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13  
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 COUNTY OF LOS ANGELES – CENTRAL DISTRICT  
16

17 **ANTELOPE VALLEY**  
18 **GROUNDWATER CASES**

19 Included Actions:  
20 Los Angeles County Waterworks District  
No. 40 v. Diamond Farming Co., Superior  
21 Court of California, County of Los  
Angeles, Case No. BC 325201;

22 Los Angeles County Waterworks District  
23 No. 40 v. Diamond Farming Co., Superior  
Court of California, County of Kern, Case  
No. S-1500-CV-254-348;

24 Wm. Bolthouse Farms, Inc. v. City of  
25 Lancaster, Diamond Farming Co. v. City of  
26 Lancaster, Diamond Farming Co. v.  
27 Palmdale Water Dist., Superior Court of  
California, County of Riverside, Case Nos.  
RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

CLASS ACTION

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

**PUBLIC WATER SUPPLIERS'  
OPPOSITION TO ANTELOPE VALLEY-  
EAST KERN WATER AGENCY'S  
MOTION IN LIMINE RE ADMISSION OF  
EVIDENCE AND ARGUMENT  
RELATING TO RETURN FLOWS**

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1 **I. INTRODUCTION**

2 Antelope Valley-East Kern Water Agency (“AVEK,”) has filed a motion *in limine* to  
3 preclude its “customers,” identified as the “Public Water Suppliers,”<sup>1</sup> from submitting any  
4 evidence showing that anyone other than AVEK has the right to recapture and use return flows  
5 attributable to water that AVEK wholesales from the California’s State Water Project. In its  
6 motion, AVEK argues that it has the sole right to the return flows, and that the Public Water  
7 Suppliers have no such right. The return flows claimed by AVEK consist of water that seeps into  
8 the ground only after having been purchased and used by the Public Water Suppliers’ customers.

9 AVEK’s claim is wrong and unsupported by law. The Public Water Suppliers – not  
10 AVEK – have the right to recapture and use the return flows of imported State Water Project  
11 water that the Public Water Suppliers purchase from AVEK. General principles of water law  
12 provide that an entity that imports water into a basin generally has the right to recapture and use  
13 the return flows, as against others who may appropriate and use the water after it is imported.  
14 However, when the importer merely sells and delivers the water to a another entity, as AVEK has  
15 done here, the importer is a wholesaler divesting itself of legal ownership and control of the  
16 water, and the latter purchasing entity acquires legal ownership and control of the water,  
17 including the right to recapture and use the return flows. Thus, the Public Water Suppliers, and  
18 not AVEK, have the right to the return flows from State Water Project water that AVEK sells and  
19 delivers to the Public Water Suppliers.

20 These principles of water law are supported and reaffirmed by the California Supreme  
21 Court’s decisions in *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, and *City of Los*  
22 *Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 and the recent appellate court decision in  
23 *City of Santa Maria v. Adam* (2012) 211 Cal. App. 4th 266. Although AVEK argues that these  
24 decisions support its right to the return flows of water it sells, the decisions actually contradict its  
25 argument, and clearly hold that the Public Water Suppliers have the right to these return flows.

26 \_\_\_\_\_  
27 <sup>1</sup> Two of the Public Water Suppliers, Palmdale Water District and Littlerock Creek Irrigation  
28 District, are State Water Contractors and receive imported water directly from the State Water  
Project, rather than purchasing it from AVEK. Accordingly, AVEK’s motion in limine does not  
apply to them. This opposition is filed on behalf of the remaining Public Water Suppliers.

1 In addition, the contracts between AVEK and the Public Water Suppliers expressly  
2 provide that the Public Water Suppliers have the right to groundwater located within their  
3 districts, and the groundwater includes the return flows from State Water Project water that  
4 AVEK sells and delivers to the Public Water Suppliers. Thus, the contracts also provide that the  
5 Public Water Suppliers have the right to the return flows.

6 Finally, AVEK's motion in limine is improper because it is a dispositive motion that seeks  
7 to prevent Public Water Suppliers from presenting evidence in support of their causes of action.  
8 (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593-1594.) Moreover, where  
9 a motion in limine seeks to exclude all evidence based on a legal issue, it has the same effect as a  
10 general demurrer. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.4th 15, 26-27;  
11 *Mechanical Contactors Association v. Greater Bay Area Association* (1998) 66 Cal.App.4th 672,  
12 676-677.) Here, all material factual allegations by the Public Water Suppliers regarding return  
13 flows must be accepted as true (unless contrary to facts that are subject to judicial notice). As  
14 shown below, the Public Water Supplier are entitled to their return flows as a matter of law.

15 For these reasons, AVEK's motion *in limine* should be denied.

16 **II. UNDER GENERAL PRINCIPLES OF WATER LAW, THE PUBLIC WATER**  
17 **SUPPLIERS HAVE THE RIGHT TO RETURN FLOWS OF STATE WATER**  
18 **PROJECT WATER THAT AVEK WHOLESALERS AND DELIVERS TO THEM.**

19 **A. If an Importer of Water Sells and Delivers the Water to Another Entity, The**  
20 **Latter Entity Has the Right to the Return Flows.**

21 Water can be and often is "reused" multiple times. (D. Getches, *Water Law in a Nutshell*,  
22 139 [4th ed. Thomson West] [hereinafter "Getches"].) For example, when a farmer uses water on  
23 its fields, or a homeowner uses water to mow his or her lawn, much of the water after its use  
24 seeps into the ground and becomes part of the groundwater supply, and is available for further use  
25 by those who extract the groundwater. The water that seeps into the ground and becomes part of  
26 the groundwater supply is considered a "return flow." (*Id.*)

27 An entity that imports water from one area to another area has the right to recapture and  
28 use the return flows, as long as the importing entity has not "abandoned" its right. (*City of Los*

1 *Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 77; *Stevens v. Oakdale Irrig. Dist.* (1939) 13  
2 Cal.2d 343, 351; *Ide v. United States* (1924) 263 U.S. 497, 505-506 [holding that return flows of  
3 federal reclamation project caused by “seepage” belong to project both under “state law and the  
4 National Reclamation Act]; *Getches*, at 139.) The importer’s right to the return flows is  
5 paramount to the rights of others who may appropriate and use the water during the interval  
6 between its importation and its emergence as a return flow. As the California Supreme Court  
7 stated in *Oakdale*, “[o]ne who, by expenditure of money and labor, diverts appropriable water  
8 from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control,  
9 so long as he is able and willing to apply it to beneficial uses, and such right extends to what is  
10 commonly known as wastage from surface run-off and deep percolation, necessarily incident to  
11 practical irrigation.” (*Oakdale*, 13 Cal.2d at 351.)

12       However, when an entity wholesales the water to another entity, the latter entity has the  
13 right to recapture and use the return flows. In this circumstance, the wholesaler divests itself of  
14 legal ownership, if any, and control of the water, and transfers legal ownership and control to the  
15 latter entity. AVEK claims to be the importer but in this situation is a “wholesaler” of water,  
16 because it does not directly sell and deliver the water to the ultimate consumer, but instead sells  
17 and delivers the water to another entity. The latter entity is a “retailer,” because it buys the water  
18 from the wholesaler and sells and delivers it to the ultimate consumer. Obviously a wholesaler  
19 does not retain legal ownership and control of a product, such as water, when the wholesaler sells  
20 and delivers the product to the retailer, which then sells and delivers the product to the ultimate  
21 consumers.

22       This is the scenario here, where AVEK sells imported water to the Public Water Suppliers  
23 who deliver it through their distribution system to the ultimate users.

24       **B.     The Public Water Suppliers Have the Right to Recapture and Use the Return**  
25       **Flows of State Water Project Water That AVEK Sells and Delivers to Them.**

26       **1.     The State Water Project**

27       The State Water Project (“SWP”), along with its federal counterpart the Central Valley  
28 Project, is one of the two major water development and distribution system in California. The

1 SWP's system of development and distribution of water supplies has been described in numerous  
2 decisions issued by the California Supreme Court and the California Court of Appeal. (*See, e.g.*  
3 *In re Bay-Delta Proceedings* (2008) 43 Cal.4th 1143, 1154; *Planning and Conservation League*  
4 *v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 219-220; *State Water Resources*  
5 *Control Board Cases* (2006) 136 Cal.App.4th 674, 693; *Central Delta Water Agency v. State*  
6 *Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 254 n. 4; *Planning and Conservation*  
7 *League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 898-903; *County of San*  
8 *Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1147; *United States*  
9 *v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 99-100.)

10 As described in these decisions, the SWP was built in the 1960s, with funds obtained  
11 through a bond measure approved by California voters. The principal feature of the SWP is the  
12 Oroville Dam and Reservoir located on the Feather River, a tributary of the Sacramento River, in  
13 northern California. The SWP is operated by the Department of Water Resources ("DWR").  
14 DWR stores Feather River water in the Oroville Reservoir, and the water, once released from the  
15 reservoir, flows downstream to the Delta that forms the confluence between the Sacramento and  
16 San Joaquin Rivers. The DWR then diverts water from the Delta through pumping facilities, and  
17 transports the water through its own aqueduct to water districts located in central and southern  
18 California, which have entered into contracts with DWR for delivery of SWP water. DWR has  
19 entered into water delivery contracts with 29 water districts and agencies, which are called "State  
20 Water Contractors." DWR supplies water to each State Water Contractor according to the terms  
21 of its contract, and delivers the water to the contractor at designated delivery points and delivery  
22 structures. The State Water Contractors include, for example, the Metropolitan Water District of  
23 Southern California, which is the largest SWP contractor and receives about one-half of the SWP  
24 water supply.

25 AVEK is one of the State Water Contractors, having entered into a contract with DWR in  
26 1962 for deliveries of SWP water. (Ex. 1, p. 1.) Under its contract, AVEK is authorized to  
27 receive annual deliveries of SWP water of up to 4,185,000 acre-feet per year, to be delivered at  
28 AVEK's designated delivery structures. (Ex. 1, pp. 26, 28, 32.)

1 After DWR delivers SWP water to a State Water Contractor, such as AVEK, the State  
2 Water Contractor typically delivers the water to a local water district who has purchased the SWP  
3 water, such as a Public Water Supplier, that has entered into a water service contract with the  
4 State Water Contractor. The water service contract typically provides, as in the case of AVEK's  
5 contract with the Public Water Suppliers, that the local water public water supplier district may  
6 request and receive annual water deliveries in specified amounts at specified prices, and the  
7 deliveries are then made to turn-outs and shut-offs maintained by the local district. Exh. 6, pp. 8,  
8 10. The local water district typically delivers the water through its own distribution system to  
9 individual users, such as households, businesses, and so forth. These individual users actually use  
10 the water for specific consumptive purposes, such as to flush toilets, water lawns, and provide  
11 cooling water for industrial facilities, among other uses.

12 After the water has been used by the ultimate user, a substantial portion of the water seeps  
13 into the ground and becomes part of the groundwater supply, and is considered a return flow  
14 because it is available for use by others who extract water from the ground. (*City of Los Angeles*  
15 *v. City of San Fernando* (1975) 14 Cal.3d 199, 210; Getches, at 140.) As Professor Getches has  
16 stated, “[m]ost unconsumed water seeps into the ground and goes back to the stream as waste or  
17 return flow and is appropriated and put to use by others.” (*Getches*, at 140.) The groundwater  
18 that is considered a return flow is distinguished from the groundwater is commingled with the  
19 native, or natural, aquifer water, because the former groundwater owes its existence to the public  
20 water supplier that purchased the imported the water and the latter native groundwater does not.  
21 (*City of San Fernando*, 14 Cal.3d at 210; *Getches*, at 140.)

## 22 2. The Right to Return Flows

23 When AVEK sells and delivers SWP water to the Public Water Suppliers, which then  
24 supply the water to the ultimate users, AVEK is considered a “wholesaler” of the water and the  
25 Public Water Suppliers are considered “retailers” of the water. That is, AVEK does not sell and  
26 deliver the water directly to the ultimate users, but rather sells and delivers the water to the Public  
27 Water Suppliers, which then provide it, together with native groundwater, to the ultimate users.  
28 When the wholesaler, *i.e.*, AVEK, sells and delivers the water to a retailer, *i.e.*, a Public Water



1 Supplier, AVEK transfers any claim of legal ownership and control of water to the Public Water  
2 Supplier, and the Supplier acquires the incidents that attach to such legal ownership and control,  
3 including the right to recapture and use the return flows.

4 Obviously when a wholesaler of a product sells and delivers the product to a retailer, the  
5 wholesaler no longer has legal ownership or control of the product, because it has transferred  
6 legal ownership and control to the retailer. If, for example, a wholesaler buys shirts produced by  
7 a factory in India, and then sells the shirts to a retail outlet in the United States, which in turn sells  
8 the shirts to its customers at its retail stores, the wholesaler cannot claim any right or interest in  
9 the shirts, absent an express contractual provision to that effect, which does not exist here.  
10 Therefore, the retailers in this case, the Public Water Suppliers, have the right to recapture and  
11 use the return flows of the SWP water that the wholesaler, AVEK, sells and delivers to them.

12 Indeed, AVEK's contention that it has the right to the return flows because it is the  
13 "importer" of the water, (AVEK Br. 9-10), is internally inconsistent. In fact, DWR is the original  
14 "importer" of SWP water under AVEK's contradictory logic, because DWR develops the water,  
15 sells it to AVEK, and then transports it to AVEK through its—DWR's—own aqueduct. If, as  
16 AVEK argues, the "importer" of water has the right to the return flows irrespective of whether the  
17 importer sells and delivers the water to another entity, then DWR has the right to the return flows  
18 of the SWP water that it sells and delivers to AVEK, and AVEK does not have this right. AVEK  
19 cannot logically claim that—as between DWR and AVEK—AVEK has the right to the return  
20 flows even though DWR is the original "importer," but that—as between AVEK and the Public  
21 Water Suppliers—AVEK has the right to the return flows because it is the "importer." Although  
22 the SWP water would not be available to the Public Water Suppliers if AVEK had not imported it  
23 to them, the water would not be available to AVEK if DWR had not imported it to AVEK. Thus,  
24 AVEK's argument that it has the right to return flows because it is the "importer" suffers from a  
25 flawed premise.

26 In fact, when AVEK sells and delivers SWP water to the Public Water Suppliers, the  
27 Public Water Suppliers themselves become the "importers" of the water, because they transport,  
28 and thus "import," the water from the places where they receive the water to the places where the

1 water is ultimately used by households, farms, industrial plants, and other such places. Thus,  
2 there are many “importers” of SWP water, as the water is transported from the rivers of northern  
3 California to the ultimate places of use in southern California. AVEK’s argument—that it alone  
4 is the “importer” and thus entitled to the return flows—improperly focuses on a single, isolated  
5 part of the long and complicated chain of distribution and importation of SWP water, rather than  
6 focusing on the chain as a whole. By focusing on an isolated part of the chain, AVEK’s argument  
7 is wholly random and arbitrary.

8 **III. THE CALIFORNIA SUPREME COURT DECISIONS IN THE CITY OF**  
9 **GLENDALE AND CITY OF SAN FERNANDO CASES SUPPORT THE PUBLIC**  
10 **WATER SUPPLIERS’ RIGHT TO RECAPTURE AND USE THE RETURN**  
11 **FLOWS OF STATE WATER PROJECT WATER THAT AVEK SELLS AND**  
12 **DELIVERS TO THEM.**

13 AVEK argues in its motion *in limine* that its right to recapture and use the return flows is  
14 supported by the California Supreme Court’s decisions in *City of Los Angeles v. City of Glendale*  
15 (1943) 23 Cal.2d 68, and *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199.  
16 AVEK Br. 9-15. In fact, these decisions—particularly the *City of San Fernando* decision—  
17 support the Public Water Suppliers’ right to the return flows, not AVEK’s claim.

18 In *City of Glendale* and *City of San Fernando*, the California Supreme Court established  
19 and reaffirmed the two basic principles of water law that govern the outcome of this case. First,  
20 the court in both cases held that an importer of water has the right to the return flows of water that  
21 the importer spreads into the groundwater basin with the intent of recapturing and using the water  
22 later. Second, the court in *City of San Fernando* held that—with respect to water that the  
23 importer sells and delivers to a local water district, which the local district then delivers to the  
24 ultimate user—the local water district has the right to the return flows. Taken together these  
25 cases support the conclusion that the Public Water Suppliers, not AVEK, have the right to return  
26 flows of SWP water that AVEK wholesales and delivers to the Public Water Suppliers. Thus,  
27 AVEK’s claim that it has the right to the return flows of the latter water supply is flatly  
28 contradicted by the California Supreme Court’s decisions.

1           **A.       The City of Glendale Decision**

2           In *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, the City of Los Angeles  
3 (“Los Angeles”) transported water through its own aqueduct from the Owens River in northern  
4 California to the San Fernando Valley.<sup>2</sup> Los Angeles spread a portion of this water in gravel pits  
5 and spreading grounds “with the object of having it sink beneath the surface to join the other  
6 water in the valley and flow with it down the valley until it reached plaintiff’s [Los Angeles’]  
7 diversion works.” (*City of Glendale*, 23 Cal.2d at 76.) Los Angeles sold another portion of the  
8 water to the farmers in the San Fernando Valley, with the intent that the waters, after they had  
9 been used and seeped into the ground, would then “join[] the normal and spread waters” as they  
10 flowed down the valley and would then be available for Los Angeles’ use. (*Id.*) As the Court  
11 noted, Los Angeles sold the water to the farmers because otherwise “the water would have seeped  
12 underground in other valleys without reaching a destination where it could be recovered.” (*Id.*)

13           The California Supreme Court concluded that Los Angeles had the right to the return  
14 flows of both forms of water, because it was spreading some waters and selling other waters with  
15 the specific intent of transporting the waters through the valley and recapturing and using them  
16 later. (*Id.*) The court stated that Los Angeles “did not abandon that right when it spread the  
17 water for the purpose of economical transportation and storage.” (*Id.*) “By availing itself of these  
18 natural reservoirs,” the Court stated, Los Angeles “spared its citizens the cost of financing the  
19 construction of additional dams . . . .” (*Id.*) Thus, *City of Glendale* holds that where an importer  
20 *transports* water from one location to another for its later use, such as by spreading the water or  
21 selling it to the ultimate user with the intent in both cases of recapturing and using the water later,  
22 the importer has the right to recapture and use the return flows, and has not “abandoned” its right.

23           *City of Glendale* thus supports AVEK’s claim that it has the right to the return flows of  
24 SWP water only as to any SWP water that AVEK stores in the groundwater basin with the  
25 “intent” of recapturing the water for later use. (AVEK Br. 16-17.)

26 \_\_\_\_\_  
27 <sup>2</sup> Although Los Angeles is a member of, and purchases water from, the Metropolitan Water  
28 District of Southern California (“MWD”), the dispute in *City of Glendale* concerned only the  
water that Los Angeles transported through its aqueduct from the Owens River, and not the water  
that Los Angeles purchased from MWD.

1           However, *City of Glendale* does not support AVEK's claim that it has the right to the  
2 return flows of SWP water that AVEK sells to the Public Water Suppliers. It is one thing for an  
3 importer to transport water through a groundwater basin with the intent of recapturing and using  
4 the water later, as Los Angeles did in *City of Glendale*. It is an entirely different matter for the  
5 importer to sell and deliver the water to a local water public water supplier, which then delivers  
6 the water through its own distribution system to the ultimate user. In the former instance, the  
7 importer has put its own water in an underground bank for its later use; in the latter, the importer  
8 has sold and delivered the water to someone else, and cannot claim that the water somehow still  
9 belongs in its underground bank. In the former instance, the importer is the "importer" of its own  
10 water, but, in the latter, the local water agency has become the "importer," by importing the water  
11 through its own distribution system to the ultimate user. *City of Glendale* provides no support for  
12 AVEK's claim that it has the right to return flows of SWP water that AVEK sells to the Public  
13 Water Suppliers.

14           **B.       The City of San Fernando Decision**

15           In *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, the Cities of Los  
16 Angeles, Glendale and Burbank (respectively, "Los Angeles," "Glendale" and "Burbank")  
17 respectively claimed the right to the return flows of various waters that were imported into the  
18 Upper Los Angeles River Area ("ULARA"), which includes most of the San Fernando Valley.  
19 (*City of San Fernando*, 14 Cal.3d at 208-209.) The imported waters fell into three categories: (1)  
20 the waters of the Owens River and Mono Lake Basin that Los Angeles diverted and transported  
21 through its own aqueduct to its facilities in the ULARA; (2) the waters of the Colorado River that  
22 Los Angeles purchased from the Metropolitan Water District of Southern California ("MWD"),  
23 which MWD delivered to the ULARA for Los Angeles' use; and (3) the waters of the Colorado  
24 River that Glendale and Burbank purchased from MWD, and that MWD delivered to the ULARA  
25 for Glendale's and Burbank's use. (*City of San Fernando*, 14 Cal.3d at 208-210, 255-256.)<sup>3</sup>

26           <sup>3</sup> In addition, of the water that Los Angeles transported from the Owens River and Mono Lake  
27 Basin through its aqueduct, Los Angeles spread "relatively small quantities" of this water into the  
28 groundwater basin, in order to recharge the basin and "recapture the water thus stored." (*City of  
San Fernando*, 14 Cal.3d at 256, & n. 48, 262-263.) The California Supreme Court held that Los  
Angeles had the right to the return flows from this spread water, just as it had held earlier in *City*

1 The California Supreme Court held, first, that Los Angeles had the right to the return  
2 flows of water that it imported from the Owens River and Mono Lake Basin through its own  
3 aqueduct to the ULARA, and that Glendale and Burbank did not have the right to these return  
4 flows. (*Id.* at 256-260.) The court stated that it had earlier decided this issue in *City of Glendale*,  
5 and that Los Angeles had the right to the return flows for the same reason that it was held to have  
6 the right in *City of Glendale*. (*Id.*)<sup>4</sup>

7 Second, and more importantly here, the Supreme Court held that all three cities—Los  
8 Angeles, Glendale and Burbank—had the right to return flows of Colorado River water that they  
9 had purchased from MWD, and that MWD had delivered to them. (*Id.* at 260-261.) Thus, Los  
10 Angeles had the right to return flows of Colorado River water that it purchased from MWD, and  
11 Glendale and Burbank had the right to return flows of Colorado River water that they purchased  
12 from MWD. *Id.* The court stated:

13 Defendants Glendale and Burbank *each delivers imported MWD*  
14 *water to users within its territory* in the San Fernando basin and  
15 each has been extracting ground water in the same territory before  
16 and after the importation. Accordingly, *each has rights to*  
17 *recapture water attributable to the return flow from such deliveries*  
for the same reason that plaintiff [Los Angeles] has this right.  
These multiple rights necessitate the apportionment of the ground  
water derived from return flow into the amounts attributable to the  
important deliveries of each defendant and plaintiff.

18 (*Id.* at 260-261 [emphasis added].)

19 The Supreme Court's decision in *City of San Fernando* is determinative, here. The court  
20 held that "each [city] delivers imported MWD water to users within its territory," and "each has  
21 rights to recapture water attributable to the return flow from such deliveries" of MWD-imported  
22 water. (*Id.*) The court thus held that where MWD, which imports Colorado River water through  
23 its own aqueduct, sells and delivers the water to the three cities, which then provide the water to  
24 their customers for ultimate use, the return flows of the MWD-imported water belong to the three

25 *of Glendale*. (*Id.* at 263-264.)

26 <sup>4</sup>The court held that its earlier adjudication of Glendale's and Burbank's claims to the return  
27 flows in *City of Glendale* did not bar Glendale's and Burbank's claims in the instant case—  
28 because the earlier decision considered only return flows from agricultural, or "irrigation," use by  
"farmers," and the instant case involved return flows from non-agricultural uses—but that the  
same principles that apply in cases involving non-agricultural uses also apply in cases involving  
agricultural uses. (*City of San Fernando*, 14 Cal.3d at 213, 258-259.)

1 cities. In the instant case, AVEK stands in the same place as MWD and the Public Water  
2 Suppliers stand in the places of the three cities, because AVEK sells and delivers imported SWP  
3 water to the Public Water Suppliers, which then provide the water to their customers for ultimate  
4 use. Because the California Supreme Court held that the three cities have the right to the return  
5 flows of MWD-imported water in *City of San Fernando*, the Public Water Suppliers have the  
6 right to the return flows of AVEK-imported water here. *City of San Fernando* thus supports the  
7 Public Water Suppliers' argument that the return flows belong to them, and rejects AVEK's  
8 argument that the return flows belong to it.

9 AVEK argues that *City of San Fernando* is distinguishable because the Public Water  
10 Suppliers "are merely customers of AVEK," while the three cities in *City of San Fernando* were  
11 all "member agencies" of MWD, in that their representatives "were members of MWD's Board of  
12 Directors" and thus "each were directly involved in the governance and policy decisions of MWD  
13 . . . ." (AVEK Br. 12.) AVEK's attempt to distinguish *City of San Fernando* is misplaced, for  
14 two main reasons. First, although the three cities in *City of San Fernando* were and are member  
15 agencies of MWD, MWD still sells and delivers water to them pursuant to water delivery  
16 contracts between MWD and the cities. Thus, the relationship between MWD and the cities, with  
17 respect to MWD's sales and delivery of Colorado River water, is an arms-length contractual  
18 relationship, and is not one in which MWD is essentially selling and delivering water to itself.  
19 Indeed, AVEK itself notes that MWD's member agencies have a preferential right to "purchase"  
20 water from MWD according to rates established in MWD's By-Laws. (AVEK Br. 13.) AVEK's  
21 claim that *City of San Fernando* is distinguishable because the cities are member agencies of  
22 MWD is belied by the actual contractual relationship between these entities. The fact that some  
23 cities that buy water from MWD may also be member agencies of MWD is of no relevance or  
24 consequence in determining the rights and interests of the parties in their contractual  
25 relationships.

26 Second, nothing in *City of San Fernando, supra*, indicates that its analysis of the rights of  
27 the three cities was based on the fact that they were member agencies of MWD. The Court did  
28 not even mention this fact in its analysis. AVEK attempts to distinguish *City of San Fernando* on

1 grounds that *City of San Fernando* did not even mention, and that were inconsequential in the  
2 Court's analysis. Thus, there is no basis for distinguishing *City of San Fernando* on grounds that  
3 the three cities that purchased MWD-imported water were members of MWD.

4 Finally, the recent appellate court decision in *City of Santa Maria v. Adam* (2012) 211  
5 Cal. App.4th 266, 301-302 cites *City of Glendale* and *City of San Fernando* in upholding the right  
6 of the City of Santa Maria to return flows. In that case the City was in the same position as the  
7 Public Water Suppliers here and there was no consideration that the return flow right should go to  
8 the Department of Water Resources or Central Coast Water Authority (who was the State Water  
9 Contractor like AVEK is here).

10 **IV. THE PUBLIC WATER SUPPLIERS HAVE THE RIGHT TO RECAPTURE AND**  
11 **USE THE RETURN FLOWS ACCORDING TO THE TERMS OF THEIR**  
12 **CONTRACTS WITH AVEK.**

13 The conclusion that the Public Water Suppliers have the right to recapture the return flows  
14 is supported not only by general principles of water law and the California Supreme Court's  
15 decision in *City of San Fernando*, but also by the contract between the Public Water Suppliers  
16 and AVEK. On July 17, 1970, AVEK entered into a water service contract with the Los Angeles  
17 County Waterworks District No. 40's two predecessors in interest, Los Angeles County  
18 Waterworks Districts Nos. 4 and 34, which are jointly referred to as the "Consumer" in the  
19 contract. (Ex. 6, p. 1.) Article 3a of the contract, entitled "Water Rights," provides: "Because it  
20 may be necessary that consumer maintain and operate his own wells to provide for his own  
21 system peak demands and as an emergency reserve water supply, it is advisable that *consumer*  
22 *retain and protect his rights to groundwater.* [¶] In the event that there is an adjudication of the  
23 groundwater basin or any of its sub-units, the Agency will assist the Consumers, if the latter so  
24 desire, in *retaining their rights in the groundwater supply.*" (Ex. 6, p. 7 [emphasis added].)<sup>5</sup>

25 Thus, the contract between AVEK and the two Public Water Suppliers unequivocally  
26 provides that the Public Water Suppliers "retain" the "rights to groundwater," and that AVEK's  
27 sole role and responsibility is to assist the Public Water Suppliers, if they wish, in "retaining their

28 <sup>5</sup> The contract is the current operative contract between Los Angeles County Waterworks District No. 40 and AVEK.  
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1 rights in the groundwater supply” in the event of an adjudication of rights in the groundwater  
2 basin. The groundwater supply includes not only the water in the native aquifer, but also the  
3 water that seeps into the ground after usage and becomes a return flow. Nothing in the contract  
4 between AVEK and the Public Water Suppliers distinguishes between these two kinds of  
5 groundwater. Thus, the contract makes clear that rights to the groundwater supply arising out of  
6 the AVEK contract, including the return flows, belongs to the Public Water Suppliers and not  
7 AVEK.

8 AVEK argues that it has not “executed any writing conveying its right to recapture or use  
9 the Return Flows resulting from AVEK imported water.” (AVEK Br. 16.) AVEK’s argument is  
10 misplaced, for at least two reasons. First, regardless of whether AVEK has executed a contract  
11 conveying its right to recapture and use the return flows, the return flows belong to the Public  
12 Water Suppliers because of the principles of water law described above, and in particular because  
13 of the California Supreme Court’s decision in *City of San Fernando* and recently affirmed in *City*  
14 *of Santa Maria*. Thus, the absence of any contract conveying the right of return flows means only  
15 that the rights remain with the Public Water Suppliers, not with AVEK. Second, the contract  
16 between AVEK and the Public Water Suppliers, described above, provides that the Public Water  
17 Suppliers “retain[] their rights in the groundwater supply.” (Ex. 6, p. 7.) Thus, regardless of  
18 whether AVEK has conveyed the right to the return flows, it has contractually provided that the  
19 Public Water Suppliers have the right to the groundwater, which includes the return flows that  
20 result from seepage.

21 **V. CONCLUSION**

22 For the foregoing reasons, Antelope Valley’s motion *in limine* should be denied.

23 Dated: April 19, 2013

BEST BEST & KRIEGER LLP

24  
25 By 

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WATERWORKS DISTRICT NO. 40



1 **PROOF OF SERVICE**

2 I, Lynda Byrd, declare:

3 I am a resident of the State of California and over the age of eighteen years, and  
4 not a party to the within action; my business address is Best Best & Krieger LLP, 3990 University  
5 Avenue, 5th Floor, Riverside, California 92501. On April 19, 2013, I served the within  
6 document(s):

7 **PUBLIC WATER SUPPLIERS' OPPOSITION TO ANTELOPE VALLEY-EAST  
8 KERN WATER AGENCY'S MOTION IN LIMINE RE ADMISSION OF EVIDENCE  
9 AND ARGUMENT RELATING TO RETURN FLOWS**

- 10  by posting the document(s) listed above to the Santa Clara County Superior Court  
11 website in regard to the Antelope Valley Groundwater matter.
- 12  by placing the document(s) listed above in a sealed envelope with postage thereon  
13 fully prepaid, in the United States mail at Sacramento, California addressed as set  
14 forth below.
- 15  by causing personal delivery by ASAP Corporate Services of the document(s)  
16 listed above to the person(s) at the address(es) set forth below.
- 17  by personally delivering the document(s) listed above to the person(s) at the  
18 address(es) set forth below.
- 19  I caused such envelope to be delivered via overnight delivery addressed as  
20 indicated on the attached service list. Such envelope was deposited for delivery  
21 by Federal Express following the firm's ordinary business practices.

22 I am readily familiar with the firm's practice of collection and processing  
23 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal  
24 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I  
25 am aware that on motion of the party served, service is presumed invalid if postal cancellation  
26 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

27 I declare under penalty of perjury under the laws of the State of California that the  
28 above is true and correct.

Executed on April 19, 2013, Riverside, California.

Lynda Byrd  
Lynda Byrd

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