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## SUPERIOR COURT OF THE STATE OF CALIFORNIA

### FOR THE COUNTY OF LOS ANGELES

**ANTELOPE VALLEY  
GROUNDWATER CASES**

) Judicial Council Coordination Proceeding  
) No. 4408

Included Actions:

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

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  
District No. 40 v. Diamond Farming Co.  
Superior Court of California, County of Kern,  
Case No. S-1500-CV-254-348 Wm. 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

) **AGWA'S OPPOSITION TO MOTION IN**  
) **LIMINE NUMBER ONE BY LOS**  
) **ANGELES COUNTY WATERWORKS**  
) **DISTRICT NO. 40; DECLARATION OF**  
) **RYAN C. DRAKE IN SUPPORT THEREOF**

) Trial Date: February 10, 2014

1     **I.     INTRODUCTION**

2             The Antelope Valley Groundwater Agreement Association (“AGWA”) opposes Los  
3 Angeles County Waterworks District No. 40’s (“District No. 40”) Motion in Limine Number One  
4 for an order precluding parties from offering testimony, documents or other evidence related to  
5 the amount and/or percentage of return flows in the Antelope Valley Water Basin (“Basin”). The  
6 Court has not previously admitted evidence or made findings sufficient to support any  
7 determination as to these issues, and therefore has no basis for an allocation of rights to return  
8 flows to the Basin, whatever they may be. The Court has specifically set the Phase 5 trial for the  
9 purpose of making a determination as to the quantities of return flows that have augmented the  
10 Basin, and no party’s competent evidence regarding the issue should be precluded.

11     **II.    ARGUMENT**

12             **A.    The Court Did Not Make Findings on Return Flows in Phase 3 Sufficient for**  
13             **an Apportionment of Rights**

14                 1.     The Phase 3 Findings Cannot Form the Basis of Further Decision in Future  
15                         Phases

16             The Court in Phase 3 conducted what it described as a “very general” determination of the  
17 safe yield, and whether the Basin is presently in a condition of overdraft such that the Court  
18 would have the authority to impose a physical solution. On that basis, the Phase III trial involved  
19 a very general examination of historic return flows for the sole purpose of conducting a broad  
20 analysis of safe yield. The Court did not make findings of fact regarding the specific amounts or  
21 quantities of the various sources of water in the Basin for water right purposes.

22             The Statement of Decision for Phase 3 acknowledged that factual testimony and findings  
23 in Phase 3 would not apply to other phases. As stated in the Court’s Phase 3 Statement of  
24 Decision, “The only issues at this phase of the trial were simply to determine whether the  
25 adjudication area aquifer is in a current state of overdraft and as part of that adjudication to  
26 determine the safe yield. This Statement of Decision focuses solely on those issues.” (Statement  
27 of Decision for Phase 3 Trial, at 2:10-12.)

28             After trial, during the Court’s drafting of the Phase 3 Statement of Decision, the purveyors  
asked the Court to go further and to make specific determinations about allocation of the safe

1 yield. In particular, the purveyors asked the Court to include in its Phase 3 Statement of Decision  
2 specific findings about what portion of the safe yield is return flows from imported water. The  
3 Court declined to make such determinations stating that, “When you are asking for a lot of  
4 detailed findings, I don’t think you are entitled to them.” (July 11, 2011 RT 13:24-26, relevant  
5 transcript pages attached as Exhibit “A” to the Declaration of Ryan C. Drake, filed concurrently  
6 with this Motion (“Drake Decl.”).)

7 When asked about return flow findings specifically, the Court stated, “And I wouldn’t be  
8 comfortable making findings as to what for example Public Water—California Water Project  
9 Water is generated and produced into the aquifer. I can’t make that determination.” (July 11,  
10 2011 RT 13:27-14:2, Drake Decl., Exhibit “A”.) The Court explained that based on the evidence  
11 presented in Phase 3, “[...]that certainly is not a sufficient basis for making a finding which  
12 would give certain rights to parties who produced—obtained that water. That’s beyond the scope  
13 of this third phase of trial.” (July 11, 2011 RT 14:5-8, Drake Decl., Exhibit “A”.) Thus, while  
14 the Court certainly received evidence on return flows in order to construct a broad snapshot of the  
15 Basin at a chosen time, the Court did not receive evidence on return flows sufficient to determine  
16 the specific amounts and therefore rights to those return flows.

17 Further, the Phase 3 Statement of Decision expressly states that the findings in Phase 3  
18 will not be used in future phases: “... the findings here have no application to other phases such  
19 as prescription or rights of appropriators, and the parties have not briefed those or other issues....”  
20 (Statement of Decision for Phase 3 Trial, at 3:21-24.) Accordingly, the Statement of Decision  
21 anticipated receiving further factual evidence related to return flows and rights of appropriators in  
22 future phases of trial. Because of this, trying the issue of the quantity of return flows is neither  
23 cumulative, nor does it amount to an improper motion for reconsideration, as alleged by the  
24 purveyors. The Court has recognized that issues related to return flows were not decided in Phase  
25 3, as the Court’s Case Management Order for the Phase 5 trial states that the subject of Phase 5  
26 includes claimed rights to return flows, “as well as the amount or percentage of return flows that  
27 augment the groundwater basin due to the imported water.” (Case Management Order for Phase 5  
28 and Phase 6 Trials (Oct. 25, 2013), at 2:7-11.)

2. The Return Flow Analysis Presented by the Purveyors in Phase 3 was Generalized and does not Account for Current Conditions

The purveyors seek to limit evidence on return flows to that presented in Phase 3. The return flow analysis contained in the Summary Expert Report, however, utilized a “historical” backward looking approach to estimate an overall safe yield for the basin. In contrast, AGWA will present evidence based on return flows under *current* conditions. This analysis reviews current and projected conditions and looks forward in time, and thus is more appropriate for the purposes of Phase 5. AGWA will offer evidence demonstrating that return flows in an urban setting (the setting most relevant for return flows from imported water) are dynamic and change over time depending on cultural practices, and that such cultural practices currently differ from those described in the Summary Expert Report.

AGWA will offer testimony that under more recent studies and conditions, including a comprehensive study of urban water use practices sponsored by the California Department of Water Resources and published in 2011, the return flow estimates discussed by Mr. Scalmanini in Phase 3 are insufficient for the Court to make an accurate determination of the source and quantity of return flows in the Basin. Of particular importance, AGWA will show that Los Angeles County Waterworks District No. 40 currently believes that 70% of water delivered to homes in the Antelope Valley is used outdoors. This number differs significantly from the 55% percent figure used in the Summary Expert Report. This change alone produces a significantly different return flow percentage. The pertinent estimates given in the Summary Expert Report are directly contradicted by current information now publically available from District 40, published on its website and confirmed through deposition testimony of District 40 staff. District 40’s MIL would see the Court set in stone all of the technical issues testified to by Mr. Scalmanini, as a basis for an allocation of water rights, even where such information is clearly inaccurate. Moreover, had AGWA been aware that that rights to return flows were being determined in Phase 3, it would have litigated the Phase differently.

1           **B.     Return Flow Evidence in Phase 3 was not Sufficient to Support Findings as to**  
2           **Quantities and Allocation is**

3           Although District No. 40 attempts to repaint the Phase 3 trial as involving extensive  
4           evidence on return flows, much of the testimony presented on return flows by the Purveyor  
5           experts at trial was hearsay, and thus such testimony cannot form the basis of the Court's Phase 5  
6           decision. Purveyor expert Joseph Scalmanini testified at Phase 3 trial on the purveyor claim to  
7           the Basin's safe yield in order to support the purveyor claim of current overdraft. The Court  
8           allowed Mr. Scalmanini to consider the analysis and findings of other experts, including other  
9           designated experts in that phase, Mr. Leffler and Mr. Wildermuth, in order to opine on the safe  
10          yield and whether the Basin is currently in overdraft. The Court ruled on numerous occasions  
11          that the hearsay testimony, opinions of experts and other hearsay data, was being admitted solely  
12          for the purpose of evaluating Mr. Scalmanini's opinion of safe yield and overdraft and not for the  
13          truth of the matters contained in the hearsay.

14          During trial on February 14, 2011, Counsel for Bolthouse Properties, LLC and Wm.  
15          Bolthouse Farms, Mr. Zimmer raised repeated hearsay objections (Feb. 14, 2011 RT, pp. 95-97,  
16          Drake Decl., Exhibit "B") on the grounds that Mr. Scalmanini was testifying as to facts based on  
17          the analysis of others. Responding to landowner party objections, the Court stated:

18                       [... ]What I'm doing in this phase will be safe yield, overdraft,  
19                       whether the Court needs to exercise equitable jurisdiction. Those  
20                       are the findings that we are making, and everything else will be  
21                       simply hearsay that the expert relied upon to form his opinion if it  
22                       is properly used in that manner." (Feb. 14, 2011 RT, p. 123, Drake  
23                       Decl., Exhibit "B".)

24          Mr. Zimmer also objected to the Court admitting, for their truth, recycled water return  
25          flow numbers offered by Mr. Scalmanini, which were based upon an analysis done by Mr.  
26          Leffler. (Feb. 14, 2011 RT, p. 123, Drake Decl., Exhibit "B".) Counsel further stated:

27                       MR. ZIMMER: So it is my understanding as to any of these  
28                       exhibits whether the Court introduces them or not to the extent they  
                      have any pumping data on them, it's not offered for the truth of the  
                      matter, but merely as some indication of what the expert was  
                      relying on.

1 THE COURT: To show the basis of the expert's estimate of  
2 pumping and recharge.

3 MR. ZIMMER: On a gross basis?

4 THE COURT: Yes. (Feb. 14, 2011 RT, pp. 124-125, Drake Decl.,  
5 Exhibit "B.")

6 Recognizing that the only matters at issue in the Phase 3 Trial were safe yield and  
7 overdraft, the Court allowed Mr. Scalmanini to rely on the recycled water return flow estimates  
8 by Mr. Leffler as a basis for Mr. Scalmanini's opinion as to safe yield and overdraft. The details  
9 relied upon are clearly hearsay within the meaning of the *Continental* case, as the Court  
10 recognized in its rulings at the Phase 3 trial. The details also lack foundation as a determination  
11 of the true return flow numbers when presented by Mr. Scalmanini, because he did not do the  
12 analysis. As the Court responded in a further discussion regarding hearsay being relied upon by  
13 Mr. Scamanini: "They are so far coming in as the basis for Mr. Scalmanini's opinion." (Feb. 14,  
14 2011 RT, p. 127, Drake Decl., Exhibit "B.") At a hearing on the Phase 3 Trial and the Statement  
15 of Decision held on July 11, 2011, landowner counsel noted that landowner parties had objected  
16 during the Phase 3 trial on hearsay grounds to much of the testimony of the purveyor experts on  
17 return flows, which the court acknowledged. (July 11, 2011 RT, p. 10, Drake Decl., Exhibit "A.")

18 In light of the Court's prior recognition of the hearsay nature of portions of Mr.  
19 Scalmanini's testimony related to return flows, the Court must hear relevant evidence regarding  
20 the source and quantification of return flows in the Basin in this Phase 5 in order to make any  
21 findings as to the same.

22 **C. The Issue of Return Flow Evidence Bears on the Burden of Proof to**  
23 **Determine Rights**

24 The standard of proof applicable to a determination of rights to return flows must be  
25 clearly defined before the Court makes a determination of those rights. In its May 23, 2011  
26 proposal on the contents of the Phase 3 Statement of Decision, AGWA commented that the Court  
27 should either use a higher standard of proof regarding quantification of return flows (among other  
28 issues), or the Phase 3 Statement of Decision had to explicitly clarify that the results of Phase 3  
would not be used in any other phase. AGWA stated, "The statement of decision should clarify

1 whether the findings concerning safe yield and overdraft are intended to be used in subsequent  
2 phases of trial, in particular for a prescriptive rights phase.” (AGWA’s Proposal Re Content of  
3 Statement of Decision (May 23, 2011), at 2:8-10.)

4 Subsequently, in the revised Phase 3 Statement of Decision, the Court removed the  
5 proposed language from the purveyors related to native safe yield and return flows. (Statement of  
6 Decision for Phase 3 Trial (July 13, 2011).) The Court clarified, “The only issues at this phase of  
7 the trial were simply to determine whether the adjudication area aquifer is in a current state of  
8 overdraft and as part of that adjudication to determine the safe yield. This Statement of Decision  
9 focuses solely on those issues.” (Statement of Decision for Phase 3 Trial, at 2:10-12.)

10 Significantly, the Court did not make any determination of the proper standard of proof  
11 applicable to determination of rights to return flows, and the Phase 3 Statement of Decision  
12 specifically references the need for determination of the applicable standard of proof in further  
13 phases. In its final Statement of Decision for Phase Three Trial, the Court referred to the  
14 preponderance of the evidence standard applied to determine safe yield and overdraft issues in  
15 Phase 3, and clarified, “This burden of proof may or may not be appropriate to other phases of  
16 this trial.” (Statement of Decision for Phase Three Trial, at 3:21-24.)

17 While the limited analysis of return flows may have been sufficient for the limited  
18 purposes of Phase 3, as defined by the Court, the purveyors’ expert analysis presented at Phase 3  
19 is not a sufficient basis on which to award water rights to a large percentage of the safe yield of  
20 the Basin, particularly where parties such as the Antelope Valley Eastern Kern Water Agency  
21 (“AVEK”) and AGWA will offer evidence that the source of this water (i.e., return flows from  
22 imported water) may not exist in the quantities assumed by the purveyors’ experts.

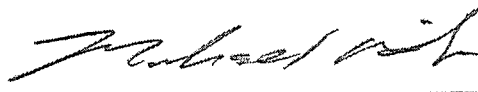
### 23 **III. CONCLUSION**

24 For the aforementioned reasons, AGWA requests that the Court deny District No. 40’s  
25 Motion, and allow the parties in this matter to admit relevant evidence related to specific amounts  
26 of return flows in the Basin and apportionment of rights to return flows, which are the subject of  
27 this Phase 5 trial.

28

1 Dated: January 31, 2014

BROWNSTEIN HYATT FARBER SCHRECK, LLP

2  
3 By: 

4 MICHAEL T. FIFE  
5 BRADLEY J. HERREMA  
6 ATTORNEYS FOR AGWA  
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Declaration of Ryan C. Drake

I, Ryan C. Drake, hereby declare as follows:

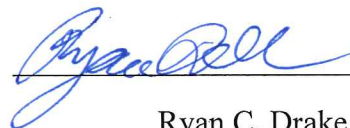
1. I am an attorney duly licensed to practice law in the State of California, and am an associate in the law firm of Brownstein Hyatt Farber Schreck LLP, counsel of record for the Antelope Valley Groundwater Agreement Association ("AGWA") in the above-entitled matter. I make this declaration of my own personal knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

2. Attached hereto as Exhibit "A" is a true and correct copy of excerpts from the transcript of proceedings in this matter on July 11, 2011.

3. Attached hereto as Exhibit "B" is a true and correct copy of excerpts from the transcript of proceedings in this matter on February 14, 2011.

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

Dated this 31st day of January, 2014, at Santa Barbara, California.



Ryan C. Drake

**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: 1020 State Street, Santa Barbara, California 93101.

On January 31, 2014, I served the foregoing document described as:

**AGWA'S OPPOSITION TO MOTION IN LIMINE NUMBER ONE BY LOS ANGELES  
COUNTY WATERWORKS DISTRICT NO. 40; DECLARATION OF RYAN C. DRAKE  
IN SUPPORT THEREOF**

on the interested parties in this action.

By posting it on the website by 5:00 p.m. on January 31, 2014.

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 January 31, 2014.

**LINDA MINKY  
TYPE OR PRINT NAME**

  
\_\_\_\_\_  
**SIGNATURE**