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ANTELOPE VALLEY-EAST KERN WATER AGENCY  
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**  
12

13 Coordination Proceeding  
14 Special Title (Rule 1550(b))

Judicial Council Coordination Proceeding  
No. 4408

15 **ANTELOPE VALLEY**  
16 **GROUNDWATER CASES**

**Santa Clara Case No.**  
**1-05-CV-049053**  
The Honorable Jack Komar, Dept.17

17 **Included Actions:**

**ANTELOPE VALLEY-EAST KERN  
WATER AGENCY'S OPPOSITION TO  
DISTRICT NO. 40's SUPPLEMENTAL  
REQUEST FOR JUDICIAL NOTICE OF  
PHASE THREE TRIAL TESTIMONIES  
AND EXHIBITS**

18 Los Angeles County Waterworks District  
19 No. 40 vs. Diamond Farming Company, a  
20 corporation, Superior Court of California,  
County of Los Angeles, Case No.  
BC325201;

21 Los Angeles County Waterworks District  
22 No. 40 vs. Diamond Farming Company, a  
23 corporation., Superior Court of California,  
County of Kern, Case No. S-1500-CV-254-  
348;

Trial Date: February 10, 2014  
Time: 9:00 a.m.  
Room: To be determined

24 Wm. Bolthouse Farms, Inc. vs. City of  
25 Lancaster, Diamond Farming Company, a  
26 corporation, vs. City of Lancaster, Diamond  
27 Farming Company, a corporation vs.  
Palmdale Water District, Superior Court of  
California, County of Riverside, Case Nos.  
RIC 353840, RIC 344436, RIC 344668.  
28

1 Cross-Complainant, the Antelope Valley-East Kern Water Agency (AVEK), submits this  
2 Opposition to the Supplemental Request for Judicial Notice of Phase Three Trial Testimonies  
3 and Exhibits, filed by Los Angeles County Waterworks District No. 40 ("District No. 40).

4 I.

5 INTRODUCTION

6 Pursuant to the provisions of Evidence Code § 452, subdivision (d), District 40 requests  
7 that the Court take judicial notice of transcripts of the Phase 3 trial testimonies of Joseph  
8 Scalmanini and other witnesses, and related trial exhibits. Implicit therein, is District 40's  
9 request that judicial notice be taken *as to the truthfulness* or binding effect of such prior trial  
10 testimonies and trial exhibits. As demonstrated below, however, judicial notice cannot be taken  
11 of *the truthfulness* of such prior testimonies and exhibits.

12 Additionally, the Court's Orders preceding the Phase 3 trial did not inform the parties that  
13 return flow amounts or percentages would be determined in that trial phase. Consequently, the  
14 parties (including AVEK) who wish to litigate that issue during the Phase 5 trial, but who did  
15 not participate in the Phase 3 trial, were not provided with any *notice* that return flow  
16 percentages would be determined in that phase of the trial. For that reason, AVEK did not  
17 participate in the Phase 3 trial.

18 Due process requires that AVEK be given an opportunity in the Phase 5 trial to cross-  
19 examine any witness whose testimony is proffered for the purpose of establishing return flow  
20 percentages. For this additional reason, the Court should not take judicial notice of prior trial  
21 testimonies, and related exhibits -- unless the witnesses are produced at the Phase 5 trial and  
22 AVEK, and others, are given the opportunity to cross-examine those witnesses regarding their  
23 prior testimonies and exhibits prepared by them.

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1 II.

2 **BECAUSE THEY ARE REASONABLY SUBJECT TO DISPUTE, THE**  
3 **TRUTHFULNESS OF FACTS ALLEGED IN PRIOR TESTIMONIES OR TRIAL**  
4 **EXHIBITS MAY NOT BE JUDICIALLY NOTICED**

5 The author of 2 Jefferson's California Evidence Benchbook (4<sup>th</sup> ed.), §49.10, pp. 1147-  
6 1148) succinctly notes:

7 There is a mistaken notion that taking judicial notice of court records under Evid  
8 C §452(d) . . . means taking judicial notice of the existence of facts asserted in every  
9 document of a court file, including pleadings and affidavits. The concept of judicial  
10 notice requires that the matter which is the proper subject of judicial notice be a fact that  
11 is not reasonably subject to dispute. Facts in the judicial record that are subject to dispute,  
12 such as allegations in affidavits, declarations, . . . are not the proper subjects of judicial  
13 notice even though they are in a court record.

14 By logical extension, this applies as well to trial testimonies and trial exhibits.

15 “[W]hen a court takes judicial notice of a document, ‘the truthfulness and proper  
16 interpretation of the document are disputable.’” (Id., at p. 1147; *StorMedia Inc. v. Superior*  
17 *Court* (1999) 20 Cal. 4<sup>th</sup> 449, 457, fn 9; and *Laabs v. City of Victorville* (2008) 163 Cal.App.4<sup>th</sup>  
18 1242, 1266 [“while we take judicial notice of the *existence* of the documents in court files, we  
19 do not take judicial notice of the truth of the facts asserted in such documents” [emphasis in  
20 original].)<sup>1</sup>

21 Therefore, the Court may “not take judicial notice of the truth of the facts asserted in  
22 such” prior testimonies and related exhibits. Accordingly, unless such witnesses are produced  
23

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24  
25 1 Even an appellate court opinion's recitation of facts should not be considered as true on any  
26 theory of judicial notice, because such is nothing more than the hearsay assertions of the justices who  
27 issued the opinion (2Jefferson, *supra*, §49.11, p.1148; *Lockley v. Law Office of Cantrell, Green, Pekich,*  
28 *Cruz & McCort* (2001) 91 Cal.App.4<sup>th</sup> 875, 887; *Plumley v. Mockett* (2008) 164 Cal.App.4<sup>th</sup> 2031,  
1050 [judicial notice that judge made particular factual findings is far cry from judicial notice that facts  
found by judge must necessarily be true].)

1 for cross-examination during the Phase 5 trial, their prior testimonies and exhibits are of no  
2 value and are inadmissible.

3 **III.**

4 **DUE PROCESS**

5 The Court's relevant Orders preceding the Phase 3 trial did not indicate that a final  
6 determination would be made therein as to return flow amounts or percentages. The Court's  
7 orders titled, ORDER AFTER CASE MANAGEMENT CONFERENCE ON MARCH 22,  
8 2010, and ORDER AFTER CASE MANAGEMENT CONFERENCE ON MAY 6, 2010, each  
9 state the following:

10 In this third phase of trial, the Court will hear evidence to determine whether the basin,  
11 as previously defined by the Court in trial phases one and two, is in such overdraft and  
12 to determine whether there is a basis for the Court to exercise its equitable jurisdiction,  
13 including the implementation of a "physical solution," as prayed for by the public water  
14 provider parties. The public water providers have the burden of proof.

15 The Court . . . expects to hear evidence concerning total pumping and total recharge from  
16 all sources, with a further breakdown showing the amount of imported water on an  
17 annual basis.

18 (Copies of both Orders are attached as Exhibits 1 and 2 hereto.)

19 The foregoing demonstrates that the Court intended that the Phase 3 trial would  
20 determine: (1) whether the basin was in overdraft and, if so, the basin's safe yield; and (2)  
21 whether the Court should exercise its equitable jurisdiction to implement a physical solution.  
22 There was no clear indication that the Court intended to make a final determination in the Phase  
23 3 trial as to return flow amounts or percentages.

24 Accordingly, the parties were not given adequate notice that the Court intended to make  
25 a final determination in the Phase 3 trial as to return flow amounts or percentages. An  
26 elementary and fundamental requirement of due process in any proceeding that is to be accorded  
27 finality is notice appropriate to the nature of the case and reasonably calculated, under all the  
28

1 circumstances, to apprise interested parties of the pendency of a matter to be determined. (*Malek*  
2 *v. Koshad* (2011) 200 Cal.App.4th 1540, 1547.)

3 In short, the parties (including AVEK) who did not participate in the Phase 3 trial, but  
4 who wish to litigate return flow amounts/ percentages in the Phase 5 trial, were not given  
5 adequate notice that such would be determined in the Phase 3 trial. Due process requires that  
6 they be given an opportunity to cross-examine any witness whose testimony is proffered in the  
7 Phase 5 trial as to return flow amounts or percentages. Otherwise, they would be denied due  
8 process.

#### 9 IV.

#### 10 THE PHASE 3 RULING REFERENCES “ESTIMATES” ONLY

11 The Court’s Statement of Decision re Phase III Trial, repeatedly notes that the return flow  
12 percentages noted therein are imprecise “estimates” only (St. Dec., 6:26-28 [“The Court  
13 recognizes the imprecision of the various estimates and the fact that an estimate by definition  
14 is imprecise”]; and 8:4-5 [“the amount of hydro-conductivity between Basin areas was beyond  
15 the scope of the Phase III trial”].

16 Moreover, the data presented to the Court in 2011, may not be accurate with respect to  
17 the imported water return flow amounts or percentages which exist in 2014 (*inter alia*, because  
18 the amount of imported water varies from year to year). In this connection, Quartz Hill’s prior  
19 motion *in limine* conceded that, “The return flows from importer water fluctuate every year,  
20 based upon the amount of water imported the prior year” (Quartz Hill Mot., 5:22-23), and  
21 “[T]he amount of imported water will fluctuate annually” (Id., 6:10).<sup>2</sup>

22 For this reason, the Court should rely upon data and analyses which are most current to  
23 the date final judgment is entered in this action, or at least as of the conclusion of the Phase V  
24 trial.

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27 2 As noted in *City of Santa Maria*, fn. 11, “Any portion of Return Flows that is not used in a given  
28 Year shall not be carried over into the following year.”

V.

**CONCLUSION**

For all of the reasons set forth above, AVEK respectfully submits that the Court should deny District No. 40's supplemental request for judicial notice, and should not accept or admit into evidence *for the truth of the facts asserted therein* any prior testimonies or exhibits – unless adequate opportunity is given during the Phase 5 trial to cross-examine each witness regarding his prior testimony and the exhibits relating thereto.

Dated: January 30, 2013

**BRUNICK, McELHANEY & KENNEDY**

By: 

WILLIAM J. BRUNICK  
LELAND P. McELHANEY  
Attorneys for Cross-Complainant,  
ANTELOPE VALLEY-EAST KERN  
WATER AGENCY

# EXHIBIT 1

ORIGINAL FILED  
APR 23 2010  
LOS ANGELES  
SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

**ANTELOPE VALLEY GROUNDWATER  
CASES**

Judicial Council Coordination  
Proceeding No. 4408

**Included Consolidated Actions:**

Lead Case No. BC 325 201

Los Angeles County Waterworks District No.  
40 v. Diamond Farming Co.  
Superior Court of California  
County of Los Angeles, Case No. BC 325 201

**ORDER AFTER CASE  
MANAGEMENT CONFERENCE  
ON MARCH 22, 2010**

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

Hearing Date(s): March 22, 2010  
Time: 9:00 a.m.  
Location: Department 1, LASC

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 Nos.  
RIC 353 840, RIC 344 436, RIC 344 668

Judge: Honorable Jack Komar

Rebecca Lee Willis v. Los Angeles County  
Waterworks District No. 40  
Superior Court of California, County of Los  
Angeles, Case No. BC 364 553

Richard A. Wood v. Los Angeles County  
Waterworks District No. 40  
Superior Court of California, County of Los



2  
3 The matter came on as a regularly scheduled telephonic Case Management Conference  
4 on March 22, 2010 in Department One in the above entitled Court. All parties appeared by  
5 telephone. Those parties appearing are listed in the minutes of the Court prepared by the Clerk of  
6 Court.

7 The parties having briefed and argued the issues, good cause appearing, the Court makes  
8 the following Case Management order:

9 The Third Phase of Trial is scheduled for September 27, 2010 at 9:00 a.m. in  
10 Department One of this Court. The time of trial is estimated at 10 court days. The Court will be  
11 in session for trial Monday through Thursday of each week. If additional days of trial are  
12 required, the Court will schedule such after conferring with the parties.

13 The parties shall comply with the provisions of Code of Civil Procedure Section  
14 2034.210 and engage in a simultaneous disclosure and exchange of expert information,  
15 including any reports prepared by such experts, on July 1, 2010. Any supplemental disclosures  
16 and exchange of information shall occur on July 15, 2010. Expert depositions shall be taken  
17 between July 15 and August 30, 2010.

18 On July 1, 2010, any party who intends to call non-expert witnesses to provide  
19 percipient testimony shall file a statement listing such witness, the subject matter of their  
20 testimony, and an estimate of the amount of time required for their testimony on direct.

21 All discovery shall be completed in compliance with the Code of Civil Procedure 30  
22 days before trial and all motions shall be heard no later than 15 days before trial.

23 Trial briefs and motions in limine shall be filed no later than September 15, 2010 and  
24 any responses or opposition shall be filed no later than September 24, 2010.

25 The public water provider parties have essentially alleged that the basin is in overdraft,  
26 that extraction of water on an annual basis exceeds recharge, and that the basin will suffer  
27 serious degradation and damage unless the Court exercises its equitable jurisdiction. In this  
28 third phase of trial, the Court will hear evidence to determine whether the basin, as previously

1 defined by the Court in trial phases one and two, is in such overdraft and to determine whether  
2 there is a basis for the Court to exercise its equitable jurisdiction, including the implementation  
3 of a "physical solution," as prayed for by the public water provider parties. The public water  
4 providers have the burden of proof.

5 The Court will not hear any evidence concerning prescription claims nor does it expect  
6 to hear evidence of individual pumping of water by any party within the basin; rather, it expects  
7 to hear evidence concerning total pumping and total recharge from all sources, with a further  
8 breakdown showing the amount of imported water on an annual basis.

9 Any party requiring further clarification of the issues in this third phase of trial is  
10 invited to request such clarification and the Court will consider a further case management  
11 conference to provide such clarification unless it is a simple matter permitting the Court to  
12 issue a clarifying order.

13  
14 Dated: March 22, 2010

/s/ Jack Komar

Honorable Jack Komar  
Judge of the Superior Court

# **EXHIBIT 2**

JUN 01 2010

John A. Glavin, Clerk of the Court

By Raul Sanchez

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

**ANTELOPE VALLEY GROUNDWATER  
CASES**

Judicial Council Coordination  
Proceeding No. 4408

Included Consolidated Actions:

Lead Case No. BC 325 201

Los Angeles County Waterworks District No.  
40 v. Diamond Farming Co.  
Superior Court of California  
County of Los Angeles, Case No. BC 325 201

**ORDER AFTER CASE  
MANAGEMENT CONFERENCE  
ON MAY 6, 2010**

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

Hearing Date(s): May 6, 2010  
Time: 9:00 a.m.  
Location: Department 1, LASC

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 Nos.  
RIC 353 840, RIC 344 436, RIC 344 668

Judge: Honorable Jack Komar

Rebecca Lee Willis v. Los Angeles County  
Waterworks District No. 40  
Superior Court of California, County of Los  
Angeles, Case No. BC 364 553

Richard A. Wood v. Los Angeles County  
Waterworks District No. 40  
Superior Court of California, County of Los

2  
3 The matter came on as a regularly scheduled telephonic Case Management Conference  
4 on May 6, 2010 in Department One in the above entitled Court. All parties appeared by  
5 telephone. Those parties appearing are listed in the minutes of the Court prepared by the Clerk  
6 of Court.

7 The parties having briefed and argued the issues, good cause appearing, the Court makes  
8 the following Case Management order:

9 **ORDERS AMENDING THE MARCH 22, 2010 ORDER AFTER CASE**  
10 **MANAGEMENT CONFERENCE**

11 The Third Phase of Trial remains scheduled for September 27, 2010 at 9:00 a.m. in  
12 Department One of this Court. The time of trial remains estimated at 10 court days. The Court  
13 will be in session for trial Monday through Thursday of each week. If additional days of trial are  
14 required, the Court will schedule such after conferring with the parties.

15 The Request of Grimmway Enterprises, Inc., Lapis Land Company, LLC, Crystal  
16 Organics, LLC and Diamond Farming Company to Modify the March 22, 2010 Case  
17 Management Order, posted on April 30, 2010, is granted as follows: the time for parties to  
18 comply with the provisions of Code of Civil Procedure Section 2034.210 and engage in a  
19 simultaneous disclosure and exchange of expert information, including any reports prepared by  
20 such experts, is extended from July 1, 2010 to **July 15, 2010**. The time for any supplemental  
21 disclosures and exchange of information is extended from July 15, 2010 to **July 29, 2010**. The  
22 time for expert depositions to be conducted is amended to **between July 29, 2010 and**  
23 **September 13, 2010**.

24 On July 15, 2010, any party who intends to call non-expert witnesses to provide  
25 percipient testimony shall file a statement listing such witness, the subject matter of their  
26 testimony, and an estimate of the amount of time required for their testimony on direct.

27 All discovery shall be completed in compliance with the Code of Civil Procedure 30  
28 days before trial and all motions shall be heard no later than 15 days before trial.

1 Trial briefs and motions in limine shall be filed no later than September 15, 2010 and  
2 any responses or opposition shall be filed no later than September 24, 2010.

3 The public water provider parties have essentially alleged that the basin is in overdraft,  
4 that extraction of water on an annual basis exceeds recharge, and that the basin will suffer  
5 serious degradation and damage unless the Court exercises its equitable jurisdiction. In this third  
6 phase of trial, the Court will hear evidence to determine whether the basin, as previously defined  
7 by the Court in trial phases one and two, is in such overdraft and to determine whether there is  
8 a basis for the Court to exercise its equitable jurisdiction, including the implementation of a  
9 "physical solution," as prayed for by the public water provider parties. The public water  
10 providers have the burden of proof.

11 The Court will not hear any evidence concerning prescription claims nor does it expect  
12 to hear evidence of individual pumping of water by any party within the basin; rather, it expects  
13 to hear evidence concerning total pumping and total recharge from all sources, with a further  
14 breakdown showing the amount of imported water on an annual basis.

15 **WOOD PLAINTIFFS' MOTION TO DISQUALIFY**

16 The Motion by the Wood Plaintiffs to Disqualify the Law Firm of Lemieux & O'Neill is  
17 denied based upon the information provided to the Court.

18 **WOOD PLAINTIFFS' MOTION FOR ALLOCATION OF EXPERT WITNESS**

19 **FEES**

20 On March 25, 2010, the Wood Plaintiffs submitted a Proposed Order re Motion for  
21 Allocation of Expert Witness Fees, providing that the twelve named "Public Water Suppliers"  
22 equally share the costs of Entrix in the amount of \$4,784.68. Objections thereto were filed by  
23 the Cities of Lancaster and Palmdale. After considering the pleadings filed by all parties, the  
24 Court finds the fees incurred to date by Entrix, in the amount of \$4,784.68 are reasonable, but  
25 modifies the order to exclude the Cities of Lancaster and Palmdale from obligation as neither of  
26 those parties are making claims against the these landowners.

27 The Court hereby orders the following public water suppliers to pay this bill directly to  
28 Entrix within fourteen days (14) of this order. The following ten public water suppliers are

1 ordered to pay this bill, in equal shares: Rosamond Community Services District, Los Angeles  
2 County Waterworks District No. 40, Littlerock Creek Irrigation District, Palm Ranch Irrigation  
3 District, North Edwards Water District, Desert Lake Community Services District, California  
4 Water Service Company, Quartz Hill Water District, Palmdale Water District and Phelan Pinon  
5 Hills Community Services District.

6 Further, the request of Richard Wood to authorize the court-appointed expert to  
7 commence the work outlined in the proposal from Entrix, which was attached to the moving  
8 papers, is denied without prejudice based on the decision that no evidence of individual  
9 pumping will be heard at the Phase III trial, as set forth in the Court's March 22, 2010 Order.

10 **TRANSFeree/TRANSFEROR OBLIGATION**

11 Regarding the Proposed Order submitted by Tejon Ranchcorp on January 4, 2008 re  
12 Jurisdiction over Transferees of Property, previously granted by the Court in open hearings, the  
13 Court hereby confirms that it will defer signing said Order until further briefing and hearing of  
14 the issues by the parties. The Court requests that the proponent of this transfer document file by  
15 May 24, 2010, a formal motion to modify it and apply it appropriately; briefing deadlines shall  
16 be per Code of Civil Procedure; the hearing date is set for June 14, 2010 at 9:00 a.m. in  
17 Department 1, Los Angeles County Superior Court.

18 SO ORDERED.

19  
20 Dated: May 25, 2010

21   
22 Honorable Jack Komar  
23 Judge of the Superior Court  
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I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California 92408-3303.

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