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7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**
10

11 ANTELOPE VALLEY GROUNDWATER) Judicial Council Coordination No. 4408
CASES)

12 Included Actions:) Santa Clara Case No. 1-05-CV-049053
Assigned to Hon. Jack Komar

13 Los Angeles County Waterworks District No. 40)
14 v. Diamond Farming Co., Superior Court of) **MOTION *IN LIMINE* FOR ORDER**
California, County of Los Angeles, Case No. BC) **EXCLUDING EXPERT TESTIMONY**
15 325201;) **OF:**

16 Los Angeles County Waterworks District No. 40) **(1) JOSEPH SCALMANINI,**
17 v. Diamond Farming Co., Superior Court of) **(2) KENNETH UTLEY, AND**
California, County of Kern, Case No. S-1500-CV-) **(3) DENNIS WILLIAMS;**
18 254-348;) **MEMORANDUM OF POINTS**
AND AUTHORITIES; AND
19 Wm. Bolthouse Farms, Inc. v. City of Lancaster,) **DECLARATION OF ROBERT G.**
Diamond Farming Co. v. Lancaster, Diamond) **KUHS IN SUPPORT THEREOF**
20 Farming Co. v. Palmdale Water Dist., Superior)
Court of California, County of Riverside, Case)
21 No. RIC 353 840, RIC 344 436, RIC 344 668)

22 Phase 2 Trial Date: October 6, 2008
23

24 To: Los Angeles County Water Works District No. 40, Rosamond Community
25 Services District, City of Lancaster, Palmdale Water District, Quartz Hill Water
26

1 al.¹ (collectively the "Designating Parties") and their respective attorneys of record:


2 **I. MOTION**

3 TEJON RANCHCORP ("Tejon") hereby moves for an order excluding the expert
4 testimony of Joseph Scalmanini, Kenneth Utley, and Dennis Williams under Code of
5 Civil Procedure section 2034.300 on the ground that the Designating Parties have
6 unreasonably failed to submit an expert witness declaration setting forth a brief
7 narrative statement of the general substance of the testimony that each expert is
8 expected to give at the Phase 2 Trial.

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10 This motion is based on this motion, the memorandum of points and
11 authorities in part II hereof, the declaration of Robert G. Kuhs in part III hereof, the
12 records and papers on file herein, and on such other and further evidence as may be
13 presented at the hearing on the motion.

14 Dated: August 29, 2008

KUHS & PARKER

15
16 By 
17 Robert G. Kuhs,
18 Attorney for Tejon Ranchcorp

19 **II. POINTS AND AUTHORITIES**

20 **A. Introduction.**

21 The Phase 2 Trial is currently set for October 6, 2008. The sole issue before the
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25 Littlerock Creek Irrigation District, Palm Ranch Irrigation District, North Edwards
26 Water District, Desert Lake Community Services District, Llano-Rio Water Co., Llano
27 Mutual Water Co., Big Rock Mutual Water Co., and Little Baldy Water Co. (collectively
28 "Littlerock Creek Irrigation District, et al.>").

2

MOTION FOR ORDER EXCLUDING EXPERT TESTIMONY OF:

- (1) JOSEPH SCALMANINI,
- (2) KENNETH UTLEY, AND
- (3) DENNIS WILLIAMS;

MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF ROBERT G. KUHS IN SUPPORT THEREOF

1 court is whether there exists one or more basins within the Antelope Valley
2 Adjudication Area ("AVAA"). The court ordered the parties to make a written
3 disclosure of experts on August 15, 2008 pursuant to Code of Civil Procedure section
4 2034.260. Tejon and other parties filed expert disclosure declarations consistent with
5 section 2034.260; the Designating Parties did not. The Designating Parties
6 designated three experts, namely, Joseph Scalmanini, Kenneth Utley, and Dennis
7 Williams. Douglas J. Evertz, acting on behalf of all of the Designating Parties, filed a
8 proforma declaration identifying the substantive "areas" that each of the three
9 experts would address. Nowhere in the declaration, however, does Mr. Evertz
10 disclose what opinions the experts will offer at trial. Furthermore, none of the experts
11 produced a written report summarizing his anticipated opinions at trial.
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13
14 By letter dated August 22, 2008, Tejon requested that the Designating Parties
15 make a disclosure in compliance with section 2034.260 or risk exclusion at trial. The
16 Designating Parties refused to make such disclosure. Accordingly, Tejon brings this
17 motion to exclude from the Phase 2 Trial any opinion not expressly disclosed in the
18 Designating Parties' expert witness declaration.

19
20 **B. When A Party Fails to Disclose the Substance of an
Expert's Testimony, Exclusion From Trial is Mandatory.**

21 One of the principal purposes of civil discovery is to do away with the
22 "sporting theory of litigation - namely, surprise at trial." (*Chronicle Pub. Ca. v.*
23 *Superior Court* (1960) 54 Cal.2d 548, 561.) The purpose is accomplished by giving
24 "greater assistance to the parties in ascertaining the truth and in checking and
25

1 preventing perjury," and by providing "an effective means of detecting and exposing
2 false and fraudulent and sham claims and defenses." (*Greyhound Corp. v. Superior*
3 *Court* (1961) 56 Cal.2d 355, 376.) In other words, pretrial discovery is designed to
4 take the "game" out of pretrial preparation. (*Ibid.*) To fulfill this goal, the legislature
5 developed a comprehensive scheme for the orderly exchange of expert witness
6 information.

7
8 The exchange of retained expert witness information must include a
9 declaration. The declaration must contain a "**brief narrative statement of the**
10 **general substance of the testimony that the expert is expected to give.**" (Code Civ.
11 Proc., § 2034.260(c)(2) [emphasis added].) The purpose of the expert witness
12 disclosure is to give "fair notice of what an expert will say at trial." (*Bonds v. Roy*
13 (1999) 20 Cal.4th 140, 146.) "This allows the parties to assess whether to take the
14 expert's deposition, to fully explore the relevant subject area at any such deposition,
15 and to select an expert who can respond with a competing opinion on that subject
16 area." (*Id.* at pp. 146-147.) "In short, the statutory scheme as a whole envisions
17 timely disclosure of the general substance of the expert's expected testimony so that
18 the parties may properly prepare for trial." (*Id.* at p. 148.)

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21 Here, the expert witness declaration of Mr. Evertz gives absolutely no notice of
22 what the experts will say at trial. Mr. Evertz declares that Mr. Scalmanini will
23 "address the following substantive areas:

- 24 (1) The Antelope Valley, including its physical setting and its
25 area of adjudication (Antelope Valley Area of Adjudication
26 or 'AVAA').

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(2) The general geology of the area and the occurrence of groundwater in the AVAA, including his opinions regarding the nature of geologic formations and aquifer materials, and the effects of geologic features on the occurrence and movement of groundwater, and on the physical effects of groundwater extraction.

(3) The existence, if any, of subbasins within the AVAA." (Ex. A.)

The declaration contains absolutely no expression of Mr. Scalmanini's opinion, only a vague reference to the substantive areas that he will discuss. As a result, Tejon and the other parties to this action are left to guess as to what opinions Mr. Scalmanini will actually express at trial, whether such opinions are consistent or inconsistent with the opinions expressed by Tejon's experts, and whether Tejon should declare a rebuttal expert, and if so on what subject. Indeed, the declaration is completely ambivalent on the central issue for trial, whether there are separate basins within the AVAA.

The declaration with respect to Utley is even less revealing. According to the declaration, Mr. Utley will "address the following substantive areas:

(1) The general geology of the area and the occurrence of groundwater in the AVAA, including his opinions regarding the nature of geologic formations and aquifer materials, and the effects of geologic features on the occurrence of movement of groundwater."

That's it! The declaration states that he will offer opinions, but fails to disclose what opinions he will offer. Again, Tejon and the other parties are left to guess as to what opinions Mr. Utley will offer that are actually relevant to the issue before the court on October 6, 2008.

1 The declaration with respect to Dennis Williams is completely devoid of
2 substance. According to the declarant, "Dr. Williams will render opinions concerning
3 the work of other experts engaged by the public water suppliers on the
4 characteristics, structure, hydrogeologic conditions of the groundwater underlying
5 the geographic area." (Ex. A.) The declaration fails to state who the "other experts
6 engaged by the public water suppliers" are, what opinions these undisclosed experts
7 have expressed, and what opinions Dr. Williams intends to offer regarding the
8 undisclosed work of other undisclosed experts.
9

10 The testimony of Mr. Williams should also be excluded for another reason. The
11 expert witness declaration must contain "(a) representation that the expert will be
12 sufficiently familiar with the pending action to submit to a meaningful oral deposition
13 concerning the specific testimony, including any opinion and its basis, that the expert
14 is expected to give at trial." (Code Civ. Proc., § 2034.260(c)(4).) Mr. Evertz failed to
15 do so and specifically acknowledges that Mr. Williams will not be sufficiently familiar
16 with the pending action to submit to a meaningful oral deposition until "after the
17 work of other experts engaged by the public purveyors is completed." Since Mr.
18 Williams cannot currently submit to a meaningful oral deposition, and no time frame
19 is given as to when, if at all, he will be in a position to do so, his testimony, must in
20 fairness be excluded from trial.
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22

23 In short, the Designating Parties have failed to disclose the general substance
24 of their experts' testimony in any fashion whatsoever. By letter dated August 22,
25 2008, Tejon requested that the Designating Parties make a supplemental disclosure
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1 or risk exclusion at trial. (Ex. B.) The Designating Parties refused to do so. As a
2 result, Tejon and other parties to this action are prejudiced since we cannot
3 determine from the declaration, whether the experts' depositions should be taken,
4 how to prepare for cross-examination and whether we should prepare rebuttal
5 testimony. "When an expert is permitted to testify at trial on a wholly undisclosed
6 subject area, opposing parties similarly lack a fair opportunity to prepare for cross-
7 examination or rebuttal. It makes little practical difference whether the party
8 proffering the expert testimony failed to submit an expert witness declaration or
9 submitted an inaccurate one." (*Bonds v. Ray, supra*, 20 Cal.4th at p. 147.)
10


11 **C. Conclusion.**

12 Based on the foregoing, Tejon respectfully requests that the court enter an
13 order excluding the testimony of Joseph Scalmanini, Kenneth Utley, and Dennis E.
14 Williams in the form attached as **Exhibit C.**

15 Dated: August 29, 2008

Respectfully submitted,

KUHS & PARKER

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19 By 
20 Robert G. Kuhs,
21 Attorney for Tejon Ranchcorp

22 **III. DECLARATION OF ROBERT G. KUHS**

23 I, ROBERT G. KUHS, declare as follows:

24 1. I am an attorney at law duly admitted to practice before all courts of the
25 State of California and a partner of Kuhs & Parker, counsel for Tejon.
26
27

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2. Attached as **Exhibit A** is a true and correct copy of the Expert Witness Declaration, without exhibits, submitted by the Designating Parties.

3. Attached as **Exhibit B** is a true and correct copy of my August 22, 2008 letter to Mr. Evertz requesting that he promptly supplement his declaration and further warning that absent such supplemental declaration, Tejon would move to exclude the testimony of his experts at trial.

4. I received no response to my August 22, 2008 letter and have received no supplemental declaration from the Designating Parties.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 29, 2008


Robert G. Kuhs

C:\WPDATA\WCK\Tejon Ranch\Motion for Order Excluding Testimony etc.wpd

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Exempt from filing fee
Government Code § 6103

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Attorneys for Cross-Complainants
10 ROSAMOND COMMUNITY SERVICES
DISTRICT and LOS ANGELES COUNTY
11 WATER WORKS DISTRICT NO. 40

12 *[See Next Page for Additional Counsel]*

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 FOR THE COUNTY OF LOS ANGELES

15 **ANTELOPE VALLEY GROUNDWATER
16 CASES**

17 Included Actions:

18 Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.
Superior Court of California, County of
19 Los Angeles, Case No. BC325201;

20 Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.
21 Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348

22 Wm. Bolthouse Farms, Inc. v. City of
23 Lancaster, Diamond Farming Co. v. City of
Lancaster, Diamond Farming Co. v. Palmdale
24 Water Dist., Superior Court of California
County of Riverside, consolidated actions; Case
25 Nos. RIC 353 840, RIC 344 436, RIC 344 668.

Judicial Council Coordination
Proceeding No. 4408

Santa Clara Case No. 1-05-CV 049053
Assigned to The Honorable Jack Komar

**EXPERT WITNESS DESIGNATION OF
LOS ANGELES COUNTY WATER
WORKS DISTRICT NO. 40, ROSAMOND
COMMUNITY SERVICES DISTRICT,
CITY OF LANCASTER, PALMDALE
WATER DISTRICT, QUARTZ HILL
WATER DISTRICT, CALIFORNIA
WATER SERVICE COMPANY AND
LITTLE ROCK CREEK IRRIGATION
DISTRICT, et al.**

Trial Date: October 6, 2008

1 [Additional counsel - as follows]

2 Raymond G. Fortner, Jr., SBN 42230
County Counsel
3 Frederick W. Pfaeffle, SBN 145742
Principal Deputy County Counsel
4 OFFICE OF COUNTY COUNSEL
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12 AND QUARTZ HILL WATER DISTRICT

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18 LEMIEUX & O'NEILL
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20 Facsimile: (805) 495-2787
Attorneys for Defendants/Cross-Complainants
21 LITTLEROCK CREEK IRRIGATION DISTRICT, PALM RANCH IRRIGATION DISTRICT
And Cross-Defendants, NORTH EDWARDS WATER DISTRICT and DESERT LAKES
22 COMMUNITY SERVICES DISTRICT, LLANO DEL-RIO WATER CO., LLANO MUTUAL
WATER CO., BIG ROCK MUTUAL WATER CO., and LITTLE BALDY WATER CO.

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TO: ALL PARTIES HEREIN, AND TO THEIR ATTORNEYS OF RECORD:

Pursuant to Code of Civil Procedure section 2034.210 *et seq.*, Los Angeles County Water Works District No. 40, Rosamond Community Services District, City of Lancaster, Palmdale Water District, Quartz Hill Water District, California Water Service Company and Littlerock Creek Irrigation District, et al.¹ (collectively, "Designating Parties") hereby submit their designation of experts, whose expert opinion testimony the Designating Parties anticipate offering into evidence at the next phase of trial of the within action, as follows:

- 1. Joseph C. Scalmanini
Luhdorff and Scalmanini Consulting Engineers
500 1st Street
Woodland, California 95695
- 2. Kenneth Utley
Luhdorff and Scalmanini Consulting Engineers
500 1st Street
Woodland, California 95695
- 3. Dennis E. Williams, Ph.D.
Geosciences
P.O. Box 220
Claremont, California. 91711

The Designating Parties expressly reserve each and all of the following rights with respect to this Expert Designation:

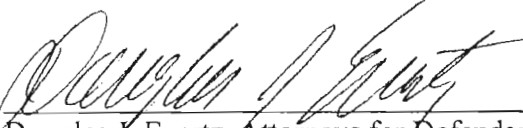
¹ Littlerock Creek Irrigation District, Palm Ranch Irrigation District And Cross-Defendants, North Edwards Water District And Desert Lakes Community Services District, Llano Del-Rio Water Co., Llano Mutual Water Co., Big Rock Mutual Water Co., and Little Baldy Water Co. (collectively "Littlerock Creek Irrigation District, et al.")

1 A. The right to name and call different or additional experts, and to amend their expert
2 witness declaration with respect to the general substance of the testimony that the expert designated
3 above is expected to give, pursuant to Code of Civil Procedure section 2034.610 *et seq.*

4 B. The right to consult with and obtain the services of additional expert witnesses to
5 testify on the Designating Parties' behalf at trial in additional areas or for purposes of impeachment,
6 pursuant to Code of Civil Procedure section 2034.310.

7 C. The right to call any experts listed on behalf of any other party to this action, regardless
8 of whether such party remains a party to this action at the time of trial. Therefore, the Designating
9 Parties incorporate herein, as though fully set forth, all information supplied by each other party herein
10 with respect to each such party's designation of experts, and any supplemental designation of experts
11 hereafter served by each such party.

12
13 DATED: August 14, 2008 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

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15 By: 
16 Douglas J. Evertz, Attorneys for Defendant/
17 Cross-Complainant and Cross-Defendant
18 CITY OF LANCASTER
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movement of groundwater, and on the physical effects of groundwater extraction.

(3) The existence, if any, of subbasins within the AVAA.

(b) Kenneth Utley. Mr. Utley is a Registered Geologist and Certified Engineering Geologist, and Senior Geologist with Luhdorff and Scalmanini, Consulting Engineers. A true and correct copy of Mr. Utley's resume is attached hereto as Exhibit "B". Mr. Utley's anticipated testimony will address the following substantive areas:

(1) The general geology of the area and the occurrence of groundwater in the AVAA, including his opinions regarding the nature of geologic formations and aquifer materials, and the effects of geologic features on the occurrence and movement of groundwater.

(c) Dr. Dennis Williams. Dr. Williams is a registered geologist and California certified hydro geologist with experience in groundwater development and management. Dr. Williams will render opinions concerning the work of other experts engaged by the public water suppliers on the characteristics, structure, hydrologic conditions of the groundwater underlying the geographic area. He has agreed to testify and will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning his specific testimony, after the work of other experts engaged by the public purveyors is completed. Additional information regarding Dr. Williams is attached hereto as Exhibit "C." Dr. Williams may also be called to offer testimony to rebut the testimony of other experts.

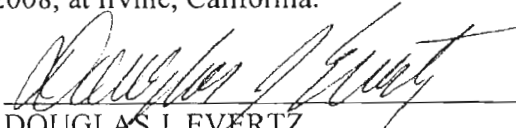
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4. The above experts have agreed to testify at trial. They will be sufficiently familiar with the pending action to submit to meaningful depositions concerning their expert opinions and the basis thereof. Mr. Scalmanini charges \$460 per hour for deposition and trial testimony. Mr. Utley charges \$284 per hour for deposition and trial testimony. Mr. Williams charges \$500 per hour for deposition and trial testimony.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14~~th~~ day of August, 2008, at Irvine, California.



DOUGLAS J. EVERTZ

KUHS & PARKER

ATTORNEYS AT LAW

WILLIAM C. KUHS
JAMES R. PARKER, JR.
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OUR FILE NO.

August 22, 2008

1291.01

VIA POSTING TO COURT WEBSITE

Douglas J. Evertz
Luce, Forward, Hamilton & Scripps LLP
2050 Main Street, Suite 600
Irvine, CA 92614

Re: Antelope Valley Groundwater Cases
Judicial Council Proceeding No. 4408
Santa Clara County Superior Court Case No. 1-05-CV 049053
Expert Witness Disclosure

Dear Mr. Evertz:

We are in receipt of the expert witness disclosure statement submitted by Los Angeles County Water Works District No. 40, Rosamond Community Services District, City of Lancaster, Palmdale Water District, Quartz Hill Water District, California Water Service Company and Littlerock Creek Irrigation District. The disclosure is not adequate.

The expert witness declaration must include "a brief narrative statement of the general substance of the testimony that the expert is expected to give." (Code Civ. Proc., § 2034.260(c)(2).) The purpose of the expert witness disclosure is to give "fair notice of what an expert will say at trial." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146.) "This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area." (*Id.* at pp. 146-147.)

The sole issue before the court during the Phase 2A trial is whether there are sub-basins within the Antelope Valley adjudication area. We cannot determine from your declaration what opinion, if any, Mr. Scalmanini, Mr. Utley and Mr. Williams will express at trial, whether we should take their depositions, and whether we should prepare rebuttal testimony.

Exhibit B

KUHS & PARKER

Douglas J. Evertz
August 22, 2008
Page 2

The purpose of this letter is to request that you promptly submit a supplemental declaration which includes a brief narrative statement of the general substance of your proposed experts' testimony. Absent such compliance, we will move to exclude Mr. Scalmanini's, Mr. Utley's and Mr. Williams' opinions. (Code Civ. Proc., § 2034.300.)

Very truly yours,



Robert G. Kuhs

RGK/lel

cc: Counsel and Parties

C:\WPDATA\WCK\Tejon Ranch\Evertz letter.wpd

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10 Defendant Tejon Ranchcorp

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

13 ANTELOPE VALLEY GROUNDWATER) Judicial Council Coordination No. 4408
14 CASES)
15 Included Actions:) Santa Clara Case No. 1-05-CV-049053
16 Los Angeles County Waterworks District No. 40) Assigned to Hon. Jack Komar
17 v. Diamond Farming Co., Superior Court of)
18 California, County of Los Angeles, Case No. BC) **[PROPOSED] ORDER EXCLUDING**
19 325201;) **EXPERT TESTIMONY**
20 Los Angeles County Waterworks District No. 40)
21 v. Diamond Farming Co., Superior Court of)
22 California, County of Kern, Case No. S-1500-CV-)
23 254-348;)
24 Wm. Bolthouse Farms, Inc. v. City of Lancaster,)
25 Diamond Farming Co. v. Lancaster, Diamond)
26 Farming Co. v. Palmdale Water Dist., Superior)
27 Court of California, County of Riverside, Case)
28 No. RIC 353 840, RIC 344 436, RIC 344 668)
Phase 2 Trial Date: October 6, 2008

29 The motion of TEJON RANCHCORP ("Tejon") for an order excluding the expert
30 testimony of Joseph Scalmanini, Kenneth Utley and Dennis Williams came on
31 regularly for hearing in Department 1 of the above-entitled court, the Honorable Jack

32 **Exhibit C**

1 Komar, presiding. The court, having considered the papers submitted and oral
2 argument of counsel, and good cause appearing therefor,

3 IT IS HEREBY ORDERED that:

4 1. Joseph Scalmanini, Kenneth Utley and Dennis Williams are excluded
5 from offering any opinion in the Phase 2 Trial.

6 Dated: _____, 2008

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8 _____
9 Judge of the Superior Court

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(661) 322-4004 • FAX (661) 322-2906

PROOF OF SERVICE

I, Lidia E. Luna, declare:

I am employed in the County of Kern, State of California. I am over the age of 18 and am not a party to the within action; my business address is Kuhs & Parker, 1200 Truxtun Avenue, Suite 200, Bakersfield, California 93301.

On August 29, 2008, I caused the foregoing document(s) described as: **MOTION *IN LIMINE* FOR ORDER EXCLUDING EXPERT TESTIMONY OF: (1) JOSEPH SCALMANINI, (2) KENNETH UTLEY, AND (3) DENNIS WILLIAMS; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF ROBERT G. KUHS IN SUPPORT THEREOF** to be served on the parties in this action, as follows::

(X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa Clara County Superior Court website: www.scefilinq.org regarding the Antelope Valley Groundwater matter.

() (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and processing of documents for mailing. Under that practice, the above-referenced document(s) were placed in seal envelope(s) addressed to the parties as noted above, with postage thereon fully prepaid and deposited such envelope(s) with the United States Postal Service on the same date at Bakersfield, California, addressed to:

() (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other overnight delivery service, for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

() (BY FACSIMILE TRANSMISSION) I am "readily familiar" with the firm's practice of facsimile transmission of documents. It is transmitted to the recipient on the same day in the ordinary course of business.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

() (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Lidia E. Luna

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