

1 WM. MATTHEW DITZHAZY  
City Attorney  
2 NOEL J. DORAN  
Deputy City Attorney  
3 CITY OF PALMDALE

4 RICHARDS, WATSON & GERSHON  
A Professional Corporation  
5 JAMES L. MARKMAN (43536) (jmarkman@rwglaw.com)  
STEVEN R. ORR (136615) (sorr@rwglaw.com)  
6 WHITNEY G. MCDONALD (245587) (wmcdonald@rwglaw.com)  
355 South Grand Avenue, 40th Floor  
7 Los Angeles, CA 90071-3101  
Telephone: (213) 626-8484  
8 Facsimile: (213) 626-0078

9 Attorneys for Defendant, Cross-Complainant,  
and Cross-Defendant CITY OF PALMDALE

10

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **COUNTY OF SANTA CLARA**

13

14 **ANTELOPE VALLEY GROUNDWATER**  
15 **CASES**

Judicial Council Coordination  
Proceeding No. 4408

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**OPPOSITION OF PUBLIC WATER  
SUPPLIERS TO ANAVERDE LLC'S  
MOTION IN LIMINE NO. 2  
SEEKING TO BLOCK THE CITY  
OF PALMDALE'S PARTICIPATION  
IN THIS ADJUDICATION**

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Phase 2 Trial: October 6, 2008  
Location: Dept. 1  
Time: 9:00 a.m.

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(Hon. Jack Komar)

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**I. OVERVIEW**

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Anaverde LLC (“Anaverde”) moves *in limine* to preclude the City of Palmdale (“City”) from participating in this case. In so doing, Anaverde seeks judgment on the pleadings. The motion is premised on Anaverde’s erroneous contention that the City must have heretofore produced water pursuant to a claimed water right in order to

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1 maintain any cause of action in this matter. Anaverde asserts that the City, unlike any  
2 other person, entity or class, must have historically exercised a water right in order to  
3 seek declaratory relief in the adjudication of water rights in a basin and to seek the  
4 imposition of a physical solution on the persons, entities or classes utilizing the basin.  
5 Anaverde is wrong, and its motion should be summarily denied.

6 Anaverde asks the Court to ignore the City’s standing in this case and its public  
7 policy interests in the outcome of the case, and to ignore the fact that numerous other  
8 parties participate in this adjudication without claiming a water right based on prior  
9 pumping. Anaverde also mistakenly refers to superseded City pleadings and  
10 mischaracterizes City’s request for dismissal of one theory in City’s cross-complaint in  
11 order to claim that City no longer asserts the existence of its own water production rights  
12 in this proceeding. A review of the accurate record herein and the following points and  
13 citations conclusively demonstrates that the City’s pleadings – made in conjunction with  
14 the other Public Water Suppliers -- seek declaratory relief of the City’s water rights and  
15 those of others and the imposition of a physical solution to preserve the resource at issue  
16 and that relief continues to be sought against Anaverde and all other parties hereto.  
17 Anaverde’s motion is baseless.

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19 **II. JUDGMENT ON THE PLEADINGS IN FAVOR OF ANAVERDE IS**  
20 **INAPPROPRIATE HERE**

21 A motion for judgment on the pleadings is akin to a general demurrer and “is  
22 properly granted only if the complaint does not state facts sufficient to state a cause of  
23 action against that defendant.” *Shea Homes Ltd. Partnership v. County of Alameda*  
24 (2004) 110 Cal.App.4th 1246, 1254. “Because a motion for judgment on the pleadings is  
25 the functional equivalent of a general demurrer, the same rules apply.” *Hightower v.*  
26 *Farmers Ins. Exchange* (1995) 38 Cal.App.4th 853, 858. Namely, the motion “attacks  
27 only defects disclosed on the face of the pleadings or by matters that can be judicially  
28 noticed.” *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.

1 Therefore, presentation of declarations or extrinsic evidence is improper. *Id.* This  
2 includes discovery admissions, which should not be considered when evaluating the  
3 pleading under attack. Robert Weil & Ira Brown, CIVIL PROCEDURE BEFORE TRIAL §  
4 7:322 (2008).

5 Also like a general demurrer, “[a] trial court’s determination of a motion for  
6 judgment on the pleadings accepts as true the factual allegations that the plaintiff makes.  
7 [Citations] In addition, it gives them a liberal construction.” *Gerawan Farming, Inc. v.*  
8 *Lyons* (2000) 24 Cal.4th 468, 515-516. Where the motion is directed toward the pleading  
9 as a whole, “the motion must be denied if even one count is good.” *Heredia v. Farmers*  
10 *Ins. Exchange* (1991) 228 Cal.App.3d 1345, 1358. As made clear in Part IV below,  
11 City’s cross-complaint states numerous viable causes of action against Anaverde.

12  
13 **III. CITY HAS STANDING TO SEEK AND DOES SEEK DECLARATORY**  
14 **RELIEF TO ASSERT WATER RIGHTS AND TO BRING CERTAINTY TO THE**  
15 **AVAILABILITY AND USE OF WATER RESOURCES IN THE ANTELOPE**  
16 **VALLEY AND TO PROTECT THAT RESOURCE**

17 The City’s interests in this matter, grounded in public policy and already stated in  
18 pleadings and in open Court, include the following:

- 19 1. An interest in basing its land use decisions on knowledge of the sustainable  
20 amount of water available to serve present land uses as well as those newly entitled;
- 21 2. An interest in preserving local basin water resources in perpetuity for the  
22 benefit of present and future Palmdale residents and businesses;
- 23 3. An interest in water being provided to its residents and businesses as  
24 economically as is feasible, an interest served by supporting the efforts of entities who  
25 are retail water suppliers in Palmdale, including Palmdale Water District and Los  
26 Angeles County Water District No. 40; and
- 27  
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1           4.       An interest in maintaining the basin as a potential source from which to  
2 exercise water rights of its own, including overlying rights which could serve open space  
3 and the City’s parks and other recreational properties.

4           Anaverde has not cited, and cannot cite, authority to the effect that the above-  
5 stated interests are not sufficient to support City’s participation in this adjudication, or its  
6 ability to state causes of action, notwithstanding the City not having produced basin water  
7 in the past. The fact that City is a potential presently dormant overlying water producer  
8 is enough to compel City’s inclusion herein for the same reason why the Court has  
9 insisted that other nonpumping landowners be afforded the opportunity to participate as  
10 members of a class.

11           It also should be noted that Antelope Valley East Kern Water Agency has been  
12 included in this matter even though that entity asserts no water production rights. Like  
13 the City, Antelope Valley East Kern Water Agency seeks Court ordered basin  
14 management and preservation of the basin which should include the Court’s ability to  
15 bind Antelope Valley East Kern Water Agency, the entity which is in the position to  
16 supply supplemental water for basin preservation. Anaverde does not disagree with  
17 Antelope Valley East Kern Water Agency’s inclusion and does not seek judgment on the  
18 pleadings against Antelope Valley East Kern Water Agency based on the fact that that  
19 entity asserts no form of water production right whatsoever. Clearly, the assertion of  
20 water rights is not a prerequisite to a party participating in this matter, whether Antelope  
21 Valley East Kern Water Agency or the City. Accordingly, the motion lacks merit.

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23       **IV.    CONTRARY TO ANAVERDE’S ASSERTION, THE CITY HAS NOT**  
24       **DISMISSED ALL CAUSES OF ACTION TO ESTABLISH ITS OWN DORMANT**  
25       **WATER RIGHTS**

26           Anaverde claims that the City dismissed its only cause of action asserting water  
27 rights (Mot., p. 5). In so doing, Anaverde refers to the City’s December 1, 2005 cross-  
28 complaint, a pleading which was superseded when the City, along with the other Public

1 Water Suppliers, filed the model cross-complaint as instructed by the Court on January  
2 10, 2007, attached hereto as Exhibit 1. A copy of the Request for Dismissal filed by the  
3 City (a non-pumper) pertaining only to the first cause of action regarding prescriptive  
4 rights is attached as Exhibit 2.

5 In summary, the City’s remaining causes of action continue to seek (2nd Cause of  
6 Action) declarations of the safe yield of the basin, quantities of surplus water, if any, the  
7 correlative rights of the parties to the safe yield, and the various rights of overlying,  
8 appropriative, and prescriptive rights to pump groundwater from the basin, (3rd Cause of  
9 Action) imposition of physical solution to protect the resource, (4th Cause of Action)  
10 declaration of municipal priority, (5th Cause of Action) determination as to priority for  
11 imported water, (6th Cause of Action) declaration regarding right to recapture return  
12 flows from imported water, (7th Cause of Action) orders preventing unreasonable use of  
13 water, and (8th Cause of Action) determination of the basin boundary. The pendency of  
14 these properly pleaded causes of action completely blunts any attempt by Anaverde to  
15 assert that there is no remaining tension between the City’s rights and Anaverde’s  
16 claimed water rights.

17 Under the standards governing motions for judgment on the pleadings, the motion  
18 must be denied.

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20 **V. NO APPLICABLE AUTHORITY REQUIRES A CITY, OR ANY OTHER**  
21 **PUBLIC ENTITY, TO HAVE PRODUCED WATER IN ORDER TO ASSERT A**  
22 **PRESENTLY DORMANT OVERLYING OR APPROPRIATIVE RIGHT**

23 Anaverde speciously cites *City of San Diego v. Sloane* (1969) 272 Cal.App.2d  
24 663 for the nonexistent principle that a city forfeits any claim of water right unless it  
25 sought to exercise that right prior to initiation of litigation (Mot., p. 5). In *Sloan*, the City  
26 of San Diego sought to condemn defendant’s property riparian to the San Diego river for  
27 park use. *Id.* at p. 664. The condemnation took 8.5 acres and left a remainder which was  
28 no longer riparian to the river. *Id.* At the trial court level, San Diego successfully

1 excluded evidence that the riparian water rights brought value to the property taken and  
 2 that depriving the remainder of its riparian nature constituted severance damages. *Id.* at  
 3 pp. 664-665. San Diego’s basis for doing so was its claim that its Pueblo right to the  
 4 river’s waters was superior to riparian rights. *Id.* at p. 665. The Court of Appeal  
 5 reversed and allowed consideration of the value of riparian water rights to the subject  
 6 property. *Id.* at p. 670. The Court did so based on a finding that San Diego was not  
 7 asserting a paramount Pueblo right to the water adjacent to the property, but, rather, was  
 8 simply taking the property solely for park purposes. *Id.* at pp. 667-668. The City never  
 9 attempted to capture all of the river water pursuant to the assertion of its Pueblo right and,  
 10 therefore, never deprived the land of its right to that river water. *Id.* In that regard, the  
 11 Court made the following statement at pp. 667-668:

12 “In the present case the land involved was not condemned to be used to  
 13 provide water for the City of San Diego. This action was initiated by the  
 14 City of San Diego pursuant to a resolution passed by its City Council  
 15 *declaring a public need and necessity to acquire the land for the purpose of*  
 16 *a public park.* No representation is made by that resolution, nor did the  
 17 City produce any evidence at the trial, to indicate it was the intention and  
 18 purpose of the City to use the land to be taken to acquire and put to use all  
 19 the waters that flow over and through it for the benefit of the inhabitants of  
 20 the City of San Diego. As to any proposed use of the water, the record is  
 21 wholly and completely silent, and we find nothing therein to indicate that  
 22 when this park is completed, the waters of the San Diego River, both  
 23 surface and subsurface, will not continue to flow, as they have for centuries,  
 24 over and through these lands, down the river, across the lands of others and  
 25 out into the sea.

26 “Indeed, the City’s position is that by the mere act of condemning  
 27 the land for a public park and by permitting the waters of the river to  
 28 continue to flow over and through the land, it has effectively asserted its

1 prior and paramount pueblo right to all such waters, and has, *as a matter of*  
 2 *law*, extinguished and rendered nonexistent the subordinate and secondary  
 3 rights of the riparian owners so that the same may not be considered as  
 4 affecting the value of land in the condemnation action.

5 “In so permitting the water of the San Diego River to continue to  
 6 flow over and through its park land, or even by using some of that water  
 7 upon the park property, the City of San Diego will not be exercising its  
 8 paramount pueblo right to *all* the water of the river. The City has the power  
 9 to exercise its prior and paramount right in full or in part, but it is the extent  
 10 to which it exercises that right by use, not the fact of its existence, which  
 11 affects the subordinate right of riparian owners. (*City of Los Angeles v.*  
 12 *City of Glendale, supra, 23 Cal.2d 68, 79.*)”

13 *Sloan* in no way supports Anaverde’s claim that the City must use water before  
 14 asserting a dormant right to do so in the future. The Court in *Sloan* simply recognized  
 15 that a condemnation for park purposes was not also an assertion of a previously dormant  
 16 Pueblo right to river water that could have deprived the property of its riparian nature and  
 17 value. Stated conversely, the Court recognized that San Diego could have exercised its  
 18 then dormant Pueblo right to capture all of the water flowing by the subject property and,  
 19 therefore, could have made its riparian nature irrelevant, thereby devaluing the property.  
 20 San Diego simply had not done so. Anaverde’s reliance on *Sloan* is misplaced and  
 21 should be disregarded.

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 23 **VI. CONCLUSION**

24 Anaverde’s motion to preclude the City’s further participation herein (at least as to  
 25 Anaverde) really should be considered to be frivolous. The City’s standing based on  
 26 public policy bases is uncontrovertible, the City’s pleadings still appropriately seek a  
 27 declaration of its overlying and appropriative rights and, most pertinent, the City is  
 28 seeking declaratory relief to manage and protect the basin through the imposition of a

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physical solution. Each of these matters entitle the City to participate in this adjudication.  
The motion must be denied.

Dated: October 2, 2008

LEMIEUX & O'NEILL  
WAYNE K. LEMIEUX  
W. KEITH LEMIEUX

BEST BEST & KRIEGER LLP  
ERIC L. GARNER  
JEFFREY V. DUNN  
STEFANIE D. HEDLUND

LAGERLOF, SENEAL, GOSNEY & KRUSE,  
LLP  
THOMAS S. BUNN III


CALIFORNIA WATER SERVICE COMPANY  
JOHN TOOTLE

LUCE, FORWARD, HAMILTON & SCRIPPS,  
LLP  
DOUGLAS J. EVERTZ

CHARLTON WEEKS LLP  
BRADLEY T. WEEKS

WM. MATTHEW DITZHAZY  
City Attorney  
NOEL J. DORAN  
Deputy City Attorney  
CITY OF PALMDALE

RICHARDS, WATSON & GERSHON  
A Professional Corporation  
JAMES L. MARKMAN  
STEVEN R. ORR  
WHITNEY G. MCDONALD

By:   
\_\_\_\_\_  
JAMES L. MARKMAN  
Attorneys for Defendant, Cross-  
Complainant, and Cross-Defendant  
CITY OF PALMDALE