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**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.
 Superior Court of California
 County of Los Angeles, Case No. BC
 325201

Los Angeles County Waterworks District
 No. 40 v. Diamond Farming Co.
 Superior Court of California, County of
 Kern, Case No. S-1500-CV 254348

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 353840, RIC 344436, RIC
 344668

Judicial Council Coordination Proceeding
 No. 4408

SC Case No. 105CV 049053

**RESPONSIVE BRIEF OF GERTRUDE J.
 VAN DAM AND DELMAR D. VAN DAM**

Informed Issues Conference
 Date: September 21, 2006
 Time: 10:00 a.m.
 Dept: 17

Hearing Location: Los Angeles County
 Superior Court, Central District, Department
 1, Room 534

Honorable Jack Komar

I. INTRODUCTION

This brief is filed on behalf of Gertrude J. Van Dam and Delmar D. Van Dam in response to the United States's Motion For Judgment on The Pleadings and as specified in this courts July

17, 2006 Order Rescheduling Phase I Trial and Setting Date on Motion to Determine
 1 Compliance with the McCarran Act and Case Management Conference.

2 This court is presented with a highly significant and unsettled legal question regarding
 3 application of the McCarran Amendment (43 U.S.C. 666) ("McCarran") to a groundwater
 4 adjudication alleged in the *Cross-Complaint of Municipal Purveyors for Declaratory and*
 5 *Injunctive Relief and Adjudication of Water Rights* filed against the United States of America and
 6 others located in what has been referred to as the Antelope Valley Groundwater Basin (the
 7 "Basin"). The consequences of failing to comply with McCarran in this litigation can be very
 8 significant and costly for the court, all the parties and the public at large. Should it be
 9 determined upon appeal that McCarran is not satisfied there will have been no waiver of
 10 sovereign immunity and hence no subject matter jurisdiction over the United States. Further,
 11 given that the United States is several times over the single largest overlying landowner in the
 12 entire Antelope Valley there is no question that they are an indispensable party that must be
 13 joined if this litigation attempts an adjudication of all groundwater rights in the Basin. If on
 14 appeal this courts ruling on the United States' motion regarding McCarran, after the parties have
 15 been busily litigating the myriad of technical issues embodied in this case, is held to be
 16 misapplied all the substantial judicial resources, public and private funds, time and effort
 17 expended will have been wasted as no judgment or stipulated judgment will be valid and
 18 enforceable against or between any party.

19 II. RESPONSE

20 A. Issue-

21 The Municipal Purveyors Cross-Complaint¹ raises a distinct issue unresolved by any
 22 known legal authority. Has Congress consented to the United States being sued in a groundwater
 23 adjudication?

24 B. McCarran Amendment Language-

25
 26 ¹ The Cross-Complaint clearly alleges that it seeks a "judicial determination of rights to all water within the
 27 Antelope Valley Groundwater Basin (the 'Basin')". (Cross-Complaint, Paragraph 1, Lines 20-21) Specifically with
 28 regard to the United States, the Municipal Purveyors allege that "this is an action to comprehensively adjudicate the
 rights of all claimants to the use of a source of water located entirely within California, i.e., the Basin, and for the
 ongoing administration of all such claimants' rights. In none of the eight causes of action or prayer is there any
 allegation making reference to any river or stream system. (Cross-Complaint, generally)

The text of McCarran provides in relevant part,

“Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water *of a river system or other source* or (2) for the administration of such rights, where it appears that the United States is . . . a necessary party.” (43 U.S.C. Section 666) (Emphasis added.)

The statute makes no express mention of groundwater, groundwater rights, or groundwater adjudications. The legal question presented to this court is whether the phrase “of a river system or other source” is an unequivocal expression by Congress that it intended that the United States could be sued in a judicial groundwater adjudication where no river system is involved. *Block v. North Dakota*, 461 U.S. 273,287 (1983) The United States has cited the Supreme Court authorities which instruct that the rules of statutory construction favor a strict rather than expansive reading of this type of statute. *United States v. Sherwood*, 312 U.S. 584,586 (1941); *Block v. North Dakota, supra*, 461 U.S. 273,287 (1983); *McMahon v. United States*, 342 U.S. 25, 27 (1951).

C. Caselaw

Significantly, no reported case has ever held that McCarran provides a waiver of sovereign immunity in an adjudication of rights to the use of water -- when all such rights are strictly limited to groundwater. Instead, all reported cases applying McCarran have involved, in some varying degree, an adjudication of rights to the use of water in a river or stream system. Thus, for example some cases make no determination of groundwater rights whatsoever. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (Colorado River Basin); *United States v. Dist. Court In and For Eagle County, Colo.*, 401 U.S. 520, (1971) (Eagle River). Some appear to have considered interrelated groundwater rights *as well as* river or stream system rights (*In re the General Adjudication of Rights of the Use of Water From the Snake River Water System* (Idaho 1988) 115 Idaho 1; *In re Uintah Basin* (Utah 2006) 133 P.3d 410; *United States v. Anderson*, 591 F.Supp. 1, 4 (1982); *United States v. Bluewater-Toltec Irrigation District*, 580 F.Supp. 1434,1437 (1984); *United States v. City of Las Cruces*, 289 F.3d 1170,1175 (10th Cir. 2002). One case has concluded that it is not necessary to include *both* an

adjudication of groundwater rights and rights to a river system. (*United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994).) However, no case has held that McCarran applies to an adjudication of groundwater rights, exclusively.

Arguably the closest case to this litigation is *Oregon*. However, it is important to note both its key factual and procedural distinctions as well as the limit of its ruling. Unlike the Antelope case, *Oregon* did expressly involve the adjudication of a river system – “all claims to surface water in the Klamath River Basin” (*Id.*, at 762) Furthermore, that case was initiated by the Oregon Water Resources Department under the Oregon statutory procedure for the mass adjudication of water rights. (Or.Rev.Stat. Section 539.021, et. seq.) Such comprehensive state systems for adjudication of water rights had been previously confirmed to be within the scope of McCarran. *United States v. Idaho*, *supra*, 508 U.S. 1; *Colorado River Water Conservation District v. United States*, *supra*, 424 U.S. 800; *United States v. Oregon*, *supra*, 44 F.3d 758, 766-67. This case of course is a judicial adjudication beyond the scope of California’s statutory adjudication system. (Water Code Sections 2500², et. seq.) Importantly, the *Oregon* court concluded that “all existing water right claims in the river system will have been determined when the adjudication is finished” without any consideration of groundwater or groundwater rights. (*Oregon*, at 768)

The United States nonetheless asserted that the suit did not fall within McCarran for the reason “that the ground and surface waters of the region are hydrologically interrelated, [and that] failure to include groundwater claims deprives the adjudication of the comprehensiveness intended by Congress”. (*Id.*) In response the *Oregon* court stated:

“the text of the Amendment lends little support to the United States’ position. On its face, the statute applies to the ‘water 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. For the United States’ argument to succeed, we must read ‘river system’ to include not only the water of the river, but hydrologically-related groundwater systems as well.” (*Id.*) (Emphasis in original)

² In fact, in California a “stream system” expressly “does not include an underground water supply other than a subterranean stream flowing through known and definite channels.” (Water Code Section 2500) The only exception to this general rule is stated in Water Code Section 2500.5 regarding Scott River in Siskiyou County.

1 The court went on to state “the United States can point to no other case law, statutory text
 2 or legislative history that specifically requires groundwater to be adjudicated *as part of the*
 3 comprehensive adjudication of a ‘river system’” (*Id.*) (Emphasis added.) Further, the court
 4 stated that it did not find that “Congress intended to require comprehensive stream adjudications
 5 under the McCarran Amendment to include the adjudication of groundwater rights *as well as*
 6 *rights to surface waters.*” (*Id.*, at 770.) (Emphasis added.) Thus, the *Oregon* court held that
 7 McCarran may, but is not required, to include groundwater as an “other source” as well as rights
 8 to a river system. It is also proper for an adjudication to be limited to rights in a river system as
 9 was the case regarding the Klamath River Basin. However, it need not cover both.
 10 Significantly, the *Oregon* court did not rule, as the issue was never presented, that McCarran
 11 could be satisfied when only groundwater rights were at issue.
 12

13 D. Legislative History

14 Excerpts of the legislative history of McCarran relied upon in various cases seem to
 15 indicate that Congress contemplated that a river or stream would be implicated in the suit. For
 16 example:
 17

18 ‘You indicate that you visualize the possibility of an individual or group, having water
 19 rights on *that stream*, bringing suit to adjudicate their respective rights thereby preventing
 20 the Bureau of Reclamation from going ahead with the Hells Canyon project while
 21 litigation is in process or pending . . . *State v. Rank*, 293 F.2d 340,347 (1961) (quoting
 22 Senator McCarran, S.Rep. No. 755, 82d Congress, 1st Session, 9 (1951)) (Emphasis
 23 added.)

24 ‘S. 18 is not intended to be used for any purpose other than to allow the United States to
 25 be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners
 26 on a *given stream*. This is because unless all of the parties owning or in the process of
 27 acquiring water rights on a *particular stream* can be joined as parties defendant, any
 28 subsequent decree will be of little value” (*United States v. Dist. Court In and For Eagle*
County, Colo., 401 U.S. 520, (1971), quoting Senator McCarran, S.Rep. No. 755, 82d
 Congress, 1st Session, 9 (1951)) (See also, *Dugan v. Rank*, 372 U.S. 609,618 (1963)
 quoting the same.) (Emphasis added.)

‘Since it is clear that the States have the control of water within their boundaries, it is

essential that each and every owner *along a given water course*, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.” *California v. United States*, 438 U.S. 645, 678-79, 98 S.Ct. 2985 (1978) quoting S.Rep. No. 755, 82d Congress, 1st Session, 3, 6 (1951) (Emphasis added)

E. Consequences

The best illustration of the terrible consequences of an erroneous determination of McCarran is illustrated in the several reported cases regarding the water rights litigation on California’s San Joaquin River. The suit was filed in 1947. It sought to enjoin local officials of the United States Bureau of Reclamation from storing and diverting water from the San Joaquin River at Friant Dam. *Dugan v. Rank* 372 U.S. 609, 614 (1963) After a few years of litigation, the District Court “ordered the United States joined as a party on the basis of the McCarran amendment”. (*Id.*, at 615) A lengthy trial and appeal process followed. *Rank v. (Krug) United States* 142 F.Supp. 1 (1956), *State of California v. Rank*, 293 F.2d 340 (1961), *Dugan v. Rank*, *supra*, 372 U.S. 609. After over sixteen years of litigation the unavoidable issues of waiver of sovereign immunity and subject matter jurisdiction over the United States and its officers came to roost. The Supreme Court ultimately determined that the court of appeal decision was correct in part when it ruled that McCarran was not applicable (*Dugan* at 617-618) but also erred because the suit against the Bureau of Reclamation officials was considered against the United States, but without consent. (*Id.*, at 620-621) Therefore sixteen years later, the Supreme Court remanded to the Court of Appeals to “vacate the judgment”. (*Id.*, 626)

There is no doubt that this court and all parties agree that such a result would be the worst possible outcome in the Antelope Valley case.

III. CONCLUSION

It is not clear whether the United States or the Municipal Purveyors are “right” as to the required application of McCarran. It is certain, however, what terrible consequences can plague this case if McCarran is applied too narrowly. It is likewise certain that the single most important ingredient to an effective and timely resolution of this adjudication will be the importation and storage in banking and recharge facilities additional water for future use in the Antelope Valley. It is imperative that such actions be taken immediately so as to preserve and

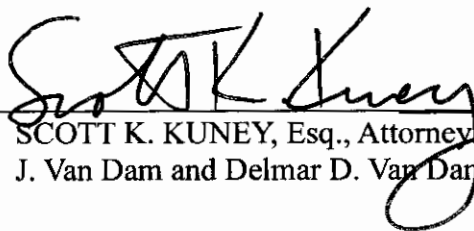
protect the Basin without any delay.

On balance, given the uncertainty in the law and the substantial risk of delaying a prompt resolution of this case, and perhaps even a reversal of the judgment, it is prudent for this court to conclude that McCarran requires that the Municipal Purveyors amend their Cross-Complaint to include the adjudication of the rights to interconnected river systems as well as to the rights to groundwater of the Basin.

Dated: September 1, 2006

THE LAW OFFICES OF YOUNG WOOLDRIDGE, LLP

By:



SCOTT K. KUNEY, Esq., Attorney for Gertrude
J. Van Dam and Delmar D. Van Dam

PROOF OF SERVICE

1 STATE OF CALIFORNIA, COUNTY OF KERN

2 I, LEANN BANDUCCI, declare: I am and was at the times of the service hereunder
3 mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business
4 address is The Law Offices of Young Wooldridge LLP, 1800 30th Street, Fourth Floor,
Bakersfield, CA 93301.

5 On September 1, 2006, I caused the foregoing document(s) entitled as: RESPONSIVE
6 BRIEF OF GERTRUDE J. VAN DAM and DELMAR D. VAN DAM to be served on the parties
7 via the following service:

8 X By Posting: I posted the document(s) listed above to the Santa Clara County Superior
9 Court website in regard to the Antelope Valley Groundwater matter pursuant to the Court's
Clarification Order. Electronic service and electronic posting completed through
10 www.scefilings.org.

11 X (By Mail) On the same date, at Bakersfield, California, pursuant to C.C.P. section 1013(a).
12 By placing / / the original or / x / a true copy thereof enclosed in a sealed envelope. I am readily
13 familiar with the firm's practice of collection and processing of documents for mailing. Under that
practice it would be deposited with United States Postal Service on that same day with postage
thereon fully prepaid at Bakersfield, California in the ordinary course of business.

14 Honorable Jack Komar
15 Santa Clara County Superior Court
16 191 North First Street, Department 17C
San Jose, CA 95113

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate and Trial Court Judicial
Services (Civil Case Coordination)
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18
19 Served original via Federal Express to the Presiding Judge on September 1, 2006
20 Superior Court of California
21 County of Los Angeles
22 Stanley Mosk Courthouse – Department 1, Room 534
111 North Hill Street
Los Angeles, CA 90012-3014

23 Executed on September 1, 2006, at Bakersfield, California. I declare under penalty of
24 perjury under the laws of the State of California that the above is true and correct.

25 
26 LEANN BANDUCCI
27
28