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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

**ANTELOPE VALLEY
GROUNDWATER CASES**

Included Actions:

Los Angeles County Waterworks District No.
40 v. Diamond Farming Co. Superior Court of
California County of Los Angeles, Case No. BC
325 201 Los Angeles County Waterworks
2District No. 40 v. Diamond Farming Co.
Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348Wm. Bolthouse
Farms, Inc. v. City of Lancaster Diamond
Farming Co. v. City of Lancaster Diamond
Farming Co. v. Palmdale Water Dist. Superior
Court of California, County of Riverside,
consolidated actions, Case No. 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
)

) **AGWA's PHASE 3 TRIAL BRIEF**
)

) **Date: January 4, 2011**
) **Time: 9:00 am, Dept.: 1**
)

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1 **I. INTRODUCTION**

2 The Phase III trial involves the central issue of whether the Antelope Valley Groundwater
3 Basin ("Basin") is currently in a condition of overdraft, and whether there is a basis for the Court to
4 exercise its equitable jurisdiction, including the implementation of a physical solution. The Court's
5 role, both in terms of the parties to the case as well as to the public interest, is to rule consistently
6 with Article X, section 2 of the California Constitution– to promote maximum beneficial use of the
7 resource without causing undesirable effects.

8 This case presents a unique factual circumstance where historical pumping was far in excess
9 of current pumping. Estimates of historical pumping peak in 1962 at approximately 400,000 acre-
10 feet per year ("AFY"). This amount is far in excess of any safe yield estimates that will be offered
11 by either the purveyors or the landowners. However, the fact that overpumping occurred in the past
12 does not mean that current pumping levels constitute overdraft. The question for the Court in Phase
13 III is whether current pumping is causing overdraft.

14 The purveyors will use four separate *calculated* water balances to argue that current pumping
15 exceeds "sustainable" levels and that the Basin is in a serious state of degradation.¹ What they will
16 avoid altogether is any attempt to show *actual* undesirable effects that are currently occurring to the
17 Basin. This is because evidence of actual current undesirable effects that are being caused by
18 current pumping, is lacking. The actual physical evidence will show that even using the best
19 available data and methodologies, the purveyors' calculated results are subject to a high margin of
20 error. In addition to this margin of error, the evidence will show that the purveyors' calculations
21 were also manipulated in order to provide the lowest possible yield result. The actual physical
22 evidence will show that current pumping is not causing harm to the Basin, and that the Basin could
23 safely tolerate increased pumping.

24
25
26 ¹ While these four approaches are styled as "independent" by the purveyors, the evidence will show
27 that three of the four water balances were calculated by the same individual who used many of the
28 same estimates and methodologies for the inputs to each of the approaches. Each of the approaches
came to a different result, though the purveyors choose to express this as supporting their single
value for the Basin's yield, instead of acknowledging that the yield of the Basin may value within a
range of values.

1 **II. STATEMENT OF FACTS**

2 **A. Physical Setting**

3 The Basin is an extremely large groundwater basin, underlying an extensive alluvial valley in
4 the western Mojave Desert. The surface area of the Basin exceeds 900,000 acres. As a means of
5 comparison, the Santa Maria Basin has a surface area of approximately 184,000 acres.

6 The Basin is bounded on the northwest by the Garlock fault zone at the base of the Tehachapi
7 Mountains and on the southwest by the San Andreas fault zone at the base of the San Gabriel
8 Mountains. The extensive network of faults in the Valley is indicative of the highly fractured
9 condition of the bedrock in the Basin. This condition is relevant to the issue of inflow to the Basin
10 through this highly fractured bedrock.

11 The Basin's boundaries were set in Phase I and were based in large part on the California
12 Division of Water Rights' Bulletin 118-2003 Basin boundaries. The sub-basin structure within those
13 boundaries is not well understood and continues to be a subject of disagreement.

14 The Basin's volume is vast, with estimates as high as 70,000,000 AF. However, the
15 purveyors' expert Mr. Scalmanini will testify that the volume of the Basin is currently unknown.
16 The location of the "bottom" of the Basin is presently unknown.

17 The Court will hear evidence as to the wide variety of irrigated agriculture that currently
18 takes place within the Basin. Cropping patterns within the Basin have historically and presently
19 continue to shift on virtually a year-to-year basis. Not only do the crops grown within the Basin
20 vary among themselves, and have varied continuously from decade to decade, the locations in the
21 Basin where such crops are grown are also constantly shifting because of the Basin's vast surface
22 area and the large amount of dormant land.

23 **B. Past Groundwater Use has Fluctuated Widely and Current Pumping is**
24 **Uncertain**

25 Groundwater use in the Basin has fluctuated dramatically in response to wide variations in
26 historical agricultural activity and, more recently, in response to increasing demands for municipal
27 and industrial purposes.

28 From at least the mid-1940s until the mid-1970s, total pumping from the Basin was over

300,000 AFY. In the late 1950s and early 1960s this pumping was close to or in excess of 400,000 AFY. In other words, for a period of at least 30 years, total pumping from the basin was more than double what it is now.

Estimates of current pumping range from approximately 150,000 AFY to approximately 175,000 AFY.² The purveyors will argue that pumping over the past 10 years has averaged approximately 150,000 AFY. The question for the Court in Phase III is thus not whether historical pumping of 300,000 to 400,000 AFY caused undesirable results, but rather whether current pumping of 150,000 to 175,000 AFY is causing undesirable results.

III. STANDARD OF PROOF AS TO OVERDRAFT AND SAFE YIELD

The Court has already determined that the purveyors bear the burden of proof in Phase III. (Phase III Order, 3:9-10.)

In attempting to perfect prescriptive rights in the Basin, the purveyors must do more than meet the usual "preponderance of the evidence" standard that applies in most civil cases. Prescription claims must be proved by clear and convincing evidence. (*Weller v. Chavarria* (1965) 233 Cal. App. 2d 234; *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228, 235; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708.)

"Clear and convincing evidence" is evidence that is clear, explicit and unequivocal. "The evidence must be so clear as to leave no substantial doubt and strong enough to command the unhesitating assent of every reasonable mind." (Wells, California Forms of Jury Instruction (1997), Section 1.26A, p. 1-42.1; *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 846; see also *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.)

Even though this phase of the trial is not about prescription per se, the elements of proof that the purveyors will offer concerning their allegations of current overdraft conditions will involve historical analysis of past pumping and recharge in the Basin. If the Court believes that any of this

² There is a factual dispute regarding both current and historical pumping amounts. This dispute arises from disagreement about the current and historical acreage under irrigation, and from disagreement about the amount of water that is needed by the various crops grown in the Valley (ie., "crop water requirements"). Under a mass balance approach as used by the purveyors, lower estimates of current and historical pumping will result in a lower natural recharge estimate and a lower total yield number.

evidence will be foundational to later phases concerning prescriptive rights, then the same standard of proof that will apply to those prescriptive rights phases must apply to Phase III where much of the foundational evidence for the prescriptive claims will be offered and evaluated.

"Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) In other words, where, under the substantive law, a fact is essential to the plaintiff's claim for relief, the burden of pleading and proof of that fact is on the plaintiff. (1 Witkin California Evidence § 7 at 159 (4th ed.).) Without clear and convincing evidence of each element of their prescriptive claims – including, if necessary, overdraft – the purveyors will fail to meet their burden of proof.

Even independent of the claims of prescription, where a greater burden is required in a civil case, it is usually described by stating that the party must introduce clear and convincing proof due to the importance of the rights at issue. (See *Bookout v. Nielsen* (2007) 155 Cal. App. 4th 1131, as modified on denial of reh'g, (Sept. 24, 2007).) Where the consequences of an outcome on important property or individual rights are high, a higher burden of proof than a preponderance of the evidence will apply. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 365; *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24, cert. denied, 549 U.S. 1178 (2007).)

"The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. [Citation.] The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. [Citations.]" (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490; see also *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546.) Where important public policy considerations are implicated, generally courts require a stricter clear and convincing evidence standard. (*Baxter Healthcare Corp, supra*, 120 Cal.App.4th at 365.)

The consequences of the Court's determination in Phase III will be significant. The manner of presentation of the purveyors' numbers, in particular the separation of return flows from

1 supplemental supplies from return flows from the use of native supplies, in combination with their
2 proposed low total yield value, will *in itself* result in an allocation outcome that will involve a
3 significant shifting of water availability and costs among the parties. The evidence will show that
4 the outcome of the Court's determination in Phase III could result in some of the oldest businesses in
5 the community going out of business. The small family-owned farms in the Valley will bear the
6 greatest proportional burden of the outcome of Phase III because of their exclusive dependence on
7 the Basin.

9 The economic consequences of the Court's findings do not influence whether those findings
10 are true or not. But where the consequences of the Court's determination may have significant
11 economic consequences for the local community, as they will here, the standard of proof that the
12 Court applies to the evidence must be greater in order for the Court to be appropriately satisfied that
13 its findings are true.

15 Thus here, the purveyors bear the burden of proof and must show by clear and convincing
16 evidence that the Basin is in overdraft condition. This extends to each of the elements necessary for
17 the Court to make such a finding – the amount of pumping occurring in the Basin, as well as the
18 yield that the purveyors claim pumping exceeds. The purveyors must also show by clear and
19 convincing evidence that there are observable undesirable effects that demonstrate that safe yield is
20 currently being exceeded and serious degradation is occurring. Only if such conditions are shown to
21 exist with evidence that is so clear as to leave no substantial doubt and strong enough to command
22 the assent of every reasonable mind, should the Court make findings and conclusions that will result
23 in serious community disruption.

25 **IV. THE COURT MUST PURSUE A PHYSICAL SOLUTION**

27 **A. It is the Court's Constitutional Duty to Pursue and Implement a Physical** 28 **Solution**

Article X, section 2 of the California Constitution requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable. (Cal. Const., art. X, §2.) This constitutional mandate was established to ensure that the state’s water resources would be available for the constantly increasing needs of all its people. (*Central and West Basin Water Replenishment District et al. v. Southern California Water Co.* (2003) 109 Cal.App. 4th 891, 904 (“*Central and West Basin*”), quoting *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal. 2d 424, 449.) This mandate applies in all water resource cases.

In groundwater adjudications, the courts are obligated to pursue, and, when necessary, to adopt a “physical solution” to manage the water resource for the fullest beneficial use. (See *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480; *Central and West Basin, supra*, 109 Cal.App.4th at 904; *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 731-32 (“*Sidebotham*”) [“under the constitutional provision, the trial court has the duty of working out a physical solution if possible and if none is suggested by the parties to work out one independently of the parties”].)

In sum, the Court’s mandate in Phase III is to determine the amount of pumping that may occur that maximizes beneficial use without harming the Basin, and to determine whether it has jurisdiction to pursue a physical solution – or to identify one that already exists – that will ensure that the maximum beneficial use may continue in the future.

B. Overdraft is not a Condition Precedent to the Court’s Ability to Implement a Physical Solution

On December 3, 2010, AGWA filed a Motion in Limine No. 3, arguing that a finding of overdraft is not a condition precedent to the Court’s ability to implement a physical solution. AGWA incorporates the arguments made in Motion in Limine No. 3 as if stated in full herein.

V. THE BASIN IS NOT CURRENTLY IN OVERDRAFT

The Court’s order of May 6, 2010, amending its prior March 22, 2010 Order (hereafter referred to as the “Phase III Order”) identifies the issues to be tried in Phase III as whether the Basin is in overdraft and whether there is a basis for the Court to exercise its equitable jurisdiction to manage the Basin.

1 **A. Overdraft and Safe Yield**

2 California courts have universally defined “overdraft” as extractions in excess of the safe
3 yield of water from a groundwater aquifer, which over time will lead to undesirable results. (*City of*
4 *Los Angeles v. City of San Fernando* (1975) 14 Cal. 3rd 199 (“*San Fernando*”); *City of Pasadena v.*
5 *City of Alhambra* (1949) 33 Cal.2d 908, 929 (“*City of Pasadena*”); *Orange County Water District v.*
6 *City of Riverside* (1959) 173 Cal. App. 2d 137.)

7 Article X, section 2 of the California Constitution) mandates that, “. . . the general welfare
8 requires that the water resources of the State be put to beneficial use to the fullest extent of which
9 they are capable” Pursuant to Article X, section 2 of the California Constitution, the Court’s
10 role in protecting the public interest is thus to identify the *maximum* beneficial use that may be made
11 of the resource without causing an undesirable result. (*Rancho Santa Margarita v. Vail* (1938) 11
12 Cal.2d 501, 558-559; see *City of Pasadena, supra*, 33 Cal.2d at 925-926.) The concept of “safe
13 yield” articulates the California constitutional mandate, as it incorporates the concept of avoidance
14 of harm.

15 The purveyors will avoid discussing safe yield entirely. Instead they will focus their analysis
16 on other yield concepts such as “sustainable yield” and “perennial yield” that do not support the
17 constitutional mandate to maximize the use of the resource without causing harm. The difference
18 between concepts such as sustainable or perennial yield and safe yield is that safe yield is the
19 maximum quantity of water that can be extracted without causing undesirable results; in contrast,
20 sustainable or perennial yield is an amount of water that can be pumped on a long term basis, but it
21 is not necessarily the maximum amount that can be safely withdrawn in satisfaction of the
22 constitutional mandate. The purveyors will attempt to confuse the terms because even they cannot
23 deny that a true safe yield analysis produces a number higher than the one they desire.

24 **B. Overdraft and Safe Yield are the Legally Operative Concepts for Phase III**

25 On December 3, 2010, AGWA filed a Motion in Limine No. 1, arguing that Overdraft and
26 Safe Yield are the operative legal concepts for Phase III. AGWA incorporates the arguments made
27 in Motion in Limine No. 1 as if stated in full herein. On December 14, 2010, Los Angeles County
28

Waterworks filed an objection to this Motion. Waterworks would have the Court alter the established definition of "Safe Yield" by ignoring the concept of "undesirable effects." The reason for this position is clear – the purveyor's approach to Phase III will be to focus on their calculated water budget in an attempt to show current overdraft, deemphasizing wherever possible the lack of physical manifestations of such overdraft in the Basin today.

C. The Evidence will be Insufficient to Establish that the Basin is in Overdraft or to Establish a Specific Safe Yield Number

1. The Purveyor Technical Analysis, Even if it was Relevant to a Safe Yield Analysis, will not Satisfy the Burden of Proof.

a. *The purveyor technical analysis is flawed and the nature of each of these flaws leads the analysis toward a lower yield result.*

Landowner experts have identified specific elements of the purveyors' analysis that are flawed. These flaws include: inappropriate averaging in their calculations, incorrect crop water requirements, incorrect native vegetation evapotranspiration, unrealistically high return flows, an incorrect approach to mountain block recharge, incorrect selection of a base period, incorrect estimate of return flow lag time, specific flaws in the underlying data used in the calculations, flawed interpolation or extrapolation of missing data, failure to verify analysis against independent data points, imprecise analysis when additional relevant data existed, the failure to acknowledge any uncertainty associated with the analysis, the application of assumptions developed in other locations that may not be similarly applicable in the Antelope Valley, use of qualitative assumptions in lieu of quantitative measurements, and failure to account for the experiences of actual irrigators in the Basin.

In many instances reliable data was available, but was ignored. In each instance, the nature of these flaws will be shown to lead the analysis to a lower yield number. In every instance, the evidence will show that correcting for these errors leads to a higher yield number.

Landowner experts have conducted independent analyses, both of discrete components of the overall yield analysis, as well as comprehensively in order to provide an alternative positive analysis of the safe yield of the Basin. The landowner experts have conducted their analysis by correcting the erroneous elements of the purveyor analysis, as well as by using more conventional methods and

1 data gathering techniques. This alternative analysis will be shown to more accurately reflect the
2 actual current physical conditions of the Basin.

3 **b. *Given the current state of the data in the Basin, any analysis is***
4 ***subject to a significant margin of error***

5 The evidence will show that the best available current data is insufficient to establish a
6 specific safe yield “number” in Phase III. This insufficiency pertains to both the quantity and quality
7 of the data regarding basin conditions. The existing data is simply insufficient to identify a precise
8 number rather than a range as the safe yield.

9 The evidence will clearly show that much of even the best available data is subject to varying
10 levels of imprecision. Some data pertains to conditions across the Basin so that even where a
11 specific estimate is off by only a small amount, that small amount of error is multiplied across a
12 large area. For example, there is a lack of data related to agricultural pumping, as there is no
13 metering and no focused monitoring program for agricultural water use. An error of even one acre-
14 foot per acre in the crop water requirements can result in a pumping estimate that is in error by many
15 tens of thousands of acre-feet. There is also a long history of widely varying land uses in the Valley,
16 as well as significant year to year variations in crop types and location.

17 Based on the current limitations of data and the overall circumstances of the Antelope
18 Valley, from a technical sense it is "overconcluding" in order to, at this time, identify a single
19 specific number as the safe yield of the Basin solely through the use of calculated water budgets and
20 computer models as proposed by the purveyors. A water budget is a collection of estimated
21 numbers; it is imprecise by definition in terms of inputs and it is imprecise in terms of its output.
22 The greater the imprecision of the inputs, the greater the imprecision of the outputs. The highest
23 degree of specificity that can currently be obtained is a range—which the evidence will show is a
24 very large range.

25 The purveyor analysis specifically avoided the question of quantifying the possible range of
26 error to the values and assumptions used in the analysis because within the error band of the
27 accuracy of the data and methods they use, they consistently emphasize the low end of the range.
28 The evidence will show that the identification of a specific number by the purveyors was made

solely to satisfy assumed management goals and not because that specific number is a more accurate technical expression of the results of their analysis.

c. *Under the purveyor analysis, the Basin should be suffering significant current harm – but it is not.*

The purveyors will argue that the yield of the Basin is 110,500 AFY and that average pumping for the past ten years has been approximately 150,000 AFY. According to their analysis then, the Basin should be in a serious condition of overdraft. If current pumping is actually higher, then the situation would be even worse.

Indeed, this has been their stated position for the last several years, as reflected in the Court's Phase III Order ("The public water provider parties have essentially alleged that the basin is in overdraft, that extraction of water on an annual basis exceeds recharge, and that the basin will suffer serious degradation and damage unless the Court exercises its equitable jurisdiction.")

But the evidence will fail to show actual, current harm, which is the primary indicator of overdraft. If indicators of overdraft are lacking and abnormally wet conditions are not present that might mask any indicators of overdraft,³ then it is possible to conclude that the Basin is not in overdraft. It is possible to make this conclusion even without a water balance. The evidence will show that *current* pumping is not causing harm to the Basin under current cultural conditions, and that the Court can therefore clearly make a finding at least that current pumping is "safe." In fact, sufficient evidence will be presented for the Court to find that pumping could be greater and still be considered safe.

2. The Evaluation of Safe Yield Cannot be Separated from the Cultural Conditions in which the Evaluation Occurs

A significant component of safe yield analysis is the consideration of cultural conditions. The evidence will show that any of the offered yield analyses are only valid under current cultural conditions. The evidence will show that if the Court adopts the purveyors' total yield value, along

³ The State of California is now in its third consecutive year of statewide drought and is under a statewide proclamation of emergency, due to the water supply crisis and the effect on communities. (See California Department of Water Resources, California Drought: An Update (September 2010) pp. 1-2. *See also*, Executive Order S-06-08 (June 4, 2008); Governor's Emergency Proclamation, State of Emergency, Central Valley (June 12, 2008); Governor's Emergency Proclamation, State of Emergency, Water Shortage (February 27, 2009).)

1 with the apportionment of this total value as proposed by the purveyors, then this finding will in
2 itself result in a water rights allocation that will concentrate pumping rights in the hands of certain
3 purveyors and result in changes to cultural conditions because local agricultural operations will be
4 forced out of business. The evidence will show that this is a known and predictable effect that will
5 result in changes in cultural conditions relevant to the safe yield determination. The evidence will
6 show that if a direct and predictable effect of the Phase III decision is a concentration of pumping
7 rights into a subsidence-prone area, then that result cannot be deemed "safe."

8 This is much of the reason the purveyors have avoided defining their preferred result as
9 "safe." Their own testimony will establish that they cannot say that their own number is "safe"
10 because of the changes in cultural conditions that will result from Court adoption of their numbers.

11 **VI. CONCLUSION**

12 The Purveyors cannot satisfy their burden of proof that the Basin is currently in overdraft or
13 that their proposed yield number is the safe yield of the Basin.

14 The purveyors will present a water balance approach to the questions of Phase III.
15 According to that water balance, the Basin should be suffering severe degradation. But it is not.
16 This is because overdraft is not defined by a water balance. Overdraft is defined by the state of the
17 Basin or the conditions in the Basin, not by a water budget.

18 The Basin will tell us itself, by itself, if it is in overdraft by the manifestation, or lack thereof,
19 of any undesirable effects. The purveyors have the all of the tools they need in order to be able to
20 "listen" to the Basin in this regard. To the extent they have not, it is because they do not want to
21 hear what it has to say.

22 Dated: December 20, 2010

BROWNSTEIN HYATT FARBER SCHRECK, LLP

23 By: 
24

25 MICHAEL T. FIFE
26 BRADLEY J. HERREMA
27 ATTORNEYS FOR AGWA
28

PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On December 20, 2010, I served the foregoing document described as:

AGWA's PHASE 3 TRIAL BRIEF

on the interested parties in this action.

By posting it on the website at 4:15 p.m. on December 20, 2010.
This posting was reported as complete and without error.

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

Executed in Santa Barbara, California, on December 20, 2010.

MARIA KLACHKO-BLAIR
TYPE OR PRINT NAME



SIGNATURE