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Exempt from filing fees 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

REPLY BRIEF IN SUPPORT OF ANTELOPE VALLEY-EAST KERN WATER AGENCY'S MOTION FOR SUMMARY ADJUDICATION

Hearing Date: January 27, 2014
Time: 9:00
Dept.: To be determined

Judge: Hon. Jack Komar

Trial Date: February 10, 2014 (Phase V)
Time: 9:00 a.m.

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The Antelope Valley - East Kern Water Agency (AVEK) submits the following Reply Brief in support of its motion for summary adjudication, and in response to the Opposition memorandum filed by the Public Water Suppliers (PWS), and any other opposition brief which may be filed.

1. The Public Water Suppliers' contract claims.

The PWS argue they are entitled to return flows because (a) AVEK "sold" SWP water without reserving the right to return flows, and (b) the indemnification provisions in the contract recognize the PWS' return flow rights (Opp., 6:15-8:20). As shown below, the PWS' arguments are without merit.

A. The PWS misperceive the effect and significance of AVEK's "sale" to them of SWP water.

PWS erroneously equate AVEK's "sale" of water with grant deeds of "fee simple title" (Opp., 6:26-7:13); doing so, the PWS overlook hornbook law confirming that there is no such thing as "fee simple title" or, indeed, any "title" to water. Water itself is not subject to ownership by private parties; instead, a party can own *the right to use* water, subject to a requirement that the use be reasonable or beneficial. (*Turlock Irr. Dist. v. Zanker* (2006) 140 Cal.App.4th 1047; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261.) "'Water rights holders have the right to "take and use water," but *they do not own the water . . .*'" (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 278 [*Santa Maria*]; italics added.)

Therefore, AVEK's "sale" of SWP water does not invest the PWS with "title" to the water, but only the right to use the water while it remains in their possession. The, the fact that AVEK "sold" to the PWS the right to use imported SWP water while it is in their possession is of no special significance. As the Supreme Court noted, "*Nothing would be gained by requiring [the importer] to change the form of its contracts from a 'sale' of the water to a transfer of the right to its use*" (*City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 78 [*Glendale*]).

B. The right to return flows is a distinct and separate property right.

Moreover, the right to return flows is a distinct and separate property right.

> "As described by our Supreme Court, the right to return flows of imported water 'is an *undivided right to a quantity of water* in the ground reservoir equal to the net amount by which the reservoir is augmented by such deliveries.' (*San Fernando, supra*, 14 Cal.3d at p. 262, italics added [in original].) Thus, the importers of SWP water may retain a right to the volume of water made available through their efforts. **That right is separate** from others' usufructuary right in the Basin's native supply."

(*Santa Maria*, supra, 211 Cal.App.4th at 302; bold print added; see, also, *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 262 [*San Fernando*].)

Therefore, the right to return flows is a separate and distinct property right.

C. Accordingly, to satisfy the Statute of Frauds, a writing conveying a right to return flows must describe the right being conveyed "with reasonable particularity."

A transfer of a right in water is an agreement for the transfer of an estate in real property, *within the statute of frauds*. (*Churchill v. Russell* (1905) 148 Cal.1; *Hays v. Fine* (1891) 91 Cal. 391; *Dorris v. Sullivan* (1891) 90 Cal. 279.)[1]

As noted, the right to return flows is a *distinct and specific* property right. To satisfy the Statute of Frauds, a contract purporting to convey or transfer that specific property right must be in a writing which identifies, *with reasonable particularity*, the specific estate or interest in real property transferred (Civ. Code § 1624(a)(1) and (3)*; Alameda Belt Line v. City of Alameda* (2003), 113 Cal.App.4th 15, 20-21; *Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769, 774 ["Preferably, the writing should disclose a description which is itself definite and certain"]).

Therefore, a right to return flow is not conveyed simply because the importer does not reserve a right thereto when it sells a possessory interest in imported surface water. Instead, rights to return flow can only be conveyed through a writing which describes with particularity, and clearly indicates an intent to convey or transfer, that specific property right.

AVEK's contracts with its customers, however, do not mention or reference, in any way, return flows or AVEK's interest in return flows -- much less purport to convey such rights to AVEK's customers. Accordingly, AVEK's contracts clearly do not satisfy the Statute of Frauds so far as the PWS' claim that the contracts convey or transfer an interest in return flows. They do not!

Analogously, in *Crane v. Stevinson* (1936) 5 Cal.2d 387, it was alleged that Stevinson had no riparian rights, because its predecessor conveyed away all such rights. Its predecessor had recorded a

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1 A producer of return flow from imported water may dispose of that distinct property right by contract [*Haun v. De Vaurs* 97 Cal.App.2d 841, 844; see, also, Hutchins, *The California Law of Water Rights*, at 397-400, noting of the Supreme Court's decision in *Stevinson Water Dist. v. Roduner*, 36 Cal.2d 264, 267-270 (1950) that "this decision sanctioned the right of the producer of imported water to provide by contract for its recapture"].

notice of appropriation of 300 cubic feet per second of the water of the San Joaquin River. He later executed the deed,

> "which appellant here contends was a conveyance of all his riparian rights as owner of the land now owned by respondent Stevinson. The property conveyed by this deed was therein described as being 'all right, interest or estate, in, to or to take water from the San Joaquin River, also to any water appropriated by said party of the first part, by written notice or by actual diversion, or otherwise, also all rights, interest and estate now in and to any water flowing or which may hereafter flow in the said San Joaquin River, which has been acquired by the party of the first part in any manner whatever, including all rights, interests, estates and privileges which may grow out of, or result from any act or thing done or performed by the said party of the first part, or by any other person in his behalf'. *It should be noted that this deed omits any reference to land owned by the grantor, or to any riparian rights belonging to him as a landowner.* On the other hand, it directly mentions his water rights as an appropriator. It does contain some more general words of description which might cover all rights of the grantor to water flowing in the river, acquired by him 'in any manner whatever". *But this does not necessarily include, and we think that it never was intended to include, the riparian rights which were only incidental and pertaining to his ownership of riparian lands.*"

(*Crane v. Stevinson* (1936) 5 Cal.2d 387, 396-397; italics added.)

The foregoing demonstrates that AVEK's contracts with its customers do not purport to convey, and do not convey, any right to, or interest in, the return flows from SWP surface water.

D. Nor is any right to return flows recognized in the indemnification provisions.

In a giant leap of logic, the PWS also claim that a right to return flows is recognized in the contract provisions wherein AVEK's customers agree to indemnify and hold harmless AVEK from any damages resulting from the PWS' "use" of the delivered water (Opp. 8:10-20). The indemnification provisions, however, merely relieve AVEK from any "liability" for damages resulting from the PWS's "use" of the water while it is in their possession, and are in no way inconsistent with AVEK's right to use the resulting return flows after the water leaves the PWS' possession and reaches groundwater.

2. The PWS' claim that AVEK has only a contractual entitlement, and no right to groundwater.[2]

The PWS also argue that "A water right is held [only] by the entity that takes water directly from a body of water, and AVEK does not take the SWP water directly from a body of water" (Opp. 2:15-17). Based on this unsupported premise, the PWS then argue that AVEK has only a contractual entitlement, and no right to groundwater. This argument also is without merit.

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2 If AVEK has no right to groundwater, as alleged in this part of the PWS's Opposition brief, how could AVEK convey such rights by contract to the PWS, as is also argued, inconsistently, in another part of the PWS' Opposition brief?

A. Water rights can be conveyed by contract; accordingly, the fact that AVEK did not "take water directly from a body of water" is irrelevant.

Simply stated, and based on well established law: water rights can be conveyed by contract (see Points 1B and 1C above); and an importer who obtains water rights by contact is entitled to the return flows from such imported water. Therefore, the fact that AVEK did not appropriate water directly from a body of water is entirely irrelevant and of no consequence.

B. AVEK's contract with DWR grants AVEK rights to SWP water.

The Water Supply Contract between the State of California (Department of Water Resources) and AVEK conveys rights in SWP water to AVEK (see Exhibit 1 to Flory Dec., and Undisputed Fact No. 1.). While in its possession, AVEK has "the sole and exclusive right" to use the contracted for SWP water (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 302) and, as the importer thereof, AVEK also is entitled to use the resulting return flows after they reach groundwater.

> ". . . one who brings water into a watershed may retain a prior right to it even after it is used. (*Glendale, supra*, at pp. 77-77.) The practical reason for the rule is that the importer should be credited with the 'fruits . . . of his endeavors in bringing into the basin water that would not otherwise be there." (*San Fernando, supra*, at p. 261 . . .)."

(*Santa Maria, supra*, 211 Cal.App.4th at 301; see, also, *Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343, 351.)

Again, the fact that AVEK did not take water directly from a body of water is wholly irrelevant, and does not negate AVEK's right to the return flows from the SWP water it imports.

3. The PWS' argument that "it is the purchaser's use that leads to return flows" also is irrelevant.

The PWS repeatedly argue that if they and other customers of AVEK did not place requests with AVEK for SWP water, "the SWP water would not reach the Basin" (Opp. 14:17-23; 15:2-7), and "it is the purchaser's use that leads to return flows" (Opp., 2:27-3:6). Those same arguments, however, could have been made with equal, but unavailing force by Los Angeles' agricultural customers in *Glendale* and *San Fernando* – nonetheless, in both cases the Supreme Court clearly stated and unequivocally held that the importer (Los Angeles) retains the right to return flows, notwithstanding the undeniable fact that the purchaser's use resulted in some imported water reaching groundwater.

> "The fact that the water drawn from a tap into a portable receptacle becomes the customer's disposable personal property [citation omitted] does not impair plaintiff's

right to recapture the return flow which is in fact produced by deliveries of its imported water." (*City of L.A. v. City of Glendale*, *supra*, 23 Cal.2d at p. 78.)

(*San Fernando*, *supra*, 14 Cal.3d 199, 260.)

4. The PWS claim that its status as a "wholesale" purchaser gives it the right to return flows is unsupported and also without merit.

Without any supporting authority, the PWS attempt to draw a distinction between retail purchasers and wholesale purchasers. They do so because in *Glendale,* the Supreme Court ruled unequivocally that the importer retains the right to return flows, rather than its retail customers (in that case, farmers and other agricultural purchasers). Therein, the Court noted that imported water was "sold to the farmers of the San Fernando Valley, . . . which settle after use beneath the surface and join the mass of water below" (23 Cal.2d at 72). It then held that the importer (Los Angeles) had a prior right to the water when it was imported (23 Cal.2d at 76), and that "[t]he use by others of this water as it flowed to the subterranean basin *does not cut off [the importer's] rights*" (23 Cal.2d at 77, italics added). All of this was reaffirmed in *San Fernando* (14 Cal.3d at 257).

Unfortunately for the PWS, neither decision draws any distinction between retail purchasers and wholesale purchasers, vis-a-vis the importer's right to retain and use the resulting return flow. Instead, the decisions unequivocally hold that the "importer" retains the right to return flows; neither decision awards return flow rights to persons who merely purchase water from the importer. Therefore, it matters not whether the purchaser is a retail purchaser or a wholesale purchaser. In either case, the importer retains the right to use the resulting return flows.

5. The *Glendale* Decision.

As noted in *Glendale* and above, some Los Angeles' imported water was banked by spreading, while other imported water was sold to farmers, with the intent of later recapturing the resulting return flows within its service area or "reservoir." AVEK likewise, by its own spreading operations, has also banked some of its imported water, and sold the balance to its wholesale and retail customers, also with the intent of using the resulting return flows within its service area or reservoir (see Undisputed Fact No. 28, and Point 8 below).

The only difference is that AVEK regularly sells its imported water to both wholesale customers and retail customers, while Los Angeles sold its imported water mostly, if not entirely, to retail customers. That, however, is a distinction without a difference. In this connection, *San Fernando* demonstrates that the importer retains the right to return flows whether it delivers its water for agricultural or urban use.

> . . . The trial court found in the present case that since the entry of the former judgment "the culture of the area within the San Fernando Basin . . . has been transformed from essentially rural and agricultural to a highly developed urban society . . . ." Much of the land formerly devoted to irrigated crops has been covered by residential and commercial development. Defendants contend that these changed conditions preclude the giving of any res judicata effect to *Glendale* in determining plaintiff's present claim to return waters.
>
> . . . Plaintiff's claim, however, encompasses returns derived from imported water *sold for purposes other than irrigation*. . . . The computations [of return flows] . . . comprehends ground water returned from a variety of urban as well as agricultural uses. Just as a change in the appropriator's place or character of use of the appropriated water does not affect his right to take it [citations omitted], *an alterative in the type of use from which imported water is returned to the ground does not impair the importer's claim to it as return water*.

(*San Fernando*, *supra*, 14 Cal.3d 199, 258-259; italics added.)

As noted above, neither *Glendale* nor *San Fernando* draw any distinction between sales to retail or wholesale customers. There is absolutely nothing in those decisions which supports the PWS' claim that the importer retains the right to return flows when it sells its water to agricultural or other retail customers, but loses its right to return flows if it sells its imported water to wholesale customers or public entities. In fact, *San Fernando* notes that Los Angeles sold some of its imported water to other "public entities" (14 Cal.3d at 255, fn. 45). Nonetheless, the importer, Los Angeles, retained the right to all return flows.

6. The *San Fernando* Decision.

In their Opposition brief, the PWS ignore extremely important distinctions between the underlying facts involved in *San Fernando* and the case at bar, to wit: in *San Fernando*, the importer (MWD): (1) did not claim any interest in return flows, (2) did not spread water in the basin, (3) did not have wells located in the basin, (4) had not pumped any groundwater in the basin, and (5) its rights to return flow were not litigated or determined in that action (see Undisputed Fact Nos. 43, 44, 45, 46; exhibits referenced therein; and Kunysz declaration, ¶¶ 3-6). Combined with the additional undisputed facts that the only recipients of MWD imported

water were its "member agencies," which were inextricably bound to MWD and directly involved in its governance, these are material and significant distinguishing facts.[3]

Notwithstanding these significant differences, the PWS argue that "AVEK stands in *the same place* as MWD and the Public Water Suppliers stand in the places of the three cities" (Opp., 12:7-8, italics added). PWS make this claim even though it is undisputed that: (1) the PWS are not member agencies of AVEK, and are not involved in its governance; (2) unlike MWD, AVEK has spread and banked SWP water in the Basin; (3) unlike MWD, AVEK has pumped groundwater; and (4) unlike MWD, AVEK has clearly asserted in this action its claim to return flows and taken other actions consistent with that claim (see Point 8 below).

The foregoing material and distinguishing facts explain why MWD's member agencies, rather than the actual importer, MWD, were awarded return flow rights in *San Fernando* -- while that Court, at the same time, continued to articulate the well established rule of general application that the "importer" retains all rights to return flows.

7. The *Santa Maria* Decision.

In their Opposition brief, the PWS misrepresent the holding in *Santa Maria*, stating that it holds that "*retail purchasers* of SWP water are entitled to return flows" and "*retail purchasers* . . . are the 'importers' of SWP water" (Opp., 9:6-9, italics added). In truth, the parties awarded return flow rights in *Santa Maria* owned their own SWP entitlement and, therefore, had the same rights as, and acted as if they were SWP contractors -- not merely "retail purchasers" (see Judgment After Trial, Exhibit F to Exhibit 1 [Exhibit 9 to Request for Judicial Notice], and AVEK's Mot., 13:13-15:25).

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3 The PWS claim that the court in San Fernando did not mention or consider the fact that the cities mentioned were MWD's "member agencies" (Opp., 13:21-23). That is not true (see Undisputed Fact No. 38, to wit: in its Findings of Facts and Conclusions of Law, the court noted that, "MWD was formed in 1929 of 13 original member agencies, including Los Angeles, Glendale and Burbank. . . . In 1971, San Fernando became a member agency in MWD." (Request for Judicial Notice, Exhibit 1, 22:23-24:1.)

Moreover, as noted in Point 4 above, the decisions in *Glendale* and *San Fernando* squarely establish that the rights to return flow belong to the importer, and not to persons who merely "purchase" water from the importer.

The PWS also make the absurd claim that, "In that case the City [of Santa Maria] was *in the same* position as the Public Water Suppliers here" (Opp., 14:4-5, italics added). Nothing could be further from the truth! As previously noted, following an assignment of rights by contract, the City *actually owned its own SWP entitlement*, thereby placing the City in the same shoes as any other State Water Contractor, and entitling it to place its own orders for SWP water, which it did. The PWS here, however, do not own an SWP entitlement, and are not able to place orders directly with DWR for SWP water; instead, the PWS are merely "purchasers" of AVEK's imported water.

As a result, there is a world of difference between the entitlements and rights owned by the City of Santa Maria, and the PWS in the case at bar. Attempting to blink this significant distinction, the PWS merely state, "This is a distinction without a difference." In truth, this distinction makes a huge difference.[4]

As if that were not enough, the PWS also ignore completely the fact that the result in *Santa Maria*, including the allocation of return flow rights, was based upon the parties' **stipulation**; as a result, in *Santa Maria*, adverse claims to return flows was not litigated but, instead, was determined by agreement among the stipulating parties.

> Most of the case was resolved by an agreement (Stipulation) among the Santa Maria Valley Water Conservation District (District), local cities and water companies (public water producers) and most of the owners of land overlying the Basin. The Stipulation contains a plan, referred to as a physical solution, which resolves conflicting water rights

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4 The PWS complain further that AVEK's motion references information which "does not appear in the records of those cases." That is incorrect. For example, pages 11 and 12 of Exhibit F to Exhibit 1 to Judgment After Trial in *City of Santa Maria* [Exhibit 9 to Request for Judicial Notice] specifically notes that, "E. The City [Santa Maria] and SCWC [Southern California Water Company] also each hold contracts to receive water from the State Water Project ('SWP Entitlement,' collectively, and 'City SWP Entitlement/ or 'SCWC SWP Entitlement,' individually)."

claims and allocates the various components of the groundwater (native groundwater, **return flows of imported water**, and salvaged water) among the stipulating parties.

Therefore, there is nothing in *Santa Maria* which gives comfort or support to the PWS regarding their claimed right to return flows. In fact, the result in *Santa Maria* confirms and supports AVEK's right to return flows, to wit: in *Santa Maria,* the persons awarded return flow rights were those who *owned* SWP entitlements and had the rights of SWP contractors – just like AVEK.

8. AVEK has adequately manifested its "intention" to recapture or otherwise use return flows.

Based on certain language in *San Fernando*, the PWS claim that AVEK has not adequately manifested its "intention" to recapture or use return flows. That is not so!

A. The language in *San Fernando*, regarding the elements necessary to establish existence of the required intent **before** the filing of a pleading claiming that right, has no application to AVEK.

In *San Fernando*, Los Angeles claimed, and the Supreme Court found, that Los Angeles formed the required "intent" to recapture return flows **before it filed its complaint in that action**. Specifically, Los Angeles was found to have formed the required "intent" and thereby perfected its right to recapture return flows **as of 1915**, *when it began importing water*, even though it did not file its complaint in *San Fernando* alleging that right until 1955.

> All these deliveries of imported water have been inside plaintiff's city limits and all plaintiff's extractions and diversions from the basin have occurred within the city or in areas long since annexed to the city. Since the deliveries and withdrawals were thus 'within plaintiff's reservoir' [Glendale, supra, 23 Cal. 2d at p. 78), 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 plaintiff's manifestation of such an intent before commencing importation in 1915.* (*Stevens v. Oakdale Irr. Dist., supra*, 13 Cal.2d 343).

(*San Fernando*, *supra*, 14 Cal.3d at. 259-260; italics added.)

In the case at bar, however, AVEK does not claim the right to return flows resulting from its water deliveries *prior to January, 2006* (when it filed its cross-complaint in this action, and clearly asserted therein its right and intention to use return flows). Therefore, the language in *San Fernando* regarding the elements necessary to establish existence of the required intent **before filing a pleading which expresses that intention and claims that right,** has no application to AVEK.

B. Shortly after filing its cross-complaint in this action, AVEK purchased real property which it then used to bank water by spreading and, also, to pump groundwater.

AVEK's January, 2006, cross-complaint, by itself, was adequate to manifest the required "intent" *at that time*. One year later, AVEK also purchased real property in the area of the adjudication which contained water wells capable of pumping groundwater; and, after acquiring that property, AVEK banked imported water thereon by spreading, and also pumped groundwater (see Undisputed Fact No. 47; the Court's Amended Statement of Partial Decision for Phase IV Trial With Party Name Corrections [Exhibit 1 hereto], noting AVEK's groundwater pumping in 2011 and 2012; the verified Supplemental Declaration of Thomas Barnes, which details AVEK's groundwater pumping for certain earlier years [Exhibit 2 hereto]; AVEK's verified Responses to the Court's Discovery Order for Phase 4 Trial, paragraph 1 and its subparts, with only certain of the exhibits attached thereto, depicting the locations of AVEK's water wells, etc. [Exhibit 3 hereto]; verified Declaration of Hong He Qiu in Lieu of Deposition Testimony for Phase 4 Trial, detailing the water use on AVEK owned properties [Exhibit 4 hereto]; and, verified Declaration of Michael Flood in Lieu of Deposition Testimony for Phase 4 Trial [Exhibit 5 hereto], providing information about the dates of AVEK's property acquisitions -- all of these exhibits were previously posted on the Court's website).[5]

The PWS also attempt to make much ado about AVEK's June 19, 2007, Ordinance O-07-2, which states: "WHEREAS, AVEK does not own or operate any facilities that can produce reclaimed water or native groundwater." This Ordinance, however, **pre-dates** AVEK's July 17, 2007, and January 31, 2008, acquisitions of the aforesaid real properties which contain numerous water wells, and AVEK's later banking, spreading and groundwater pumping operations thereon. (See verified Declaration of Michael Flood in Lieu of Deposition Testimony for Phase 4 Trial [Exhibit 5 hereto], providing information about the dates of AVEK's property acquisitions -- this exhibit was previously posted on the Court's website).

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5 The PWS also claim that, "AVEK has not demonstrated that it has pumped groundwater from the Basin," notwithstanding the fact that, in the Phase IV trial, the PWS stipulated to AVEK's pumping of groundwater. AVEK hereby requests that the Court take judicial notice of the Court's findings during the Phase IV trial regarding AVEK's groundwater pumping.

Accordingly, the PWS' reference to AVEK's earlier Ordinance, which pre-dates AVEK's acquisition of properties which contain water wells (and upon which AVEK has spread SWP water and pumped groundwater), is much ado about nothing of consequence.

Therefore, in January, 2006, AVEK filed its cross-complaint in this action, expressly asserting its right to use the return flows from its imported water, and in the next two years acquired parcels of real property which it subsequently used to bank imported water by spreading and to pump groundwater. It cannot be disputed that the combination of these actions, commencing in January, 2006, adequately manifest AVEK's "intent" to recapture or otherwise use the return flows from its imported water.

C. Even if, *en arguendo*, AVEK is deemed to have abandoned its right to return flows *as to the water deliveries made prior to January 1, 2006*, that does not preclude AVEK from asserting and reclaiming its right to return flows from water deliveries made after that date.

Even if AVEK is deemed to have abandoned the right to return flows as to water delivered prior to 2006, that abandonment does not preclude it from reasserting its rights in 2006 -- which it did.

> Waters brought in from a different watershed and reduced to possession are private property during the period of possession. When possession of the actual water, or *corpus*, has been relinquished, or lost by discharge *without intent to recapture*, property in it ceases. *This is not the abandonment of a water right, but merely an abandonment of specific portions of water*, i.e., the very particles which are discharged or have escaped from control. . . . *As to this specific flow*, discharged without intent to recapture, the abandonment has been complete . . . But this past abandonment . . . of certain water, as distinguished from a water right, has not conferred . . . any right to compel a like abandonment in the future . . .

(*Stevens v. Oakdale Irr. Dist.* 13 Cal.2d 343, 350, italics added.)

Therefore, even if AVEK is deemed to have abandoned it right to return flows *resulting from the water deliveries made prior to January 1, 2006*, that does not preclude it from asserting and reclaiming its right to return flows from water deliveries made after that date.

Moreover, because of the extensive over pumping which occurred in the 31 years between 1974 and 2005, it is unlikely that any return flows remain in the groundwater from imported water deliveries made during that earlier time period.

For the foregoing reasons, AVEK has adequately manifested its intent and, therefore, is entitled to recapture or otherwise use the return flows resulting from its delivery of SWP water in January, 2006, and thereafter.

9. The PWS' argument that DWR's claim to return flows is a valid as AVEK's claim also is without merit.

The PWS do not dispute that AVEK is an "importer" of SWP water; to the contrary, the PWS claim "there are numerous 'importers' of SWP water," including DWR and AVEK (Opp., 15:28-16:10). However, the PWS make the wholly unsupported argument that DWR has an equally valid claim to return flows. This flies in the face of the following undisputed principles and facts: (1) all briefing parties agree that an "intent" to recapture or use return flows is required to establish a right thereto; and (2) there is absolutely no evidence (and none has been proffered by the PWS) that DWR (I) ever formed or manifested an "intent" to recapture return flows, (ii) ever spread water in the Basin, or (iii) ever had wells or any other means of recapturing return flows in the Basin.

Therefore, there is an absolute dearth of evidence to support PWS' argument that DWR has an equally valid claim to return flows. The PWS' argument borders on the absurd.

10. The PWS' "indispensable parties" argument also is without merit.

The PWS also argue that AVEK's motion should be denied because AVEK has not joined indispensable parties. This argument also is without merit.

First, AVEK's motion, in pertinent part, seeks judgment on the Sixth Cause of Action *of the PWS' own cross-complaint* which claims that the PWS have the exclusive right to use the return flows from the SWP water they purchase from AVEK. The alleged absence of indispensable parties is manifestly no bar to granting AVEK's motion as to the PWS' Sixth Cause of Action.

As to the Fourth Cause of Action of AVEK's cross-complaint, which alleges that AVEK is entitled to recapture and use the return flows resulting from the SWP water it imports into the area of adjudication and then sells to its customers, the PWS' argument also is without merit.

> The objection is also made that the court erred in allocating water without the joinder of a number of private users who pumped comparatively small amounts. . . . No request was made by appellant for the inclusion of any party who had not been joined, and there is no showing that its interest was injuriously affected by the failure to require the joinder of all possible claimants. [Citation omitted.] The line must be drawn somewhere in order to bring the proceeding within practical bounds, and it would have been impossible to reach a solution of the problems involved and to rend a valid judgment if jurisdiction to make an allocation depended upon the joinder of every person having some actual or potential right to the water in the basin and its sources of supply. The persons not made parties are, of course, not bound by the judgment, nor are they injured by the injunction.

(*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 919-920).

Therefore, the PWS' complaint about non joinder of certain parties is without merit. It clearly has no application, and is no bar, to that part of the motion which seeks judgment on the PWS' Sixth Cause of Action.

11. The PWS' responses to AVEK's Separate Statement of Undisputed Facts fail to demonstrate that any of the facts stated therein are actually "disputed."

The PWS purport to "dispute" virtually all of the facts set forth in AVEK's Separate Statement of Undisputed Facts. However, the PWS' responses do not proffer **any countervailing evidence**. In most instances, the PWS's responses merely argue that the referenced facts are irrelevant or the supporting evidence is insufficient. There is absolutely no showing, however, that any of the facts stated are actually disputed on the basis of admissible countervailing evidence -- and none is offered by the PWS.

Indeed, by purporting to dispute virtually all of the facts stated (many of which are self evident or universally accepted), the PWS' responses bespeak bad faith.

12. Conclusion

AVEK has submitted evidence sufficient to establish each of the undisputed facts in its Amended Statement of Undisputed Facts and, further, that no triable issue of material fact exists with respect to the causes of action which are the subject of this motion. Based on that showing,

the burden shifts to the PWS and any other opposing parties to demonstrate, by competent evidence, the existence of a triable issue of material fact.

The PWS, however, have not demonstrated the existence of a triable issue of material fact. Accordingly, AVEK is entitled to summary adjudication in its favor as to: (1) AVEK's Fourth Cause of Action, which alleges that AVEK is entitled to recapture and use the return flows resulting from the SWP water it imports into the area of adjudication and then sells to its customers; and (2) the PWS' Sixth Cause of Action, wherein the PWS claim the exclusive right to use the return flows from the SWP water they purchase from AVEK.

Dated: January 3, 2014

BRUNICK, McELHANEY & KENNEDY

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

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}

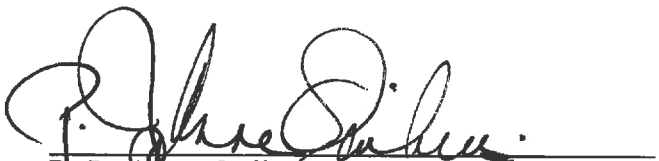
I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California.

On January 3, 2014, I served the foregoing document(s) described as: **REPLY BRIEF IN SUPPORT OF ANTELOPE VALLEY-EAST KERN WATER AGENCY'S MOTION FOR SUMMARY ADJUDICATION** on the interested parties in this action served in the following manner:

__XX__ **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 January 3, 2014, at San Bernardino, California.



P. Jo Anne Quihuis