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Attorneys for the United States

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Coordination Proceeding)	Judicial Council Coordination
Special Title (Rule 1550(b)))	Proceeding No. 4408
)	
ANTELOPE VALLEY GROUNDWATER CASES)	[Assigned for all Purposes to the
)	Honorable Jack Komar]
Included actions:)	
)	FEDERAL DEFENDANTS'
<u>Los Angeles County Waterworks District No. 40 v.</u>)	REQUEST TO CLARIFY AND
<u>Diamond Farming Co., et al.</u>)	AMEND THE MARCH 22 CASE
Los Angeles County Superior Court, Case No. BC 325)	MANAGEMENT ORDER
201)	
)	
<u>Los Angeles County Waterworks District No. 40 v.</u>)	
<u>Diamond Farming Co., et al.</u>)	
Kern County Superior Court, Case No. S-1500-CV-)	
254-348)	
)	
<u>Wm. Bolthouse Farms, Inc. v. City of Lancaster</u>)	
<u>Diamond Farming Co. v. City of Lancaster</u>)	
<u>Diamond Farming Co. v. Palmdale Water District</u>)	
Riverside County Superior Court, Consolidated Action,)	
Case nos. RIC 353 840, RIC 344 436, RIC 344 668)	
)	
AND RELATED CROSS ACTIONS)	
_____)	

**FEDERAL DEFENDANTS' REQUEST TO CLARIFY AND AMEND
THE MARCH 22 CASE MANAGEMENT ORDER**

1
2 Pursuant to the Court's *Order After Case Management Conference on March 22, 2010*
3 ("Order") allowing parties to request clarification of the Order, the United States respectfully
4 requests a clarification regarding the duty to file written expert reports. The Order instructs
5 parties "shall comply with the provisions of Code of Civil Procedure Section 2034.210 and
6 engage in a simultaneous disclosure and exchange of expert information, including any reports
7 prepared by such experts, on July 1, 2010." *Id.* at 2. As understood by the United States from
8 discussions during the March 22 conference, testifying experts must file an expert disclosure
9 statement which provides general information about the subject matter of their testimony. The
10 United States therefore respectfully requests that the Court clarify its March 22 Order to require
11 that all testifying experts prepare and file a report on or before July 1. Further, to avoid
12 prejudice and the difficulties encountered in the Phase II trial preparations (described below), the
13 United States also asks that the Court order that all reports detail and document the expert's
14 opinion and include the data or other information considered by the expert witness in forming his
15 or her opinion.

16 During the month prior to and well into the Phase II trial commencing on October 6,
17 2008, the parties engaged in, at times, rancorous disagreements on the sufficiency of expert
18 witness opinion proffered in reports and at depositions. The Phase II trial involved a discrete
19 issue of basin characteristics and hydraulic connectivity of groundwater in the Antelope Valley
20 basin. Some parties filed expert reports when they designated experts on August 15, 2008.^{1/}
21 Many did not. Of the parties that filed expert reports, other parties objected to the sufficiency of
22 the reporting. Depositions of parties were scheduled and re-scheduled as disputes arose whether
23 a party's expert would testify at trial and the nature of his or her substantive testimony.

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26 ^{1/} Expert reports were originally due on June 27, 2008. *See Amended Order After Case*
27 *Management Conference*, dated May 27, 2008. Upon motions of various parties the Court extended
28 the expert report deadline to July 27, *see Order Granting Relief from Expert Disclosure Deadline*,
dated June 18, 2008, and then again from June 27 to August 15, 2008. *See Minute Order*, dated June
25, 2008

1 Numerous pleadings (motions in limine, motions to exclude, letters of protest, *et al.*) were filed
2 in the six weeks prior to beginning of trial challenging expert reporting and opinion, or lack
3 thereof.^{2/} Additional controversy arose and more pleadings were filed during the break in trial in
4 October. As a result, parties were forced to spend time and resources writing or responding to
5 allegations regarding anticipated expert testimony, rather than direct preparation for trial.

6 To avoid a repeat of such a contentious exchange of motions and correspondence, and to
7 promote efficient discovery and trial preparation, the Court should exercise its judicial powers in
8 this complex coordinated case to establish special procedures controlling the reporting of
9 experts. Under the California rules of civil procedure, testifying experts are to file an expert
10 witness declaration which includes "a brief narrative statement of the general substance of the
11 testimony that the expert is expected to give." Code Civ. Proc. § 2034.260(c)(2). The brief
12 narrative is intended to supply basic information of what an expert will say at trial and allow the
13 parties to fully explore the relevant subject area at the expert's deposition. *See Bonds v. Roy*, 20
14 Cal.4th 140, 146-47 (1999). In a technically complex case such as the Antelope Valley
15 Groundwater adjudication involving numerous experts, however, a brief narrative compounds
16 the difficulty in ascertaining an expert's opinion and, as shown in Phase II trial preparations, can
17 lead to charges of intentional or unintentional delay in achieving full disclosure of a party's

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19 ^{2/} See e.g., *Demand for Exchange of Expert Reports and Writings*, filed Aug. 15, 2008 (Docket
20 No. 1820); *Letter from Robert G. Kuhs to Douglas J Evertz Regarding Expert Witness Disclosure*,
21 filed Aug. 22, 2008 (Docket No. 1848); *Letter from Robert G. Kuhs to R. Lee Leininger Regarding*
22 *Supplemental Expert Witness Declaration*, filed Sept. 17, 2008 (Docket No. 2025); *Motion in Limine*
23 *for Order Excluding Expert Testimony of Jason C. Sun*; *Memorandum of Points and Authorities;*
24 *and Declaration of Robert G. Kuhs in Support Thereof*, filed Sept. 29, 2008 (Docket No. 2076);
25 *Letter from Richard G. Zimmer to Jim Markman Regarding Deposition of Tom Sheahan*, filed Sept.
26 30, 2008 (Docket No. 2097); *Public Water Suppliers' Opposition to Tejon Ranchcorp's Motion in*
27 *Limine for Order Excluding Expert Testimony of (1) Joseph Scalmanini, (2) Kenneth Utley, and (3)*
28 *Dennis Williams*; *Declaration of Jeffrey V. Dunn in Support Thereof*, filed Oct. 2, 2008 (Docket No.
2120); *Bolthouse Properties, LLC's Opposition to Motion in Limine of Tejon Ranchcorp to Exclude*
Expert Testimony of N. Thomas Sheahan, filed Oct. 2, 2008 (Docket No. 2119); *Letter from*
Kimberly A. Huangfu to All Counsel Regarding Procedure for Expert Depositions, filed Oct. 2, 2008
(Docket No. 2116).

1 position and expert’s opinion. In order to provide more efficient discovery, the United States
2 therefore requests that the Court require a fuller expert disclosure akin to that required under the
3 Federal Rules.

4 In contrast to C.C.P. § 2034, Federal Rule of Civil Procedure Rule 26(a)(2)(B) provides
5 detailed requirements for testifying expert disclosures. For example, the federal rules require
6 witness reports that are “a *complete statement* of all opinions the witnesses will express and the
7 basis and reasons for them.” *Id.* (emphasis added). Significantly, the federal rule also requires
8 the expert’s report to contain data or other information considered in forming opinions.^{3/} Fed. R.
9 Civ. P. 26 was enacted and evolved as a tool to promote efficient discovery and “remove surprise
10 from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their
11 dispute.” *United States ex rel. Schwartz v. TRW, Inc.*, 211 F.R.D. 388, 392 (C.D. Cal. 2002)
12 *citing Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998). More
13 specifically, the federal expert disclosure requirements are imposed upon parties so that both
14 sides may “prepare for trial or make an informed decision about settlement.” Rule 26 Advisory
15 Committee Notes. Rule 26 subdivision (a) was amended in 1993 to the current enumeration of
16 the items to be disclosed. The purpose of this amendment was “to accelerate the exchange of
17 basic information about the case and to eliminate the paper work involved in requesting such
18 information. . . .” Rule 26, advisory committee notes, 1993 amendments.

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20 ^{3/} Fed. R. Civ. P. 26(a)(2)(B) states, in full:

21 Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be
22 accompanied by a written report--prepared and signed by the witness--if the witness is one retained
23 or specially employed to provide expert testimony in the case or one whose duties as the party's
24 employee regularly involve giving expert testimony. The report must contain:

- 25 (i) a complete statement of all opinions the witness will express and the basis and reasons
26 for them;
- 27 (ii) the data or other information considered by the witness in forming them;
- 28 (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous
10 years;
- (v) a list of all other cases in which, during the previous four years, the witness testified as
an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

1 In coordinated proceedings, judges are vested with “whatever great breadth of discretion
2 that may be necessary and appropriate to ease the transition through the judicial system and the
3 logjam of cases which gives rise to coordination.” *Abelson v. National Union Fire Ins. Co.*, 28
4 Cal. App. 4th 776, 786 (Cal. Ct. App. 1994) (quoting *McGhan Medical Corp. v. Superior Court*,
5 11 Cal. App. 4th 804, 812 (Cal. Ct. App. 1992). Procedures available to the coordinated trial
6 judge are flexible. *Id.* In light of events during the Phase II trial, the Court should exercise its
7 discretion and require disclosure of detailed statements and supporting data in order to promote
8 efficiency and better exchange of information and to remove trial by surprise in what is likely to
9 be a highly technical and expert driven trial.

10 Accordingly, the United States respectfully requests the Court amend the March 22 Order
11 to specify that (1) expert reports from all testifying experts are required, (2) expert reports shall
12 be a complete and detailed statement of the expert’s opinion and the rationale behind the
13 opinion, and (3) expert reports shall include the data considered in forming the expert’s opinion.

14 Respectfully submitted this 15th day of April 2010.

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16 _____
17 /s/
18 R. LEE LEININGER
19 JAMES J. DUBOIS
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PROOF OF SERVICE

I, Karmen Robinson, 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 April 15, 2010, I caused the foregoing documents described as; **FEDERAL DEFENDANTS' REQUEST TO CLARIFY AND AMEND THE MARCH 22 CASE MANAGEMENT ORDER**, 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 April 15, 2010, at Denver, Colorado.

/s/ Karmen Robinson
Karmen Robinson
Paralegal Specialist