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

Coordination Proceeding Special Title (Rule 1550 (b)), ANTELOPE VALLEY GROUNDWATER CASES	Judicial Council Coordination Proceeding No. 4408 [Assigned to the Honorable Jack Komar, Judge Santa Clara County Superior Court, Dept. 17] Santa Clara Court Case No. 1-05-CV-049053 UNITED STATES' RESPONSE TO BRIEFING ON EXCLUSION OF EXPERT TESTIMONY
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1 The United States hereby responds to Diamond Farming Company, et al.'s, *Briefing on*
2 *Exclusion of Expert Testimony Regarding Opinions Outside the Stated Parameters of Testimony*
3 *Contained in the Expert Witness Declaration*, filed February 8, 2014. Diamond appears to make
4 a motion asking the Court to exclude portions of the United States' expert's testimony (for Mr.
5 Rand Herbert) in the Phase 5 trial. Diamond does not specify what should be excluded from Mr.
6 Herbert's expert testimony. Diamond makes a broad complaint that any opinions that had not
7 been disclosed in the Expert Witness Declaration describing the scope of Mr. Herbert's
8 testimony should be excluded. *Id.* at 2. However, when counsel for Diamond made an objection
9 to Mr. Herbert's testimony at trial, it was focused on Mr. Herbert's opinion on historic water use
10 at Edwards Air Force Base and Air Force Plant 42. To allow such testimony, Diamond argues,
11 would violate Code of Civil Procedure section 2034, et seq. *Id.*

12 CCP § 2034, subdivision (j), empowers a trial court to exclude the opinion testimony of
13 any expert witness who did not previously disclose that opinion at deposition. An important goal
14 of section 2034 is to enable parties to properly prepare for trial, and "[a]llowing new and
15 unexpected testimony for the first time at trial" is contrary to that purpose. *Jones v. Moore*, 80
16 Cal.App.4th 557, 566, 95 Cal.Rptr.2d 216, 221 (2000); *Bonds v. Roy*, *supra*, 20 Cal.4th 140, 83
17 Cal.Rptr.2d 289 (1999). That is certainly not the case here. At his deposition, Mr. Herbert was
18 asked repeatedly, and in depth, his opinion regarding historical water use at Edwards Air Force
19 Base and Air Force Plant 42:

20 Mr. Joyce: In your effort to do the historical research as to the either reservation
21 or acquisition or condemnation in order to create the conglomerate of real
22 property which is now known as Edwards Air Force Base, did you do any
23 historical evaluation or assessment of the water demands or needs of what you
24 refer to as Edwards Air Force Base over time?

24 Mr. Herbert: Yes.

25 Mr. Joyce: Were you able to locate any documents or any historical information
26 that quantified the amount of water that was needed for what is referred to as the
27 Edwards Air Force Base in connection with the very first reservation that you
28 allude to in 1934?

28 Mr. Herbert: I'd have to review the materials that I have to know how far back
they go. I know they go back to World War II. . . .

1 Transcript of the Deposition of Rand Frank Herbert, dated Tuesday, March 12, 2013, pg. 39, ll.
2 9-25, excerpts attached as Exhibit 1. Mr. Joyce also asked, “Were you able to isolate or locate
3 any well -- groundwater well production records for any of the wells associated with any of the
4 reservations?” *Id.* at 65, ll 15-18-16. Mr. Joyce then proceeded to inquire:

5 Mr. Joyce: Do you have any intention of providing testimony at trial concerning
6 any of the historical water consumption, either at Edwards Air Force Base or
7 Plant 42?

8 Mr. Herbert: If I'm asked to do so, yes.

9 Mr. Joyce: Have you been asked to do so prior to today?

10 Mr. Herbert: I've been told that may be an issue that I will have to address.

11 *Id.* at 80, ll 8-16. The deposition transcript follows this inquiry with 5 pages of questioning
12 regarding historical water consumption at the military facilities. Clearly, the issue of water use
13 was probed in depth at Mr. Herbert's deposition.¹ Accordingly, Diamond's "briefing" is without
14 merit and its request to exclude testimony should be denied.
15

16 RESPECTFULLY SUBMITTED this 17th day of February 2014.
17

18 /s/ R. Lee Leininger
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27 _____
28 ¹ No objection to this line of questioning was made by the federal counsel at the deposition
because the disclosure of Mr. Herbert as an expert on the historical acquisition and reservation of
the military sites and their purposes was broad enough to encompass historic water use.