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Tejon Ranchcorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES - CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER)
CASES)
Judicial Council Coordination No. 4408

Included Actions:)
Santa Clara Case No. 1-05-CV-049053

Los Angeles County Waterworks District No. 40)
Assigned to Hon. Jack Komar
v. Diamond Farming Co., Superior Court of)
MOTION *IN LIMINE* FOR ORDER
California, County of Los Angeles, Case No. BC)
EXCLUDING EXPERT TESTIMONY
325201;)
OF JASON C. SUN; MEMORANDUM
Los Angeles County Waterworks District No. 40)
OF POINTS AND AUTHORITIES;
v. Diamond Farming Co., Superior Court of)
AND DECLARATION OF ROBERT G.
California, County of Kern, Case No. S-1500-CV-)
KUHS IN SUPPORT THEREOF
254-348;)

Wm. Bolthouse Farms, Inc. v. City of Lancaster,)
Diamond Farming Co. v. Lancaster, Diamond)
Farming Co. v. Palmdale Water Dist., Superior)
Court of California, County of Riverside, Case)
No. RIC 353 840, RIC 344 436, RIC 344 668)
Phase 2 Trial Date: October 6, 2008

To: The United States of America ("United States") and its attorney of record:

I. MOTION


TEJON RANCHCORP ("Tejon") hereby moves for an order excluding the expert
testimony of Jason C. Sun under Code of Civil Procedure section 2034.300 on the ground

1 that the United States has unreasonably failed to submit an expert witness declaration
2 setting forth a brief narrative statement of the general substance of the testimony that
3 its expert is expected to give at the Phase 2 Trial.

4 This motion is based on this motion, the memorandum of points and authorities
5 in part II hereof, the declaration of Robert G. Kuhs in part III hereof, the records and
6 papers on file herein, and on such other and further evidence as may be presented at the
7 hearing on the motion.
8

9 Dated: September 29, 2008

KUHS & PARKER

10
11 By 
12 Robert G. Kuhs,
13 Attorney for Tejon Ranchcorp

14 II. POINTS AND AUTHORITIES

15 A. Introduction.

16 The Phase 2 Trial is currently set for October 6, 2008. The sole issue before the
17 court is whether there exists one or more basins within the Antelope Valley Adjudication
18 Area ("AVAA"). This court ordered the parties to make a written disclosure of experts
19 on August 15, 2008 and supplemental disclosure by September 4, 2008, pursuant to Code
20 of Civil Procedure section 2034.260. Tejon and other parties filed expert disclosure
21 declarations consistent with section 2034.260; the United States did not. R. Lee
22 Leininger filed a supplemental declaration designating Jason C. Sun. Nowhere in the
23 declaration, however, does Mr. Leininger disclose what opinions Mr. Sun will offer at
24 trial. Furthermore, Mr. Sun did not produce a written report summarizing his anticipated
25 opinions at trial.
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1 By letter dated September 17, 2008, Tejon requested that the United States make
2 a disclosure in compliance with section 2034.260 or risk exclusion at trial. On or about
3 September 24, 2008 the United States advised that it would provide a more detailed
4 declaration regarding Mr. Sun's opinion. Mr. Sun sat through the deposition testimony
5 of Tejon's expert, Dick Rhone, on September 25, 2008. As of September 29, 2008,
6 however, the United States has not disclosed Mr. Sun's opinions. Accordingly, Tejon
7 brings this motion to exclude from the Phase 2 Trial any opinion not expressly disclosed
8 in the United States' supplemental expert witness declaration.
9

10 **B. When A Party Fails to Disclose the Substance of an**
11 **Expert's Testimony, Exclusion From Trial is Mandatory.**

12 One of the principal purposes of civil discovery is to do away with the "sporting
13 theory of litigation - namely, surprise at trial." (*Chronicle Pub. Co. v. Superior Court*
14 (1960) 54 Cal.2d 548, 561.) The purpose is accomplished by giving "greater assistance
15 to the parties in ascertaining the truth and in checking and preventing perjury," and by
16 providing "an effective means of detecting and exposing false and fraudulent and sham
17 claims and defenses." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.)
18 In other words, pretrial discovery is designed to take the "game" out of pretrial
19 preparation. (*Ibid.*) To fulfill this goal, the legislature developed a comprehensive
20 scheme for the orderly exchange of expert witness information.
21

22 The exchange of retained expert witness information must include a declaration.
23 The declaration must contain a "**brief narrative statement of the general substance of**
24 **the testimony that the expert is expected to give.**" (Code Civ. Proc., § 2034.260(c)(2)
25 [emphasis added].) The purpose of the expert witness disclosure is to give "fair notice
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1 of what an expert will say at trial." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146.) "This
2 allows the parties to assess whether to take the expert's deposition, to fully explore the
3 relevant subject area at any such deposition, and to select an expert who can respond
4 with a competing opinion on that subject area." (*Id.* at pp. 146-147.) "In short, the
5 statutory scheme as a whole envisions timely disclosure of the general substance of the
6 expert's expected testimony so that the parties may properly prepare for trial." (*Id.* at
7 p. 148.)

8
9 Here, the expert witness declaration of Mr. Leininger gives absolutely no notice
10 of what Mr. Sun will say at trial. Mr. Leininger states:

11 "Dr. Sun may provide rebuttal testimony to refute opinions of
12 other experts on the use of hydrogeological modeling to
13 establish the existence of subbasins in the Antelope Valley."
(Ex. A.)

14 The declaration contains absolutely no expression of Mr. Sun's opinion. As a result,
15 Tejon and the other parties to this action are left to guess as to what opinions Mr. Sun
16 will actually express at trial, whether such opinions are consistent or inconsistent with
17 the opinions expressed by Tejon's experts, whether Tejon should declare a rebuttal
18 expert, and if so on what subject.

19
20 The United States has failed to disclose the general substance of Mr. Sun's
21 testimony in any fashion whatsoever. By letter dated September 17, 2008, Tejon
22 requested that the United States make a supplemental disclosure or risk exclusion at
23 trial. (Ex. B.) The United States refused to do so. As a result, Tejon and other parties to
24 this action are prejudiced since we cannot determine from the declaration, whether Mr.
25 Sun's deposition should be taken, how to prepare for cross-examination and whether we
26 should prepare rebuttal testimony. "When an expert is permitted to testify at trial on a
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1 wholly undisclosed subject area, opposing parties similarly lack a fair opportunity to
2 prepare for cross-examination or rebuttal. It makes little practical difference whether the
3 party proffering the expert testimony failed to submit an expert witness declaration or
4 submitted an inaccurate one." (*Bonds v. Ray, supra*, 20 Cal.4th at p. 147.) Exclusion from
5 trial is appropriate.

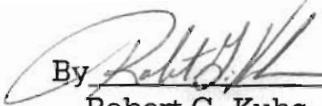
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7 **C. Conclusion.**

8 Based on the foregoing, Tejon respectfully requests that the court enter an
9 order excluding the testimony of Jason C. Sun in the form attached hereto as **Exhibit C**.

10 Dated: September 29, 2008

Respectfully submitted,

11 KUHS & PARKER

12
13 By 
14 Robert G. Kuhs,
15 Attorney for Tejon Ranchcorp

16 **III. DECLARATION OF ROBERT G. KUHS**

17 I, ROBERT G. KUHS, declare as follows:

18 1. I am an attorney at law duly admitted to practice before all courts of the
19 State of California and a partner of Kuhs & Parker, counsel for Tejon.

20 2. Attached as **Exhibit A** is a true and correct copy of the Supplemental
21 Expert Witness Declaration, without exhibit, submitted by the United States.

22 3. Attached as **Exhibit B** is a true and correct copy of my September 17, 2008
23 letter to Mr. Leininger requesting that he promptly supplement his declaration and
24 further warning that absent such supplemental declaration, Tejon would move to
25 exclude the testimony of his expert at trial.

26
27 4. On or about September 24, 2008 Mr. Leininger advised that he would
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1 submit a supplemental declaration setting forth the opinions that Mr. Sun intends to offer
2 at trial. Mr. Sun attended the deposition of Tejon's expert, Dick Rhone, on September 25,
3 2008. We are now one week from trial and the United States still has not disclosed what
4 opinions, if any, Mr. Sun will offer at the Phase 2 trial.

5
6 5. Tejon is prejudiced by the United States' failure to disclose the opinions of
7 Mr. Sun in that Tejon cannot prepare for Mr. Sun's deposition, cannot confer with its own
8 experts regarding Mr. Sun's opinion and cannot determine whether to present rebuttal
9 or impeachment testimony. Accordingly, in fairness, Mr. Sun's testimony should be
10 excluded from the Phase 2 trial.

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

13
14 Dated: September 29, 2008


Robert G. Kuhs

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

3 R. LEE LEININGER
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EXEMPT FROM FILING FEES UNDER
GOVERNMENT CODE SECTION 6103

7 Attorneys for Federal Defendants

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
COUNTY OF LOS ANGELES

9 Coordination Proceeding
10 Special Title (Rule 1550(b))

) Judicial Council Coordination
) Proceeding No. 4408

11 ANTELOPE VALLEY GROUNDWATER CASES

12 Included actions:

) **SUPPLEMENTAL EXPERT**
) **WITNESS DECLARATION**

13 Los Angeles County Waterworks District No. 40 v.
Diamond Farming Co., et al.

14 Los Angeles County Superior Court, Case No. BC 325
201

15 Los Angeles County Waterworks District No. 40 v.
Diamond Farming Co., et al.

16 Kern County Superior Court, Case No. S-1500-CV-
17 254-348

18 Wm. Bolthouse Farms, Inc. v. City of Lancaster

Diamond Farming Co. v. City of Lancaster

19 Diamond Farming Co. v. Palmdale Water District

Riverside County Superior Court, Consolidated Action,
20 Case nos. RIC 353 840, RIC 344 436, RIC 344 668

21 AND RELATED CROSS ACTIONS
22 _____
23

24 Pursuant to California *Code of Civil Procedure* § 2034.280, Cross-Defendant, United
25 States of America, hereby supplements its list of experts with Dr. Jason Sun who may be called
26 to testify at the time of the Phase 2 Trial or related hearings. The United States reserves the right
27 to supplement this witness list and designate additional witnesses including expert witnesses for
28 use in rebuttal. The United States further reserves the right to call as an witness at trial an expert
not previously designated for impeachment purposes pursuant to *Code of Civil Procedure* §

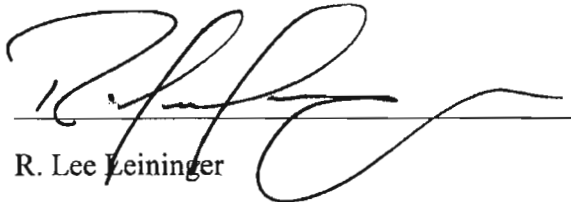
1 2034.310.

2 The United States further declares that:

- 3 1. Dr. Sun has a Doctor of Philosophy degree in Civil and Environmental Engineering, with an
4 emphasis in ground water hydrology, from the Massachusetts Institute of Technology. Dr. Sun
5 has conducted ground water model simulations and has reviewed ground water model calibration
6 for over 10 years. Dr. Sun has reviewed/modified/performed ground water models in southern
7 California since 2005. Dr. Sun has been performing ground water modeling work for Edwards
8 AFB in California since 2007. Dr. Sun also participated in ground water modeling projects in
9 Oregon, Washington, Florida, New York, and Massachusetts. Dr. Sun is experienced in ground
10 water model review, statistical analysis on field data, data reduction, and groundwater
11 remediation analysis. A copy of his Curriculum Vitae is attached as Exhibit 1.
- 12 2. Dr. Sun may provide rebuttal testimony to refute opinions of other experts on the use of
13 hydrogeological modeling to establish the existence of subbasins in the Antelope Valley.
- 14 3. Dr. Sun has agreed to testify at the Phase II trial.
- 15 4. Dr. Sun is sufficiently familiar with this pending action to submit to a meaningful oral
16 deposition concerning the use of groundwater modeling.
- 17 5. Dr. Sun's rate is \$163.58 per hour for testifying at depositions, mediations, arbitrations, trial,
18 and for travel time; plus all out-of-pocket expenses, including, but not limited to, hotel, airfare,
19 car rental, copying, postage, shipping, telephone calls, etc.

20 I declare under the penalty of perjury, the above statements are true and correct.

21 Dated this 4th day of September 2008.

22 
23
24 R. Lee Leininger

25

26

27

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KUHS & PARKER

ATTORNEYS AT LAW

WILLIAM C. KUHS
JAMES R. PARKER, JR.
ROBERT G. KUHS

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OUR FILE NO.

September 17, 2008

1291.01

R. Lee Leininger
United States Department of Justice
Environment and Natural Resources Division
1961 Stout Street, Suite 800
Denver, CO 80294

Re: Antelope Valley Groundwater Cases
Supplemental Expert Witness Declaration

Dear Mr. Leininger:

We are in receipt of the Supplemental Expert Witness Declaration filed on behalf of the United States of America. The disclosure is not adequate.

The Expert Witness Declaration must include (a) "a brief narrative statement of the general substance of the testimony that the expert is expected to give." (Code Civ. Proc., § 2034.260(c)(2).) The purpose of the expert witness discovery statute is to give "fair notice of what an expert will say at trial." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146.) "This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on the subject." (*Id.* at pp. 146-147.)

At paragraph 2 of your declaration you state: "Dr. Sun may provide rebuttal testimony to refute opinions of other experts on the use of hydrogeological modeling to establish the existence of subbasins in the Antelope Valley." Although the declaration discloses the subject matter, the declaration falls far short of disclosing "the general substance of the testimony that the expert is expected to give."

The purpose of this letter is to request that the United States submit a supplemental declaration in compliance with section 2034.260(c)(2). Absence such compliance, we will move to exclude Mr. Sun's opinion. (Code Civ. Proc., § 2034.300.)

Very truly yours,



Robert G. Kuhs

RGK/lel

cc: Counsel and Parties

Exhibit B

William C. Kuhs, State Bar No. 39217
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Defendant Tejon Ranchcorp

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

ANTELOPE VALLEY GROUNDWATER)	Judicial Council Coordination No. 4408
CASES)	
)	Santa Clara Case No. 1-05-CV-049053
Included Actions:)	Assigned to Hon. Jack Komar
Los Angeles County Waterworks District No. 40)	
v. Diamond Farming Co., Superior Court of)	[PROPOSED] ORDER EXCLUDING
California, County of Los Angeles, Case No. BC)	EXPERT TESTIMONY
325201;)	
)	
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. Lancaster, Diamond)	
Farming Co. v. Palmdale Water Dist., Superior)	
Court of California, County of Riverside, Case)	
No. RIC 353 840, RIC 344 436, RIC 344 668)	
_____)	Phase 2 Trial Date: October 6, 2008

The motion of TEJON RANCHCORP ("Tejon") for an order excluding the expert testimony of Jason C. Sun came on regularly for hearing in Department 1 of the above-entitled court, the Honorable Jack Komar, presiding. The court, having

Exhibit C

considered the papers submitted and oral argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Jason C. Sun is excluded from offering any opinion in the Phase 2 Trial.

Dated: _____, 2008

Judge of the Superior Court

C:\WPDATA\WCK\Tejon Ranch\Sun Order.wpd

PROOF OF SERVICE

I, Lidia E. Luna, declare:

I am employed in the County of Kern, State of California. I am over the age of 18 and am not a party to the within action; my business address is Kuhs & Parker, 1200 Truxtun Avenue, Suite 200, Bakersfield, California 93301.

On September 29, 2008, I caused the foregoing document(s) described as: **MOTION *IN LIMINE* FOR ORDER EXCLUDING EXPERT TESTIMONY OF JASON C. SUN; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF ROBERT G. KUHS IN SUPPORT THEREOF** to be served on the parties in this action, as follows::

(X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa Clara County Superior Court website: www.scefilinq.org regarding the Antelope Valley Groundwater matter.

() (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and processing of documents for mailing. Under that practice, the above-referenced document(s) were placed in seal envelope(s) addressed to the parties as noted above, with postage thereon fully prepaid and deposited such envelope(s) with the United States Postal Service on the same date at Bakersfield, California, addressed to:

() (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other overnight delivery service, for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

() (BY FACSIMILE TRANSMISSION) I am "readily familiar" with the firm's practice of facsimile transmission of documents. It is transmitted to the recipient on the same day in the ordinary course of business.

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

() (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Lidia E. Luna