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GOVERNMENT CODE SECTION 6103

Attorneys for Federal Defendants

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

Coordination Proceeding Special Title (Rule 1550(b)))	Judicial Council Coordination Proceeding No. 4408
ANTELOPE VALLEY GROUNDWATER CASES)	
Included actions:)	UNITED STATES' REPLY TO OPPOSITION TO REQUEST FOR JUDICIAL NOTICE
<u>Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., et al.</u>)	Phase 3 Trial Date: Date: January 4, 2011 Time: 9:00 a.m. Dept: 4, LASC
Los Angeles County Superior Court, Case No. BC 325 201)	
<u>Los Angeles County Waterworks District No. 40 v. 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)	
_____)	

The Antelope Valley Ground Water Agreement Association (“AGWA”) and the
Bolthouse Properties, LLC and Wm. Bolthouse Farms, Inc (collectively “Bolthouse”) object to
the Court taking judicial notice of a United States Geological Survey (“USGS”) document
showing a tabulation of compaction measurements recorded at a well site (the “Holly Site”)

1 located on Edwards Air Force Base (“EAFB”) in the Antelope Valley. AGWA argues that such
2 data should not be accepted into evidence because it was not specifically mentioned in the
3 deposition testimony of the United States’ expert, Dr. June Oberdorfer, nor the depositions of the
4 Public Water Suppliers’ experts Dr. Wildermuth or Mr. Scalmanini. See Objections of Antelope
5 Valley GroundWater Agreement Association to United States’ Request for Judicial Notice
6 (“AGWA Obj.”), filed December 22, 2010, at 2 - 3. They further argue that any opinion
7 testimony regarding the data proffered by hydrology experts at trial should be disallowed
8 because the landowners have not had an opportunity to review and critique the anticipated expert
9 “calculations and interpretation.” Id. at 4.

10 Bolthouse argues that the “extensometer data in question involves only one location and
11 is of questionable relevance and persuasive value.” See Bolthouse Properties, LLC's and Wm.
12 Bolthouse Farms, Inc.'s Objection to United States' Request for Judicial Notice and Joinder in
13 Objection by AGWA Regarding Same (“Bolthouse Obj.”), filed December 29, 2010, at 2.
14 Nevertheless, Bolthouse avers that taking judicial notice of the data would be “extremely
15 prejudicial.” Id. at 3. The opponent also argues that the document is inadmissible hearsay and,
16 in any case, the data “is not the type of document which may properly be judicially noticed.” Id.
17 at 4.

18 These arguments are without merit.

19 1. Judicial notice of the USGS data is proper.

20 Judicial notice “is a long-established substitute for normal proof by evidence” and
21 encompasses adjudicative facts relevant to a determination of the claims presented in the case.
22 60 Am. Jur. 3d Proof of Facts § 175 (2010). “The fundamental theory of judicial notice is that
23 the matter that is judicially noticed is one of law or fact that cannot reasonably be disputed.”
24 Post v. Prati, 90 Cal. App. 3d 626, 633 (1979) (citation omitted). Neither AGWA nor Bolthouse
25 offers proof (or citation to legal authority) to overcome the presumption that the USGS properly
26 performed its duties in acquiring the data. Nor have the objectors attempted to show that the
27 certified data is unauthentic, or not what it purports to be - the real-time measurements of land
28 compaction at a location on EAFB.

1 Instead, the objectors argue that the data is unfairly submitted because the subject matter
2 - land subsidence - has never been at issue. This allegation is incorrect. Both the United States
3 and the Public Water Suppliers and their experts did aver and place at issue the question of
4 subsidence in the Antelope Valley Groundwater Basin. The United States's expert Dr. June
5 Oberdorfer was identified as an expert witness testifying on the state of the aquifer and
6 concluded that "overdraft [of the Basin] demonstrates that the current rate of pumping is
7 unsustainable and, if water levels continue to decline as they have over the last decade in many
8 areas, *significant land subsidence could be re-initiated* and additional negative consequences to
9 the basin be produced." See Expert Witness Declaration, report attached as Exhibit B at 6-7
10 (emphasis added). She was also deposed and asked whether subsidence data existed. As shown
11 in the response to the AGWA Motion in Limine No. 4, Dr. Oberdorfer responded that she was
12 aware of subsidence because of studies performed by the United States Geological Survey
13 ("USGS"), dating back to the 1960s. See United States' Supplemental Response to AGWA'S
14 Motion in Limine No. 4, filed December 30, 2010. Further, she stated that her general awareness
15 of the subsidence that had occurred in the past decade came from more recent studies containing
16 USGS extensometer data. Id. Mr. Scalmanini was also asked about the extensometer data at his
17 deposition. As shown by the Public Water Provider's Opposition to AGWA'S Motion in Limine
18 No. 4; Declaration of Stefanie Hedlund, filed December 29, 2010, at 7, Mr. Scalmanini not only
19 discussed subsidence and the existence of extensometer data, he also stated that the
20 extensometers have been collecting data in the Basin since 1990, and that "subsidence continues
21 for all practical purposes linearly from 1990 to present."

22 The document the United States has moved for judicial notice is the most recently
23 collected data of subsidence by the USGS (October 1, 2004 to September 30, 2009) at the Holly
24 Site. This information has been collected for years and is publically available from the USGS.
25 Previous studies by the USGS have analyzed the extensometer data from the Holly Site well on
26 EAFB and the results have been published. Both Dr. Oberdorfer and Mr. Scalminini notified
27 AGWA and Bolthouse of the existence of this data source. The objectors cannot credibly be
28 surprised that such information exists. More fundamentally, however, surprise is not a valid

1 ground for refusing judicial notice.

2 2. The measurement data is evidence of subsidence.

3 AGWA contends that even if the Court takes judicial notice of the USGS public records
4 themselves, the Court cannot take judicial notice of the *truth* of the compaction data contained in
5 the records. AGWA Obj. at 2. The case AGWA cites in support of its theory, Love v. Wolf,
6 involved an attempt to have a senator’s “critical and caustic comments” regarding
7 pharmaceutical marketing practices judicially noticed for their truth because they were contained
8 in a congressional transcript, which is a public record. Love v. Wolf, 226 Cal. App. 2d 378, 403
9 (Cal. Ct. App. 1964). Id. But Love involved a public transcript containing a senator’s
10 inflammatory and subjective opinions; it is entirely inapposite in the context of public records
11 which compile objective data recorded by scientific instruments, like the Holly Site
12 extensometer data. The USGS records at issue simply collect compaction measurements
13 recorded at the Holly Site at periodic intervals. The data is measured by scientific instruments
14 and recorded electronically. It contains no element of subjectivity or opinion, and a court may
15 properly take judicial notice of the data as true measurements of compaction at the Holly Site.

16 Bolthouse similarly asserts that the Court cannot take judicial notice of the *accuracy* of
17 the compaction data because “there has been no showing that the extensometers were maintained
18 and calibrated” to provide accurate data. Bolthouse Obj. at 5. However, Bolthouse’s argument
19 overlooks the presumption in California that official duties have been regularly performed. Cal.
20 Evid. Code § 664; see Furman v. Dep’t. of Motor Vehicles, 100 Cal. App. 4th 416, 422 (Cal. Ct.
21 App. 2002). The official duty of the USGS is to provide the nation with specialized geologic,
22 natural resources, and groundwater data to facilitate environmental protection and effective land-
23 management. See 43 U.S.C. § 31 (*et seq.*) (2010). The data collected and recorded from the
24 extensometer at the Holly Site was compiled pursuant to this USGS duty under federal law, and
25 there is no evidence of defective equipment or other irregularities in the recording or
26 certification of this data. When a public record is certified by an official operating under a
27 public duty, it is presumed that the data contained therein is accurate, and the burden shifts to the
28 party challenging the data to rebut the presumption with more than speculation. See Petricka v.

1 Dep't. of Motor Vehicles, 89 Cal. App. 4th 1341, 1348-50 (Cal. Ct. App. 2001) (burden shifted
2 to defendant to prove officer did not properly perform blood-alcohol test). Neither AGWA nor
3 Bolthouse has presented any evidence that would rebut this standard presumption under
4 California law, and the Court may judicially notice the extensometer data as accurate compaction
5 measurements.

6 3. The data is not inadmissible hearsay.

7 Bolthouse claims that the extensometer data is inadmissible hearsay. Bolthouse Obj. at
8 4-5. Bolthouse, however, does not address or even mention Evidence Code section 1280. This
9 provision states:

10 Evidence of a writing made as a record of an act, condition, or event is not made
11 inadmissible by the hearsay rule when offered in any civil or criminal proceeding
12 to prove the act, condition, or event if all of the following applies: (a) The writing
13 was made by and within the scope of duty of a public employee. (b) The writing
14 was made at or near the time of the act, condition, or event. (c) The sources of
15 information and method and time of preparation were such as to indicate its
16 trustworthiness.

14 Bolthouse appears to argue that the third foundational requirement - that the USGS data is
15 trustworthy - has not been met. Bolthouse Obj. at 5 (“there has been no showing that
16 the extensometers were maintained and calibrated and that they produced accurate data.”)

17 “[T]he trustworthiness of the method of preparation of the record is . . . supported by the
18 presumption, contained in Evidence Code section 664, that “official duty has been regularly
19 performed.” Bhatt v. Dep't of Health Servs. for State, 133 Cal. App. 4th 923, 931 (Cal. App.
20 2005) (quoting lower court decision). “This presumption shifts the burden of proving the
21 foundational issue of trustworthiness of the method of preparing the official writing to the party
22 objecting to the admission of the official writing.” Id. Again, neither Bolthouse nor AGWA
23 presented evidence to establish that the USGS or its methods of data collection were
24 untrustworthy. Therefore, the data is an exception to the hearsay rule.

25 4. The data itself has relevance independent of expert testimony.

26 Finally, AGWA and Bolthouse Properties argue that the USGS records should not be
27 judicially noticed because expert testimony is necessary for the Court to understand the data, and
28 the objecting parties have not had adequate opportunity to prepare their own experts. The Court

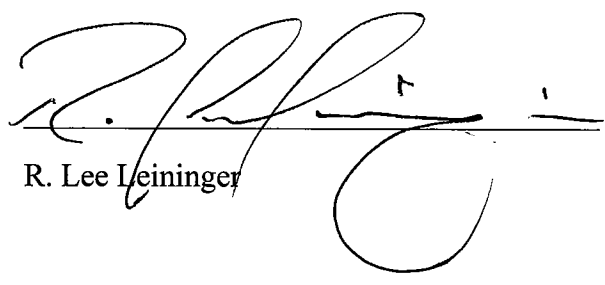
1 may take judicial notice of the USGS records because, as previously discussed, they have been
2 officially certified, they fall under the government records exception to the hearsay rule, and they
3 have relevance independent of the expert testimony concerning them.

4 The compaction measurements contained within the USGS records are relevant evidence
5 even without interpretation by expert witnesses. The test for relevant evidence is “whether the
6 evidence tends logically, naturally, and by reasonable inference to establish material facts”
7 People v. Fields, 175 Cal. App. 4th 1001, 1016 (Cal. Ct. App. 2009). Even a lay person can
8 logically infer from the trend in data values that the extensometer measurements are increasing
9 over time. As Mr. Bunn explained, “the extensometers actually measure how much the land
10 goes down . . . There is no analysis that goes into this.” AGWA Obj. at 3 (citing Dec. 15, 2010
11 Reporter’s Transcript, 43:9-16). The fact that measurements at the Holly Site are notably
12 increasing demonstrates that subsidence is occurring in the Antelope Valley basin, and therefore,
13 that the aquifer is suffering the effects of overdraft. Although the Court would probably benefit
14 from expert testimony that analyzes the significance of the USGS data in greater detail, the data
15 does not “require” expert analysis to be relevant, as AGWA contends. AGWA Obj. at 3. The
16 raw data itself is relevant even without expert interpretation because it reveals an on-going trend
17 in compaction measurements from which a fact finder can reasonably infer that the land at the
18 Holly Site is subsiding in the period of record, October 1, 2004 to September 30, 2009 .

19 There is no question this information is relevant to the issues of safe yield and overdraft.
20 AGWA even “acknowledges the Court's duties with respect to the public interest in the Antelope
21 Valley Groundwater Basin,” including the intent of the Court to “hear all relevant evidence
22 during the Phase III Trial and [its] . . . affirmative duty to seek out such evidence if not presented
23 by the parties.” AGWA Obj. at 2. As relevant information presumed to be properly acquired
24 and officially certified true and correct, the extensometer data is precisely the type of document
25 of which the Court may and should take judicial notice.

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Dated this 3rd day of January 2011.



R. Lee Leininger

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, Environment and Natural Resources Section, 999 18th Street, South Terrace - Suite 370, Denver, Colorado 80202.

On January 3, 2011, I caused the foregoing document(s) described as: **UNITED STATES' REPLY TO OPPOSITION TO REQUEST FOR JUDICIAL NOTICE**, to be served on the parties via the following service:

BY ELECTRONIC SERVICE AS FOLLOWS by posting the document(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 January 3, 2011, at Denver, Colorado.

/s/ Karmen Robinson
Karmen Robinson
Paralegal Specialist