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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**
12

13 Coordination Proceeding
Special Title (Rule 1550(b))

Judicial Council Coordination Proceeding
No. 4408

14 **ANTELOPE VALLEY**
15 **GROUNDWATER CASES**

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

16 **Included Actions:**

**ANTELOPE VALLEY-EAST KERN
WATER AGENCY'S SUPPLEMENTAL
TRIAL BRIEF FOR PHASE V TRIAL
RE RETURN FLOW OWNERSHIP**

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

Date: March 10, 2014 (Phase V)
Time: 9:00 a.m.
Dept.: To be determined (San Jose)

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

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

1 On February 17, 2014, AVEK posted its amended trial brief. Thereafter, on February 18,
2 2014, the law firm of Smiland Chester LLP filed LANDOWNERS' BRIEF IN RESPONSE TO
3 PHASE FIVE TRIAL BRIEFS OF AVEK AND PUBLIC WATER SUPPLIERS, and on
4 February 24, 2014, filed LANDOWNERS' BRIEF IN RESPONSE TO AVEK'S AMENDED
5 PHASE FIVE TRIAL BRIEF. This supplemental brief by AVEK responds the Landowners'
6 February 18, 2014 and February 24, 2014 postings.

7 1. The Landowners' brief posted on February 18, 2014

8 In sum and substance, the Landowners argue that DWR is the SWP water "importer"
9 because: DWR is "the first link;" AVEK is only "the second link;" the PWS are merely
10 middlemen "between AVEK and their customers;" and the PWS's customers "are the fourth link
11 in the chain of distribution." The Landowner's then make several unwarranted leaps of logic,
12 arguing that: neither AVEK nor any Supplier is an importer of SWP water; the end users do not,
13 and cannot make any claim for the resulting return flows; and, "the augmented groundwater
14 supply may be reclaimed by overlying right holders, including the Landowners."¹

15 The Landowners' argument is flawed. Even assuming, *en arguendo* only, that DWR is
16 "the first link" in the distribution/importation chain, the lesson to be learned from *City of Los*
17 *Angeles v. City of San Fernando*, 14 Cal.3d 199 (1975) is that where, as here, the person who
18 is the "first link" does not assert a claim to return flows and its rights are not litigated, the rights
19 to return flows will be awarded to the next party in the importation chain, provided that party
20 has manifested the required intention to recapture or use the resulting return flows.

21 Based on the Landowner's analysis, in *San Fernando*, the Metropolitan Water District
22 of Southern California was the "first link" in the distribution/importation chain of imported
23 Colorado River water, and the "second link" in the distribution/importation chain of the SWP
24 water Metropolitan also brought into the basin (14 Cal.3d 199, 253). Nonetheless, because
25

26 ¹ Regarding the PWS, the Landowners point out that, "As to the augmented groundwater supply,
27 the [PWS] have no greater claim to reclaim the water as those who use it. Indeed, their claim is not as
28 strong, as they neither develop, nor import, nor use water, and own no interest in the appropriative
right" (2/18/14 Br., 6:12-14).

1 neither Metropolitan nor DWR joined the lawsuit or otherwise asserted claims to return flows
2 (and their rights were not litigated therein), *San Fernando* awarded the return flows to the next
3 parties in the distribution/importation chain who did claim and manifest an intent to recapture
4 the return flows (i.e., Burbank, Glendale and San Fernando). Therefore, even under the
5 Landowners’ analysis of the parties’ relative positions in the distribution/importation chain, the
6 result in *San Fernando* actually supports AVEK’s return flow claim.²

7 Of *City of Santa Maria v. Adam*, 211 Cal.App.4th 266 (2012), the Landowners likewise
8 note that: “DWR was not a party to that case, and its role was not adjudicated;” and, “there, as
9 here, the water that augmented the groundwater was SWP water.” Notwithstanding those
10 obvious similarities to the case at bar, the Landowners disapprove of the result in *Santa Maria*,
11 arguing that, “Because *Santa Maria* did not adjudicate the role and function of DWR and the
12 water uses [sic, users], it should not control here.” (Brf., 8:19-20). This argument also is flawed
13 because: (1) in the pending action, as in *Santa Maria*, DWR’s postulated claim to return flows
14 (if it ever had an intent to recapture or otherwise use the resulting return flows) will not be
15 adjudicated; and (2) in *Santa Maria*, the rights of landowners and other end users were, in fact,
16 fully litigated – the landowners just didn’t like the result.³

17 In truth, the result in *Santa Maria* is quite apposite to the case at bar. This is so, because
18 the parties who were awarded return flow rights also were “second links” in the
19 distribution/importation of SWP water, and each of them also owned their own SWP
20 “entitlement” – just like AVEK in the case at bar.

21 Accordingly, nothing in the Landowners’ February 18, 2014 brief militates against
22 AVEK’s return flow rights.

24 ² Moreover, in both *San Fernando* and the case at bar, the purported first “links” (Metropolitan
25 and DWR) delivered into the areas of adjudication only untreated water, while the purported “second
26 links” (Burbank, Glendale and San Fernando in *San Fernando*, and AVEK in the case at bar) treated
the water and made it suitable for human consumption.

27 ³ The Landowners also disagree *Santa Maria*, arguing that it erroneously holds that “water
28 does not revert to the status of unappropriated water if it is imported” (Brf., p. 5, fn 3).

1 2. The Landowners' February 24, 2014 brief.

2 The Landowners repeat here their disagreement with *Santa Maria*, which they claim
3 erroneously holds that “water does not revert to the status of unappropriated water if it is
4 imported” (2/18 Brf., p. 5, fn 3). Simply put, the Landowners reject the now well established
5 body of law articulated in *Stevens v. Oakdale Irr. Dist.* (13 Cal.2d 343), *Glendale, San Fernando*
6 and *Santa Maria* that an importer retains the right to return flows, notwithstanding the
7 subsequent use of imported water by other persons before it percolates through the soil and joins
8 the groundwater (see *San Fernando* [14 Cal.3d at 257 , “[t]he use by others of this water as it
9 flowed to the subterranean basin does not cut of plaintiff’s rights,” and 14 Cal.3d at 259, “an
10 alteration in the type of use from which imported water is returned to the ground does not impair
11 the importer’s claim to it as return water;” see, also, *Santa Maria*, 211 Cal.App.4th at 301, “one
12 who brings water into a watershed may retain a prior right to it even after it is used”]).

13 By necessary implication, the Landowners also reject the very clear holding in *Glendale*
14 that the importer retains the right to return flows, notwithstanding the indisputable fact that the
15 return flows resulted from “use” of the foreign water by the importer’s farmer *landowners*.

16 By making repeated references to Water Code sections 1202(d), 1241 and 7075, the
17 Landowners also attempt to buttress their claim that return flows from imported water should
18 be classified as “unappropriated” water. In making this argument, the Landowners ignore the
19 body of law which clearly indicates that return flow from imported water is not unappropriated
20 water. That this is so, is clearly indicated in the annotations to these same code sections in
21 West’s Annotated California Codes, as follows:

- 22 • 1202(d): “The statute defining unappropriated surface water does not apply to return
23 flows of imported water. *City of Santa Maria v. Adam* (App. 6 Dist. 2012) 211 C.A.4th
24 266, modified on denial of rehearing, review denied.”
25 (68 West’s Annotated California Codes (2014 Cumulative Pocket Part), Water, page 2, note 2.)
26 • 1241: “The statute providing that unused water shall revert to the public when party
27 entitled to use fails beneficially to use all of it for period of three years refers only to
28 water appropriated under a license of permit and does not apply to water in underground

1 basin which is not embraced by licensing system and which does not flow in known
2 definite channels. City of Pasadena v. City of Alhambra (1949) 33 Cal.2d 908 . . .”

3 (68 West’s Annotated California Codes, Water, page 110, note 5.)

4 • 7075: “Where City of Los Angeles brought water from distant watersheds . . . , the city
5 in spreading waters in valley with knowledge that water could in due time be recaptured
6 did not ‘abandon’ the water nor turn it free to be taken by others, and retained title to and
7 could recapture the spread waters. City of Los Angeles v. City of Glendale (1943) 142
8 P.2d 289, 23 C.2d 68.”

9 (68A West’s Annotated California Codes, Water, page 20, note 8.)


10 • 7075: “Importers of return flows to underground basin retained a right to the volume of
11 water made available through their efforts, separate from others’ usufructuary rights in
12 the basin’s native supply, even if importers’ pumping stations were not down-gradient
13 from the place where the water percolated into the basin. City of Santa Maria v. Adam
14 (App. 6 Dist. 2012) . . . 211 Cal.App.4th 266 . . .”

15 (68A West’s Annotated California Codes (2014 Cumulative Pocket Part), Water, page 4, note
16 3.)

17 For the reasons indicated above, neither of the Landowners’ recently posted trial briefs
18 militate, in any way, against AVEK’s right to use or otherwise control the return flows which
19 result from the SWP water it causes to be brought into the area of adjudication.

20 Respectfully submitted,

21 **BRUNICK, McELHANEY & KENNEDY**

22
23 By: 
24 WILLIAM J. BRUNICK
25 LELAND P. McELHANEY
26 Attorneys for Cross-Complainant,
27 ANTELOPE VALLEY-EAST KERN
28 WATER AGENCY

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA }
3 COUNTY OF SAN BERNARDINO }

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

7 On February 27, 2014, I served the foregoing document(s) described as: ANTELOPE
8 VALLEY-EAST KERN WATER AGENCY'S SUPPLEMENTAL TRIAL BRIEF FOR
9 PHASE V TRIAL RE RETURN FLOW OWNERSHIP in the following manner:

10 ■ **BY ELECTRONIC SERVICE AS FOLLOWS** by posting the document(s)
11 listed above to the Santa Clara website in the action of the *Antelope Valley Groundwater*
12 *Litigation*, Judicial Council Coordination Proceeding No. 4408, Santa Clara Case No.
13 1-05-CV-049053.

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

16 Executed on February 27, 2014, at San Bernardino, California.

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18 P. Jo Anne Quihuis

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