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Exempt from filing fee pursuant to Gov't. Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation, Superior Court of California, County of Los Angeles, Case No. BC325201;

Los Angeles County Waterworks District No. 40 vs. Diamond Farming Company, a corporation., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348;

Wm. Bolthouse Farms, Inc. vs. City of Lancaster, Diamond Farming Company, a corporation, vs. City of Lancaster, Diamond Farming Company, a corporation vs. Palmdale Water District, Superior Court of California, County of Riverside, Case Nos. RIC 353840, RIC 344436, RIC 344668.

Judicial Council Coordination Proceeding No. 4408

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

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S REPLY BRIEF IN SUPPORT OF ITS *IN LIMINE* MOTION TO PRECLUDE ARGUMENT OR EVIDENCE RELATING TO OWNERSHIP OF RETURN FLOWS

Date: May 13, 2013
Time: 9:00
Dept.: Room 222
Judge: Hon. Jack Komar, Judge Presiding

Trial Date: May 28, 2013 (Phase IV)
Time: 9:00 a.m.

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The Antelope Valley-East Kern Water Agency (AVEK), submits this Reply Brief in further support of its *in limine* motion for an Order precluding the introduction of argument or evidence that any person other than AVEK is entitled to recapture and use the return flows resulting from AVEK-imported water.

I.

INTRODUCTION

This reply brief, submitted in further support of AVEK's *in limine* motion and in response to the Public Water Suppliers's opposition thereto, demonstrates further that:

1. District #40's and the Public Water Suppliers' reliance on the decisions in *City of San Fernando* and *City of Santa Maria* in support of their claims to return flows is misplaced;

2. District #40's claims that it is an "importer" of foreign water and also, that DWR's right to return flows is equal or superior to AVEK's right thereto, are both without merit.

3. District #40's claim that AVEK's contracts acknowledge a right to return flows in the Public Water Suppliers, also is without merit.

II.

AVEK IS NOT MWD

Quoting from and relying upon the *City of San Fernando* decision, District #40 argues that:

> . . . importantly here, the Supreme Court held that all three cities – Los Angeles, Glendale and Burbank – had the right to return flows of Colorado River water that they had purchased from MWD, and that MWD had delivered to them. . . . [¶]The Supreme Court's decision in *City of San Fernando* is determinative here. . . [¶] . . . AVEK stands in the same place as MWD and the Public Water Suppliers stand in the paces of the three cities, because AVEK sells and delivers imported SWP water to the Public Water Suppliers, which then provide the water to their customers for ultimate use. Because the California Supreme Court held that these three cities have the right to the return flows of the MWD-imported water in *City of San Fernando*, the Public Water Suppliers have the right to the return flow of AVEK-imported water.

(Dist. #40 Opp., 10:7-11:6)

On the surface, the foregoing argument appears appealing. Upon closer scrutiny, however, it is clear that (i) District #40's and the other Public Water Suppliers' attempt to equate

AVEK with MWD is completely unfounded, and (ii) the facts in the *City of San Fernando* are clearly distinguishable from those in the case at bar.

AVEK's Opposition to the *in limine* motions of Quartz Hill and Rosamond describes some of the significant differences between MWD and AVEK. In its opposition brief, District #40 addresses only one of those differences (attempting to address the essential commonality between MWD and its members agencies, including Burbank, Glendale and San Fernando), but District #40 fails even to address the additional distinguishing factors, to wit: in *City of San Fernando*, MWD was not a party to the litigation, and MWD never claimed a right to the return flows resulting from the water it delivered to its member agency cities.

When one probes a little further, it also becomes quite clear why MWD did not join the litigation in *City of San Fernando*, and why MWD never claimed a right to the return flows from the water delivered to its member agencies. The reason can be summed up in one word: "intent."

As District #40 repeatedly acknowledges (and as is explained clearly in both *City of Glendale* and *City of San Fernando)*, an importer is entitled to the resulting return flows only when the importer acts with the specific "intent" to recapture the return flows (see Dist. #40's Opp., 7:20-22; 8:8-10; 8:14-16; 8:21 ["with the intent in both cases of recapturing and using the water later"]; and 9:3-4). Speaking of *City of Glendale*, the Supreme Court in *City of San Fernando* explained:

> This holding had a dual basis. One basis for the holding was the trial court's finding that before commencing the importation of Owens water, *plaintiff had formed an intention to recapture the return waters* used for irrigation in the San Fernando Valley whenever such return waters were needed for its municipal purposes and the use of its inhabitants, *and that the Los Angeles Aqueduct had been planned and located to facilitate the availability and recapture of such return waters*. Under these circumstances, plaintiff retained its prior right to the return waters wherever they might appear. (Id., 23 Cal.2d at p. 78; *Ide v. United States* (1924) 263 U.S. 497, 506-506 . . . ; *United States v. Haga* (D. Idaho 1921) 276 F. 41.)

(14 Cal.3d at 257, italics added)

It virtually "shouts itself out," however, that MWD never intended to recapture the return flows resulting from the water it delivered to its member agencies. That is demonstrated by the undisputed facts that MWD elected not join the suit in *City of San Fernando*, or to assert a claim therein to return flows, and never claimed a right to such return flows; and, also, by the equally indisputable fact that *MWD never acquired or constructed wells that could be utilized for the recapture of return flows*. Absent such production wells, it would be physically impossible for MWD to recapture return flows.

All of the mentioned distinguishing factors demonstrate that MWD never had the required "intent" to recapture return flows from the MWD-imported water delivered within its boundaries. Based upon the requirements confirmed in *City of Glendale* and *City of San Fernando*, MWD had no valid claim to return flows, for the additional reason that MWD never had the required intention or means to recapture return flows.

A. AVEK IS NOT MWD

In stark contrast to MWD's circumstances stated above, AVEK owns wells which can be used to recapture return flows from AVEK-imported water; AVEK is currently drilling additional wells; and, AVEK is considering purchasing other property with water well production capability. Further, AVEK is an active participant in the extant proceeding, filing therein a cross-complaint which expressly asserts AVEK's right to the return flows from AVEK-imported water. In this latter connection, the Supreme Court in *City of San Fernando*, expressly ruled:

> . . . the allegation of an *intent* to recapture the return waters in the present complaint, filed in 1955, was sufficient for purposes of the present case to establish whatever rights would have arisen from the plaintiff's manifestation of such *intent* before commencing importation in 1915. (*Stevens v. Oakdale Irr. Dist., supra,* 13 Cal.2d 343.)

(14 Cal.3d, at 259-260; italics added.)

Therefore, for the reasons stated herein and previously, the Public Water Suppliers' contention that "AVEK stands in the same place as MWD" in *City of San Fernando* is patently incorrect; and the *City of San Fernando* decision is readily distinguishable from the case at bar.

B. AVEK IS BOTH A WHOLESALER AND A RETAILER

District # 40 also claims that AVEK is merely a wholesaler of SWP water "because it does not directly sell and deliver the water to the ultimate consumer" (Dist. 40 Opp., 3:15-16; 5:25-26). This claim also is patently incorrect, because AVEK is both a wholesaler and retailer of SWP water -- wholesaling water to the Public Water Suppliers, and retailing water to "ultimate consumers" who include AVEK's agricultural customers and other private customers.

Without citing any other applicable authority to support the proposition, District #40 also argues that when AVEK delivers water to another entity, it thereby divests "itself of *legal ownership* and control of the water, and the latter purchasing entity acquires legal ownership and control of the water." (Dist. #40 Opp., 1:14-17; 3:12-15, italics added.) That claim flies in the face of the Supreme Court's explanation that, "The use by others of this water . . . does not cut off [the importer's] rights. In *Stevens* . . . , it was recognized that one who brings water into a watershed may retain a prior right to the water after permitting others to use the water . . ." (*City of Glendale,* 23 Cal.2d 68, 76-77.)

District #40's opposition also makes repeated references to its claimed "legal ownership" of the AVEK-imported water which it receives (Dist. #40 Opp., 1:14-17; 3:12-15; 6:1-6 ["when a wholesaler of a product sells and delivers the product to a retailer, the wholesaler no longer has legal ownership or control of the product, because it has transferred legal ownership and control to the retailer").

Rights in water, however, are usufructuary only. Accordingly, when District #40 attempts to equate ownership rights to water with ownership rights in "shirts produced by a factory in India," District #40 is clearly treading in dangerous waters. In any event, as noted above, District #40's claims are premised entirely upon its assertion that, "The Supreme Court's decision in *City of San Fernando* is determinative here." For the reasons indicated above, that is not true.

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III.

THE DECISION IN *CITY OF SANTA MARIA* ALSO IS CLEARLY DISTINGUISHABLE

District #40 also relies upon the recent decision in *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 301-302, and makes essentially the identical argument it erroneously makes as to *City of San Fernando*, that: "In [*City of Santa Maria*] *the City was in the same position as the Public Water Suppliers here . . .*" That assertion also is patently incorrect, for the reasons which are demonstrated, in detail, in AVEK's Opposition to the *in limine* motions of Quartz Hill and Rosamond.[1]

Among other material differences, unlike Santa Maria, the Public Water Suppliers in the case at bar: (i) have not had assigned or transferred to them SWP water "entitlements;" and (ii) the parties in this proceeding have not "stipulated" that the Public Water Suppliers have the right to return flows.

In short, District #40's reliance upon *City of Santa Maria* to support the Public Water Suppliers' claim to return flows also is completely unfounded.

IV.

DISTRICT #40'S MULTIPLE "IMPORTERS" ARGUMENT

In another interesting argument, District #40 claims there are actually three categories of "importers" of AVEK-imported water (i.e., DWR, AVEK and the Public Water Suppliers) and, further, that DWR's potential claim to return flows is equal, if not superior claim, to AVEK's claims to such return flows. (Dist. #40 Opp., 6:12-7:7) Again, District #40's arguments are without merit.

First, District #40 claims that the Public Water Suppliers qualify as *importers,* "because they transport, and thus 'import,' the water *from the places where they receive the water* to the places where the water is ultimately used . . . (Dist. #40, 6:26-7:1, italics added). District #40's

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1 Rather than repeating same herein and to save time of court and counsel, AVEK incorporates in full herein by this reference the points and authorities relating to *City of Santa Maria* contained in AVEK's opposition briefs to *in limine* motions of Quartz Hill and Rosamond.

premise is flawed, because a person claiming "importer" status must actually *bring water into the basin*. The Public Water Suppliers, however, receive AVEK-imported water at AVEK delivery locations located entirely *inside* the basin. Therefore, the Public Water Suppliers manifestly do not qualify, and cannot qualify, as persons who actually import into the basin water from outside the basin. Accordingly, the Public Water Suppliers are not "importers."

Second, District #40's suggestion that DWR also might have a claim to return flows from AVEK-imported water is likewise flawed. This is so for the same reasons indicated above as to MWD, to wit: DWR has never claimed a right to the return flows, DWR has never manifested an "intent" to recapture the return flows, and DWR does not have production wells in the basin capable of capturing return flows.

V.

AVEK'S CONTRACT DOES NOT ACKNOWLEDGE PUBLIC WATER SUPPLIERS' RIGHT TO RETURN FLOWS

District #40 also argues that:

> . . . the contracts between AVEK and the Public Water Suppliers expressly provide that the Public Water Suppliers have the right to groundwater located within their districts, and the groundwater includes the return flows from State Water Project water that AVEK sells and delivers to the Public Water Suppliers. Thus, *the contracts also provide that the Public Water Suppliers have the right to the return flows*."

(Dist. #40 Opp., 2:1-5; 12:10-13:7; italics added.)

To support this claim, District #40 relies upon the following contract language:

> Because it may be necessary that consumer maintain and operate his own wells to provide for his own system peak demands and as an emergency reserve water supply, it is *advisable* that consumer retain and protect his rights to groundwater. [¶] In the event that there is an adjudication of the groundwater basin or any of its sub-units, the Agency will assist the Consumers, if the latter so desire, in retaining their rights in the groundwater supply. (Italics added.)

Based upon that innocuous language which clearly is intended only to encourage AVEK customers to preserve whatever groundwater rights they may have, in order to minimize their demands upon AVEK-imported water, District #40 then makes an unwarranted and, indeed, herculean leap of logic by arguing that, "Thus, the contract makes clear that rights to the groundwater supply arising out of the AVEK contract, including the return flows, belongs [sic] to the Public Water Suppliers and not AVEK" (Id., at 13:5-7); and, "regardless of whether AVEK has conveyed the right to the return flows, it has contractually provided that the Public Water Suppliers have the right to the groundwater, which includes the return flows that result from seepage" (Id., at 13:17-20).

To state charitably that the Public Water Suppliers have read a bit more into the above quoted contract language than is actually contained therein, would be a gross understatement. In fact, there is absolutely nothing within AVEK's contracts with its customers (including the Public Water Suppliers) which acknowledges that the Public Water Suppliers have a right to the return flows from AVEK-imported water.[2]

VI.

CONCLUSION

AVEK's retention of its right, as importer, to control the return flows from AVEK-imported water will benefit everyone who depends upon the Basin's groundwater. This is so because, except in an emergency, AVEK intends to maintain the return flows in the groundwater to help stabilize the Basin, increase the amount of water available for future use, raise well levels, and otherwise help remedy the overdraft. If the return flows were pumped, however, such pumping most likely would occur in areas where critical overdraft exists, increasing the overdraft and making the problem significantly worse.

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2 AVEK notes further than its expert witness, Robert Wagner, has concluded that the claimed return flow rate for M&I usage of 39 percent is based on 11 percent of total M&I use for domestic irrigation, and 17 percent for return flow from septic system disposal, and both number appear to be overstated. For further detail, see Exhibit 1 attached hereto.

AVEK's taxpayers as a whole should be credited with the fruits of their endeavors in bringing into the basin water that otherwise would not be present in the basin.

Where, as here, an importer has not assigned, transferred, abandoned or otherwise relinquished its right to return flows, no court has ever denied an importer's claimed right to recapture and use the return flows, in favor of the importer's customer's claimed right to recapture and use the same return flows.

Dated: May 3, 2013

BRUNICK, McELHANEY & KENNEDY

By: _____
WILLIAM J. BRUNICK
LELAND P. McELHANEY
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN
WATER AGENCY

EXHIBIT 1

The return flow rate for M&I usage of 39 percent is based on 11 percent of total M&I use for domestic irrigation, and 17 percent for return flow from septic system disposal. The sum of these two is 28 percent and is convoluted multiple times for an ultimate estimate of return flow of 39 percent. Agricultural return flow rate of 34 percent may also be overstated. These amount are overstated for the following reasons.

Three assumptions were made in the Summary Expert Report – Phase 3 regarding return flow: 1) there are no delays between utilization of water and its recharge; 2) an average return flow rate was developed and utilized herein for agriculture irrigation; 3) return flow rates were developed and utilized for M&I water usage from the detailed analysis of M&I water requirements and supplies as described in Appendix D. (see APP F page 3-5).

Assumption 1 overstates return flow because perfect connectivity between surface disposal and groundwater aquifer may not exist, and land use conditions change over time causing a disruption in the connectivity between surface and groundwater aquifer.

Assumption 2 may be a reasonable assumption if the average was computed from parcels overlying clay layers and non clay layers, and the proportion of parcels overlying clay layers and non clay layers remains the same in the future, otherwise the historic average would not be applicable in the future.

Assumption 3 included in part that the M&I return flow rates were based on agricultural irrigation practices which overstates return flow from M&I water usage. Furthermore, M&I return flow rates were based on: 1) no evaporation/evapotranspiration from leach fields; 2) no difference in percolation and edge effects between large area irrigation and small area irrigation; 3) no clay layers impeding recharge to the groundwater aquifer; all of which likely overstates return flow.

Future land use changes and conservation will affect the disposal of water and return flow rates in the future. Therefore, it is necessary to make the determination now, of not only what the return flow rate is, but what conditions current and future will affect the volume of return flow.

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}

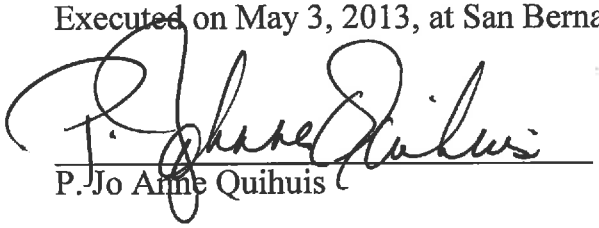
I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California 92408-3303.

On May 3, 2013, I served the foregoing document(s) described as: **ANTELOPE VALLEY-EAST KERN WATER AGENCY'S REPLY BRIEF IN SUPPORT OF ITS *IN LIMINE* MOTION TO PRECLUDE ARGUMENT OR EVIDENCE RELATING TO OWNERSHIP OF RETURN FLOWS** on the interested parties in this action served in the following manner:

■ **BY ELECTRONIC SERVICE AS FOLLOWS** by posting the document(s) listed above to the Santa Clara website in the action of the *Antelope Valley Groundwater Litigation*, Judicial Council Coordination Proceeding No. 4408, Santa Clara Case No. 1-05-CV-049053.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 3, 2013, at San Bernardino, California.



P. Jo Anne Quihuis