

1 **RICHARD G. ZIMMER - SBN 107263**
 2 **T. MARK SMITH - SBN 162370**
 3 **CLIFFORD & BROWN**
 4 **A Professional Corporation**
 5 **Attorneys at Law**
 6 **Bank of America Building**
 7 **1430 Truxtun Avenue, Suite 900**
 8 **Bakersfield, CA 93301-5230**
 9 **(661) 322-6023**

10 Attorneys for Bolthouse Properties, LLC
 11 and Wm. Bolthouse Farms, Inc.

12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF SANTA CLARA

14 * * *

15 COORDINATION PROCEEDING) Judicial Council Coordination Proceeding No.
 16 SPECIAL TITLE (Rule 1550(b))) 4408

17 ANTELOPE VALLEY GROUNDWATER)
 18 CASES) CASE NO. 1-05-CV-049053

19 INCLUDED ACTIONS:) **BOLTHOUSE PROERTIES, LLC and**
 20) **Wm. BOLTOUSE FARMS, INC.'S**
 21) **OPPOSITION TO:**

22 LOS ANGELES COUNTY) **1. Quartz Hill Water District Motion**
 23 WATERWORKS DISTRICT NO. 40 v.) **in Limine No. One Regarding**
 24 DIAMOND FARMING COMPANY, et al.,) **Quantity of Imported Water Return**
 25 Los Angeles Superior Court Case No.) **Flows;**
 26 BC325201)

27 LOS ANGELES COUNTY) **2. Motion in Limine Number One by**
 28 WATERWORKS DISTRICT NO. 40 v.) **Los Angeles County Waterworks**
 DIAMOND FARMING COMPANY, et al.,) **District No. 40 to Preclude Evidence**
 Kern County Superior Court Case No. S-) **Re Decided Issues Including Return**
 1500-CV-25438) **Flow Contribution to Basin Safe**
) **Yield;**

DIAMOND FARMING COMPANY, and) **3. Motion in Limine of Rosamond**
 W.M. BOLTHOUSE FARMS, INC., v.) **Community Services District For**
 CITY OF LANCASTER, et al.,) **Order: (1) Excluding Any Evidence**
 Riverside Superior Court) **or Argument that the District is Not**
 Case No. RIC 344436 [c/w case no. RIC) **Entitled to Produce Return Flows**
 344668 and 353840]) **From Its Imported Waters, and (2)**
) **Excluding Any Evidence or**
) **Testimony Contrary To or**
) **Inconsistent With the Return Flow**
) **Formula Adopted by the Court in**
) **the Phase III Trial; and**

ROSAMOND COMMUNITY SERVICES) **4. Request for Judicial Notice of Trial**
 DISTRICT,) **Testimonies, Exhibits, and Decision**
) **in Phase Three Re Return Flows by**
 CROSS-COMPLAINANT,) **Los Angeles County Waterworks**
) **District No. 40**

1 COME NOW WILLIAM BOLTHOUSE PROPERTIES, LLC and WM. BOLTHOUSE
2 FARMS, INC. (hereinafter “Bolthouse”) in opposition to:

- 3 1. Quartz Hill Water District Motion in Limine Regarding Quantity of Imported
4 Water Return Flows;
- 5 2. Motion in Limine Number One by Los Angeles County Waterworks District No.
6 40 to Preclude Evidence Re Decided Issues Including Return Flow Contribution to
7 Basin Safe Yield;
- 8 3. Motion in Limine of Rosamond Community Services District For Order: (1)
9 Excluding Any Evidence or Argument that the District is Not Entitled to Produce
10 Return Flows From Its Imported Waters, and (2) Excluding Any Evidence or
11 Testimony Contrary To or Inconsistent With the Return Flow Formula Adopted by
12 the Court in the Phase III Trial; and
- 13 4. Request for Judicial Notice of Trial Testimonies, Exhibits, and Decision in Phase
14 Three Re Return Flows by Los Angeles County Waterworks District No. 40.

15 These Motions in Limine and the Request for Judicial Notice seek to eliminate
16 presentation of evidence and litigation of the purveyor claimed rights to return flows. As
17 discussed below, these motions and the Request for Judicial Notice improperly suggest that
18 return flow rights were litigated in Phase 3, would result in a finding of return flow rights based
19 upon hearsay without proper foundation, would deprive the parties of their due process right to
20 litigate return flow claims and would not be in the interest of justice because it would deprive
21 parties of their opportunity to litigate the return flow issues and would force parties to appeal to
22 obtain a trial on return flows.

23
24 **I. JOINDER IN AGWA OPPOSITION**

25 Bolthouse joins in **AGWA’s Opposition To Motions In Limine To Preclude**
26 **Evidence Re Decided Issues Including Return Flow Contribution To Basin Safe Yield.**
27 Bolthouse additionally adds the following comments, analysis and arguments.

1 **II. ALL OF THE MOTIONS IN LIMINE AND THE REQUEST FOR JUDICIAL**
2 **NOTICE IMPROPERLY SUGGEST THAT RETURN FLOW RIGHTS WERE**
3 **LITIGATED IN PHASE 3**

4 **A. Return Flow Rights Were Not Litigated in Phase 3.**

5 Numerous parties over a significant period of time voiced concerns about proceeding to
6 the Phase 3 Trial in the absence of clearly defined trial issues. The Court also was concerned
7 about the issues which would be tried. Given the fact that the Court did not intend to try
8 distinct causes of action, and given the extremely complicated and factually intensive nature of
9 a groundwater rights adjudication, it was essential to determine exactly what was being tried
10 and to limit presentation of evidence to the issues being tried and to limit the findings to the
11 Phase 3 issues tried. As early as March 8, 2010, counsel and this Court considered what issues
12 would be tried in Phase 3. The following comments were made at the March 8th hearing:

13 THE COURT:

14 “And I would like to talk about the issues to be
15 adjudicated in that next phase of the trial. It seems to me that it
16 has got to evolve around the question of overdraft. Certainly if
17 the current conditions - - because if we are talking about issues
18 related to the management of the aquifer, we need to determine
19 what its present conditions are.

20 If there is no overdraft - - and that is possible and I don’t
21 know what the evidence is in this case - - that is going to end that
22 inquiry.

23 Then it’s going to be up to the individual disputants
24 among themselves to determine whether or not they have any
25 claims that they wish to pursue against each other. (page 2)

26 ...Well, my interest right now is determining whether or
27 not the Court is going to have to be involved in the management
28 of this basin, totally apart from what the rights inter se may be
between the various complainants against each other in terms of
prescriptive rights or appropriated rights and the like. (page 5)

... And then that is totally apart from any individual claims
that parties may have vis-à-vis each other whether it be
public water providers or landowners or whoever it might
be. All right. (page 6) (emphasis added)

MR. ZIMMER:

... And I think it is important that everybody understands what is
being tried and what evidence we are going to be admitting for

1 what purposes rather than have a bunch of evidence come in and
2 not knowing whether it is going to be used in this phase or the
next phase or whatever. (page 9 and 10)

3 ...I guess what I might suggest that we shake some of that out
4 earlier rather than before we get to the expert deposition phase. I
5 know in the last trial we ended up in a big flurry at the end. And
6 everybody had a different idea what we were trying, and I would
7 like to see, I guess, is some kind of pretrial order that issues
fairly early on with some comment by all counsel as to what we
8 think we are trying, and then we could come up with a pretrial
9 order as to what we - - an accounting by all as to what we will be
10 trying. (page 11 and 12)

11 ... To the extent that the Court finds that there is an overdraft
12 here and the dealing with the management of the basin, that is
13 going to take place separately from the claims vis-à-vis each
14 other as to whether or not there is a claim ..." (page 13)

15 See Exhibit "A" to the Declaration of Richard G. Zimmer (Reporter's
16 Transcript of Proceedings dated Monday, March 8, 2010 at pp. 2, 5, 6, 9, 10, 11, 12.

17 Thereafter, the Court issued an Order After Case Management Conference On
18 March 22, 2010, including the following language:

19 "... In this third phase of trial, the Court will hear evidence to
20 determine whether the basin, as previously defined by the Court
21 in trial phases one and two, is in such overdraft and to determine
22 whether there is a basis for the Court to exercise its equitable
23 jurisdiction, including the implementation of a "physical
24 solution," as prayed for the by the public water provider parties.
25 The public water providers have the burden of proof."

26 See Exhibit "B" to the Declaration of Richard G. Zimmer filed herewith. (Order After
27 Case Management Conference On March 22, 2010 at p. 2, 3.)

28 **B. The Discovery, Witnesses and Focus of Phase 3 Would Have Been Different
if Return Flows Were At Issue for the Phase 3 Trial.**

Discovery and depositions focused on the safe yield of the groundwater basin and
whether the groundwater basin was in overdraft such that the Court should exercise equitable
jurisdiction. Peter Leffler was identified as an expert witness for Phase 3. Joseph Scalmanini
also was designated as an expert by the purveyors for Phase 3. As the Court knows, these
experts participated on behalf of the purveyors in preparing what has been described as the
Summary Expert Report (SER), identified but not admitted into evidence at trial as Exhibit 101.

1 Mr. Leffler conducted the analysis to prepare section 3.6.5 “Fractured Bedrock” and IV Water
2 Resources Analyses, section 4.6 “Recycled Water” of the SER. The recycled water section
3 deals with return flows. The expert designations for these witnesses for Phase 3 designated
4 them as experts as follows:

5 Peter Leffler “12. Mr. Leffler will offer testimony regarding
6 characteristics of bedrock surrounding the Antelope Valley and
7 potential flows of groundwater through those materials into the
8 Basin. Mr. Leffler will also offer rebuttal testimony regarding
9 other experts' analyses regarding characteristics of bedrock
10 surrounding the Antelope Valley and potential flows of
11 groundwater through those materials into the Basin.”

12 See Exhibit “C” to Declaration of Richard G. Zimmer filed herewith (Public Water
13 Suppliers' Expert Designation For Phase III Trial And Expert Declaration (page 7); See also
14 Exhibit “D” to Declaration of Richard G. Zimmer. (Reporter’s Transcript of Proceedings dated
15 February 14, 2011, p. 88).

16 Joseph Scalmanini: “Mr. Scalmanini will testify as to
17 characteristics and hydrologic conditions of the groundwater in
18 the Antelope Valley Groundwater Adjudication Area (“Basin”).
19 Mr. Scalmanini will testify concerning the Basin's sustainable
20 yield and geology and the occurrence of groundwater in the
21 Basin. Mr. Scalmanini's testimony will include historic
22 groundwater conditions, effects of groundwater development and
23 the current status and past changes in groundwater conditions.
24 Mr. Scalmanini will also be prepared to offer rebuttal testimony
25 concerning the groundwater conditions analyses prepared by
26 other experts.”

27 See Exhibit “C” Public Water Suppliers' Expert Designation For Phase III Trial And
28 Expert Declaration (page 6).

After the deposition of Mr. Leffler was noticed, the Sanitation District attorney, Chris
Sanders, objected to the deposition of Mr. Leffler on the issue of recycled return flow water and
the analysis he did of recycled return flow water in the Summary Expert Report. Mr. Sanders
objected on the grounds that this analysis was beyond the expert designation for the Phase 3
Trial which included discussion of section 3.6.5 “Fractured Bedrock” of the SER but did not
include section IV Water Resources Analyses, section 4.6 “Recycled Water” of the SER.

See Exhibit “G” to the Declaration of Richard G. Zimmer filed herewith. (Trial Exhibit
C4; See also Exhibit “D” Reporter’s Transcript of Proceedings dated February 14, 2011, p. 88.

1 Mr. Leffler's deposition was set a second time. This was met with another objection by
2 Mr. Sanders entitled "Objections to Bolthouse Notice of Deposition of Expert Peter Leffler"
3 attached as Exhibit "E" to the Declaration of Richard G. Zimmer filed herewith. (Also see
4 Exhibit "D" attached to the Declaration of Richard G. Zimmer (Reporter's Transcript of
5 Proceedings dated February 14, 2011, p. 90). The objection stated "Mr. Leffler has been
6 designated by the Public Water Suppliers for a limited purpose of providing expert testimony
7 and rebuttal testimony regarding characteristics of bedrock surrounding the Antelope Valley
8 and potential flows of groundwater through those materials into the basin." (*Id.* at p. 91.) The
9 purveyor attorneys for Los Angeles County also objected in a document entitled "Objections"
10 attached as Exhibit "F" to the Deposition of Richard G. Zimmer filed herewith.

11 Given the fact that the purveyor parties had taken the position that the Phase 3 Trial
12 would not include testimony on return flows by the expert that did this analysis, and their
13 specific objection that Mr. Leffler would not be permitted to testify regarding recycled return
14 flow water, and because the trial was solely to evaluate safe yield and overdraft on a gross
15 basis, we argued:

16 Counsel pointed out to this Court the following:

17 "MR. ZIMMER: For example, Mr. Leffler provided all the recycled
18 water analysis. It is recycled water analysis that they are now attempting
19 to use through Mr. Scalmanini. So this is the foundation for that
objection." (See Exhibit "D" page 89)

20 "MR. ZIMMER: Our position regarding Mr. Leffler is that Mr. Scalmanini is
21 attempting to get into evidence information on recycled water in a very broad context,
22 many different issues, and attempting to get that before the Court when we were denied
the ability to depose Mr. Leffler on that issue and I will get to the deposition here I've
got attached on Exhibit C3 as well."

23 See Exhibit "D" to Declaration of Richard G. Zimmer filed herewith (Reporter's
24 Transcript of Proceedings dated February 14, 2011 at p. 92.)

25 We confirmed for the Court at that time, that the following stipulation was confirmed
26 by email:

27 "MR. ZIMMER: We by stipulation did not take his deposition on
28 recycled water because of the objection and because of the

1 stipulation of counsel that there would be no testimony about
2 recycled water.” (page 93)

3 See Exhibit “D” to Declaration of Riochard G. Zimmer filed herewith (Reporters
4 Transcript of Proceedings dated February 14, 2011 at p. 93.)

5 **C. The Presentation of Evidence Would Have Been Different if Return Flows
6 Was at Issue In the Phase 3 Trial.**

7 The Phase 3 Trial consisted of numerous experts being called on the issue of the safe
8 yield and whether current extractions were in excess of the safe yield, thereby resulting in
9 overdraft. Peter Leffler, who conducted the recycled water return flow analysis for the
10 purveyors, was not called as a witness by the purveyors, nor was any other witness called to
11 testify regarding the details of how the return flow analysis was done and therefore he was not
12 cross examined by the parties regarding the return flow numbers. The numbers were simply
13 accepted by Joseph Scalmanini, as discussed below, for the purpose of his expert opinion of
14 safe yield and overdraft.

15 Litigation of the return flow claims would have involved significant investigation,
16 discovery and expert analysis along with extensive presentation of evidence and expert
17 testimony at trial regarding the right to return flows, the amounts of return flows, transmission
18 losses, quality issues, and numerous other issues. This did not occur in the present case since
19 the scope of the Phase 3 trial was the overall safe yield and whether the basin was currently in
20 overdraft.

21 **D. If Return Flows Was Litigated in Phase 3, The Statement of Decision Would
22 Have Been Different.**

23 The Court requested proposed statements of decision following the Phase 3 Trial.
24 Consistent with the pre-trial conferences, pre-trial order and discovery and trial presentation,
25 Bolthouse submitted a proposed statement of decision including the following language:

26 “That the Statement of Decision be limited to ‘the safe yield of
27 the Antelope Valley Aquifer’ and ‘whether the Aquifer is in a
28 state of overdraft such that the Court should exercise equitable
powers to protect the Aquifer from detriment caused by any such
overdraft’ as set forth in the Order After Hearing Held on
November 18, 2010 setting forth the scope of the Phase 3 Trial.”

1 See Bolthouse Properties, LLC's and Wm. Bolthouse Farms, Inc.'s Proposal Re Content
2 of Statement of Decision filed May 24, 2011 at p. 2 attached as Exhibit "H" to the Declaration
3 of Richard G. Zimmer filed herewith.

4 On June 6, 2011, Best Best and Krieger, counsel for Los Angeles County Water District
5 40 served a proposed Statement of Decision Re Phase III Trial submitted by Los Angeles
6 County and other water purveyors. The proposed Statement of Decision, attached to the
7 Declaration of Richard G. Zimmer as Exhibit "I" filed herewith, improperly attempted to
8 include issues in the Statement of Decision which were not litigated, including among other
9 issues, a detailed determination of return flow amounts and percentages.

10 Bolthouse filed an "Objection to Statement of Decision Re Phase 3 Trial Submitted By
11 Los Angeles County and Other Water Purveyors". Numerous objections were filed by other
12 parties as well. The Bolthouse objection included on page 3, a citation to this Court's "Order
13 After Hearings Held on November 18, 2010, setting forth the scope of the Phase 3 Trial as
14 follows:

15 "The trial will commence on January 4, 2011 at 9:00 a.m. in
16 department 1 of the Los Angeles County Superior Court to hear
17 evidence of the **safe yield** of the Antelope Valley aquifer and to
18 further hear evidence as to **whether the aquifer is in a state of
overdraft** such that the court should exercise equitable powers to
protect the aquifer from detriment caused by any such overdraft."
(Emphasis added.)

19 The Bolthouse objection also pointed out on page 5 that "The so called native safe
20 yield, supplemental safe yield and return flows were not litigated and have been improperly
21 added by los angeles county and the purveyors to the statement of decision."

22 A lengthy hearing regarding the scope of the Phase III Trial and the Statement of
23 Decision was held on July 11, 2011. At this hearing, Bolthouse and other parties argued that
24 the County and other purveyors were adding new issues to the case which were not tried and
25 which were not clearly defined before the trial started. (page 8) Bolthouse further argued:

26 "... these other issues that are being raised and - - or were raised
27 in terms of return flows and what others may argue in terms of
28 native recharge, the legal right to return flows, the amount of
return flows, if there's a legal right to it, those are all things that I
think we can properly tackle in a rights phase of the trial when

1 particular parties are claiming rights, for example, imported
2 water or to other aspects of the safe yield.

3 The bottom line is we tried safe yield for purposes of
4 overdraft, and that was it. And the Court made a decision on
5 that.” (page 9)

6 Counsel also pointed out that:

7 “During the trial we objected on hearsay grounds to a lot of the
8 information that was being employed by the experts for precisely
9 this reason. And the Court, I believe, on several occasions said
10 that the - - all this information and data was being offered not for
11 the truth of the matter asserted, but for simply as a basis for an
12 expert’s opinion as to safe yield or overdraft.

13 THE COURT: All right.” (page 10)

14 All parties argued the issues extensively and vociferously. Following these arguments
15 the Court made the following comments:

16 “ ... THE COURT: All right. Thank you.

17 Let me make an observation. I’m going to give you a
18 written statement of decision that will encompass my final
19 rulings on these objections. But I think that is[sic] it is important
20 to note that the Phase III Trial - - the purpose was to determine
21 whether or not there was a status of overdraft within the basin
22 and the adjudication area such that it was necessary for the Court
23 to seek a physical solution to that problem.

24 So the principal issue was overdraft.” (page 12)

25 “... I did not make and could not make individual
26 determinations as to pumping in various areas, total sources of
27 water that went into various portions of the aquifer, the amount
28 of subsidence in variance areas or lack thereof.

None of those things were adjudicated. It was
adjudicated on a very general basis with the intent of determining
whether or not there was a sufficient overdraft problem in the
adjudication area such that the court would be in the position of
making determinations concerning physical solutions and how
that might be brought about.

So that when - - when you are asking for a lot of detailed
findings, I don’t think you are entitled to them. And I don’t
think you are entitled to findings - - and I wouldn’t be
comfortable making findings as to what for example public water
- - California water project water is generated and produced into
the aquifer. I can’t make that determination.” (page 13, 14)

“So I’m not inclined to do that. And I think that there is a
possibility for a great deal of argument and discussion

1 concerning water that is introduced into the valley from other
2 areas as well as with the return flows might be for agricultural
3 and for municipal and industrial, for salvaged water for any
4 number of other sources of water or whatever they may be.

5 So, essentially, what I'm saying is I'm going to sustain
6 the objection. And what I'm ultimately going to do here with
7 regard to each one of these issues is deal with it in terms of the
8 Statement of Decision, and I'll draft it myself. All right." (page
9 14)

10 See Reporter's Transcript on Hearing dated July 11, 2011 at pp. 8, 9, 12, 13, 14.

11 The Court's final Statement of Decision Phase Three Trial attached as Exhibit "L" to
12 the Declaration of Richard G. Zimmer filed herewith, confirmed:

13 "The **only issues** at this phase of the trial were simply to
14 determine whether the adjudication area aquifer is in a current
15 state of **overdraft** and as part of the adjudication to determine
16 the **safe yield**. This Statement of Decision focuses solely on
17 those issues." (page 2) (emphasis added)

18 The final Statement of Decision authored by this Court, is broken down into sub-parts which
19 include "overdraft," page 5 and "safe yield," page 7. Accordingly, there is no question that the
20 issues in the Phase III Trial were limited to safe yield and overdraft as a basis for determining
21 whether the Court has equitable jurisdiction.

22 **E. The Phase 4 Issues Would Be Different If Return Flows Were Litigated in**
23 **Phase 3.**

24 The issues in Phase 4 would be different if return flows were litigated in Phase 3. The
25 Court specifically articulated the Phase 4 issues in its Case Management Order for Phase 4
26 Trial filed on December 12, 2012, as follows:

27 ". . . 2. The **Phase 4 trial** will address the issue of current
28 groundwater production of all parties for the calendar year 2011
and January 1 through November 30, 2012, proof of claimed
reasonable and beneficial use of water for each parcel to be
adjudicated, **claimed return flows from imported water**, and
federal reserved rights. Claims of prescription will be tried
following the decision in Phase 4." (page 2) (emphasis added)

1 **III. ANY RETURN FLOW INFORMATION IN PHASE 3 WAS HEARSAY WITHOUT**
2 **FOUNDATION ADMITTED FOR THE LIMITED PURPOSE OF SHOWING THE**
3 **BASIS FOR PURVEYOR EXPERT SCALMANINI'S CONCLUSION OF SAFE**
4 **YIELD AND OVERDRAFT**

5 **A. Procedural history:**

6 As discussed above, the Phase 3 trial was limited to safe yield and overdraft. Purveyor
7 expert Peter Leffler conducted the recycled water return flow analysis for the purveyors which
8 is contained in the Summary Expert Report. Joseph Scalmanini testified at trial on behalf of
9 the purveyors on the purveyor claim to the amount of the safe yield in order to support the
10 purveyor claim of current overdraft. The Court allowed Mr. Scalmanini to consider the
11 analysis and findings of other experts, including Mr. Leffler, in order to opine on the safe yield
12 and whether the basin is currently in overdraft. However, as discussed below, the Court
13 properly ruled on numerous occasions that the hearsay testimony, opinions of experts and other
14 hearsay data, was being admitted solely for the purpose of evaluating Mr. Scalmanini's opinion
15 of safe yield and overdraft and not for the truth of the matters contained in the hearsay.

16 **B. The Law.**

17 **Hearsay:**

18 While an expert may base his opinion on inadmissible hearsay evidence which is the
19 type of evidence an expert normally relies on, "when [an expert] opinion is based in part on
20 inadmissible hearsay statements, it is improper for the proponent of the testimony to solicit
21 evidence of the substance of the statements on direct examination." (*Korsak v. Atlas Hotels,*
22 *Inc.* (1992) 2 Cal.App.4th 1516, 1525-1527.

23 The law also is clear that analysis and opinion of non-testifying experts is hearsay,
24 although it may be relied upon as a basis for the opinion of a testifying expert. *See, Continental*
25 *Airlines, Inv. v. McDonnell Douglas Corp.* (date) 216 Cal.App.3d 388. The *Continental* case
26 involved one expert who based his opinion on the analysis of two other experts who were not
27 present at trial. The court found that the analysis by the two absent experts was hearsay and
28

1 that the testifying expert could not properly testify to the hearsay in the reports of the non-
2 testifying experts. (*Id.* At 414).

3 “While an expert may state on direct examination the matters on
4 which he relied in forming his opinion, he may not testify as to
5 the details of such matters if they are otherwise inadmissible.
6 [citations]. The rule rests on the rationale that **while an expert
7 may give reasons on direct examination for his opinions,
8 including the matters he considered in forming them, he may
9 not under the guise of reasons bring before the jury
10 incompetent hearsay evidence.** [citation].” (*People v. Coleman*
11 (1985) 38 Cal.3d 69, 92 [emphasis added]).

12 “In other words . . . **while an expert may rely on inadmissible
13 hearsay in forming his her opinion [citation], and may state
14 on direct examination the matters on which he or she relied,
15 the expert may not testify as to the details of those matters if
16 they are otherwise inadmissible.**” (*Id.*) (emphasis added)

17 The court in *Continental* affirmed the trial court’s decision to preclude one expert from
18 testifying as to the contents of the reports by other experts, upon which the testifying expert
19 relied. This case was discussed at length with the court in the trial proceedings on February 14,
20 2011 starting at page 95 of the Reporter’s Transcript. Likewise, as the court noted in *People v.*
21 *Campos*:

22 “An expert witness may not, on direct examination, reveal the
23 content of reports prepared or opinions expressed by
24 nontestifying experts. The reason for this is obvious. The
25 opportunity of cross-examining the other doctors as to the basis
26 for their opinion, etc., is denied the party as to whom the
27 testimony is adverse. [citation] . . . Here, the reports of the
28 nontestifying experts were hearsay. Doctor Mertz was properly
allowed to testify that she relied upon the reports in forming her
own opinions. The trial court erred, however, when it allowed
her to reveal their content on direct examination by testifying
that each prior medical evaluation agreed with her own opinion.
Doctors can testify as to the basis for their opinion [citation], but
this is not intended to be a channel by which testifying doctors
can place the opinion of innumerable out-of-court doctors before
the jury. [citations].” (*People v. Campos* (1995) 32 Cal.App.4th
304, 308).

During this discussion on February 14, 2011, attorney Bob Joyce aptly described the
hearsay as “inadmissable hearsay on top of hearsay,” page 111 of the Reporter’s Transcript

1 attached as Ex “D” to the Declaration of Richard G. Zimmer filed herewith, also known as
2 multiple hearsay. Following the lengthy argument, the Court ultimately stated:

3 “...What I’m doing in this phase will be safe yield, overdraft,
4 whether the Court needs to exercise equitable jurisdiction.
5 Those are the findings that we are making, and everything
6 else will be simply hearsay that the expert relied upon to
7 form his opinion if it is properly used in that manner.” (page
8 123) (emphasis added)

9 **Judicial Notice:**

10 The purveyors also improperly request that the Court take Judicial Notice of Phase 3
11 testimony to prove return flows even though the Phase 3 Trial was not intended to litigate
12 return flows and even though judicial notice would be improper.

13 “A court may take judicial notice of the *existence of each*
14 *document in a court file, but can only take judicial notice of the*
15 *truth of facts asserted in documents such as orders, findings of*
16 *fact and conclusions of law and judgments.” (Garcia v. Sterling*
17 *(date) 176 Cal.App.3d 17, 22 [quoting Day v. Sharp (1975) 50*
18 *Cal.App.3d 904, 914]) (emphasis added).*

19 As such, a witnesses’ prior testimony is not accepted as true merely because judicial
20 notice may be taken of its existence. It is well established that:

21 “a court *cannot take judicial notice of hearsay allegations* as
22 *being true, just because they are part of a court record or file . . .*
23 *.” (Day v. Sharp (1975) 50 Cal.App.3d 904, 914)(emphasis*
24 *added).*

25 **C. Requesting Judicial Notice of the Testimony of Joseph Scalmanini On Safe**
26 **Yield and Overdraft Which to a Limited Extent Was Based Upon Hearsay**
27 **Analysis and Conclusions of Peter Leffler Regarding Recycled Water Return**
28 **Flows, and Without Foundation by Mr. Scalmanini Since He Did Not Do This**
Analysis, Is Clearly Improper.

As noted above, purveyor expert Peter Leffler conducted the analysis of recycled water
return flows for the purposes of the Summary Expert Report. Joseph Scalmanini relied on
recycled water return flow numbers based upon analysis done by Mr. Leffler, not by Mr.
Scalmanini. At trial on February 14, 2011, counsel objected to admitting such recycled water
return flow numbers for the truth of the numbers. See, Exhibit “D” to Declaration of Richard
G. Zimmer (Reporter’s Transcript dated February 14, 2011 at page 123). Counsel further
pointed out that numerous exhibits contained numbers that were not verified by Mr. Scalmanini

1 and that admitting such exhibits would suggest that this was actual data “as opposed to
2 something the expert merely relied upon.” page 124. Following the Court’s comments, counsel
3 further stated:

4 .. “So it is my understanding as to any of these exhibits
5 whether the Court introduces them or not to the extent they have
6 any pumping data on them, it’s not offered for the truth of the
7 matter, but merely as some indication of what the expert was
8 relying on.

9 THE COURT: To show the basis of the expert’s estimate
10 of pumping and recharge.

11 MR. ZIMMER: On a gross basis?

12 THE COURT: YES.” (pages 124-125)

13 The Court correctly recognized that the only matters at issue in the Phase 3 Trial were
14 safe yield and overdraft and allowed Mr. Scalmanini to rely on the recycled water return flow
15 estimates by Mr. Leffler as a basis for Mr. Scalmanini’s opinion as to safe yield and overdraft.
16 The details relied upon are clearly hearsay within the meaning of the *Continental* case and
17 based upon the Court’s ruling. The details also lack foundation as a determination of the true
18 return flow numbers when presented by Mr. Scalmanini, because he did not do the analysis.

19 Additionally, the Sanitation District and Los Angeles County Water District 40,
20 objected to taking expert Leffler’s deposition on the issue of recycled water return flows. They
21 made this objection claiming that recycled water return flows were beyond the scope of the
22 expert witness designations which were directed to the Phase 3 issues. Based upon this
23 objection, a stipulation was reached that recycled water return flow evidence would not be
24 received into evidence at the Phase 3 trial. The Court properly ruled that the details of the
25 recycled water return flow analysis conducted by Mr. Leffler was not introduced into evidence
26 for the truth of the matter, but merely as a basis for supporting Mr. Scalmanini’s safe yield and
27 overdraft opinion.
28

1 **IV. GRANTING THE MOTIONS IN LIMINE AND REQUEST FOR JUDICIAL**
2 **NOTICE WOULD DEPRIVE PARTIES OF THE DUE PROCESS RIGHT TO**
3 **LITIGATE RETURN FLOWS**

4 As noted above, the Court properly defined the scope of the Phase 3 Trial as a
5 determination of safe yield and overdraft. The Court also properly ruled that the testimony of
6 the expert witnesses was limited to safe yield and overdraft and that all of the hearsay upon
7 which they relied for purposes of forming their opinions, was not being accepted for the truth
8 of the matters thereof. The Court made this ruling in trial on many occasions, such as during
9 the testimony of Mr. Wildermuth when the following clarification was requested:

10 "MR. ZIMMER: I would join as well, as well. Just for
11 clarification, your honor, it is my understanding that to the extent
12 that there is hearsay in any of these exhibits that these exhibits
13 are not being accepted for the truth of the matter, but merely as
14 the basis for the expert opinion.

15 THE COURT: Everyone[sic] of them. (page 140)

16 See Exhibit "O" to the Declaration of Richard G. Zimmer filed herewith.

17 As the Court responded in a further discussion regarding hearsay being relied upon by Mr.
18 Scamanini:

19 "MR. ROBERT KUHS: ...Under the Continental case, I think it
20 is clear that the details don't come in; but if they are coming in, I
21 would like the court to make it clear that they are coming in not
22 for the truth of the matter asserted.

23 "THE COURT: They are so far coming in as the basis for Mr.
24 Scalmanini's opinion."

25 See Exhibit "D" to Declaration of Richard G. Zimmer filed
26 herewith at page 127.

27 Likewise, concerning the testimony of federal expert June Oberdorfer, the Court stated:

28 "MR. LEININGER: Your Honor, at this time, I would move for
entries of exhibits marked I-1 through 18 and I-20 of her
testimony.

THE COURT: Now I understand that there are objections to the
Court accepting the information for the truth of the matters. That
objection has been sustained. I'll permit them to come in
exemplifying her testimony with the understanding that hearsay
is hearsay."

See Exhibit "O" to Declaration of Richard G. Zimmer filed herewith.
(Reporter's Transcript dated February 17, 2011 at p. 85).

1 Granting the motions in limine and request for judicial notice would deprive parties of
2 the due process right to litigate return flows for the following reasons:

- 3
- 4 1. Doing so would improperly deprive the parties from hearing testimony of Peter Leffler
5 who conducted the recycled water return flow analysis.
 - 6 2. Doing so would eliminate the need for direct examination of Mr. Leffler or some other
7 expert to provide appropriate foundation and basis for the recycled water return flow
8 numbers.
 - 9 3. Doing so would deprive parties of the right to cross-examine Mr. Leffler, the individual
10 who did the recycled water return flow analysis.
 - 11 4. Doing so would deny the parties the right to present rebuttal evidence based upon direct
12 and/or cross-examination testimony of the expert who did the recycled water return
13 flow analysis.
 - 14 5. Doing so would allow proof of return flows based upon hearsay without foundation.
 - 15 6. Doing so would allow proof of return flows without the proper foundation of the
16 process and procedure used to determine return flow numbers.
 - 17 7. Doing so would require the court to make return flow findings without trial and without
18 providing the parties the opportunity to present their evidence on return flow issues.

19 **V. GRANTING THE MOTIONS IN LIMINE AND THE REQUEST FOR JUDICIAL**
20 **NOTICE IS NOT IN THE INTEREST OF JUSTICE BECAUSE IT WOULD BE**
21 **COUNTERPRODUCTIVE TO SETTLEMENT NEGOTIATIONS BY FORCING**
22 **PARTIES TO SEEK APPELLATE RELIEF TO OBTAIN A TRIAL ON RETURN**
23 **FLOWS**

24 It is clear that the Phase 3 Trial did not litigate return flow and recycled water issues. It
25 is also clear that due process requires that the parties be provided the opportunity to fairly
26 litigate return flow issues. Denying this right to trial on these important issues would be
27 counterproductive to settlement negotiations. It would force parties to seek appellate relief to
28 obtain a trial on these issues and would prevent them from considering such claims for
settlement purposes following the opportunity to investigate and dispute the claims. As such,

1 granting the motions in limine and request for judicial notice would not be in the interest of
2 justice.

3 **VI. CONCLUSION**


4 The motions in limine and request for judicial notice improperly suggest that return
5 flow issues were litigated and decided in Phase 3. The record clearly demonstrates that this is
6 not correct. Further, the motions in limine and request for judicial notice request findings on
7 return flows which were not litigated and which are based upon hearsay without proper
8 foundation. As such, the motions in limine and request for judicial notice deprive parties of
9 their due process right to contest and litigate these issues. Accordingly, Bolthouse requests that
10 the motions in limine and request for judicial notice regarding these issues be denied.

11
12 DATED: April 19, 2013

Respectfully submitted.

13 CLIFFORD & BROWN

14
15
16 By:


17 RICHARD G. ZIMMER, ESQ.
18 Attorneys for
19 BOLTHOUSE PROPERTIES, LLC and
20 WM. BOLTHOUSE FARMS, INC.
21
22
23
24
25
26
27
28

1 PROOF OF SERVICE (C.C.P. §1013a, 2015.5)
2 Antelope Valley Groundwater Cases
3 Judicial Counsel Coordination Proceeding No. 4408
4 Santa Clara County Superior Court Case No. 1-05-CV-049053

5 I am employed in the County of Kern, State of California. I am over the age of 18 and
6 not a party to the within action; my business address is 1430 Truxtun Avenue, Bakersfield, CA
7 93301.

8 On April 19, 2013, I served the foregoing document(s) entitled:

9 **BOLTHOUSE PROERTIES, LLC and Wm. BOLTOUSE FARMS, INC.'S**
10 **OPPOSITION TO:**

- 11 1. Quartz Hill Water District Motion in Limine No. One Regarding Quantity of
12 Imported Water Return Flows;
- 13 2. Motion in Limine Number One by Los Angeles County Waterworks District No. 40
14 to Preclude Evidence Re Decided Issues Including Return Flow Contribution to
15 Basin Safe Yield;
- 16 3. Motion in Limine of Rosamond Community Services District For Order: (1)
17 Excluding Any Evidence or Argument that the District is Not Entitled to Produce
18 Return Flows From Its Imported Waters, and (2) Excluding Any Evidence or
19 Testimony Contrary To or Inconsistent With the Return Flow Formula Adopted
20 by the Court in the Phase III Trial; and

21 **Request for Judicial Notice of Trial Testimonies, Exhibits, and Decision in Phase Three**
22 **Re Return Flows by Los Angeles County Waterworks District No. 40**

23 by posting the DOCUMENT listed above to the Santa Clara Superior Court
24 website in regard to the Antelope Valley Groundwater Matter. All parties listed on the Santa
25 Clara Superior Court in regard in regard to this matter are hereby incorporated herein by this
26 reference.

27 Executed on April 19, 2013, at Bakersfield, California.

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


VICKI STREET

2455-2