

1 Robert G. Kuhs, SBN 160291
Bernard C. Barmann, Jr., SBN 149890
2 Kuhs & Parker
3 P. O. Box 2205
1200 Truxtun Avenue, Suite 200
4 Bakersfield, CA 93303
Telephone: (661) 322-4004
5 Facsimile: (661) 322-2906
E-Mail: rgkuhs@kuhsparserlaw.com
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7 Attorneys for Tejon Ranchcorp
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

12 ANTELOPE VALLEY GROUNDWATER
13 CASES

14 Included Actions:

15 Los Angeles County Waterworks District No. 40
v. Diamond Farming Co., Superior Court of
16 California, County of Los Angeles, Case No. BC
325201;

17 Los Angeles County Waterworks District No. 40
18 v. Diamond Farming Co., Superior Court of
California, County of Kern, Case No. S-1500-CV-
19 254-348;

20 Wm. Bolthouse Farms, Inc. v. City of Lancaster,
21 Diamond Farming Co. v. Lancaster, Diamond
Farming Co. v. Palmdale Water Dist., Superior
22 Court of California, County of Riverside, Case
23 No. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination No. 4408

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

**BRIEF OF TEJON RANCHCORP ON
MOTIONS IN LIMINE RE RIGHT
TO RETURN FLOWS**

Hearing Date: May 13, 2013

Time: TBD

Dept: TBD

Judge: Hon. Jack Komar

Phase 4 Trial Date: May 28, 2013

24 **I. INTRODUCTION**
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26 The Court should deny all motions in limine regarding the right to return flows because,
27 as discussed in part III below, the right to recapture and use return flows from imported water is
28 a fact intensive inquiry that cannot be resolved by motion in limine.

KUHS & PARKER
ATTORNEYS AT LAW
P. O. BOX 2205
BAKERSFIELD, CALIFORNIA 93303
(661) 322-4004 • FAX (661) 322-2906

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On March 28, 2013, ANTELOPE VALLEY EAST-KERN WATER AGENCY (AVEK) filed a motion in limine claiming a right to recapture return flows from imported water purchased from the State of California Department of Water Resources (DWR) and sold to AVEK customers within the Antelope Valley Area of Adjudication (AVAA). QUARTZ HILL WATER DISTRICT (Quartz Hill WD) and ROSAMOND COMMUNITY SERVICES DISTRICT (Rosamond CSD) also filed motions in limine claiming a right to the return flows from imported water that they purchased from AVEK. Thereafter, on April 19, 2013, Quartz Hill WD and LOS ANGELES COUNTY WATER DISTRICT NO. 40 (WD 40) filed opposition to AVEK's motion asserting that ownership of return flows cannot be resolved by motion in limine, but also claiming a right to return flows from AVEK water. AVEK filed opposition to the motions of Quartz Hill WD and Rosamond CSD.

TEJON RANCHCORP (Tejon), like WD 40 and others, purchases water from AVEK and also imports and banks additional supplies in the AVAA. Tejon claim the right to recapture and use return flows from imported water.

II. STATEMENT OF FACTS

The principal source of imported water supply in the AVAA is SWP water delivered into the AVAA via the East Branch of the California Aqueduct. Twenty-nine agencies and districts currently have long term contracts with DWR, so-called State Water Contractors. The DWR contracts provide for a total maximum delivery of 4,129,306 acre feet of Table A water annually. There are three such State Water Contractors operating within the AVAA, namely AVEK, Littlerock Creek ID and Palmdale WD. A flow chart showing the relationship of the these State Water Contractors is attached as **Exhibit A**.

AVEK has a long term contract with DWR for delivery of a maximum of 141,400 acre feet of Table A water annually. Palmdale WD and Littlerock Creek ID also have long term

1 contracts with DWR for delivery of 21,300 acre feet and 2,300 acre feet, respectively, of Table A
2 water. (DWR Bulletin 132-08 pp. 11-12.) Drought and environmental restriction have
3 substantially reduced the Table A water supplies actually available for delivery.

4 Contractual relationships for delivery of imported water are numerous and varied. As
5 shown in Exhibit A, Palmdale WD is principally a water retailer selling water to end users within
6 its service area.¹ AVEK is both a wholesaler and retailer of water. AVEK sells water to other
7 retailers within the AVAA such as Rosamond CSD, Quartz Hill WD, several mutual water
8 companies and WD 40. These retailers in turn sell water to end users within their respective
9 jurisdictional boundaries. AVEK sells water to the United States, agricultural customers such as
10 Tejon, Grimmway, Bolthouse and others. AVEK also sells water to M&I customers such as U.S.
11 Borax and Tejon.

12 In addition to being an AVEK customer, Tejon also imports and stores its own water for
13 its own uses. In 2002 Tejon submitted a development application to the Los Angeles County
14 Department of Regional Planning for a master plan community known as The Centennial
15 Project, that includes 22,998 housing units, commercial, business park, civic/institutional uses,
16 open space, parks and waste water reclamation facilities on 12,000 acres of land in the west end
17 of Antelope Valley. The application was deemed complete in 2008. In 2011 Golden Valley
18 Municipal Water District approved the water supply assessment (WSA) for the Centennial
19 Project. Base supplies for the WSA include water purchased from AVEK and banked in Tejon's
20 water bank, water acquired by Tejon and loaned to AVEK, SWP Table A supplies purchased
21 from Tulare Lake Basin Water Storage District and Dudley Water District, recycled water, and
22 of course groundwater. Tejon claims the right to recapture and use return flows from this
23 imported water.

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28 ¹ Palmdale WD sells water to the United States for operation of Plant 42.

1 The Semitropic-Rosamond Water Bank Authority, a JPA consisting of Semitropic Water
2 Storage District, Rosamond CSD and Valley Mutual Water Company, operates the Antelope
3 Valley Water Bank. Imported water from various sources is imported into the AVAA via the
4 East Branch of the California Aqueduct for spreading. Presumably, the importer or end user of
5 this imported water will claim a right to return flows once the water is recovered and delivered
6 for beneficial use.

8 III. DISCUSSION

9 A. RETURN FLOWS BELONG TO THE PARTY WHOSE "EXPENDITURES AND 10 ENDEAVORS" BRING INTO THE BASIN WATER THAT WOULD 11 OTHERWISE NOT BE THERE.

12 In *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, at p. 261, the
13 Supreme Court stated the principle that return flows from imported water belong to the party
14 whose "expenditure and endeavors" bring "into the basin water which otherwise would not be
15 there." The principle was recently recited in *City of Santa Maria v. Adam* (2012) 211
16 Cal.App.4th 266, 201 wherein the court stated: "one who brings water into a watershed may
17 retain a prior right to it even after it is used." The rationale for the rule is straightforward: The
18 party responsible for importing the water should be credited with the "fruits of his endeavors in
19 bringing into the basin water that otherwise would not be there."

20 Stating the rule, however, does not resolve the legal question. As WD 40 points out, a
21 party claiming return flows must show an "intent" to recapture. (PWS Opp., p. 8.) And, the right
22 to return flows may be lost by abandonment or transferred by contract. (PWS Opp. pp. 2, 12-
23 13.) Thus, the court must engage in a fact intensive inquiry to determine which of the many
24 parties in the stream of commerce of imported water should be credited with the right to
25 recapture and reuse return flows from that water based upon that party's expenditures and
26 endeavors in bringing the water into the basin. Then the court must address whether any party
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1 has lost all or a portion of the right by abandonment or contract.

2 These factual inquiries cannot be decided by pre-trial motion. Accordingly, the court
3 should deny the pending motions in limine regarding the right to recapture and use return flows
4 of imported water and decide the issue only after hearing the evidence.

5 **B. MANY OF THE POINTS RAISED BY THE PWS HAVE**
6 **NO BASIS IN LAW OR FACT.**

7 Many of PWS's arguments fall under their own weight. For example:

8 1. **The Retailer/Wholesaler Confusion.** The PWS argues that the right to return
9 flows belongs to the "retailer" of water, not the wholesaler. (PWS Opp. pp. 5-6.) None
10 of the authorities cited and relied by the PWS, however, makes a material distinction
11 between wholesaler and retailer. Instead, the courts have awarded return flows to the
12 party whose "expenditures and endeavors" brought water into the basin.

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14 2. **Passage of Title Argument:** The PWS argues that they own right to return flows
15 since title to the water and resulting return flows passes from AVEK to AVEK's
16 customers on sale of the water. Notably, the PWS do not cite any authority to support
17 this argument. If, as the PWS assert, the right to return flows passes with sale of the
18 water, then the right to return flows belongs not to the PWS, but their respective
19 customers, who are not presently before this court. Further, as this court is acutely aware,
20 in order to retain jurisdiction over the United States the litigation must satisfy the
21 McCarran Act and achieve a mutually binding adjudication of all rights to water in the
22 groundwater basin. (See e.g., *See Colorado River Water Conservation Dist. v. United*
23 *States*, 424 U.S. 800, 819 (1976); see also *Arizona v. San Carlos Apache Tribe of*
24 *Arizona*, 463 U.S. 545, 569 (1983).)

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27 3. **The PWS Cannot Show Intent to Recapture.** The PWS argue that return flows
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belong to the party who transported water into the valley with the specific intent to recapture the water. (PWS Opp., p.8.) There is compelling evidence that neither Quartz Hill, nor WD 40 had any intent to recapture return flows from imported water. Quartz Hill WD's general manager, Chad Reed, admitted in deposition that the district had never accounted for return flows in its water supply documents, on its balance sheets, in its water rate structure or reported such water as an asset to its auditors. In fact, neither Quartz Hill WD, nor WD 40 has produced any documents in response to the Phase 4 discovery order showing any intent to recapture return flows from imported water even though they have been purchasing AVEK water for decades. (See e.g., PWS Opp. p. 12.) The simple fact is that these PWS did not have any intent to claim return flows from imported water until after this proceeding was commenced. [Cf; *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 77-78 [plaintiff awarded return flows because it had formed intent to recapture Owens water before importation commenced].)

4. **The PWS Have Abandoned Any Claim to Return Flows.** The PWS acknowledge that even if a party is legally entitled to claim return flows, that right may be lost by abandonment. (PWS Opp., pp. 2-3, citing *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 77.). Here there is compelling evidence that WD 40 and other PWS have abandoned any claim to return flows. For example, WD 40 states in response to the Phase 4 Discovery Order that, even though it has been purchasing AVEK water for more than 40 years, it has never once in that 40 years recaptured so much as a bucket of return flow water. (See WD 40 Responses to Discovery Order, Request

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1 III.1(A); Palmdale WD Response to Discovery Order, Request III.1(A).² By any
2 measure, 40 years of non-use of return flows in an overdrafted basin constitutes
3 abandonment.

4 **III. CONCLUSION**

5 Based on the forgoing, Tejon requests that the motions in limine be denied.

6 Dated: May 3, 2013

KUHS & PARKER

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8 By 
9 Robert G. Kuhs, Attorneys for
10 Tejon Ranchcorp

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ATTORNEYS AT LAW
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² The PWS's claim to pump in excess of 30,000 acre feet of water annually from the aquifer, none of which is return flow from imported water. We doubt that the PWS's pumps can distinguish between native and imported water.

