William J. Brunick, Esq. [SB No. 46289]
Leland P. McElhaney, Esq. [SB No. 39257]
BRUNICK, McELHANEY& KENNEDY PLC
1839 Commercenter West
San Bernardino, California 92408-3303

MAILING:
P.O. Box 13130
San Bernardino, California 92423-3130

Telephone: (909) 889-8301
Facsimile: (909) 388-1889
E-Mail: bbrunick@bmblawoffice.com

Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN WATER AGENCY

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

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S AMENDED TRIAL BRIEF FOR PHASE 5 TRIAL RE RETURN FLOW OWNERSHIP AND PERCENTAGES

Date: February 18, 2014 (Phase 5)
Time: 9:00 a.m.
Dept.: To be determined

Judge: Hon. Jack Komar

The Antelope Valley - East Kern Water Agency (AVEK) submits this amended brief for the Phase 5 trial on the issues of imported water return flow ownership and percentages.

I. INTRODUCTION

The California Supreme Court has repeatedly stated that the person who "brings" or "delivers" foreign water into a watershed has the right to the return flows resulting from such imported water. Nonetheless, in denying AVEK's motion for summary adjudication, this Court in pertinent part stated:

> The return flows result from *use* of imported water; not just from importation. . . . water *users* who have imported the water into the basin and who have augmented the water in the acquifer *through use* are entitled [to] rights to the amount of water augmenting the acquifer. If on the trial of this matter AVEK can establish some quantity of water augments the aquifer *because of its use*, beyond what it may sell to other water producers/providers, it may establish such rights.

(Italics added.)

Responding to the aforesaid statement, i.e., that to establish a right to return flows an importer must itself make some "use" of the water such that the aquifer is augmented *because of its use,"* AVEK makes the following points:

- The PWS have no greater claim to return flows based on their "use" of imported water. This is so, because the PWS make significantly *less* use of the State water they receive from AVEK, and their use thereof does not augment the aquifer.
- Additionally, the Court's foregoing analysis flies in the face of the Supreme Court's decision in *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68 (*Glendale*), and its progeny. In *Glendale*, Los Angeles spread in gravel pits and spreading ponds some of the water it imported from the Owens River Valley, and "The remainder of the water was sold to the farmers of the San Fernando Valley . . ." (Ibid., at 76.) Therefore, except for its spreading operations, *Los Angeles made no other "use" of the imported water beyond selling and delivering the imported water to its farmer customers*. Nonetheless, Los Angeles was given all rights to the resulting return flows.

Citing the decision in *Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 264 (*Oakdale Irr. District*), the Court in *Glendale* also noted that, "It is immaterial whether the farmers who use the imported water acquire their rights through a transfer of land that include a water right . . . or by some other means. . . . In any event ***the importer brings*** *the water to the land of the farmer, and* ***the farmer uses it.***" (Id., at 78; emphasis added.) Therefore, in *Glendale* the "use" which caused the basin to be augmented was manifestly the farmer's use. Nonetheless, the Court made it quite clear that,

> *The use by others* of this water as it flowed to the subterranean basin 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* (Id., at 77; emphasis added).

Based on the foregoing analysis, the Court in *Glendale* ruled that the importer is entitled to the resulting return flows, notwithstanding the undeniable fact that the farmers' subsequent "use" of the imported water was the direct cause of the return flows, not the importer's "use" of the water. Following this same logic, it makes no difference how many persons "use" the imported water before it reaches the groundwater as return flow.

This same principle was reaffirmed in *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199, 257 (*San Fernando*):

> 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,* at 260; emphasis added.)

> *. . . an alteration 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.*

(14 Cal.3d 199, 258-259; italics added.)

This principle was again reaffirmed in *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266 (*Santa Maria*), wherein that Court stated,

> . . . one *who **brings** water into a watershed* may retain a prior right to it even after it is used. [citing *Glendale*]. 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.' [citing *San Fernando*]

(Id., at 301; emphasis added.)

These controlling decisions consistently hold that to retain the right to return flows an importer need satisfy only two requirements: (1) "bring" or "deliver" foreign water into a watershed; and (2) do so, with the intention of later recapturing or controlling the resulting return flows. Nothing more is required *of the importer*! These decisions do not state that an importer retains return flow rights only if, in addition to bringing foreign water into a watershed, it also makes some other *use* of the water which augments the groundwater *because of its use*. In short, the controlling decisions do not impose a requirement that the importer itself make some "use" of the foreign water which augments the basin groundwater *because of its use*.

Further, in response to the Court's inquiry, AVEK does "use" the imported State water in ways that augment the basin, to wit:

- Like the City of Los Angeles in *Glendale*, some imported State water is spread and banked by AVEK;
- In its treatment facilities, AVEK also converts raw aqueduct water into potable water, suitable for human consumption (which is significantly *more* than Los Angeles did in *Glendale*, with respect to the untreated water it provided to its farmer customers);
- AVEK then delivers treated water directly into the water systems of the PWS and Edwards AFB;
- Through its discounted water rates, AVEK also uses the imported State water for the replacement or offset of groundwater pumping (thereby reducing over drafting of the basin); and

- AVEK has also used imported State water for agricultural operations conducted on properties owned by AVEK.[1]

Thus, AVEK's multiple "uses" of imported water result in the basin being recharged either through AVEK's own use of the imported water on properties it owns, or through use thereof by others after AVEK has processed, treated and delivered the water so that it can be consumptively used. **In stark contrast thereto, the Public Water Suppliers are "middlemen" only, who merely transport to their customers the State water AVEK imports, treats and delivers directly into the PWS's water distribution systems.**

Based on these undisputed facts, AVEK must be deemed to be "the importer" of the SWP water it "brings" and "delivers" to its customers. As such, AVEK is entitled to the ensuing return flows.

II. FURTHER ARGUMENT

1. The Public Water Suppliers' "contract" claims.

The PWS argue they are entitled to return flows because AVEK "sold" SWP water without a reservation of rights to return flows, and the indemnification provisions in the contract recognize the PWS' return flow rights. 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;" doing so, the PWS overlook basic 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

---

1 Since 2006, AVEK also has consistently indicated that, in the event of drought, it would pump the resulting return flows to meet its customers' critical needs; otherwise, AVEK's preference is to maintain the return flows in the groundwater to reduce the over draft and help heal the basin.

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; italics added.)

Therefore, AVEK's "sale" of SWP water does not invest the PWS with "title" to the water, but only the usufructuary right to use the water while it remains in the PWS' possession.

B. The importer's right to return flows is not dependent upon the existence of a reservation of rights in its contracts with its customers.

Glendale conclusively demonstrates that the importer's right to return flows is not dependent upon the existence of a reservation of rights in its contracts with its customers. Therein, the Supreme Court explained: "*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*" (*Glendale, supra,* 23 Cal.2d 68, 78). This demonstrates that, to preserve its right to return flows, the importer need not change the form of its contracts from a "sale" of the water to a transfer of the right to its use, **nor expressly reserve therein its right to the resulting return flows.**

The actual holding in *Glendale* provides further confirmation of this same point, i.e., the importer, Los Angeles, was awarded the right to all return flows from the water it imported and delivered to its farmer customers, **notwithstanding the absence of any evidence that Los Angeles' agreements with its farmer customers contained a reservation of rights to return flows.** Clearly, the *Glendale* decision did not turn, or depend upon, the presence of a reservation of rights to return flows in Los Angeles' agreements with its farmer customers.

Thus, the PWS' claim that AVEK conveyed or somehow lost its right to return flows simply because AVEK's contracts with its customers do not expressly reserve the right to return flows, is entirely without merit.[2]

---

2 By its enabling Act, Water Code Appendix 98-49 et seq., AVEK is mandated to distribute and apportion the State water it imports on an equitable basis, *based on taxes collected.* AVEK's Board of Directors must assure to each area within the Agency's service area its fair share of the imported water, and may contract and take all acts necessary to exercise the Agency's powers to accomplish this equitable apportionment. (Appendix 98-61, subdivisions 13, 14, and 15, and 98-61.1 [Equitable distribution and apportionment of water; determination of fair share].)

C. Moreover, the right to return flows is a distinct and separate property right, and any conveyance or transfer thereof must satisfy the requirements of the Statute of Frauds.

> "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."

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

This distinct and specific property right may be conveyed to others (*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"); provided the requirements of the Statute of Frauds are satisfied, i.e., the instrument must identify the specific property right being conveyed or transferred, and clearly indicate an intention to convey that specific property right (Civ. Code § 1624(a)(1) and (3); *Alameda Belt Line v. City of Alameda* (2003), 113 Cal.App.4th 15, 20-210; *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"]).[3]

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 AVEK's contracts convey or transfer an interest in return flows. They do not!

For the foregoing reasons, it is clear that: (1) AVEK's contracts with its customers do not purport to convey, much less effectively convey, any right to return flows; and (2) the absence

---

3 A transfer of a right in waters 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.)

in AVEK's contracts with its customers of a reservation of rights to return flows is of absolutely no consequence.[4]

2. The PWS' claim that AVEK has no groundwater rights.

AVEK owns nearly 3,000 acres of land within the area of adjudication, upon which numerous water wells are located. By that fact alone and its status as an overlyer, AVEK owns groundwater rights.

Moreover, the Water Supply Contract between the State of California (Department of Water Resources) and AVEK conveys rights in SWP water to AVEK. 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, it 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.)

3. The PWS claim that their status as "wholesale" purchasers gives them the right to return flows also is unsupported and 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,* as noted above, the Supreme Court ruled unequivocally that the importer retains the right to return flows, rather than its retail customers (in that case, agricultural purchasers). Therein, the Court noted that imported water was "sold to the farmers of the San Fernando Valley, . . . which settle after use beneath

---

4 In a giant leap of logic, the PWS also claim that their 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. The indemnification provisions, however, merely relieve AVEK from "liability" for damages resulting from the PWS's "use" of the water while it is in their possession; the indemnification provisions manifestly do not recognize any right in the PWS to return flows.

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, however, 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. Therefore, it matters not whether the purchaser is a retail purchaser or a wholesale purchaser; in either case, the importer retains the right to the resulting return flows.[5]

There is absolutely nothing in the reported case 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, as the importer, Los Angeles retained the right to all return flows.

4. The *San Fernando* Decision.

In *San Fernando*, the Court also noted that, "The only governmental parties before us are the plaintiff city [Los Angeles], three defendant cities, and the Crescenta Valley County Water District . . . (14 Cal.3d at 272, fn 71), and further that, "The Los Angeles County Flood Control District has engaged in such spreading since 1932 [citation omitted] but has made no claim to the water so spread and was dismissed from the present action" (14 Cal.3d at264, fn 60). Accordingly, it is clear that several parties with potential groundwater or return flow claims were

---

5 In *San Fernando*, 14 Cal.3d at 269, fn 64, the Court "rejected" appellants' argument that, "the *Glendale* judgment entitled plaintiff to the return flow from its imported water delivered to farmers for irrigation but not from such water delivered to urban customers."

not parties to the action in *San Fernando* (including the Metropolitan Water District of Southern California [MWD]), and most importantly, *their rights were not litigated in the action.*

Therefore, while the principles of law stated in *San Fernando* are absolutely sound, the holding in that decision has precedential value only with respect to the rights actually litigated in that action. Accordingly, care must be taken not to conclude from the holding in *San Fernarndo* that MWD (or any other importer similarly situated) does not have a valid claim to return flows from water it imports into a watershed. (See *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 920 ["persons not made parties are, of course, not bound by the judgment."]).

5. The *Santa Maria* Decision.

The PWS misinterpret *Santa Maria*, arguing that it holds that "*retail purchasers* of SWP water are entitled to return flows" and "*retail purchasers* . . . are the 'importers' of SWP water." In truth, as noted in an exhibit which was expressly incorporated into, and made a part of, the Judgment entered in *Santa Maria*, of the parties awarded return flow rights, " each hold contracts to receive water from the State Water Project ('SWP Entitlement,' . . .);" therefore, each had the same rights as, and acted as if it were an SWP contractor -- *not merely a "retail purchaser"* (see Judgment After Trial, Exhibit F to Exhibit 1 therein [AVEK's Trial Exhibit 9]).[6]

Moreover, as noted above, the decisions in *Stevens v. Oakdale Irr. District*, *Glendale*, *San Fernando* and *Santa Maria* all squarely hold that the right to return flows belongs to the importer who "brings" or "delivers" foreign water into a watershed, 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." Nothing could be further from the truth!

---

6 Pages 11 and 12 of Exhibit F to Exhibit 1 of the Judgment After Trial in *City of Santa Maria* [AVEK's Exhibit 9] 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)."

As previously noted, the City actually owned its own SWP amount/entitlement, thereby placing the City in the same shoes as any other State Water Contractor, enabling the City to place its own orders for SWP water, which it did. In the case at bar, however, the PWS do not own an SWP amount or entitlement, and are not able to place orders directly with DWR for SWP water; instead, the PWS are merely customers of AVEK and purchasers of AVEK's imported water.

Indeed, the PWS are "middlemen" only, merely delivering the potable State water which AVEK imports, treats and delivers directly into the PWS' systems, for delivery to their customers. 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.

As if that were not enough, the PWS also ignore the fact that the result in *Santa Maria*, including allocation of return flow rights, was based upon the parties' "stipulation":

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

(*Santa Maria*, 211 Cal.App.4th 266, 276; bold print added.)

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* fully supports AVEK, to wit: the persons awarded return flow rights in *Santa Maria* were those who *owned* SWP entitlements and had the rights of SWP contractors – just like AVEK.

6. 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** filing a pleading, has no application to AVEK.

In *San Fernando*, Los Angeles claimed, and the Supreme Court found, that Los Angeles had 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 claimed 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, 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.

Although its January, 2006, cross-complaint, by itself, was adequate *at that time* to manifest the required "intent," 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 has banked imported water thereon by spreading, and also pumped groundwater (see Court's findings in the Phase IV trial regarding AVEK groundwater pumping).[7]

---

7 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

Therefore, in January, 2006, AVEK filed its cross-complaint in this action, expressly asserting therein its right to use or control the use of return flows from its imported water, and the next year acquired 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 adequately manifested AVEK's "intent" to recapture or otherwise control the use of return flows from its imported water, as of January, 2006.

C. Even if, *en arguendo*, AVEK is deemed to have abandoned it right to return flows *as to 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.

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, underscoring added.)

Therefore, even if AVEK is deemed to have abandoned it right to return flows *as to its 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 by it after that date.

---

findings during the Phase IV trial regarding AVEK's groundwater pumping.

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

7. 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. However, the PWS make the wholly unsupported claim that DWR's claim to return flows is a valid as AVEK's claim thereto. 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's postulated claim to return flows is as valid as AVEK's claimed right thereto.

III. CONCLUSION

For the foregoing reasons, AVEK respectfully submits that it has the right to recapture or otherwise control the use of the return flows from the State water it imports and causes to be delivered into the basin.[8]

BRUNICK, McELHANEY & KENNEDY

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

---

8 AVEK also will present evidence at trial as to the actual amount or percentage of return flows from imported water.

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 February 17, 2014, I served the foregoing document(s) described as: **ANTELOPE VALLEY-EAST KERN WATER AGENCY'S AMENDED TRIAL BRIEF FOR PHASE 5 TRIAL RE RETURN FLOW OWNERSHIP AND PERCENTAGES** 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 February 17, 2014, at San Bernardino, California.

P. Jo Anne Quihuis