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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

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

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, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668

RICHARD WOOD, on behalf of himself and all other similarly situated v. A.V. Materials,

Judicial Council Coordination Proceeding No. 4408

CLASS ACTION

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

OPPOSITION TO ANTELOPE VALLEY-EAST KERN WATER AGENCY'S MOTION FOR SUMMARY ADJUDICATION

[Filed concurrently with Separate Statement of Disputed Material Facts, Request for Judicial Notice, and Declarations of Jeffrey V. Dunn and Steve A. Perez]

Date: January 27, 2014
Time: To be determined
Dept.: To be determined

Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC509546

Trial Date: February 10, 2014 (Phase V)

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Los Angeles County Waterworks District No. 40 ("District No. 40"), City of Palmdale, City of Lancaster, Rosamond Community Services District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, Big Rock Mutual Water Company, Quartz Hill Water District, and California Water Service Company (collectively, "Public Water Suppliers") respectfully submit the following Opposition to Antelope Valley-East Kern Water Agency's ("AVEK") Motion for Summary Adjudication of All Causes of Action Relating to Ownership of Return Flows ("Motion").

I. INTRODUCTION

No court has ever ruled that a State Water Project wholesaler has a groundwater right to the return flows of its retail customers. "Return flows (imported water that is used on the surface which then percolates into the Basin) . . . are derived from State Water Project (SWP) water imported by several of the public water producers." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 280.) AVEK is not a public water producer but a SWP wholesaler. If its Motion is successful, it would likely create a legal havoc within the State Water Project System, a public water supply for tens of millions of Californians.[1]

AVEK's Motion should be denied for each of the following reasons:

- AVEK does not have a groundwater right to SWP water but merely a contractual entitlement to deliver SWP water to Public Water Suppliers and other water users. The Public Water Suppliers uses of SWP water augment the Basin's groundwater supply and thereby create their right to the return flows.
- The Motion is procedurally defective on numerous grounds.
- The Motion lacks legal authority for AVEK's return flow claims.
- AVEK's water delivery contracts disclaim any responsibility for SWP water sold by AVEK to the Public Water Suppliers and therefore any claim to the SWP water.
- Public Water Suppliers have a right to return flows under existing law.

[1] A brief overview of the State Water Project is found in *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 903.

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For each of these reasons, AVEK's Motion should be denied.

II. AVEK HAS A CONTRACTUAL ENTITLEMENT TO SWP WATER AND NO GROUNDWATER RIGHT TO RETURN FLOWS.

AVEK's claims are unprecedented and lack legal support. There are 29 SWP contractors and 250 Central Valley Project ("CVP") contractors that deliver state and federal water from northern California to central and southern California. (Request for Judicial Notice, Exs. 1 & 2.) Despite long-standing and apparent consensus among the wholesale water contractors that they do not have a right to return flows as against their retail user customers - and ignoring the impact to all water suppliers who purchase water from the SWP and CVP contractors - AVEK now claims that it owns return flows to SWP water that it sold to Public Water Suppliers. AVEK makes this claim despite the fact that AVEK never reserved the return flows in its written contracts selling SWP water to the Public Water Suppliers.

A contract entitlements are not a groundwater right. A water right is held by the entity that takes water directly from a body of water, and AVEK does not take the SWP water directly from a body of water. Instead, AVEK has a contract Department of Water Resources ("DWR"), which holds the surface water right, to receive and deliver SWP water to public water suppliers and private property owners. Thus, a contractual entitlement is created by a contract between DWR as an appropriative water right holder, and AVEK as a contracting entity to take delivery of water that DWR diverts by means of its appropriative water right.

SWP and CVP wholesalers, including AVEK, have contracts with DWR and the U.S. Bureau of Reclamation, respectively, which specify the amount of water each wholesaler district is entitled to if full allocations are available. If less than full allocations are available, then the reduced delivery each wholesaler district receives is determined by the terms of the contract and not by any water right. The wholesaler districts generally have contracts with public water suppliers and landowners purchasing SWP water for their respective uses, and it is the purchasers' use that lead to return flows that augment the groundwater basin supply and the return

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flow right.

It is important to note that SWP water does not augment the Basin's supply unless the Public Water Suppliers and AVEK's other retail user customers buy the SWP water. The Public Water Suppliers use SWP water, and it is that use which augments the Basin's supply. If the PWS and other AVEK retail customers do not use the SWP water, it does not augment the Basin's supply. AVEK, on the other hand, is contractually obligated to DWR regardless of the amount of water SWP delivered.

Stated simply, AVEK has no groundwater right.

III. AVEK'S MOTION IS PROCEDURALLY DEFECTIVE

A. The Motion Should Be Denied Because It Fails To Establish Every Element Of AVEK's Cause of Action Or The Public Water Suppliers' Affirmative Defenses

A plaintiff is entitled to summary adjudication only if it proved each element of the cause of action and that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subds.,(f)(1), (p)(1), (o); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-55; *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 589-90.) The AVEK Motion, however, fails to completely dispose of any cause of action.

The Motion argues that "no defense exists as to AVEK's Fourth Cause of Action; the PWS' Sixth Cause of Action relating to the same issue is without merit; no triable issue of material fact exists with respect to either cause of action; and, accordingly, AVEK is entitled to judgment establishing its right to use all return flows. . . ." (Motion at p. 5.) AVEK's motion, however, fails to establish each and every element of AVEK's Fourth Cause of Action or address any of the fourteen affirmative defenses raised in District No. 40's Answer. (Declaration of Jeffrey V. Dunn ("Dunn Decl."), Ex. B [Answer].) AVEK's Motion is so deficient that it fails to even identify the elements of an alleged AVEK return flow claim.

Additionally, AVEK failed to establish that no triable issue of fact exists regarding:

(1) whether some State Water Project water returns and/or enters the Basin;

(2) whether "there is underground space available in the Basin to store the return flows";

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and

(3) whether AVEK can have or "has the sole right to recapture return flows attributable to its State Project water." (Dunn Decl., Ex. A at pp. 10-11[AVEK's Cross-Complaint].) The Motion does not reference those facts[2] nor does it even assert the amount of return flows from SWP water to which AVEK alleged it has groundwater rights. As shown by the Public Water Suppliers' accompanying Separate Statement of Disputed Material facts filed concurrently with this opposition and incorporated by reference herein, the Motion's supporting materials facts are not undisputed which requires the Motion to be denied.

Moreover, the Motion asks the Court to determine only one aspect of the return flow cause of action. The request is inappropriate and not permitted under Section 437c, subdivision (f). (Code Civ. Proc. § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."].)[3] In amending Section 437c, subdivision (f), the California Legislature stated that the purpose of subdivision (f) is "to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense." (*Hood, supra,* 33 Cal. App. 4th at p. 323 [quoting Stats. 1990, ch. 1561, § 1].) AVEK's Motion is inconsistent with the Legislature's intent to "promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials." (*Id.* [quoting *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854].) For this reason alone, summary adjudication on either AVEK's Fourth Cause of Action or the Public Water Suppliers' Sixth Cause of Action should be denied.

Even assuming *arguendo* that AVEK sufficiently established each element of the return flow cause of action, which it has failed to do, AVEK as a cross-complainant, would need to establish that there is no defense to its Fourth Cause of Action. (Code Civ. Proc. § 437c, subd. (p)(1).) On or about February 23, 2007, District No. 40 and Rosamond Community Services

[2] Public Water Suppliers note that other parties have indicated that they intend to relitigate other elements of the return flow.

[3] All section references are to the Code of Civil Procedure unless otherwise indicated.

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District filed their answer to all complaints and cross-complaints, including AVEK's Cross-Complaint, in these coordinated actions. (Dunn Decl., Ex. B [Answer].) In their answer, District No. 40 and Rosamond Community Services District allege fourteen affirmative defenses, none addressed by AVEK's Motion. For example, the Tenth and Separate Affirmative Defense alleges that AVEK failed to join indispensable and necessary parties, namely other landowners and water producers within the Basin. Yet, AVEK's Motion fails to address this defense and does not discuss its alleged return flow rights against other landowners. For this reason alone, AVEK's Motion should be denied. (Code Civ. Proc., § 437c, subd. (p)(1).)

B. The Motion's Declarations Are Largely Inadmissible Statements

The moving party has the burden of making a sufficient showing that a plaintiff's claim is without merit; failure to do so must result in denial of the motion. (*City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 273; Code Civ. Proc., § 437c, subd. (p).) To meet this burden, the moving party must support its motion "by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (Code Civ. Proc., § 437c, subd. (b)(1).)

Supporting affidavits or declarations "shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (*Id.* at subd. (d).) Affidavits or declarations not based on personal knowledge, that contain hearsay or impermissible opinions, lack foundation, or are argumentative, speculative or conclusory, are insufficient. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219, 1236, 1238.)

As shown in evidentiary objections concurrently filed, the Motion should be denied because most, if not all, of the declarant testimony is inadmissible. The Motion's accompanying declarations contain hearsay or impermissible opinions, lack foundation, or are argumentative, speculative or conclusory. (See Code Civ. Proc., § 437c, subd. (d); *Gilbert, supra*, 147 Cal.App.4th at 26; *Tuchscher Development Enterprises, Inc., supra*, 106 Cal.App.4th at 1236, 1238.)

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C. The Motion Should Be Denied Because It Includes Untimely And Unauthorized Filings

The Court set November 13, 2013 as the deadline for filing a summary judgment motion. AVEK, however, submitted a procedurally unauthorized "Supplemental Brief" and a self-labeled "Amended Statement of Undisputed Facts" on December 14, 2013 – only thirteen days before the Public Water Suppliers' opposition deadline. (*Id.*) By this opposition, the Public Water Suppliers object to AVEK's procedurally improper and untimely Motion.

IV. AVEK SOLD SWP WATER TO PUBLIC WATER SUPPLIERS WITHOUT ANY RESERVATION OF A RETURN FLOW CLAIM BY AVEK

AVEK admits it exists "for the purpose of providing water received from the State Water Project ("SWP") as a supplemental source of water to retail water purveyors and other water interests within AVEK's Jurisdictional Boundaries *on a wholesale basis*." (Dunn Decl., Ex. C at Appendix B, Resolution R-11-09 [AVEK's 2010 UMWP] [emphasis added].) Consistent with its wholesaler status, AVEK has a contract with DWR for AVEK to receive and then deliver SWP water to Public Water Suppliers and other AVEK customers. (*Id.*; Flory Decl., Ex. 1.)

The Public Water Suppliers have written water purchase contracts with AVEK (collectively, AVEK's "Water Supply Contracts"). The Public Water Suppliers buy SWP water from AVEK pursuant to the Water Supply Contracts. They provide that "'substantial uniformity' in those contracts is 'desirable' and that AVEK will 'attempt to maintain such uniformity' between such contracts." (Dunn Decl., Ex. C at Appendix B, Article 19, Resolution R-11-09 [AVEK's 2010 UMWP].) Many of the Public Water Suppliers, including District No. 40 and Rosamond Community Services District, entered into Water Supply Contracts with AVEK. (E.g., Dunn Decl., Ex. E [Water Service Agreement between AVEK and District No. 40]; Declaration of Steve A. Perez ("Perez Decl."), Ex. A [Water Service Agreement between AVEK and Rosamond Community Services District].)

A. AVEK Does Not Retain Any Interest In SWP Water Purchased By The Public Water Suppliers

It is well established that a selling party relinquishes all rights and interests in the sold property unless the seller expressly reserves an interest. (*E.g.*, Civ. Code §§ 1105 ["A fee simple

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title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."] and 1084 ["The transfer of a thing transfers also all its incidents, unless expressly excepted"]; *American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 220 ["In the absence of some exception, limitation or reservation, a grant deed is presumed to convey the grantor's entire interest."]; *Long Beach v. Marshall* (1938) 11 Cal.2d 609, 613-14 [a transfer of real property is presumed to be a grant of fee simple title]; Com. Code § 2401 ["Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. . . . Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading . . . [i]f the contract requires delivery at destination, title passes on tender there."].)

Pursuant to the terms of AVEK's Water Supply Contracts, AVEK sells SWP water to the Public Water Suppliers. (*E.g.*, Dunn Decl., Ex. E and Perez Decl., Ex. A [AVEK's Water Service Agreements].)

AVEK admits its Water Supply Contracts do not mention return flows let alone reserve an interest in the SWP water. (Motion at p. 8.) The written agreements' complete silence on return flows is relevant because the Water Supply Contracts reference the Public Water Suppliers' groundwater rights. Article 3a of the Water Supply Contracts provides:

> Because it may be necessary that consumer maintain and operate his own wells to provide for his own system peak demands and as an emergency reserve water supply, ***it is advisable that consumer retain and protect his rights to groundwater***.
>
> ***In the event there is an adjudication of the groundwater basin*** or any of its sub-units, ***the Agency will assist the Consumers***, if the latter so desire, ***in retaining their rights in the groundwater supply***.

(E.g. Dunn Decl., Ex. E [AVEK's Water Service Agreement, Article 3a] [emphasis added].)

The agreements explicit reference to the Public Water Supplier groundwater rights, together with no reference to any AVEK groundwater disposes any notion that that AVEK has

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return flow rights. AVEK sold SWP water to its Public Water Suppliers customers and that they have complete and undivided interest to the SWP water purchased from AVEK. Stated simply, AVEK has no right to return flows.

B. Other Provisions of AVEK's Water Supply Contracts Recognize The Public Water Suppliers' Return Flow Rights

Civil Code Section 1641 provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Not only do AVEK's Water Supply Contracts lack any reservation of a return flow interest on the part of AVEK, but the Contracts establish return flow rights for the Public Water Suppliers.

For example, the Water Supply Contracts' Article 11 provides that once AVEK delivers the SWP water to the Public Water Suppliers, AVEK shall not be liable "for the control, carriage, handling, ***use***, disposal, distribution or changes occurring in the quality of such water supplied to the Consumer or for claim of damages of any nature . . . ; and the Consumer shall indemnify and hold harmless [AVEK] . . . from any such damages or claims of damages . . . ." (Dunn Decl., Ex. E [AVEK's Water Service Agreement] [emphasis added].) Thus, AVEK disclaims any responsibility and therefore any interest in the use of SWP water purchased by the PWS. By now arguing that it somehow has groundwater rights to return flows, AVEK asks the Court to adopt an absurd interpretation of the Water Supply Contracts that would allow AVEK to claim return flows while being indemnified and held harmless by the Public Water Suppliers for any liability associated with their return flow uses.

V. UNDER GENERAL PRINCIPLES OF WATER LAW, THE PUBLIC WATER SUPPLIERS HAVE THE RIGHT TO RETURN FLOWS OF STATE WATER PROJECT WATER THAT AVEK WHOLESALES AND DELIVERS.

A. Case Law Supports the Public Water Suppliers' Right To Recapture and Use the SWP Water Return Flows

In *City of Glendale* (1943) 23 Cal.2d 68 and *City of San Fernando* (1975) 14 Cal.3d 199, the California Supreme Court established the two basic principles governing return flows. First, the court in both cases held that an importer of water has the right to the return flows of water that the importer spreads into the groundwater basin with the intent of recapturing and using the water later. Second, the court in *City of San Fernando* held that—with respect to water that the

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importer sells and delivers to a local water district, which the local district then delivers to the ultimate user—the local water district has the right to the return flows. Taken together these cases support the conclusion that the Public Water Suppliers, not AVEK, have the right to return flows of SWP water that AVEK wholesales and delivers to the Public Water Suppliers. Moreover, the California Supreme Court's decisions have recently been upheld by the Court of Appeal in *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 301-303, which held that retail purchasers of SWP water are entitled to return flows attributed to their respective water purchases. Stated simply, retail purchasers like the Public Water Suppliers here, are the "importers" of SWP water. Thus, AVEK's claim that it has the right to the return flows of the latter water supply is contradicted by and inconsistent with these decisions.

1. The *City of Glendale* Decision

In *City of Glendale*, *supra*, the City of Los Angeles ("Los Angeles") transported water through its own aqueduct from the Owens River in northern California to the San Fernando Valley.[4] Los Angeles spread a portion of this water in gravel pits and spreading grounds "with the object of having it sink beneath the surface to join the other water in the valley and flow with it down the valley until it reached plaintiff's [Los Angeles'] diversion works." (*City of Glendale, supra*, 23 Cal.2d at 76.) Los Angeles sold another portion of the water to the farmers in the San Fernando Valley, with the intent that the waters, after they had been used and seeped into the ground, would then "join[] the normal and spread waters" as they flowed down the valley and would then be available for Los Angeles' use. (*Id.*) As the court noted, Los Angeles sold the water to the farmers because otherwise "the water would have seeped underground in other valleys without reaching a destination where it could be recovered." (*Id.*)

The California Supreme Court concluded that Los Angeles had the right to the return flows of both forms of water, because it was spreading some waters and selling other waters with the specific intent of transporting the waters through the valley and recapturing and using them

[4] Although Los Angeles is a member of, and purchases water from, the Metropolitan Water District of Southern California ("MWD"), the dispute in *City of Glendale* concerned only the water that Los Angeles transported through its aqueduct from the Owens River, and not the water that Los Angeles purchased from MWD.

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later. (*Id.*) The court started that Los Angeles "did not abandon that right when it spread the water for the purpose of economical transportation and storage." (*Id.*) "By availing itself of these natural reservoirs," the court stated, Los Angeles "spared its citizens the cost of financing the construction of additional dams. . . ." (*Id.*) Thus, *City of Glendale* holds that where an importer *transports* water from one location to another for its later use, such as by spreading the water or selling it to the ultimate user with the intent in both cases of recapturing and using the water later, the importer has the right to recapture and use the return flows, and has not "abandoned" the right.

City of Glendale does not support AVEK's claim that it has the right to the return flows of SWP water that AVEK sells to the Public Water Suppliers. It is one thing for an importer to transport water through a groundwater basin with the intent of recapturing and using the water later, as Los Angeles did in *City of Glendale*. It is an entirely different matter for the importer to sell and deliver the water to a local water public water supplier, which then delivers the water through its own distribution system to the ultimate user. In the former instance, the importer has put its own water in an underground bank for its later use; in the latter, the importer has sold and delivered the water to someone else, and cannot claim that the water somehow still belongs in its underground bank. In the former instance, the importer is the "importer" of its own water, but, in the latter, the local water agency has become the "importer," by importing the water through its own distribution system to the ultimate user.

2. The *City of San Fernando* Decision

In *City of San Fernando*, *supra*, the Cities of Los Angeles, Glendale and Burbank (respectively, "Los Angeles," "Glendale" and "Burbank") respectively claimed the right to the return flows of various waters that were imported into the Upper Los Angeles River Area ("ULARA"), which includes most of the San Fernando Valley. (*City of San Fernando, supra*, 14 Cal.3d at 208-209.) The imported waters fell into three categories: (1) the waters of the Owens River and Mono Lake Basin that Los Angeles diverted and transported through its own aqueduct to its facilities in the ULARA; (2) the waters of the Colorado River that Los Angeles purchased from the Metropolitan Water District of Southern California ("MWD"), which MWD delivered to

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the ULARA for Los Angeles' use; and (3) the waters of the Colorado River that Glendale and Burbank purchased from MWD, and that MWD delivered to the ULARA for Glendale's and Burbank's use. (*Id.* at 208-210, 255-256.)[5]

The California Supreme Court held, first, that Los Angeles had the right to the return flows of water that it imported from the Owens River and Mono Lake Basin through its own aqueduct to the ULARA, and that Glendale and Burbank did not have the right to these return flows. (*Id.* at 256-260.) The court stated that it had earlier decided this issue in *City of Glendale*, and that Los Angeles had the right to the return flows for the same reason that it was held to have the right in *City of Glendale*. (*Id.*)[6]

Second, and more importantly here, the Supreme Court held that all three cities—Los Angeles, Glendale and Burbank—had the right to return flows of Colorado River water that they had purchased from MWD, and that MWD had delivered to them. (*Id.* at 260-261.) Thus, Los Angeles had the right to return flows of Colorado River water that it purchased from MWD, and Glendale and Burbank had the right to return flows of Colorado River water that they purchased from MWD. *Id.* The court stated:

> Defendants Glendale and Burbank ***each delivers imported MWD water to users within its territory*** in the San Fernando basin and each has been extracting ground water in the same territory before and after the importation. Accordingly, ***each has rights to recapture water attributable to the return flow from such deliveries*** for the same reason that plaintiff [Los Angeles] has this right. These multiple rights necessitate the apportionment of the ground water derived from return flow into the amounts attributable to the important deliveries of each defendant and plaintiff.

(*Id.* at 260-261 [emphasis added].)

---

[5] In addition, of the water that Los Angeles transported from the Owens River and Mono Lake Basin through its aqueduct, Los Angeles spread "relatively small quantities" of this water into the groundwater basin, in order to recharge the basin and "recapture the water thus stored." (*City of San Fernando*, 14 Cal.3d at 256, & n. 48, 262-263.) The California Supreme Court held that Los Angeles had the right to the return flows from this spread water, just as it had held earlier in *City of Glendale*. (*Id.* at 263-264.)

[6] The court held that its earlier adjudication of Glendale's and Burbank's claims to the return flows in *City of Glendale* did not bar Glendale's and Burbank's claims in the instant case—because the earlier decision considered only return flows from agricultural, or "irrigation," use by "farmers," and the instant case involved return flows from non-agricultural uses—but that the same principles that apply in cases involving non-agricultural uses also apply in cases involving agricultural uses. (*City of San Fernando*, 14 Cal.3d at 213, 258-259.)

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The California Supreme Court's decision in *City of San Fernando* is determinative, here. The court held that "each [city] delivers imported MWD water to users within its territory," and "each has rights to recapture water attributable to the return flow from such deliveries" of MWD-imported water. (*Id.*) The court thus held that where MWD, which imports Colorado River water through its own aqueduct, sells and delivers the water to the three cities, which then provide the water to their customers for ultimate use, the return flows of the MWD-imported water belong to the three cities. In the instant case, AVEK stands in the same place as MWD and the Public Water Suppliers stand in the places of the three cities, because AVEK sells and delivers imported SWP water to the Public Water Suppliers, which then provide the water to their customers for ultimate use. Because the California Supreme Court held that the three cities have the right to the return flows of MWD-imported water in *City of San Fernando*, the Public Water Suppliers have the right to the return flows of AVEK-imported water here. *City of San Fernando* thus supports the Public Water Suppliers' argument that the return flows belong to them, and rejects AVEK's argument that the return flows belong to it.

AVEK argues that *City of San Fernando* is distinguishable because the Public Water Suppliers "are merely customers of AVEK," while the three cities in *City of San Fernando* were all "member agencies" of MWD, in that their representatives "were members of MWD's Board of Directors" and thus participated in the governance and policy decisions of MWD. (Motion at p. 11.) AVEK's attempt to distinguish *City of San Fernando* is misplaced, for three main reasons. First, although the three cities in *City of San Fernando* were and are member agencies of MWD, MWD still sells and delivers water to them pursuant to water delivery contracts between MWD and the cities. Thus, the relationship between MWD and the cities, with respect to MWD's sales and delivery of Colorado River water, is an arms-length contractual relationship, and is not one in which MWD is essentially selling and delivering water to itself. AVEK's claim that *City of San Fernando* is distinguishable because the cities are member agencies of MWD is belied by the actual contractual relationship between these entities. The fact that some cities that buy water from MWD may also be member agencies of MWD is of no relevance or consequence in determining the rights and interests of the parties in their contractual relationships.

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Second, MWD's relation to the cities are akin to AVEK's relationship to the Public Water Suppliers. For example, MWD's calculation of how much water each of the three cities in *City of San Fernando* are entitled is similar to how AVEK determines how much its SWP water should be delivered to its customers. Each city in *City of San Fernando*:

> has a preferential right to purchase from [MWD] for distribution . . . the proportion of the water served by [MWD] that, from time to time, shall bear the same ratio of all of the water supply of [MWD] as the total accumulation of amounts paid by such municipality to [MWD] on tax assessments and otherwise, excepting the purchase of water, toward the capital cost and operating expense of the District's works shall bear to the total of such payments received by [MWD] from all of its municipalities.

(Motion at p. 11.) In other words, water received by each city shall be reflective of the total amount paid by such city. Similarly, the Antelope Valley-East Kern Water Agency Law ("AVEK Law"), which authorizes, establishes, and empowers AVEK, contains a similar provision. Section 61.1 of AVEK Law provides:

> The ***agency shall whenever practicable, distribute and apportion the water purchased from the State of California*** or water obtained from any other source as equitably as possible ***on the basis of total payment by a district*** or geographical area within the agency regardless of its present status, of taxes, ***in relation that such payment bears to the total taxes and assessments collected from all other areas.***
>
> ***It is the intent of this section to assure each area or district its fair share of water based upon the amounts paid into the agency, as they bear relation to the total amount collected by the agency***.

(Stats. 1959, ch. 2146, p. 5114, Deering's Ann. Wat.–Uncod. Acts (2013) Act 580, § 61.1 [emphasis added].)

Third, nothing in *City of San Fernando* indicates that its analysis of the rights of the three cities was based on the fact that they were member agencies of MWD. The Court did not even mention this fact in its analysis. AVEK goes so far as to attempt to distinguish *City of San Fernando* on grounds that *City of San Fernando* did not even mention, and that were inconsequential in the Court's analysis. Thus, there is no basis for distinguishing *City of San Fernando* on grounds that the three cities that purchased MWD-imported water were members of MWD.

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3. The *City of Santa Maria* Decision

The recent appellate court decision in *City of Santa Maria, supra,* 211 Cal.App.4th 266, 301-302 cites *City of Glendale* and *City of San Fernando* in upholding the right of the City of Santa Maria to return flows. In that case the City was in the same position as the Public Water Suppliers here and there was no consideration that the return flow right should go to the Department of Water Resources or Central Coast Water Authority (who was the State Water Contractor like AVEK is here). Stated simply, retail purchasers like the Public Water Suppliers here, are the "importers" of SWP water.

AVEK spends numerous pages attempting, unsuccessfully, to distinguish *City of Santa Maria* from the present action by improperly referencing contracts and resolutions that allegedly assigned City of Santa Maria's public water suppliers specific entitlements to Santa Barbara County Flood Control and Water Conservation District's SWP contract rights; whereas here the Public Water Suppliers did not enter such agreements with AVEK. (Motion at pp. 13-16.) This is a distinction without a difference.

Like Central Coast Water Authority, the SWP wholesaler in *City of Santa Maria*, AVEK is a SWP wholesaler that delivers SWP water only when a retail water purchaser requests and pays for the SWP water. In fact, AVEK would only schedule water delivery from DWR for the quantity of water on which the Public Water Suppliers have advanced. (Dunn Decl., Ex. F [June 13, 1980 AVEK Letter].) It is only because of the purchase by the retail water purchasers, like District No. 40 here, and the City of Santa Maria in *City of Santa Maria* that SWP water is actually imported. If purchasers, like District No. 40 do not buy and import the SWP water into the Antelope Valley Basin, AVEK would not wholesale purchase the SWP water and the SWP water would not reach the Basin. (Dunn Decl., Ex. F [June 13, 1980 AVEK Letter].)

In recognizing the Public Water Supplier's right to the return flows, *City of Santa Maria* held the return flow right "means that one who brings water into a watershed may retain a prior right to it even after it is used." (*City of Glendale*, *supra*, 23 Cal.2d at 76–77.) The practical reason for the rule is that the importer should be credited with the "fruits … of his endeavors in bringing into the basin water that would not otherwise be there." (*City of Santa Maria, supra,* 211

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Cal.App.4th at 301.)

A wholesaler entity, like AVEK or Central Coast Water Authority in *City Santa Maria* only delivers SWP water when a public water supplier retailer or other purchaser pays for it. It is the public water supplier or other purchaser of SWP water who imports the SWP water into the Basin that would not otherwise be there. The actual water importers here, as in *City of Santa Maria* are the public water suppliers and other SWP purchasers because without their purchases, no SWP water would be imported into the Basin.

B. Matters Not Considered by the Courts in *City of San Fernando* and *City of Santa Maria* Should not Be Considered

In its Motion, AVEK improperly attempts to introduce extraneous records and information not stated in the *City of San Fernando* and *City of Santa Maria* decisions, or that does not appear in the records of those cases. (Motion at pp. 10-16.) Introduction of facts not considered by the deciding courts are inappropriate. (8 Witkin Sum. Cal. Law Const. Law § 1108 ["A case is only authority for a point decided, and the ratio decidendi is ordinarily discovered by examining the court's opinion."].) *Ratio decidendi*, or "[t]he principle of the case, is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." (*Achen v. Pepsi-Cola Bottling Co. of Los Angeles* (1951) 105 Cal.App.2d 113, 124.) Facts not treated by the court as material should not be considered as part of the principle of case. (*Id.*) While some courts have reviewed records on appeal and briefs to examine the facts and issues of the prior case, AVEK provided no authority that allows this Court to examine facts that were not sufficiently important or material to be included in either of the *City of San Fernando* and *City of Santa Maria* decisions and, in any event, certainly were not part of the appellate decision. (9 Witkin Cal. Proc. Appeal § 510.) The Public Water Suppliers hereby object to AVEK attempts to rewrite the *City of San Fernando* and *City of Santa Maria* decisions or attempt to introduce information and material here not stated in the decisions.

C. If the Wholesaler is an "Importer" of SWP Water, DWR is the "Importer"

AVEK's contention that it has the right to the return flows because it is the "importer" of the water, is internally inconsistent. DWR is the original "importer" of SWP water under

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AVEK's contradictory logic, because DWR develops the water, sells it to AVEK, and then transports it to AVEK through its—DWR's—own aqueduct. If, as AVEK argues, the "importer" of water has the right to the return flows irrespective of whether the importer sells and delivers the water to another entity, then DWR has the right to the return flows of the SWP water that it sells and delivers to AVEK, and AVEK does not have this right. AVEK cannot logically claim that—as between DWR and AVEK—AVEK has the right to the return flows even though DWR is the original "importer," but that—as between AVEK and the Public Water Suppliers—AVEK has the right to the return flows because it is the "importer." Although the SWP water would not be available to the Public Water Suppliers if AVEK had not delivered it to them, the SWP water would not be available to AVEK if DWR had not delivered it to AVEK. Thus, AVEK's argument that it has the right to return flows because it is the "importer" suffers from a flawed premise.

In fact, when AVEK sells and delivers SWP water to the Public Water Suppliers, the Public Water Suppliers themselves become the "importers" of the water, because they transport, and thus "import," the water from the places where they receive the water to the places where the water is ultimately used by households, farms, industrial plants, and other such places. Thus, there are numerous "importers" of SWP water, as the water is transported from the rivers of northern California to the ultimate places of use in southern California. AVEK's argument—that it alone is the "importer" and thus entitled to the return flows—improperly focuses on a single, isolated part of the long and complicated chain of distribution and importation of SWP water, rather than focusing on the chain as a whole. By focusing on an isolated part of the chain, AVEK's argument is wholly random and arbitrary.

VI. AVEK FAILS TO DEMONSTRATE INTENT TO RECAPTURE RETURN FLOWS FROM SWP WATER

AVEK asserts that it manifested its intent to recapture SWP water by filing a pleading claiming return flows. AVEK misreads the intent requirement set forth under *City of San Fernando*, which provides:

> The trial court made findings that no party delivered imported waters to others with the intent or purpose of later recapturing it . . .

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> . It is unnecessary for us to rule on any of these contentions because the parties' respective rights to the return flow derived from delivered imported water in this case do not depend on plaintiff's intent prior to importation. From the beginning of plaintiff's delivery of imported water to users in the San Fernando basin up to the present time, a return flow from such deliveries has augmented the basin's ground supply. ***From an even earlier time up to the present, plaintiff has relied and regularly drawn upon that same basin supply for its municipal water distribution system and has claimed the native waters of the basin under its pueblo right***. [] All these deliveries of imported water have been inside plaintiff's city limits and all plaintiff's extractions and diversions from the basin have occurred either within the city or in areas long since annexed to the city. ***Since the deliveries and withdrawals were thus "within plaintiff's reservoir" (City of L. A. v. City of Glendale, supra, 23 Cal.2d at p. 78), the allegation of an intent to recapture the return waters in the present complaint, filed in 1955, was sufficient for purposes of the present case to establish whatever rights would have arisen from plaintiff's manifestation of such an intent before commencing importation in 1915***. (*Stevens v. Oakdale Irr. Dist.*, *supra*, 13 Cal.2d 343 [emphasis added].)

AVEK selectively quotes from only the last sentence to the above paragraph to suggest that the mere filing of a pleading alleging return flows was sufficient to establish intent. (Motion at p. 7.) A complete reading of the *City of San Fernando* decision, however, indicates that an importer ***must*** make a showing of historical pumping of groundwater from the basin for its distribution system before it can rely solely on its pleading to prove intent to recapture return flows.

Here, AVEK has not demonstrated that it has pumped groundwater from the Basin; rather, AVEK simply alleges, without supporting evidence, that it "owns wells capable of recapturing return flows." (Motion at p. 8.) In fact, in an ordinance adopted on June 19, 2007—almost a year after AVEK filed its cross-complaint AVEK admits that it "*does not own or operate any facilities that can produce reclaimed water or native groundwater.*" (Dunn Decl., Ex. C at Appendix B, Ordinance O-07-2 [AVEK's 2010 UMWP] [emphasis added].)

By contrast, the Public Water Suppliers have been pumping groundwater from the Basin prior to the initiation of these coordinated actions, and have manifested their intent to pump by filing their Cross-Complaint, and thereby satisfying the intent requirement under *City of San Fernando*. Moreover, the Public Water Suppliers have asserted their return flow rights in pleadings since the inception of the adjudication proceedings.

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VII. AVEK'S COSTS ARGUMENTS DO NOT SUPPORT ITS RETURN FLOW CLAIM

AVEK dedicated pages to a convoluted and misleading argument that the Public Water Suppliers do not pay for the full costs of SWP water and therefore cannot own the full right and use of SWP water they purchase from AVEK. (Motion at pp. 17-20.) The costs arguments fail for many reasons. First, how much the Public Water Suppliers pay for their SWP water is irrelevant because the sale of SWP water by AVEK to the Public Water Suppliers is governed by the Water Supply Contracts. Article 13 of the Water Supply Contract provides:

> Payment of all charges shall be made at the rates, times and in the manner provided for in the "Rules and Regulations for Distribution of Water, Antelope Valley-East Kern Water Agency" . . . . On or before July 1st of each year, the ***Agency shall adopt by resolution of the Board of Directors the water rate in dollars per acre-foot*** which will be charged for water to be delivered in the next succeeding year.

(Dunn Decl., Ex. E [AVEK's Water Service Agreement] [emphasis added].)

AVEK has unilateral control and authority to set the price of SWP water it sells to the Public Water Suppliers and that rate may bear no relation with the actual costs of SWP water. In fact, AVEK Law ***requires*** AVEK to:

> ***shall fix such rate or rates*** for water in the agency and in each improvement district therein ***as will result in revenues which will pay the operating expenses of the agency, and the improvement district, provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due***. Said rates for 574 water in each improvement district may vary from the rates of the agency and from other improvement districts therein.

(Stats. 1959, ch. 2146, p. 5114, Deering's Ann. Wat.–Uncod. Acts (2013) Act 580, § 77 [emphasis added].)

In other words, rates paid by the Public Water Suppliers, in accordance with their respective Water Supply Contract, not only pays for SWP water, but also for numerous other operating expenses and debts incurred by AVEK. Thus, these rates bear no relation or relevance to whether either AVEK or the Public Water Suppliers are entitled to return flows.

Second, to the extent that the costs are relevant to the return flow causes of action,

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AVEK's calculation of costs per acre-feet of water are flawed because: (1) instead of calculating costs or amounts paid by AVEK "to insure participation [in SWP], and to construct, maintain and operate the 'infrastructure' needed to import, transport, treat and deliver [SWP] water, AVEK used the amount paid by taxpayers, not AVEK (Motion at 17.); and (2) AVEK's calculation includes costs associated with infrastructure, not water. (Dunn Decl., Ex. G [Aug. 11, 1987 AVEK letter] ["[T]he pricing policy of AVEK requires a water rate for deliveries outside the Agency service area that reflects full recovery of costs, including ***capital for associated capacity in Agency facilities, that are otherwise received from property taxes within the Agency service Area***."] [emphasis added].) Charges associated with infrastructure should not be included in costs of water because while payments made under AVEK's Water Supply Contract are based on the amount of SWP water received from AVEK, payments from SWP contractors to DWR bear no relation to whether the SWP contractor actually receives water from DWR. (*Antelope Valley-East Kern Water Agency v. Local Agency Formation Com.* ("*Agua Dulce*") (1988) 204 Cal.App.3d 990, 995 ["Payment of obligations is required even if contracting agencies have not yet received any water."] [citing *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 904 fn. 2].) Consequently, even if costs of SWP water are relevant to the return flows causes of action, AVEK's cost methodology is flawed.

Third, AVEK is likely receiving payments from taxpayers located outside of AVEK's jurisdiction. In *Agua Dulce*, *supra*, an association of homeowners sought to detach their property from the territories of AVEK and was granted relief by the Local Agency Formation Commission of Los Angeles County ("LAFCO") from further tax payments and assessments to AVEK. (*Agua Dulce*, 204 Cal.App.3d at 991-92.) AVEK initiated a writ of mandate proceeding to set aside LAFCO's decision, and the Court of Appeal agreed with AVEK that even though the homeowners have detached themselves from AVEK and can never benefit from SWP water delivered to the region by AVEK, they must continue to pay taxes and assessments to AVEK. (*Id.* at 995 [Under AVEK Law "the taxable property shall continue taxable by AVEK for the purpose of paying the bonded indebtedness to the same extent it would have been taxable if exclusion had not occurred."].) Consequently, although the property taxes and assessments may

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pay for AVEK's indebtedness, infrastructure and/or operational costs, they bear no relation to the actual cost of the SWP water.

Fourth, AVEK's cost calculation ignores payments by Public Water Suppliers' customers for "Capital Facilities Charges" they must pay to AVEK. (See Dunn Decl., Ex. D [list of the current Capital Facilities Charges].) Each Public Water Supplier customer who is not already connected to the AVEK's infrastructure must pay the stated Capital Facilities Charges for the connection.

Fifth, AVEK's cost calculation does not take into consideration of payments made by the Public Water Suppliers for AVEK's infrastructure that are not related to actual purchase of water. Article 5 of the Water Supply Contracts provides:

> Consumer shall make application to Agency for water service connections through which all or a portion of the water to be delivered pursuant to this Agreement shall be delivered to Consumer. Consumer agrees to pay any and all costs incurred by Agency for the design; construction, inspection, operation and maintenance of water service connections) serving Consumer. Application and payment for water service connections shall be in accordance with the procedures set forth in the Rules and Regulations. After the same have been Constructed, Agency shall own the water service coru1ections and all appurtenances and facilities a part thereof and related thereto.

(Dunn Decl., Ex. E [AVEK's Water Service Agreement].)

Under this provision, the Public Water Suppliers are to pay for water service connections built and owned by AVEK. Nowhere in AVEK's Motion are these payments considered.

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VIII. CONCLUSION

For each reasons stated above, AVEK's Motion for Summary Adjudication should be denied.

Dated: December 27, 2013

BEST BEST & KRIEGER LLP

By _____

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PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 5 Park Plaza, Suite 1500, Irvine, California, 92614. On December 27, 2013, I served the within document(s):

OPPOSITION TO ANTELOPE VALLEY-EAST KERN WATER AGENCY'S MOTION FOR SUMMARY ADJUDICATION

☒ by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

☐ by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on December 27, 2013, at Irvine, California.

Kerry V. Keefe

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