

1 **MICHAEL T. FIFE (State Bar No. 203025)**  
2 **BRADLEY J. HERREMA (State Bar No. 228976)**  
3 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**  
4 **1020 State Street**  
5 **Santa Barbara, California 93101**  
6 **Telephone No: (805) 963-7000**  
7 **Facsimile No: (805) 965-4333**

8 **Attorneys for:** Gene T. Bahlman, Thomas M. Bookman, B.J. Calandri, John Calandri, John  
9 Calandri as Trustee of the John and B.J. Calandri 2001 Trust, Son Rise Farms, Calmat Land  
10 Company, Sal and Connie L. Cardile, Efren and Luz Chavez, Consolidated Rock Products, Del Sur  
11 Ranch LLC, Steven Godde as Trustee of the Forrest G. Godde Trust, Lawrence A. Godde, Lawrence  
12 A. Godde and Godde Trust, Robert and Phillip Gorrindo, Gorrindo Family Trust, Laura Griffin,  
13 Healy Farms, Healy Enterprises, Inc., John Javadi and Sahara Nursery, Juniper Hills Water Group,  
14 Gailen Kyle, Gailen Kyle as Trustee of the Kyle Trust, James W. Kyle, James W. Kyle as Trustee of  
15 the Kyle Family Trust, Julia Kyle, Wanda E. Kyle, Maritorena Living Trust, Jose and Marie  
16 Maritorena, Richard H. Miner, Barry S. Munz, Terry A. Munz and Kathleen M. Munz, Eugene B.  
17 Nebeker, R and M Ranch, Inc., Richard and Michael Nelson, Robert Jones, John and Adrienne Reza,  
18 Mabel Selak, Jeffrey L. & Nancee J. Siebert, Dr. Samuel Kremen and Tierra Bonita Ranch  
19 Company, Triple M Property FKA and 3M Property Investment Co., Vulcan Materials Co. and  
20 Vulcan Lands Inc., Willow Springs Company, Donna Wilson, **collectively known as the Antelope**  
21 **Valley Groundwater Agreement Association (“AGWA”)**

22 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

23 **FOR THE COUNTY OF LOS ANGELES**

24 **ANTELOPE VALLEY** )  
25 **GROUNDWATER CASES** )  
26 )  
27 )  
28 )

Included Actions: )  
Los Angeles County Waterworks District No. )  
40 v. Diamond Farming Co. Superior Court of )  
California County of Los Angeles, Case No. BC )  
325 201 Los Angeles County Waterworks )  
District No. 40 v. Diamond Farming Co. )  
Superior Court of California, County of Kern, )  
Case No. S-1500-CV-254-348 Wm. Bolthouse )  
Farms, Inc. v. City of Lancaster Diamond )  
Farming Co. v. City of Lancaster Diamond )  
Farming Co. v. Palmdale Water Dist. Superior )  
Court of California, County of Riverside, )  
consolidated actions, Case 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**  
**NOTICE OF MOTION AND MOTION IN**  
**LIMINE OF AGWA FOR ORDER**  
**EXCLUDING EVIDENCE OF MODELING**  
**BY DESIGNATED EXPERT DENNIS**  
**WILLIAMS; MEMORANDUM OF POINTS**  
**AND AUTHORITIES IN SUPPORT**  
**THEREOF; DECLARATION OF**  
**MICHAEL T. FIFE**

Trial Date: February 10, 2014  
Time: 9:00 a.m.  
Dept: Room 222

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

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

**PLEASE TAKE NOTICE** that on February 10, 2014, at 9:00 a.m., in Department 222 (Old Department 1) of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California, the Antelope Valley Groundwater Agreement Association (“AGWA”) will, and hereby does move this Court in limine for an order excluding all evidence and testimony offered by the Public Water Suppliers (“PWS”) relating to Basin-wide groundwater modeling performed by the PWS’s designated expert for Phase V, Dr. Dennis Williams.

This motion is made pursuant to Evidence Code sections 350, 352, 720, and 803, and the Court’s inherent power to regulate the order of proof and conserve judicial resources. AGWA moves for an order in limine prohibiting the introduction of testimony and evidence arising out of Dr. Williams’ modeling because the model has not been made available to the parties, the model and key model information were withheld from the parties prior to Dr. Williams’ deposition so that it was impossible to meaningfully depose Dr. Williams on his intended testimony. The first time any notice was given of Dr. Williams’ intended use of a computer model was at his deposition on January 16, 2014, less than a month before trial in this matter, so no party has or will have a meaningful opportunity to evaluate his proposed testimony even if a working copy of the model is now provided.

Furthermore, it appears from the Dr. Williams’ deposition testimony that the technical work to construct the model in its current form was done by Mr. Joseph Scalmanini, contrary to the assertions made by counsel at the January 15, 2014 ex parte hearing that Mr. Scalmanini did no work relating to Phase V. Finally, all of the above is to be balanced against the lack of probative value of the model results, since, according to Dr. Williams’ deposition testimony, the main purpose of the modeling work was for management purposes and to validate the safe yield number of 110,000 acre-feet per year, neither of which is at issue in Phase V. Accordingly, AGWA and other parties would be unduly prejudiced if the Court were to admit Dr. Williams’ modeling results and testimony into evidence.


///  
///

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

This motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Michael T. Fife, and all other pleadings and papers on file herein, and as such evidence and oral argument as may be presented at or before the time of the hearing of this motion.

Dated: January 24, 2014

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By:   
MICHAEL T. FIFE  
BRADLEY J. HERREMA  
ATTORNEYS FOR AGWA

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The Antelope Valley Groundwater Agreement Association (“AGWA”) seeks an order  
4 excluding any and all evidence at the Phase V trial related to modeling runs of the Antelope  
5 Valley Groundwater Basin (“Basin”) performed by the Public Water Suppliers’ designated  
6 expert, Dr. Dennis Williams. Specifically, AGWA seeks to exclude 1) any testimony by Dr.  
7 Williams relating to groundwater modeling of the Basin; and 2) any testimony or data relating to  
8 model runs performed by Dr. Williams.

9 At his January 16, 2014 deposition, Mr. Williams revealed that in performance of his  
10 expert work, he ran a United States Geological Survey (“USGS”) 2003 MODFLOW model of the  
11 Basin which had been substantially modified by Mr. Joseph Scalmanini, an expert retained by the  
12 Public Water Suppliers (“PWS”) in Phase III of this matter. The model and key model  
13 information was withheld from the parties prior to Dr. Williams’ deposition so that it was  
14 impossible to meaningfully depose Dr. Williams on his intended testimony, and the first time any  
15 notice was given of Dr. Williams’ intended use of a computer model was at his deposition on  
16 January 16, 2014, less than a month before trial in this matter, so that no party has or will have a  
17 meaningful opportunity to evaluate his proposed testimony even if a working copy of the model is  
18 now provided.

19 Furthermore, it appears from the Dr. Williams’ deposition testimony that the technical  
20 work to construct the model in its current form was done by Mr. Scalmanini, contrary to the  
21 assertions made by counsel at the January 15, 2014 ex parte hearing that Mr. Scalmanini did no  
22 work relating to Phase V. Finally, all of the above is to be balanced against the lack of probative  
23 value of the model results since, according to Dr. Williams’ deposition testimony, the main  
24 purpose of the modeling work was for management purposes and to validate the safe yield  
25 number of 110,000 acre-feet per year, neither of which is at issue in Phase V.

26 Taken together, the probative value of Dr. Williams’ modeling is far outweighed by the  
27 potential prejudice to AGWA and other parties who have had insufficient time to review the  
28 model, risking the type of “ambush” at trial the rules of Civil Procedure and expert disclosure are

1 designed to avoid. For these reasons, AGWA requests an order in limine from the Court  
2 excluding all testimony by and all modeling evidence generated by Dr. Williams.

3 **II. STATEMENT OF FACTS**

4 On November 18, 2013, counsel for the PWS designated Dennis Williams, P.E., as an  
5 expert witness in the Phase V trial in this matter. The Declaration of Jeffrey V. Dunn in support  
6 of the PWS's expert designation stated the scope of Dr. Williams' testimony would be as follows:  
7 "Dr. Williams may be called to offer testimony concerning return flows, and the characteristic,  
8 structure, hydrologic conditions of the groundwater underlying the Basin." (See Declaration of  
9 Jeffrey V. Dunn attached to Public Water Suppliers' Notice of Designation of Expert Witnesses  
10 (Nov. 18, 2013), ¶ 7, attached as Exhibit "A" to the Declaration of Michael T. Fife, filed  
11 concurrently with this Motion ("Fife Decl.")). The designation of Dr. Williams contains no  
12 indication that he would produce evidence on modeling of the Basin, or any groundwater  
13 modeling at all. (Fife Decl., Exhibit A, at ¶ 7.)

14 Subsequently at the deposition of Dr. Williams on January 16, 2014, Dr. Williams  
15 testified that his opinions with respect to Phase V are based entirely on a single run of a basin-  
16 wide model of the Basin. (Fife Decl., at ¶ 4; see relevant excerpts from the rough transcript of the  
17 deposition of Dr. Williams (January 16, 2014), attached as Fife Decl., Exhibit "B," at 12:18-23.)  
18 This model was obtained by the PWS in 2012 from the United States Geological Survey  
19 ("USGS"). (Fife Decl., at ¶ 5; Fife Decl., Exhibit B, at 12:6-11.)

20 According to Dr. Williams, after obtaining the model from USGS in 2012, Mr. Scalmanini  
21 and his staff made potentially significant changes to the model in order to make it conform to the  
22 Phase III Summary Expert Report. (Fife Decl., at ¶ 6; Fife Decl., Exhibit B, at 13:1-10, 18:1-22.)  
23 Dr. Williams testified that Mr. Scalmanini directed the modeling, (Fife Decl., ¶ 7; Fife Decl.,  
24 Exhibit B, at 39:6-12), but Mr. Scalmanini is unavailable to be deposed due to his medical  
25 condition. (Fife Decl., ¶ 8.) No documentation of these changes was or has since been provided  
26 to the parties.

27 Counsel for AGWA and counsel for the Wood Class requested that the Public Water  
28 Suppliers make Dr. Williams' model available so that other parties could review the data and

1 assumptions utilized in Dr. Williams’ modeling. (Fife Decl., ¶ 9; Fife Decl., Exhibit B, at pp. 46-  
2 47.) At Dr. Williams’ deposition, counsel for Los Angeles County Waterworks District No. 40  
3 Jeffrey Dunn stated that Waterworks was not making the model available and did not know  
4 whether it would do so. (Fife Decl., at ¶ 10; Fife Decl., Exhibit B, at 52:12-16.) At approximately  
5 4:00 pm on January 22, 2014, nearly a week after Dr. William’s deposition, Mr. Dunn informed  
6 counsel for landowner parties that District No. 40 would make the model available to the parties  
7 on condition of an “agreement” by the parties to restrict their ability to analyze the functionality  
8 of the model. (Fife Decl., at ¶ 11.) On January 23, 2014, counsel for AGWA Mr. Fife requested  
9 a copy of such “agreement” in order to understand the specific restrictions that are proposed to be  
10 placed on the model. (Fife Decl., at ¶ 12.) To date there has been no response from Waterworks  
11 as to this request. (Fife Decl., at ¶ 12.)

12 AGWA did not hire a groundwater modeling expert to review the work of Dr. Williams,  
13 or to conduct any independent modeling, because AGWA was unaware that other parties would  
14 offer such modeling testimony. (Fife Decl., at ¶ 13.) According to Dr. Williams’ deposition  
15 testimony, he and Mr. Scalmanini have been working with the USGS model since 2012. (See Fife  
16 Decl., Exhibit B, at 12:6-11, 18:1-22.) Given the fact that AGWA has not been able to obtain  
17 access to Dr. Williams’ model and modeling runs previously, and given the short time leading up  
18 to trial in this Phase, it is impractical for AGWA to be expected to hire a groundwater modeling  
19 expert to conduct a review of over a year of work by Mr. Scalmanini and Dr. Williams before  
20 trial commences. (Fife Decl., at ¶ 14.) Even this impracticality assumes that the model would be  
21 made available in a form that would permit a meaningful review, which does not appear to be the  
22 case.

23 **III. WHEN A PARTY FAILS TO DISCLOSE THE SUBSTANCE OF AN EXPERT’S**  
24 **TESTIMONY, EXCLUSION FROM TRIAL IS NECESSARY**

25 One of the principal purposes of civil discovery is to do away with the “sporting theory of  
26 litigation - namely, surprise at trial.” (*Chronicle Pub. Ca. v. Superior Court* (1960) 54 Cal.2d 548,  
27 561.) The purpose is accomplished by giving “greater assistance to the parties in ascertaining the  
28 truth and in checking and preventing perjury....” (*Greyhound Corp. v. Superior Court* (1961) 56

1 Cal.2d 355, 376.) In other words, pretrial discovery is designed to take the “game” out of pretrial  
2 preparation. (*Ibid.*) To fulfill this goal, the legislature developed a comprehensive scheme for the  
3 orderly exchange of expert witness information.

4 Pursuant to Code of Civil Procedure section 2034.300, the trial court “shall exclude”  
5 expert opinion testimony offered by a party who has “unreasonably” failed to exchange expert  
6 witness information or make the expert available for a deposition. (Code Civ. Proc., § 2034.300.)  
7 Grounds for exclusion of witness testimony include a failure to properly exchange expert  
8 information on issues clearly expected to be the subject of expert testimony, as well as failure to  
9 produce discoverable reports and writings; or failure to make the expert available for deposition  
10 before trial. (See Code Civ. Proc., §§ 2034.210, 2034.300; see also *Fairfax v. Lords* (2006) 138  
11 Cal.App.4th 1019, 1021, 1025–1027.) The PWS failed to make their expert’s modeling openly  
12 available to AGWA with sufficient time before the deposition of Mr. Williams, and even now the  
13 PWS still do not appear willing to make the model openly available. As a result, AGWA has  
14 insufficient time to review the input and output data for model runs from that will form the basis  
15 of Dr. Williams’ expert opinion. (Fife Decl., ¶¶ 13-14). Because of this, all testimony relating to  
16 modeling efforts and results should be excluded to avoid prejudice to the parties in this action.

17 **IV. THE PROBATIVE VALUE OF DR. WILLIAMS’ MODELING EVIDENCE IS**  
18 **OUTWEIGHED BY THE PREJUDICE TO AGWA OF ADMITTING THE**  
19 **EVIDENCE**

20 Pursuant to Evidence Code section 352, “the court in its discretion may exclude evidence  
21 if its probative value is substantially outweighed by the probability that its admission will (a)  
22 necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of  
23 confusing the issues, or of misleading the jury.” Here, where AGWA has had no prior access to  
24 Dr. Williams’ modeling, and has no meaningful time to hire a groundwater hydrologist to review  
25 the modeling runs completed by Mr. Williams, there is a substantial danger of undue prejudice to  
26 AGWA. It would be highly prejudicial to AGWA to have to present evidence and arguments in  
27 response to Dr. Williams’ modeling when AGWA has not been provided sufficient time to run  
28 and review Dr. Williams’ model, and AGWA has no way of verifying the input and output data  
used in the model. In particular, AGWA must have the ability to run and manipulate the model in

1 order to understand the significance of the changes performed on the USGS model by Mr.  
2 Scalmanini. The potential prejudice is further compounded by the fact that AGWA cannot  
3 depose Mr. Scalmanini, who Dr. Williams testified performed the substantive work to modify the  
4 USGS model. (Fife Decl., at 5; see also, Fife Decl., Exhibit B, at pp. 37-39, 45-48.)

5 This prejudice is substantially outweighed by the questionable probative value of Dr.  
6 Williams' testimony. Dr. Williams testified that the purpose of the modeling effort was to create  
7 a management tool that could be used in developing a physical solution. While this is clearly a  
8 valuable purpose, management issues are not at issue in the Phase V trial. (Case Management  
9 Order for Phase 5 and Phase 6 Trials (Oct. 22, 2013), ¶ 2.) Beyond this, Dr. Williams testified  
10 that the primary purpose of the model was to verify that safe yield determined in Phase III. (Fife  
11 Decl., at ¶ 6; Fife Decl., Exhibit B, at 13:1-10, 18:1-22.) Again, safe yield is not at issue in Phase  
12 V and the Court should not allow the PWS to make it an issue.


13 **V. CONCLUSION**

14 For the aforementioned reasons, AGWA requests that the Court issue an order in limine  
15 excluding all evidence and testimony offered by the PWS relating to Basin-wide groundwater  
16 modeling performed by the PWS's designated expert for Phase V Dr. Dennis Williams.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: January 24, 2014

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By:   
MICHAEL T. FIFE  
BRADLEY J. HERREMA  
ATTORNEYS FOR AGWA



**Declaration of Michael T. Fife**

I, Michael T. Fife, hereby declare as follows:

1. I am an attorney duly licensed to practice law in the State of California, and am a shareholder in the law firm of Brownstein Hyatt Farber Schreck LLP, counsel of record for the Antelope Valley Groundwater Agreement Association (“AGWA”) in the above-entitled matter. I make this declaration of my own personal knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

2. Attached hereto as Exhibit “A” is a true and correct copy of the Public Water Suppliers’ Notice of Designation of Expert Witnesses; Declaration of Jeffrey V. Dunn (Nov. 18, 2013).

3. Attached hereto as Exhibit “B” is a true and correct copy of excerpts from the rough draft transcript of Dr. Dennis Williams, dated January 16, 2014.

4. At the deposition of Dr. Williams on January 16, 2014, Dr. Williams testified that his opinions with respect to Phase V are based entirely on a single run of a basin-wide model of the Basin.

5. The model used by Dr. Williams was obtained by the Public Water Suppliers in 2012 from the United States Geological Survey (“USGS”).

6. Dr. Williams testified at his deposition that, after obtaining the model from USGS, Mr. Scalmanini and his staff made potentially significant changes to the model in order to make it confirm to the Phase III Summary Expert Report.

7. Dr. Williams testified that Mr. Joseph Scalmanini directed the modeling efforts undertaken by Dr. Williams.

8. Counsel for the Public Water Suppliers Mr. Jeffrey Dunn has indicated that Mr. Scalmanini is unavailable to be deposed due to Mr. Scalmanini’s medical condition.

1           9.       At Dr. Williams’ deposition, I and counsel for the Wood Class Michael  
2 McLachlan requested that the Public Water Suppliers make Dr. Williams’ model available so that  
3 other parties could review the data and assumptions utilized in Dr. Williams’ modeling.

4           10.       At Dr. Williams’ deposition, counsel for Los Angeles County Waterworks District  
5 No. 40 Jeffrey Dunn stated that Waterworks was not making the model available and did not  
6 know whether it would do so.

7           11.       At approximately 4:00 pm on January 22, 2014, nearly a week after Dr. William’s  
8 deposition, Mr. Dunn informed counsel for landowner parties that District No. 40 would make the  
9 model available to the parties on condition of an “agreement” by the parties to restrict their ability  
10 to analyze the functionality of the model.

11           12.       On January 23, 2014, counsel for AGWA Mr. Fife requested a copy of such  
12 “agreement” in order to understand the specific restrictions that are proposed to be placed on the  
13 model. To date there has been no response from Waterworks as to this request.

14           13.       AGWA did not hire a groundwater modeling expert to review the work of Dr.  
15 Williams, or to conduct any independent modeling, because AGWA was unaware that other  
16 parties would offer such modeling testimony.

17           14.       Given the fact that AGWA has not been able to obtain access to Dr. Williams’  
18 model and modeling runs previously, and given the short time leading up to trial in this Phase, it  
19 is impractical for AGWA to be expected to hire a groundwater modeling expert to conduct a  
20 review of over a year of work by Mr. Scalmanini and Dr. Williams before trial commences.

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

24           Dated this 24th day of January, 2014, at Santa Barbara, California.

25  
26  
27  
28



Michael T. Fife

1 **PROOF OF SERVICE**

2  
3 **STATE OF CALIFORNIA,  
COUNTY OF SANTA BARBARA**

4  
5 I am employed in the County of Santa Barbara, State of California. I am over the age of  
6 18 and not a party to the within action; my business address is: 1020 State Street, Santa Barbara,  
California 93101.

7 On January 24, 2014, I served the foregoing document described as:

8 **NOTICE OF MOTION AND MOTION IN LIMINE OF AGWA FOR ORDER  
9 EXCLUDING EVIDENCE OF MODELING BY DESIGNATED EXPERT DENNIS  
10 WILLIAMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
11 THEREOF; DECLARATION OF MICHAEL T. FIFE**

12 on the interested parties in this action.

13 By posting it on the website by 5:00 p.m. on January 24, 2014.

14 This posting was reported as complete and without error.

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

17 Executed in Santa Barbara, California, on January 24, 2014.

18  
19  
20 **LINDA MINKY  
21 TYPE OR PRINT NAME**

22  
23  
24   
25 \_\_\_\_\_  
26 **SIGNATURE**