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12

13 SUPERIOR COURT OF CALIFORNIA
14 COUNTY OF LOS ANGELES

15 Coordination Proceeding Special title (Rule 1550(b))
16 **ANTELOPE VALLEY GROUNDWATER CASES:**
17 Included Actions:
18 Los Angeles County Waterworks District No. 40 v.
Diamond Farming Co.
19 Superior Court of California, County of Los Angeles,
Case No.: BC 325 201
20 Los Angeles County Waterworks District No. 40 v.
21 Diamond Farming Co.
Superior Court of California, County of Kern, Case No.:
22 S-1500-CV-254-348
23 Wm. Bolthouse Farms, Inc. v. City of Lancaster
Diamond Farming Co. v. City of Lancaster
24 Diamond Farming Co. v. Palmdale Water District
Superior Court of California, County of Riverside,
25 consolidated actions, case Nos. RIC 353 840, RIC 344
436, RIC 344 668
26

Judicial Council Coordination
Proceeding No.: 4408
Los Angeles Superior Court
Case No.: 1-05-CV-049053
**STATE OF CALIFORNIA'S
OPPOSITION TO MOTION
BY TEJON RANCHCORP
AND OTHER PARTIES FOR
PROTECTIVE ORDER RE
DISCLOSURE AND
CONFIDENTIALITY OF
WELL DATA AND OTHER
PRIVATE INFORMATION**
Date: December 15, 2006
Time: 9:00 A.M.
Dept: Dept. 1
Location: Los Angeles Superior
Court, 111 North Hill Street
Los Angeles, CA 90012

1 The State of California, the Santa Monica Mountains Conservancy, and the
2 State of California 50th District Agricultural Association (collectively, State Parties)
3 submit the following Opposition to the motion by Tejon Ranchcorp and other parties for
4 a "Protective Order re Disclosure and Confidentiality of Well Data and Other Private
5 Information."

6 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

7 Tejon Ranchcorp's motion requests that this court issue a protective order
8 that requires disclosure of, among other things, confidential well completion reports that
9 are filed with the California Department of Water Resources (DWR) pursuant to Water
10 Code section 13751, and which are confidential pursuant to Water Code section 13752.
11 DWR opposes the proposed protective order insofar as it would require disclosure of
12 reports protected from disclosure by section 13752. Section 13752 provides:

13 Reports made in accordance with paragraph (1) of
14 subdivision (b) of Section 13751 shall not be made available
15 for inspection by the public, but shall be made available to
16 governmental agencies for use in making studies, or to any
17 person who obtains a written authorization from the owner of
18 the well. However, a report associated with a well located
19 within two miles of an area affected or potentially affected by
20 a known unauthorized release of a contaminant shall be made
21 available to any person performing an environmental cleanup
22 study associated with the unauthorized release, if the study is
23 conducted under the order of a regulatory agency. A report
24 released to a person conducting an environmental cleanup
25 study shall not be used for any purpose other than for the
26 purpose of conducting the study.

27 Section 13752 imposes on DWR, the official custodian of well completion
28 reports filed as required by section 13751, an affirmative duty to keep well completion
reports confidential, and to disclose such reports only to those who fall within the
categories for disclosure listed in the statute. There are only three categories of entities
entitled to disclosure in the statute: (1) governmental agencies performing studies; (2)
any person who obtains written authorization for disclosure from the well owner; (3) any
person performing an environmental cleanup study associated with the unauthorized
release of a contaminant, if the study is conducted under the order of a regulatory agency.

1 Contrary to the clear language of the statute, the proposed order would require DWR to
2 disclose the reports to any party and for any purpose within the scope of this litigation,
3 including settlement, or trial and other contested proceedings, without the consent of the
4 affected well owners. In DWR's view, section 13752 will not permit this type of
5 disclosure.

6 **II. ARGUMENT**

7
8 **A. THE LEGISLATIVE HISTORY OF SECTION 13752**
9 **DEMONSTRATES A STRONG LEGISLATIVE POLICY THAT**
10 **WELL COMPLETION REPORTS ARE PROPRIETARY AND NOT**
11 **SUBJECT TO DISCLOSURE ABSENT CONSENT OF THE WELL**
12 **OWNER OR REQUEST FROM A GOVERNMENT AGENCY**

13 Well completion reports have been confidential, with limited exceptions,
14 since 1951, when Section 7076.1 (predecessor to Section 13752) was added to the Water
15 Code. Unless one of the statutory exceptions applies, the confidentiality is held by the
16 landowner. A memorandum to Governor Earl Warren from his staff dated May 29, 1951
17 summarizes the comments of state agencies in support of the bill. The Attorney General
18 commented that it was within the province of the Legislature to prevent random
19 inspection since the reports are required for use only by regional water pollution control
20 boards. The director of the Department of Public Health commented that well log
21 information "would be of assistance not only to the State Department of Public Health
22 but also to local health departments." The Deputy Director of Public Works stated that
23 well log information "is regarded by some well drillers as part of their stock in trade and
24 such drillers are reluctant to submit such information if it is made available to the general
25 public....It is believed that if the information is not open to public inspection more
26 complete and accurate information will be received." (Exhibit 1, Governor's Bill File,
27 California State Archives.)

28 In 1994, a bill, AB 2530, was enrolled that would have made reports for
wells located in urbanized areas (but not rural ones) available to geologists, geophysicists
and civil engineers (not just public agencies) for use in making studies, unless the

1 landowner specifically requested that they not be released. The bill was vetoed by
2 Governor Pete Wilson, leaving in place the long-standing confidentiality of such reports,
3 except for release to public agencies making studies. (Exhibit 2, Bill History for AB
4 2530, www.leginfo.com.)

5 The reasons for state officials' support of the original 1951 legislation are
6 consistent with DWR's interpretation of section 13752 today. The purpose of the statute
7 has always been to facilitate government agencies' protection of public health and safety,
8 and at the same time to ensure the privacy and proprietary rights of well owners.

9 **B. NONE OF TEJON RANCHCORP'S SIX REASONS JUSTIFY**
10 **CIRCUMVENTION OF THE CLEAR LANGUAGE OF WATER**
11 **CODE SECTION 13752**

12 Tejon Ranchcorp's motion summarily advances six reasons why the court
13 should issue the proposed protective order despite the clear language of section 13752.
14 Upon specific analysis, however, none of these reasons have merit.

15 **1. DISCLOSURE TO PRIVATE PARTIES IS NOT EQUIVALENT**
16 **TO DISCLOSURE TO A GOVERNMENT AGENCY FOR**
17 **PURPOSES OF MAKING A STUDY.**

18 Tejon Ranchcorp first asserts that because section 13752 allows disclosure
19 to a governmental agency, it also permits disclosure to all parties in this litigation
20 because such would amount to disclosure to this court, a governmental agency. But the
21 court is not a governmental agency making a study. In DWR's view, section 13752 does
22 not include courts exercising strictly judicial powers as falling within the meaning of the
23 term "governmental agencies." Statutes are to be construed to give effect to the usual,
24 ordinary import of the language employed in them. (*Phelps v. Stostad* (1997) 16 Cal.4th
25 23, 32.) Applying this rule of statutory construction to section 13752, we believe that the
26 Legislature used the term "governmental agencies" to refer to agencies of federal, state or
27 local governments who are involved in the process of making ground water studies, not
28 to a public entity engaged in a purely judicial function, such as the court in this case.
This interpretation finds additional support in the legislative policy declarations in Water
Code sections 13700 and 13701. These sections demonstrate that the purpose of

1 Division 7, Chapter 10 of the Water Code (sections 13700-13806), including section
2 13752, is to protect *water quality* of groundwater basins by developing and enforcing
3 well construction and operation standards, and to empower state and local departments
4 with the means to enforce such standards. ^{1/}

5 Tejon Ranchcorp also contends that disclosure may be ordered by the court
6 because it has an affirmative duty to promote a physical solution pursuant to Article X,
7 Section 2 of the California Constitution, citing *City of Lodi v. East Bay Municipal Utility*
8 *District* (1936) 7 Cal.2d 316, 341. The fact that the court (and the parties) in this case
9 may have an obligation to achieve a physical solution, and to admit evidence relating to a
10 physical solution, however, does not mean that a statutory directive such as section
11 13752 can be ignored in striving for such a result. Neither Article X, Section 2 nor *City*
12 *of Lodi* can be read to allow the court or the parties in this case to resort to privileged and
13 inadmissible evidence, in circumvention of Water Code section 13752 and Evidence
14 Code section 1040.

15 **2. DISCLOSURE OF CONFIDENTIAL WELL COMPLETION**
16 **REPORTS IS LIMITED TO THE CATEGORIES LISTED IN**
17 **SECTION 13752.**

18 Next, Tejon Ranchcorp argues that section 13752 only prohibits disclosure

19 1. Water Code section 13700 states: "The Legislature finds that the greater portion of the
20 water used in this state is obtained from underground sources and that those waters are subject to
21 impairment in quality and purity, causing detriment to the health, safety and welfare of the people
22 of the state. The Legislature therefore declares that the people of the state have a primary interest
23 in the location, construction, maintenance, abandonment, and destruction of water wells, cathodic
24 protection wells, groundwater monitoring wells, and geothermal heat exchange wells, which
25 activities directly affect the quality and purity of underground waters."

26 Water Code section 13701 states: "The Legislature finds and declares all of the following:
27 (a) Improperly constructed and abandoned water wells, cathodic protection wells, groundwater
28 monitoring wells, and geothermal heat exchange wells can allow contaminated water on the surface
to flow down the well casing, thereby contaminating the usable groundwater. (b) Improperly
constructed and abandoned water wells, cathodic protection wells, groundwater monitoring wells,
and geothermal heat exchange wells can allow unusable or low quality groundwater from one
groundwater level to flow along the well casing to usable groundwater levels, thereby contaminating
the usable groundwater. (c) Contamination of groundwater poses serious public health and economic
problems for many areas of the state."

1 to the general “public,” and therefore the proposed protective order limiting disclosure of
2 well completion reports to the parties in this litigation, for the purposes of this litigation,
3 does not contravene section 13752. This construction of section 13752 is incorrect,
4 however. The statute limits disclosure to three and only three explicit categories: (1)
5 governmental agencies performing studies, (2) persons who have obtained the consent of
6 the well owner, and (3) persons performing cleanup studies pursuant to regulatory order.
7 The fact that it does not expressly address discovery in litigation does not mean that it
8 should be interpreted to permit disclosure to parties in this groundwater adjudication
9 proceeding. The expression of certain things in a statute necessarily involves exclusion
10 of other things not expressed. (*People v. Anzalone* (1999) 19 Cal.4th 1074, cited in 58
11 Cal. Jur.3d, Statutes, section 130, p. 550.) This maxim of statutory construction,
12 *expressio unius est exclusio alterius*, precludes the interpretation of section 13752
13 advanced by Tejon Ranchcorp.

14 **3. WELL COMPLETION REPORTS FILED WITH DWR ARE**
15 **SUBJECT TO THE OFFICIAL INFORMATION PRIVILEGE OF**
16 **EVIDENCE CODE SECTION 1040.**

17 Tejon Ranchcorp next asserts that “Section 13752 was clearly not designed
18 to govern or effect discovery obligations.” It offers no support or authority for this bald
19 conclusion. The assertion that section 13752 does not bar disclosure in litigation and
20 creates no privilege or exemption from ordinary discovery requirements is without merit.
21 A privilege allows its holder to refrain from providing evidence. Privileged information
22 is not discoverable. (Code Civ. Proc., sec. 2017.010.) What constitutes a privilege is
23 governed by the Evidence Code, notwithstanding civil discovery statutes. (See *Blue*
Ridge Ins. Co. v. Superior Court (1988) 202 Cal.App.3d 339, 345.)

24 Well completion reports filed with DWR by well drillers or owners are
25 subject to the official information privilege found in Evidence Code section 1040. That
26 section authorizes a public entity to refuse to disclose official information and to prevent
27 another from disclosing official information. It defines “official information” as
28 “information acquired in confidence by a public employee in the course of his or her duty

1 and not open, or officially disclosed, to the public prior to the time the claim of privilege
2 is made.” Well completion reports filed pursuant to section 13751 and maintained as
3 confidential under section 13752 clearly constitute official information within the
4 meaning of Evidence Code section 1040. DWR, and the Attorney General’s Office as
5 DWR’s legal representative in this action, have an affirmative duty to assert the privilege
6 to refuse to disclose official information pursuant to Evidence Code section 1040, and to
7 advise the court that disclosure is forbidden by a statute of this state, namely section
8 13752. (*Proconier v. Superior Court* (1973) 35 Cal.App.3d 211, 212.)

9 Disclosure of official information is forbidden if an act of Congress or a
10 California statute prohibits it (Evid. Code, sec. 1040(b)(1)), or, if disclosure is against the
11 public interest because there is a necessity for preserving the confidentiality of the
12 information that outweighs the necessity for disclosure. (Id., sec. 1040(b)(2).) Either
13 prong is sufficient to prevent disclosure. Here, disclosure of well completion reports is
14 prohibited by a California state statute, Water Code section 13752. Therefore, the
15 privilege (and duty) not to disclose those reports to persons not expressly authorized by
16 the statute is absolute. The discretionary deliberative process under Evidence Code
17 section 1040(b)(2) is not applicable to the situation presented in this case. (See
18 Jefferson’s California Evidence Benchbook, vol. 2, section 42.2, p. 957 [If a statute
19 forbids disclosure, and an employee of the public entity claims the privilege, the trial
20 judge must sustain the claim and preclude admissibility of the evidence, regardless of the
21 effect on the outcome of the action.])

22 **4. THE SOLE METHOD FOR SEEKING WELL COMPLETION**
23 **REPORTS FROM NON-PARTIES IS BY ISSUANCE OF A**
24 **DEPOSITION SUBPOENA DUCES TECUM DIRECTED AT NON-**
25 **PARTY WELL OWNERS; NOT TEJON RANCHCORP’S**
26 **PROPOSED PROTECTIVE ORDER.**

27 Tejon Ranchcorp next reasons that since the court can order discovery of
28 well completion reports from both well owners who are parties and well owners who are
non-parties, the court must also have the authority to order that DWR disclose well
completion reports filed by such well owners. This reasoning is faulty on several counts.

1 First, the only method for obtaining discovery of documents from a non-
2 party is through a deposition subpoena served on that non-party under Code of Civil
3 Procedure sections 2020.010 and 2020.410. The recipient of the subpoena then has the
4 opportunity to assert any privilege or defense to the discovery by moving to quash the
5 subpoena under Code of Civil Procedure section 1987.1. Tejon Ranchcorp's proposed
6 protective order would circumvent these Discovery Act requirements by obtaining the
7 documents directly from DWR without any notice or opportunity to be heard afforded
8 the non-party well owner.

9 Second, the State of California is a party to this action because several state
10 agencies, including DWR, are overlying property owners in the Antelope Valley. This
11 proprietary capacity is to be distinguished from DWR's duties under sections 13751 and
12 13752. In filing well completion reports and maintaining their confidentiality, DWR is
13 performing a purely governmental function. Well completion data for state-owned wells
14 may indeed be discoverable directly from the state agencies who own and operate the
15 wells. But well completion reports owned by others, maintained as confidential by
16 DWR under section 13752, may not be disclosed simply because the State is a party to
17 this action.

18 Third, the well owners who have disclosed well completion reports to
19 DWR have done so because the law (section 13751) requires it. These owners have not
20 voluntarily disclosed data to DWR, and they have not waived any right to keep the data
21 confidential. They are entitled to the privileges of section 13752 and Evidence Code
22 section 1040, and DWR, in its governmental capacity, is obligated to assert those
23 privileges for them.

24 **5. FAIRNESS AND DUE PROCESS DO NOT REQUIRE**
25 **DISCOVERY OF CONFIDENTIAL WELL COMPLETION**
26 **REPORTS FROM DWR; LESS INTRUSIVE ALTERNATIVE**
27 **METHODS ARE AVAILABLE.**

28 Tejon Ranchcorp summarily contends that fairness and due process require
disclosure of well completion reports from DWR despite the privileges of section 13752

1 and Evidence Code section 1040. Tejon Ranchcorp provides no elaboration or citation
2 of authority for such a statement. Equally unsubstantiated is Tejon Ranchcorp's
3 statement on page 2 of its motion that "we can state that several experts have expressed
4 the need to obtain and analyze such data in order to define the Basin's problems and
5 attempt to develop agreed physical solutions." Tejon Ranchcorp does not offer the
6 declaration of any expert in order to authenticate this statement.

7 Moreover, the claim that DWR has provided well completion reports to
8 Los Angeles County is incorrect. The November 2, 2006 letter from Michael L. Crow to
9 Henry Weinstock (Exhibit 2 of Tejon Ranchcorp's brief) states that DWR has provided a
10 limited number of well completion reports to Palmdale Irrigation District and to Boron
11 Community Services District, and is in the process of providing reports to the USGS for
12 purposes of updating a groundwater flow model in conjunction with Los Angeles
13 County.

14 The court should not accept Tejon Ranchcorp's unsubstantiated claims
15 about fairness and due process without exploring alternatives that would not run afoul of
16 the confidentiality requirement in section 13752. Existing studies performed by
17 governmental agencies or by retained experts may provide the information needed to
18 develop a physical solution, without the need to disclose actual well completion reports.

19 There is an alternate approach that would be permitted by section 13752,
20 and would address the issues of fairness and due process raised by Tejon Ranchcorp.
21 Parties to the litigation who are also well owners have the option of granting permission
22 to release their well completion reports to other parties. It may be that this dispute can be
23 resolved, in large part, by developing a joint release agreement between parties who are
24 also well owners. This would not result in the release of all well logs, but if the major
25 well owners are parties, as they should be if the adjudication is comprehensive, this
26 should be a useful amount of information. In addition, the court could order that well
27 owners who are not now parties should be named as parties, especially if they are
28 significant pumpers of groundwater or have the potential to be.

1 **6. EXPERT WITNESS INFORMATION DISCOVERY**
2 **REQUIREMENTS DO NOT AUTHORIZE DISCLOSURE OF**
3 **DWR's CONFIDENTIAL WELL COMPLETION REPORTS.**

4 Finally, Tejon Ranchcorp asserts that it will be entitled to discovery of
5 confidential well completion reports under the provisions of Code of Civil Procedure
6 section 2034.260 authorizing deposition of an expert concerning the basis of his or her
7 opinion. This section must be read together with sections 2034.210 and 2034.270.
8 These sections permit discovery of reports and writings made by the expert. They do not
9 require disclosure of all data the expert relied on in making a report. Moreover, even if
10 sections 2034.210 et seq. relating to expert witness discovery could be read to require
11 disclosure of confidential well completion reports, these sections still would not
12 authorize a wholesale disclosure demand for DWR records, as Tejon Ranchcorp attempts
13 to justify in its motion. A determination of the reports that actually were relied on by an
14 expert in making a study or forming an opinion, and how the expert obtained the reports,
15 would first have to be made.

16 **CONCLUSION**

17 The State respectfully requests that the court deny the motion of Tejon
18 Ranchcorp and other parties for a protective order.

19 Dated: November 30, 2006

20 Respectfully submitted,

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