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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

11 ANTELOPE VALLEY GROUNDWATER CASES

12 INCLUDED ACTIONS:

13 LOS ANGELES COUNTY WATERWORKS
14 DISTRICT NO. 40 v. DIAMOND FARMING
15 COMPANY, Superior Court of California, County
of Los Angeles, Case No. BC 325201;

16 LOS ANGELES COUNTY WATERWORKS
17 DISTRICT NO. 40 v. DIAMOND FARMING
18 COMPANY, Superior Court of California, County
of Kern, Case No. S-1500-CV-254-348;

19 WM. BOLTHOUSE FARMS, INC., v. CITY OF
20 LANCASTER, DIAMOND FARMING CO. v.
21 CITY OF LANCASTER, DIAMOND FARMING
22 CO. v. CITY OF PALMDALE WATER
DISTRICT, Superior Court of California, County of
Riverside, Consolidated Actions, Case Nos. RIC 344
436, RIC 344 668 and RIC 353 840

Judicial Council Coordination No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

**NOTICE OF MOTION AND MOTION
IN LIMINE BY NRG SOLAR ALPINE,
LLC TO LIMIT THE NEED FOR
TRIAL TESTIMONY**

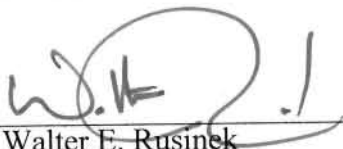
1 **TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on May 28, 2013, at 9:00 a.m., or as soon thereafter as
3 the matter may be heard in a department to be determined of the Superior Court of California,
4 County of Los Angeles, NRG Solar Alpine LLC (“NRG”), will move the Court for an order that
5 the statements in the “Declaration of Keith Latham For NRG Solar Alpine, LLC, in Lieu of
6 Deposition Testimony for Phase IV Trial” dated January 28, 2013, are competent evidence of
7 those facts and that NRG is not required to have a witness testify at trial to establish the amount t
8 of and it owns in the Antelope Valley Area of Adjudication or its use of groundwater on that land
9 during the years 2011 and 2012.

10 This motion is made under the provisions of Evidence Code, the Court’s inherent ability
11 to control trial testimony, and the provisions of the Fourth Amendment to the Case Management
12 Order, and is based on the attached Memorandum of Points and Authorities, the pleadings,
13 papers, and records in this action, and any evidence presented at the hearing on this matter.

14 DATE: May 15, 2013

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

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16 By: 
17 _____
18 Walter E. Rusinek
19 Attorneys for NRG Solar Alpine, LLC
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 NRG Solar Alpine, LLC (“NRG”) requests that this Court issue an order confirming that
4 the “Declaration of Keith Latham For NRG Solar Alpine, LLC, in Lieu of Deposition Testimony
5 for Phase IV Trial” dated January 28, 2013 [Court Document 5936] (“Latham Declaration”)
6 constitutes competent evidence of the facts stated in the declaration and that NRG is not required
7 to have a witness testify at trial to establish that (1) NRG owns approximately 660 acres of land in
8 the Antelope Valley and (2) NRG pumped from and used groundwater on that overlying land in
9 2011 and 2012 to construct a solar energy-generation facility. The Latham Declaration was filed
10 in response to this Court’s First Amendment to the Case Management Order For Phase IV Trial
11 (“CMO”) using the format provided by counsel for the Los Angeles County Waterworks District
12 No. 40 (with other parties referred to below as the “Public Water Suppliers”).

13 Issuance of the requested order would implement this Court’s Fourth Amendment to the
14 CMO. That Amendment established a May 3, 2013, deadline for parties to object to the filed
15 declarations, identified the required elements of such objections, and stated that the failure to
16 provide adequate objections would mean that the facts in the declaration would be accepted,
17 limiting the need for trial testimony. The only objection to the Latham Declaration (which was
18 filed by the Public Water Suppliers) does not satisfy the criteria of the Fourth Amendment.

19 While this motion only addresses the Latham Declaration, the questions it raises
20 concerning what evidence will be needed at trial to prove land ownership and water use applies to
21 all parties. Given the number of parties in the case and the number of objections to declarations
22 filed by the Public Water Suppliers, if the Latham Declaration’s listing of the specific parcels
23 NRG owns by Assessor’s Parcel Number (“APN”) and the acreage in each parcel is insufficient
24 to prove ownership, and its listing of the amount of water used daily based on meter readings to
25 construct the project is inadequate to prove water use, then the then the process of proving land
26 ownership and water use will be both time consuming and costly for all parties and the Court. For
27 those broader reasons as well, this Court should issue an order stating that NRG is not required to
28 provide testimony at trial to establish the facts stated in the Latham Declaration.

1 **II. ARGUMENT**

2 **A. A Motion in Limine is a Proper Method to Enforce the Court’s CMO.**

3 In the Fourth Amendment to the CMO, this Court included specific requirements to be
4 met by parties which chose to object to a declaration or a stipulation. Specifically, Paragraph 3
5 stated that any objection to the facts stated in a declaration

6 shall indicate by party and paragraph, the statement of fact being disputed, the
7 basis of the objection and/or dispute to the [sic], and shall identify documents
8 and witnesses known to the disputing and/or objecting party that disputes,
9 contradict or is inconsistent with the disputed fact. If the evidence on which
10 the objecting party relies consists in whole or in part of documents, the
objecting party shall either identify the documents in its objection or serve
copies of those documents with the objection.

11 In addition, Paragraph 4 of the Fourth Amendment stated that these objections “must be specific;
12 a broad or general statement of objection or dispute without a specifically stated basis will be
13 ineffective for satisfying paragraph 3 of this Order.” As discussed below, the objections of the
14 Public Water Suppliers fail to satisfy these criteria. Under Paragraph 5 of the Fourth Amendment
15 to the CMO, the failure to meet these criteria means that the declaration “will be accepted by the
16 Court in the Trial as competent evidence of the facts stated therein, without the necessity to call a
17 witness to establish the fact.”

18 Case law is clear that courts “have inherent power, separate from any statutory authority,
19 to control the litigation before them and to adopt any suitable method of practice, even if the
20 method is not specified by statute or by the Rules of Court.” *Amtower v. Photon Dynamics, Inc.*
21 (2008) 158 Cal.App.4th 1582, 1595. One method that courts use to control litigation is through *in*
22 *limine* motions, which are “designed to facilitate the management of a case, generally by deciding
23 difficult evidentiary issues in advance of trial.” *Id.* at 1595. Consequently, this motion *in limine*
24 is a proper method to enforce the requirements of the Fourth Amendment to the CMO and this
25 Court’s inherent authority to control the litigation.

26 **B. The Latham Declaration Included Sufficient Information to Prove How Much**
27 **Land NRG Owns in the Antelope Valley Area of Adjudication.**

28 The Latham Declaration provided the specific information on land ownership requested

1 by the Public Water Suppliers in their “Form Declaration” which all the parties used. Page one of
2 the Form Declaration under the heading “Property Ownership and Parcel Size,” requested
3 information on the County in which the land was located and that each of the parcels be identified
4 by their APNs. That section also asked that the acreage of each parcel and the time period of
5 ownership be identified and sought information on past owners of the property and their time of
6 ownership. There was no request for deeds or other information.

7 In response, the Latham Declaration specifically identified by APN the parcels which
8 NRG owns in the Antelope Valley Area of Adjudication, and included in Exhibit D a list of the
9 acreage of each individual APN. The Latham Declaration also identified when NRG purchased
10 each of the parcels and, to the best of its ability, identified previous owners of the properties and
11 the period of previous ownership.

12 Even so, the “Objections to Declarations and Stipulations in Phase IV” filed by the Public
13 Water Suppliers on April 15, 2013[Court Document 6313] and again on May 3, 2013
14 (“Objections”) [Court Document 6450] claimed that the Latham Declaration “is also unclear or
15 provide [sic] insufficient information regarding acreage” Objections at 2: 22-23. The
16 Objections did not challenge the fact that NRG actually owns property in the Antelope Valley, so
17 that fact is not disputed. Rather, the Objections simply asserted, without providing any evidence
18 to the contrary, that the list of APNs and their associated acreages was “insufficient.” The
19 Objections did not state what the actual acreages are for each APN or indicate if the number of
20 acres claimed was wrong by some percentage.

21 Not only did NRG provide the exact information requested by the Form Declaration, but
22 the objection by the Public Water Suppliers that the Latham Declaration provided “insufficient”
23 information regarding the acreage of land owned by NRG constitutes the type of “broad or
24 general statement of objection” prohibited by the Fourth Amendment. In fact, that objection
25 indicates that the Public Water Suppliers did not even review the information included in the
26 declaration. Such an objection is inadequate under the Fourth Amendment, and pursuant to the
27 terms of the Fourth Amendment, NRG should not be required to provide testimony at trial as to
28 its ownership of parcels in the Antelope Valley or as to the acreage of each of those parcels.

1 **C. The Latham Declaration Provided Sufficient Information to Prove How**
2 **Much Groundwater NRG Pumped and Used in 2011 and 2012.**

3 The Public Water Suppliers also improperly challenged the information provided in
4 paragraphs 19, 20, 41, 42 and 43 of the Latham Declaration concerning water use on the NRG
5 property. Under the heading “Water Meter Records,” Paragraph 19 of the Form Declaration
6 simply asked that the “records” for “water meters” be provided and Paragraph 20 requested the
7 “total yearly production amounts by metered well” on the properties for specified years. No
8 additional information on the meters was requested.

9 In response, the Latham Declaration included a chart as Exhibit E which identified the
10 amount of water pump monthly during 2011 and 2012 as measured by the water meter on the
11 well. That chart listed by date the quantity of groundwater pumped in gallons, cubic feet, and acre
12 feet, and included a running tally of the amount of groundwater pumped for 2011 and 2012.

13 Based on those pumping records, the Latham Declaration also included information on the
14 use of water in response to the requests in Paragraphs 41 and 42 of the Form Declaration. Those
15 paragraphs simply asked for information concerning the quantity of water used on the each APN
16 in 2011 and 2012 and how the water was used during those years. Paragraph 41 of the Latham
17 Declaration stated that NRG used approximately 1.5 acre feet of water on specified parcels for
18 “dust control, soil stabilization and conditioning, and other construction purposes during the
19 construction of a solar power facility” in 2011, and Paragraph 42 stated that NRG used
20 approximately 126 acre feet of water on those same parcels for the same purposes in 2012.
21 Paragraph 43 of the Latham Declaration confirmed that NRG “did not produce or use water
22 within the Antelope Valley Area of Adjudication” other than as identified in the declaration.

23 In objecting to the information provided in the Latham Declaration, the Public Water
24 Suppliers claimed that the information “does not support the claimed water use or calculation of
25 water use . . . [and] is also unclear or provide [sic] insufficient information regarding . . . water
26 meter records, method of calculations, water use, and calculation of applied water use.”
27 Objections at 2:22-25. Once again, the objections addressed information not requested in the
28 Form Declaration, and constituted the type of “broad or general statement of objection or dispute

1 without a specifically stated basis” rejected as inadequate by the Fourth Amendment to the CMO.

2 The Objections also seemed to ignore the fact that the quantity of water used was not
3 calculated based on crop types or acreage, but was based on meter readings of water pumped for
4 use in constructing an approximately 600-acre solar power-generating facility. The use of that
5 water for dust control and other construction purposes was properly identified in the Latham
6 Declaration, and the Public Water Suppliers did not challenge the fact that the project actually
7 was constructed on the parcels identified. Once more, these Objections regarding the amount of
8 water used and the actual purpose for which the water was used do not satisfy the criteria adopted
9 by this Court in the Fourth Amendment as a way to limit the amount of trial testimony needed to
10 prove water use.

11 III. CONCLUSION

12 Paragraph 5 of the Fourth Amendment to the CMO states that “[a]ny portion of a
13 Stipulation or Declaration to which no objection has been made by the time set forth in paragraph
14 3 hereof will be accepted by the Court in the Trial as competent evidence of the facts stated
15 therein, without the necessity to call a witness to establish the fact.” As the discussion above
16 shows, the only objections to the Latham Declaration filed by the deadline do not meet the criteria
17 established in the Fourth Amendment to the CMO. Consequently, this Court should issue an order
18 that the facts stated in the Latham Declaration constitute competent evidence of (1) the amount
19 and location of the land that NRG owns within the Antelope Valley Area of Adjudication, and (2)
20 the amount of water NRG pumped and used on those overlying parcels during the years 2011 and
21 2012 to construct a solar power-generating facility and that NRG is not required to provide the
22 testimony of any witness at trial to establish these facts.

23 DATE: May 15, 2013

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

24
25
26 By: 

Walter E. Rusinek
Attorneys for NRG Solar Alpine, LLC

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 530 "B" Street, Suite 2100, San Diego, California 92101. On **May 15, 2013**, I served the within documents:

NOTICE OF MOTION AND MOTION IN LIMINE BY NRG SOLAR ALPINE, LLC TO LIMIT THE NEED FOR TRIAL TESTIMONY

- by transmitting via facsimile a copy of said document(s) listed above to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.
- by electronic mail: by posting the document listed above to the Santa Clara Superior Court website: www.scefilng.org regarding the ANTELOPE VALLEY GROUNDWATER matter.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid 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 than one day after date of deposit for mailing an affidavit.
- by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at San Diego, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 530 "B" Street, San Diego, California 92101 in the ordinary course of business on the date of this declaration.
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **May 15, 2013**, at San Diego, California.



Sarai DeJesus