

RICHARD G. ZIMMER - SBN 107263  
T. MARK SMITH - SBN 162370  
CLIFFORD & BROWN  
A Professional Corporation  
Attorneys at Law  
Bank of America Building  
1430 Truxtun Avenue, Suite 900  
Bakersfield, CA 93301-5230  
(661) 322-6023

Attorneys for Bolthouse Properties, LLC and Wm. Bolthouse Farms, Inc.

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

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COORDINATION PROCEEDING  
SPECIAL TITLE (Rule 1550(b))

) Judicial Council Coordination Proceeding No.  
4408

ANTELOPE VALLEY GROUNDWATER  
CASES

) CASE NO. 1-05-CV-049053

INCLUDED ACTIONS:

LOS ANGELES COUNTY  
WATERWORKS DISTRICT NO. 40 v.  
DIAMOND FARMING COMPANY, et al.,  
Los Angeles Superior Court Case No.  
BC325201

) **BOLTHOUSE PROPERTIES, LLC'S  
AND WM. BOLTHOUSE FARMS, INC.'S  
PHASE 3 TRIAL BRIEF**

) Phase 3 Trial Date:  
January 4, 2011

LOS ANGELES COUNTY  
WATERWORKS DISTRICT NO. 40 v.  
DIAMOND FARMING COMPANY, et al.,  
Kern County Superior Court Case No. S-  
1500-CV-254348

) **DATE: December 15, 2010  
TIME: 10:00 A.M.  
DEPT: 1**

DIAMOND FARMING COMPANY, and  
W.M. BOLTHOUSE FARMS, INC., v.  
CITY OF LANCASTER, et al.,  
Riverside Superior Court  
Case No. RIC 344436 [c/w case no. RIC  
344668 and 353840]

ROSAMOND COMMUNITY SERVICES  
DISTRICT,  
CROSS-COMPLAINANT,

COMES NOW defendants, Bolthouse Properties, LLC and Wm. Bolthouse Farms, Inc.

(hereinafter "Bolthouse"), and hereby submit their Phase 3 Trial Brief as follows:

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1 ***PHASE 3 TRIAL BRIEF***

2 **PHASE 3 ISSUES**

3 The Phase 3 issues include a determination of Safe Yield and a determination whether  
4 the Antelope Valley water basin is currently in a state of Overdraft in order to determine  
5 whether the Court should exercise continuing equitable jurisdiction, and if so, in what manner.

6 **THE LAW**

7 The California Supreme Court in the case of *City of Los Angeles v. City of San*  
8 *Fernando* (1975) 14 Cal.3d 199 evaluated both Safe Yield and Overdraft. *San Fernando*  
9 defined Safe Yield as follows:

10 “ ‘Safe yield’ is defined as ‘the maximum quantity of water which  
11 can be withdrawn annually from a ground water supply under a  
12 given set of conditions without causing an undesirable result..”  
(14 Cal.3d, 278.)

13 The Court defined Undesireable Result as:

14 “The phrase ‘undesirable result’ is understood to refer to a  
15 gradual lowering of the ground water levels resulting eventually  
in depletion of the supply.” (14 Cal.3d, 278.)

16 The Court defined Overdraft as follows:

17 “Overdraft commences whenever extractions increase, or the  
18 withdrawable maximum decreases, or both, to the point where  
the surplus ends. (Page 14 Cal,3d, 278.) [O]verdraft occurs only  
19 if extractions from the basin exceed its safe yield plus any such  
temporary surplus.” (14 Cal.3d, 280.)

20 The Court defined Surplus as:

21 “The findings state that ‘[s]urplus is that condition which exists  
22 when the draft on the ground water supply is less than the safe  
yield.’” (14 Cal.3d, 278.)

23 The Court defined Temporary Surplus as:

24 “[I]f a ground basin's lack of storage space will cause a limitation  
25 of extractions to safe yield to result in a probable waste of water,  
the amount of water which if withdrawn would create the storage  
26 space necessary to avoid the waste and not adversely affect the  
basin's safe yield is a temporary surplus available for  
27 appropriation to beneficial use. Accordingly, overdraft occurs  
only if extractions from the basin exceed its safe yield plus any  
28 such temporary surplus.” (14 Cal.3d, 280.)

1 **BURDEN OF PROOF**

2 This Court previously determined that the Purveyor Parties have the burden of proof on  
3 the issues of Safe Yield and Overdraft. As discussed by AGWA in AGWA's Phase 3 Trial  
4 Brief, when significant property issues are at stake, a clear and convincing evidence standard  
5 should apply. Further, injunctive provisions should be imposed, if at all, narrowly and based  
6 upon appropriate proof. Applying the correct standard of proof and imposing injunctive  
7 provisions or other equitable provisions narrowly is particularly critical in this case. As the  
8 Court will see based upon presentation of evidence, data in the Antelope Valley is lacking, the  
9 Purveyor analysis is flawed and any scientific analysis must recognize that there is a certain  
10 margin of error and/or range which must be considered in determining the Safe Yield.  
11 Accordingly, Bolthouse requests this Court hold the Purveyors to the proper standard of proof  
12 and require that proof be made as to the maximum quantity of water which can be withdrawn  
13 from the groundwater basin while at the same time protecting the groundwater basin resource.

14 **DISCUSSION OF SAFE YIELD AND OVERDRAFT**

15 The California Supreme Court in *San Fernando* provides a legal standard for Safe Yield  
16 and Overdraft. However, determination of Safe Yield and Overdraft within this legal definition  
17 must be based upon the facts and circumstances of the particular water basin in question. Safe  
18 Yield is defined by San Fernando as the maximum amount of water which can be withdrawn  
19 from a groundwater basin under a given set of cultural conditions without causing undesirable  
20 results. Undesirable result is defined as the gradual lowering of water levels leading to ultimate  
21 depletion and/or destruction of the water supply. This broad legal definition allows the Court  
22 to evaluate all of the attributes of the particular basin in question, the cultural practices  
23 occurring in a basin at any given time, and expert testimony bearing on these issues, to  
24 determine whether any manifested results in the basin are undesirable. The desired result of  
25 this analysis is to determine the maximum amount of water that can be withdrawn from the  
26 basin which will be safe, in other words, which will not cause exhaustion or destruction of the  
27 water supply.

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1 **THE EVIDENCE**

2 Based upon depositions to date, Bolthouse expects the Purveyors will present expert  
3 testimony of basin yield which is not consistent with the California Supreme Court's definition  
4 of Safe Yield and Overdraft. In particular, Purveyor experts Durbin and Wildermuth both  
5 testified they did not do a safe yield calculation. In other words, they did not do an evaluation  
6 of the maximum amount of water that can be withdrawn from the water basin without harm to  
7 the water basin. In fact, the entire Summary Expert Report is based upon a so-called  
8 "sustainable yield" which by its terms does not define Safe Yield as defined by the California  
9 Supreme Court in *San Fernando*.

10 Even if the Summary Expert Report and the Purveyor opinions had been based upon the  
11 proper legal standard, the evidence will show that the water basin is not currently in Overdraft  
12 and that the Safe Yield is not currently being exceeded within the meaning of these terms as  
13 defined by the California Supreme Court.

14 As the brief filed by AGWA discusses in greater detail, pumping in the Antelope Valley  
15 groundwater basin in the past was much greater than it is today. Given the fact that in recent  
16 times there has been no pumping which will lead to exhaustion or destruction of the supply,  
17 groundwater pumping can continue in the future at levels which are now being pumped, and  
18 even potentially greater levels, without causing any undesirable result within the meaning of  
19 *San Fernando*.

20 The evidence will show that the initial Purveyor expert analysis found no allegedly  
21 undesirable results other than some lowering of water levels. Bolthouse and the other Landowner  
22 Parties will present testimony that water levels are not continuing to decline but to the contrary,  
23 have stabilized.

24 Based upon a recent change in strategy from the Summary Expert Report and from the  
25 initial depositions of Purveyor experts, the Purveyors now request augmentation of expert  
26 designations and to use additional data which they obtained for the first time within the last  
27 week or so, to show subsidence. Subsidence of the entire groundwater basin was tracked for a  
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1 long period of time by satellite. This tracking shows that subsidence decreased and ceased on a  
2 basin wide basis in recent times.

3 The subsidence information obtained by the Purveyor Parties within the last week or so,  
4 involves one data point near Edwards Air Force Base which is of questionable relevance and  
5 significance. The extensometer readings for this one data point, in reality show the end of a  
6 subsidence occurrence which followed pumping long ago. Additionally, simply looking at  
7 subsidence at one specific point in the basin is not a proper legal basis for a determination of  
8 subsidence elsewhere in the basin. Further, although subsidence may have occurred in the past,  
9 or may occur in the future, it is not determinative of whether Overdraft has occurred. As this  
10 Court properly recognized at the most recent Case Management Conference, any time there is  
11 dewatering of particular geologic material prone to subsidence, subsidence will occur to some  
12 degree or another. Whether subsidence is localized and/or whether subsidence is undesirable  
13 within the meaning of *San Fernando*, is subject to determination by this Court.

14 Bolthouse and other Landowner experts also will testify regarding why the Purveyor  
15 scientific analysis is flawed. The Purveyor scientific analysis fails to recognize that the  
16 analysis of Safe Yield, including the hydrogeologic component parts of a Safe Yield analysis,  
17 necessarily involves a margin of error and/or a range of values. Further, with regard to  
18 virtually every component part of the Purveyor Safe Yield analysis, the Purveyor experts  
19 selected the method and/or data which gives rise to the lowest Safe Yield determination.

### 20 THE WITNESSES

21 The Purveyor expert witnesses participated to one degree or another in preparing what  
22 they entitled "Summary Expert Report." The Summary Expert Report itself is not evidence.  
23 Each of the Purveyor experts performed analysis and formed conclusions on specific areas  
24 within their respective fields of expertise. Bolthouse requests this Court limit testimony by  
25 Purveyor experts to the particular analysis they conducted, rather than simply repeating  
26 opinions of other experts. This will promote efficient use of court time by eliminating  
27 cumulative testimony and eliminating the need for Landowner attorneys to cross-examine  
28 testifying experts regarding the opinions of other Purveyor experts. This approach is consistent

1 with the law that an expert may not simply repeat the hearsay opinion of another expert in the  
2 case.

3 The Landowner experts have analyzed the opinions proffered by the various Purveyor  
4 experts. To the extent Purveyor experts give these opinions in the Phase 3 Trial, Landowner  
5 experts will be called to challenge these opinions. Once again, the Summary Expert Report is  
6 not evidence and Landowner experts should not be required to address any and all opinions  
7 they may have regarding the Report itself. Landowner experts are prepared to limit their  
8 opinions to the opinions actually offered by Purveyor experts at trial. Once again, this will  
9 foster efficient use of court and party time and resources. Speaking generally, the thrust of the  
10 Landowner expert opinions will be that the Purveyor expert analysis is scientifically flawed and  
11 biased resulting in an excessively low Safe Yield number and directed to the improper  
12 conclusion that the basin is currently in Overdraft.

13 In addition to opining regarding the opinions of Purveyor experts, the Landowner  
14 experts have conducted their own exhaustive analysis of Safe Yield and Overdraft. The  
15 Landowner expert analysis will involve a more comprehensive analysis of the issues, is based  
16 upon actual data from the field and consists of testimony of eminently qualified experts.

17 The evidence will demonstrate that a significant problem with the Purveyor expert  
18 analysis of Safe Yield results from a gross underestimation of natural recharge. The evidence  
19 will show that recharge to the Antelope Valley groundwater basin occurs primarily from the  
20 surrounding watershed. Simply stated, precipitation falls on the mountains and makes its way  
21 to the groundwater basin either by runoff or by underflow through bedrock massively fractured  
22 by at least three different faults. Natural recharge occurring in this manner, particularly from  
23 fractured bedrock, has in the past either not been considered, not studied and/or grossly  
24 underestimated.

### 25 **CONCLUSION**

26 The evidence will show that current pumping in the Antelope Valley is not exceeding  
27 Safe Yield and that the basin is not in Overdraft. The evidence will show that the Purveyor  
28 analysis focuses on a more generalized water balance which fails to comport with the

1 Constitutional requirements of Article X, Section 2, along with the proper definitions of Safe  
2 Yield and Overdraft articulated by the California Supreme Court in *San Fernando*. The  
3 Purveyor scientific approach is flawed scientifically and fails to determine the maximum  
4 amount which can be withdrawn from the water basin as required by Article X, Section 2.

5 The Landowner parties have invested both themselves and their financial resources into  
6 retaining qualified experts to analyze the matters at issue in Phase 3. Although some of the  
7 experts testifying to the Court may be more familiar to the Court, Bolthouse requests this Court  
8 carefully scrutinize the testimony from all experts, evaluate the credentials of the witnesses and  
9 evaluate the basis for the opinions being given in light of Article X, Section 2 and *San*  
10 *Fernando*.

11 The ramifications of the Phase 3 decision on the Landowners, cannot be overstated.  
12 This decision will have a dramatic effect on their livelihoods and the ability of farmers to grow  
13 crops which feed people throughout this country. At the conclusion of the evidence, Bolthouse  
14 and the other Landowner Parties, will request this Court make a determination of the maximum  
15 quantity of water, in terms of range or otherwise, which can be withdrawn from the  
16 groundwater basin under current cultural conditions, without causing an undesirable result.

17 Bolthouse requests that the Safe Yield be set as a maximum number, or range, based  
18 upon the recognition that this number and or range, may be adjusted in the future. Adjustments  
19 to the Safe Yield likely will be necessary in the future, based upon better monitoring, more data  
20 and changing cultural conditions. Additionally, under continuing jurisdiction this Court has the  
21 ability to enjoin activities which potentially would cause an undesirable result by enjoining  
22 pumping in certain areas by parties with junior rights. In other words, pumping the same  
23 amount of water in different ways and in different places within a water basin, will affect  
24 whether such pumping causes an undesirable result. Accordingly, this Court, consistent with  
25 the priority rights of the parties, may properly continue jurisdiction to maximize yield while at  
26 the same time avoiding any undesirable result. With proper management, the Safe Yield of the

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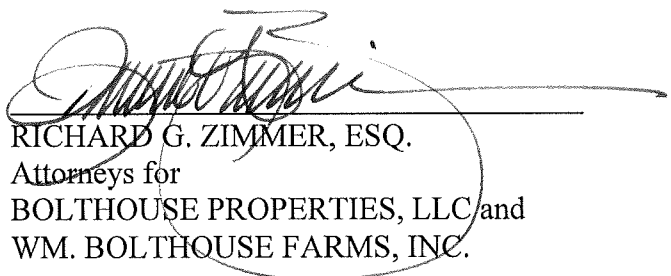
1 basin will be maximized as Constitutionally required.

2  
3 DATED: December 20, 2010

Respectfully submitted.

4 CLIFFORD & BROWN

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6  
7 By:

  
RICHARD G. ZIMMER, ESQ.

Attorneys for

BOLTHOUSE PROPERTIES, LLC and  
WM. BOLTHOUSE FARMS, INC.



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