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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 2 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 1 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 1 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’
13 Phase 2 Trial Brief, Oct. 1, 2008 at pg. 2:17-19 (“PWS’ Phase 2 Trial Brief”).) This is true to a
14 large extent. Anaverde was never served and did not participate in the first phase of this trial, and
15 hence the findings of the Court are not binding on it. Virtually conceding this point, the PWS try
16 to assert some form of “collateral estoppel” by vaguely mentioning it in a footnote that Anaverde’s
17 interests were represented. (*Id.* at pg. 2:27-28 and pg. 3:19-23, fn. 1.) As stated in Crystal
18 Organic Farms’ Opposition to PWS’ Motion *in Limine* No. 1, parties that were not a part of the
19 Phase 1 trial are not precluded from introducing evidence in an effort to correct, or clarify, the
20 previously delineated 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

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

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

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

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

1 almost one year after the completion of Phase 1 of this adjudication, it cannot be barred from
2 rearguing the critical issues concerning the boundaries and its separation from the larger Antelope
3 Basin.

4 Anaverde is in the far southwest portion of the Basin. Its testimony on this issue is very
5 limited so reopening the record to address this matter is not prejudicial nor time consuming to
6 other parties. Given the balancing of the equities, Anaverde requests that no bar to Anaverde's
7 evidence be granted even if it was previously heard in Phase 1.

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

9 Numerous trial briefs before this Court contain allegations implying that evidence exists
10 regarding the hydraulic connectivity between the Anaverde Basin and Antelope Valley Basin. The
11 briefs are silent as to what evidence supports those claims. In fact, no expert, other than
12 Anaverde's, proffered any opinion regarding Anaverde, its sub-basin, flow amounts through
13 subterranean barriers, or of any nature. PWS assert that "the evidence will show that significant
14 groundwater flow occurs across features" thought to impede or restrict groundwater flow. (PWS'
15 Phase 2 Trial Brief, Oct. 1, 2008 at pg. 4:8-11.) Further, PWS acknowledges that Anaverde's
16 property is south of the San Andreas Fault/Rift Zone. The PWS contend that "[w]hile there may
17 be some evidentiary support for [the fault serving as a barrier], the Anaverde area southerly of the
18 San Andreas Fault does not meet the criteria for a groundwater basin." (*Id.* at pg. 8:26-28.)
19 Considering that not one of the numerous PWS experts had any opinions relating to the Anaverde
20 property or the Anaverde Creek Basin, the PWS' assertions are not supported by scientific
21 evidence or foundation. Counsel's trial brief is inaccurate and a Judgment for Non-Suit must be
22 granted at the outset of the trial. At the very minimum, any such assertions must be excluded from
23 this case at the outset of the trial.

24 Similarly, in Bolthouse Properties' Trial Brief, it makes blanket assertions that are not
25 grounded in fact. The parties in support of a single aquifer presume a "hydraulically connected
26 water basin" with absolutely no evidentiary support. (*See generally*, Bolthouse Properties, LLC's
27 and Wm. Bolthouse Farms, Inc.'s Trial Brief, Oct. 1, 2008.)
28

1 More importantly, the experts who provided deposition testimony failed to render any
2 opinion, one way or the other, as to whether Anaverde's property is a separate basin. (*See*
3 Anaverde's Trial Brief, Oct. 1, 2008 at pg. 6:8-22, containing specific references to the lack of any
4 expert opinion's regarding the Anaverde property, including any hydrological connectivity.)
5 More recently, Dr. June Oberdorfer testified for the United States ("U.S.") that she has no "actual
6 person[al] knowledge of [the] Anaverde Creek Watershed" nor has she "formed an opinion yet" in
7 relation to Anaverde. (Deposition of Dr. Oberdorfer, Sept. 30, 2008 at pg. 197:18-21 and pg.
8 199:1-6.) The U.S. references Dr. Oberdorfer's report stating that "[t]here is no clear definition of
9 the term 'hydrogeologic subbasins.'" (U.S.' Trial Brief, Oct. 1, 2008 at pg. 3:9.) Rather than
10 pointing to concrete data relating to the Anaverde property, including the well logs and reports that
11 Dr. Oberdorfer admittedly has, the U.S. is only able to make general assertions regarding the
12 "uncertain" nature of "sub-basins". Also, as noted in Anaverde's Trial Brief, expert Dr. Dennis
13 Williams testified that he had no opinion regarding Anaverde's sub-basin. (Deposition of Dr.
14 Dennis Williams, Oct. 2, 2008, Draft Transcript Not Yet Received.) Additionally, in the
15 Deposition of Dr. Jason Sun, Dr. Sun also stated that he had no opinions regarding Anaverde.
16 (Deposition of Dr. Sun, Oct. 2, 2008, Draft Transcript Not Yet Received.) The PWS have the
17 burden of proof. Their case fails because unsupported allegations by counsel in a trial document,
18 do not overcome the lack of evidence.

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

21 The U.S. appears to be making the identical argument as to the PWS that the decision of
22 basin boundaries (and therefore effectively sub-basins) was determined in Phase 1 and hence the
23 burden shifts to Anaverde. It further appears, but is entirely unclear, whether the U.S. is trying to
24 rely on a tortuous reading of the McCarren Act to buttress that interpretation. (See U.S. Trial
25 Brief, Oct. 1, 2008 at pg. 11, fn 4.)

26 Anaverde simply cannot devine the applicability of the McCarren Act to the burden of proof in
27 this case since the McCarren Act applies to sovereign immunity. Nonetheless, raising application of
28 the McCarran Amendment in a trial brief is not the appropriate method to assert its application and

1 fundamentally alter the way Phase 2 will proceed. This is particularly true, where the parties will not
2 have an opportunity to fully brief the matter. In the Phase 2 Case Management Order, this Court
3 expressly precluded the submission of anything other than evidentiary objections to evidence.
4 Evidentiary objections to evidence submitted in opposition shall be filed and posted on October 3,
5 2008. (Case Management Order, Sept. 9, 2009 at pgs. 3:25-28 and 4:1-2.) “No other reply papers are
6 allowed.” (*Id.* at pg. 4:2.)

7 As the Court may recall, this is not a new issue. In Phase 1, in relation to application of the
8 McCarran Amendment, the U.S. filed a Motion for Judgment on the Pleadings. (U.S. Department of
9 Justice's Motion for Judgment on the Pleadings (“JOP”), Aug. 18, 2006.) Numerous and heated
10 oppositions were filed. (State of California, Santa Monica's Response, Aug. 31, 2006; AVEK's
11 Statement re: Motion for Judgment on the Pleadings, Sept. 1, 2006; Tejon Ranch's Opposition to
12 Motion for JOP, Sept. 1, 2006; Municipal Water Provider's Opposition to Motion for JOP, Sept. 1,
13 2006; Diamond Farming Company's Joinder to State of CA's Response to JOP, Sept. 1, 2006;
14 Diamond Farming Company's Response to Motion for JOP, Sept. 1, 2006; Responsive Brief of
15 Gertrude and Delmar Van Dam, Sept. 1, 2006; Response of Bolthouse Property to JOP, Sept. 1, 2006;
16 City of Palmdale's Notice of Joinder to PWS' Opposition to JOP, Sept. 8, 2006; City of Lancaster's
17 Notice of Joinder and Joinder to PWS' Opposition to JOP, Sept. 15, 2006; with a U.S. Reply to
18 Responses to JOP filed on Sept. 15, 2006.)

19 On September 22, 2006, this Court denied the U.S.' Motion without prejudice indicating that
20 the U.S. may re-raise the issue based on the evidence at a later time. As evidenced by the exhaustive
21 list of the briefs in opposition to application of this law (and any burden shifting as a result thereof),
22 this issue requires a full and fair opportunity by all parties in this matter to brief the issue for the
23 Court. The U.S. attempts to re-raise the issue merely by its assertion in a Trial Brief to which no other
24 parties have an opportunity, by direct Case Management Order, to brief the issue, would violate due
25 process. Should the U.S. desire to raise the issue, or the Court to entertain the issue, this Court must
26 allow briefing by all parties, and should set a briefing schedule to accomplish this. Absent a full and
27 fair opportunity to brief the issue by all parties, this Court must reject any application of the McCarran
28 Amendment or burden shifting to the Cross-Defendants, including Anaverde.

1 **V. CONCLUSION.**

2 For the reasons set forth above, Plaintiff bears the burden of proving, by a preponderance
3 of the evidence, that there is one single source of water, ie. that the Anaverde sub-basin enjoys
4 hydrologic connectivity to the aquifer. Anaverde's evidence will rebut this PWS claim. The
5 Anaverde Creek Watershed is distinct and separate from the Basin. Based on the evidence, the
6 Court must find that the sub-basin lacks hydrologic connectivity and must be treated as an
7 independent water source.

8
9 DATED: October 5, 2008

Respectfully submitted,

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