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SUPERIOR COURT OF THE STATE OF CALIFORNIA

United States' Response to Motion in Limine

1
2 **COUNTY OF LOS ANGELES**

3 Coordination Proceeding) Judicial Council Coordination
4 Special Title (Rule 1550(b)))
5) Proceeding No. 4408

6 **ANTELOPE VALLEY GROUNDWATER**
7 **CASES**

8 Included actions:

9 Los Angeles County Waterworks District No. 40 v.)
10 Diamond Farming Co., et al.)
11 Los Angeles County Superior Court, Case No. BC)
12 325 201)

13 Los Angeles County Waterworks District No. 40 v.)
14 Diamond Farming Co., et al.)
15 Kern County Superior Court, Case No. S-1500-CV-)
16 254-348)

17 Wm. Bolthouse Farms, Inc. v. City of Lancaster)
18 Diamond Farming Co. v. City of Lancaster)
19 Diamond Farming Co. v. Palmdale Water District)
20 Riverside County Superior Court, Consolidated)
21 Action, Case nos. RIC 353 840, RIC 344 436, RIC)
22 344 668)

23 **AND RELATED CROSS ACTIONS**)
24)
25)
26)
27)
28)

**UNITED STATES' OPPOSITION
TO TEJON RANCHCORP'S
MOTION *IN LIMINE* FOR
ORDER EXCLUDING EXPERT
TESTIMONY OF JASON C. SUN**

17 Cross-Defendant United States of America hereby opposes the Motion in Limine filed by
18 Tejon Ranchcorp ("Tejon") on September 30, 2008 to exclude the expert testimony of Jason C.
19 Sun, prospective rebuttal witness for the United States in the Phase II trial commencing October
20 6, 2008. Tejon's motion should be denied because it is based on an incomplete set of facts and
21 an inaccurate interpretation of the law. Further, the United States' expert witness was noticed
22 and available for deposition and, therefore, Tejon was not prejudiced in its preparation for the
23 Phase II trial.

24 I. Background.

25 California Code of Civil Procedure § 2034.260 requires the filing of an expert witness
26 declaration including, *inter alia*, a brief narrative statement of the general substance of the
27

1 testimony that the expert is expected to give. *See id.* at section (c)(2). On August 15, 2008, the
2 United States submitted an Expert Witness Declaration identifying Dr. June Oberdorfer as the
3 testifying expert for its case in chief for the Phase II trial. Dr. Oberdorfer's testimony was
4 described as follows:

5 Dr. Oberdorfer has been asked to provide testimony for the upcoming Phase II
6 trial on the issue of basin characteristics and the existence of hydraulically
7 isolated subbasins. In general, the substance of her expert opinion testimony is
8 that the Antelope Valley groundwater adjudication area consists of a single
9 hydrogeologic groundwater basin. She will show that while faults and other
10 features have been used in the past to subdivide the Antelope Valley groundwater
11 basin into geologic subunits, these subunits are hydraulically interconnected, with
12 no area being hydraulically isolated from the others. She will further testify that
13 regional ground water flow models developed for the Antelope Valley show
14 groundwater flow to occur between subunits, with flow moving from recharge
15 areas to discharge areas.

16 On that date, Tejon also filed a declaration identifying two experts who may be called to
17 testify: Dr. A. E. John List and Dr. Richard A. Rhone. The substance of both identified experts
18 potential testimony was described, in their entirety, as:

19 The characteristics of the Antelope Valley Groundwater Basin and, in particular,
20 the West Antelope Valley Sub-Basin.

21 Tejon Ranchcorp's Exchange of Expert Witness Testimony (August 15, 2008), at 2-3.

22 Consistent with the order of the Court, the United States, Tejon and others filed reports of their
23 experts describing opinions their respective experts have developed concerning the Phase II trial
24 issues. Tejon's expert report includes a detailed opinion on the use of, and results from, a
25 computer model for simulating groundwater flow in the western Antelope Valley. Tejon's
26 experts used for their interpretation a U.S. Geological Survey (USGS) regional flow model
27 (Leighton and Phillips, 2003).

28 The United States reviewed the Tejon expert witness reports and determined that it may
29 wish to offer rebuttal testimony to their experts' specific use of and conclusions derived from the
30 groundwater model. Because the anticipated rebuttal testimony may contradict the opinion of
31 Tejon's experts, the United States, on September 4, 2008, identified Dr. Jason Sun as a
32 supplemental expert witness. Dr. Sun has conducted ground water model simulations and has

1 reviewed ground water model calibration for over 10 years. Dr. Sun has also reviewed,
2 modified, and/or constructed ground water models in southern California since 2005. *See* United
3 States' Supplemental Witness Declaration (September 4, 2008), at 2.

4 Pursuant to Cal. Civ. Proc. Code § 2034.280, the United States' supplemental Expert
5 Witness Declaration includes a brief narrative statement of the general substance of the
6 testimony that Dr. Sun may give:

7 Dr. Sun may provide rebuttal testimony to refute opinions of other experts on the
8 use of hydrogeological modeling to establish the existence of subbasins in the
Antelope Valley.

9 United States' Supplemental Witness Declaration (September 4, 2008), at 2. Also pursuant to
10 Cal. Civ. Proc. Code § 2034.280, the United States announced that Dr. Sun was made available
11 for deposition. After consultation among attorneys participating in the Phase II trial, including
12 counsel for Tejon Ranchcorp, it was agreed that Dr. Sun's deposition would occur on October 2,
13 2008 commencing at 9:00 a.m. at the Best, Best & Krieger offices in Ontario, California.

14 By letter dated September 17, 2008, Tejon requested the United States supplement its
15 declaration and expand on the general substance of Dr. Sun's testimony. In a telephonic
16 conversation that day or soon after, counsel for the United States explained to counsel for Tejon
17 that Dr. Sun was identified for rebuttal purposes only on the use of the USGS model, as
18 explained in the earlier declaration. It was also explained that the United States was continuing
19 to examine the use of the groundwater model by Tejon's experts and would endeavor to expand
20 on the general substance of the expected rebuttal testimony.

21 Nevertheless, on September 29, 2008, Tejon filed the present motion. Approximately 19
22 minutes later, the United States filed a supplement to the declarations of Drs. Oberdorfer and
23 Sun. The supplement expanded upon the brief narrative statement of the general substance of
24 the testimony of Drs. Oberdorfer and Sun with a three page description of potential rebuttal
25 testimony which may be offered by Drs. Oberdorfer or Sun.

26 Counsel for the United States contacted counsel for Tejon soon after the concurrent
27 September 29 filings. Tejon was asked whether, in light of the United States' supplemental

1 declaration, it would agree that Tejon's motion to exclude Dr. Sun because of a purported failure
2 to disclose his opinion was now moot, and whether the motion would be withdrawn. Tejon
3 declined to withdrawal its motion.

4 On October 2, 2008, Dr. Sun's deposition was conducted at the scheduled time and place.
5 Upon information and belief, counsel for Tejon did not attend or in any other manner participate
6 in Dr. Sun's deposition.

7 II. Argument.

8 1. The United States complied with California Code of Civil Procedure § 2034.260

9 Contrary to Tejon's statement in its memorandum of Points and Authorities in support of
10 its Motion in Limine, the United States did submit a proper expert disclosure under Cal. Civ.
11 Proc. Code Section 2034.260 for Dr. Sun. Tejon acknowledges that a supplemental Expert
12 Witness Declaration identifying Dr. Sun was timely filed by the United States. In fact, Tejon
13 attaches to its motion as Exhibit A a copy of the United States' declaration. Tejon's argument
14 does not go to whether the United States filed a brief narrative statement on the general
15 substance of Dr. Sun's testimony. Rather, Tejon argues that the declaration does not "disclose
16 what opinions Mr. Sun will offer at trial." Motion in Limine, at 2. Tejon misconstrues the
17 requirement in Section 2034.260, specifying generally what the expert will testify to, as
18 requiring the expert declaration to specify what the expert's opinion will be at trial. By its own
19 terms, Section 2034.260 does not require that the declaration specify what the experts opinions
20 will be, merely what the "general substance" of the testimony will be.^{1/}

21
22 ^{1/} Section 2034.260(c) specifies the requirements for an expert witness declaration. It provides that
23 the declaration shall contain:

- 24 (1) A brief narrative statement of the qualifications of each expert.
- 25 (2) A brief narrative statement of the general substance of the testimony that the expert is
26 expected to give.
- 27 (3) A representation that the expert has agreed to testify at the trial.
- 28 (4) A representation that the expert will be sufficiently familiar with the pending action to
submit to a meaningful oral deposition concerning the specific testimony, including any
opinion and its basis, that the expert is expected to give at trial.

1 The authority cited by Tejon does not support its position. In *Bonds v. Roy*, 20 Cal. 4th
2 140 (1999), an expert witness attempted to expand the scope of his testimony on the last day of
3 trial into a different subject matter than previously declared. The expert was not permitted to
4 testify at trial on a whole new area of testimony not disclosed in the party's declaration. The
5 trial court "properly limited the [expert's] testimony to the area described in the expert witness
6 declaration." *Id.* at 143.

7 The declaration for Dr. Sun does contain the "general substance" of his potential expert
8 testimony.² He was identified to "provide rebuttal testimony to refute opinions of other experts
9 on the use of hydrogeological modeling to establish the existence of subbasins in the Antelope
10 Valley." Tejon, having submitted a report with analysis of a hydrogeological model to support
11 its claim of the existence of a subbasin in the Antelope Valley, can hardly argue that it surprised
12 or prejudiced by the subject matter of Dr. Sun's potential testimony.

13 In addition, though not necessary, Dr. Sun's brief narrative was greatly expanded in his
14 and Dr. Oberdorfer's supplemental declaration, filed September 29, 2008. This supplement
15 describes in detail the substance of possible testimony in rebuttal to the opinions expressed by
16 Tejon's experts.

22 (5) A statement of the expert's hourly and daily fee for providing deposition testimony and
23 for consulting with the retaining attorney.

24 Cal. Civ. Proc. Code § 2034.260(c) (emphasis added).

25 ² Moreover, the general description of Dr. Sun's testimony is almost twice the length of the
26 general description of the Tejon experts' expected testimony contained in the Tejon declaration,
27 which stated simply "[t]he characteristics of the Antelope Valley Groundwater Basin and, in
particular, the West Antelope Valley Sub-Basin.

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2 2. The purpose of Cal. Civ. Proc. Code Section 2034.260 is to inform parties of an
3 expert's general substance of testimony so that a deposition may be taken to fully
4 explore the expected testimony.

5 Tejon further ignores the purpose of the requirement of a brief narrative statement in Cal.
6 Civ. Proc. Code § 2034.260. It allows a party to depose an expert to fully explore the expected
7 testimony. "The information contained in [an expert witness] declaration allows the parties to
8 assess within a short time frame 'whether to take the expert's deposition, to fully explore the
9 relevant subject area at any such deposition, and to select an expert who can respond with a
10 competing opinion on the subject area.'" *Schreiber v. Estate of Kiser*, 22 Cal.4th 31 (1999)
11 (citation omitted). The subject area of the expert's opinion is to be "fully explored . . . at any
12 such deposition." *Bonds*, 20 Cal. 4th at 146. Thus, it is the expert's deposition, not counsel's
13 expert declaration in the disclosure, where the expert's actual opinion must be fully disclosed.

14 In cooperation with all counsel, Dr. Sun was made available for deposition on October 2,
15 2008. Tejon Ranchcorp chose not to attend Dr. Sun's deposition. Consequently, Tejon cannot
16 demonstrate prejudice.

17 III. Conclusion.

18 Based on the forgoing, the United States respectfully asks that Tejon's motion be denied.

19 Respectfully submitted this 2nd day of October, 2008,

20 RONALD J. TENPAS
21 Assistant Attorney General
22 Environment and Natural Resources Division

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13 *Attorneys for the United States*

14
15 DECLARATION OF R. LEE LEININGER

16 I, R. Lee Leininger, declare as follows:

- 17 1. I have personal knowledge of the facts below, and if called upon to do so, I could testify
18 competently thereto in a court of law.
- 19 2. I am licensed to practice law in the State of Colorado. I am an attorney in good standing
20 employed by the United States Department of Justice.
- 21 3. On August 15, 2008, the United States submitted an Expert Witness Declaration
22 identifying Dr. June Oberdorfer as the testifying expert for its case in chief for the Phase II trial.
- 23 4. On September 4, 2008, the United States identified Dr. Jason Sun as a supplemental
24 expert witness. Dr. Sun has conducted ground water model simulations and has reviewed
25 ground water model calibration for over 10 years. Dr. Sun has also reviewed, modified, and/or
26 constructed ground water models in southern California since 2005.
- 27 5. Dr. Sun was made available for deposition after consultation among attorneys
28 participating in the Phase II trial, including counsel for Tejon Ranchcorp, on October 2, 2008
commencing at 9:00 a.m.

1 6. By letter dated September 17, 2008, Tejon requested the United States supplement Dr.
2 Sun's declaration and expand on the general substance of his testimony. On or about September
3 17, counsel for the United States explained to counsel for Tejon that Dr. Sun was identified for
4 rebuttal purposes only, as explained in his earlier declaration. It was also explained that the
5 United States was continuing to examine the use of the groundwater model by Tejon's experts
6 and would endeavor to expand its brief narrative statement.

7 7. On September 29, 2008, the United States filed a supplement to the declarations of Drs.
8 Oberdorfer and Sun. The supplement expanded upon the brief narrative statement of the general
9 substance of the testimony of Drs. Oberdorfer and Sun with a three page description of potential
10 rebuttal testimony which may be offered by Drs. Oberdorfer or Sun on the use of the
11 groundwater model.

12 8. Counsel for the United States contacted counsel for Tejon soon after the September 29
13 filings. Tejon was asked whether, in light of the United States' supplemental declaration, it
14 would agree that Tejon's motion to exclude Dr. Sun because of a purported failure to disclose his
15 opinion was now moot, and whether the motion would be withdrawn. Tejon declined to
16 withdrawal its motion.

17 9. On October 2, 2008, Dr. Sun's deposition was conducted at the scheduled time and place.
18 Upon information and belief, counsel for Tejon did not attend or in any other manner participate
19 in Dr. Sun's deposition.
20

21 s/ R. Lee Leininger

22 R. Lee Leininger
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PROOF OF SERVICE

I, Linda C. Shumard, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environmental and Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

On October 2, 2008, I caused the foregoing documents described as; **UNITED STATES' OPPOSITION TO TEJON RANCHCORP'S MOTION *IN LIMINE* FOR ORDER EXCLUDING EXPERT TESTIMONY OF JASON C. SUN**, to be served on the parties via the following service:

BY ELECTRONIC SERVICE AS FOLLOWS by posting the documents(s) listed above to the Santa Clara website in regard to the Antelope Valley Groundwater matter.

BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By placing true copies thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

BY OVERNIGHT COURIER: I caused the above-referenced document(s) be delivered to FEDERAL EXPRESS for delivery to the above address(es).

Executed on October 2, 2008, at Denver, Colorado.

/s/Linda C. Shumard _____
Linda C. Shumard
Legal Support Assistant