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8

9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**
11

12 Coordination Proceeding
Special Title (Rule 1550(b))

) Judicial Council Coordination Proceeding
) No. 4408

13 **ANTELOPE VALLEY**
14 **GROUNDWATER CASES**

) (For Filing Purposes Only: Santa Clara
) County Case No.: 1-05-CV-049053)

15 Included Actions:

) Assigned for All Purposes To:
) Judge: Hon. Jack Komar

16 *Los Angeles County Waterworks District*
No. 40 v.

) (Filing Fees Exempt, Per Gov't Code § 6103)

17 *Diamond Farming Co., et al.*

18 Los Angeles County Superior Court, Case
No. BC 325 201

) **CASE MANAGEMENT CONFERENCE**
) **STATEMENT OF PHELAN PIÑON**
) **HILLS COMMUNITY SERVICES**
) **DISTRICT; DECLARATION OF**
) **WESLEY A. MILIBAND IN SUPPORT**
) **THEREOF**

19 *Los Angeles County Waterworks District*
No. 40 v.

20 *Diamond Farming Co., et al.*

21 Kern County Superior Court, Case No.
S-1500-CV-254-348

22
23 *Wm. Bolthouse Farms, Inc. v. City of*
Lancaster

) **DATE: October 12, 2012**

24 *Diamond Farming Co. v. City of Lancaster*
Diamond Farming Co. v. Palmdale Water
25 *Dist.*

) **TIME: 9:00 a.m.**

26 Riverside County Superior Court,
Consolidated Action, Case Nos. RIC 353
840, RIC 344 436, RIC 344 668

) **LOCATION: Stanley Mosk Courthouse,**
Dept. 1, Room 534

27 **AND RELATED CROSS-ACTIONS**
28

1 TO THE HONORABLE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF
2 RECORD HEREIN:

3 Phelan Piñon Hills Community Services District (“PPHCSD”) hereby submits this Case
4 Management Conference (“CMC”) Statement for the CMC set for October 12, 2012.

5 Despite PPHCSD’s support of mediation sessions before the Honorable Justice Ronald B.
6 Robie, as well as PPHCSD’s best and reasonable efforts to settle issues, certain parties are
7 unwilling to compromise and instead seek to decide the issues themselves. Though some tentative
8 agreement may exist by and between some parties, whether or not on allocation of the safe yield,
9 various issues including allocation of the safe yield remain unresolved for those parties with a
10 tentative allocation agreement *and* those parties that are not part of the tentative agreement. In
11 other words, allocation of the safe yield remains at issue for all parties and this important issue has
12 dominated dialogue with the Court during previous conferences as well as settlement
13 communications.

14 To that end, and consistent with the Court’s Minute Order dated June 19, 2012, PPHCSD
15 submits the following list of items to invite direction from the Court on various procedural, factual,
16 and legal issues pertaining to Phase Four,¹ with PPHCSD attempting to meet-and-confer with the
17 parties in this regard²:

18 **I. IDENTIFICATION OF PHASE FOUR ISSUES.**

19 Various CMCs since the Summer of 2011 have explored issues for the next phase of trial,
20 ranging from management and regionalized issues to allocation issues, including prescription.
21 Numerous issues remain unresolved involving water rights (and rights to return flows, whether
22 from imported or native supplies) and components to a “physical solution.”

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24 _____
25 ¹ PPHCSD understands that several of these items may be more appropriately addressed at a later
26 time through briefing and otherwise. PPHCSD identifies these items as a non-exclusive list simply
27 to identify issues that it believes assist with management of and preparation for Phase Four.

28 ² See, Declaration of Wesley A. Miliband filed concurrently herewith, ¶ 2, Exhibit “A,” October 5,
2102 correspondence to all counsel.

1 **A. Establish Production History.**

2 To move this complex matter closer toward resolution in an efficient manner, the next
3 phase of trial should entail each party offering admissible evidence to the Court of that party's
4 production history for any of the following reasons:

- 5 (i) Allocation of the safe yield remains unresolved (whether partially or globally
6 among the parties);
- 7 (ii) This process would provide the factual foundation for legal issues to be resolved
8 through settlement *or* by the Court, which inevitably is necessary at some point
9 for settling and non-settling parties, thereby removing this component to
10 resolution of each party's claim to water; and,
- 11 (iii) This process would not require the Court and the parties to engage now in the
12 complexities of what the Court has correctly and generally recognized as
13 regional differences in the aquifer (discussed *infra*), which relates to *both* the
14 type of water right a party must establish *and* to physical solution components;

15 This proposed process is consistent with the Court's comment from the Status Conference
16 held on June 19, 2012, wherein the Court indicated that "whether by trial or prove up, the parties
17 have to establish by competent evidence pumping history," and also is consistent with the Court's
18 July 9, 2012 Minute Order identifying this CMC to address "Default/Prove-Up/Trial" as well as
19 various other parties from all sides of the table previously suggesting prove-up be done.

20 **1. Same Standard And Burden Of Proof For Settling And Non-Settling**
21 **Parties.**

22 Irrespective of whether this proposed process is adopted, no lesser standard or burden of
23 proof should apply for settling parties to establish their claims to an allocation of the safe yield,
24 particularly if the settling parties allocate the entire safe yield to the exclusion of non-settling
25 parties (i.e., to the detriment of other parties' rights). To allow such could produce a legally
26 deficient result under relevant legal authorities, including *City of Barstow v. Mojave Water Agency*
27 (2000) 23 Cal.4th 1224, by permitting a lower standard or burden of proof for approval of a
28 settlement while holding non-settling parties to a different standard at trial.

1 Practically, the same standard should apply to non-settling and settling parties because of
2 the contingencies inherent with the settlement process, including parties' agreeing to an allocation
3 contingent upon resolution of other issues, as well as many of the parties (public and private)
4 having to seek approval from their respective legislative or governing bodies. Even if these
5 contingencies are successfully navigated, the ultimate contingency rests with the Court's approval,
6 or lack thereof, of a settlement.

7 Thus, employing a more universal approach as proposed would ensure that all parties
8 provide a sufficient basis for a water right through a legally-sound approach, while also achieving
9 maximum efficiency relative to the alternative of diving into the type of water rights to be
10 established by each party.

11 2. Identification Of Time Period(s) For Offering Evidence Of Production

12 History.

13 Also irrespective of whether this proposed process specifically is adopted, the time period
14 for production would need to be established. During the Status Conference on June 19, 2012, the
15 Court indicated that it does not have a "firm notion in mind," but that current production may be
16 appropriate. The Court should – and may need to – hear current production. This notion lends
17 itself to significant legal and practical import.

18 There are essentially two time periods for which the parties' production needs "proving up,"
19 so to speak: (i) the necessarily inclusive prescriptive period (or, "base period," if prescription is
20 appropriate), which may be based on the date of consolidation, or other benchmarks, so as to,
21 among other things, satisfy the requirements of the McCarran Act; and (ii) the particular production
22 period for each party, which should extend to the present so as to provide a measure of the non-
23 prescriptive rights in the Basin and to identify the total demand on the Basin for which a "physical
24 solution" needs fashioning.

25 Production for these time periods would assist with laying the foundation for later
26 establishing an appropriative right or prescriptive right (and related self-help invoked by overlying
27 parties), and management purposes. The "base period" issue specific to prescription was briefed by
28 various parties earlier this year, with the motion denied pending further case developments.

1 **B. Regional Issues Must Be Addressed Prior To Prescription.**

2 At some point, specific regional issues must be resolved, particularly before a phase of trial
3 is set for establishing a specific type of water right – namely, prescriptive rights.

4 The Court stated in the Statement of Decision Phase Three Trial (July 13, 2011) that: **“But**
5 **having heard evidence about the aquifer as a whole, the Court is not making historical**
6 **findings that would be applicable to specific areas of the aquifer or that could be used in a**
7 **specific way to determine water rights in particular areas of the aquifer.”** (Statement of
8 Decision Phase Three Trial (July 13, 2011) (“Phase Three Decision”), p.4:21-24 [emphasis
9 added].)

10 This language indicates that the Phase Three Decision finding that the aquifer is in overdraft
11 does not necessarily require an appropriator (whether a public or private entity) to prove
12 prescription, but instead that further inquiry and findings are needed, whether that be: (i) to address
13 regionalized issues for identifying whether that portion of the “aquifer” is in overdraft; (ii) to
14 determine the type of water right held by a party in that portion of the aquifer (e.g., appropriative or
15 prescriptive); and/or (iii) to identify management areas.

16 The Court also mentioned this issue during the June 19, 2012 Status Conference by noting
17 that there are “variances in the valley and different relationships among and between parties, and
18 we have been talking about the basin as a whole but sub-parts exist.” The Court also noted that it is
19 unclear where and how this issue will be dealt with, and it would make for a very complicated trial.

20 The Court is correct to conclude regional differences exist. Specifically, the Court’s Phase
21 Three Decision relies heavily upon evidence offered by public water suppliers, which arose in large
22 part from a complex technical document prepared by several experts and simply referred to as the
23 “Summary Expert Report” (the “Report”). Contents of the Report further necessitate establishing
24 regional differences prior to prescription; namely that overdraft has not and does not exist in the
25 area where PPHCSD is located. For instance, Section 4.3 (Groundwater levels, Storage and
26 Natural Recharge), Subsection 4.3.1.4 (East Antelope Valley), at page IV-13 states: “In general,
27 groundwater levels in the Buttes and Pearland subbasins have not changed significantly since 1951
28 and, in some cases, have risen (06N/10W-22D1). Groundwater flow direction in this area is

1 generally to the west and has not changed significantly since 1951.” In addition, Figures 4.3-1
2 through 4.3-9 show the Buttes and Pearland subbasins in the southeast area of the of the Antelope
3 Valley Adjudication Area and overlapping the Los Angeles/San Bernardino County line into the
4 southwest area of the Mojave Adjudication Area, as does the Antelope Valley Groundwater Basin.
5 Thus, prescription issues cannot precede these regional issues.

6 Ultimately, the trial phases have evolved from a global approach by identifying
7 Adjudication Area boundaries; to identifying parties within those boundaries; to the general
8 condition of the aquifer. Thus, prior to engaging in prescription issues, these regional issues are a
9 legally-necessary step, particularly given: (i) the vast geographical size of the Basin, (ii) the Court’s
10 comments stated, *supra*, as well as recognizing that the aquifer is not like a “bathtub” due to
11 regionalized differences in geology and pumping (*Ibid.* at p. 9:13-19), and, (iii) whether those
12 differences affect what type of right a party would need to prove at the time of trial.

13 **C. The Adjudication Boundary In The “Southeast Area” Of The Basin.**

14 Through prior dialogue with the Court during a CMC this year, the Court invited PPHCSD
15 to bring an evidentiary motion to address the existing adjudication boundary in the “southeast
16 area,” specifically relating to the existence of the Antelope Valley hydrogeological basin extending
17 farther east than the adjudication boundary currently set along the Los Angeles / San Bernardino
18 County line. PPHCSD had been working diligently to bring such a motion, which requires
19 significant preparation particularly given the Court’s direction to bring an evidentiary motion.

20 Changing the circumstances since that CMC is a pending study of the Antelope Valley
21 groundwater basin by the United States Geological Survey (“USGS”) that became known recently
22 to many parties in this case, including PPHCSD.

23 Separate from a confidential-mediation presentation by USGS to parties in this matter, the
24 USGS made a public presentation on May 10, 2012 in Monterey, California during the semi-annual
25 conference hosted by the Association of California Water Agencies. During this public
26 presentation, the USGS discussed portions of its groundwater modeling, including aspects that
27 relate to the southeast area of the basin. As such, the USGS’s work seems to relate directly to this
28

1 issue (and many others), however, the USGS has not provided significant detail and does not
2 anticipate doing so until later this year.

3 Given the impact the USGS's work may offer to the Court and the parties, it may be more
4 appropriate to brief this issue at a later date, which would not create any further or unnecessary
5 delay in this matter if the next phase of trial is for the parties to establish production history.
6 Notably, this issue relates directly to PPHCSD's Eighth Cause of Action (Declaratory Relief –
7 Boundaries of Basin).

8 Meanwhile, and consistent with the USGS's policy, the study (or the model) should be
9 shared privately with the interested stakeholders (i.e., the parties), which to date, has not been done.
10 Failure to share this work with interested stakeholders such as PPHCSD and other parties to this
11 case casts an appearance of bias and raises suspicion as to how a select number of parties may be
12 influencing this work, particularly in light of a stated USGS policy providing for interested
13 stakeholders to be able to see this agency's important work.

14 **D. Management Of Procedural And Discovery Issues**

15 **1. Utilization Of "Universal" Discovery.**

16 Given the breadth of discretion vested with the Court to manage this complex action
17 pursuant to the California Rules of Court, this item relates to a question of whether, and if so to
18 what extent, written and testimonial discovery for Phase Four can proceed by utilizing "universal"
19 or "model" discovery, similar in concept to the "Model Answer" employed by the Court earlier in
20 this action. Without any such discovery devices or standards, discovery would be extraordinarily
21 cumbersome for the Court and the parties, due to the vast number of parties and potentially
22 multiple water rights held by some parties (e.g., an overlying water right holder that also
23 appropriates water). In addition, some parties may have yet to even file the "Model Answer" or
24 otherwise avail themselves to the Court's jurisdiction, raising a question of when to move for
25 default (and the effect thereof on the final, single judgment to be entered by the Court).

26 Likewise, for those parties who filed Answers that include affirmative defenses, a
27 procedural question exists as to which of those defenses that party seeks to establish, and whether
28 those defenses would be part of Phase Four.

1 2. Establishing The Burden Of Proof, And, Whether Phase Four Issues Are
2 Subject To A Jury Or Bench Trial.

3 Though issues relating to identifying which parties bear – and what is – the appropriate
4 burden of proof may seem like simple questions of law, the burden of proof for Phase Three was in
5 dispute evident from relevant pleadings, and CMC Statements filed since conclusion of Phase
6 Three reveal varying perspectives on other issues. Similarly, depending on what Phase Four
7 encompasses, some issues may or may not be subject to a bench trial. Accordingly, all of these
8 issues might lack consensus among the parties, which irrespective of consensus, are issues
9 ultimately within the Court’s purview.

10
11 Dated: October 8, 2012

ALESHIRE & WYNDER, LLP
DAVID J. ALESHIRE
WILLIAM W. WYNDER
WESLEY A. MILIBAND

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13
14 By: _____


Wesley A. Miliband
Attorneys for Cross-Defendant and
Cross-Complainant,
Phelan Piñon Hills Community
Services District

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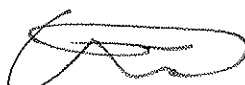
DECLARATION OF WESLEY A. MILIBAND

I, Wesley A. Miliband, declare:

1. I am an attorney at law duly licensed to practice before the Court of the State of California, and I am an attorney of record for Phelan Piñon Hills Community Services District (“PPHCSD”). I have personal knowledge of the facts contained herein as one of the attorneys handling this matter, and could and would testify competently thereto. This declaration is made in support of PPHCSD’s Case Management Conference Statement.

2. Attached hereto as Exhibit “A” is a true and correct copy of the October 5, 2012 correspondence that I caused to be served on that date on all counsel via the Court’s electronic service system.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on the 8th day of October, 2012, in Irvine, California.



Wesley A. Miliband

EXHIBIT A



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October 5, 2012

Via Electronic Service

To All Counsel
Antelope Valley Groundwater Cases
(Judicial Council Coordination No. JCCP 4408)

Re: Meet and Confer for Phase Four Trial Issues

Dear Counsel:

Consistent with Judge Komar's direction for the parties to meet-and-confer regarding identification of the scope of issues and procedures for the Phase Four trial set for February 11, 2013, and having not received any communications regarding this meet-and-confer other than Mr. Brunick's September 7 memorandum indicating that other counsel would initiate this process, Phelan Piñon Hills Community Services District ("PPHCSD") seeks to meet-and-confer in this regard. Accordingly, this letter serves that purpose, particularly with another mediation session with Justice Robie having been completed this week and a Case Management Conference set for next Friday, October 12. To that end, PPHCSD proposes the following for Phase Four:

Each party offers admissible evidence to the Court of that party's production history, for any of the following reasons:

- (i) Allocation of the safe yield remains unresolved, whether partially or globally;
- (ii) This process would provide the factual foundation for legal issues to be resolved through settlement *or* by the Court, which inevitably is necessary at some point for settling and non-settling parties, thereby removing this component to resolution of each party's claim to water;
- (iii) This process would not require the Court and the parties to engage now in the complexities of what the Court has correctly and generally recognized as "regional" differences (i.e., differing specifics applicable or related to different regions) within the Basin, and these regional differences must be determined prior to determining the type of water right a party must establish particularly given the Court's statement that the "Court is not making historical findings that would be applicable to specific areas of the aquifer or that could be used in a specific way to determine water rights in particular areas of the aquifer."

(Statement of Decision Phase Three Trial (July 13, 2011) (“Phase Three Decision”), p.4:21-24);

- (iv) Insufficient time now exists before the trial date currently set for February 11, 2013 to prepare for a phase of trial set to determine regional differences in the aquifer which must be done prior to determining prescriptive rights issues; and
- (v) This process would – in addition to providing the basis for allocating the safe yield – assist with physical solution and management issues for multiple reasons including more certainty as to the production rights throughout the Basin.

This proposed process is consistent with the Court’s statement from the Status Conference held on June 19, 2012, wherein the Court indicated that “whether by trial or prove up, the parties have to establish by competent evidence pumping history,” and with the Court’s statements including from the Phase Three Decision and on July 9, 2012 Trial Setting Conference recognizing that the aquifer is not a “bathtub” and that regional differences exist in the aquifer.

Alternatively, perhaps the next phase could address the regional differences in the aquifer, which would determine for the non-settling parties the type of water right to be proved (e.g., appropriative versus prescriptive) *and* would assist with formulating a physical solution for long-term management of this natural resource. Not only would this process for preparation and trial be highly complex, an impediment toward these efforts – as well as the Basin boundary issue along the Los Angeles/San Bernardino County line (PPHCSD’s Eighth Cause of Action (Declaratory Relief – Boundaries of Basin)) – exists until the USGS’s study is released. Public and private discussions with USGS reveal that the study contains information and data relevant to this adjudication, thereby compelling the need for this information and data to best determine existing adjudication issues.

Until this study is publicly available, the study (or the model) should be shared privately with the interested stakeholders (i.e., the parties), consistent with USGS policy. Moreover, until this study is publicly available, the case issues identified above cannot properly be addressed. Thus, the proposed process is the most logical and appropriate set of issues for the next phase of trial.

Irrespective of whether this proposed process is adopted, no lesser standard or burden of proof should apply for settling parties to establish their claims to an allocation of the safe yield, particularly if the settling parties allocate the entire safe yield to the exclusion of non-settling parties (i.e., to the detriment of other parties’ rights). To allow such could produce a legally deficient result under relevant legal authorities, including *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, by permitting a lower standard or burden of proof for approval of a settlement while holding non-settling parties to a different standard at trial. Practically, the

same standard should apply to non-settling and settling parties because of the contingencies inherent with the settlement process, including parties' agreeing to an allocation contingent upon resolution of other issues, as well as many of the parties (public and private) having to seek approval from their respective legislative or governing bodies. Even if these contingencies are successfully navigated, the ultimate contingency rests with the Court's approval, or lack thereof, of a settlement.

Also irrespective of whether this proposed process specifically is adopted, the base period for production would need to be established. During the Status Conference on June 19, 2012, the Court indicated that it does not have a "firm notion in mind" but the Court may want current production. While this notion lends itself to significant practical import for management of the Basin, the Court will need current production information. Recent historical production would also assist to lay the foundation for later establishing (if necessary) an appropriative right, or prescriptive right (and related self-help invoked by overlying parties).

Procedurally, "universal" or "model" discovery, similar in concept to the "Model Answer" employed by the Court earlier in this action, should be employed for the proposed process. In addition, some parties may have yet to even file the "Model Answer" or otherwise avail themselves to the Court's jurisdiction, raising a question of when to move for default (and the effect thereof on the final, single judgment to be entered by the Court).

I look forward to your response.

Very truly yours,

ALESHIRE & WYNDER, LLP



Wesley A. Miliband

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3 **PROOF OF SERVICE**

4 I, Marie W. Young,

5 I am employed in the County of Orange, State of California. I am over the age of 18 and
6 not a party to the within action. My business address is 18881 Von Karman Avenue, Suite 1700,
Irvine, CA 92612.

7 On October 8, 2012, I served the within document(s) described as **CASE**
8 **MANAGEMENT CONFERENCE STATEMENT OF PHELAN PINON HILLS**
9 **COMMUNITY SERVICES DISTRICT; DECLARATION OF WESLEY A. MILIBAND IN**
10 **SUPPORT THEREOF** as follows:

11 (ELECTRONIC SERVICE) By posting the document(s) listed above to the Santa Clara
County Superior Court website in regard to Antelope Valley Groundwater matter pursuant to the
Court's Clarification Order. Electronic service and electronic posting completed through
www.scefiling.org.

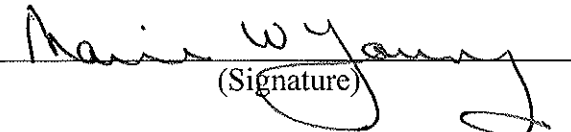
12 (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope
13 addressed as set forth above. I placed each such envelope for collection and mailing following
ordinary business practices. I am readily familiar with this Firm's practice for collection and
14 processing of correspondence for mailing. Under that practice, the correspondence would be
deposited with the United States Postal Service on that same day, with postage thereon fully
15 prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of the
party served, service is presumed invalid if postal cancellation date or postage meter date is more
16 than one day after date of deposit for mailing in affidavit.

17 (BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained
by Overnight Express, an express service carrier, or delivered to a courier or driver authorized by
18 said express service carrier to receive documents, a true copy of the foregoing document(s) in a
sealed envelope or package designated by the express service carrier, addressed as set forth above,
with fees for overnight delivery paid or provided for.

19 Executed on October 8, 2012, at Irvine, California.

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

22 Marie W. Young
23 _____
(Type or print name)

24 
(Signature)