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28 *Antelope Valley Groundwater Cases*
United States' Response to Anaverde LLC's
Motion in Limine No. 1

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))) Proceeding No. 4408

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**)

**UNITED STATES' RESPONSE
TO ANAVERDE LLC'S MOTION
IN LIMINE NO. 1 TO EXCLUDE
WITNESSES FROM THE
COURTROOM PRIOR TO
TESTIFYING**

**Trial Phase 2
October 6, 2008
Department 1
L.A. County Courthouse**

23 Cross-Defendant United States of America respectfully submits this Response in opposition
24 to the Motion in Limine No. 1 that Cross-Defendant Anaverde LLC filed on September 30, 2008
25 in advance of the Phase 2 trial proceedings scheduled to begin in this matter on October 6, 2008.
26 See Anaverde LLC's Motion in Limine No. 1 Regarding Excluding Prospective Witnesses from the
27 Courtroom During the Testimony; Points and Authorities, filed Sept. 30, 2008 ("Motion No. 1").
28 In its motion in limine, Anaverde requests that the Court exclude prospective witnesses that the
parties have designated in this matter from the courtroom during trial before the witnesses testify.
Because Anaverde has not demonstrated that permitting witnesses to remain in the courtroom during
trial testimony of other witnesses will prejudice any party, and because allowing the witnesses
designated in this case to remain in the courtroom is consistent with the California Evidence Code,

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1 and promotes judicial economy, the Court should exercise its discretion to allow witnesses to remain
2 in the courtroom and deny Anaverde's motion.

3 **I. FACTUAL BACKGROUND.**

4 The relief sought in these coordinated cases is the comprehensive adjudication of all the
5 parties' claims to groundwater rights within the Antelope Valley Adjudication Area ("AVAA"). In
6 Phase 1 of this litigation, the Court concluded that "the alluvial basin as described in California
7 Department of Water Resources Bulletin 118-2003 should be the basic jurisdictional boundary for
8 purposes of this litigation." Order After Hearing on Jurisdictional Boundaries at 4, filed Nov. 8,
9 2006 ("Phase 1 Order"). The Court has instructed the parties that "[t]he Phase 2 trial will address
10 whether sub-basins exist in the Antelope Valley Area of Adjudication ("Basin")." Case
11 Management Order for Phase 2 Trial ¶ 2, at 1, filed Sept. 9, 2008. The Phase 2 trial is scheduled to
12 begin on October 6, 2008.

13 In preparation for the Phase 2 trial, numerous parties have designated expert witnesses that
14 will opine on various technical matters relevant to the issue the Court identified for this phase of the
15 litigation. The subjects upon which the experts will opine include, but are not limited to, hydrology,
16 hydrogeology, groundwater storage, groundwater movement, and groundwater modeling. In
17 accordance with Section 2034.260 of the California Code of Civil Procedure, the parties have
18 identified numerous experts that will testify at trial, and many, although not all, of the experts that
19 the parties have identified have filed expert reports with the Court. These reports are available to
20 all parties and have been circulated among counsel and the parties' retained experts. In addition,
21 over the last several weeks, the parties have deposed all the experts that have been designated as
22 testifying witnesses in the Phase 2 trial. Many of the experts the parties retained attended some or
23 all of these depositions.

24 **II. PROCEDURAL BACKGROUND.**

25 On September 30, 2008, Anaverde submitted its motion to exclude prospective witnesses
26 from the Courtroom during the Phase 2 trial. Anaverde moves for an order under California
27

1 Evidence Code § 777, excluding all prospective non-party witnesses from the Courtroom before they
2 have testified. Anaverde offers no valid justification for granting the relief that it seeks. Equally
3 important, excluding expert witnesses from the Courtroom would unfairly restrict the parties’ rights
4 under Cal. Evid. Code §§ 801 and 804 to present expert testimony that relies or comments on fact
5 and opinion evidence other parties introduce.

6 **III. LAW REGARDING WITNESSES IN THE COURTROOM.**

7 Decisions on sequestering or excluding witnesses from the courtroom are committed to the
8 court’s sound discretion. *See People v. Bales*, 11 Cal. Rptr. 639, 644 (Ct. App. 1961)(affirming trial
9 court’s denial of a motion to exclude witnesses where the movant “did not explain to the court any
10 reason for the motion, nor point out any necessity for such order”). Section 777 of the California
11 Evidence Code gives trial courts discretion to sequester non-party witnesses so that “they cannot
12 hear the testimony of other witnesses.” Cal. Evid. Code § 777(a). Preventing witnesses from
13 listening to other witnesses’ testimony before they take the stand helps to ensure that their testimony
14 will be based on their personal knowledge. *See* Cal. Evid. Code § 702(a) (requiring lay witnesses’
15 testimony be based on personal knowledge); *People v. Smith*, 107 P.3d 229, 246 (Cal. 2005). “The
16 purpose of [an] order [to exclude witnesses] is to prevent tailored testimony and aid in the detection
17 of less than candid testimony.” *People v. Valdez*, 223 Cal. Rptr. 149, 152 (Ct. App. 1986).

18 These concerns about protecting the integrity of fact witnesses’ accounts do not exist when
19 the witness is testifying as an expert. *See id.* (drawing a distinction “between ‘percipient’ witnesses
20 who testify to observed facts in the controversy, and expert witnesses who express their opinions
21 on the basis of hypothetical facts, personal knowledge of facts not in controversy, or testimony they
22 hear in court”). Unlike fact witnesses, experts can base their testimony on their knowledge, skills,
23 experience, and training, and may rely on a broad scope of sources including:

24 [M]atter (including his special knowledge, skill, experience, training, and education)
25 perceived by or personally known to the witness or made known to him *at or before*
26 *the hearing*, whether or not admissible, that is of a type that reasonably may be relied
27 upon by an expert in forming an opinion upon the subject to which his testimony
relates, unless an expert is precluded by law from using such matter as a basis for his
opinion.

1 Cal. Evid. Code § 801(b) (emphasis added). Experts can also rely “in whole or in part upon the
2 opinion or statement of another person,” Cal. Evid. Code § 804(a), including “a witness who has
3 testified in the action concerning the subject matter of the opinion or statement upon which the
4 expert witness has relied,” Cal. Evid. Code § 804(b). Indeed, California courts have stated
5 repeatedly that, under circumstances in which multiple experts are merely testifying to their expert
6 opinions, “it [is] highly desirable that they should hear each other’s testimony.” *People v. Maxey*,
7 104 Cal. Rptr. 466, 470 (Ct. App. 1972); *see also People v. Valdez*, 223 Cal. Rptr. at 152 (discussing
8 *People v. Maxey*).

9 **IV. ARGUMENT.**

10 Anaverde argues that “there is a risk that prospective witnesses who have not yet been called
11 to testify will be unfairly educated and informed as to matters on which said witnesses will be
12 interrogated.” Motion No. 1 at 3. Anaverde’s assertion, however, does not account for the full
13 scope of information sources that expert witnesses are permitted to consult in forming their opinions.
14 Indeed, excluding expert witnesses from the courtroom in this case may curtail inappropriately the
15 experts’ ability to consider all the sources of information that the California Evidence Code allows
16 them to consider in forming their opinions, and would impede the experts’ ability to comment on
17 and rebut the expert opinions other parties offer.

18 Anaverde offers no basis nor justification for curtailing the rights that the parties would
19 otherwise be accorded under Cal. Evid. Code §§ 801 and 804 to have their experts observe and
20 consider testimony of other witnesses so that they can comment upon and rebut other parties’ expert
21 opinions. Anaverde cites no authority for the relief it seeks other than the Court’s discretion to act
22 under section 777. Nor does Anaverde’s request demonstrate any recognition of the procedures that
23 have already occurred in this case, and the procedures that will likely occur in the future.
24 Anaverde’s request overlooks the fact that all of the witnesses that will testify already have access
25 to the expert reports that the parties have filed in this case; that many of witnesses that will testify
26 have attended the depositions of one or more of the other experts that will offer opinions in this case;
27

1 and that some of the experts that will testify may be recalled to respond or rebut opinions offered
2 in the various parties' case-in-chief. In sum, barring witnesses from attending the testimony of other
3 experts may undermine judicial economy, because it will frustrate the parties' ability to offer
4 comprehensive testimony initially and may delay unnecessarily the parties' ability to present
5 accurate responsive evidence.

6 **VI. CONCLUSION.**

7 The allegations that Anaverde raises in its motion in limine are insufficient to demonstrate
8 that permitting expert witnesses to remain in the courtroom during trial testimony will prejudice any
9 party materially. Moreover, the California Evidence Code contemplates experts offering opinions
10 based on many sources, including testimony that other witnesses offer. Because permitting experts
11 to attend the testimony of other witnesses is within the Court's discretion and is consistent with
12 California law, and because such a practice promotes judicial economy in this case, the Court should
13 deny Anaverde's motion.

14 Respectfully submitted this 2nd of October, 2008,

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16 Assistant Attorney General
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17 *s/ R. Lee Leininger*

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PROOF OF SERVICE

I, Linda C. Shumard, declare:

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

On October 2, 2008, I caused the foregoing documents described as; **UNITED STATES' RESPONSE TO ANAVERDE LLC'S MOTION IN LIMINE NO. 1 TO EXCLUDE WITNESSES FROM THE COURTROOM PRIOR TO TESTIFYING**, to be served on the parties via the following service:

BY ELECTRONIC SERVICE AS FOLLOWS by posting the document(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).

Executed on October 2, 2008, at Denver, Colorado.

/s/Linda C. Shumard _____
Linda C. Shumard
Legal Support Assistant