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Landinv, Inc.; Bruce Burrows; 300 A 40 H, LLC;
Little Rock Sand and Gravel, Inc.;
10 The George and Charlene Lane Family Trust;
The Frank and Yvonne Lane 1993 Family Trust;
11 Monte Vista Building Sites, Inc., A.V. Materials, Inc.;
Holliday Rock Co., Inc.; Littlerock Aggregate Co., Inc.
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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES
16

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

Judicial Council Coordination No. 4408
[Assigned to Hon. Jack Komar; Dept 17]

18 ANTELOPE VALLEY GROUNDWATER)
19 CASES)

Santa Clara Case No.: 1-05-CV-049053

20 Included CONSOLIDATED Actions:)

21)
22) **LANDOWNERS' BRIEF IN RESPONSE**
23) **TO PHASE FIVE TRIAL BRIEFS OF**
24) **AVEK AND PUBLIC WATER**
25) **SUPPLIERS**

22 Los Angeles County Waterworks District No.)
40 vs. Diamond Farming Company)
23 Los Angeles Superior Court Case No.)
BC325201)

Trial Date: February 10, 2014
Time: 9:00 a.m.
Dept.: Old Dept. 1

25 Los Angeles County Waterworks District No.)
40 vs. Diamond Farming Company)
26 Kern County Superior Court Case No. S-1500-)
CV-254348 NFT)
27)
28)

1 Diamond Farming Company vs. City of)
2 Lancaster Riverside County Superior Court)
3 Lead Case No. RIC 344436 [Consolidated w/)
4 Case Nos. 344668 & 353840])
5 Willis v. Los Angeles County Waterworks)
6 District No. 40; Los Angeles Superior Court)
7 Case No. BC 364553)
8 Wood v. Los Angeles County Waterworks)
9 District No. 40; Los Angeles Superior Court)
10 Case No. BC 391869)
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1 **Introduction**

2 This brief responds to the phase five trial briefs filed January 31, 2014 by Antelope
3 Valley-East Kern Water Agency (“AVEK”) and various cities, water districts, and water
4 companies known collectively as the Public Water Suppliers (“Suppliers”). It is filed on behalf
5 of ten companies, trusts, and individuals (collectively, the “Landowners”) that are cross-
6 defendants in this proceeding.¹

7 The Landowners own, possess, or operate, in the aggregate, several thousand acres of
8 land in the Antelope Valley Groundwater Adjudication Area (“Basin”). Each pumps
9 groundwater from the aquifer underlying the Basin and owns overlying rights to use native
10 water. They use such water, as well as the augmented supply at issue here, for various purposes,
11 including irrigating crops, watering stock, and mining aggregate.

12 AVEK and each Supplier argues that it is an “importer” of the State Water Project
13 (“SWP”) surface water imported into the Basin and discharged into the aquifer. Point 1 below
14 argues that neither AVEK nor any Supplier is an importer (or developer or appropriator) of the
15 SWP water. Each is simply an intermediary or middleman operating solely within the Basin.
16 The importer of the water is the Department of Water Resources (“DWR”). DWR, and DWR
17 alone, brings such water to the Basin.

18 The Suppliers, but not AVEK, also contend that they are the “users” of the SWP surface
19 water. Point 2 argues that the initial users of the SWP water (and the equitable interest in the
20 appropriative right) include the households and businesses that buy it from one of the Suppliers
21

22 _____
23 ¹ The Landowners are listed on page 1 of this brief.

24 ² Some agricultural users, including two of the Landowners, also buy some water from AVEK.

25 ³ In *Santa Maria* the Court of Appeal discussed a second arguably relevant statute, Water Code Section 1202(d).
26 The landowners in *Santa Maria* relied on Section 1202(d), which defines unappropriated water as water which,
27 having been used, “flows back into a stream, lake, or other body of water.” The court read the statute narrowly. It
28 construed the term “other body of water” to include only surface water. *Santa Maria*, 211 Cal.App.4th at 301. But
the term also includes “subterranean streams flowing through known and definite channels.” Water Code § 1200.
The court also stated that, under the statute, water which flows “back into” a body of water does not include
imported water. 211 Cal.App.4th at 301. Here, the SWP water, when used by the Suppliers’ customers to irrigate,
flows into an aquifer that is not a surface stream but may be a subterranean stream. If it is, the aquifer is a body of
water and SWP water flows into it. Section 1202(d) describes flow into “a” body of water, not “the” body of water
from which it originated. But, according to *Santa Maria*, water does not revert to the status of unappropriated water
if it is imported. SWP water flows from the Feather River through the Sacramento River to the Sacramento-San
Joaquin Delta and, thereafter, to the Antelope Valley aquifer. The language of the statute is not limited to a flow

1 and use it for domestic or industrial purposes and apply it to the ground for landscape or crop
2 irrigation.

3 Point 3 below analyzes the pertinent statutes, including Water Code Section 7075. Under
4 that statute, holders of overlying rights to use the native groundwater may also reclaim the
5 augmented supply resulting from the percolation of imported irrigation water.

6 Point 4 analyzes *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68 (1943), *City of Los*
7 *Angeles v. City of San Fernando*, 14 Cal.3d 199 (1975), and *City of Santa Maria v. Adam*, 211
8 Cal.App.4th 266 (2012). *Glendale* and *San Fernando* both involved Los Angeles' importation of
9 northern and eastern California water into the San Fernando basin, spreading and selling such
10 water, storing and transporting it through the basin, and reclaiming it for municipal use. The
11 court held that Los Angeles had the right to reclaim the augmented supply that was prior to any
12 rights of the cities of Glendale and Burbank. *San Fernando* also related to Colorado River water
13 developed by the Bureau of Reclamation and transported by the Metropolitan Water District
14 through its own aqueduct. Here, by contrast, AVEK's facilities are wholly within the Basin.
15 *Santa Maria* involved SWP water developed by DWR and transported by it through the Central
16 Valley, over the Coast Range, and through the Santa Maria Valley. DWR was not a party to that
17 case, and its role was not adjudicated.

18 **1. NEITHER AVEK NOR ANY SUPPLIER IS AN IMPORTER**

19 The Suppliers describe themselves as the "importers" of SWP water in the Basin.
20 Suppliers Brief, pp. 2, 10, 12, 13. They also assert that they have "imported" and currently
21 "import" such water. *Id.* at pp. 8, 9, 12, 16. They do not allow that any other person or entity is
22 an importer of, or imports, such water. In particular, they state that AVEK "does not import"
23 SWP water to the Antelope Valley. *Id.* at p. 9. The findings to date and the evidence to be
24 adduced at the phase five trial will not support the Suppliers' claim to be the sole importers.

25 The SWP water reaches users in the Basin by way of a distribution chain containing five
26 links. DWR, the first link, built the SWP facilities, including the Oroville Dam on the Feather
27 River, the California Aqueduct in the San Joaquin Valley, and the East Branch Aqueduct through
28

1 the Antelope Valley, to divert and convey water from northern to southern California. DWR
2 holds legal title to the appropriative right to use the SWP water. *State Water Resources Control*
3 *Board Cases*, 136 Cal.App.4th 674, 805 (2006); *U.S. v. State Water Resources Control Board*,
4 183 Cal.App.3d 82, 106 (1986). For years, DWR has stored, diverted, and transported such
5 water to the Basin. It should be deemed to be the importer. But for its construction and
6 operation of such SWP facilities and exercise of such rights, there would be no importation of
7 SWP water into the Basin. DWR has sole management of the SWP water until after the water is
8 within the Basin, and it manages such water after it leaves the Basin.

9 The second link of the distribution chain is AVEK. It contracted to buy SWP surface
10 water from the DWR, and it receives such water within the Basin. It purifies the water in its in-
11 valley treatment facilities and conveys it to the Suppliers, its customers, in its in-valley
12 distribution system.

13 AVEK argues that it must be deemed “the importer,” as it “brings” and “delivers” the
14 water to the Basin. AVEK Brief, p. 6. AVEK does not develop the water in northern California,
15 nor does it transport it to southern California or to the Basin. DWR does all that. AVEK takes
16 delivery of the water after it has already reached the Basin. AVEK’s purchase, treatment,
17 distribution, and resale of the water all occur within the Basin. It is a middleman between DWR
18 and the Suppliers. It holds neither any legal nor equitable interest in the appropriative right.²

19 The Suppliers (cities, water districts, and water companies within the Basin) also claim to
20 be importers of the SWP water; indeed, they claim to be the only importers. Suppliers Brief,
21 pp. 2, 10. They buy the water from AVEK and re-sell it to their customers, which include urban
22 households, commercial buildings, industrial facilities. The Suppliers’ claim is flawed. They
23 cannot argue that they produced the water in the north, conveyed it to the south, or received it
24 within the Basin. All their activities (purchase, distribution, sale) occur within the Basin. Their
25 role is a middleman between AVEK and their customers, the mainly urban users of the SWP
26 water. They hold no legal or beneficial interest in the appropriative right.

27
28 ² Some agricultural users, including two of the Landowners, also buy some water from AVEK.

1 The above households, buildings, factories, and farms are the fourth link in the chain of
2 distribution. The Landowners are not aware that such users claim to be importers of the SWP
3 water. Any such claim would be dubious. These buyers take delivery of and use (and discharge)
4 such water within the Basin long after its importation. It is such use of the water that perfects the
5 appropriative right. *State Water Resources Control Board*, 136 Cal.App.4th at 106.

6 After some SWP water is applied to the ground for various uses, including irrigation
7 (landscaping or agriculture) it percolates into the aquifer and mingles with and augments the
8 native groundwater. Eventually, pumpers, including the Landowners, extract and use this
9 comingled water. This second group of water users, in effect, constitutes the fifth link in the
10 distribution chain.

11 **2. NEITHER AVEK NOR ANY SUPPLIER IS A USER**

12 The Suppliers also claim that they are the “users” of the imported SWP water. Suppliers
13 Brief pp. 2, 10, 12, 13. They further assert that they “used” or “use” the water in question. *Id.*,
14 pp. 1, 8, 15. This contention cannot be proved.

15 The Suppliers are not householders who drink the SWP water, wash dishes and clothes,
16 flush toilets, or take showers. They are not businesses which use it in manufacturing processes
17 or incorporate it in products. Nor do they water stock or irrigate either landscapes or agricultural
18 fields. The Suppliers acknowledge that their customers are the “ultimate” users of the water. *Id.*
19 pp. 10, 12. The Suppliers simply buy and resell the water for use by their customers.

20 The Suppliers state that their customers “depend” on them to provide SWP water.
21 Suppliers Brief, pp. 1, 2. Any such dependence does not make a Supplier a user.

22 The Suppliers also assert that it is they who “pay” for the SWP water. Suppliers Brief,
23 p. 13. This is not probative, as their customers reimburse them for the payments they make to
24 AVEK.

25 The Suppliers invoke *Glendale*, *San Fernando*, and *Santa Maria*, arguing that they
26 “should be credited with the benefits of their endeavors.” Suppliers Brief, pp. 3, 13. But it is the
27 importer and the users whose endeavors, and the resulting benefits, should principally be
28 credited. DWR and end users are essential to the SWP, as producers, users, and right holders are

1 to any water project. The Suppliers, like AVEK, are middlemen between the importer and the
2 users. They have no appropriative rights. They are neither the first seller nor the last buyer of
3 the water. The role they play is not insignificant. But they, themselves, do not develop nor use
4 the imported water.

5 AVEK correctly states that the Suppliers do not make any “use” of the SWP water and
6 that they are “no different” than AVEK in this regard. AVEK Brief, p. 2. AVEK, like any
7 Supplier, is an intermediary in the chain of distribution of SWP water.

8 **3. THE GOVERNING STATUTES DO NOT CONFER ON AVEK OR THE**
9 **SUPPLIERS THE POWER TO RECLAIM THE AUGMENTED**
10 **GROUNDWATER SUPPLY**

11 In *Glendale*, *San Fernando*, and *Santa Maria*, the courts analyzed the most pertinent
12 statute, Water Code Section 7075.³

13 The suppliers in *Glendale*, *San Fernando*, and *Santa Maria* relied on Section 7075, a part
14 of Division 4, relating, among other things, to conduits and streams. A “conduit” includes
15 various “appliances” for conducting water. Water Code §§ 7000, 7030. Section 7075 provides,
16 in relevant part: “Water which has been appropriated may be turned into the channel of another
17 stream, mingled with its water, and then reclaimed . . .” The court construed the word “stream”
18 broadly to include an aquifer. *Santa Maria*, 211 Cal.App.4th at 301 (citing *San Fernando* and
19 *Glendale*).

20 Here, the water was “appropriated,” DWR holding title to the right and the end users
21 owning the equitable or beneficial interest. Neither AVEK nor any supplier owns any such
22

23 ³ In *Santa Maria* the Court of Appeal discussed a second arguably relevant statute, Water Code Section 1202(d).
24 The landowners in *Santa Maria* relied on Section 1202(d), which defines unappropriated water as water which,
25 having been used, “flows back into a stream, lake, or other body of water.” The court read the statute narrowly. It
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27 the term also includes “subterranean streams flowing through known and definite channels.” Water Code § 1200.
28 The court also stated that, under the statute, water which flows “back into” a body of water does not include
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if it is imported. SWP water flows from the Feather River through the Sacramento River to the Sacramento-San
Joaquin Delta and, thereafter, to the Antelope Valley aquifer. The language of the statute is not limited to a flow
back to a natural water body in which the water originated.

1 interest. The aquifer seems to be a “stream” under Section 7075. The SWP water that is applied
2 and percolates is surely “mingled” with the aquifer’s native water. The aquifer, itself, may not
3 be an “appliance” for conducting water, but the wells of overlying landowners that extract the
4 augmented supply are. Apart from stating that such water may be “reclaimed,” the Legislature
5 did not define that decisive term: Who may reclaim the augmented supply? By what means may
6 they do so? The Landowners have long pumped water from wells on their property for use
7 thereon. They contend that they have thereby “reclaimed” the water at issue, within the meaning
8 of the statute, by operating their wells and using the groundwater, including both the native and
9 augmented portions.

10 AVEK and the Suppliers do pump some water from the aquifer for sale to their end users.
11 They do so as appropriators of the native groundwater and such rights are junior to those of the
12 Landowners. As to the augmented groundwater supply, the Suppliers have no greater claim to
13 reclaim the water as those who use it. Indeed, their claim is not as strong, as they neither
14 develop, nor import, nor use water, and own no interest in the appropriative right.

15 **4. THE CASES PROVIDE THE MIDDLEMEN WITH LIMITED SUPPORT**

16 *Glendale* involved a suit by the City of Los Angeles against the cities of Glendale and
17 Burbank. Los Angeles secured water rights and imported water from the Owens Valley to the
18 San Fernando Valley through its own aqueduct. Some of the water was spread within the basin
19 by Los Angeles for storage and transport from the northwest corner of the valley to the southeast
20 corner. Other such water was sold to valley farmers, owners of equitable interests in the rights,
21 for uses that similarly recharged the aquifer. The aquifer was used by Los Angeles as a
22 subterranean stream. Glendale and Burbank also pumped water from the aquifer for their own
23 municipal uses. The Court held that Los Angeles had a prior right to reclaim the augmented
24 supply under the predecessor of Section 7075. The statute was designed to encourage the use of
25 natural storage and transport formations. Spreading water and selling it to farmers for
26 subsequent extraction from the aquifer was an economical way to store and transport the
27 imported water. The water moving through the aquifer was in effect “within [Los Angeles’]
28 reservoir.” 23 Cal.2d at 78.

1 The Suppliers also cite *San Fernando* and its holding as to water imported by Los
2 Angeles from the Mono Lake Basin and Owens Valley. Los Angeles, which acquired rights, did
3 supply farmers in the San Fernando Valley, who perfected them. It played a far more substantial
4 and diverse role than the Suppliers play here. It built its own aqueduct between Owens Valley
5 and the San Fernando Valley, as well as an extension to the Mono Lake Basin and a second
6 “barrel.” It operated those facilities to import water from those sources to the San Fernando
7 Valley for spreading and sale to farmers. Thus, Los Angeles performed the functions (importer,
8 developer, right holder) there that DWR plays here. Then it stored water in the aquifer and
9 transported it, using the aquifer as a subterranean stream, for reclamation and subsequent
10 municipal supply.

11 The Suppliers also rely on the second holding of *San Fernando*. *Id.*, pp. 3, 7, 8-9, 11-12.
12 That relates to water stored by the U.S. Bureau of Reclamation behind Hoover Dam on the
13 Colorado River, transported by the Metropolitan Water District through its own aqueduct to the
14 Southern California coast, and delivered to MWD member cities, such as Burbank and Glendale,
15 for distribution to their households and businesses. This chain of distribution is analogous to that
16 involved here, with AVEK and the MWD playing somewhat comparable roles and the Suppliers
17 and the two cities doing so, as well. But there is a significant difference too. Unlike AVEK
18 here, MWD there reached out well beyond its service area and built and operated an aqueduct to
19 the Colorado River. Here, AVEK’s role is much more limited functionally and geographically.
20 It neither developed nor imported the water at issue. The Suppliers’ role is similarly limited and
21 even further down the distribution chain.

22 AVEK and the Suppliers also rely on the *Santa Maria* case. There, as here, the water that
23 augmented the groundwater was SWP water. There, DWR was not made a party to the
24 litigation. DWR built Oroville Dam on the Feather River and the California Aqueduct through
25 the San Joaquin Valley. It also built the Central Branch Aqueduct, which started at the mid-point
26 of the California Aqueduct, passed over the Coast Range to the coast, and turned south passing
27 through the Santa Maria Valley Groundwater Basin. The public water suppliers (called
28 “producers” by the court), including the City of Santa Maria, took possession of the water within

1 the basin and delivered it to municipal and industrial users. Some of that water was used for
2 landscape irrigation and augmented the aquifer. The augmented groundwater supply was
3 subsequently pumped by agricultural landowners who held overlying rights. DWR was the
4 importer of the SWP water. The suppliers were middlemen who purchased and resold such
5 water within the basin. The end users of the SWP water were their municipal and industrial
6 customers. The subsequent users of the resulting augmented groundwater supply were the
7 overlying landowners.

8 It is difficult to square the Court of Appeal’s opinion in *Santa Maria* with the Supreme
9 Court’s opinions in *Glendale* and *San Fernando*. In the latter cases, Los Angeles built and
10 operated the Owens Valley aqueduct to bring water from the east side of the Sierras to the San
11 Fernando Valley. Los Angeles had the right to reclaim the resulting augmented groundwater
12 supply; any rights the cities of Glendale and Burbank had were junior thereto. In *Santa Maria*,
13 DWR was in much the same position as Los Angeles. It brought the water from the west side of
14 the Sierras to the Central Coast, just as Los Angeles brought water from the east side of the
15 Sierras to the Antelope Valley. The scope and function of the two are analogous. Yet the City
16 of Santa Maria was allowed to reclaim where Glendale and Burbank were not. Los Angeles
17 transported the percolated water through the aquifer as a subterranean stream. DWR transported
18 the SWP water through the Santa Marin Valley by means of the Central Branch Aqueduct.
19 DWR does the same thing through the East Branch Aqueduct. Because *Santa Monica* did not
20 adjudicate the role and function of DWR and the water uses, it should not control here.

21 **Conclusion**

22 In this case, a full examination of the governing law and relevant facts will show that
23 DWR is the importer of the SWP surface water, and urban households and businesses are its
24 users. After irrigation use and percolation, the augmented groundwater supply may be reclaimed
25 by overlying right holders, including the Landowners.

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1 Dated: February 18, 2014

Respectfully Submitted,
SMILAND CHESTER LLP
RING & TAYLOR

5 By /S/ Theodore A. Chester, Jr. _____
6 Theodore A. Chester, Jr.

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, Felicia Herbstreith am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 601 West Fifth Street, Suite 1100, Los Angeles, California 90071.

On **February 18, 2014**, I served the foregoing document described as:
LANDOWNERS’ RESPONSE TO PHASE FIVE TRIAL BRIEFS on the interested parties in this action by posting the document listed above to the Santa Clara County Superior website in regard to the Antelope Valley Groundwater Adjudication matter, pursuant to the Electronic Filing and Service Standing Order of Judge Komar.

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

Executed on **February 18, 2014**, at Los Angeles, California.

/s/ Felicia Herbstreith
Felicia Herbstreith