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COUNTY WATERWORKS DISTRICT NO. 40

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

17 **ANTELOPE VALLEY GROUNDWATER
CASES**

18 **Included Actions:**
19 Los Angeles County Waterworks District No.
40 v. Diamond Farming Co., Superior Court of
20 California, County of Los Angeles, Case No.
BC 325201;

21 Los Angeles County Waterworks District No.
22 40 v. Diamond Farming Co., Superior Court of
California, County of Kern, Case No. S-1500-
23 CV-254-348;

24 Wm. Bolthouse Farms, Inc. v. City of Lancaster,
Diamond Farming Co. v. City of Lancaster,
25 Diamond Farming Co. v. Palmdale Water Dist.,
Superior Court of California, County of
26 Riverside, Case Nos. RIC 353 840, RIC 344
436, RIC 344 668

Judicial Council Coordination No. 4408

CLASS ACTION

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

LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40 REPLY RE RETURN
FLOW TO: (1) AVEK'S OPPOSITION TO
MOTIONS IN LIMINE; (2) AVEK'S
OPPOSITION TO REQUEST FOR
JUDICIAL NOTICE; (3) AGWA'S
OPPOSITION TO MOTIONS IN LIMINE;
and (4) BOLTHOUSE PROPERTIES, LLC
and Wm. BOLTHOUSE FARMS, INC.'S
OPPOSITION TO MOTION IN LIMINE
AND REQUEST FOR JUDICIAL NOTICE

1 **I. INTRODUCTION**

2 Only a few landowner parties dare suggest that the Court took no evidence on the amount
3 of return flows for the Court's safe yield and overdraft determinations in the Phase 3 trial. They
4 do this now because they remain unhappy with the Court's safe yield and overdraft findings, and
5 they would have this Court re-do its lengthy and extremely costly Phase 3 trial on safe yield and
6 overdraft by litigating, again, the quantity or amount of return flows which are part of the safe
7 yield. They know that if they can get the Court to make a return flow finding amount in Phase 4
8 that is inconsistent with the evidence in Phase 3 on safe yield, the Court's safe yield and overdraft
9 findings are effectively overturned after years of costly contested litigation.

10 Safe yield includes return flows. For this reason, the Court took evidence on return flows.
11 The fact that large landowner parties convinced the Court after its safe yield and overdraft
12 findings not to include a specific percentage for the return flow amounts does not change the legal
13 requirement or reality that return flows were determined as part of the safe yield and overdraft
14 findings.

15 There can be no reasonable dispute that the Court took the evidence on return flow
16 amounts during the Phase 3 trial. Most participating parties, including the relatively few parties
17 opposing this motion in limine, presented evidence regarding both municipal and agricultural
18 return flows. Yet, the opposing parties obfuscate this fact by wrongly claiming they are merely
19 seeking to present evidence on who has the right to return flows.

20 Abundant good cause exists for this motion in limine to be granted. If not, the Court
21 effectively re-opens the Phase 3 trial on safe yield and overdraft to the extreme prejudice of the
22 Public Water Supplier parties whose expert, Joseph Scalmanini, is no long able to testify. All
23 parties would suffer a tremendous waste of time and money, and the Court would waste its
24 judicial resources.

25 **II. ARGUMENT**

26 **A. The Court's Phase 3 Safe Yield Determination Includes Return Flow**
27 **Amounts Or Percentages**

28 As the Court stated in its Phase 3 Statement of Decision, a court's determination of safe

1 yield includes the “return flow from delivered imported water.” (*Los Angeles v. San Fernando*
2 (1975) 14 Cal.3d 199, 278-279.) The California Supreme Court stated:

3 Basically, safe yield was deemed equivalent to an adjusted figure
4 for net ground water recharge, consisting of (A) recharge from (1)
5 native precipitation and associated runoff, (2) **return flow from**
6 **delivered imported water**, and (3) return flow from delivered
7 ground water less (B) losses incurred through natural ground water
8 depletions consisting of (1) subsurface outflow, (2) excessive
9 evaporative losses in high ground water areas and through
10 vegetation along streams, (3) ground water infiltration into sewers,
11 and (4) rising water outflow, or water emerging from the ground
12 and flowing past Gauging Station No. F57 down the river channel
13 to the sea.

14 (Emphasis added.)

15 More recently, the Court of Appeal in *City of Santa Maria v. Adam* (2012) 211
16 Cal.App.4th 266, 279 reiterated the principle that safe yield “is generally calculated as the net of
17 inflows less subsurface and surface outflows.” (Citing *Los Angeles v. San Fernando, supra*, at
18 pp. 278-279.) Stated simply, the mere suggestion that the Court determine return flow
19 percentages in this next phase of trial is tantamount to a claim that the Court failed to do its legal
20 duty to include the return flows in its safe yield finding of 110,000 afy.

21 **B. The Court Took Evidence On Return Flow Percentages In The Phase 3 Trial**
22 **To Determine Safe Yield**

23 Opposing parties do not deny that the purpose of the Phase III trial was to determine the
24 groundwater basin’s safe yield and whether the Basin is in an overdraft condition. (E.g., AVEK
25 Opp. at 3; AGWA Opp. at 2.) Indeed, the Court’s Phase 3 Statement of Decision states: “The
26 only issues in this phase of trial were simply to determine whether the adjudication aquifer is in a
27 current state of overdraft and as part of that adjudication determine safe yield.” (Phase 3 Stmt.
28 Dec. at 2:10-13.)

It is presumed that this Court acted properly in making its safe yield determination. (Evid.
Code § 666 [“Any court of this state or the United States, or any court of general jurisdiction in
any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in
the lawful exercise of its jurisdiction.”].) Thus, absent a showing to the contrary, it is presumed
that this Court acted properly in including the return flow evidence in the safe yield finding of

1 110,000 afy. The presumption is not needed here because the Court’s Phase 3 decision states that
2 evidence on return flows was presented by the experts and included in their calculations:

3 “Experts also conducted a sophisticated analysis of precipitation and its runoff, stream flow, and
4 infiltration into the aquifer, including such things as evapotranspiration, water from other sources
5 introduced into the aquifer (artificial recharge), as well as the nature and quantity of extractions
6 from the aquifer and return flows there from.” (Phase 3 Stmt. Dec. at 4:12-15.)

7 The Court is aware that Mr. Scalmanini presented substantial evidence on return flow
8 percentages and how they are included in the safe yield. For example, as shown on Scalmanini
9 Phase 3 Trial Exhibit Number 12, safe yield is equal to natural recharge plus agricultural return
10 flows plus municipal and industrial return flows when groundwater storage is constant over time.¹
11 Thus, the safe yield finding of 110,000 afy was based on the evidence presented during the Phase
12 3 trial including the return flow testimony from Mr. Scalmanini.²

13 **C. The Court Determined The Safe Yield Return Flows In The Phase 3 Trial**

14 The Court decided the safe yield of 110,000 afy which includes the amount of return
15 flows. The safe yield of 110,000 afy was the safe yield number presented by Mr. Scalmanini and
16 it included his return amounts and percentages. *There was no other evidence presented that*
17 *would have allowed the Court to make a safe yield determination of 110,000 afy.* To re-litigate
18 this decided issue would be a waste of judicial resources as the parties would again present
19 evidence on the safe yield’s return flows. Moreover, it would lead to potentially inconsistent
20 findings with the 110,000 afy safe yield finding.

21
22
23 ¹ A copy of the exhibit is attached hereto as Exhibit A.

24 ² The only expert witness designated to testify about new safe yield return flow percentages is Dr. Jan Hendrickz. He
25 is retained, again, by attorney Michael Fife to testify about the safe yield’s return flows. He testified in the Phase 3
26 trial on safe yield and he is retained to testify about safe yield return flow amounts in the Phase 4 trial. Ironically, Dr.
27 Jan Hendrickz’ deposition concerned the same Scalmanini Exhibit 12 with a red square around municipal and
28 industrial return flows, which Dr. Hendrickz now plans on attacking in the Phase 4 trial. (See Ex. B.) His deposition
testimony tentatively opines that the municipal and industrial return flow percentage, which was found to be 28.1
percent in order to reach the 110,000 afy safe yield determination in Phase 3, should now be a mere 12 percent. The
irony of this new improper opinion is it would lead to a dramatically reduced safe yield. A lower safe yield
necessarily means even less available water to allocate amongst the parties’ competing interests, and even greater
overdraft harm.

1 **D. The Court’s Safe Yield Determination Was Not An Idle Act But Is A Critical**
2 **Finding To Adjudicate The Parties’ Water Rights Claims**

3 Contrary to AGWA’s contention, when the Court stated its Phase 3 findings “have no
4 application to other phases,” the Court was addressing the issue of whether the *standard of proof*
5 in Phase 3 is applicable to other phases. (Phase 3 Stmt. Dec. at 3:19-24; AGWA Opp. at 3.) The
6 Court merely concluded that it may or may not be. (*Id.*) The Court did *not* say that it would
7 allow parties to re-open the Court’s safe yield determination including the return flows. AGWA’s
8 argument distorts the Court’s comments and would potentially mislead the Court by inferring that
9 none of the Court’s Phase 3 findings are applicable in subsequent phases.

10 **E. Opposing Parties Failed To Timely Request Reconsideration Of The Court’s**
11 **Safe Yield Determination**

12 Bolthouse claims that Peter Leffler’s testimony would have been different if the return
13 flow percentages had been tried in Phase 3. (Bolthouse Opp. at 4-7.) This is incorrect. For the
14 Phase 3 trial, the Public Water Suppliers designated Mr. Leffler for the sole purpose of rebutting
15 mountain front recharge opinion testimony by other experts. The Public Water Suppliers did not
16 designate or need Mr. Leffler to testify to recycled water because Mr. Scalmanini offered this
17 testimony. Moreover, Mr. Scalmanini used the recycled return flow water estimates from the
18 Summary Expert Report—a fact known by all parties participating in the Phase 3 trial. If
19 opposing parties had wished to challenge Mr. Scalmanini’s reliance on the data in his trial
20 testimony, they should have raised those challenges during Phase 3 trial.

21 New evidence now on the safe yield’s return flow percentages cannot be introduced in the
22 Phase 4 trial because the parties have submitted evidence on this contested issue during the Phase
23 3 trial. As the parties have submitted evidence and arguments, the matter is deemed submitted.
24 (*See* 7 Witkin Cal. Proc. Trial § 166 [citing *Ensher, Alexander & Barsoom, Inc. v. Ensher* (1964)
25 225 Cal. App. 2d 318, 326].) Once a matter has been submitted, new evidence can only be
26 admitted upon leave and showing of good cause, which has not been requested or shown in this
27 case.

28 A motion to reopen a case for further evidence can be granted only

1 on a showing of good cause. Reopening is not a matter of a right
2 but rests upon the sound discretion of the trial court. That
3 discretion should not be overturned on appeal absent a clear
4 showing of abuse.

5 (*Sanchez v. Bay General Hospital* (1981) 116 Cal. App. 3d 776, 793 [citations omitted].)

6 Good cause to reopen a matter requires more than mere omission of the relevant evidence. (*See*
7 *Horning v. Shilberg* (2005) 130 Cal. App. 4th 197, 208-209 [trial court did not abuse its
8 discretion in denying plaintiff leave to reopen matter where plaintiff made a tactical decision not
9 to present evidence on all types of damages sustained].) Here, opposing parties have neither
10 timely requested leave to introduce new evidence on the safe yield's return flows nor established
11 good cause as to why such evidence was not submitted during Phase 3. Opposing parties did or
12 could have participated in the Phase 3 trial. They had ample opportunity to introduce evidence
13 regarding the safe yield's return flows. They are now foreclosed from re-litigating the safe
14 yield's return flows in the Phase 4 trial.

15 Finally, new evidence for the purpose of re-litigating a determined issue is unduly
16 cumulative. (Evid. Code § 352 ["The court in its discretion may exclude evidence if its probative
17 value is substantially outweighed by the probability that its admission will (a) necessitate undue
18 consumption of time"]; *see also, Sanchez*, 116 Cal.App.3d at 794; *Rosener v. Sears, Roebuck*
19 *& Co.* (1980) 110 Cal.App.3d 740, 756; *Tip Top Foods, Inc. v. Lyng* (1972) 28 Cal.App.3d 533,
20 554 [excluding cumulative evidence].)

21 **F. The Court Necessarily Included The Safe Yield's Return Flow Percentages**

22 AVEK's opposition mischaracterizes the Phase 3 Statement of Decision to incorrectly find
23 that percentages of imported water return flows were "'estimates' only" that cannot be relied
24 upon. (AVEK Opp. At 4:17-5:2.) Rather, the Statement of Decision provides that the Phase 3
25 trial evidence demonstrated that "[r]eliable estimates of the long-term extractions from the basin
26 have exceeded *reliable estimates of the basin's recharge* by significant margins, and empirical
27 evidence of overdraft in the basin corroborates that conclusion." (Stmt. Dec. 5:18-20, 7:10-12 ["a
28 reliable estimate of average future recharge based on precipitation can be made."].) Moreover,
the Court clarified that "the fact that estimates lack precision does not mean that the Court cannot

1 rely upon such estimates. The scientific community relies upon such estimates in the field of
2 hydrogeology and the Court must do the same.” (Phase 3 Stmt. Dec., 8:24-26.) Finally, the use
3 of estimated percentages for the safe yield’s return flow percentages has been recently validated
4 by the Court of Appeal in *City of Santa Maria, supra*. (211 Cal.App.4th at 521-522.)

5 **G. The “Historical” Approach Argument Is Flawed And Ignores Judicial**
6 **Economy**

7 AVEK and AGWA’s contention that the Phase 3 trial evidence presented may not be
8 accurate to the imported water return flow percentage is nonsensical. (AVEK Opp. at 5; AGWA
9 Opp. at 4.) Although the amount of imported water may fluctuate year to year, the percentage of
10 return flow does not. The fluctuation in imported water only affects the ultimate return flow
11 amount, not the percentage.

12 AVEK’s contention that updated evidence must be constantly introduced each year to
13 calculate the return flow amount and percentages is without merit. (AVEK Opp. at 5.) Utilizing
14 AVEK’s rationale, the Court must then hold a trial each year to determine the return flow amount.
15 This is not necessary and is why there is a return flow percentage assigned. The return flow
16 percentage is applied to the imported water to calculate the amount of return flows. (*City of*
17 *Santa Maria, supra*, 211 Cal.App.4th at 521-522.)

18 **H. District No. 40 and Other Public Water Suppliers Will Suffer Severe**
19 **Prejudice If Parties Are Permitted to Re-Litigate Return Flow**

20 Mr. Scalmanini was the primary witness during the Phase 3 issues, including the safe
21 yield’s return flows. Mr. Scalmanini is no longer available to testify for reasons established on
22 the Court’s record. Parties prepared for years to litigate Phase 3 trial issues and Mr. Scalmanini
23 was the primary witness. He worked with others worked on safe yield, including return flows and
24 overdraft for years. To now allow parties to re-open the Phase 3 issues would be extremely
25 prejudicial to District No. 40 and the other Public Water Suppliers.

26 **I. The Phase 3 Trial’s Determination Of Safe Yield Return Flows Was Not a**
27 **Due Process Violation**

28 Contrary to AVEK’s contention, the parties had notice that the Court intended to make a

1 determination in Phase 3 trial as to safe yield and overdraft, which necessarily included the return
2 flow percentage. There was no indication that the Court would merely make a tentative decision.

3 Not only did Mr. Scalmanini and others testify extensively to return flows in Phase 3,
4 parties had access to the Expert Summary Report which thoroughly discussed return flows well in
5 advance of the Phase 3 trial. Opposing parties and their experts had had access to the work before
6 expert disclosure.

7 Each opposing party participated in the Phase 3 trial. They had the opportunity to cross
8 examine Mr. Scalmanini on the safe yield return flow issue. They had an opportunity to present
9 their testimony regarding the safe yield's return flows.

10 **J. Request for Judicial Notice Does Not Present a Hearsay Problem**

11 Contrary to AVEK's contention, District No. 40 is not asking for judicial notice of the
12 truth of fact asserted in the documents attached to District No. 40's Request for Judicial Notice.
13 Rather, District No. 40 is merely requesting that the Court: (1) take judicial notice of the
14 existence of documents in its own files to show that testimony and exhibits were provided and
15 admitted regarding the safe yield's return flow percentages; and (2) if necessary, admit relevant
16 evidence introduced in the Phase 3 trial in the Phase 4.

17 Additionally, there is no hearsay issue with Mr. Scalmanini's testimony. An expert may
18 rely on any matter in forming his opinion including inadmissible hearsay. (Evid. Code § 801 [If a
19 witness is testifying as an expert, his testimony in the form of an opinion is limited to such an
20 opinion as is: . . . Based on matter (including his special knowledge, skill, experience, training,
21 and education) perceived by or personally known to the witness or made known to him at or
22 before the hearing, *whether or not admissible*, that is of a type that reasonably may be relied
23 upon by an expert in forming an opinion upon the subject to which his testimony relates, unless
24 an expert is precluded by law from using such matter as a basis for his opinion."]) [Emphasis
25 added].) Bolthouse's belated objection to Phase 3 evidence admitted by the Court does not cite
26 to any case law or statute that would preclude Mr. Scalmanini's reliance on Mr. Leffler's
27 analysis.

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III. CONCLUSION

Opposing Parties attempt nothing more than to repeat expensive and time-consuming litigation of the Phase 3 trial safe yield's return flows. The Phase 3 trial was a costly undertaking of more than 3 months. There is no good cause established to redo the Phase 3 trial. District No. 40 respectfully requests that the Court grant its motion.

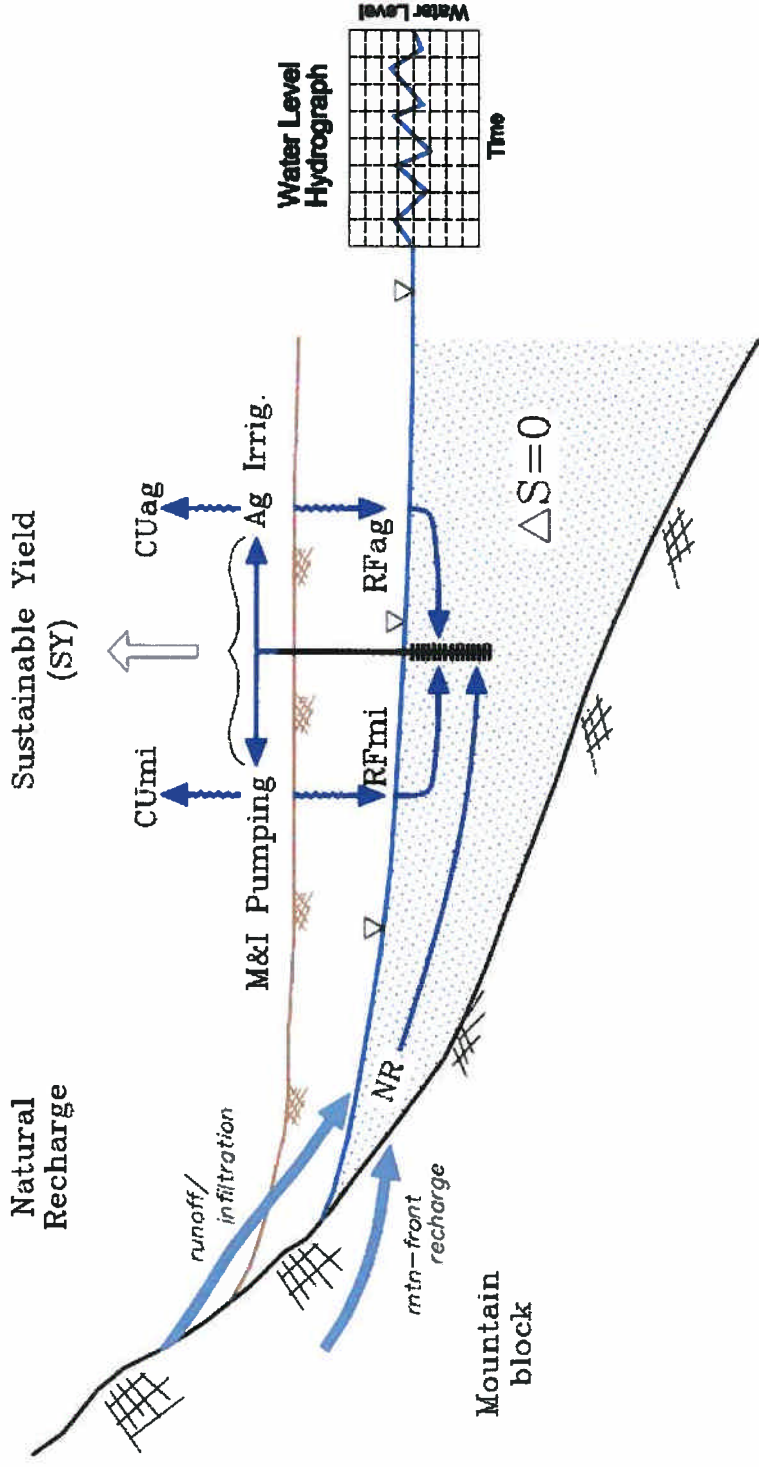
Dated: May 3, 2013

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EXHIBIT A

Sustainable Yield

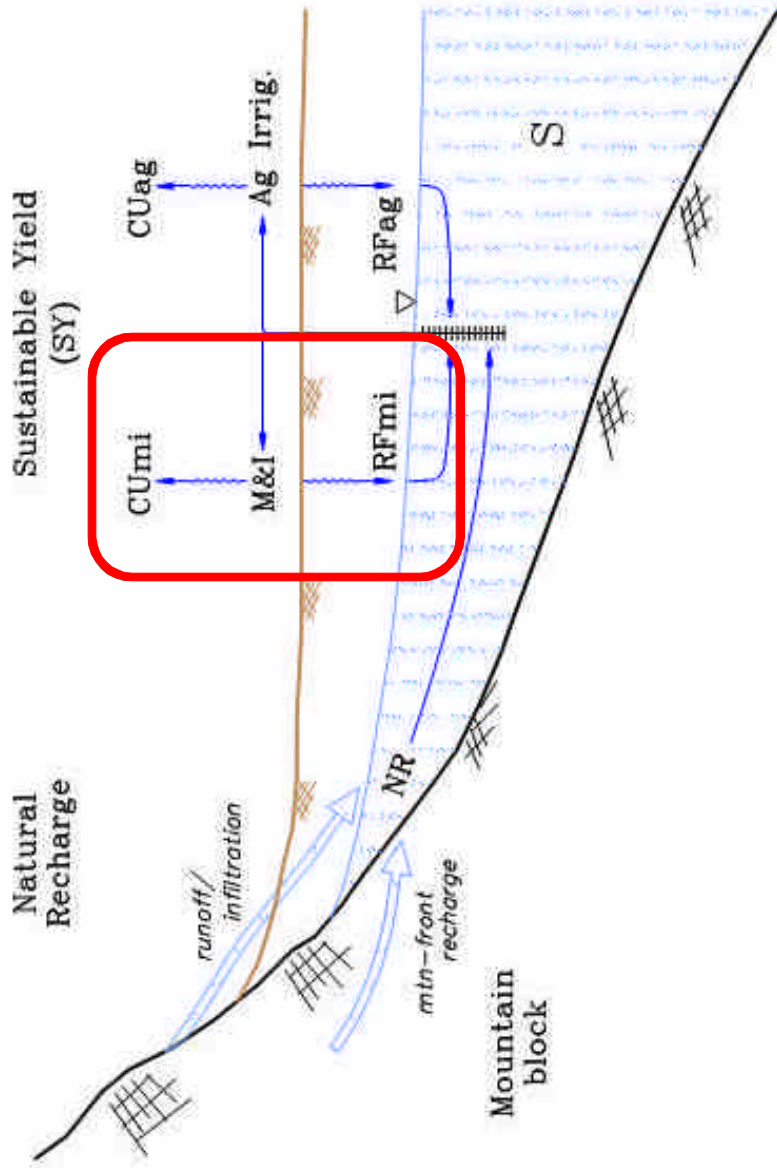


$$\text{Sustainable Yield (SY)} = \text{Natural Recharge (NR)} + \text{Ag Return Flows (RFag)} + \text{M\&I Return Flows (RFmi)}$$

(when $S = \text{constant over time}$)

- Ag = agricultural irrigation
- M&I = municipal and industrial use
- CU = consumptive use
- S = groundwater storage

EXHIBIT B



Sustainable Yield (SY) = Natural Recharge (NR) + Ag Return Flows (RFag) + M&I Return Flows (RFmi)
 (when S = constant over time)

- Ag = agricultural irrigation
- M&I = municipal and industrial use
- CU = consumptive use
- S = groundwater storage

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Figure F.1-1
Schematic Illustration of Sustainable Yield
Antelope Valley Area of Adjudication