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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

) **REPLY TO OPPOSITION TO MOTION IN**
) **LIMINE OF AGWA FOR ORDER**
) **EXCLUDING EVIDENCE OF MODELING**
) **BY DESIGNATED EXPERT DENNIS**
) **WILLIAMS; DECLARATION OF RYAN C.**
) **DRAKE**

) Trial Date: February 10, 2014
) Time: 9:00 a.m.
) Dept: Room 222
)

1 **I. INTRODUCTION**

2 The Antelope Valley Groundwater Agreement Association (“AGWA”) hereby responds to
3 the Public Water Suppliers’ (“PWS”) Opposition to Motion in Limine of AGWA for Order
4 Excluding Evidence of Modeling by Designated Expert Dennis Williams (“PWS Opposition”),
5 filed on January 31, 2014. The PWS play loose with the facts and incredulously maintain that
6 AGWA and other parties will not be prejudiced if the Court does not exclude Dr. Williams’
7 testimony and evidence on modeling, because Dr. Williams is available to be deposed again less
8 than a week before trial about a model that was created by someone else (Mr. Scalmanini) and
9 that counsel received three business days ago (January 31). For the reasons in AGWA’s Motion
10 in Limine and as explained further below, AGWA’s Motion is well taken and the Court must
11 exclude the modeling evidence and testimony of Dr. Williams to prevent substantial prejudice to
12 the parties in this proceeding.

13 **II. RESPONSE TO THE PWS STATEMENT OF FACTS**

14 **A. The PWS Mischaracterize The Modeling Work Performed By Dr. Williams**

15 The PWS contend that:

16 Dr. Williams explained how he took electronic data from the USGS
17 and from Technical Committee members, respectively, and used
 that data in a calibrated USGS MODFLOW model.

18 (PWS Opposition, 3:1-4; *see also*, 2:19 (“He took electronic data files prepared by the
19 USGS”) and 2:22-23 (“Dr. Williams also took data gathered by members of the Technical
20 Committee”).)

21 In fact, the most significant work on the model—and the only work that is relevant for
22 Phase 5 because it pertains to return flows—was performed by Ludhorf & Scalmanini. When the
23 PWS Opposition describes “using” data in the USGS model, it is describing a modification that
24 they performed on the USGS model in order to make that model conform to the assumptions in
25 the Summary Expert Report. In other words, the USGS model, with which “[t]he USGS has been
26 analyzing the overdraft condition in the Basin with the safe yield of 110,000 acre-feet per year
27 (“afy”) determined by the Court in the Phase III trial . . .” (PWS Opposition, at 2:20-22), uses
28 different numbers for return flows than does the Summary Expert Report. Notably, these return

1 flow numbers are **lower** than those used by the Summary Expert Report. Accordingly, when the
2 PWS obtained this model, the first thing they did was to change these numbers. But neither Dr.
3 Williams, nor his firm, did this work.

4 Dr. Williams: The modification to the pumping amounts and
5 distribution, as well as the return flow amounts and distribution
came from Ludoff & Scalmanini.

6 Mr. McLachlan: "Did you or your firm do any independent work or
7 analysis to try to verify any of those input numbers?"

8 Dr. Williams: No.

9 (RT 70:18-23, Deposition of Dr. Dennis Williams (Jan. 16, 2014), true and correct copies
10 of relevant excerpts attached as Exhibit "A" to the Declaration of Ryan C. Drake, filed
11 concurrently with this Reply ("Drake Decl., Exh. A").)

12 Mr. McLachlan: With any of the other inputs that you made or data
13 that you have used to modify the 2003 USGS model, did you or
14 your firm do any independent work to evaluate the accuracy of
those inputs.

15 Dr. Williams: Well, I think the answer would be yes, because
16 Scalmanini's firm was subcontracted to us to improve the accuracy
17 of the pumping and, as a result, they also improved the return flows,
but they used the same percentages that their firm developed in the
expert report.

18 Mr. McLachlan: Okay. But if I understood your prior testimony,
19 you and Geoscience just took the work of Ludorff & Scalmanini for
granted and you didn't do any independent analysis or verification
of their pumping work?

20 Dr. Williams: No, we did not.

21 (RT, 72:4-18 (Drake Decl., Exh. A).)

22 Furthermore, it appears that Mr. Scalmanini himself was personally involved in at least
23 some portion of this work.

24 Mr. McLachlan: And were you – you yourself were, early on,
25 interfacing with Joe Scalmanini?

26 Dr. Williams: Yeah, I have been interfacing with him regularly
27 since – even before '08 up until just a few months ago.

28 Mr. McLachlan: So when was the last time you interfaced with
him?

1 Dr. Williams: I think maybe six months ago or something.

2 (RT, 104:24-105:5 (Drake Decl., Exh. A).)

3 The PWS Opposition omits any reference whatsoever to Mr. Scalmanini, and gives the
4 calculated impression that it was Dr. Williams who performed all of the modeling work. On the
5 contrary, the work most relevant to Phase 5 – the increase in the return flow percentages that the
6 USGS thought were appropriate to use in its model – was done by Mr. Scalmanini who is
7 unavailable for deposition, a fact which the PWS knew when they had him do this work.

8 This underscores the problem with this testimony. The PWS wish to offer as evidence for
9 their claim to a quarter of the safe yield of the Basin modeling work that has been in process for
10 over a year but which was not revealed until the eve of trial and which was performed by an
11 expert who is unavailable for deposition.

12 **B. The PWS Mischaracterize The Nature Of The Work Performed By Dr.**
13 **Williams As A “Peer Review”**

14 The PWS contend that:

15 Dr. Williams also based his opinions on his peer review of the
16 Phase III trial testimony by expert witnesses Joseph Scalmanini,
Mark Wildermuth, and Tim Durbin.

17 (PWS Opposition, 2:26-28.)

18 As demonstrated by the transcript quotations above, at least with respect to return flow
19 percentages, Dr. Williams did no independent analysis or verification of such numbers. He simply
20 accepted the numbers as given to him. This cannot be characterized as a “peer review.”

21 **C. The PWS Mischaracterize The Sequence Of Events Following Dr. Williams**
22 **Deposition**

23 The PWS contend that:

24 AGWA did not formally request the modeling files until after close
25 of business on January 29, 2014.

26 (PWS Opposition, at 3:16-17.)

27 As demonstrated in Exhibit 5 to the Declaration of Jeffrey Dunn, filed concurrently with
28 the PWS Opposition, on January 22, 2014, in response to requests from landowner counsel,

1 counsel for Los Angeles County Waterworks District No. 40 Mr. Jeffrey Dunn stated he would
2 make the model used by Dr. Williams available, but that “You will need to make an agreement
3 that the produced files cannot be modified, changed or altered.” Later that day, counsel for
4 AGWA Michael Fife sent an email back to Mr. Dunn requesting a copy of the agreement
5 regarding modification of the model. (See Exhibit 5 to the Declaration of Jeffrey Dunn, filed
6 concurrently with the PWS Opposition (Jan. 31, 2014), at p. 3.) Nearly a week after not receiving
7 a response, on January 29, 2014, counsel for AGWA noted the lack of response to the prior
8 inquiry on the modeling agreement, and formally requested the modeling information. (See
9 Exhibit 5 to the Declaration of Jeffrey Dunn, filed concurrently with the PWS Opposition (Jan.
10 31, 2014), at p. 3.)

11 Counsel for Los Angeles County Waterworks District No. 40 ultimately responded on
12 January 30, 2014, stating that the office would send the modeling overnight to AGWA, a night
13 before the PWS filed their Opposition to AGWA’s Motion in Limine. (Declaration of Jeffrey
14 Dunn, filed concurrently with the PWS Opposition (Jan. 31, 2014), at ¶ 20.) AGWA received the
15 modeling files that day, with 10 days until trial to review all of Dr. Williams’ modeling, his input,
16 and to attempt to hire an expert to review the modeling data. The PWS account of the sequence
17 of events is erroneous.

18 **III. AGWA WILL BE HIGHLY PREJUDICED BY THE INTRODUCTION INTO**
19 **EVIDENCE OF MODELING WHICH IT HAS HAD INSUFFICIENT TIME TO**
20 **VET**

21 **A. AGWA Has Been Given Insufficient Time to Test Input and Assumptions of**
22 **the Model**

23 The PWS Opposition argues that since Dr. Williams’ model was produced January 30,
24 2014, approximately 10 days before the Phase 5 trial, they have satisfied expert disclosure
25 requirements and AGWA and other parties are not prejudiced. Allowing only a matter of weeks
26 for attorneys to review groundwater modeling files and data inputs is inherently unreasonable
27 when such modeling will inform the main portion of the PWS’ expert’s opinions. In particular, in
28 this instance it is not just one model at issue, but two. As shown by the deposition transcript
excerpts quoted above, Dr. Williams utilized a USGS model that was modified by Mr.

1 Scalmanini. This modification pertained specifically to the return flow numbers. In order to
2 understand these changes, it may be necessary to also look at the original USGS model. For
3 example, under the USGS assumptions, did all of the inputs balance even with a lower return
4 flow number and a total safe yield of 110,000 AFY? Why? What does this show? These are
5 important questions for Phase 5, and are clearly questions that the PWS do not want answered
6 before the Court awards them water rights to assumed return flows that total approximately a
7 quarter of the safe yield of the Basin.

8 In order to meaningfully evaluate the modeling performed by Dr. Williams, AGWA must
9 be able to test the model calibration, evaluate the purpose of the model, and review the choice of
10 input data used by Dr. Williams. The PWS' suggestion that AGWA is not prejudiced because it
11 received Dr. Williams' modeling 10 days before trial is disingenuous.

12 The case of *Stanchfield v. Hamer Toyota* (1995) 37 Cal.App.4th 1495, cited by the PWS,
13 is distinguishable from the facts here. In that case, on March 29, 1993, Hamer Toyota designated
14 Miller as its damages expert and, in a declaration executed on that date, its counsel stated that
15 Miller would be sufficiently familiar with the pending action to submit to a meaningful oral
16 deposition. (37 Cal.App.4th at 1503.) Subsequently, on July 6, 1993, the plaintiff deposed Mr.
17 Miller and he stated that he needed 16 hours to form his opinion. (*Id.*) Plaintiff did not seek a
18 follow-up deposition, and then voiced an objection when Miller took the stand nearly 3 months
19 later. The court held that since the plaintiff could have taken a follow-up deposition two days
20 after the initial one, and three months before trial, it could not object at the last minute.

21 Here, AGWA was not informed of Dr. Williams' modeling until less than three weeks
22 before trial, and did not receive the model until less than two weeks before trial. A follow-up
23 deposition in this case within a week before trial would effectively be meaningless unless AGWA
24 could fully vet Dr. Williams' model before any follow-up deposition. Indeed, the *Stanchfield*
25 court explained that one of the purposes of the need for disclosure of expert reports well ahead of
26 time is "...to safeguard against surprise." (37 Cal.App.4th at 1504, citing *Beverly Hospital v.*
27 *Superior Court* (1993) 19 Cal.App.4th 1289, 1294.)

1 The PWS Opposition's claim that since the return flow portion of this phase of trial is now
2 moved until the week of February 18, 8 days after originally scheduled, does not excuse the fact
3 that the PWS did not produce the modeling until after the actual deposition of its expert 10 days
4 before trial was scheduled, affording AGWA no meaningful opportunity to obtain a modeling
5 expert to review the model and test the assumptions used by Dr. Williams.

6 **B. The Expert Designation of Dr. Williams Failed to Include His Reports and**
7 **Output Data**

8 If a demand for an exchange of information concerning expert trial witnesses includes a
9 demand for production of reports and writings as described in subdivision (c) of Section
10 2034.210, all parties must produce and exchange, at the place and on the date specified in the
11 demand, all discoverable reports and writings, if any, made by any designated expert described in
12 subdivision (b) of Section 2034.210. The Notice of Deposition of Dr. Williams filed by the
13 Wood Class specifically included a request for any "computer runs," "renderings," "statistical
14 analyses of any kind," and other requests for copies of any analysis conducted by Dr. Williams.
15 Neither he nor his counsel produced the modeling at deposition. The PWS' failure to comply
16 shows a total disregard for the requirements of these provisions.

17 The fact that Dr. Williams' files are large does not excuse the PWS' failure to produce
18 them ahead of the deposition. The PWS Opposition claims that: "The data is so extensive that it
19 requires special processing for making computer disk copies, and the files are too large to
20 transmit via email or to post on the Court's website. Consequently, Dr. Williams did not bring
21 those modeling files to his deposition." (PWS Opposition, 3:6-8.) This statement alone
22 demonstrates the gamesmanship at work in this issue. The PWS state (with a straight face), that
23 because the files were too big to email or post on the Court's website, that they were not able to
24 make computer disk copies and bring them to the deposition. This non-sequitur of an explanation
25 highlights the objective of the PWS to limit any kind of critical analysis of their modeling work.

26 **C. The Expert Designation Did Not Sufficiently Apprise AGWA of Dr. Williams'**
27 **Intended Testimony**

28 The fact that modeling was included in Dr. Williams' resume as past work that he has
done in unrelated matters, but not specifically listed within the scope of his intended testimony in

1 this matter, cannot excuse the PWS' failure to sufficiently apprise the parties of Dr. Williams'
2 modeling. The PWS first claim that since Dr. Williams' expert disclosure included his resume,
3 which contains multiple references to groundwater modeling, AGWA should have been aware
4 that Dr. Williams was going to conduct modeling of the entire Basin within his specified scope of
5 testimony on return flows. Dr. Williams' qualifications included with his expert designation also
6 reference "design and construction of...water supply wells," as well as the fact that he is a
7 geologist in addition to a hydrologist. (See Declaration of Jeffrey V. Dunn re Public Water
8 Suppliers' Notice of Designation of Expert Witnesses (Nov. 18, 2013), at ¶ 6.) Should AGWA
9 thus have also been prepared to question Dr. Williams on design and construction of wells and
10 geologic principles? While the PWS are correct that an expert designation need only provide a
11 general description of the testimony the expert intends to give, (*Bonds v. Roy* (1999) 20 Cal.4th
12 140, 148-149), a failure to mention that the basic foundation of the expert's opinion will be based
13 upon modeling of the groundwater basin fails to provide adequate notice to the parties to allow
14 them to sufficiently prepare for deposition of the modeling expert.

15 The PWS reference to hydrologic modeling conducted by Dr. Jan Hendrickx, AGWA's
16 designated expert, is a red herring. Dr. Hendrickx was deposed on modeling of return flows at
17 the Phase 4 trial on April 17, 2013, when the Phase 4 trial originally related to return flows. Dr.
18 Hendrickx's testimony in Phase 5 on return flows is a continuation of his work for which he was
19 deposed in Phase 4, and Dr. Hendrickx has not formed any new opinions not already disclosed
20 during the Phase 4 trial, and all of his materials have previously been made available to the PWS.
21 In contrast, Dr. Williams has not been designated in any prior phase of trial, has not been deposed
22 before, and has not offered any opinions that were referenced in prior phases of trial. Thus, Dr.
23 Williams' testimony is completely unlike that of Dr. Hendrickx in terms of notice of the work
24 performed, notice of the opinion reached, and notice of the input elements into the studies
25 conducted by the expert.

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1 **IV. CONCLUSION**

2 For the aforementioned reasons and to prevent AGWA and other landowner parties from
3 having to respond to the modeling evidence presented by Dr. Williams with one hand tied behind
4 their proverbial backs, AGWA requests that the Court issue an order excluding the modeling
5 testimony and evidence presented by Dr. Williams at the Phase 5 trial.

6
7 Dated: February 5, 2014

BROWNSTEIN HYATT FARBER SCHRECK, LLP

8
9 By: 

10 MICHAEL T. FIFE
11 BRADLEY J. HERREMA
12 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. In accordance with the deadline specified in the Case Management Order for Phase 5 and Phase 6 Trials in this matter, on January 24, 2014, AGWA filed its Motion in Limine for an Order Excluding Evidence of Modeling related to evidence and testimony on modeling performed by Dr. Dennis Williams.

3. On January 23, 2014, I directed my assistant Linda Minky to request a final copy of the deposition transcript of Dr. Williams, dated January 16, 2014, from Veritext Legal Solutions ("Veritext"), the service vendor for deposition transcripts in this case.

4. Ms. Minky was informed that the final copy of the Williams deposition from January 16, 2014, was not yet available, and Veritext transmitted a rough transcript of the deposition.

5. Since the final certified copy was not yet available on January 24, 2014, AGWA filed excerpts from the rough transcript of the Williams deposition in support of its Motion in Limine for an Order Excluding Evidence of Modeling.

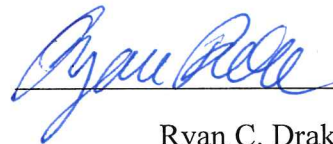
6. Subsequently, on January 30, 2014, Ms. Shay Tyler of Veritext transmitted an electronic copy of the final certified transcript of Dr. Williams from January 16, 2014.

7. Attached hereto as Exhibit "A" is a true and correct copy of excerpts from the final certified transcript of Dr. Williams' deposition from January 16, 2014, in support of AGWA's Motion in Limine for an Order Excluding Evidence of Modeling and AGWA's Reply to the Opposition of the Public Water Suppliers to AGWA's Motion in Limine for an Order Excluding

1 Evidence of Modeling.

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

4 Dated this 5th day of February, 2014, at Santa Barbara, California.

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7 Ryan C. Drake
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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 February 5, 2014, I served the foregoing document described as:

**REPLY TO OPPOSITION TO MOTION IN LIMINE OF AGWA FOR ORDER
EXCLUDING EVIDENCE OF MODELING BY DESIGNATED EXPERT DENNIS
WILLIAMS; DECLARATION OF RYAN C. DRAKE**

on the interested parties in this action.

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

**LINDA MINKY
TYPE OR PRINT NAME**


SIGNATURE