

1 BEST BEST & KRIEGER LLP
ERIC L. GARNER, Bar No. 130665
2 JEFFREY V. DUNN, Bar No. 131926
WENDY Y. WANG, Bar No. 228923
3 18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612
4 TELEPHONE: (949) 263-2600
TELECOPIER: (949) 260-0972
5 Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
6 DISTRICT NO. 40

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7 OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
8 JOHN F. KRATTLI, Bar No. 82149
COUNTY COUNSEL
9 WARREN WELLEN, Bar No. 139152
PRINCIPAL DEPUTY COUNTY COUNSEL
10 500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
11 TELEPHONE: (213) 974-8407
TELECOPIER: (213) 687-7337
12 Attorneys for Cross-Complainant LOS ANGELES
COUNTY WATERWORKS DISTRICT NO. 40

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

15 ANTELOPE VALLEY GROUNDWATER
16 CASES
17 Included Actions:
18 Los Angeles County Waterworks District No.
40 v. Diamond Farming Co., Superior Court of
19 California, County of Los Angeles, Case No.
BC 325201;
20 Los Angeles County Waterworks District No.
40 v. Diamond Farming Co., Superior Court of
21 California, County of Kern, Case No. S-1500-
CV-254-348;
22 Wm. Bolthouse Farms, Inc. v. City of
23 Lancaster, Diamond Farming Co. v. City of
Lancaster, Diamond Farming Co. v. Palmdale
24 Water Dist., Superior Court of California,
County of Riverside, Case Nos. RIC 353 840,
25 RIC 344 436, RIC 344 668
26 RICHARD WOOD, on behalf of himself and
27 all other similarly situated v. A.V. Materials,
Inc., et al., Superior Court of California,
28 County of Los Angeles, Case No. BC509546

Judicial Council Coordination Proceeding
No. 4408

CLASS ACTION

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

MOTION IN LIMINE NUMBER ONE BY
LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40

Trial Date: February 10, 2014 (Phase V)

[Concurrently filed with Supplemental
Request for Judicial Notice]

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612


MOTION IN LIMINE NUMBER ONE

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Los Angeles County Waterworks District No. 40 (“District No. 40”) moves this Court for an order precluding parties from offering any testimony, documents or other evidence related to issues decided in prior phases of this action, including the safe yield and the amount and/or percentage of return flows. The motion is made pursuant to Evidence Code Section 352 and the inherent authority of the courts to manage litigation, and is based on the grounds that re-litigating a decided issue will be both severely prejudicial and necessitate undue consumption of time.

This Motion is based on the attached Memorandum of Points and Authorities, the accompanying Request for Judicial Notice posted to the Court’s website on March 29, 2013 and currently under consideration by the Court, the Supplemental Request for Judicial Notice filed concurrently therewith, and on any other matters properly before the Court.

Dated: January 24, 2014

BEST BEST & KRIEGER LLP
By 
ERIC U. GARNER
JEFFREY V. DUNN
WENDY Y. WANG
Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 The purpose of Phase Three was to determine whether the Antelope Valley Water Basin
4 (“Basin”) was in a state of overdraft and if so, the amount of safe yield. (Request for Judicial
5 Notice, posted to the Court’s website on March 29, 2013 and currently under consideration by the
6 Court, (“RJN”)¹, Ex. HH at p. 3.) After hearing numerous days of testimony from various experts
7 and reviewing exhibits over the course of four months, this Court found that the Basin is in a state
8 of overdraft and that the safe yield for the Basin is estimated to be 110,000 acre feet a year
9 (“afy”). (RJN, Exs. A to GG & HH at pp. 3 & 9.) As the Court noted in its Statement of
10 Decision, the amount of safe yield is determined only after the Court ascertained the average
11 amount of recharge from all sources, including return flows. (RJN, Ex. HH at p. 7.)

12 Despite this Court’s statement that it will not rehear the issue of safe yield and the amount
13 of return flows contributing to the safe yield, District No. 40 is informed and believes that during
14 the Phase 5 trial other parties will attempt to re-litigate issues decided during Phase 3 and to
15 introduce evidence disputing the safe yield’s amount of return flows and/or the percentage of
16 imported water that constitutes return flows. To allow any party to present such evidence or to
17 re-try the decided issues will be severely prejudicial, unduly time consuming, and further delay
18 the litigation process.

19 II. LEGAL STANDARD

20 Courts have “fundamental inherent equity, supervisory, and administrative powers, as well
21 as inherent power to control litigation before them.” (*Rutherford v. Owens-Illinois, Inc.* (1997)
22 16 Cal.4th 953, 967.) Under Evidence Code section 352, the court “may exclude evidence if its
23 probative value is substantially outweighed by the probability that its admission will (a)
24 *necessitate undue consumption of time* or (b) *create substantial danger of undue prejudice*, of
25 confusing the issues, or of misleading the jury.” (Evid. Code § 352 [emphasis added].) Re-
26 litigating issues determined by the Court in Phase 3, such as the safe yield and the amount of

27 ¹ At the January 15, 2014 hearing regarding discovery and District No. 40’s *ex parte* application to quash deposition
28 of Mr. Joseph Scalmanini, the Court indicated that it will take the RJN under consideration. In an effort to reduce
duplicative filings, District No. 40 is not resubmitting the RJN again.

1 return flows contributing to the safe yield, will “necessitate undue consumption of time” and
2 create undue prejudice to the Public Water Suppliers as their primary witness in Phase 3, Joseph
3 Scalmanini, has already testified to these issues and is no longer available to testify in Phase 5.

4 **III. ARGUMENT**

5 **A. Phase 5 Return Flow Issues Should Only Concern Parties’ Claims to Return**
6 **Flows, And Not The Amount of Return Flows Contributing to Safe Yield**

7 During the October 16, 2013 hearing, the Court stated that it will not retry the issue of safe
8 yield and the amount of return flows contributing to the safe yield and that it may hear evidence
9 regarding each party’s specific claim to return flows. (See Supplemental Request for Judicial
10 Notice, concurrently filed, (“Supplemental RJN”), Ex. LL at 17:8-12 [“I’m not going to rehear
11 the issue of the safe yield absent some justification for reopening the case and setting aside the
12 previous decision”] & 26:15-19 [“with regard to return flow numbers, the percentages that the
13 Court was given, testified to, and accepted by the Court. Those numbers are not likely to
14 change.”].) The Court further noted that the return flow findings in Phase 3 are “averages” and
15 “do not take into consideration particular facets of an individual’s use of water and how it is used
16 and what factors might be present that would impact differently the right to claim a percentage of
17 return flows.” (*Id.* at 17:15-25.) In other words, the Court indicated that it does not intend to re-
18 litigate the safe yield amount and total return flow percentage and/or amount for the Basin, but is
19 willing to entertain testimony that the return flow amount for a particular party and/or parcel is
20 different. However, District No. 40 is informed, based on recent expert witness deposition
21 testimony for Phase 5, that other parties will not be presenting evidence of different return flow
22 percentages for different parties or parcels, but will instead present evidence that the overall
23 return flow percentage for municipal and industrial uses is different from that used by the court to
24 arrive at the safe yield. Consequently, District No. 40 believes such parties intend to re-litigate
25 issues decided during Phase 3, which should not be permitted.

26 **B. The Court’s Safe Yield Determination Necessarily Included A**
27 **Determination of Return Flow Amounts**

28 The Court’s Phase 3 Statement of Decision states: “The only issues in this phase of trial

1 were simply to determine whether the adjudication area aquifer is in a current state of overdraft
2 and as part of that adjudication determine safe yield.” (RJN, Ex. HH at p. 2.) As the Court noted,
3 the amount of safe yield is determined only after the Court ascertained the average amount of
4 recharge from all sources, including return flows. (RJN, Ex. HH at pp. 3-4 & 7.)

5 In *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199, the California Supreme Court
6 stated:

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

18 (14 Cal.3d 199, 278-279 [emphasis added].) More recently, in *City of Santa Maria v. Adam*
19 (2012) 211 Cal.App.4th 266, 279, the court reiterated the principle that safe yield “is generally
20 calculated as the net of inflows less subsurface and surface outflows.” (Citing *Los Angeles v. San*
21 *Fernando, supra*, at pp. 278-279.)

22 Stated simply, the mere suggestion that the Court has not determined the return flow
23 percentages and should do so in Phase 5 of trial is tantamount to a claim that the Court failed to
24 do its legal duty to include the return flows in its safe yield finding of 110,000 afy.

25 **C. The Court Took Evidence On Return Flow Percentages and Amount In The**
26 **Phase 3 Trial To Determine Safe Yield**

27 It is presumed that this Court acted properly in making its safe yield determination. (Evid.
28 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 amount in the safe yield finding of
110,000 afy. The presumption is not needed here because the Court’s Phase 3 decision states that
evidence on return flows was presented by the experts and included in their calculations:

1 “Experts also conducted a sophisticated analysis of precipitation and its runoff, stream flow, and
2 infiltration into the aquifer, including such things as evapotranspiration, water from other sources
3 introduced into the aquifer (artificial recharge), as well as the nature and quantity of extractions
4 from the aquifer and return flows therefrom.” (RJN, Ex. HH at p. 4.)

5 The Court is aware that Mr. Scalmanini presented evidence on return flow percentages
6 and how they are included in the safe yield. After providing all parties with an opportunity to
7 present evidence on the amount of return flows, the Court made a determination of the safe yield
8 which includes the return flows percentage estimates from supplemental, non-native water
9 supplies. (See *City of Santa Maria v. Adam, supra*, 211 Cal.App.4th at 301-303 [expert’s
10 percentage return flow estimates are sufficient evidence of return flow amounts].) For example,
11 as shown on Scalmanini Phase 3 Trial Exhibit Number 12, safe yield is equal to natural recharge
12 plus agricultural return flows plus municipal and industrial return flows when groundwater
13 storage is constant over time. (Supplemental RJN, Ex. JJ.) Thus, the Court’s safe yield finding
14 of 110,000 afy was based on the evidence presented during the Phase 3 trial including the return
15 flow testimony from Mr. Scalmanini. Specifically, when asked by what opinions Mr. Scalmanini
16 reached, he replied:

17 it would be my opinion or my conclusion that **the native or**
18 **natural yield of the groundwater basin is about 82,000** or -- you
19 know, we used, you know, a third digit, the 82,300 acre feet per
20 year, meaning that’s the yield that derives from waters that are local
21 to the Valley itself.

22 As I think most know, that the **Antelope Valley has made**
23 **use of supplemental waters primarily from the state water**
24 **project since the 1970s, and the importation and use of that**
25 **supplemental water contributes in an indirect fashion**
26 **additional recharge to the basin which augments the yield of the**
27 **basin.**

28 And I’m sure we’ll get into it in more detail later, depending
on what time period you analyze as representative cultural
conditions, that that **use of supplemental water contributes**
something on the order of 25,000 to 28,000 acre feet per year of
additional yield.

So that in total the native yield plus a supplemental yield
would add up to the better part of 110,000 acre feet per year.

(Supplemental RJN, Ex. II, at 30:8-31:4 [emphasis added].) Mr. Scalmanini subsequently

1 elaborated further on the basis of his opinion. (RJN, Ex. Q, at 500:7-514:4; Supplemental RJN,
2 Ex. KK, at 514:5-516:5.) Of note, Mr. Scalmanini testified that approximately 27,500 acre-feet
3 of the safe yield was attributable to return flows from imported water. (Supplemental RJN, Ex.
4 KK, at 515:20-24.)

5 **D. Re-Litigating the Amount of Return Flows Would Alter The Phase 3 Safe**
6 **Yield Determination**

7 In Phase 3, the Court determined the safe yield of the Basin to be 110,000 afy, which
8 includes the amount of return flows. The safe yield of 110,000 afy was the safe yield number
9 presented by Mr. Scalmanini and it included his return flow amounts and percentages. *There was*
10 *no other evidence presented that would have allowed the Court to make a safe yield*
11 *determination of 110,000 afy.* To re-litigate this decided issue would be a waste of judicial
12 resources as the parties would again present evidence on the safe yield's return flows. Moreover,
13 it could lead to findings that are inconsistent with the Phase 3 findings. For example, if the
14 amount of return flows is less than what Mr. Scalmanini testified and the Court determined in
15 Phase 3, then the safe yield amount, which encompasses the return flow amounts, will have to be
16 reduced. Such a finding would contradict the Court's Phase 3 determination.

17 **E. No Party Has Timely Requested A Reconsideration Of The Court's Safe**
18 **Yield Determination**

19 New evidence now on the safe yield's return flow percentages cannot be introduced in the
20 Phase 5 trial because the parties have submitted evidence on this contested issue during the Phase
21 3 trial. As the parties have submitted evidence and arguments, the matter is deemed submitted.
22 (See 7 Witkin Cal. Proc. Trial § 166 [citing *Ensher, Alexander & Barsoom, Inc. v. Ensher* (1964)
23 225 Cal. App. 2d 318, 326].) Once a matter has been submitted, new evidence can only be
24 admitted upon leave and showing of good cause, which has not been requested or shown in this
25 case.

26 A motion to reopen a case for further evidence can be granted only
27 on a showing of good cause. Reopening is not a matter of a right
28 but rests upon the sound discretion of the trial court. That
discretion should not be overturned on appeal absent a clear
showing of abuse.

1 (*Sanchez v. Bay General Hospital* (1981) 116 Cal. App. 3d 776, 793 [citations omitted].) Good
2 cause to reopen a matter requires more than mere omission of the relevant evidence. (*See*
3 *Horning v. Shilberg* (2005) 130 Cal. App. 4th 197, 208-209 [trial court did not abuse its
4 discretion in denying plaintiff leave to reopen matter where plaintiff made a tactical decision not
5 to present evidence on all types of damages sustained].) Here, parties have neither timely
6 requested leave to introduce new evidence on the safe yield's return flows nor established good
7 cause as to why such evidence was not submitted during Phase 3. Parties participating in Phase 5
8 either did or could have participated in the Phase 3 trial. They had ample opportunity to
9 introduce evidence regarding the safe yield's return flows. They are now foreclosed from re-
10 litigating the safe yield's return flows in the Phase 5 trial.

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

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

19 Mr. Scalmanini was the Public Water Suppliers' primary witness during the Phase 3 trial
20 and his testimony included the return flows amounts that this Court incorporated into its safe
21 yield finding. As the Court is aware, Mr. Scalmanini was diagnosed with amyotrophic lateral
22 sclerosis, commonly known as Lou Gehrig's disease, shortly before the Phase 3 trial. The Court
23 went to great lengths to allow Mr. Scalmanini to testify and be cross-examined in Phase 3 trial.
24 Mr. Scalmanini is unavailable to testify again. To allow a re-litigation of the return flow
25 contributions to the safe yield, would be severely prejudicial to the parties who retained Mr.
26 Scalmanini and whose work was conducted over many years at any extraordinary cost.

1 **G. New Evidence Concerning the Return Flow Amounts Provides Little**
2 **Probative Value**

3 Because the Court has already factually determined the return flow amount, new evidence
4 on this decided issue is unnecessary, and any additional evidence will merely be cumulative and
5 without much probative value. (*See Rosener, supra*, 110 Cal.App.3d at p. 756 [“trial court did
6 not abuse its discretion in excluding such expert testimony, which was only marginally relevant,
7 and at best repetitive and unduly time consuming.”]; *Tip Top Foods, Inc., supra*, 28 Cal.App.3d at
8 p. 554 [trial court did not abuse its discretion by excluding cumulative evidence].) Presenting the
9 same or new evidence to litigate a settled issue will accomplish nothing, consume time, and
10 further delay resolution in this action. (*See Sanchez, supra*, 116 Cal.App.3d at 794 [matters that
11 “could consume enormous amounts of time to no enlightenment on the key issues before the
12 court” may be excluded].)

13 **H. Re-Litigating A Decided Issue Is A Waste Of Judicial Resource**

14 To allow evidence on a decided issue will defeat one of the primary purposes of splitting
15 this action into different phases – efficient resolution of disputes. (Code Civ. Proc., §1048, subd.
16 (b) [“The court, in furtherance of convenience or to avoid prejudice, or *when separate trials will*
17 *be conducive to expedition and economy*, may order a separate trial of any cause of action,
18 including a cause of action asserted in a cross-complaint, or of any separate issue or of any
19 number of causes of action or issues. . . .”] [emphasis added].) For the sake of judicial economy,
20 the Court should not allow parties to re-litigate findings determined in a prior phase.

21 **IV. CONCLUSION**

22 Based on the foregoing, District No. 40 respectfully requests that the Court preclude any
23 party from offering any evidence related to issues decided in prior phases of this action,
24 especially evidence relating to the amount or percentage of return flows.

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Dated: January 24, 2014

BEST BEST & KRIEGER LLP
By *Jeffrey V. Dunn*
ERIC L. CARNER
JEFFREY V. DUNN
WENDY Y. WANG
Attorneys for Cross-Complainant
LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40

LAW OFFICES OF
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

LAW OFFICES OF
BEST, BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000
IRVINE, CALIFORNIA 92612

PROOF OF SERVICE

I, Sandra K. Sandoval, declare:

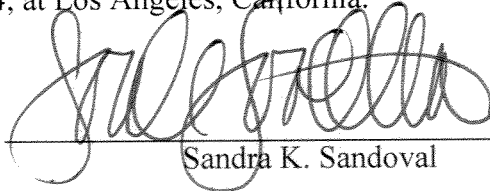
I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 300 South Grand Avenue, 25th Floor, Los Angeles, CA 90071. On January 24, 2014, I served the within document(s):

**MOTION IN LIMINE NUMBER ONE BY LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40**

- by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.
- by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 24, 2014, at Los Angeles, California.



Sandra K. Sandoval

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