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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

REBECCA LEE WILLIS, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40; CITY OF LANCASTER; CITY OF LOS ANGELES; CITY OF PALMDALE; PALMDALE WATER DISTRICT; LITTLEROCK CREEK IRRIGATION DISTRICT; PALM RANCH IRRIGATION DISTRICT; QUARTZ HILL WATER DISTRICT; ANTELOPE VALLEY WATER CO.; ROSAMOND COMMUNITY SERVICE DISTRICT; MOJAVE PUBLIC UTILITY DISTRICT; CALIFORNIA WATER SERVICE COMPANY; DESERT LAKE COMMUNITY SERVICES DISTRICT; NORTH EDWARDS WATER DISTRICT; and DOES 4 through 1,000,

Defendants.

JUDICIAL COUNCIL COORDINATION PROCEEDING No. 4408
Santa Clara Case No. 1-05-CDV-049053
Assigned to The Honorable Jack Komar

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WILLIS' OPPOSITION TO DEMURRER TO SECOND AMENDED COMPLAINT

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

Phase 2 Trial: October 6, 2008

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff alleges that Defendants have taken and damaged her property and that, as public entities, Defendants must pay just compensation for doing so. In their Demurrer, Defendant Municipal Water Purveyors ("MWPs") challenge the Condemnation causes of action in Plaintiff's Second Amended Class Action Complaint (SAC), i.e. the third and fourth causes of action, on the grounds (1) that they are not required to provide compensation for groundwater rights acquired by prescription; and (2) that Plaintiff's taking claims are barred by the statute of limitations. These defenses, however, are inconsistent with the allegations of the SAC and Defendants' arguments completely lack merit. Defendants cite cases that stand for the proposition that a *private* party plaintiff need not compensate a *private* party defendant when it acquires a prescriptive easement on defendant's property. Here, however, a *public entity* is trying to seize *private* property. The California Supreme Court and Courts of Appeal have clearly held that when a public agency, through its groundwater extractions, has taken or damaged private property, compensation through inverse condemnation is appropriate.

Moreover, Defendants' argument is based on the assumption that they have validly taken Plaintiff's property by prescription. But the SAC does not plead the elements of *prescription;* indeed, Plaintiff disputes that claim. Furthermore, per the California Supreme Court, Defendants cannot obtain prescription against dormant unexercised landowners. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224. Hence, Defendants' arguments rest on a fallacious premise.

With regard to Defendants' second contention -- that Plaintiff's taking claims are barred by the statute of limitations -- the SAC is impervious to a demurrer, as the date that Plaintiff 's claims accrued is not clear on the face of the complaint. For a demurrer to lie, the running of the statute of limitations must appear "clearly and affirmatively" from the dates alleged. It is not enough that the claims ***might*** be barred. Plaintiffs' Complaint simply alleges that "at a yet unidentified point in the past, the [Defendants] began to extract groundwater from the Antelope Valley to a point above and beyond an average annual safe yield."

Further, the statute of limitations is no defense at the demurrer stage where, as here, the

taking was not apparent to the landowner and plaintiff's claims accrued at a later date. Tolling provisions apply where the government's wrongful conduct is not obvious to the landowner. The court should not rely on statements or legal conclusions made by an adverse party regarding prescription and the accrual date to determine whether or not the complaint states sufficient facts to constitute a cause of action. To do so would contradict the function of a demurrer. *Code Civ. Proc.* § 430.30(a); *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324; *SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905-906. Thus, Defendants' demurrer for failure to state a cause of action based on statute of limitations must be denied.

Plaintiff pleads material facts that support a prima facie case for a constitutional taking, i.e. ownership of real property, intervening public use, and damages. In the present context, Defendants cannot controvert facts in support of an inverse condemnation claim. Indeed, the MWPs concede: (1) dormant landowners have a present property interest in the reasonable and beneficial use of groundwater; (2) the taking of groundwater was for public use; and (3) the taking injured plaintiffs' real property interest. (See Defendants First Amended Cross-Complaint filed on March 13, 2007). Those injuries, Defendants concede include, but are not limited to, depletion of groundwater, land subsidence, increased costs to pump water, and water quality issues. All these facts trigger the landowner's rights to compensation for condemnation under the United States and California Constitutions.

In short, Defendants would have this court believe that Plaintiff has no claim for inverse condemnation because (1) *if* Defendants acquired prescriptive rights then there is no compensation; and (2) *if* they did not acquire prescriptive rights then there is no taking. But neither argument holds water. Case law provides for compensation in the context of prescription; and Plaintiff has alleged that Defendants have harmed the basin and taken Plaintiff's water rights without giving her notice. In either case, there is compensation owed.

II. THE PARTIES

The Willis Class members own approximately 65,000 parcels of land within Kern and Los Angeles Counties, totaling over 100,000 acres. It is estimated that the Class occupies 70% of the adjudication area. Aggregate assessed value of all the parcels is estimated to be over 1.5 billion

dollars. It is likely that many owners reside outside of the local county. Their property is not connected to any water service area. For their water needs, the landowners will rely entirely on groundwater in the basin to develop their property. Without it their properties may be worthless. The condemnation theory is pled to compensate dormant landowners from continued wrongful taking of non-surplus groundwater by the government. The government entities should be made to pay for the taking of any non-surplus groundwater and the resultant injury to the Class' property interests.

Defendants are municipal water districts that claim superior groundwater rights by prescription. The MWPs seek a declaration that they have prescriptive rights to a defined quantity of groundwater, which rights they contend are superior to any overlying right in the basin. They claim the basin is in overdraft and they have been taking non-surplus water for many years. If they prevail in their claims of prescription, the groundwater available to overlying landowners, primarily the Willis Class, will be reduced, and the value of their real property will be significantly diminished. MWPs should not be allowed to plead prescription and continue to take unlimited amounts of non-surplus water and at the same time deprive the Class of their constitutional damage remedy.

III. LEGAL ARGUMENTS

A. Defendants' Demurrer As To Plaintiff's Inverse Condemnation Claims Under State and Federal Law Fails

1. Standard of Review on Demurrer

The MWPs ignore established law that the sole issue raised by a demurrer is whether the complaint, as it stands, unconnected with extraneous material, states a cause of action. In testing the legal sufficiency of a pleading against a demurrer, all properly pleaded allegations, including those that arise by reasonable inference, are deemed admitted regardless of the possible difficulty of proof at trial. In other words, all facts pled in the complaint are assumed true on demurrer. *Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 18. A complaint is invulnerable to a demurrer if on any theory it states a cause of action. *Johnson v. Clark* (1936) 7 Cal.2d 529, 536; *Truta v. Avis Rent A Car System, Inc.* (1987) 193 Cal.App.3d 802, 815. That is, all that is necessary as against a general demurrer is to plead facts that the plaintiff may be entitled to some

relief. *Richard H. v. Larry D.* (1988) 198 Cal.App.3d 591, 594.

In ruling on a demurrer, the court is limited to defects that appear on the face of the pleading and matter subject to judicial notice. The rule is well established that, except for judicially noticed matter, a demurrer can neither allege facts that if true would disclose a defect in the challenged pleading nor bring in extrinsic evidence that would disclose such a defect. *Code Civ. Proc.* § 430.30(a); *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324; *SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905-906.

Moreover, the SAC's allegations must be liberally construed, with a view to substantial justice between the parties. *Code Civ. Proc.* § 452; *Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 18. Finally, a demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. *CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.

2. Plaintiff Has Alleged Sufficient Facts to Support Her Claims For Inverse Condemnation Under State and Federal Law

The authority for an inverse condemnation claim lies in Article I § 19 of the California Constitution and in the 5th and 14th Amendments of the United States Constitution. To plead inverse condemnation, the plaintiff must allege (1) a property interest, (2) intervening public use, and (3) taking or damaging of property. *United States v. Clarke,* (1980) 445 U.S. 253, 257. Additional authority for condemnation may be found under Section 1245 of the Water Code which provides that a municipal corporation "shall" be liable for "all damages suffered or sustained...either directly or indirectly because of injury, damage, destruction or decrease in value of any...property resulting from or caused by the taking of any such lands or waters...or by the taking, diverting, or transporting of water from... the watershed..." Here, all the elements for a taking have been alleged in the SAC.

First, Plaintiff has alleged the right to use the groundwater underlying her property. SAC, ¶ 15. The right to use groundwater underlying one's property is recognized as a real property right. *Tehachapi-Cummings County Water District v. Armstrong* (1975) 49 Cal.3d 992, 999. Second, Plaintiff has alleged that the groundwater the MWPs are pumping is for public use. SAC ¶¶ 36 and 41. Defendants do not dispute the intervening public use of the groundwater. Third, Plaintiff has

alleged that Defendants have (a) "taken" her right to use the groundwater and (b) "injured" her land in violation of the California and United States Constitutions. SAC ¶ 35. Plaintiff alleges that Defendants' pumping has caused her loss of water rights, a *taking*. In addition, Defendants' pumping has caused injury in the form of increased pumping costs, water quality degradation, and diminution in the market value of her real property, *damages*. SAC ¶¶ 16, 35. The Court of Appeal has found that "[i]rreparable damage may, however, be sustained from whatever makes the supply less dependable, less satisfactory in its quality or permanently more expensive." *Orange County Water Dist. v. City of Riverside* (1959) 173 Cal.App.2d 137, 216. Here, the Defendants have inflicted permanent damages to the aquifer. Furthermore, the taking of non-surplus water has the following consequences: wells are deepened, cost of pumping water increases throughout the basin, alluvial areas undergo contractions, all of which injure those entitled to extract. *Tehachapi-Cummings* at 999. All of these conditions have been pled in the SAC.

Moreover, despite Defendants' contentions, the California Supreme Court has expressly recognized inverse condemnation as an appropriate remedy in a situation where groundwater pumping by a public entity has taken or damaged a private property. "When public use has attached for any recognized reason, reverse condemnation proceedings may be invoked and applied." *Hillside Water Co. v. City of Los Angeles, et al., En Banc* (1938) 10 Cal.2d 677, 688. California appellate courts have also recognized inverse condemnation as an appropriate remedy when public entities take or damage water rights. The intervention of a public use does not bar suit by the owner of a water right; it merely limits his remedy to damages in place of an injunction. *City of Los Angeles v. City of Glendale,* (1943) 23 Cal.2d 68, 80. "Intervention of public use ... constitutes inverse or reverse condemnation for which damages lie." *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 91. "[A] Municipal Water District is a public corporation organized solely to serve a public use...[t]he only legal procedure provided by the constitution and statutes of this state for the taking of private property for a public use is that of a condemnation suit, which the constitution expressly provides must *first* be brought before private property can be taken or damaged for a public use." *Jacobsen v. Superior Court* (1923) 192 Cal. 319, 331. "It should not require discussion or authority to demonstrate that the state cannot in this manner take

private property for public use. (citation omitted). The constitution expressly forbids it (Now Art. I, sec.14)." *City of San Bernardino v. City of Riverside*, (1921) 186 Cal. 7, 29-30.

Defendants have chosen to ignore Constitutional protections afforded Plaintiff and instead fleece Plaintiff of her property rights without just compensation. "[N]o consideration of [public] policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water[s]...of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain." *Miller & Lux v. Madera Canal and Irrigation Company* (1909) 155 Cal. 59, 65. Plaintiff has alleged that Defendants have taken property from her in violation of her constitutional rights and has thus alleged a valid cause of action for inverse condemnation; the MWPs' Demurrers must be denied.

B. Plaintiff Disputes the Government's Claim of Prescription

1. Plaintiff Has Not Pled Prescription

Defendants mischaracterize Plaintiff's pleading. Plaintiff has pled that her property rights have been injured and compensation is due her under the California and United States Constitutions. Specifically, Plaintiff's right to use the groundwater underlying her property has been taken and her property has been damaged by land subsidence and other physical damages. Notably, Plaintiff has not pled prescription. The elements of prescription are in dispute and cannot be resolved by demurrer.

A demurrer based on an affirmative defense cannot properly be granted when the action ***might*** be barred by the defense, but is not necessarily barred. *CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635 (emphasis added). Here, the MWPs attempt to bar Plaintiff's inverse condemnation claim with the defense of prescription. Prescription, however, has not been proven and is an issue for the trier of fact. The existence or non-existence of prescription is a question of fact for the jury or court. *O'Bannion* v. *Borba*, (1948) 32 Cal.2d 145.

2. There Are No Facts On the Face of Plaintiff's Pleading That Indicate Plaintiff's Inverse Condemnation Claim Is Barred By Prescription

Plaintiff disputes those facts the MWPs purport support their claim of prescription. Indeed, several elements are disputed and are yet to be determined. Prescriptive rights to

percolating groundwater are acquired by an adverse taking of water where the use of it is (1) open and notorious; (2) hostile and adverse to the original owner; (3) continuous and uninterrupted for the statutory period of five years, and (4) under claim of right. *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926. The burden on the party claiming prescription is very high. Defendants have the burden to prove by clear and convincing evidence all the essential elements to the superior title. *Pleasant Valley Canal Company v. Borror* (1998) 61 Cal.4th 742, 784. The court should not assume prescription or try prescription on this demurrer.

For the elements of open and notorious to be satisfied it is not enough that an overdraft condition exists. The parties with rights in the supply must have notice of the overdraft and thus adversity. *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 282-83. "Notice is a question of fact." *Lindsay v. King* (1956) 38 Cal.App.2d 333, 343. The prescriptive time begins running not when the overdraft of the basin begins but when the overlying owners are given notice of *adversity in fact. City of Los Angeles* at 282. Unlike the facts in *City of Pasadena v. City of Alhambra* where the overlying users could physically see the groundwater table dropping in their wells, the Plaintiff in this case is a dormant landowner who does not have visual access to groundwater tables under her land. Members of the Class may not even reside in the county where the property is located. Here, there are no facts on the face of the pleading to support the notion that Plaintiff had either actual notice or constructive notice. Notice is disputed and specifically negated. Plaintiff charges that the groundwater was clandestinely sapped and the value of her property impaired without notice from the parties that claim prescription. *Katz v. Walkinshaw,* (1902) 141 Cal. 116, 149. These elements will be contested in this litigation.

For adverse and hostile use there must be interference in the legal rights of users to enjoy the perennial water supply. A condition termed "overdraft" may supply the adversity requirement that in turn is determined by a calculation of the basin's annual "safe yield." See generally *City of Pasadena v. City of Alhambra,* (1949) 33 Cal.2d 908. These terms are partly legal and partly hydrogeology. As far as the Willis Class is concerned, the Supreme Court has ruled that prescriptive rights would not necessarily impair the owner's rights to groundwater for new overlying uses for which the need had not yet come into existence during the prescriptive period. *City of*

Barstow vs. Mojave Water District, (2000) 23 Cal.4th 1224. Defendants cannot interfere with the dormant class' rights if the class has not yet exercised those rights. (See the Willis Class Motion to Strike Defendants' Prescription claims set for hearing concurrently with Defendants' Demurrer)

Continuous and uninterrupted use is the next set of elements. The *Pasadena v. Alhambra* decision provided that for a prescriptive right to vest, there must be five consecutive years of overdraft conditions. *City of Pasadena v City of Alhambra* (1949) 33 Cal.2d 908, 926-927. A single year of surplus breaks the continuity requirement for the running of the prescriptive period. The California Supreme Court in the *Los Angeles v. San Fernando* decision approved this requirement. In this case, these elements are also disputed. *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199.

Thus, Defendants' argument at the demurrer stage that they have somehow already acquired prescriptive rights to use percolating groundwater underlying Plaintiff's property is meritless and should be summarily denied. The SAC is legally sufficient.

3. Defendants Cite Prescription Cases Involving Either Two or More Private or Public Entities, But No Case Cites For Disputes Between Public and Private Entities, As Are the Facts In This Case

While Defendants correctly rely on *Warsaw* and *Baker* for the proposition that one who acquires an easement by prescription need not compensate the servient estate, in neither case was there a public actor acquiring the easement. In *Warsaw*, there was a dispute between two ***private*** parties as to whether the private party plaintiff, who acquired a prescriptive easement from a ***private*** party Defendant, needed to compensate Defendant for acquiring the easement as well as the cost of tearing down a structure that was placed by Defendant on Plaintiff's easement. The court ruled no. *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Ca1.3d 564. This was a dispute, however, between ***private*** parties, not a dispute between a public and private party, which invokes the constitution.

Defendants also rely on *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1990) 220 Cal.App.3d 1602, 1609. *Baker* merely held that where a public entity ***acquired*** an avigation easement from a predecessor ***private*** company, the public entity was not required to compensate the plaintiffs under a theory of inverse condemnation. The facts before us are very different.

Here, a public entity has directly attempted to take property by condemnation rather than purchasing a pre-existing easement as happened in *Baker*.

The Defendants further their flawed analysis by arguing "water rights cases have uniformly recognized a public entity's ability to acquire prescriptive rights to produce groundwater without requiring the prescribing entity to provide compensation therefore." (See Defendants' Demurrer p. 9). Again, Defendants cite five cases where the disputes were between two or more ***public*** actors. See *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 (Plaintiff, a public actor, sought declaration of its prior rights to groundwater and to enjoin public actor defendants from extracting water other than in subordination to plaintiff's prior pueblo rights. Also, the main prescriptive argument focused on Civil Code § 1007, which provides that public entities are exempt from other parties acquiring prescriptive rights to the public entities water rights.); *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908 (The plaintiff, a city, and the defendant, a public utility, were the public parties to the action. Whether a public actor may take property by prescription from a private party was not addressed nor did it address inverse condemnation and whether a taking of the right to use water is compensable, the crux of Plaintiff's complaint.); *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68 (Case involving two *public actors* that determined "property belonging to one municipality cannot ...be condemned for the benefit of another." Id. at 80. Again, this case has no bearing on Plaintiff's inverse condemnation claim.); *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 16 (A case involving two public actors which determined that "... a state cannot...take private property for public use. [citation omitted]. The constitution expressly forbids it [Art. I, sec. 14]." *Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137 (Again, a case with two public entities and no private parties that did not address inverse condemnation).

In short, the MWPs have not cited cases applicable to the facts in the case at hand.

4. Even If MWPs Have Prescriptive Rights, They Must Compensate the Class Under the United States and California Constitutions

This case raises compelling issues that relate to constitutional law and real property law. In real property, the law of adverse possession provides that a trespasser's possession of another's property will result in transfer of title if the possession is adverse, exclusive, open and notorious,

and uninterrupted for the statutory period. *City of Pasadena v. City of* Alhambra, (1949) 33 Cal. 2d 908, 926. By failing to assert the right to exclude, a landowner may lose title and be without claim of compensation. Under constitutional law, however, the government must pay just compensation for any land taken for public purpose. The point where these two legal doctrines cross was devoid of analysis until *Pascoag Reservoir & Dam, LLC v. Rhode Island. Pascoag Reservoir & Dam, LLC v. The State of Rhode Island, et al.*, (2002) 217 F. Supp. 2d 206, cert. denied (2003) 540 U.S. 1090. Recognizing that no federal court had addressed this question before, *Pascoag* held that a sufficient takings claim was stated in the complaint that merits compensation in the face of prescription:

> When the State acquires an easement on behalf of the public that terminates a property owner's right to exclude others from his or her land and allows any member of the public to enter and exit the property without restriction, the State has engaged in permanent physical occupation. *See Nollan, 483 U.S. at 831-32.* Both are per se violations of the *takings clause. See id.; Loretto, 458 U.S. at 441.* Therefore, plaintiff has alleged a sufficient takings claim in the complaint in this case.

Pascoag, 217 F.Supp.2d 206, 221-222.

The court further noted that common law principles of adverse possession and prescriptive easements should not trump our constitution:

> The *Takings Clause* was meant to protect private individuals from excessive government intrusion on their property rights. *See, e.g., Nollan,* 438 U.S. at 835 n.6. Simply because an area of law may be ancient and well settled does not mean that it trumps the mandates of the United States Constitution. The Fifth Amendment contains a limitation on governmental power vis a vis private property. *U.S. Const. Amend. V.* This Court recalls the words of Justice Holmes: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co., 260 U.S. at 416; see also Nollan, 483 U.S. at 841-42* ("California is free to advance its comprehensive program, if it wishes, by using its power of eminent domain for this public purpose, see *U.S. Const. Amdt. 5*; but if it wants an easement across the Nollan's property, it must pay for it.")

Id. at 225.

The scope of compensable injury under California law is even broader than under the United States Constitution. The California Constitution requires compensation not only where property is *taken* but also where it is *damaged. See Cal. Const.*, Art. I, § 19 (emphasis added). The words "or damaged" were added in 1879 to make it clear that compensation is due when, because

of a public improvement, adjacent property is damaged, even though it was not taken. Plaintiff here has alleged damages to her interests by Defendants' wrongful taking of non-surplus water. This harm is separate and independent of the quantity of water taken by Defendants. It is also separate and independent of any claims of prescription. This harm alleged to have occurred includes, but is not limited to: land subsidence; drop in water levels; and permanent harm to the aquifer.

Moreover, even if there is prescription, Defendants filed suit in 2006 thereby presumptively interrupting prescription and fixing the quantity of water they may be entitled to. Yet, Defendants have been pumping groundwater at an increasing rate over the past few years. If their current extractions exceed the amount of water they claim by prescription, then the class has no remedy other than a claim for damages in an inverse condemnation case. Neither prescription nor pumping data is presently before the court. To sustain Defendants' demurrer at this time would wrongly deprive the class members of their damages remedy.

C. Defendants' Demurrer As to Statute of Limitations Must Be Denied

1. A Demurrer Only Lies Where the Dates In Question Are Shown On the Face of the Complaint

The running of the statute of limitations must appear "clearly and affirmatively" from the dates alleged. It is not enough that the complaint might be barred. *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 CA 4th 1397, 1403. The demurrer lies only where the dates in question are shown on the face of the complaint. If they are not, there is no ground for general or special demurrer. Thus, a complaint alleging that defendant's conduct began "at a date unknown to Plaintiff" is not subject to demurrer on statute of limitations grounds. *Union Carbide Corp. v. Sup. Ct. (Villmar Dental Labs, Inc.)* (1984) 36 Cal.3d 15, 25. Plaintiff's Complaint alleges no specific date. Specifically, it alleges "at a yet unidentified point in the past, the [Defendants] began to extract groundwater from the Antelope Valley to a point above and beyond an average annual safe yield." [Willis' Second Amended Complaint ¶ 11] Thus, Defendants' demurrer for failure to state a cause of action based on statute of limitations must be denied.

2. The Statute of Limitation Is Tolled When the Taking Is Not Apparent

An action for inverse condemnation must be filed within 3 years if the plaintiff's property is

damaged (C.C.P. 338(j)), or within 5 years if it is taken (*Garden Water Corp. v. Fambrough* (1966) 245 Cal.App.2d 324, 327 [5 year statute applies to taking of water system].

While the MWPs are correct that the limitations period on inverse condemnation claims may begin to run when the governmental entity takes possession of the property (citing *Otay Water Dist. V. Beckwith* (1991) 1 Cal. 4th 1041, 1049, and *Institoris v. Los Angeles* (1989) 210 Cal.App.3d 10, 16-18), the MWPs fail to cite that portion of the decision that would most apply to this case - the taking in this case is not "immediately apparent." Under that condition, the statute of limitations is tolled. The *Otay* court specifically said: "Where, however, there is no direct physical invasion of the landowner's property and the fact of taking is not immediately apparent, the limitations period is tolled until the damage is sufficiently appreciable to a reasonable person..." *Otay* at 1049; *Mehl vs. People ex rel Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717.

Here, the physical invasion and taking of groundwater is not obvious. Unlike the above ground reservoir in *Otay*, or street improvement in *Ocean Shore R.R. v. City of Santa Cruz* (1961) 198 Cal.App.2d 267, or the low flying aircrafts in *Institoris*, where the taking was in plain view, the taking of groundwater by the MWPs was hidden. The landowners are not pumping groundwater, nor using their land, and it is questionable whether they even reside in the county where the property is located. These circumstances clearly support the tolling provisions.

3. Accrual Date For the Statute of Limitation Is Disputed and Cannot Be Resolved On Demurrer

The *Institoris* decision, a case cited by Defendants, further provides that "the time a cause of action accrues is a question of fact." *Institoris* at 17. Factual disputes are not traditionally resolved in a demurrer. *Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 18. Here, the accrual date is in dispute. Plaintiff contends the earliest date she could have discovered harm to her real property was at or about the time she retained counsel. Defendants contend first day of accrual is first day of prescription - a date not yet revealed in any of the pleadings. The court should not resolve this dispute by demurrer.

In *Mehl*, a takings case, the court clearly addressed accrual and that the landowner must be aware of the government's invasion. *Mehl vs. People ex rel Dept. Pub. Wks.* (1975) 13 Cal.3d 710. The court emphasized that "the date the taking occurred is not necessarily the date on which the

period of limitation and the claims asserted started to run. Rather, the period begins to run when the damage is sufficiently appreciable to a reasonable man." *Id.* at 717. As in *Mehl*, Willis pled she was unaware of the taking of her groundwater.

In *Smart*, the court found the accrual date commenced when the owner attempted to *sell* the property and thereby discovered the burden. *Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232. The court also concluded by saying that justice requires the court "merely recognize that property owners may be damaged by a given governmental activity in different ways and at different times." *Id.* at 239.

The *Pascoag* court noted that the takings clock does not start until after the prescriptive period:

> ***If the takings clock were to stop at the moment the adverse possession clock has run, then the record owner as against the government is in a curious Catch-22 situation.*** He or she had no takings claim prior to the completion of the adverse possession prescription period, but would be similarly barred from having a takings claim after the period was completed. ***This Court does not sanction this bonanza for the government at the intersection of property law and constitutional law.***

Pascoag, 217 F.Supp.2d 206, 224 (emphasis added).

The accrual date cannot be resolved on demurrer and thus, Defendants' demurrer must be denied.

D. California Water Company Possesses the Power of Eminent Domain and Thus Is Subject to Inverse Condemnation Claims

Defendant Cal-Water argues that an action claiming a taking of private property for a public purpose may not be maintained against a private party under either the California or U.S. Constitutions. *Oliver v. AT&T Wireless Services* (1999) 76Cal.App.4th 521, 530.

Cal-Water's reliance on *Oliver*, however, is misplaced. In *Oliver*, the Plaintiff, a ***private*** individual, sued Defendant, also a ***private*** individual for inverse condemnation based on diminution of value of Plaintiff's adjacent land due to Defendant constructing a cellular transmission tower on Defendant's land. While there is no disputing Cal-Water's contention that a takings action may not be maintained against a ***private*** party, Cal-Water is not a ***private party.*** The court further cites *7 Miller & Starr, Cal. Real Estate (2d ed. 1990) Inverse Condemnation*, §23:1, p. 592: "a property owner has no action for inverse condemnation 'against a *private* entity

that does not have the power of eminent domain.'" *Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 530. Cal-Water is both a public utility and has the power of eminent domain.

Cal-Water is defined as a public utility per Pub. Util. Code § 2701 titled "Water companies as public utilities; Control and regulation." The statute reads that "any corporation...owning, controlling, operating or managing any water systems within the State who sells, leases, rents or delivers water to any person, firm, corporation, municipality or any other political subdivision of the State, whether under contract or otherwise, is a public utility, and is subject to ...the jurisdiction, control, and regulation of the commission..." Thus, Cal-Water is governed by this statute as it is a water company that delivers water to the public.

In addition to Cal-Water being defined as a public utility, it also possesses the statutory power of eminent domain. Cal-Water's powers of eminent domain are found in Cal. Pub. Util. Code §618 which provides that "[a] water corporation may condemn any property necessary for the construction and maintenance of its water system." The Law Revision Commission Comment states: "Section 618 grants a 'water corporation' ...the right of eminent domain to acquire property necessary for the construction and maintenance of its water system....Thus, Section 618 authorizes condemnation of any property necessary to carry out the regulated activities of the water corporation." Hence, Cal-Water has the right to acquire property if such property is necessary for the construction and maintenance of its water system.

Further, Cal. Code Civ. Proc. §1240.110 (a) reads "...any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire any interest in property necessary for that use including, but not limited to, ***...rights of any nature in water...***" (emphasis added).

Since Cal-Water, even as a private corporation possesses the power of eminent domain, it is also subject to inverse condemnation proceedings. Actions for direct condemnation and inverse condemnation are functionally the same. The only difference is that inverse condemnation is an action initiated by the landowner whose property rights have already been infringed upon, whereas in a direct condemnation action, the public entity acts first and compensates the landowner prior to the taking. *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal. 3d 862, 866.

Thus, Cal-Water is a proper party subject to inverse condemnation claims asserted against it.

IV. CONCLUSION

For all the foregoing reasons, Defendants' demurrer to Plaintiff's First Amended Complaint must be denied.

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