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*Exempt from filing fee pursuant to  
Gov't. Code Section 6103*

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14  
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
16 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

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

19 **ANTELOPE VALLEY**  
20 **GROUNDWATER CASES**

21 **Included Actions:**

22 Los Angeles County Waterworks District  
23 No. 40 vs. Diamond Farming Company, a  
24 corporation, Superior Court of California,  
25 County of Los Angeles, Case No.  
26 BC325201;

27 Los Angeles County Waterworks District  
28 No. 40 vs. Diamond Farming Company, a  
corporation., Superior Court of California,  
County of Kern, Case No. S-1500-CV-254-  
348;

Wm. Bolthouse Farms, Inc. vs. City of  
Lancaster, Diamond Farming Company, a  
corporation, vs. City of Lancaster, Diamond  
Farming Company, a corporation vs.  
Palmdale Water District, Superior Court of  
California, County of Riverside, Case Nos.  
RIC 353840, RIC 344436, RIC 344668.

Judicial Council Coordination Proceeding  
No. 4408

**Santa Clara Case No.**  
**1-05-CV-049053**  
The Honorable Jack Komar

**NOTICE OF MOTION AND MOTION  
IN LIMINE OF ANTELOPE VALLEY-  
EAST KERN WATER AGENCY RE  
ADMISSION OF EVIDENCE AND  
ARGUMENT RELATING TO RETURN  
FLOWS; ATTACHED SUPPORTING  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: May 13, 2013  
Time: To be determined  
Dept.: To be determined  
Judge: Hon. Jack Komar

Trial Date: May 28, 2013 (Phase IV)  
Time: 9:00 a.m.

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1 **TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**


2 **PLEASE TAKE NOTICE THAT** on May 13, 2013, at 9:00 a.m., or as soon thereafter  
3 as the matter may be heard in a department to be determined of the Superior Court of California,  
4 County of Los Angeles, cross-complainant, the Antelope Valley-East Kern Water Agency  
5 ("AVEK"), hereby submits its *in limine* motion for an Order of Court precluding the  
6 introduction of any evidence or argument that any person other than AVEK is entitled to  
7 recapture and use the Return Flows resulting from foreign water AVEK has imported, and will  
8 import, from outside the watershed of the Adjudicated Basin.

9 The Court is further requested to direct all parties and their counsel to caution, warn, and  
10 instruct all of their respective witnesses not to make any reference to such evidence or argument,  
11 and to follow the same Order.

12 This motion is made under the provisions of Evidence Code Sections 352 and 350, and  
13 is based on the attached supporting Memorandum of Points and Authorities; all pleadings,  
14 papers, and records in this action; the evidence presented at the hearing of this matter; and any  
15 evidence received at the hearing.

16 Dated: March 29, 2012

**BRUNICK, McELHANEY & KENNEDY**

17  
18 By:   
19 WILLIAM J. BRUNICK  
20 LELAND P. MCELHANEY  
21 Attorneys for Cross-Complainant,  
22 ANTELOPE VALLEY-EAST KERN  
23 WATER AGENCY  
24  
25  
26  
27  
28

1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2   **I.**

3   **INTRODUCTION**

4           The California Supreme Court has clearly stated that the person who imports into a  
5 groundwater basin foreign water from another watershed is the person entitled to recapture and  
6 use the return flows resulting from such imported water. By far, AVEK is the largest importer  
7 of foreign water into the Adjudicated Basin (AVAA). Accordingly, as a matter of law, AVEK  
8 is entitled to recapture and use the Return Flows which result from the foreign water AVEK has  
9 imported, and will continue to import, into the AVAA.

10          AVEK's taxpayers in the counties of Kern, Los Angeles and Ventura have directly  
11 contributed, and continue to contribute, to the construction of State Water Project facilities  
12 which transport and deliver into the AVAA foreign water which AVEK purchases from the  
13 State of California (AVEK Imported Water). AVEK contracts directly with the State of  
14 California for the delivery into the AVAA of AVEK Imported Water, and makes payments  
15 directly to the State of California for such AVEK Imported Water. AVEK taxpayers also have  
16 directly paid for, and continue to pay for, construction of the internal treatment and distribution  
17 systems whereby AVEK Imported Water is eventually delivered to AVEK's agricultural,  
18 industrial and municipal customers both within and outside the AVAA.<sup>1</sup>

19          Consequently, the water which augments the AVAA's groundwater (through Return  
20 Flows from AVEK Imported Water) is imported by AVEK **alone**. AVEK has not assigned or  
21 transferred to any other person the right to recapture or use such Return Flows; nor has AVEK  
22 abandoned or relinquished its right to recapture and use the Return Flows resulting from AVEK  
23 Imported Water. Therefore, as a matter of law, AVEK alone has the right to recapture and use  
24 all Return Flows attributable to AVEK Imported Water; accordingly, AVEK's customers  
25

---

26  
27          <sup>1</sup> Before AVEK Imported Water is delivered to any of its municipal or industrial customers  
28 (including the PWS), it is first treated at AVEK water treatment facilities constructed and operated  
by AVEK.

1 (including the Public Water Suppliers [PWS]) have no ownership rights in, or right to recapture  
2 or use, the Return Flows resulting from AVEK Imported Water.<sup>2</sup>

3 Where, as here, the importer has not assigned, transferred, abandoned or otherwise  
4 relinquished its right to Return Flows, no court has ever denied an importer's claimed right to  
5 recapture and use Return Flows attributable to the water the importer introduces into a basin,  
6 in favor of the competing claimed right of the importer's customers to recapture and use the  
7 same Return Flows.

## 8 II.

### 9 THE "IMPORTER" HAS THE RIGHT TO RECAPTURE AND USE THE 10 RESULTING RETURN FLOWS

11 An importer's right to recapture and use Return Flows has been clearly established and  
12 repeatedly affirmed by the California Supreme Court (*City of Los Angeles v. City of Glendale*,  
13 23 Cal.2d 68, 76-78; *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 257-259, 262-  
14 263)

## 15 III.

### 16 AVEK IS THE "IMPORTER" OF FOREIGN WATER

17 In 1959, residents of Kern, Ventura and Los Angeles Counties formed the Antelope  
18 Valley-East Kern Water Agency ("AVEK") for the purpose of contracting with the State of  
19 California for the purchase and delivery of Supplemental Water. (California Water Code  
20 Appendix 98-1, et seq.) AVEK services a land area of 2,400 square miles in the three counties,  
21 including land areas both inside and outside the AVAA; the adjudicated boundaries in this  
22 Action represent 58% of the total land area service by AVEK.

23 In 1962, AVEK signed a Water Supply Contract with the State (Exhibit 1 hereto) to  
24 insure delivery of AVEK imported Water to supplement Antelope Valley Groundwater; in 1963,  
25

---

26 <sup>2</sup> Two other State Water Contractors (Palmdale Water District and Littlerock Creek Irrigation  
27 District) also import foreign water into the AVAA, although in much smaller quantities; absent contract  
28 arrangements to the contrary, the Return Flows which result therefrom belong to those "importers" as  
well.

1 the Contract was validated by Court action. Of the 29 State Water Contractors, AVEK has the  
2 third largest water allocation, which allows AVEK to take an annual maximum amount of up  
3 to 141,000 AF of Imported Water; however, due to environmental, supply and climate  
4 limitations inherent in the State Water Project, AVEK's contract with the State of California has  
5 a delivery reliability factor of approximately 60% of AVEK's annual allocation of 141,000 AF.

6 Initial funds for the construction the State Water Project facilities were obtained through  
7 a \$1.75 billion bond issue, ratified by California voters in 1960. AVEK taxpayers from the three  
8 counties have paid approximately \$383,254,215.00 for all State Project costs.

9 Twenty-two State Water Project dams and reservoirs are used to capture and store run-off  
10 from Northern California Mountains and Valleys. AVEK's Imported Water is pumped from the  
11 Sacramento Delta down the 444 mile aqueduct. After crossing the Techachapis, the aqueduct  
12 divides into the East and West branches; AVEK receives its Imported Water through the  
13 aqueduct's East branch.

14 In 2011 and 2012 alone, AVEK delivered to its agricultural, industrial and municipal  
15 customers a total of 76,881 AF of AVEK Imported Water within the AVAA. The total Return  
16 Flows resulting therefrom are estimated to be approximately 29,343 AF. The totals in earlier  
17 years are even greater.<sup>3</sup>

18 The bulk of AVEK'S Imported Water is treated and distributed to AVEK customers  
19 through the Domestic-Agricultural Water Network (DAWN) Project facilities.<sup>4</sup> The DAWN  
20 Project consists of: more than 100 miles of distribution pipeline; four water Treatment Plants;  
21 four 8-million gallon storage reservoirs near Mojave; one 3-million gallon capacity reservoir at  
22 Vincent Hill Summit; and one 1-million gallon reservoir at Godde Hill Summit.

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23  
24 3 Although this calculation was based the percentages of 33% and 39% respectively for  
25 Agricultural use versus M&I use, AVEK's consultant has opined as to the assumed M&I percentage of  
26 39% that the 11% component thereof for outdoor irrigation return flow is not supported and is  
27 overstated, and the 17% component thereof for septic disposal is also overstated but by a smaller  
28 amount.

4 AVEK also delivers to Antelope Valley farmers untreated irrigation water from the aqueduct  
and AVEK owned turnouts.

1 four 8-million gallon storage reservoirs near Mojave; one 3-million gallon capacity reservoir at  
2 Vincent Hill Summit; and one 1-million gallon reservoir at Godde Hill Summit.

3 The DAWN Project was financed by a local \$71 million bond issue authorized by AVEK  
4 voters in 1974. The first bond issue, Series A, of \$23 million was used for project start-up  
5 construction; AVEK taxpayers have completely repaid the Series A bonds. The second bond  
6 issue in 1976, Series B, of \$19 million has also been completely repaid by AVEK taxpayers. In  
7 1977, the \$18 million Series C bond issue authorized phase three of the DAWN facilities  
8 construction; the Series C bonds have been completely repaid by AVEK taxpayers.

9 In August, 1986, the final Phase of the DAWN Project construction commenced when  
10 AVEK's Board of Directors authorized expenditure of the remaining \$11 million in bonds,  
11 Series D. These funds were used to construct internal local facilities to distribute AVEK  
12 Imported Water

13 Reference is made to the attached AVEK map (Exhibit 2) which shows existing facilities  
14 and improvements under construction including future banking improvements. The Water  
15 Supply Stabilization Project No. 2 (WSSP2) is a groundwater banking project that will increase  
16 the reliability of the Antelope Valley Region's water supplies by storing excess water available  
17 from the State Water Project (SWP) during wet periods and recovering it to serve to customers  
18 during dry and high demand periods or during a disruption in deliveries from the SWP.

19 By banking excess water for future use, the WSSP2 will significantly reduce the Region's  
20 dependence on constant water deliveries from the Delta. The WSSP2 will also help to stabilize  
21 the groundwater basin and preserve agricultural land and open space. The groundwater bank  
22 obtains the SWP water from the California Aqueduct's West Feeder Turnout, which is then  
23 delivered to the water banking site near West Avenue B-8 and 140<sup>th</sup> Street West via the  
24 Agency's existing West Feeder Pipeline in Los Angeles County.

25 From 2011 through 2012, AVEK has banked a total of approximately 36,502 AF, and  
26 claims the right to recapture 90% of that amount, or 32,851 AF, as the Return Flow resulting  
27 therefrom.



1 The West Feeder pipeline is part of the DAWN Project improvements and is a 22 mile  
2 transmission pipeline with a diameter that varies between 33 and 60 inches, that delivers raw  
3 water from the California Aqueduct to AVEK's Rosamond Water Treatment Plant and to  
4 agricultural water users along the pipeline route. AVEK Imported Water is delivered from the  
5 West Feeder through 36-inch diameter turnouts with recharge pipelines to the recharge basins  
6 located to the west and east of 140<sup>th</sup> St. West. The groundwater bank site includes about 1,500  
7 acres of land on which the Agency plans to construct temporary low berm (3 ft or less) recharge  
8 basins that allow the Agency to either spread water for recharge or lease the property for  
9 farming. The land on which the recharge area will be constructed has historically been used for  
10 growing alfalfa and row crops. The recharge area was selected based on studies performed by  
11 the United States Geological Survey (USGS).

12 Based on USGS's work, it is expected that the percolation rate of raw water placed in the  
13 recharge area will average about six inches per day. Though recharge operations can be  
14 accomplished year round as SWP water is available, the primary recharge period is planned for  
15 four months per year (November through February). Over 120 days, with an anticipated  
16 minimum recharge rate of 0.5 ft/Day, about 23,000 AF could be recharged over a 400 acre site.  
17 Any remaining parcels of the property can be leased to grow alfalfa and/or row crops or left  
18 fallowed when water is not being recharged.

19 When deemed necessary by the Agency due to water supply shortfalls from SWP water  
20 or other operational strategies, the Agency will recover not more than 90% of the volume of  
21 water that is put into the groundwater bank. Recovery operations will take place with the  
22 construction of 10 groundwater recovery wells with depths averaging about 600 feet. Well  
23 yields will range between 500 gpm to 2,800 gpm. The recovered groundwater will be collected  
24 with a 4+ mile well collection system ranging in pipeline diameters from 12 to 30-inches. This  
25 network will connect each well to the bank's Storage and Treatment site at the intersection of  
26 West Avenue B and 135<sup>th</sup> Street West where the well water will be stored and chlorinated. The  
27 Storage and Treatment Site will include a 2,700 sf Concrete Unit Masonry building which will  
28 house a chlorination station (1,600 gals of Sodium Hypochlorite storage) The storage

1 component of the site will hold one 4-Million gallon steel tank with plans for the construction  
2 of an identical future tank for a total storage capacity of 8 MG. From the Storage and Treatment  
3 Site, water will be delivered through the construction of a new 5.5 mile 48-inch diameter  
4 transmission pipeline capable of delivering 45 MGD. The transmission line runs along Avenue  
5 B from the Storage and Treatment Site on 135<sup>th</sup> Street West and Avenue B, and connects to  
6 AVEK's existing South North Intertie Pipeline (SNIP) at the intersection of Avenue B and 80<sup>th</sup>  
7 Street West.

8         The SNIP Pipeline and Pump Station/Turnout Project constructed in 2011 includes 15  
9 miles of 48-inch diameter pipe which connects the existing 14 MGD Rosamond Water  
10 Treatment Plant and the 90 MGD Quartz Hill Water Treatment Plant by utilizing the ability to  
11 move water through the Los Angeles County Water Works District's (LACWWD) pipelines.  
12 Water will be able to move in either direction based on deficiencies in supply, by utilizing the  
13 SNIP turnout at 80<sup>th</sup> Street West and Avenue H. The SNIP Turnout is capable of moving water  
14 to and from the LACWWD at the rate of about 28 MGD. The SNIP Pump Station includes three  
15 750 hp pumps with variable frequency drives capable of pumping about 6,500 gpm each. With  
16 the use of the SNIP pipeline, banked water at the WSSP2 site can be served directly or through  
17 existing transfer agreements to any area of the AVAA. In order to serve water from the WSSP2  
18 site to the LACWWD through the existing SNIP Turnout at Avenue H and 80<sup>th</sup> Street West,  
19 AVEK plans to construct a pump station (currently under design) capable of delivering up to 28  
20 MGD of water through the existing turnout. The pump station would consist of three 150 hp  
21 pumps with variable frequency drives capable of delivering about 6,500 gpm, each. The Agency  
22 also plans to build a future pump station capable of delivering 45 MGD from the WSSP2 site  
23 to the Quartz Hill Water Treatment Plant. This will include construction of an extension to  
24 AVEK's SNIP Pipeline from the intersection of Avenue H and 80<sup>th</sup> Street West to the Quartz  
25 Hill Water Treatment Plant along with the construction of a 45 MGD Pump Station equipped  
26 with five 1,200 hp pumps capable of delivering about 6,500 gpm, each. Other facility  
27 improvements to allow for better distribution of water since the DAWN Project Improvements  
28 include the Parallel South Feeder consisting of 7.5 miles of pipelines with diameters of 36 to 48

1 inches paralleling the existing DAWN funded South Feeder and including the addition of 9 MG  
2 of storage at the Quartz Hill Water Treatment Plant.

3 Also, a Tank Farm extension of approximately 2 miles of 30-inch diameter pipeline was  
4 constructed to provide water to the LACWWD's major water storage facility at Avenue M and  
5 6<sup>th</sup> Street East. These improvements allow banked water from the WSSP2 site to be distributed  
6 to many of AVEK's retail customers, including the Federal Government.

7 As part of future groundwater banking operations, AVEK currently owns 1,500 acres in  
8 Kern County adjacent to the West Feeder (raw water) and SNIP Pipeline (treated water) in the  
9 vicinity of 80<sup>th</sup> Street West and Gaskell Avenue. Environmental documentation has not been  
10 completed for the proposed recharge project, but existing agricultural wells could potentially be  
11 pumped to move water to the West Feeder and then onto the Rosamond Water Treatment Plant  
12 where the water could be treated and delivered to many of AVEK's customers.

13 Accordingly, since the inception of the State Water Project, AVEK taxpayers have paid  
14 a total of \$475,777,218.84 on their property tax bills to insure participation in the California  
15 State Water Project, and to construct AVEK's treatment and distribution systems for the delivery  
16 of AVEK Imported Water.

17 AVEK makes payments directly to the State of California for the AVEK Imported Water  
18 purchased by it, which is later sold and delivered to AVEK's agricultural, industrial and  
19 municipal customers. Water rates charged to AVEK customers recover the cost of supply,  
20 treatment and delivery. Thus, AVEK taxpayers both within and outside the Adjudication  
21 Boundaries have subsidized, and continue to subsidize AVEK Imported Water which AVEK  
22 sells and delivers to its customers, including without limitation the Public Water Suppliers and  
23 many other named parties in this Action.

24 AVEK's Board of Directors has determined that, in the exercise of AVEK's right to  
25 recapture and control the use of return flows, and except in emergencies (i.e., in the event  
26 AVEK's allocation of State Project Water is not sufficient to meet the critical needs of its  
27 customers, requiring AVEK to recapture Return Flows to meet those needs), AVEK's  
28 preference is to maintain all Return Flows from AVEK Imported Water in the Basin, to

1 gradually increase the groundwater supply and raise water levels over a period of time, and  
2 thereby augment the AVAA's available supply. This practice will benefit AVEK's existing and  
3 future customers and taxpayers, both inside and outside the AVAA.<sup>5</sup>

4 IV.

5 **USE OF IMPORTED WATER BY OTHERS DOES NOT IMPAIR OR NEGATE**  
6 **AVEK'S RIGHT TO RECAPTURE AND USE THE RETURN FLOWS**  
7 **ATTRIBUTABLE TO ITS IMPORTED WATER**

8 In *City of Los Angeles v. City of Glendale*, the Supreme Court succinctly noted:

9 The use by others of this water as it flowed to the subterranean basin does not cut  
10 off [the importer's] rights. In *Stevens v. Oakdale Irr. Dist.*, 13 Cal.2d 343 . . . , it was  
11 recognized that one who brings water into a watershed may retain a prior right to the  
12 water after permitting others to use the water for irrigation. That case, involving water  
13 used in irrigation and then reappearing in a creek bed within the district, held that the  
14 district's rights to the water were superior to those of a lower landowner who had  
15 appropriated it. . . .

16 (23 Cal.2d 68, 76-77.)

17 The Supreme Court reaffirmed this point in *City of San Fernando*, as follows:

18 In *City of Los Angeles v. City of Glendale*, *supra*, 23 Cal.2d 68, . . . It was held  
19 that [Los Angeles] had a prior right to the water when it was imported (23 Cal.2d at p.

20  
21 5 Consistent with the foregoing, AVEK's Cross-Complaint in this Action contends: "The rights  
22 of Cross-Defendants, if any, are limited to the native supply of the Basin and/or their own imported  
23 water. Cross-Defendants' rights, if any, do not extend to water imported into the Basin by [AVEK]"  
24 (AVEK Cross-Complaint, ¶ 32); "As the primary importer of supplemental State Project water into the  
25 Basin, [AVEK] has the sole right to recapture return flows attributable to its State Project water. The  
26 rights of Cross-Defendants, if any are limited to the native supply of the Basin and/or to their own  
27 imported water, and do not extend to groundwater attributable to [AVEK's] return flows" (Id., ¶ 38).

28 Additionally, although AVEK's preference is to maintain the Return Flows in the Basin to  
replenish the AVAA and increase the amount of water available for future use, raise well levels and  
address the overdraft, nonetheless, AVEK has not abandoned its right to Return Flows from AVEK  
Imported Water; AVEK continues to have the right and intent to recapture and use Return Flows from  
AVEK Imported Water should emergency conditions warrant, as previously explained.

1           76) and that “[t]he use by others of this water as it flowed to the subterranean basin  
2           does not cut off plaintiff’s rights.” (23 Cal.2d at p. 77 ...)

3           (14 Cal.3d 199, at p. 257; bold print added)

4           The fact that the water drawn from a tap into a portable receptacle becomes the  
5           customer’s disposable personal property [citation omitted] **does not impair [the**  
6           **importer’s] right to recapture the return flow which is in fact produced by**  
7           **deliveries of its imported water.**

8           ( *City of Los Angeles v. City of San Fernando* [*City of San Fernando*], 14 Cal.3d 199, at 260;  
9           *City of L.A. v. City of Glendale*, 23 Cal.2d at 78; bold print added.)

10          Therefore, the law is quite clear that “the use by others” (e.g., the Public Water Suppliers)  
11          of AVEK Imported Water does not in any way impair or negate AVEK’s right to control and,  
12          if necessary, recapture and use the return flows derived from AVEK Imported Water.

13          In *City of San Fernando, supra*, the Supreme Court also clearly noted:

14          . . . the allegation of an intent to recapture the return waters in the present complaint,  
15          filed in 1955, was sufficient for purposes of the present case to establish whatever rights  
16          would have arisen from the plaintiff’s manifestation of such intent before commencing  
17          importation in 1915. (*Stevens v. Oakdale Irr. Dist., supra*, 13 Cal.2d 343.)

18          (14 Cal.3d, at 259-260)

19          The Court’s foregoing explanations demonstrate that: (1) the actual “importer” of foreign  
20          water is the person who has the right to recapture and determine the use of Return Flows; (2)  
21          AVEK’s allegation in its cross-complaint of its intent to recapture the return flows is “sufficient  
22          . . . to establish whatever rights would have arisen from [AVEK’s] manifestation of such intent  
23          before commencing importation in” 1976; and, (3) the right to recapture and control the use of  
24          Return Flows enjoys a “priority” over overlying rights and rights based on appropriation of  
25          native groundwater supply.

26          ///

27          ///

V.

**THE REFERENCED DECISIONS DO NOT SUPPORT THE PUBLIC WATER  
SUPPLIERS' CLAIM**

In *City of San Fernando, supra*, the Supreme Court concluded:

Defendants Glendale and Burbank each delivers imported MWD water to users within its territory in the San Fernando basin . . . Accordingly, each has right to recapture water attributable to the return flow from such deliveries for the same reason that [Los Angeles] has such a right.

(14 Cal.3d 199, 260-261)

In sum, we conclude that . . . plaintiff [Los Angeles] and defendants Glendale and Burbank each has a prior right to return waters in the San Fernando basin attributable to its deliveries of imported water to users within its own territory in that basin. The imported water to which we refer is the Owens water delivered by plaintiff **and the MWD water delivered by plaintiff and each of those defendants.**

(Id., at 262, bold print added.)

Accordingly, in *City of San Fernando*, the Supreme Court held that Los Angeles, Glendale and Burbank were entitled to the return flows derived **from MWD imported water**. On the surface, this might appear to be inconsistent with the Supreme Court's repeated statements that return flows belong to the "importer," not to the importer's customers or subsequent users.

Nonetheless, based on the foregoing language, the PWS in this action may attempt to argue that they (like Glendale and Burbank in *City of San Fernando*) are entitled to the return flows attributable to the AVEK Imported Water which AVEK sold and delivered to the PWS. That argument, if made, is entirely without merit for the following reasons:

1. In the *City of San Fernando*, the relationship between MWD and the cities of Burbank, Glendale and Los Angeles differed significantly from the relationship between AVEK and the PWS in the case at bar. In the case at bar, the PWS are merely customers of AVEK - nothing more and nothing less! In the *City of San Fernando*, however, the cities of Burbank, Glendale,

1 and Los Angeles were all “member agencies” of MWD; their representatives were members of  
2 MWD’s Board of Directors; and, thus, each were directly involved in the governance and policy  
3 decisions of MWD, including determining the rates those cities were required to pay for MWD  
4 water.<sup>6</sup>

5 Regarding that special relationship, the Superior Court in *City of San Fernando* made the  
6 following findings:

7 MWD was formed in 1929 of 13 original member agencies, including Los Angeles,  
8 Glendale and Burbank. In 1940, MWD completed construction of its aqueduct for  
9 delivery of water from the Colorado River to the South Coastal Plain of California, within  
10 which ULARA [Upper Los Angeles River Area] is located. In 1971, San Fernando  
11 became a member agency in MWD.

12 (Findings of Fact and Conclusions of Law [FFCL], dated January 26, 1979, Exhibit 3 hereto,  
13 22:23-24:1.)

14 Los Angeles has constructed and operates its Owens-Mono Aqueduct, and has an  
15 accumulated capital investment therein of \$196,570,000. In addition, Los Angeles is a  
16 member agency of MWD and therefrom acquires imported water supplies from the  
17 Colorado and State Aqueduct. During the period 1929-1976, Los Angeles has paid  
18 \$335,293,633 to MWD. Glendale and Burbank are also member agencies of MWD and  
19 have respectively paid a total of \$16,168,252 and \$15,205.171 in taxes to MWD during  
20 said period. San Fernando became a member agency of MWD in 1971 and assumed a  
21 capital obligation for annexation fees of \$2,271,421 and has from the date of said  
22 annexation to July 1, 1976, paid taxes to MWD in the amount of \$553,310.

23 (FFCL, Exhibit 3, 30:18-31:1)

24 MWD’s “History and First Annual Report, Commemorative Edition,” June 2011 (Exhibit  
25 5 hereto) notes the following:

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26  
27 <sup>6</sup> The Metropolitan Water District Act, Section 133, provides that MWD’s Board of Directors  
28 [which includes representatives of Burbank, Glendale and Los Angeles] “shall fix the rate or rates at  
which water shall be sold” to those “member agencies.”

1 The powers of the District are vested in a board of directors consisting of at least one  
2 representative from each municipality . . . (p. 311)

3 Each municipality, whose corporate area is included within the District, has a  
4 preferential right to purchase from the District for distribution by such municipality . . .  
5 the proportion of the water served by the District that, from time to time, shall bear the  
6 same ratio to all of the water supply of the District as the total accumulation of amounts  
7 paid by such municipality to the District on tax assessments and otherwise, excepting the  
8 purchase of water, toward the capital cost and operating expense of the District's works  
9 shall bear to the total of such payments received by the District from all of its  
10 municipalities.

11 (Id., p. 312; see, also, the Metropolitan Water District Act, Section 135.)

12 Therefore, as "member agencies" (with their representatives sitting on MWD's Board of  
13 Directors), the cities of Burbank, Glendale and Los Angeles, in a very real sense, were the  
14 MWD. As a practical matter, MWD does not have any existence separate from its member  
15 agencies. This extremely close relationship and interconnection between MWD and its member  
16 agencies undoubtedly explains why (1) MWD was not made a party to the proceeding in *City*  
17 *of San Fernando*, and (2) there is no indication therein that MWD ever disputed Los Angeles'  
18 claim that MWD's member agencies were entitled to recapture and use the return flows from  
19 MWD delivered water.<sup>7</sup>

20 In the case at bar, however, the PWS are not "member agencies" of AVEK, their  
21 representatives do not sit on AVEK's Board of Directors, and they do not determine the rates  
22 paid for the AVEK Imported Water they receive. Like so many others, the PWS are merely  
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25

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26 <sup>7</sup> That MWD was not a party in *City of San Fernando* is demonstrated in the Court's Findings  
27 of Fact and Conclusions of Law, Exhibit 3 hereto, pp. 7-10, and Attachments "B," "C," and "D;" and  
28 also in the Judgment, entered January 26, 1979, Exhibit 4 hereto, pp. 21-22, and Attachments "B," "C,"  
and "D."



1 “customers” of AVEK. As customers of AVEK, the PWS have no special claim or right to the  
2 return flows resulting from AVEK Imported Water.<sup>8</sup>

3 2. Although there is no indication in *City of San Fernando* that MWD ever claimed the  
4 return flows that were granted to its member agencies, or ever manifested an intention to  
5 recapture return flows from water sold to those cities, in the case at bar, AVEK has consistently  
6 claimed the right to recapture and use return flows attributable to AVEK Imported Water – that  
7 claim and intention is clearly stated in AVEK’s cross-complaint filed herein on August 30, 2006.

8 3. In *City of San Fernando*, MWD’s right to return flows was not litigated by the parties,  
9 nor determined by the Court. The Supreme Court did state over and over again, however, that:

10 The purpose of giving the right to recapture returns from delivered imported water . . .  
11 is to credit **the importer** with the fruits of his expenditures and endeavors in bringing  
12 into the basin water that would not otherwise be there.

13 (14 Cal.3d, at p. 261, bold print added)

14 In *City of L.A. v. City of Glendale*, *supra*, 23 Cal.2d 68, this court affirmed a  
15 judgment which declared that plaintiff [the importer] had prior rights, as against  
16 defendants Glendale and Burbank, to “return waters” beneath the San Fernando Valley.  
17 These return waters [from the Owens River Valley] were described as those **which were**  
18 **imported by plaintiff** and “sold to the farmers of the San Fernando Valley, and which  
19 settle after use beneath the surface and joint the mass of water below, as anticipated when  
20 sold.” (23 Cal.2d at p. 72.) It was held that **plaintiff had a prior right to the water**  
21 **when it was imported** (23 Cal.2d at p. 76) and that “[t]he use by others of this water  
22 **as it flowed to the subterranean basin does not cut off plaintiff’s rights.**” (23 Cal.2d  
23 at p. 77.)

24 (14 Cal.3d, at 257.)

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27 <sup>8</sup> Likewise, Los Angeles also delivered water “**to public entities**” (14 Cal.3d at 255, fn. 45).  
28 Nonetheless, the Court determined that Los Angeles **alone** had the right to return flows from all  
water it imported from the Owens River Valley or purchased from MWD.

1 For the foregoing reasons, the decision in *City of San Fernando* does not support the PWS  
2 claims to the return flows from AVEK Imported Water. To the contrary, the decisions in *City*  
3 *of Los Angeles v. City of Glendale* and *City of Los Angeles v. City of San Fernando* continue to  
4 stand for the proposition that the person who actually “imports” water from a foreign watershed  
5 is the person entitled to recapture and use the return flows resulting from such imported water  
6 – in the case at bar, that person is AVEK (and the other state water contractors).<sup>9</sup>

7 VI.

8 **AVEK HAS NOT DISPOSED OF ITS RIGHTS TO RETURN FLOWS**

9 **BY CONTRACT**

10 A producer of return flow from foreign water may dispose of the same by contract [*Hawn*  
11 *v. De Vours* 97 Cal.App.2d 841, 844.]

12 The right of the producer to dispose of surplus foreign water by contract, as  
13 against the claims of appropriators of the excess, was sustained by the supreme court in  
14 a decision that construed the terms of the contract. [*Stevinson Water Dist. v. Roduner*, 36  
15 Cal.2d 264, 267-270 (1950).] There was a dispute as to whether water released in excess  
16 of an amount guaranteed by the contract was abandoned water. The parties to whom the  
17 water was delivered were required by the agreement to take all water in excess of the  
18 guaranteed quantity that could be safely carried in their canal. **The contract provided**  
19 **that all of the return flow in excess of the water guarantee should not be deemed**  
20 **water abandoned, but should be deemed water delivered for the use of the**  
21 **contracting party, subject to the right of the producer to provide in the future for**  
22 **its use by others.** The contractual right was held to extend to all water released pursuant

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26 <sup>9</sup> Unless an importer expressly assigns, transfers, abandons or otherwise relinquishes its right to  
27 return flows, that right belongs to the “importer” (as the Supreme Court has repeatedly stated). Whether  
28 a customer is a private or public party, no reported California decision has denied an importer’s claim  
to return flow in favor of the importer’s customer’s claim to such return flows (absent the importer’s  
express assignment or transfer, or abandonment of such right).

1 to the agreement, and the excess over the quantities guaranteed did not constitute  
2 abandoned water.

3 The return flow from foreign water in the *Stevinson Water Dist.* Case . . . was  
4 released into Owens Creek and flowed down the creek to the plaintiffs' canal. . . **this**  
5 **decision sanctioned the right of the producer of imported water to provide by**  
6 **contract for its recapture from a natural channel at a point outside the boundaries**  
7 **of the importing district, into which channel the district had allowed the return flow**  
8 **to collect for such purpose,** as against claimants upstream from the canal of the  
9 contracting party who claimed appropriative rights in the return flow.

10 (Hutchins, *The California Law of Water Rights*, at 397-400.)

11 AVEK has not executed any writing conveying its right to recapture or use the Return  
12 Flows resulting from AVEK Imported Water. To the contrary, AVEK's contracts with its  
13 customers for delivery of AVEK Imported Water do not assign, convey or transfer to AVEK  
14 customers, or to anyone else, ownership of, or the right to recapture or use, Return Flows  
15 attributable to AVEK Imported Water; indeed, AVEK's Customer Agreements do not mention  
16 or reference, in any way, Return Flows, or the issue of ownership of, or right to recapture and  
17 use, Return Flows attributable to AVEK Imported Water. A typical AVEK Customer Agreement  
18 is attached as Exhibit 6 hereto.

19 *City of San Fernando* and the other cited decisions demonstrate that the right to return  
20 flow is a distinct property right. Moreover, a conveyance or transfer of rights to water is subject  
21 to the statute of frauds (*Hayes v. Fine* (1891) 91 Cal. 391; *Dorris v. Sullivan* (1891) 90 Cal. 279).

22 For the foregoing reasons, AVEK's right to Return Flow from AVEK Imported Water  
23 has not been conveyed or lost by contract.

## 24 VII.

### 25 SPREADING WATER

26 In *City of San Fernando, supra*, the Supreme Court noted:

27 there is evidence in the record of [Los Angeles'] intent to recapture the water spread by  
28 it, and no reason other than such intent appears for plaintiff's admitted investment in the

1 construction and operations of its spreading grounds. [Los Angeles'] intent to recapture  
2 its spread water was found as a fact in *Glendale* . . . and to that extent is res judicata here  
3 as to defendants Glendale and Burbank. The fact that spread water is commingled with  
4 other ground water is no obstacle to the right to recapture the amount by which the  
5 available conglomerated supply has been augmented by the spreading. . . .  
6 (14 Cal.3d, at 263-264)

7 As noted above, in 2011 and 2012, AVEK spread 36,502 AF of AVEK Imported Water  
8 with the intent to recapture such spread water and, also, invested in the construction and  
9 operation of its spreading grounds. Of that amount of spread water, AVEK claims the right to  
10 resulting Return Flows of 32,851 AF.


11 **VIII.**

12 **CONCLUSION**

13 For the foregoing reasons, AVEK respectfully submits that the Court should issue its  
14 Order precluding the introduction of any evidence or argument that any person other than AVEK  
15 is entitled to recapture and use the Return Flows resulting from AVEK Imported Water, and to  
16 direct all parties and their counsel to caution, warn, and instruct all of their respective witnesses  
17 not to make any reference to such evidence or argument, and to follow the Court's Order.

18 Dated: March 29, 2012

**BRUNICK, McELHANEY & KENNEDY**

19  
20 By:   
21 WILLIAM J. BRUNICK  
22 LELAND P. McELHANEY  
23 Attorneys for Cross-Complainant,  
24 ANTELOPE VALLEY-EAST KERN  
25 WATER AGENCY  
26  
27  
28

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA }  
3 COUNTY OF SAN BERNARDINO }

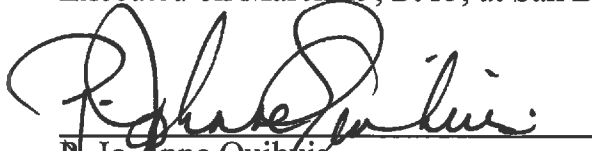
4 I am employed in the County of the San Bernardino, State of California. I am over  
5 the age of 18 and not a party to the within action; my business address is 1839 Commercenter  
West, San Bernardino, California 92408-3303.

6 On March 29, 2013, I served the foregoing document(s) described as: **NOTICE OF**  
7 **MOTION AND MOTION *IN LIMINE* OF ANTELOPE VALLEY-EAST KERN**  
8 **WATER AGENCY RE ADMISSION OF EVIDENCE AND ARGUMENT RELATING**  
9 **TO RETURN FLOWS; ATTACHED SUPPORTING MEMORANDUM OF POINTS**  
10 **AND AUTHORITIES** on the interested parties in this action served in the following  
11 manner:

12 ☒ **BY ELECTRONIC SERVICE AS FOLLOWS** by posting the document(s)  
13 listed above to the Santa Clara website in the action of the *Antelope Valley Groundwater*  
14 *Litigation*, Judicial Council Coordination Proceeding No. 4408, Santa Clara Case No.  
15 1-05-CV-049053.

16 X (STATE) I declare under penalty of perjury under the laws of the State of California  
17 that the above is true and correct.

18 Executed on March 29, 2013, at San Bernardino, California.

19   
20 P. Jo Anne Quihuis  
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23  
24  
25  
26  
27  
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