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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.
Superior Court of California
17 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,
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 SUPPLEMENTAL
PHASE II TRIAL BRIEF**

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

1 **I. INTRODUCTION.**

2 Anaverde is not bound by the Court's Order in Phase I because it was not a party at that
3 time. To date, no evidence has been submitted to support a single aquifer in relation to the
4 Anaverde property. Arguments by counsel in Trial Briefs do not constitute evidence, nor cite to
5 any credible evidence upon which they can rely. All experts, other than Anaverde's have
6 expressed no opinions regarding Anaverde's sub-basin. Despite advocating the existence of a sub-
7 basin, Plaintiff's bear the burden of proof, and nothing in the McCarran Act, nor the Evidence
8 Code alter that fact.

9 **II. ANAVERDE DID NOT PARTICIPATE IN PHASE I OF THIS ADJUDICATION AND**
10 **IS NOT ESTOPPED FROM CHALLENGING THE PHASE 1 BOUNDARY.**

11 The Public Water Suppliers ("PWS") accuse Anaverde of wanting to retry the issue of
12 whether its water shed is a separate basin. (Public Water Suppliers and City of Los Angeles' Trial
13 Brief at 2:17-19.) This is true to a large extent. Anaverde was never served and did not
14 participate in the First Phase of this trial, and hence the findings of the Court are not binding on it.
15 Virtually conceding this point, the Public Water Suppliers ("PWS") try to assert some form of
16 "collateral estoppel" by vaguely mention in a footnote that Anaverde's interests were represented.
17 (*Id.* at pg. 2:27-28, pg. 3:19-23, fn. 1.) As stated in Crystal Organic Farms' Opposition to Public
18 Water Suppliers' Motion *in Limine* No. 1, parties that were not a part of the Phase 1 trial are not
19 precluded from introducing evidence in an effort to correct, or clarify, the previously delineated
20 boundary line.

21 General principles of res judicata or so-called "claim" preclusion, are not applicable in this
22 instance. Res judicata bars the relitigation of the same cause of action in a second suit between the
23 same parties or parties in privity with them. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.*
24 (1962) 58 Cal. 2d 601.) Collateral estoppel, or issue preclusion, causes a judgment in a previous
25 action between the same parties to operate in the second action as a conclusive adjudication as to
26 whatever issues were actually and necessarily decided in the first action. (*Id.*) Collateral estoppel
27 may be applied *only* if due process requirements are satisfied; due process requires that the party
28 to be estopped must have had identity or community of interest with the losing party and be

1 adequately represented in the first action. Additionally, the circumstances must have been such
2 that party to be estopped should reasonably have been expected to be bound by the prior
3 adjudication. For whatever reason, the PWS refused to serve Anaverde before the first trial, and
4 they therefore cannot take advantage of its absence in the case.

5 In determining if claim preclusion applies, the court must balance rights of party to be
6 estopped against the need for applying collateral estoppel in particular case, in order to promote
7 judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which can
8 undermine integrity of judicial system, or to protect against vexatious litigation. (*Sutton v. Golden*
9 *Gate Bridge Highway & Transportation Dist.* (1998) 68 Cal. App. 4th 1149, 1155, 81 Cal. Rptr.
10 2d 155 (holding that collateral estoppel may be applied only if due process requirements are met,
11 such that the party to be estopped must have had an identity or community of interest with, and
12 adequate representation by, the losing party in the first action, as well as that the circumstances
13 must have been such that the party to be estopped should reasonably have expected to be bound by
14 the prior adjudication) (quoting *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal. 3d 865, 874,
15 151 Cal. Rptr. 285, 587 P. 2d 1098).

16 Application of these principles to water cases are not uncommon. In *Wright v. Goleta* (1985) 174
17 Cal. App. 3d 74 (“*Wright*”), a groundwater adjudication involving the determination of sub-basins
18 and relative water rights, the court asserted that it “ha[d] no jurisdiction over an absent party and
19 its judgment cannot bind [the absent party].” (*Id.* at 88, citing *Kraus v. Willow Park Public Golf*
20 *Course* (1977) 73 Cal. App. 3d 354, 368.) “This is true even though an adjudication between the
21 parties before the court may on occasion adversely affect the absent person as a practical matter,
22 or leave a party exposed to a later inconsistent recovery by the absent person.” (*Id.*)

23 In the pending case, this Court specifically recognized that certain geographical areas may
24 be excluded if it “appear[s] to lack any real connection to the Antelope Valley aquifer”
25 (Court Order, Nov. 3, 2006 at pg. 4:20-22.) The language of this Court’s Order acknowledges that
26 the boundary, set forth pursuant to Department of Water Resources Bulletin 118, may be overly
27 inclusive and, subsequently, warrant further consideration. Since Anaverde Anaverde was not
28 served until almost one year after the completion of Phase 1 of this adjudication, it cannot be

1 barred from rearguing the critical issues concerning the boundaries and its separation from the
2 larger Antelop Basin.

3 Anaverde is in the far southwest portion of the Basin. Its testimony on this issue is very
4 limited so reopening the record to address this matter is not prejudicial or time consuming to other
5 parties. Given the balancing of the equities, Anaverde requests that no bar to the presentation of
6 evidence be granted even if it previously was heard in Phase I.

7 **III. ASSERTIONS IN TRIAL BRIEFS DO NOT VITIATE A LACK OF EVIDENCE.**

8 Numerous trial briefs before this court contain allegations implying that evidence exists
9 regarding the hydraulic connectivity between the Anaverde Basin and Antelope Basins. The briefs
10 are silence as to what evidence supports those claims. In fact, no expert, other than Anaverde's,
11 proffered any opinion regarding Anaverde, its sub-basin, flow amounts through subterranean
12 barriers, or of any nature. PWS assert that "the evidence will show that significant groundwater
13 flow occurs across features" thought to impede or restrict groundwater flow. (PWS' Phase 2 Trial
14 Brief at pg. 4:8-11.) Further, PWS acknowledges that Anaverde's property is south of the Santa
15 Andreas Fault/Rift Zone. The PWS contend that "[w]hile there may be some evidentiary support
16 for [the fault serving as a barrier], the Anaverde area southerly of the San Andreas Fault does not
17 meet the criteria for a groundwater basin." (*Id.* at pg. 8:26-28.) Considering that not one of the
18 numerous PWS experts had any opinions relating to the Anaverde property or the Anaverde Creek
19 Basin, the PWS' assertions are not supported by scientific evidence or foundation. Counsel's trial
20 brief is inaccurate and a Judgment for Non-Suit must be granted at the outset of the trial. At the
21 very minimum, any such assertions must be excluded from this case at the outset of the trial.

22 Similarly, in Bolthouse Properties' Trial Brief, it makes blanket assertions that are not
23 grounded in fact. The parties in support of a single aquifer presume a "hydraulically connected
24 water basin" with absolutely no evidentiary support. (*See generally*, Bolthouse Properties, LLC's
25 and Wm. Bolthouse Farms, Inc.'s Trial Brief.)

26 More importantly, the experts who provided deposition testimony failed to render any
27 opinion, one way or the other, as to whether Anaverde's property is a separate basin. (Please see
28 Anaverde's Trial Brief containing specific references to the lack of any expert opinion's

reagarding the Anaverde property, including any hydrological connectivity. More recently, Dr. June Oberdorfer testified for the United States that she has no “actual person[al] knowledge of [the] Anaverde Creek Watershed” nor has she “formed an opinion yet” in relation to Anaverde. (Deposition of Dr. Oberdorfer, Sept. 30, 2008 at pg. 197:18-21 and pg. 199:1-6.) The United States references Dr. Oberdorfer’s report stating that “[t]here is no clear definition of the term ‘hydrogeologic subbasins.’” (United States’ Trial Brief at pg. 3:9.) Rather than pointing to concrete data relating to the Anaverde property, including the well logs and reports that Oberdorfer admittedly has, the US is only able to make general assertions regarding the “uncertain” nature of “sub-basins”. Additionally, as noted in Anaverde’s Trial Brief expert Dennis Williams testified that he had no opinion regarding Anaverde’s sub-basin. (Draft Deposition of Dennis Williams, Oct. 1, 2008) Additionally, in the Deposition of Dr. Jason Sun, Dr. Sun also stated that he had no opinions regarding Anaverde. (Oct. 2, 2008, Draft Transcript Not Yet Received.) Because the PWS have the burden of proof, their case fails because unsupported allegations by counsel in a Trial Document, do not overcome the lack of evidence.

IV. THE UNITED STATES EFFORTS TO SHIFT THE BURDEN OF PROOF TO ANAVERDE IN ITS TRIAL BRIEF IS INACCURATE AND INAPPROPRIATE.

The United States appears to be making the identical argument as to the PWS that the decision of basin boundaries (and therefore effectively sub-basins) was determined in Phase I and hence the burden shifts to Anaverde. It further appears, but is entirely unclear, whether the U.S. is trying to rely on a tortuous reading of the McCarren Act to buttress that interpretation. See U.S. Brief at 11 fn 4)

Anaverde simply cannot devine the applicability of the McCarren Act to the burden of proof in this case since the McCarren Act applies to sovereign immunity. Nonetheless, raising application of the McCarran Amendment in a trial brief is not the appropriate method to assert its application and fundamentally alter the way Phase II will proceed. This is particularly true, where the parties will not have an opportunity to fully brief the matter. In the Phase II Case Management Order, this Court expressly precluded the submission of anything other than evidentiary objections to evidence

submitted in opposition shall be filed and posted on Oct. 3, 2008 (Case Management Order, Sept. 9, 2008, pg. 3:25-28, 4:1-2.) "No other reply papers are allowed." (*Id.* at pg. 4:2.)

As the Court may recall, this is not a new issue. In Phase I, in relation to application of McCarran Amendment, the US filed a Motion for Judgment on the Pleadings. (U.S. Department of Justice's Motion for Judgment on the Pleadings ("JOP"), August 18, 2006.) Numerous and heated Oppositions were filed. (State of California, Santa Monica's Response, August 31, 2006; AVEK's Statement re: Motion for Judgment on the Pleadings, Sept. 1, 2006; Tejon Ranch's Opposition to Motion for JOP, Sept. 1, 2006; Municipal Water Provider's Opposition to Motion for JOP, Sept. 1, 2006; Diamond Farming Company's Joinder to State of CA's Response to JOP, Sept. 1, 2006; Diamond Farming Company's Response to Motion for JOP, Sept. 1, 2006; Responsive Brief of Gertrude and Delmar Van Dam, Sept. 1, 2006; Response of Bolthouse Property to JOP, Sept. 1, 2006; City of Palmdale's Notice of Joinder to MWS' Opposition to JOP, Sept. 8, 2006; City of Lancaster's Notice of Joinder and Joinder to MWS' Opposition to JOP, Sept. 15, 2006; with a US Reply to Responses to JOP filed on Sept. 15, 2006.) On Sept. 22, 2006, this Court denied the Motion without prejudice indicating that the US may re-raise the issue based on the evidence at a later time. As evidenced by the exhaustive list of the briefs in opposition to application of this law (and any burden shifting as a result thereof), this issue requires a full and fair opportunity by all parties in this matter to brief the issue for the Court. The US attempt to re-raise the issue merely by its assertion in a Trial Brief to which no other parties have an opportunity, by direct CMO Order, to brief the issue, would violate due process. Should the US desire to raise the issue, or the Court to entertain the issue, this Court must allow briefing by all parties, and should set a briefing schedule to accomplish this. Absent a full and fair opportunity to brief the issue by all parties, this Court must reject any application of the McCarran Amendment or burden shifting to the Cross-Defendant's including Anaverde.

V. CONCLUSION.

For the reasons set forth above, Plaintiff bears the burden of proving, by a preponderance of the evidence, that there is one single source of water, ie. that the Anaverde sub-basin enjoys hydrologic connectivity to the aquifer. Anaverde's evidence will rebut this PWS claim. The Anaverde Creek Watershed is distinct and separate from the Basin. Based on the evidence, the

1 Court must find that the sub-basin lacks hydrologic connectivity and must be treated as an
2 independent water source.

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DATED: October 3, 2008

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Respectfully submitted,

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

PROOF OF SERVICE

I declare that:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012.

On October 3, 2008, 2008, I served **ANAVERDE LLC'S SUPPLEMENTAL PHASE II TRIAL BRIEF** posting the document(s) to the Santa Clara Superior Court website in regard to the Antelope Valley Groundwater matter.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on October 3, 2008, 2008.

/s/
Maritza Estrada