

1 **MICHAEL T. FIFE (State Bar No. 203025)**  
2 **BRADLEY J. HERREMA (State Bar No. 228976)**  
3 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**  
4 **21 East Carrillo Street**  
5 **Santa Barbara, CA 93101-2706**  
6 **Telephone: 805.963.7000**  
7 **Facsimile: 805.965.4333**

8 **Attorneys for:** Gene T. Bahlman, William R. Barnes & Eldora M. Barnes Family Trust of  
9 1989, Thomas M. and Julie Bookman, Bruce Burrows, 300 A 40 H, LLC, Calmat Land  
10 Company, Cameo Ranching Co., Sal and Connie L. Cardile, Consolidated Rock Products,  
11 Del Sur Ranch LLC, Forrest G. Godde, Forrest G. Godde as Trustee of the Forrest G.  
12 Godde Trust, Lawrence A. Godde, Lawrence A. Godde and Godde Trust, Gorrindo Family  
13 Trust, Leonard and Laura Griffin, Healy Enterprises, Inc., Hines Family Trust, Habod  
14 Javadi, Juniper Hills Water Group, Eugene V., Beverly A., & Paul S. Kindig, Paul S. &  
15 Sharon R. Kindig, Kootenai Properties, Inc., Dr. Samuel Kremen, Gailen Kyle, Gailen Kyle  
as Trustee of the Kyle Trust, James W. Kyle, James W. Kyle as Trustee of the Kyle Family  
Trust, Julia Kyle, Wanda E. Kyle, Malloy Family Partners, Jose Maritorena Living Trust,  
Richard H. Miner, Barry S. Munz, Terry A. Munz and Kathleen M. Munz, Eugene B.  
Nebeker, R and M Ranch, Inc., John and Adrienne Reca, Edgar C. Ritter, Paula E. Ritter,  
Paula E. Ritter as Trustee of the Ritter Family Trust, Sahara Nursery, Marygrace H. Santoro  
as Trustee for the Marygrace H. Santoro Rev Trust, Marygrace H. Santoro, Mabel Selak,  
Jeffrey L. & Nancee J. Siebert, Helen Stathatos, Savas Stathatos, Savas Stathatos as Trustee  
for the Stathatos Family Trust, Tierra Bonita Ranch Company, Beverly Tobias, Vulcan  
Lands, Inc., **collectively known as the Antelope Valley Ground Water Agreement  
Association (“AGWA”)**

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
17 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

18 **ANTELOPE VALLEY**  
19 **GROUNDWATER CASES**

20 Included Actions:  
21 Los Angeles County Waterworks District  
22 No. 40 v. Diamond Farming Co. Superior  
23 Court of California County of Los Angeles,  
24 Case No. BC 325 201 Los Angeles County  
25 Waterworks 2District No. 40 v. Diamond  
26 Farming Co. Superior Court of California,  
27 County of Kern, Case No. S-1500-CV-254-  
348Wm. Bolthouse Farms, Inc. v. City of  
Lancaster Diamond Farming Co. v. City of  
Palmdale Water Dist. Superior Court of  
California, County of Riverside,  
consolidated actions, Case No. RIC 353  
840, RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding No.  
4408

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

**AGWA’S OBJECTION TO PROPOSED  
STATEMENT OF DECISION RE PHASE III  
TRIAL**

Date: July 11, 2011  
Time: 11:00 AM

1           On May 6, 2011, the Court issued its Tentative Decision for the Phase III trial. On May  
2 16, 2011, the landowner parties requested a Statement of Decision pursuant to Code of Civil  
3 Procedure section 632. On May 19, 2011, the Court ordered the purveyors to prepare the  
4 Statement of Decision. On May 23, 2011, the Antelope Valley Groundwater Agreement  
5 Association (“AGWA”) filed its Proposal re Content of Statement of Decision pursuant to Code  
6 of Civil Procedure section 632 identifying controverted issues and area of ambiguity that should  
7 be addressed by the Statement of Decision. On May 24, 2011, Bolthouse Properties, LLC and  
8 Wm. Bolthouse Farms, Inc. (“Bolthouse”) filed its own proposal. On June 6, 2011, the purveyors  
9 filed their proposed Statement of Decision.

10           The proposed Statement of Decision prepared by the purveyors appears nearly identical to  
11 the Court’s Tentative Decision because it ignores virtually all of the comments provided by the  
12 landowners and, with the exception of one paragraph, fails to make any attempt to cite to the  
13 Phase III record. However, on closer inspection it appears that a great deal of effort in fact went  
14 into editing the Court’s Tentative Decision in order to eliminate those parts of the decision that  
15 the purveyors apparently did not like and to add findings that go beyond the scope of the  
16 Tentative Decision. Because the purveyors made no attempt to inform the parties of the manner in  
17 which they edited the Tentative Decision, either through a redline showing the edits or through  
18 some kind of textual description of the changes, many of these edits are difficult to discern unless  
19 a party reads the two documents next to one another. Unfortunately, these edits do not resolve any  
20 of the ambiguities previously identified by the landowners and, in fact, have introduced many  
21 more.

22           Therefore, AGWA objects to the proposed Statement of Decision because it does not  
23 resolve controverted issues and is ambiguous.

24 ////

25 ////

26

27

28

1 **I. AGWA AND BOLTHOUSE’S PROPOSED CONTENT OF STATEMENT OF**  
2 **DECISION**

3 The proposed Statement of Decision ignored nearly all of the comments provided by  
4 AGWA and Bolthouse in their filings pursuant to Code of Civil Procedure section 632. Rather  
5 than reiterate those comments here, AGWA incorporates the previous comments herein by  
6 reference. Those comments that were addressed by the proposed Statement of Decision are as  
7 follows.

8 **A. Standard of Proof**

9 The Statement of Decision cites to Evidence Code section 115 in response to AGWA’s  
10 request to clarify why the appropriate standard of proof is preponderance of the evidence rather  
11 than clear and convincing evidence. Since the Statement of Decision does not specify which part  
12 of section 115 it relies upon, AGWA assumes the citation is to the sentence that reads: “Except as  
13 otherwise provided by law, the burden of proof requires proof by a preponderance of the  
14 evidence.”

15 However, a mere citation to this section is not responsive to AGWA’s May 23, 2011  
16 comments because it does not clarify why, in a prescriptive rights case where significant property  
17 rights are at issue, the standard of proof is not clear and convincing evidence. AGWA argued this  
18 point at length in its Phase III Trial Brief and incorporates these arguments herein by reference.  
19 (AGWA Phase III Trial Brief dated December 20, 2010, pages 3-5.) Unless the intention of the  
20 Court is that the safe yield determined in Phase III is a “safe yield management number” whose  
21 relevance is to management and not to an adjudication of water rights, then the basis for using a  
22 preponderance of the evidence standard must be clarified.

23 **B. Definition of Safe Yield**

24 In its May 23, 2011 comments, AGWA questioned whether the Court utilized the correct  
25 definition of “safe yield.” This issue was also briefed in detail by AGWA in its Motion in Limine  
26 No. 1 dated December 3, 2010, and these arguments are incorporated herein by reference.

27 The proposed Statement of Decision cites to page 278 of the San Fernando decision, but  
28 does not clarify specifically what is being cited to on this page. AGWA assumes the citation is to

1 the sentence that reads: “‘Safe Yield’ is defined as ‘the maximum quantity of water which can be  
2 withdrawn annually from a ground water supply under a given set of conditions without causing  
3 an undesirable result.’”

4 However, a mere citation to this sentence does not clarify how the Court’s stated  
5 definition relates to this definition and how a “conservative” safe yield number relates to a  
6 “maximum” safe yield number. In addition, the mere citation to San Fernando decision does not  
7 clarify the evidentiary basis for a finding that the safe yield is 110,000 acre-feet when the  
8 purveyor’s primary witness Mr. Scalmanini testified that with proper management the safe yield  
9 could be greater than 110,000 acre-feet (RT, 1/19/2011, 911:8-21) and Mr. Wildermuth testified  
10 that with proper management and monitoring the Basin could be pumped at 150,000 acre-feet  
11 without causing harm to the Basin (RT, 2/1/2011, 148:16-21, 152:13-16).

12 In addition, the Statement of Decision should clarify how these terms relate to the term  
13 “Sustainable Yield” which was the only term used in the purveyor’s expert report and was the  
14 concept about which they were deposed prior to trial.

15  
16 **II. STATEMENT OF DECISION CHANGES AND ADDITIONS TO TENTATIVE**  
17 **DECISION**

18 In addition to its failure to address the comments provided by landowner parties, the  
19 proposed Statement of Decision also made significant changes and additions to the Court’s  
20 Tentative Decision. Some of these changes and additions appear to be the result of stylistic  
21 preferences of the purveyors, but many appear to constitute substantive changes.

22 For example, the purveyors took the seemingly neutral sentence from the Tentative  
23 Decision that read: “The only source of natural or native recharge for the Antelope Valley is  
24 precipitation that recharges the aquifer and it is therefore necessary to ascertain average annual  
25 precipitation,” (Tentative 6:13-14) and added the words, “from the surrounding mountains” so  
26 that the sentence now reads: “The only sources of natural or native recharge for the Antelope  
27 Valley are precipitation from the surrounding mountains that recharges the Basin and it is  
28 therefore necessary to ascertain average annual precipitation.” (SOD 5:8-11.) Without the benefit

1 of any citation to the record, the purveyors took a neutral sentence and made it a significant  
2 evidentiary finding supporting the purveyor’s theory that no water that falls as precipitation on  
3 the Valley floor finds its way into the aquifer, no matter how hard it rains in any given year. Other  
4 such changes are described as follows

5 **A. Addition of clauses re return flow of imported water**

6 The most significant changes reflect the purveyor’s desire to carve-out from the safe yield  
7 a fixed amount of water that will be allocated to them as return flow from imported water. These  
8 changes can be found throughout the proposed Statement of Decision, in particular at page 8,  
9 lines 12-19, but also at 2:26 and 6:23-24 where the language of the Tentative Decision is altered  
10 to include findings on this issue. While such an allocation is beyond the scope of Phase III, and  
11 while the methodology used by the Court to arrive at its safe yield finding is inconsistent with  
12 such an allocation carve-out, the sole citation to the record provided by the purveyors is to the  
13 Scalmanini exhibits that provide the purveyor evidence supporting such a carve-out. In effect, the  
14 primary concern of the purveyors in their statement of decision appears to be to pre-empt future  
15 phases by using the proposed Statement of Decision to allocate to themselves a significant portion  
16 of the safe yield.

17 The Court based its finding concerning the safe yield on a finding that water levels appear  
18 to be declining (loss of storage) and that there is current Basin-wide subsidence that cannot be  
19 attributed to residual effects from past overpumping. The Court found that if these phenomena are  
20 occurring, then pumping levels when they occur must be too high. While this approach to  
21 estimating safe yield is an appropriate method for establishing a rough estimate of safe yield and  
22 determining at a qualitative level whether the Basin is in overdraft, it does not support an internal  
23 allocation of that yield as between different types of water such as native water, supplemental  
24 water, return flows from native water, return flows from supplemental water, subsurface outflow,  
25 etc.

26 In addition, again without the benefit of any citation to evidence presented on the subject,  
27 the purveyors add to the factors considered by the Court (loss of storage and subsidence) the  
28 “amount and direction of flow to Edwards Air Force Base.” Like the issue of the amount of

1 return flows from imported water, this issue only has relevance to an allocation decision of the  
2 federal reserved right based on the availability of water at the federal reservation. Again, the  
3 purveyors are merely attempting to use the Statement of Decision to establish factual issues that  
4 will be of use to them in later a phase of the case.

5 **B. Addition regarding causation relating to subsidence**

6 The proposed statement of decision adds the sentence: “. . . a preponderance of the  
7 evidence establishes that ongoing and continued subsidence is caused, in part, by ongoing  
8 groundwater extractions in excess of the Basin’s safe yield.” (SOD 5:1-3.) This sentence was not  
9 in the Tentative Decision, and, in fact, the Tentative Decision did not make any findings  
10 concerning causation related to subsidence. Since liability for damage caused by subsidence is  
11 strict liability to the party causing such subsidence (*Los Osos Valley Associates v. City of San*  
12 *Luis Obispo* (1994) 30 Cal.App.4th 1670, 36 Cal.Rptr.2d 758), it is understandable that the  
13 purveyors, in particular Los Angeles County Waterworks whose pumping is concentrated in the  
14 most urbanized area of the Valley, would want to diffuse this liability to all pumpers. However,  
15 no evidence was presented in Phase III that would justify such a finding and the Court should not  
16 allow the purveyors to use the Statement of Decision as a way to shield themselves from liability  
17 associated with subsidence.

18 **C. Additional Ambiguities Created in Statement of Decision**

19 1. Throughout the Statement of Decision, the purveyors have replaced reference to  
20 the “aquifer” with reference to the “Basin.” The significance of this replacement is not clear.

21 2. Throughout the Statement of Decision, the purveyors have replaced reference to  
22 the term “hydro-conductivity” (e.g. Tentative Decision 4:14-16) with the alternative term  
23 “hydraulic connectivity” (e.g. SOD 3:10-11). The significance of this replacement is not clear.

24 3. What is the significance of placing the word “wetter” (with reference to the  
25 historical precipitation cycle) in quotation marks, when it was not so in the Tentative Decision?  
26 (See Tentative Decision 5:5 vs. SOD 3:28.)

27 4. What is the significance of changing the description of the AVAA boundaries as  
28 having been the “subject” (Tentative Decision 4:12) of the Phase I and II trials, to having been

1 “decided” (SOD 3:8) in the Phase I and II trials?

2 5. What is the significance of the difference between “agricultural and industrial  
3 changes” and “land use changes” (Tentative Decision 5:17 vs. SOD 4:11)?

4 6. What is the basis for elimination of reference to different safe yields for different  
5 parts of the Basin? (Tentative Decision 9:1-2 vs. SOD 7:22-25.)

6 7. What is the significance of the removal from the Tentative Decision of the phrase,  
7 “coinciding with periods of drought,” with reference to historic pumping? (Tentative Decision  
8 5:10-11 vs. SOD 4:4.)


9 8. What is the significance of changing the phrase: “. . . the need to drill for water at  
10 deeper and deeper levels in those parts of the aquifer most affected by the overdraft” (Tentative  
11 Decision 8:18-19) to simply: “. . . declining water levels” (SOD 7:13), except for the fact that  
12 there was no corroborating evidence, such as the need to drill for water at deeper and deeper  
13 levels, to the purveyor’s calculated decline in water levels?

14  
15 **III. CONCLUSION**

16 AGWA joins in the Objections filed by other landowner parties including but not limited  
17 to Tejon Ranchcorp, Copa De Oro Land Company, and Diamond Farming Company, and  
18 requests the Court to order that a new Statement of Decision should be prepared, either by the  
19 purveyors or the landowners.

20  
21 Dated: June 21, 2011

BROWNSTEIN HYATT FARBER  
SCHRECK, LLP

22  
23   
24 By: \_\_\_\_\_  
25 MICHAEL T. FIFE  
26 BRADLEY J. HERREMA  
27 Attorneys for Defendant  
28 ANTELOPE VALLEY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

**STATE OF CALIFORNIA,  
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On June 21, 2011, I served the foregoing document described as:

**AGWA'S OBJECTION TO PROPOSED STATEMENT OF DECISION  
RE PHASE III TRIAL**

on the interested parties in this action.

By posting it on the website by 5:00 p.m. on June 21, 2011.  
This posting was reported as complete and without error.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Santa Barbara, California, on June 21, 2011.



MARIA KLACHKO-BLAIR  
**TYPE OR PRINT NAME**

SIGNATURE