

1 RONALD J. TENPAS
Assistant Attorney General
2 Environment and Natural Resources Division

3 R. LEE LEININGER
JAMES J. DUBOIS
4 United States Department of Justice
Environment and Natural Resources Division
5 Natural Resources Section
1961 Stout Street, Suite 800
6 Denver, Colorado 80294
lee.leininger@usdoj.gov
7 james.dubois@usdoj.gov
Phone: 303/844-1364 Fax: 303/844-1350
8

EXEMPT FROM FILING FEES UNDER
GOVERNMENT CODE SECTION 6103

9 CAROL L. DRAPER
MARK S. BARRON
10 United States Department of Justice
Environment and Natural Resources Division
11 Natural Resources Section
Post Office Box 663, Ben Franklin Station
12 Washington, DC 20044-0663
carol.draper@usdoj.gov
13 mark.barron@usdoj.gov
Phone: 202/305-0490 Fax: 202/305-0506
14

Attorneys for the United States
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

2 **COUNTY OF LOS ANGELES**

3 Coordination Proceeding) Judicial Council Coordination
4 Special Title (Rule 1550(b)))
5 **ANTELOPE VALLEY GROUNDWATER**)
6 **CASES**)
7 Included actions:)
8 Los Angeles County Waterworks District No. 40 v.)
9 Diamond Farming Co., et al.)
10 Los Angeles County Superior Court, Case No. BC)
11 325 201)
12 Los Angeles County Waterworks District No. 40 v.)
13 Diamond Farming Co., et al.)
14 Kern County Superior Court, Case No. S-1500-CV-)
15 254-348)
16 Wm. Bolthouse Farms, Inc. v. City of Lancaster)
17 Diamond Farming Co. v. City of Lancaster)
18 Diamond Farming Co. v. Palmdale Water District)
19 Riverside County Superior Court, Consolidated)
20 Action, Case nos. RIC 353 840, RIC 344 436, RIC)
21 344 668)
22 **AND RELATED CROSS ACTIONS**)
23
24
25
26
27
28

18 Defendant United States of America respectfully submits this narrative case management
19 statement in advance of the Case Management Conference scheduled to take place in this matter
20 on January 9, 2009 in Los Angeles, California. On November 25, 2008, at the case management
21 conference held in San Jose, California, the Court directed the parties to: (i) propose a course for
22 further proceedings in this manner, with specific reference to the issues that should be tried at the
23 next phase of trial; and (ii) address certain parties' contention that the next phase of trial be tried
24 to a jury. Because the question of safe-yield and overdraft are common factual predicates for all
25 the claims that remain pending in this case, and because resolution of those questions may
26 obviate the need for additional proceedings with respect to certain parties' claims, the Court
27
28

1 should decide those two questions in the next phase of trial. Because a determination of safe
2 yield and overdraft are findings that the Court has discretion to make without empaneling a jury,
3 and because litigating these issues to a jury may frustrate judicial economy, the Court should
4 reach those determinations on its own.

5 **I. INTRODUCTION.**

6 On November 21, 2008, in advance of the November 25, 2008 case management
7 conference, the United States submitted its Case Management Statement (“CMS”), proposing a
8 litigation schedule for the next phase of trial. See Federal Defendants’ Case Management
9 Statement, filed Nov. 21, 2008. In its November 21, 2008 CMS, the United States identified
10 three primary questions that it believes should be resolved in the Phase III trial of this case:

- 11 (i) What constitutes (or defines) safe yield in the Antelope Valley groundwater
12 basin? What is the amount of the safe yield in average acre-feet per annum in the
13 Antelope Valley groundwater basin?
- 14 (ii) Is the Antelope Valley groundwater basin in a state of overdraft today? If yes,
15 how long has this condition existed?
- 16 (iii) Has overdraft of the Antelope Valley groundwater basin resulted in land surface
17 subsidence within the Antelope Valley? If so, where? Where is the subsidence
18 most pronounced?

19 Likewise, during November 25, 2008 case management conference, the Court identified
20 a number of issues that it will need to address to resolve this case, including: (i) safe yield; (ii)
21 overdraft; (iii) prescriptive elements; and (iv) pumping evidence. The Court explained that it
22 was inclined to hear evidence on safe yield and overdraft during Phase III of the trial, because
23 those two factors were “conditions precedent” to any of the parties’ claims in this case.

24 Consistent with the reasoning the Court articulated at the November 25, 2008, the United States
25 continues to believe the three questions the United States presented in its November 21, 2008
26 CMS are the most appropriate matters for the Court to consider in the Phase III trial in this case.

II. CALIFORNIA LAW REGARDING BIFURCATION OF ISSUES.

The California Code of Civil Procedure grants trial courts discretion to select specified claims or issues and decide them before proceeding to other matters in the same case where such bifurcation promotes “the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation.” Cal. Code Civ. P. § 598. More specifically, “when separate trials will be conducive to expedition and economy,” the court may order a separate trial of any cause of action . . . or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by [law].” Cal. Code Civ. P. § 1048(b). Accordingly, the California appellate courts have acknowledged that, “[a]t all times, bifurcation and the order of proof remain in the discretion of the trial court.” Estate of Young, 72 Cal. Rptr. 3d 520, 543 (Ct. App. 2008). See also Cal. Evid. Code § 320 (“Except as otherwise provided by law, the court in its discretion shall regulate the order of proof.”). In California, “trial courts have broad discretion to determine the order of proof in the interests of judicial economy.” Grappo v. Coventry Fin. Corp., 286 Cal. Rptr. 714, 718-19 (Ct. App. 1991).

The trial judge’s discretion to manage the action is especially broad in the case of a coordinated action. See Keenan v. Sup. Ct., 168 Cal. Rptr. 561, 563 (Ct. App. 1980)(explaining that the coordination rules “give the coordination judge broad discretion to adopt procedures which will serve the convenience of parties, witnesses and counsel, and utilize judicial personnel and facilities efficiently”). “The purposes of coordination include promoting the efficient use of judicial resources.” Abelson v. Nat’l Union Fire Ins. Co., 35 Cal. Rptr. 2d 13, 18 (Ct. App. 1994). See also Cal. Code Civ. P. 404.1. To satisfy this purpose, the trial judge in a coordinated proceeding is required to “assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay.” Cal. R. Ct. 1541(b). “Consistent with this mandate, the coordination judge may ‘ . . . order any issue or defense to be tried separately and prior to the trial of the remaining issues when it appears the disposition of any of the coordinated actions might thereby be expedited.’”

1 Abelson, 35 Cal. Rptr. 2d at 18 (quoting Cal. R. Ct. 1541(b)(3)).

2 The plain language of the California Code of Civil Procedure and the California Rules of
3 Court makes it clear that, “[t]he statutory provisions for severance and separate trial are not
4 limited to separate trial of a cause of action but also authorize separate trial of any issue.”

5 Walton v. Walton, 36 Cal. Rptr. 2d 901, 908 (Ct. App. 1995). See Cal. Code Civ. P. §§ 598 and
6 1048; Cal. R. Ct. 1541(b)(3). Moreover, “[i]t is well established that, in a case involving both
7 legal and equitable issues, the trial court may proceed to try the equitable issues first, without a
8 jury . . . and that if the court’s determination of those issues is also dispositive of the legal issues,
9 nothing further remains to be tried by a jury.” Hoopes v. Dolan, 168 Cal. App. 4th 146, 157 (Ct.

10 App. 2008)(quoting Raedeke v. Gibraltar Sav. & Loan Ass’n, 517 P.2d 1157, 1160 (Cal. 1974)).

11 Indeed, not only is trying equitable issues before legal issues within the Court’s discretion, the

12 California Court of Appeals has stated that the “‘better practice’ is for ‘the trial court [to]

13 determine the equitable issues before submitting the legal ones to the jury.’” Hoopes, 168 Cal.

14 App. 4th at 157 (quoting Bate v. Marsteller, 43 Cal. Rptr. 149, 157 (Ct. App. 1965). See also

15 Nwosu v. Uba, 19 Cal. Rptr. 3d 416, 423 (Ct. App. 2004)(explaining that where a party’s

16 “claims consist of a ‘mixed bag’ of equitable and legal claims, the equitable claims are properly

17 tried first by the court”). This preference is based on the courts’ recognition that trial of

18 equitable issues first promotes judicial economy. See Nwosu, 19 Cal. Rptr. 3d at 423. See also

19 Hoopes, 168 Cal. App. 4th at 157 (acknowledging that “the trial of the equitable issues may

20 dispense with the legal issues and end the case,” and summarizing that “[i]n short, trial of

21 equitable issues first may promote judicial economy”)(internal quotation omitted).

22 **III. CALIFORNIA LAW REGARDING PRESCRIPTION OF WATER RIGHTS.**

23 It is well settled in California that “[w]ater rights are a species of real property capable of
24 acquisition by adverse user.” Locke v. Yorba Irrigation Co., 217 P.2d 425, 429 (Cal. 1950). See

25 also Cal. Civ. Code § 1007; City of Barstow v. Mojave Water Agency, 5 P.3d 853, 863 (Cal.

26 2000)(“[W]here the taking [of water] is wrongful, it may ripen into a prescriptive right.”). “The

1 elements that create a claim of prescriptive water right, like a claim for prescriptive easement,
2 include use that is (1) actual, (2) open and notorious, (3) hostile and adverse to the original
3 owner, (4) continuous and uninterrupted, (5) under a claim of right, (6) for the statutory period of
4 five years.” Brewer v. Murphy, 74 Cal. Rptr. 3d 436, 443-44 (Ct. App. 2008).

5 Because prescription requires that the taking of water be wrongful, “[p]rescriptive rights
6 are not acquired by the taking of surplus or excess water.” City of Barstow, 5 P.3d at 863.

7 Consequently, in a groundwater system, adverse use begins only when overdraft commences.

8 See Cal. Water Serv. Co. v. Edward Sidebotham & Son, Inc., 37 Cal. Rptr. 1, 7 (Ct. App. 1964).

9 The fact that one party’s taking of water from a basin is open, notorious, and
10 under claim of right does not invade any other party’s water rights in the basin so
11 as to entitle the other party to injunctive relief or start the running of any
12 prescriptive period against the other party’s rights so long as the taking is only
13 from a surplus of basin water, that is, so long as there is not an overdraft on the
14 basin supply. The commencement of overdraft provides the element of adversity
15 which makes the first party’s taking an invasion constituting a basis for injunctive
16 relief to the other party.

17 City of L.A. v. City of San Fernando, 537 P.2d 1250, 1310-11 (Cal. 1975). In applying this
18 analysis, it is the province of the trial court to determine “whether there is a surplus in the water
19 field subject to appropriation.” City of Barstow, 5 P.3d at 864.

20 **IV. CASE MANAGEMENT STATEMENT.**

21 At the November 25, 2008 case management conference, the Court described the
22 questions of safe yield and overdraft as “conditions precedent” to all of the parties’ legal claims
23 in this case and indicated that it was inclined to address those two questions at the Phase III trial
24 in this case. As discussed above, the Court clearly has the discretion to bifurcate these two
25 issues and to direct the order in which evidence is presented. Moreover, bifurcation of the issues
26 in this manner makes sense and will promote judicial economy.

27 First, the establishment of a safe yield calculation and an overdraft conclusion are factual
28 predicates necessary to resolve all of the claims the parties have raised in this case and for the

1 parties and the Court to craft a physical solution.^{1/} Further, the evidence that will be presented
2 related to safe yield and overdraft will necessarily be “basin-wide” and therefore applicable to all
3 of the parties in the case, whereas certain evidence related to pumping and/or prescription may
4 not be relevant to the interests of all participants in this adjudication. Second, the calculation of
5 a safe-yield combined with an overdraft determination may obviate the need for some, if not all,
6 additional proceedings in this manner. If the Court were to determine that the Antelope Valley
7 Groundwater Basin was not in overdraft, for example, there would be no need to proceed with
8 any of the parties’ claims based in prescription. Finally, the evidence related to safe yield and
9 overdraft will be exclusively expert testimony of the type that this Court -- as opposed to a lay
10 jury -- is experienced in weighing and evaluating.

11 Nor should the Court adopt a different approach because the factual findings it makes
12 related to safe yield and overdraft may potentially impact the resolution of certain parties’
13 prescriptive claims. Notably, while they admittedly play a role in the factfinder’s prescription
14 analysis, neither safe yield nor overdraft constitute an element of a legal claim for a prescriptive
15 water right under California law. See Brewer, 74 Cal. Rptr. 3d at 443-44 (enumerating elements
16 of a prescriptive water right). Conversely, both safe yield and overdraft are factual predicates
17 related fundamentally to the Court’s application of its equitable powers to apportion the
18 groundwater rights in the Antelope Valley. Cf. City of Barstow, 5 P.3d at 858 (holding that a
19 physical solution based on equitable apportionment must take into account the parties’ legal
20 rights to the water in a basin). Therefore, even where equitable and legal issues may be
21 presented the “better practice” is to proceed to try the equitable issues first, without a jury,
22 precisely because it may obviate the need for further proceedings and dispense with any need to
23 submit additional issues to a jury. Hoopes, 168 Cal. App. 4th at 157. Because the Court has
24 broad discretion to regulate the order of proof in this coordinated action, and because limiting the

25
26 ^{1/}Because of their relevance to all the matters before the Court, in addition to advancing the litigation
27 of all claims in this case, a judicially recognized safe yield figure will also assist the parties in their
on-going settlement negotiations.

Phase III trial to resolving the questions of safe yield and overdraft is preferential practice designed to promote judicial economy, the Court should decide those two issues at the next phase of trial.

V. PROPOSED CASE MANAGEMENT SCHEDULE.

The Court has now approved procedures for notice and joinder of class members in this case. The United States believes that Phase III litigation should begin promptly once the time period for putative class members to join has expired. As explained in its November 21, 2008 CMS, the United States also believes that Phase III should be structured to allow the parties to proceed along concurrent tracks of negotiation and preparation for trial. Based on the notice and response provisions that the Court has implemented at this time, the United States proposes the following schedule:²

1. **June 1, 2009:** Court Order or Minute Entry advising all newly joined parties that the Phase III trial will consist of proceedings to determine the safe yield of the Antelope Valley Groundwater Basin and to determine whether the basin is in a state of overdraft.
2. **August 3, 2009:** Deadline for the filing of experts' reports on the issues identified for litigation in the Phase III trial. All parties intending to present expert testimony at trial shall be required to file written expert reports. The report must contain a complete statement of all opinions the witness will express and the bases and reasons for the opinions, the data or other information the witness considered in forming the opinions, any exhibits that will be used to summarize or support the opinions, and the witnesses' qualifications. The submission of expert reports will assist in minimizing discovery costs and increasing judicial efficiency by reducing discovery disputes.
3. **September 1, 2009:** Deadline for the filing of experts' rebuttals to initial expert reports. All parties intending to present rebuttal expert testimony at trial shall be required to file

²The United States acknowledges that any remaining phases of litigation may include a determination of prescriptive rights and other issues. The scheduling and trial setting for subsequent phases, however, should be deferred until after completion and ruling on Phase III issues.

1 written rebuttal expert reports. The report must contain a complete statement of all
2 opinions the witness will express and the basis and reasons for the opinions, the data or
3 other information the witness considered in forming the opinions, any exhibits that will
4 be used to summarize or support the opinion, and the witnesses' qualifications.

- 5 4. **September 1, 2009 to October 30, 2009:** Oral or written depositions of experts.
6 5. **November 13, 2009:** Opening trial briefs due.
7 6. **November 20, 2009:** Exchange of exhibits to be used at trial.
8 7. **December 4, 2009:** Responsive briefs due.
9 8. **December 11, 2009:** Phase III Trial commences.

10
11 Respectfully submitted this 2d day of January, 2009.

12
13 /s/ Mark Barron

14 R. LEE LEININGER
15 JAMES J. DUBOIS
16 United States Department of Justice
17 Environment and Natural Resources Division
18 Natural Resources Section
19 1961 Stout Street, Suite 800
20 Denver, Colorado 80294
21 lee.leininger@usdoj.gov
22 james.dubois@usdoj.gov
23 Phone: 303/844-1364 Fax: 303/844-1350

24 CAROL L. DRAPER
25 MARK S. BARRON
26 United States Department of Justice
27 Environment and Natural Resources Division
28 Natural Resources Section
Post Office Box 663, Ben Franklin Station
Washington, DC 20044-0663
carol.draper@usdoj.gov
mark.barron@usdoj.gov
Phone: 202/305-0490 Fax: 202/305-0506

Attorneys for the United States

1 **PROOF OF SERVICE**

2 I, Linda S. Davis, declare:

3 I am a resident of the State of Colorado and over the age of 18 years, and not a party to
4 the within action. My business address is U.S. Department of Justice, Environmental and
5 Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

6 On January 2, 2009, I caused the foregoing documents described as; **UNITED STATES'**
7 **CASE MANAGEMENT STATEMENT AND MEMORANDUM**, to be served on the parties
8 via the following service:



BY ELECTRONIC SERVICE AS FOLLOWS by posting the documents(s)
listed above to the Santa Clara website in regard to the Antelope Valley
Groundwater matter.



BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By
placing true copies thereof enclosed in sealed envelopes addressed as indicated
on the attached service list.



BY OVERNIGHT COURIER: I caused the above-referenced document(s)
be delivered to FEDERAL EXPRESS for delivery to the above address(es).

15 Executed on January 2, 2009, at Denver, Colorado.
16
17
18

19 /s/Linda S. Davis
Linda S. Davis
20 Paralegal
21
22
23
24
25
26
27