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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **COUNTY OF LOS ANGELES – CENTRAL DISTRICT**  
16

17 **ANTELOPE VALLEY**  
18 **GROUNDWATER CASES**

19 Included Actions:  
20 Los Angeles County Waterworks District  
No. 40 v. Diamond Farming Co., Superior  
21 Court of California, County of Los  
Angeles, Case No. BC 325201;

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

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

Judicial Council Coordination No. 4408

CLASS ACTION

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

**PUBLIC WATER SUPPLIERS’  
RESPONSE TO OBJECTIONS RE  
SCALMANINI TESTIMONY;  
DECLARATION OF STEFANIE  
HEDLUND**

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

This brief by the Public Water Suppliers (“PWS”) responds to the Landowner attorneys objections to expert Joseph Scalmanini’s testimony and exhibits.<sup>1</sup> The Landowner attorneys made five similar categories of objections including: (1) Mr. Scalmanini’s Expert Designation did not disclose subsidence as a topic; (2) Mr. Scalmanini cannot testify regarding recycled water; (3) Mr. Scalmanini relied on hearsay; (4) Mr. Scalmanini cannot testify to certain reports he was asked about on cross examination and later in re-direct; and, (5) Mr. Scalmanini cannot testify as to individualized pumping. As discussed below, the objections are without merit and should be denied.

In addition to the arguments below that address the five general categories, attached as Exhibit “A” is a matrix of the specific motions to strike and exclusions of exhibits.

### **II. ARGUMENT**

#### **A. Mr. Scalmanini’s Expert Designation Was Sufficiently Broad To Cover Subsidence**

Mr. Scalmanini’s expert designation was broad enough to cover his testimony regarding subsidence. The Public Water Suppliers Expert Designation for Mr. Scalmanini states:

Mr. Scalmanini will testify as to characteristics and hydrologic conditions of the groundwater in the Antelope Valley Groundwater Adjudication Area (“Basin”). Mr. Scalmanini will testify concerning the Basin’s sustainable yield and geology and the occurrence of groundwater in the Basin. Mr. Scalmanini’s testimony will include historic groundwater conditions, effects of groundwater development and the current status and past changes in groundwater conditions.

The subject of subsidence is covered in several of these topics, most notably “effects of groundwater development and the current status and past changes in groundwater conditions” and “geology.” The Oxford Dictionary defines geology as “the science that deals with the earth’s

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<sup>1</sup> The Landowner objections are stated on the transcript of February 14, 2011, pages 85 thru 131.

1 physical structure and substance, its history, and the processes that act on it.”

2       Subsidence is included in geology and is a geologic term describing when water is  
3 depleted in areas that contain fine grain sediments. The de-watering of fine grain sediments  
4 causes the eventually subsiding of land levels, also know as subsidence. Thus the designation for  
5 current status and past changes in groundwater conditions would cover subsidence. Furthermore,  
6 the geology of the Basin is broad enough to include subsidence. If this designation was not  
7 detailed enough, then the Landowners should have objected and demanded a more detailed  
8 disclosure. The expert witness disclosures of the Landowners were similar to the Public Water  
9 Suppliers in level of detail. The Landowners also provided no reports.

10       The Landowners also seek to exclude Mr. Scalmanini’s subsidence testimony by arguing  
11 that subsidence in the Antelope Valley in general, and at Edwards Air Force Base specifically, is  
12 an event of the past. Their argument is based upon claim that the Expert Report does not have  
13 any information on subsidence after 1992.

14       However, the report prepared by Mr. Scalmanini and other experts does not state that  
15 subsidence stopped in 1992. Logically, if subsidence began in 1930 and was present in 1992,  
16 then it would be highly unlikely for it to abruptly stop in 1992, especially given the ongoing  
17 groundwater level decline in the Basin.

18       Fundamentally, the landowners seek to prevent this court from considering an undesirable  
19 effect of the ongoing overdraft. Mr. Scalmanini’s expert designation properly included  
20 subsidence and his testimony and opinions should be admitted.

21               1.       The Expert Report Relied And Cited To Reports Containing  
22                       Extensometer Data

23       The Expert Report posted by the Public Water Suppliers on July 15, 2010 as an exhibit to  
24 the expert witness declaration contains statements about ongoing subsidence and references the  
25 United States Geological Services (“USGS”) report. The report states: “Subsidence has been  
26 occurring in the basin since about 1930, indicating that pumping has exceeded sustainable yield  
27 since at least that time, and has continued to the present as pore pressures within the thickest  
28 aquitards slowly equilibrate with lower heads in the aquifer units.” (Expert Report at p. V-2.) In

1 addition, an entire section, 4.5 is dedicated to the discussion of land subsidence and how it was  
2 used in the change of storage calculation. The USGS report is used and referenced in the Expert  
3 Report. (*See* Hedlund Decl., ¶ 2.) In fact, Appendix “B” to the Expert Report includes a list of  
4 11 reports, largely USGS reports, which discuss and analyze subsidence in the Antelope Valley.  
5 These reports are available on the USGS website. The Landowners knew about these reports,  
6 knew that they were used by Mr. Scalmanini, and knew they were significant because they were  
7 extensively used in his cross-examination.

8 While the Expert Report does not focus solely on subsidence, it does document  
9 subsidence in both the main body and its appendices. In order to properly calculate the change in  
10 groundwater storage over time, it was necessary to summarize how much water came out of  
11 compaction of fine grain sediments. Simply put, subsidence results from the fact that water  
12 slowly drains out from compaction and it is necessary to quantify it in order to account for change  
13 in storage. To properly calculate the change in storage over time, it is necessary to know where  
14 subsidence took place and to quantify the water from compaction. The Expert Report relied on  
15 USGS maps that show the spatial and vertical extent of subsidence in the Antelope Valley. The  
16 work was based on surface measurement surveying of the ground surface to identify how much  
17 the land was subsiding. The last USGS report on subsidence and its widespread occurrence  
18 covered the period up to 1992. In 1990 as part of the ongoing work, the USGS installed  
19 extensometers. The data collected from the extensometers and associated monitoring wells was  
20 not included in the work through 1992 and was first reported in the USGS 2005 Fact Sheet  
21 authored by Sneed, et al., and referenced in the Expert Report. While extensometer data doesn’t  
22 add to the change in storage calculation, it is informative to demonstrate how much subsidence  
23 has occurred.

24 The disclosure of the Expert Report and the citations to the 2005 USGS Fact Sheet  
25 demonstrate that all parties have been aware of the extensometer data since at least as early as  
26 July 2010.  
27  
28

2. Mr. Scalmanini Was Deposed For Three Days And All Parties Had Adequate Time to Ask Mr. Scalmanini About His Opinions Regarding Land Subsidence

The Landowners wish to limit Mr. Scalmanini's testimony on subsidence to what was specifically described in the Summary Expert Report. However, they cite no authority for doing so, and the law allows expert testimony to go beyond written reports, as long as there is no unfair surprise or prejudice. (*See Easterby v. Clark* (2009) 171 Cal.App.4th 772, 775.) Here, the Public Water Suppliers were under no obligation to furnish an expert report. The court specifically declined to require expert reports, and none of the other parties furnished expert reports at the time of the expert disclosure.

Here, there is no unfair surprise or prejudice, because the Landowners were able to inquire into Mr. Scalmanini's opinions on subsidence at his deposition. Mr. Scalmanini deposition lasted for three days and each party had adequate time to depose Mr. Scalmanini regarding his opinions relating to subsidence. Landowner counsel was aware that Mr. Scalmanini had opinions on subsidence:

A. Groundwater levels are declining, groundwater storage has been declining and continues to decline; and subsidence has been mapped and is ongoing. (Hedlund Decl., ¶ 3, Scalmanini Vol., 2, 277:20-278:1.)

A. So what I'm struggling with from memory is because Wildermuth did the change in storage from compaction, so that kind of took possession of the subsidence topic in terms of writing it up. I can't from memory recall you know the fate of the active extensometers and piezometers that are associated with those, that were installed by the USGS as part of an investigation and whether that data comes forward in time. I just don't remember. So I intend to go back and look. (Hedlund Decl., ¶ 4, Scalmanini Vol., 2, 371:6-16.)

A. And I said I couldn't remember about the ongoing data collection because I thought there was a possibility the funding had dried up and they might just be sitting out there. But I was wrong on that speculation. So there have been extensometers out there since 1990. They have been read. And there's a clear and complete data set that tracks water levels and monitoring wells around the extensometers and subsidence itself from the extensometers since they went in. And subsidence continues for all practical purposes linearly from 1990 to the present.

Q. When you say linearly, do you mean it's remained the same or --

1 A. At the same rate. (Hedlund Decl., ¶ 5, Scalmanini Vol., 3,  
2 485:9-486:24.)

3 Furthermore, there was adequate time to depose Mr. Scalmanini regarding the current  
4 subsidence and extensometer data because Mr. Scalmanini was deposed for three days. Finally,  
5 Mr. Fife and Mr. Zimmer extensively questioned Mr. Scalmanini regarding the subsidence data.  
6 Mr. Scalmanini's opinion regarding ongoing subsidence did not change. There is simply no legal  
7 basis to exclude Mr. Scalmanini's subsidence testimony.

8  
9 **B. Evidence Regarding Recycled Water Should Not Be Excluded**

10 The Landowner Attorneys argue that Mr. Leffler is the only person who may testify  
11 regarding recycled water. This is simply incorrect. Mr. Scalmanini relied on data, which was  
12 included in the Expert Report, provided by the Los Angeles County Sanitation Districts  
13 ("Sanitation District"). While Mr. Leffler is retained by the Sanitation District as its expert in this  
14 litigation, it does not mean that other expert are not allowed to rely on recycled water data. Mr.  
15 Scalmanini simply used the recycled water data to calculate return flows for his safe yield  
16 opinion. He did not rely on any expert opinions provided by Mr. Leffler.

17 Apparently one of the Landowner attorneys had an agreement with the Mr. Sanders, the  
18 attorney for the Sanitation District regarding Mr. Leffler's deposition. Whatever undocumented  
19 agreement they may have entered into did not bind any Public Water Supplier regarding how Mr.  
20 Scalmanini might use data provided by the Los Angeles County Sanitation Districts or from Mr.  
21 Leffler in forming his opinions.

22 **C. Mr. Scalmanini Was Not Prohibited from Providing Evidence of  
23 Individualized Pumping**

24 This court has never prohibited Mr. Scalmanini, or anyone else, from providing testimony  
25 regarding individualized pumping. This testimony is useful to the court because it is one of the  
26 components of the calculation for determining safe yield and overdraft.

27 This court has repeatedly stated that it will not issue an order based on evidence in this  
28 phase of trial that binds parties on their amount of individualized pumping. Simply because the  
court will not issue such an order at this phase of the trial does not mean that Mr. Scalmanini

1 cannot testify regarding the individualized amount, or base his opinion regarding safe yield or  
2 overdraft on this amount.

3 **D. Experts May Properly Rely on Hearsay**

4 According to Evidence Code section 801(b), an expert may base opinion testimony on *any*  
5 reliable material, including inadmissible material such as hearsay. This includes reports of other  
6 experts and scientific texts and articles. California Expert Witness Guide, CEB at section 4.1.  
7 The courts have admonished counsel for not allowing the expert to offer an opinion based upon  
8 hearsay (*People v. Hayes* (1985) 172 Cal.App.3d 517, 523 fn 3). Mr. Scalmanini has properly  
9 relied on hearsay information, similar to the landowner experts.

10  
11 1. Continental Airlines case does not apply to the expert opinion offered in  
12 this case

13 The Landowners often cite *Continental Airlines v. McDonnell Douglass* (1989) 216  
14 Cal.App.3d 388 and seek to exclude testimony of Mr. Scalmanini on this case. This case states an  
15 expert may testify as to the details of inadmissible hearsay unless such testimony cannot be cured  
16 by limiting instructions to the jury.

17 In this action, much of the testimony that the Landowners seek to exclude is based upon  
18 admissible hearsay, such as those documents prepared by a public employee. There is no basis to  
19 exclude admissible hearsay. The Landowners mistakenly argued that all testimony based on  
20 hearsay should be excluded. The Landowners have not distinguished between admissible and  
21 inadmissible hearsay and thus their argument fails.

22 The second obstacle for the Landowners is that the purpose of excluding detailed  
23 testimony regarding inadmissible hearsay is that a limiting instruction to the jury may not be an  
24 adequate remedy. In this bench trial there such concern, and therefore this case is inapplicable.  
25 All Mr. Scalmanini's testimony, regardless of the amount of detail, should be considered by the  
26 court. The court will consider the inadmissible hearsay for the purpose for which it has been  
27 offered – as the basis for Mr. Scalmanini's opinion.



1  
2 **E. Evidence Code Section 356 Permits Additional Portions of Documents Used**  
3 **on Cross To Be Presented In Evidence**

4 In the cross-examination of Mr. Scalmanini the Landowner attorneys selectively quoted  
5 from numerous USGS publications and a California Department of Water Resources publication  
6 regarding the Nipomo Mesa. These portions of publications were generally 1 or 2 pages taken  
7 from reports consisting of hundreds of pages. (*See* Exhibits: A-3, A-4 A-5,A-6, A-7 and B-14.)<sup>2</sup>  
8 Often portions of the publications would be read out of context or read is such a manner that the  
9 court might misinterpret the meaning or Mr. Scalmanini's testimony as it relates to that quote.  
10 For example a quote was read from the 2005 USGS Fact Sheet that discussed ground-water  
11 extraction and compartmentalization at Edwards Air Force base, but did not include basin wide  
12 groundwater pumping as it related to those issues. Another example includes where Landowner  
13 attorneys read Mr. Scalmanini one sentence out of an abstract contained in Ex. 104 without  
14 providing him the other pages of the abstract.

15 This cherry picking of quotes in reports by the Landowner attorneys, dealt with two  
16 subject matters: subsidence and a table dealing a range of error in preparing a water budget. An  
17 example is Exhibit A- 7, which included a cover page and a summary from a 65 page report. The  
18 portions of Exhibits 104-108 read or discussed in Mr. Scalmanini's re-direct directly involved the  
19 issues raised in cross examination and gave context or explanation to the otherwise "cherry  
20 picked" quotes used in cross examination. For example, Landowner Attorneys provided exhibit  
21 B-14 which is a table showing a range of error for a water budget. However, in reviewing the  
22 entirety of Chapter VII (Ex. 107) it is clear that a water budget method was used to calculate yield  
23 and no where in the chapter is there a reduction for range of error. Furthermore, this table was  
24 from course material from a class taught by Mr. Scalmanini for several years. (*See* Exhibit 108.)

25 The Public Water Suppliers wish the court to have all of the information so that the court  
26 understand the portions quoted by the Landowners in context and have a full and complete

27 \_\_\_\_\_  
28 <sup>2</sup> Note that Exhibit 104 is the full report from A-6. Exhibit 105 is the full report from A-7. Exhibit 106 and 107 are a  
page of the bibliography and the entire Chapter VII from B-14.

1 understanding of groundwater conditions in the Antelope Valley.

2 Evidence Code section 356 is designed to prevent a party from introducing portions of  
3 writings without the context, such as the Landowners attempted in this case. It provides that in  
4 that situation, the other party may inquire into the whole of the writing on the same subject, even  
5 though the writing might otherwise be inadmissible.

6 In *People v. Harrison* (2005) 35 Cal.4<sup>th</sup> 208, 239, the defendant introduced a portion of a  
7 statement. The appellate court found, pursuant to Evidence Code section 356, that once the  
8 defendant introduced a portion of the statement, the prosecution was entitled to introduce the  
9 remainder. The same situation occurred here. It was only after portions of the USGS reports  
10 were introduced on cross examination that the Public Water Suppliers read or inquired into other  
11 portions.

- 12 1. The USGS Reports and Other Government Reports are Official Records  
13 made by a Public Employee and therefore admissible under the Public  
Employee exception to the hearsay rule

14 Nearly all the documents that the Landowners seek to exclude are USGS reports. Those  
15 documents not published by the USGS were still prepared by a public employee. One example of  
16 this is the USGS 2005 Fact Sheet. This document was prepared by Michelle Sneed, Tracy  
17 Nishikawa, and Peter Martin, all employees of the USGS. Another example of this is Reported  
18 Crop Coefficients, Evapotranspiration of Crops, and Irrigation Efficient California High Desert,  
19 prepared by Grant Poole, and employee of the University of California Cooperative Extension.

20 A writing prepared by a public employee is excepted from the hearsay rule (Evidence  
21 Code § 1280). Most of the documents that the Public Water Suppliers have requested to be  
22 admitted into evidence have been prepared by Public Employees and therefore should be admitted  
23 (*Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 272).

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1 **III. CONCLUSION**

2 For all the above reasons, the PUBLIC WATER SUPPLIERS respectively request the  
3 objections to Mr. Scalmanini's testimony and admission of exhibits be denied.  
4

5 Dated: March 4, 2011

BEST BEST & KRIEGER LLP

7 By: /s/ Original Signed

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**PROOF OF SERVICE**

I, Stefanie Hedlund, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 400 Capitol Mall, Suite 1650, Sacramento, California 95814. On March 4, 2011, I served the within document(s):

**PUBLIC WATER SUPPLIERS' RESPONSE TO OBJECTIONS RE SCALMANINI TESTIMONY**



by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.



by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.



by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.



by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.



I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on March 4, 2011, at Sacramento, California.

/s/ Original Signed  
Stefanie D. Hedlund