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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF SANTA CLARA**

11 **ANTELOPE VALLEY GROUNDWATER**
12 **CASES:**

13 Included Actions:

14 Los Angeles County Waterworks District No.

40 v. Diamond Farming Co.

Superior Court of California

15 County of Los Angeles, Case No. BC325201

16 Los Angeles County Waterworks District No.

40 v. Diamond Farming Co.

17 Superior Court of California

County of Kern, Case No. S-1500-CV-254-

18 348

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

20 Diamond Farming Co. v. City of Lancaster

Diamond Farming Co. v. Palmdale Water Dist.

21 Superior Court of California

County of Riverside, consolidated actions

22 Case Nos. RIC 353840, RIC 344436,

23 RIC 344668

Judicial Council Coordination
Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to the Honorable Jack Komar

ANAVERDE LLC'S MOTION *IN LIMINE*
NO. 2, OBJECTING TO ALL EVIDENCE
THE CITY HAS INTRODUCED AND
WILL INTRODUCE AT THE TIME OF
TRIAL; MEMORANDUM OF POINTS
AND AUTHORITIES; AND
DECLARATION OF KIMBERLY
HUANGFU

[CONCURRENTLY FILED WITH
[PROPOSED] ORDER]

Phase 2 Trial: October 6, 2008

Location: Dept. 1

Time: 9 a.m.

24
25 **MOTION IN LIMINE No. 2**

26 Plaintiff moves this Court for an order excluding all evidence that the City has introduced
27 and will introduce at the time of trial.
28

1 This motion is made on the grounds that even if all of the allegations contained in the
2 City's Cross-Complaint were true, and if all evidence were viewed most favorably to the City,
3 there is no substantial evidence to support a judgment in its favor. A court may properly treat
4 motions *in limine* as a motion for judgment on the pleadings. *Coshov v. City of Escondido* (2005)
5 132 Cal. App. 687, 701.

6 This motion is based upon this notice of motion, the attached memorandum of points and
7 authorities, the declaration in support of the motion, the papers and records on file herein, and
8 such oral and documentary evidence as may be presented at the hearing of this motion.

9 Anaverde respectfully requests that this Court grant its motion *in limine* and issue an order
10 entering judgment in favor of Anaverde and against the City.

11 DATED: September 30, 2008

Respectfully submitted,

12 MALISSA HATHAWAY McKEITH
13 JOSEPH SALAZAR, JR.
14 JACQUELINE MITTELSTADT
15 KIMBERLY A. HUANGFU
16 LEWIS BRISBOIS BISGAARD & SMITH LLP

17 By: _____
18 JACQUELINE MITTELSTADT
19 Attorneys for ANAVERDE LLC
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the City’s Cross-Complaint (“PCC”), the City (“City”) alleges that it possesses overlying landowner water rights to water from the Antelope Valley Groundwater Basin (“Basin”). (Declaration of Kimberly Huangfu (“Huangfu Dec.”), City’s Cross-Complaint, Kern County Superior Court Case No. S-1500-CV 254-348, Exhibit A to the Huangfu Dec., ¶23; City’s Cross-Complaint, Los Angeles County Superior Court Case No. BC325201, Exhibit B to the Huangfu Dec., ¶23.) The City also states, both in the cross-complaints as well as in discovery responses, that it currently does not pump any water from the Basin. In fact, the City admits that it has never pumped water from the Basin. (Huangfu Dec., Exhibits A and B, ¶23; City Responses to Rebecca Lee Willis’ Special Interrogatories, Set No. One, Nos. 23-31, Exhibit C to the Huangfu Dec.) Instead, the City purchases water from water purveyors. (Huangfu Dec., Exhibits A and B.) The City also admits in discovery responses that it does not possesses any prescriptive rights, (Huangfu Dec., Exhibit C, Nos. 20-21), that it has not exercised any appropriative rights to date but is purportedly in a position to exercise such appropriative rights. (Huangfu Dec., Exhibit C, No. 16).

I. ARGUMENT

1. Palmdale Lacks Entitlement to Any Water Rights in Relation to the Anaverde Basin.

Courts possess inherent powers to control litigation and to conserve judicial resources. This inherent power allows a court to enter judgment in favor of a defendant (or presumably cross-defendant) when the motions *in limine* illustrate that even if the plaintiff’s (or cross-complainant’s) allegations were proved, the evidence would not establish a cause of action. (*Coshov v. City of Escondido* at 1701.) In this matter, the City cannot show that it is entitled to water rights and the court should respond accordingly. Public agencies enjoy special protections under the law with regard to water rights. For example, unlike individuals or non-public entities, a public agency cannot lose water rights by prescription. (*Civil Code* §1007.)

1 However, in some instances a city can be stripped of its water rights by a failure to exercise
2 those rights. In *City of San Diego v. Sloane* (1969) 272 Cal. App. 2d 663, the California Court of
3 Appeals held that the City's water rights were limited to the extent that it exercised such rights.
4 (*Id.* at 667.) Although the *Sloane* case dealt with the City of San Diego's pueblo rights -- pueblo
5 rights are riparian (including overlying) rights and appropriative rights are the original species of
6 water rights recognized in California law. (*Pleasant Valley v. Borrer* (1998) 61 Cal. App.4th 742,
7 751.) In addition to pueblo rights, occasionally cities acquire water rights through status as an
8 appropriator. But, even that status allows entitlement only if the appropriator has actually acquired
9 water: ". . .the right of an appropriator . . . depends upon the actual taking of water." (*Id.* at 1241,
10 citing *California Water Service, Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715,
11 725-726.)

12 The City has not established any water rights in the Basin. (Huangfu Dec., Exhibits A and
13 B, ¶23, Exhibit C, Nos. 23-31.) Even if one assumes *arguendo* that the City had overlying water
14 rights, the City still would not be entitled to any meaningful rights to the Basin. Under *City of San*
15 *Diego*, the City's water rights are limited to the extent to which it has exercised those rights. Based
16 on its own assertions it has never pumped a single drop of water from the Basin. (*Id.*)
17 Consequently, the City has failed to exercise any water rights as an alleged overlying owner, and
18 its water rights are limited to its current use which, based on its own assertions in pleadings and
19 discovery, is none.

20 Similarly, though the City may argue entitlement to water in the Basin as an appropriator,
21 this argument fails. Appropriator status turns on previous actual use. Since the City engaged in no
22 actual use, the City failed to assert any theory on which it has standing to participate in this action,
23 to submit evidence, and to engage in the Phase II trial. Anaverde objects to any City participation
24 in this case, and to all evidence proffered at the time of trial on the grounds that there is no
25 supporting evidence to justify the City's participation. Anaverde respectfully requests that this
26 Court grant this motion *in limine* and enter judgment in favor of Anaverde and against City.
27 Ultimately a Judgment on the Pleadings is warranted.

1 **2. Lack of Use Equals Lack of Rights.**

2 The City filed its cross-complaint in this matter on December 1, 2005, alleging causes of
3 action for declaratory relief as to water rights against all cross-defendants and declaratory
4 relief/injunctive relief –physical solution as to all cross-defendants. On August 4, 2008, the Willis
5 class filed a challenge to the viability of various City causes of action. As a result, the City filed a
6 Request for Dismissal as to its first cause of action for declaratory relief as to water rights.
7 Consequently, the only cause of action that remains, pursuant to its cross-complaint, is the City of
8 Palmdale's claim for declaratory and injunctive relief for a physical solution of the Basin. In its
9 cross-complaint, it alleges that the City owns land within the geographic boundaries of the Basin
10 that is the subject matter of this litigation. It alleges, that as a landowner, it has a claim to
11 overlying right to produce groundwater from the basin even if unutilized now.
12

13 In the *City of San Diego v. Sloane* case, the City of San Diego had commenced eminent
14 domain proceedings to acquire landowner's property. (*City of San Diego* at 664.) The property that
15 the city sought to acquire was within watershed of the San Diego River, giving the property owner
16 riparian rights to the water. (*Id.*) At the urging of the City, the trial court did not allow the jury or
17 any witness to consider what effect the riparian rights would have on the market value of the land.
18 (*Id.* at 664-665.) On appeal, the issue became how the riparian water rights should have been
19 treated in a condemnation action brought by a city. (*Id.* at 664.) Noting that no evidence existed
20 that the city intended to use part of or all of the water that flowed over the property acquired. (*Id.*
21 at 667), the appellate court requested the city's position that the mere act of condemning the land
22 would be effective in asserting its paramount pueblo rights to such waters as a matter of law. (*Id.*
23 at 668.) The appellate court disagreed, stating "...the City may take and use the water of the river
24 by the barrel or by the drop, but if it takes and uses only a drop, it cannot play dog in the manger
25 with the water remaining in the barrel." (*Id.* (Emphasis added).)
26

27 The *City of San Diego* decision is significant in water law because the court limited the
28 pueblo rights of a public agency. The pueblo right is a paramount right to which riparian

landowner rights are subordinate. (*Id.*) Yet, the court in the *City of San Diego* went so far as to limit the City of San Diego's exercise of their pueblo rights to the extent of their use. (*Id.*) The California Court of Appeals has also applied this rule to private parties stating that, "overlying users retain priority but lose amounts not pumped." (*Hi-Desert County Water District v. Blue Skies Country Club, Inc.* (1994) 23 Cal. App. 4th 1723, 1732.)

Here, the City admitted that it has never pumped water from the Basin as an alleged overlying owner. The *City of San Diego* case states that mere assertion of a right, even a pueblo right, is not enough. (*Id.* at 668.) The appellate court provided an extreme illustration of their holding, stating that although the city may take and use the water by an amount they choose, if they only use a drop, it cannot then later assert rights as to the remainder of the water. (*Id.*) The evidence the City has presented in this case establish facts that fall short of even the extreme illustration presented in the *City of San Diego* case. They have admitted that they have not even taken one drop. Thus, they cannot now "play dog in the manger" as to the water in the Basin. Even assuming that all of the City's allegations are true and viewing all evidence in their favor, there simply exists no substantial evidence for judgment in favor of the City.

If the intention of the City is to argue for its right to a share of water when it has not pumped water, that allocation would amount to an equitable apportionment of water based on a physical solution rather than legally recognized water rights. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224). As the California Supreme Court explained, even where all parties stipulate to such a physical solution for an overdrafted basin, and the appellate court confirms that solution, "in ordering a physical solution...a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine." (*Id.* at 1250).

II. CONCLUSION

Anaverde respectfully requests that this Court grant its motion *in limine* and enter judgment in favor of Anaverde and against City.

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DATED: September 30, 2008

Respectfully submitted,

MALISSA HATHAWAY McKEITH
JOSEPH SALAZAR, JR.
JACQUELINE MITTELSTADT
KIMBERLY A. HUANGFU
LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/
KIMBERLY A. HUANGFU
Attorneys for ANAVERDE LLC

DECLARATION OF KIMBERLY HUANGFU

I, Kimberly Huangfu, declare as follows:

1. I am an attorney duly licensed to practice in all of the courts of the State of California and am an associate with Lewis Brisbois Bisgaard & Smith LLP, attorneys of record for Anaverde LLC herein. The facts set for the herein are of my own personal knowledge, and if sworn I could and would competently testify thereto.

2. Attached as **EXHIBIT "A"** and incorporated by reference as though fully set forth herein is a true and correct copy of the Cross-Complaint of the City in the Kern County Superior Court Case No. S-1500-CV 254-348.

3. Attached as **EXHIBIT "B"** and incorporated by reference as though fully set forth herein as a true and correct copy of the Cross-Compliant of the City in the Los Angeles Superior Court Case No. BC 325201.

4. Attached as **EXHIBIT "C"** and incorporated by reference as though fully set forth herein is a true and correct copy of the City's responses to Rebecca Lee Willis' Special Interrogatories.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on September 30, 2008, at Los Angeles, California.

Sept. 30, 2008

/s/ _____
Kimberly Huangfu