduct 'statutory adjudications,' pursuant to Water Code Section 2500, but such authority extends only to the adjudication of surface water, not percolating groundwater. [H]owever, the California courts also have jurisdiction to conduct water rights adjudications, and are not limited to surface water, but may adjudicate both surface and groundwater." State Defendants' Brf. at 4, n.1 (citations omitted).

5. The lack of compliance with the McCarran Amendment is evident and does not require resolution of facts at trial.

The Municipal Water Providers and Tejon RanchCorp argue that the threshold jurisdictional question presented here is not appropriate for a motion for judgment on the pleadings. They state that the hydrology of the Antelope Valley is a factual question that must be addressed in the adjudication, presumably in an evidentiary hearing. MWP Brf. at 2; TR Brf. at 5. Notably, neither of these parties contests the fundamental fact relevant to the jurisdictional issue; surface water from the surrounding Antelope Valley watershed is the *primary* source of recharge of the groundwater aquifer, *see* State Defendants' Brf. at 2, 5-6, yet rights to that surface water have not been included in this purported McCarran Amendment general stream adjudication. The surface water source of the groundwater is a conspicuous and undeniable fact and, as such, is sufficient for granting this motion for judgment on the pleadings.

The grounds for a motion for judgment on the pleadings "shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc., § 438, subd. (d)). A complaint may be read as though it includes matters judicially noticed. (Code Civ. Proc., § 430.30); *Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 590. By extension, such matters may be used to show that a complaint fails to state a cause of action even though its bare allegations do not disclose any defect. *Id.* at 590.

The Cross-Complaint alleges an adjudication of rights to water in the Antelope Valley Groundwater Basin, defined as the alluvial aquifer. Cross-Complaint at ¶¶ 1,18. It also alleges a water rights adjudication consistent with the McCarran Amendment. *Id.* at ¶¶ 15-17. Evident in the Cross-Complaint is the failure to state a cause of action consistent with the McCarran

Amendment because it does not include within its alleged jurisdictional boundaries the adjacent river system and surface water sources of the groundwater basin.

The Court may take judicial notice of facts that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute. (Cal. Evid. Code § 452, subd. (g)); *Rank v. Krug* (S.D.Cal.1950) 90 F.Supp. 773 ("Public facts, geographical positions, . . . and the like may be judicially noticed.").[8/] The surface water source of groundwater for the Antelope Valley basin is undisputed and cannot reasonably be the subject of dispute. The Court need not take notice of the extent, or quantify the amount, of contribution from the watershed areas. The Court need only determine that the failure to include, at all, rights to surface water in this adjudication violates the comprehensiveness requirement under the McCarran Amendment.

6. Whether the Court should order the joinder of *de minimis* parties is not an issue appropriate for determination at this time.

Tejon RanchCorp asks the Court to order the exclusion of *de minimis* parties from the adjudication. This issue is not appropriate for determination at this time. Exclusion of water users or potential water users, if any, will be factually driven. Indeed, Tejon RanchCorp's request demonstrates the need for a factual foundation. It defines a *de minimis* exception as "water usage [that is] too small to materially affect groundwater supplies in this basin," but then proposes arbitrary definitions to select "where to draw the *de minimis* line." Id. at 8, 9. Tejon RanchCorp argues for the exclusion of landowners and other water users who pump less than 10 acre-feet per year from the Antelope Valley Groundwater Basin (based on a statutory definition of minor pumping quantities), as well as the exclusion of owners of less than 20-50 acres of land

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[8/] Standards for judicial notice are well established:
The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know? and (2) is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid.
Varcoe v. Lee (1919) 180 Cal. 338, 346-347.

overlying the basin (without reference to a basis). This is not a determination of the material affect of pumping on the groundwater supply.

Tejon RanchCorp inaccurately cites to an Arizona case in support of its argument. It claims that *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* (Ariz. 1993) 857 P.2d 1236, holds that the comprehensiveness requirement of the McCarran Amendment does not require joinder of all owners of wells. Tejon RanchCorp is mistaken. This decision was issued long after joinder of all water right claimants and potential claimants, including well owners, in the Gila River general stream adjudication. Only after joinder of all claimants and the opportunity of all claimants to participate in the contested issue, did the Arizona Supreme Court determine that theoretically "the trial court may adopt a rationally based exclusion for wells having a *de minimis* effect on the river system." *Id.* at 1248. Importantly, the Arizona court did not exclude these parties from the adjudication, but stated that the creation of a *de minimis* exclusion "is, in effect, a summary adjudication of their rights."[2]/ *Id.*

The issue of whether certain parties using *de minimis* quantities of water may be summarily adjudicated water rights, or may have their rights excluded from adjudication, is an issue the Court should take up only after joinder of all potential water right holders.

Respectfully submitted this 15th day of September, 2006.

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

2/ The decision in *Gila River* did not set a *de minimis* exclusion, but merely held that one is possible. Following the Arizona Supreme Court's decision, the adjudication court's Special Master examined the relevant facts and issued a report on what constitutes a *de minimis* use of water in a major tributary of the Gila River. The court adopted most the Special Master's findings of fact and conclusions of law, stating that the Special Master "succinctly summarized the balance between claimants' needs for specification of water rights and the efficient use of resources." Order, dated September 26, 2002, at 2 (attached as Exhibit 1).

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) Consolidated
IN RE SANDS GROUP OF CASES	Contested Case W1-11-19 (Consolidated)

A hearing was held on September 27, 2001, to consider whether the court should approve and adopt as an order of this court, the findings and conclusions set forth in Special Master John E. Thorson's November 14, 1994 Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases Involving Stockwatering, Stockponds, and Domestic Uses, as modified by order dated February 23, 1995 (collectively referred to as "Special Master's *De Minimis* Report"). Special Master Thorson concluded that stockwatering and certain stockpond and domestic water uses constitute *de minimis* depletions of water within the San Pedro River Watershed of the Gila River system and source whose characteristics or attributes should be summarily adjudicated. Numerous parties filed objections to the report in 1995, and in 2000 and 2001, parties filed responses, replies, and supplemental briefs on objections.

The Special Master's *De Minimis* Report arose in response to an invitation by the Arizona Supreme Court to "adopt a rationally based exclusion for wells having a de minimis effect on the river system." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 394, 857 P.2d 1236, 1248 (1993) ("*Gila II*"). The Court held that:

> A properly crafted *de minimis* exclusion will not cause piecemeal adjudication of water rights or in any other way run afoul of the McCarran Amendment. Rather, it could simplify and accelerate the adjudication by reducing the work involved in preparing the hydrographic survey

EXHIBIT 1

reports and by reducing the number of contested cases before the special master. *Id.*[1]

The Arizona Supreme Court's goal of insuring that the adjudication court devotes the proper level of resources to determining small water claims, while not requiring claimants to engage in unproductive litigation, supports the Special Master's conclusion that summary adjudication should be extended to all types of *de minimis* claims (as opposed to only claims involving wells). In his report, Special Master Thorson succinctly summarized the balance between claimants' needs for specification of water rights and the efficient use of resources. The court agrees with Special Master Thorson's conclusion that no one is aided by expensive litigation that does not provide meaningful results.

In this proceeding, summary adjudication is appropriate to determine the attributes and characteristics of water uses that do not individually affect the water supply available to other claimants. This perspective guides this order.[2] The purpose of this order is not to finally adjudicate the amount of water flow available to any claimant or whether those holding a water right of higher priority will be able to enforce their right at times when water supply is insufficient to satisfy all users. This order is limited to identifying water right claims that should be summarily adjudicated in accordance with the principles expressed in *Gila II*.

With certain limitations, the court agrees with Special Master Thorson's conclusion that stockwatering, stockpond, and many domestic water uses do not require a detailed adjudication because it is likely that a significant number of these water rights will not be administered after a final decree is entered.

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[1] In *Gila IV*, the Supreme Court stated that this is "an approach we continue to endorse." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 342, 9 P.3d 1069, 1081 (2000), *cert. denied sub nom.* Phelps Dodge Corp. v. U.S., 533 U.S. 941 (2001) ("*Gila IV*").

[2] For purposes of this order, the court adopts the Special Master's definitions of the terms "de minimis water use," "summary adjudication," and "proposed water right characteristics." Special Master's De Minimis Report 5.

As to the question of what qualifies as a *de minimis* use of water within the San Pedro River Watershed, the Special Master considered the following factors in making this determination:

1. The amount of water available to downstream users;
2. The number of stockwatering, stockpond, and domestic uses;
3. The number and impact of each of these uses; and
4. The relative costs and benefits of summary versus complete adjudication of these three types of water uses.

With respect to the first issue, the amount of available water supply, Special Master Thorson had to decide on a method of measurement that would reflect the reliably available flow of a river system that is not harnessed by dams or other mechanisms designed to regulate or store water flow. After reviewing the Special Master's *De Minimis* Report and the memoranda filed in support and in opposition to his findings and conclusions, the court has concluded that the Special Master adopted an appropriate statistical analysis that provides the most reasonable determination of water flow reliably available from the San Pedro River Watershed to downstream users.

The analysis regarding the remaining factors considered by the Special Master is adequately set forth in his report. However, several of the parties' objections deserve special mention.

At the hearing, some parties raised concerns that use of the abbreviated adjudication procedures suggested by Special Master Thorson might prejudice their enforcement rights in the future. This order approves certain of the Special Master's findings of fact and conclusions of law and authorizes summary adjudication with respect only to declaring the nature and priority of water uses deemed to be *de minimis*. This order does not approve any determination that would adversely affect substantive and

procedural rights in subsequent water right enforcement proceedings.[3]

Several parties object to the court designating any uses of water drawn from wells as *de minimis* for purposes of this adjudication because the San Pedro River Watershed's subflow zone is yet to be determined and, therefore, the scope of this court's jurisdiction over water drawn from wells remains undecided. The court does not see the prejudice to any well owner or claimant that would result from adoption of the Special Master's recommendations. If a well is determined to be pumping only groundwater that is not within the subsequently determined subflow zone, then the court's determination is of no consequence. If the well is drawing subflow, then the claimant's water right will have been summarily determined, and costly litigation will have been avoided. In addition, when the subflow zone of the San Pedro River Watershed is finally determined, the court can easily enter an order deleting those wells that are not part of this adjudication.

Another objection relates to the Special Master's discussion of procedures relating to the severance and transfer of an adjudicated water right. Some dispute the conclusion that this court's approval is required whenever the Arizona Department of Water Resources authorizes the severance and transfer of an adjudicated *de minimis* water right. The Special Master's report accurately reflects the current severance and transfer process. The fact that this court has final approval of the severance and transfer of these rights eliminates the risk identified by the San Carlos Apache Tribe and others, that those holding multiple adjudicated *de minimis* water rights, can attempt to cumulate or group the water rights and sever and transfer them to fewer points of diversion where the impact on downstream users might be greater than as isolated rights. The court's approval of severances and transfers of adjudicated *de minimis* water rights will insure that the court addresses these concerns before any adverse impacts occur.

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[3] Because of the limited scope of the water uses to be determined by summary adjudication, the court does not adopt as part of this order several of the Special Master's findings of fact (nos. 42 through 44 and 53 through 58).

To alleviate a concern of some parties, this order does not address the legal ownership of water rights on state's and federal lands, an issue outside the scope of the Special Master's *De Minimis* Report.

Finally, there are objections to certain of Special Master Thorson's findings of fact and conclusions of law. To provide historical clarity, the court has sustained objections relating to findings of fact that are inconsistent with the court's approval and adoption of the Special Master's *De Minimis* report.

The Special Master's *De Minimis* Report addressed only stockwatering and certain stockpond and domestic water uses. In the future, the court or the Special Master may find other water uses that are *de minimis* and subject to summary adjudication.

After considering the positions and objections of all the parties, the court finds that Findings of Fact Nos. 1 through 41, as amended; 7A; 7B; 7C; 45 through 52; and 59 through 64, as amended; and those portions of the Special Master's *De Minimis* Report supporting these findings are not clearly erroneous based on the evidence the Special Master considered, and orders as follows:

1. Findings of Fact Nos. 1 through 41, as amended; 7A; 7B; 7C; 45 through 52; and 59 through 64, as amended; and those portions of the Special Master's *De Minimis* Report supporting these findings are adopted as an order of this court;

2. Without treating the merits of the Special Master's analysis, Findings of Fact Nos. 42 through 44 and 53 through 58; and those portions of the Special Master's *De Minimis* Report supporting these findings are not required for the court's current ruling and, accordingly, are not adopted as part of this order;

3. Conclusions of Law Nos. 1 through 30 and those portions of the Special Master's *De Minimis* Report supporting these conclusions are adopted as an order of this court.

4. Conclusion of Law No. 31 is modified to provide as follows and is adopted as part of this order:

Any purported severance or transfer of a *de minimis* water right that has been summarily adjudicated by this court will only become effective upon entry of an order approving such transfer by this court.

5. The Arizona Department of Water Resources shall prepare subsequent hydrographic survey reports in accordance with the determinations made in this Order.

/s/ Eddward P. Ballinger, Jr.
The Honorable Eddward P. Ballinger, Jr.
Judge of the Superior Court
September 26, 2002

* * * *

A copy of this order is mailed to all parties on the Court-approved mailing list for W1-11-19 dated July 16, 2002 (Attachment A). It is also mailed to all parties on the Court-approved mailing list for W-1, W-2, W-3, and W-4 dated July 16, 2002.

PROOF OF SERVICE

I, Linda C. Shumard, 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 September 15, 2006, I caused the foregoing documents described as **UNITED STATES' REPLY TO RESPONSES TO THE MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM IN SUPPORT**, 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.

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

(Served original to Presiding Judge on September 15, 2006)
Presiding Judge of the Superior Court of California, County of Los Angeles
County Courthouse
111 North Hill Street
Los Angeles, CA 90012

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate and Trial Court Judicial Services (Civil Case Coordination)
455 Golden Gate Avenue
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Honorable Jack Komar
Santa Clara County Superior Court
191 North First Street, Department 17C
San Jose, CA 95113

Executed on September 15, 2006, at Denver, Colorado.

Linda C. Shumard
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