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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b))

ANTELOPE VALLEY GROUNDWATER CASES

Included **CONSOLIDATED** Actions:

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

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

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

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

LANDOWNERS' REPLY TO AVEK'S SUPPLEMENTAL PHASE FIVE TRIAL BRIEF

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

Diamond Farming Company vs. City of Lancaster Riverside County Superior Court Lead Case No. RIC 344436 [Consolidated w/ Case Nos. 344668 & 353840]

Willis v. Los Angeles County Waterworks District No. 40; Los Angeles Superior Court Case No. BC 364553

Wood v. Los Angeles County Waterworks District No. 40; Los Angeles Superior Court Case No. BC 391869

Introduction

The Landowners (identified above) here reply to AVEK's third, or "supplemental," phase five trial brief, relating to the right to reclaim augmented groundwater supply under Section 7075 of the Water Code.

The flaws in AVEK's latest brief are twofold. First, it either ignores, or fails to distinguish, certain cited cases. Second, it fails to draw the proper parallels between the links in the chain of distribution in the instant case and those in other arguably pertinent precedents.

I. AVEK FAILS TO ANALYZE THE *IDE* CASE, ON WHICH BOTH *GLENDALE* AND *SAN FERNANDO* RELIED

AVEK's latest brief again discusses the *Glendale* and *San Fernando* cases, but not a U.S. Supreme Court case on which both relied. This is significant, because it highlights how all three are distinguishable from the case at bar.

Ide v. U.S., 263 U.S. 497 (1924) involved a federal project, Wyoming law, and no middlemen. The source of water was the Shoshone River. In the same vicinity was Bitter Creek, a ravine that carried off storm water occasionally and snowmelt seasonally. In 1904 the Shoshone Project was approved, to be constructed and operated by the U.S. Bureau of Reclamation. The project involved canals from the river to project lands, including certain lands to which the creek was contiguous. It also contemplated improvements to the creek by the Bureau in order to collect seepage for further project use. Shortly after approval, the Bureau began canal construction and obtained the appropriative right to use river water for irrigating project lands. In 1908 it began to deliver irrigation water to the lands adjacent to the creek, and it also initiated planning and financing for the projected creek improvements. As more and more project water was applied to such lands, an ever increasing quantity percolated underground and, thereafter, seeped into the creek. Between 1910 and 1913, settlers purchased lands that abutted or were crossed by the creek. After the Bureau began the long-planned construction to improve the creek, the settlers obstructed the work. At issue in the resulting litigation was whether the Bureau or the settlers were entitled to reclaim the seepage in the creek. The Court described the contested water as "artificial flow" originating from a source created and controlled by the Bureau and caused by project irrigation. 263 U.S. at 504, 505. It held that the seepage

producing the artificial flow is "part of the water" appropriated for project use, stating: "A second use in accomplishing that object [cultivation and reclamation of project lands] is as much within the scope of the appropriation as a first use is." *Id.* at 505. From inception, the Bureau had diligently planned, financed, and initiated creek improvements. Thus, the Bureau's right to reuse the seepage for project purposes was "not abandoned." *Id.* at 506-07.

Ide was cited by *Glendale* for the proposition that the project operator had the "right to retake seepage . . . where such recapture had been planned when arrangements for importing the water were made." 23 Cal.2d at 78. The Court, again citing *Ide*, further stated that Los Angeles had selected an area where it could "recover as much water as possible from seepage, and it should not be deprived of the benefit of its foresight." *Id.* Thus, *Glendale* was similar to *Ide* in that Los Angeles, like the Bureau, as appropriator, had designed and constructed the project *ab initio* for the purpose of reclaiming the seepage and reusing it a second time for project purposes.

San Fernando relied upon *Ide* in similar fashion. It emphasized that, before commencing the importation of Owens Valley water, Los Angeles had planned to recapture the return flows in the San Fernando Valley for municipal use. "Under these circumstances, [Los Angeles] retained its prior right to the return waters . . ." 14 Cal.3d at 257.

The case at bar differs significantly from *Ide*, *Glendale*, and *San Fernando*. A half century ago, the Legislature authorized, and DWR planned, designed, financed, and built, the SWP, and DWR appropriated the water for, has operated the project ever since. At no time has DWR made any plan or effort to reclaim the resulting augmented groundwater supply in the Basin. Instead, it has been content to sell and deliver the SWP surface water to AVEK for resale and delivery (through the intermediaries) to end users there. This necessarily resulted in some percolation, mingling, and groundwater augmentation. DWR's failure to reclaim such water served a second major purpose of the SWP, slowing the rate of groundwater depletion, as discussed in point 4 below.

2. *STEVENS* PROVIDES AVEK WITH LITTLE SUPPORT

AVEK cites *Stevens v. Oakdale Irrigation District*, 13 Cal.2d 343 (1939), among other cases, for the proposition that "an importer retains the right to return flows, notwithstanding the

subsequent use of imported water by other persons before it percolates through the soil and joins the groundwater." AVEK Supplemental Brief, p. 4. *Stevens* is not quite that simple.

Stevens, like *Ide*, involved a river, a canal, and irrigated farmlands abutting a creek. A water district diverted water from the river to the canal, and delivered it to the farmers for application to their lands, resulting in seepage in the creek. Two holdings are relevant here.[1]

First, between 1912 and 1934, the farmers reclaimed water that had been used for irrigation, percolated into the groundwater, and seeped into the creek. The Court concluded that there had been an "abandonment" of such water by the district. 13 Cal.2d at 350.

Second, as to future years, the Court stated that the district, in order to reduce seepage use, may change the flow of water imported or the volume of water discharged "so long as this is done above the point where the water leaves the works of the district or the boundaries of its land." 13 Cal.2d at 352.

In the case at bar, DWR has abandoned the water in question each and every year for decades. As to future years, the Landowners are aware of no evidence suggesting that DWR, who has "appropriated" the SWP surface water (as contemplated in Section 7075), has decided to reduce deliveries or reclaim what would otherwise become an augmented groundwater supply.

3. *RODUNER* PROVIDES THE OVERLYERS WITH SUBSTANTIAL SUPPORT

AVEK has twice cited *Stevinson Water District v. Roduner*, 36 Cal.2d 264, 267-70 (1950) for the proposition that an importer has the right to recapture return flow for its own use or the use of others. AVEK Brief, p. 4; AVEK Amended Brief, p. 7. This is only partly right, as *Roduner* stands for something more, as well.

Roduner involved the Merced River and the Owens Creek. Water from the river was diverted by the Merced Irrigation District and discharged into the creek for conveyance to the East Side Canal. Stevinson Water District owned certain water works, including that canal, which were leased to the East Side Canal & Irrigation Company, a public utility. The creek was intercepted by the canal. A contract between the two districts provided for a transfer from Merced to Stevinson each year of a guaranteed amount of water and, possibly, an amount in

[1] *Stevens* did not cite Water Code Section 7075 nor its predecessor Civil Code Section 1413, nor did it cite *Ide*.

addition thereto. Landowners riparian to the creek diverted all of the foreign water along with the natural flow. The district and the utility sued to stop this practice and won as to one part of the foreign water, but lost as to the second part. The farmers had riparian rights in the natural flow of the creek. 36 Cal.2d at 267. The water district and public utility were entitled to reclaim some of the foreign water in the creek under Section 7075. *Id*. at 269. However, the canal lacked sufficient capacity to carry all the foreign water, and the excess was released rather than delivered for use. The right to reclaim the foreign water was "limited to such water as shall be reasonably required for the beneficial use to be served." Cal. Const. Art. 10, § 2; Water Code § 100. The farmers, who put the excess portion of the foreign water to beneficial use, were entitled to reclaim it. *Id*. at 169-70.

Here, the water in dispute is comparable to the excess water in *Roduner*. It has been allowed by DWR, after application, to percolate and mingle with the native groundwater, and DWR has made no effort to reclaim it, nor does DWR have the means or any plans to do so. DWR has abandoned any right to use such water, and the overlyers are entitled to reclaim it.[2]

4. AVEK'S ANALYSIS OF THE LINKS IN THE DISTRIBUTION CHAIN IS FAULTY

AVEK states that DWR "does not assert a claim to return flows," any such claim has only been "postulated," and DWR's rights will not be "litigated" or "adjudicated" here. AVEK Supplemental Brief, pp. 2, 3. If AVEK is correct, DWR cannot prevail over the overlyers' as to the right to reclaim the water in question.

AVEK argues that it, as the "next" (or second) link in the chain of distribution, should be awarded the right to reclaim the augmented supply. AVEK Supplemental Brief, pp. 2, 3, 5. AVEK's claim apparently derives from any claim DWR might otherwise have had. But AVEK offers no reason or authority for such a result.

AVEK repeats the Landowners' argument that the Suppliers are middlemen, not importers, who neither develop nor use water, nor own any interest in the right, but calls such

[2] For a helpful discussion of the issue by the Supreme Court of Utah, see *Strawberry Water Users Assoc. v. Bureau of Reclamation*, 2006 UT 19; 133 P.3d 410, 424-27 (2006).

argument "flawed." AVEK Supplemental Brief, p. 2. Again, AVEK proffers no evidence and cites no authority in support of this contention.

As to end users of SWP surface water, AVEK asserts that their rights were fully litigated in *Santa Maria*. AVEK Supplemental Brief, p. 3. In addition to other reasons previously specified, *Santa Maria* has dubious precedential value here. First, in that case the groundwater basin underlying the valley had not been in overdraft since 1967 and had been stable and near the historic high thereafter. As stated by the court: "The existence of a surplus makes this case different from most other basin adjudications." *Santa Maria*, 211 Cal.App.4th at 299. Here, by contrast, the Basin has long been in overdraft. Second, neither DWR nor the end users of SWP surface water, the co-owners of the right to use it, were parties to that action. They did not join the stipulation, nor were their rights and duties relating to the foreign water litigated or adjudicated. They were neither appellants nor respondents on appeal.

Finally, as to the overlyers, AVEK again describes the Landowners' argument as "flawed," but makes no attempt to support that description. AVEK Supplemental Brief, p. 1. The main purposes of the SWP include, not only providing new surface water to end users, but also enhancing the groundwater supply available to overlyers, as shown by the foundational plan and the authorizing legislation for the SWP.

The main SWP planning bulletin focuses on overdrafted groundwater basins, including Antelope Valley. Where extraction exceeds replenishment within a basin over a long period of time, the supply becomes deficient, an additional supply is necessary, and the situation, if uncorrected, becomes catastrophic. New SWP surface water may recharge or replenish such a basin by way of canal seepage, return flows, and deep percolation of surface irrigation water that is applied but not consumed.[3]

The legislation authorizing the financing, construction, and operation of the SWP, as planned in the bulletin, makes certain findings, and requires certain studies of groundwater basins. A primary interest of the citizenry is the prevention and correction of impairment or

[3] Department of Water Resources, *The California Water Plan: Bulletin No. 3* (May 1957), pp. v., 13, 15-16, 155-57, 207-09, 219.

damage to groundwater basins caused by overdraft. The legislation declares that recharge of overdrafted basins is effective and necessary. Water Code §§ 12922, 12922.1, 12924, 12926, 12931, 12934(d).[4]

Water Code Section 7075 and any other relevant statutes must be read in conjunction with the above bulletin and legislation. Denying overlyers the right to reclaim the augmented supply under the former would be inconsistent with a major purpose of the SWP set forth in the latter.

Conclusion

For these reasons, the overlyers, including the Landowners, should prevail against all in the distribution chain of SWP surface water on the Section 7075 issue in the phase five trial.

Dated: April 2, 2014

Respectfully submitted

SMILAND CHESTER LLP
RING & TAYLOR

By /s/ Theodore A. Chester, Jr.
Theodore A. Chester, Jr.

[4] See also Water Code §§ 461-463.

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 **April 2, 2014**, I served the foregoing document described as: **LANDOWNERS' REPLY TO AVEK'S SUPPLEMENTAL PHASE FIVE TRIAL BRIEF** 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 **April 2, 2014**, at Los Angeles, California.

/*s*/ Felicia Herbstreith
Felicia Herbstreith