

5-AVUMG-1

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

**ANTELOPE VALLEY GROUNDWATER
CASES**

Included Consolidated Actions:

Los Angeles County Waterworks District No.
40 v. Diamond Farming Co.
Superior Court of California
County of Los Angeles, Case No. BC 325 201

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

Wm. Bolthouse Farms, Inc. v. City of Lancaster
Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water Dist.
Superior Court of California, County of
Riverside, consolidated actions, Case Nos.
RIC 353 840, RIC 344 436, RIC 344 668

Rebecca Lee Willis v. Los Angeles County
Waterworks District No. 40
Superior Court of California, County of Los
Angeles, Case No. BC 364 553

Richard A. Wood v. Los Angeles County
Waterworks District No. 40
Superior Court of California, County of Los
Angeles, Case No. BC 391 869

Judicial Council Coordination
Proceeding No. 4408

Lead Case No. BC 325 201

**ORDER AFTER HEARING ON
JANUARY 27, 2014**

**1. Motion by Cross-Complainant
Antelope Valley-East Kern Water
Agency ("AVEK") for Summary
Judgment/Summary Adjudication**

Hearing Date(s): January 27, 2014
Time: 10:00 a.m.
Location: Old Dept 1A (Mosk)

Judge: Honorable Jack Komar, Ret.

1 AVEK seeks summary adjudication of its 4th Cause of Action and the Public Water
2 Suppliers' 6th Cause of Action of its Cross-Complaint.

3 AVEK contends it has absolute right to all return flows from water it imports and sells to
4 member cities and others, that the facts are not in dispute, and it is entitled to judgment as a
5 matter of law.

6 REQUESTS FOR JUDICIAL NOTICE:

7 AVEK requests that the court take judicial notice of 14 documents (Exhibit 1 through 14)
8 related to the trial court decisions in the City of San Fernando and Santa Maria cases. AVEK's
9 request for judicial notice of those exhibits is denied on the ground that these exhibits are
10 irrelevant. Trial exhibits are not useful in determining the law stated in an appellate opinion.
11 PWS request for judicial notice of DWR web site documents. The request is denied as lacking a
12 proper foundation.

13 EVIDENTIARY OBJECTIONS

14 The court rules as follows on the evidentiary objections of the Public Water Suppliers:
15 Evidentiary objections 1-15 to the Declaration of Dwayne Chisam are sustained on grounds of
16 lack of foundation and personal knowledge. Evidentiary objections to the Declaration of Dan
17 Flory are sustained as to objections 1-31 on grounds of lack of foundation and personal
18 knowledge; objections 25-26 are also sustained as legal conclusions. Evidentiary objections 1-8
19 to the Declaration of Kathleen Kunysz are sustained on grounds of irrelevance.

20 It is noted that the Public Water Suppliers did not comply with the law regarding a
21 separate statement of objections to evidence and further that evidence to which objections were
22 sustained did not affect the outcome of the ruling on the motions.

23 The Public Water Suppliers object to the late filing of the supplemental brief by AVEK.
24 The objection is overruled. Responding party had time to and did respond to the filing in a
25 timely fashion. Moreover, the late filed papers did not affect the outcome of the motion.

26 This motion is about the right to return flow of imported water when the net aquifer is
27 augmented and by return flows which are stored and which results from water that is used in the
28 environment whether agricultural, industrial, or municipal.

1 AVEK has a contractual right to receive and convey water to buyers who will use the
2 water from the Department of Water Resources (DPR). AVEK pays for the water and then sells
3 it to various private and public water producers and users. Palmdale, Lancaster, and others may
4 be customers who use the water by selling it at retail to their residents and recycling portions of it
5 so that it returns to the aquifer. That use by their customers results in a certain percentage of
6 return flows. For example, water for household use may be returned through recycling pools and
7 systems of a percentage of the water used by households. When that water is reintroduced into
8 the aquifer, it becomes part of the ground water in the basin and to the extent it is separate
9 because there is storage room, the municipality may be entitled to store that return flow. To the
10 extent that there is no storage, and it merges, there may still be value in drought or overdraft
11 conditions.

12 It is noted that there is insufficient evidence submitted that would permit granting
13 summary adjudication of an entire cause of action or defense and the motion could be denied on
14 that basis.

15 Water Code § 7075 provides that water that has been appropriated “may be turned into
16 the channel of another stream, mingled with its water, and then reclaimed; but in reclaiming it
17 the water already appropriated by another shall not be diminished.” Thus, “one who brings
18 water into a watershed may retain a prior right to it even after it is used.” City of Santa Maria v.
19 Adam (2012) 211 Cal.App.4th 266, 301 (citing City of Los Angeles v. City of Glendale (1943)
20 23 Cal. 2d 68, 76-77). To preserve its right to return flows, an importer must manifest its intent
21 to recapture or otherwise use return flows.

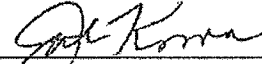
22 AVEK contends that it owns wells capable of recapturing return flows and that it also
23 spreads water with the express intent of recapturing the resulting return flows. [Undisputed Facts
24 #28-30, 47] Water that has been banked or spread is not in issue here, however. The assertion
25 that a portion of the imported water augments the aquifer by such use is not sufficient for the
26 court to award summary adjudication of an entire cause of action. Moreover, manifesting intent
27 to recapture return flows or preserve the right to do so is effective only where there is a right to
28 be preserved. Such manifestation does not, without more, create such a right.

1 AVEK purports to offer evidence that it has not transferred, abandoned or otherwise
2 relinquished any right to recapture return flows from the water it sells. [UF #33-34] As with
3 AVEK's purported manifestation of intent to recapture return flows, however, the fact that it may
4 not have transferred, abandoned or relinquished any such right is meaningless if no such right
5 exists to be relinquished. AVEK presents no competent evidence that it is entitled to use the
6 water it imports and sells. The buyers present evidence that they in fact use the water and create
7 return flows.

8 The return flows result from use of imported water; not just from importation. On the
9 undisputed evidence before the court, AVEK has failed to establish that, as a State Water Project
10 ("SWP") contractor with a contractual entitlement to receive and deliver SWP water to public
11 water suppliers and private property owners, it is an appropriator or importer of SWP water such
12 that it may retain a prior right to recapture return flows from the water delivered to and used by
13 others. AVEK has thus failed to establish it is entitled to summary adjudication of its return flow
14 claim as a matter of law. The entirety of case law supports that proposition that water users who
15 have imported the water into the basin and who have augmented the water in the aquifer
16 through use are entitled rights to the amount of water augmenting the aquifer. If on the trial of
17 this matter AVEK can establish some quantity of water augments the aquifer because of its use,
18 beyond what it may sell to other water producers/providers, it may establish such rights.

19 The Motion is **DENIED**.

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21 Dated: 1-30-2014

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23 Hon. Jack Komar (Ret.)
24 Judge of the Superior Court
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