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10 ANTELOPE VALLEY-EAST KERN WATER AGENCY

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**  
13

14 Coordination Proceeding  
15 Special Title (Rule 1550(b))

Judicial Council Coordination Proceeding  
No. 4408

16 **ANTELOPE VALLEY GROUNDWATER  
17 CASES**

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

18 **Included Actions:**

19 Los Angeles County Waterworks District No.  
20 40 vs. Diamond Farming Company, a  
corporation, Superior Court of California,  
County of Los Angeles, Case No. BC325201;

21 Los Angeles County Waterworks District No.  
22 40 vs. Diamond Farming Company, a  
23 corporation., Superior Court of California,  
County of Kern, Case No. S-1500-CV-254-348;

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

**NOTICE OF MOTION AND MOTION OF  
ANTELOPE VALLEY-EAST KERN  
WATER AGENCY FOR SUMMARY  
ADJUDICATION OF ALL CAUSES OF  
ACTION RELATING TO OWNERSHIP OF  
RETURN FLOWS**

[Code Civ. Proc. §437(c)]

Date: January 27, 2014  
Time: To be determined  
Dept.: To be determined  
Judge: Hon. Jack Komar

Trial Date: February 10, 2014 (Phase V)  
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 January 27, 2014, at a time and in a Department to be  
3 determined by the Court, or as soon thereafter as the matter may be heard, cross-complainant, the  
4 Antelope Valley-East Kern Water Agency ("AVEK") will move, and hereby moves, for summary  
5 adjudication of the respective causes of action alleged by various parties specific to the right to recapture  
6 and use return flows which result from State Water Project water AVEK imports into the area of  
7 adjudication in this Action.

8 This motion is made pursuant to the provisions of Code of Civil Procedure section 437(c) and  
9 is based upon: the supporting declarations and Memorandum of Points and Authorities attached hereto;  
10 all pleadings, papers, and records in this action; the Separate Statement of Undisputed Facts and Request  
11 for Judicial Notice filed concurrently herewith; any Reply or Supplemental Memoranda or Requests for  
12 Judicial Notice which may be filed hereafter in support of the Motion; and on the oral argument  
13 presented at the time of the hearing on the Motion.

14 Dated: November , 2013

**BRUNICK, McELHANEY & KENNEDY**

15  
16 By:   
17 WILLIAM J. BRUNICK  
18 LELAND P. McELHANEY  
19 Attorneys for Cross-Complainant,  
20 ANTELOPE VALLEY-EAST KERN  
21 WATER AGENCY  
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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 groundwater  
5 basin water from another watershed is entitled to recapture and use the return flows resulting from the  
6 imported foreign water. AVEK is a State Water Contractor contractually entitled to import State Water  
7 Project water into the area of adjudication in this action and, by far, is the largest importer of foreign  
8 water into the area of adjudication. [Undisputed Facts Nos. 1, 2, 3, 4, 5]. Therefore, as a matter of law,  
9 AVEK is entitled to recapture and use the return flows resulting from the foreign water AVEK imports  
10 into the area of adjudication.

11           AVEK's taxpayers in the counties of Kern, Los Angeles and Ventura have directly contributed,  
12 and continue to contribute, to the construction of the State Water Project (SWP) facilities which  
13 transport and deliver into the area of adjudication foreign water which originates in northern California  
14 [Undisputed Facts Nos. 6, 7]. AVEK also contracts directly with, and makes payments directly to, the  
15 State of California for the delivery of all SWP water which AVEK imports into the area of adjudication  
16 [Undisputed Facts Nos. 2, 8]. AVEK taxpayers have also paid for, and continue to pay for, construction  
17 and maintenance of the extensive internal treatment and distribution systems used to deliver the SWP  
18 water which AVEK imports and then distributes to its agricultural, industrial and municipal customers,  
19 both within and outside the area of adjudication [Undisputed Facts Nos. 16, 17, 18, 19, 20, 21, 22, 23].<sup>1</sup>

20           AVEK has not assigned or transferred to anyone its right to recapture and use the return flows  
21 resulting from the SWP water it imports into the area of adjudication; nor has AVEK done anything that  
22 would constitute an abandonment or relinquishment of its right to recapture and use such return flows  
23 [Undisputed Facts Nos. 33, 34]. Where, as here, an importer of foreign water has not assigned,

24 \_\_\_\_\_  
25           1 Before the SWP water imported by AVEK is delivered to any of its municipal or industrial customers  
26 (including the Public Water Suppliers [City of Lancaster, City of Palmdale, Littlerock Creek Irrigation District,  
27 Los Angeles County Waterworks District No. 40, Palmdale Water District, Palm Ranch Irrigation District,  
28 Rosamond Community Services District, and Quartz Hill Water District]), the water is first treated at water  
treatment facilities which also are constructed and operated by AVEK [Undisputed Facts Nos. 17, 18, 19, 20,  
21, 22, 23, 24].

1 transferred, abandoned or otherwise relinquished its right to return flows, no California court has ever  
2 denied the importer's claimed right to recapture and use the resulting return flows.

3 For the foregoing reasons and as a matter of law, AVEK alone has the right to recapture and use  
4 all return flows attributable to the SWP water which AVEK imports into the area of adjudication; none  
5 of its customers (including the Public Water Suppliers) have any ownership rights in, or right to  
6 recapture or use, such return flows.<sup>2</sup>

## 7 II.

### 8 MOTIONS FOR SUMMARY ADJUDICATION

9 In pertinent part, Code of Civil Procedure §437(c), subdivision (f) provides:

10 (1) A party may move for summary adjudication as to one or more causes of action within  
11 an action . . . if that party contends that the cause of action has no merit or that there is no  
12 affirmative defense thereto. . . . A motion for summary adjudication shall be granted only if it  
13 completely disposes of a cause of action . . . .

14 (2) A motion for summary adjudication may be made by itself . . . and shall proceed in all  
15 procedural respects as a motion for summary judgment. . . .

16 Subdivision (b)(1) provides, in part:

17 The motion shall be supported by . . . declarations [etc.], and matters of which judicial  
18 notice shall or may be taken. The supporting papers shall include a separate statement setting  
19 forth plainly and concisely all material facts which the moving party contends are undisputed.  
20 Each of the material facts stated shall be followed by a reference to the supporting evidence. .  
21 . .

22 Subdivision (c) provides, in part:

23 The motion . . . shall be granted if all the papers submitted show that there is no  
24 triable issue as to any material fact and that the moving party is entitled to a judgment  
25 as a matter of law. . . .

26 This motion seeks a final determination "of one or more causes of action," to wit: the Fourth  
27 Cause of Action of AVEK's cross-complaint, which alleges that AVEK alone is entitled to recapture  
28 and use the return flows resulting from the SWP water it imports into the area of adjudication and then  
sells to its customers [Undisputed Facts No. 37.]

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29 2 Two other State Water Contractors (Palmdale Water District and Littlerock Creek Irrigation District)  
also import foreign water into the AVAA, although in much smaller quantities; absent contract arrangements to  
the contrary, the return flows which result therefrom belong to those "importers" as well.

1 Likewise, the Sixth Cause of Action of the Public Water Suppliers' cross-complaint also claims  
2 the exclusive right to use the return flows from the SWP water they purchase from AVEK (see PWS'  
3 cross-complaint, ¶¶ 26, 69 and 71). Although AVEK is not named as a cross-defendant in the PWS'  
4 cross-complaint, this motion also is dispositive of the PWS' claimed right to a portion of the return  
5 flows resulting from AVEK imported water.

6 Therefore, this motion seeks to establish that: no defense exists as to AVEK's Fourth Cause of  
7 Action; the PWS' Sixth Cause of Action relating to the same issue is without merit; no triable issue of  
8 material fact exists with respect to either cause of action; and, accordingly, AVEK is entitled to  
9 judgment establishing its right to use all return flows resulting from the SWP water it imports into the  
10 area of adjudication. All of which is established by the following points:

- 11 • The "importer" of foreign water has the right to recapture and use the return flows;
- 12 • AVEK is an "importer" of foreign water;
- 13 • AVEK has manifested adequately its intention to recapture return flows;
- 14 • AVEK has not assigned or transferred to anyone its right to use return flows;
- 15 • Nor has AVEK abandoned or relinquished its right to use return flows;
- 16 • Use by others of AVEK imported water does not impair or negate AVEK's right to recapture and  
17 use the resulting return flows;
- 18 • The decisions in *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199 and *City of Santa*  
19 *Maria v. Adam* (2012) 211 Cal.App.4th 266 are factually distinguishable, and do not support the Public  
20 Water Supplier's claim to return flows in this action; and,
- 21 • AVEK and its taxpayers are the only parties who have paid the full cost of the State Water  
22 Project water imported by AVEK.

### 23 III.

#### 24 THE "IMPORTER" OF FOREIGN WATER HAS THE RIGHT TO RECAPTURE AND 25 USE THE RESULTING RETURN FLOWS

26 An importer's right to recapture and use return flows has been clearly established and repeatedly  
27 affirmed by the California Supreme Court (see *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68,  
28 76-78; *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 257-259, 262-263).

1 IV.

2 **AVEK IS AN “IMPORTER” OF FOREIGN WATER**

3 In 1959, residents of Kern, Ventura and Los Angeles Counties formed AVEK to contract with  
4 the State for the purchase and delivery of SWP water for use in AVEK’s service area within the  
5 Antelope Valley (California Water Code Appendix 98-1, et seq.) [Undisputed Facts Nos. 1, 2]. AVEK  
6 services a land area of 2,400 square miles within the three counties; the adjudicated boundaries in this  
7 Action represent 58% of the total land area serviced by AVEK [Undisputed Facts Nos. 10, 11].

8 The SWP water which AVEK imports into the area of adjudication is pumped from the  
9 Sacramento Delta down the 444 mile aqueduct; after crossing the Techachapis, the aqueduct divides into  
10 the East and West branches; AVEK receives its imported water through the aqueduct’s East branch  
11 [Undisputed Facts Nos. 12, 13].<sup>3</sup>

12 Initial funds for the construction the State Water Project facilities were obtained through a \$1.75  
13 billion bond issue, ratified by California voters in 1960 [Undisputed Facts No. 6].

14 In 1962, AVEK signed a water supply contract with the State (Exhibit 1 to Flory declaration  
15 attached hereto) to insure delivery to AVEK of SWP water to supplement the Antelope Valley’s  
16 groundwater [Undisputed Facts No. 2]. Of the 29 State Water Contractors, AVEK has the third largest  
17 water entitlement, which allows AVEK to take an annual maximum entitlement of up to 141,000 AF  
18 of State Water Project (SWP) water; however, due to environmental, supply and climate limitations  
19 inherent in the SWP, AVEK’s contract with the State of California has a delivery reliability factor of  
20 only approximately 60% of AVEK’s annual entitlement of 141,000 AF [Undisputed Facts Nos. 3, 4].

21 The bulk of AVEK’s SWP imported water is treated and distributed to its customers through the  
22 Domestic-Agricultural Water Network (DAWN) Project facilities;<sup>4</sup> the DAWN Project consists of more  
23 than 100 miles of distribution pipeline; four water treatment plants; four 8-million gallon storage  
24

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25  
26 3 In 2011 and 2012 alone, AVEK imported and delivered to its agricultural, industrial and municipal  
customers a total of 100,718 AF of State Water Project water [Undisputed Facts No. 14].

27 4 AVEK also delivers to Antelope Valley farmers untreated irrigation water from the aqueduct and  
28 AVEK owned turnouts.



1 reservoirs near Mojave; one 3-million gallon capacity reservoir at Vincent Hill Summit; and one 1-  
2 million gallon reservoir at Godde Hill Summit [Undisputed Facts Nos. 17, 18].

3 The DAWN Project was financed by a \$71 million local bond issue authorized by AVEK voters  
4 in 1974, all of which has been repaid by AVEK taxpayers [Undisputed Facts Nos. 19, 20, 21, 22, 23].  
5 The attached AVEK map (Exhibit 2) shows AVEK's existing facilities, and improvements under  
6 construction including future water banking improvements [Undisputed Facts No. 24]. From 2011  
7 through 2012, AVEK has spread and banked a total of approximately 36,502 AF, and claims the right  
8 to recapture 90% of that amount, or 32,851 AF [Undisputed Facts Nos. 25, 26, 27, 28].

9 Accordingly, since the inception of the State Water Project, AVEK taxpayers have paid a total  
10 of \$475,777,218.84 on their property tax bills to insure participation in the California State Water Project  
11 and, also, to construct and maintain AVEK's treatment and distribution systems for the delivery of SWP  
12 water to AVEK'S municipal, industrial and agricultural customers [Undisputed Facts No. 31].

13 AVEK alone pays the State for the SWP water AVEK imports into the area of adjudication  
14 [Undisputed Facts No. 8]; none of AVEK's customers (including the Public Water Suppliers), have  
15 made any payments to the State for the SWP water AVEK has purchased and imported into the area of  
16 adjudication [Undisputed Facts No. 9].

17 The foregoing demonstrates that AVEK is an "importer" of foreign water, to wit: AVEK imports  
18 into the area of adjudication the State Water Project water it purchases from the State and then treats  
19 and sells to its municipal, industrial and agricultural customers.

## 20 V.

### 21 **AVEK HAS MANIFESTED ITS INTENTION TO RECAPTURE RETURN FLOWS**

22 To preserve its right to return flows, an importer must manifest the "intent" to recapture or  
23 otherwise use return flows. Such intent need not be manifested before importation begins (*Stevens v.*  
24 *Oakdale Irr. Dist.* (1939) 13 Cal.2d 343; *City of San Fernando, supra*, 14 Cal.3d, at 257-260), and is  
25 manifested adequately by filing a pleading claiming the right prior to final adjudication of that right.

26 . . . the allegation of an intent to recapture the return waters in the present complaint, filed in  
27 1955, was sufficient for purposes of the present case to establish whatever rights would have  
28 arisen from the plaintiff's manifestation of such intent before commencing importation in 1915.  
(*Stevens v. Oakdale Irr. Dist., supra*, 13 Cal.2d 343.)

1 (City of San Fernando, *supra*, 14 Cal.3d, at 259-260; underscoring added.)

2 The Fourth Cause of Action of AVEK's 2006 cross-complaint herein alleges:

3 "The rights of Cross-Defendants [including the Public Water Suppliers and all other AVEK  
4 customers] . . . are limited to the native supply of the Basin and/or their own imported water.  
5 Cross-Defendants' rights, if any, do not extend to water imported into the Basin by [AVEK]"  
6 (AVEK Cross-Complaint, ¶ 32); "As the primary importer of supplemental State Project water  
7 into the Basin, [AVEK] has the sole right to recapture return flows attributable to its State  
Project water. The rights of Cross-Defendants, if any, are limited to the native supply of the  
Basin and/or to their own imported water, and do not extend to groundwater attributable to  
[AVEK's] return flows" (Id., ¶ 38).

8 [Undisputed Facts No. 37]

9 Additionally, AVEK owns wells capable of recapturing return flows and, also, spreads water with  
10 the express intent of recapturing the resulting return flows. For all of these reasons, AVEK has  
11 manifested adequately the required "intent" to recapture return flows.

## 12 VI.

### 13 AVEK HAS NOT TRANSFERRED TO ANYONE ITS RIGHT TO RETURN FLOWS

14 A producer of return flow from imported water may dispose of that property right by contract  
15 [Haun v. De Vours 97 Cal.App.2d 841, 844; see, also, Hutchins, *The California Law of Water Rights*,  
16 at 397-400, noting of the Supreme Court's decision in *Stevinson Water Dist. v. Roduner*, 36 Cal.2d 264,  
17 267-270 (1950) that "this decision sanctioned the right of the producer of imported water to provide by  
contract for its recapture"].

18 Nonetheless, AVEK has not executed any writing conveying its right to recapture or use the  
19 return flows resulting from the SWP water it imports into the area of adjudication. To the contrary,  
20 AVEK's contracts with its customers do not mention return flows, the ownership thereof, or the right  
21 to recapture and use return flows attributable to AVEK imported water.

22 (A typical AVEK Customer Agreement is attached as Exhibit 1 hereto.)

23 As noted in *City of L.A. v. City of Glendale*, 23 Cal.2d 68, 78, "Nothing would be gained by  
24 requiring plaintiff to change the form of its contracts from a 'sale' of the water to a transfer of the right  
25 to its use."

Moreover, the right to return flow is a distinct property right; thus, any conveyance or transfer thereof is subject to the Statute of Frauds (*Hayes v. Fine* (1891) 91 Cal. 391; *Dorris v. Sullivan* (1891) 90 Cal. 279). This means that an intent to convey or transfer the right to return flows must be clearly and unequivocally stated in an appropriate writing, signed by the party conveying or transferring such right. No writing exists, however, wherein AVEK clearly and unequivocally states an intent to convey or transfer its right to return flows; accordingly, AVEK's right to return flows from the State Water Project water it imports has not been conveyed, transferred or lost by contract [Undisputed Facts No. 33].

#### VII.

#### **NOR HAS AVEK ABANDONED OR RELINQUISHED ITS RIGHT TO RETURN FLOWS**

AVEK has not abandoned or otherwise relinquished its right to return flows [Undisputed Facts No. 34].

#### VIII.

#### **USE BY OTHERS OF AVEK IMPORTED WATER DOES NOT NEGATE AVEK'S RIGHT TO THE RESULTING RETURN FLOWS**

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

The use by others of this water as it flowed to the subterranean basin does not cut off [the importer's] rights. In *Stevens v. Oakdale Irr. Dist.*, 13 Cal.2d 343 . . . , it was recognized that one who brings water into a watershed may retain a prior right to the water after permitting others to use the water . . .

(23 Cal.2d 68, 76-77; see also *City of San Fernando, supra*, 14 Cal.3d 199, 257.)

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

(*City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 260; *City of L.A. v. City of Glendale*, 23 Cal.2d 68, 78; underscoring added.)

Therefore, the law is quite clear that "the use by" AVEK's customers of the SWP water AVEK imports into the area of adjudication does not impair or negate, in any way, AVEK's right to control and, if necessary, recapture and use the return flows derived therefrom.

///

IX.

**THE DECISIONS RELIED UPON BY THE PUBLIC WATER SUPPLIERS ARE READILY  
DISTINGUISHABLE, AND DO NOT SUPPORT THEIR CLAIM TO RETURN FLOWS**

A. *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199 (“*City of San Fernando*”)

Relying on *City of San Fernando*, the Public Water Suppliers contend that AVEK stands, figuratively speaking, in the shoes of the Metropolitan Water District (MWD), and the Public Water Supplies stand in the shoes of the cities of Burbank, Glendale and San Fernando. The Public Water Suppliers’ argument is without merit, because in *City of San Fernando*: (1) the relationship between MWD and its “member agencies” (the cities of Burbank, Glendale, Los Angeles and San Fernando) was markedly different than the relationship in this action between AVEK and its customers (including the Public Water Suppliers); and (2) MWD did not intend or claim the right to recapture return flows from water it delivered to its member agencies, and it did not have the means of doing so. For these reasons, MWD did not join and was not made a party to the *City of San Fernando* action; as a result, MWD’s right to return flows was not litigated by the parties, nor determined by the Court.<sup>5</sup>

1. The relationship between MWD and its “member agencies”

In the *City of San Fernando*, however, the cities of Burbank, Glendale, Los Angeles and San Fernando were all “member agencies” of MWD; their representatives sat on MWD’s Board of Directors; and, accordingly, each member agency was directly involved in MWD’s governance and policy decisions -- including determining the rates they paid for MWD water [Undisputed Facts Nos. 38, 39].<sup>6</sup>

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

MWD was formed in 1929 of 13 original member agencies, including Los Angeles, Glendale and Burbank. . . . In 1971, San Fernando became a member agency in MWD.

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<sup>5</sup> The relevant time period in *City of San Fernando* was from 1955, when the complaint was filed, until final arguments ended on July 20, 1967 (Remand Procedure Order No. 1, exhibit 14 to Request for Judicial Notice filed concurrently herewith).

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

1 (Findings of Fact and Conclusions of Law [FFCL], dated January 26, 1979, 22:23-24:1; Exhibit 1 to  
2 Request for Judicial Notice ("RJN") filed concurrently herewith.)

3 MWD's "History and First Annual Report, Commemorative Edition," June 2011 (Exhibit 2 to  
4 RJN) notes:

5 The powers of [MWD] are vested in a board of directors consisting of at least one representative  
6 from each municipality [i.e., each "member agency"] . . . (p. 311)

7 Each municipality, whose corporate area is included within the District, has a preferential  
8 right to purchase from the District for distribution by such municipality . . . the proportion of the  
9 water served by the District that, from time to time, shall bear the same ratio to all of the water  
supply of the District as the total accumulation of amounts paid by such municipality to the  
District 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 the District from all of its municipalities.

10 (Id., p. 312; see, also, the Metropolitan Water District Act, Section 135, Ex. 3 to RJN)

11 Thus, MWD does not exist separate from its "member agencies; they are inextricably bound  
12 together and, in a very real sense, MWD's "member agencies" are the MWD [Undisputed Facts Nos.  
13 38, 39, 40]. The umbilical cords tying MWD to its member agencies undoubtedly explain why in *City*  
14 *of San Fernando*: (1) MWD did not claim a right to return flows; (3) MWD did not then own or operate  
15 any wells, or spread or inject water, within the Upper Los Angeles River Area; and (3) MWD did not  
16 join, and was not made a party to the proceeding [Undisputed Facts Nos. 43, 44, 45, 46].

17 In the case at bar, however, AVEK's customers (including the Public Water Suppliers) are **not**  
18 "member agencies" of AVEK; their representatives do **not** sit on AVEK's Board of Directors; and they  
19 do **not** participate in the determination of the water rates paid for AVEK imported water. AVEK's  
20 customers are merely that, i.e., "customers" - nothing more and nothing less! As such, AVEK's  
21 customers (including the Public Water Suppliers) have no special claim or right to the return flows  
22 resulting from the State Water Project water that AVEK contracts for, and imports into the area of  
23 adjudication.

24 That the Public Water Suppliers are "public entities" does not alter this fact. In *City of San*  
25 *Fernando*, Los Angeles imported water from the Owens River Valley and (like AVEK in the case at bar)  
26 delivered imported water **"to public entities"** (14 Cal.3d at 255, fn. 45). Nonetheless, the Court  
27 determined that Los Angeles **alone** had the right to return flows from all water it either imported from  
28 the Owens River Valley or purchased from MWD. This is consistent with the Court's determination that

1 “use by others” does not impair the importer’s right to recapture return flows (see Point VIII above).  
2 Likewise, the Court in *City of L.A. v. City of Glendale*, noted: “Defendants rely upon the fact that their  
3 taking of the water constitutes an intervening public use of it. The intervention of a public use, however,  
4 does not bar suit by the owner of a water right . . .” (23 Cal.2d at 80).

5 2. While AVEK has the requisite “intent” to recapture return flows, MWD never did

6 As noted, MWD never claimed a right to, or manifested an intention to recapture return flows  
7 from water MWD delivered to its *member agencies* [Undisputed Facts Nos. 43, 44, 45, 46]. As a result,  
8 MWD’s circumstances were like those involving the Los Angeles Flood Control District, regarding  
9 which the Court noted: “The fact that this water was made available by the Los Angeles Flood Control  
10 District **does not determine its ownership. The district makes no claim to the water . . .**” (*City of Los*  
11 *Angeles v. City of Glendale*, 23 Cal.2d 68, 73; emphasis added).

12 So, also, in *City of San Fernando*, MWD lacked the necessary “intent” to establish a right to  
13 ownership of return flows, because it never asserted or claimed a right to return flows.

14 Waters brought in from a different watershed and reduced to possession are private property  
15 during the period of possession. When possession of the actual water, or *corpus*, has been  
16 relinquished, or lost by discharge without intent to recapture, property in it ceases. . . .As to this  
17 specific flow, discharged without intent to recapture, the abandonment has been complete . . .  
(*Stevens v. Oakdale Irr. Dist.* 13 Ca.2d 343, 350, underscoring added; see, also, *City of San Fernando*,  
18 *supra*, 14 Cal.3d 199, 257-260 [“plaintiff has formed an intention to recapture the return flows”].)

19 For the same reason, MWD effectively abandoned whatever right it had to the return flows,  
20 because it never had the requisite intent to recapture or reclaim return flows. In *City of San Fernando*,  
21 however, the right to recapture and use return flows had to be given to someone! Because MWD never  
22 claimed the right to return flows, and effectively abandoned any claim thereto, it was logical to assign  
23 that right to MWD’s “member agencies” – who intended to use all of the available groundwater and,  
24 unlike MWD, had the wells needed to recapture return flows.

25 In stark contrast to MWD, AVEK has consistently claimed the right to recapture and use return  
26 flows attributable to AVEK imported water – that claim and intention is clearly manifested in AVEK’s  
27 cross-complaint filed in this Action and, also, in AVEK’s ownership of wells capable of recapturing  
28 return flows [Undisputed Facts Nos. 37, 47]. Unlike MWD, AVEK has never abandoned its right to  
recapture the return flows from the State Water Project water it imports into the area of adjudication.

1 For the foregoing reasons, *City of San Fernando* is clearly distinguishable from the case at bar.  
2 Moreover, the Supreme Court has repeatedly stated that unless the importer of foreign water expressly  
3 assigns, transfers, abandons or otherwise relinquishes its right to return flows, that right belongs to the  
4 “importer;” that is true whether the importer’s customers are private parties or public entities. No  
5 reported California decision has denied an importer’s claim to return flow in favor of the importer’s  
6 customer’s claim to such return flows (absent the importer’s express assignment, transfer, or  
7 abandonment of such right).

8 The above cited decisions clearly state that the person who actually “imports” water from a  
9 foreign watershed is entitled to recapture and use the return flows resulting therefrom – as to the water  
10 AVEK imports from the State Water Project, that entity is AVEK.

11 B. *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266

12 Like *City of San Fernando*, the facts in *City of Santa Maria* are clearly distinguishable from the  
13 case at bar. In *City of Santa Maria*, the State Water Project contractor (Santa Barbara County Flood  
14 Control and Water Conservation District) had years earlier “assigned” to City of Santa Maria a portion  
15 of the District’s SWP “entitlement.” As a result, Santa Maria was itself able to direct and order the  
16 importation of SWP water. Based on these undisputed facts, the parties to *City of Santa Maria*  
17 “stipulated” that Santa Maria and others similarly situated were “importers.” These distinguishing facts  
18 explain why the Judgment After Trial and the Court of Appeal’s Opinion in *City of Santa Maria* both  
19 characterize Santa Maria as an “importer,” entitled to the return flows resulting from State Water Project  
20 water the city of Santa Maria caused to be imported.

21 1. “WATER SUPPLY RETENTION” AGREEMENT

22 On or about June 25, 1985, a SWP contractor, the Santa Barbara County Flood Control and  
23 Water Conservation District (“the District”) entered into a Water Supply Retention Agreement with  
24 Santa Maria, giving Santa Maria the right to “retain” a portion of the District’s State Water Project  
25 “entitlement.” In its Resolution No. 82-509, Santa Maria approved the First Amendment to the Water  
26 Retention Agreement, which provides:

27 [Santa Maria] agrees to pay the DISTRICT the amount required to be paid by the DISTRICT  
28 under the State Water Contract to retain annual entitlement and capacity right of 11,300 acre feet  
and all rights associated therewith under the State Water Contract (“Retained Rights”) . .

(Third page of Exhibit 5 to Request for Judicial Notice filed concurrently herewith; emphasis added.)

2. TO UTILIZE THE ACQUIRED SWP "ENTITLEMENTS" OF SANTA MARIA AND OTHERS  
SIMILARLY SITUATED, A JOINT POWERS AGENCY WAS FORMED

Santa Maria's Resolution No. 90-31 dated March 20, 1990, confirms its status as a SWP "contractor" with "retained rights" to State Water Project water, thereby entitled to make "all decisions" relating to its SWP water entitlement through the Santa Barbara Water Purveyors Agency:

... on June 25, 1985, the City of Santa Maria entered into an agreement with the [District] designated "Water Supply Retention Agreement", Model I, 12/11/84, as amended by First, Second & Third Amendments, ("WSRA") and is, pursuant to the WSRA, one of the "Contractors" to which "Retained Rights" were assigned pursuant to the WSRA; and

... this entity is a member of the Santa Barbara Water Purveyor's Agency ("SBWPA"), a joint powers agency formed on November 16, 1982 ...

... Article 5(c) of the WSRA provides that the Contractors under the WSRA shall make all decisions relating to the retained rights and shall transmit those decisions to the District, who shall communicate them to the [DWR] ...

1. The Santa Barbara Water Purveyors Agency ["SBWPA"] is hereby acknowledged, ratified, and designated as the entity referred to in Article 5(c) of the WSRA, as the organization through which the making and transmission of all decisions relative to the WSRA shall be made. [Underscoring added.]

(First page of Exhibit 6 to Request for Judicial Notice filed concurrently herewith).

3. ACCORDINGLY, SANTA MARIA AND OTHERS SIMILARLY SITUATED WERE  
ACKNOWLEDGED TO BE STATE WATER PROJECT "CONTRACTORS"

Santa Maria's January 15, 1991, Resolution No. 91-12, ratified SBWPA's Resolution No. 90-10, "regarding the approval by the State Department of Water Resources of the Assignment of Rights Embodied in the Water Supply Retention Agreements ... ." The SBWPA Resolution attached thereto notes:

... on July 1, 1989, Model I of the [WSRAs], which had previously been entered into by various members and associate members of the [SBWPA] ("Contractors") and [the District], became effective assigning the District's rights under the 1963 State Water Contract ... between the District and [DWR] to the contractors [including Santa Maria]; and

... Article 41 of the Water Supply Contract contemplates formal approval by DWR of the assignment of rights under the contract; and

1. [T]he Contractors since entering into the WSRAs have exercised their rights under the agreements and have contracted with DWR through the District ...

3. The Contractors [including Santa Maria] hereby agree, pursuant to Article 3 c) of the WSRA, to reimburse the District for all costs and expenses which the District becomes obligated to pay under the Water Supply Contract regarding the Contractors' retained rights ...



(Pages 2 and 3 of Exhibit 7 to Request for Judicial Notice filed concurrently herewith; emphasis added.)

Therefore, the public water purveyors, which included Santa Maria and other similarly situated, became the assignees and owners of specific SWP “entitlements;” and through the SBWPA joint powers agency, they were each able to direct and order the importation of State Water Project water.

4. ADDITIONAL CONFIRMATION OF THE TRANSFER OF SWP RIGHTS

Santa Maria’s September 3, 1991, Resolution No. 91-151, adopting SBWPA’s Resolution #91-14 notes:

... in 1983 the District entered into Water Supply Retention Agreements (WSRAs) with certain Water Purveyors (hereinafter the Water Purveyors which executed the WSRA’s are referred to as “Contractors”) transferring the District’s rights under the SWP Contract to the Water Purveyors . . .

(Pages 2 and 3 of Exhibit 8 to Request for Judicial Notice filed concurrently herewith; emphasis added.)

5. WATER MANAGEMENT AGREEMENT CONFIRMING THE STATUS OF SANTA MARIA AND SCWC AS STATE WATER PROJECT CONTRACTORS, WITH RIGHTS TO RETURN FLOWS

The June 15, 2004, Water Management Agreement signed by City of Santa Maria and Southern California Water Company notes:

E. The City [Santa Maria] and SCWC [Southern California Water Company] also each hold contracts to receive water from the State Water Project (“SWP Entitlement,” collectively, and “City SWP Entitlement” or “SCWC SWP Entitlement,” individually). Collectively, their contract entitlements total 18,350 acre-feet per year.”

F. Both the City and SCWC are legally entitled to retain and recapture that portion of their respective SWP Entitlement that recharges the Basin after the consumptive use of the SWP Entitlement (“Return Flows”).

...

H. It is to the mutual advantage of the City and Santa Maria to have several alternatives for making use of their SWP Entitlements, Return Flows . . . [All emphasis added.]

(Pages 11 and 12 of Exhibit F to Exhibit 1 to Judgment After Trial [Exhibit 9 to Request for Judicial Notice filed concurrently herewith].)

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1 6. SANTA MARIA VALLEY PUBLIC WATER PURVEYOR WATER MANAGMENT  
2 AGREEMENT CONFIRMS SANTA MARIA'S STATUS AS A SWP CONTRACTOR AND RIGHT  
3 TO RETURN FLOWS

4 The June 30, 2005, Santa Maria Valley Public Water Purveyor Management Agreement between  
5 City of Santa Maria, City of Guadalupe and Southern California Water Company, provides:

6 The Parties also each hold contracts to receive water from the State Water Project ("SWP  
7 Entitlement," collectively, and "Santa Maria SWP Entitlement," "Guadalupe SWP Entitlement,"  
8 or "SCWC SWP Entitlement," individually). Santa Maria's contract is for 17,800 acre feet,  
9 SCWC's contract is for 550 acre feet and Guadalupe's contract is for 610 acre feet. Collectively,  
10 the SWP Entitlement totals 18,960 acre-feet per year. [Pages 1-2]

11 7.3 It is to the mutual advantage of Guadalupe and Santa Maria to have several  
12 alternatives for making use of their SWP Entitlements, Return Flows and Twitchell Yield .  
13 . . [Page 5]

14 7.5 . . . Santa Maria shall have a right of first refusal to purchase any SWP Return Flows  
15 that Guadalupe elect to sell from its existing SWP Entitlement . . . [Pages 5-6]

16 (Pages 1, 5 and 6 of Exhibit F to Exhibit 1 to Judgment After Trial [Exhibit 9 to Request for Judicial  
17 Notice].)

18 7. THE PARTIES TO THE LITIGATION STIPULATED THAT SANTA MARIA AND OTHERS  
19 SIMILARLY SITUATED HAVE SWP CONTRACTS AND, ACCORDINGLY, ARE "IMPORTERS"  
20 OF STATE WATER PROJECT WATER

21 The stipulating parties in *City of San Fernando* agreed that the public water purveyors, including  
22 the City of Santa Maria and others similarly situated, "have SWP contracts," and are "importers."

23 At the date of this Stipulation, the Importers are Santa Maria, SCWC, Guadalupe, Pismo Beach  
24 and Oceano.

25 Santa Maria, SCWC and Guadalupe all have SWP Contracts.

26 (Page 2, lines 26-28, and page 13, lines 5-6 of Exhibit 1 to Judgment After Trial [Exhibit 9 to Request  
27 for Judicial Notice].)

28 8. JUDGMENT AFTER TRIAL IN CITY OF SANTA MARIA

Based upon the referenced assignments of State Water Project water "entitlements," and the  
parties' aforesaid Stipulation thereto, it is not surprising that the Court's Judgment After Trial in *City*  
*of Santa Maria* finds that:

The City of Santa Maria and Golden State Water Company have a right to use the Basin for  
temporary storage and subsequent recapture of the Return Flows generated from their  
importation of State Water Project water. [4:13-15; emphasis added.]

1 9. THE COURT OF APPEAL'S OPINION

2 Consistent with all of the foregoing, the Court of Appeal's Opinion in *City of Santa Maria* notes  
3 and finds:

4 . . . **Most of the case was resolved by an agreement (Stipulation)** among the Santa  
5 Maria Valley Water Conservation District (District), local cities and water companies (public  
6 water producers), and most of the owners of land overlying the Basin. The **Stipulation . . .**  
7 **allocates** the various components of the groundwater (native groundwater, **return flows of**  
8 **imported water**, and salvaged water) among the stipulating parties.

9 The trial court approved the Stipulation and made it part of the final judgment. . . .  
10 [211 Cal.App.4th 266, 276; bold print added.]

11 For the foregoing reasons, *City of Santa Maria* is readily distinguishable from the case at bar,  
12 to wit: AVEK has not assigned or transferred to any of its customers (including the Public Water  
13 Suppliers) any portion of AVEK's State Water Project "entitlement" [Undisputed Facts No. 33.]  
14 Consequently, the Public Water Suppliers do not own or control any part of AVEK's SWP entitlement;  
15 accordingly, they are neither SWP contractors, nor "importers" of State Water Project water.

16 Notwithstanding these material distinguishing facts, the *City of Santa Maria* decision clearly  
17 supports AVEK's claim to ownership of return flows, by confirming that SWP contractors who use their  
18 "entitlements" to import water into a Basin are entitled to recapture and use the resulting return flows.

19 X.

20 AVEK AND ITS TAXPAYERS ARE THE ONLY PARTIES WHICH PAY THE  
21 FULL COST OF THE IMPORTED WATER

22 The Public Water Suppliers argue they are "importers" because the SWP water they receive from  
23 AVEK is imported into the area of adjudication only because they have ordered and paid AVEK for such  
24 water; without their ordering and paying for such water, it would not be imported into the area of  
25 adjudication. Although this argument has some superficial appeal, closer scrutiny reveals the fallacy of  
26 the claim – as the following example and facts demonstrate:

- 27 • From the inception of AVEK's participation in the State Water Project, AVEK's taxpayers have  
28 paid a total of \$475,777,218.84 to insure participation therein, and to construct, maintain and  
operate the "infrastructure" needed to import, transport, treat and deliver AVEK imported water  
to its customers [Undisputed Facts No. 48].

- 1 • AVEK also has incurred and paid energy and related costs related to the actual transportation of  
2 SWP water which total \$331,663,051.00 [Undisputed Facts No. 49].
- 3 • Accordingly, the total cost incurred and paid by AVEK and its taxpayers to obtain, transport,  
4 treat and deliver SWP water to its customers is \$807,440,269.84 (i.e., \$475,777,218.84 +  
5 \$331,663,051.00) [Undisputed Facts No. 50].
- 6 • From 1972 (when AVEK first began importing SWP water) through 2012, AVEK has imported  
7 a total of 1,976,971AF of SWP water [Undisputed Facts No. 51].
- 8 • Some loss unavoidably results during the transportation, treatment and delivery stages; as a  
9 result, AVEK delivered to its customers during the same time period a total of 1,923,039 AF  
10 [Undisputed Facts No. 52].
- 11 • Accordingly, the average total cost per acre feet to AVEK and its taxpayers for the water  
12 delivered to AVEK customers from 1972 through 2012 is \$419.88 per AF (i.e., \$807,440.269.84  
13 ÷ 1,923,039) [Undisputed Facts No. 53].
- 14 • During the same time period, AVEK has delivered to Waterworks District #40 a total of 808,790  
15 AF [Undisputed Facts No. 54].
- 16 • The total cost incurred and paid by AVEK and its taxpayers in procuring and delivering the SWP  
17 water that was sold and delivered to Waterworks District #40 is approximately \$339,594,745.20  
18 (i.e., 808,790 AF x \$419.88 per AF) [Undisputed Facts No. 55].
- 19 • Waterworks District #40 has paid a total of only \$177,693,610.00 for the aforesaid 808,790 AF  
20 of SWP water it purchased and received from AVEK, or \$219.70AF (i.e., \$177,693,610.00 ÷  
21 808,790 AF) [Undisputed Facts No. 56].
- 22 • Thus, for the water received by it, Waterworks District #40 paid \$200.28AF less than the actual  
23 cost of the water (i.e., \$419.88 - \$219.70) or only 52% of the total cost of the water it received  
24 (i.e., \$177,693,610.00 ÷ \$339,594,745.20) [Undisputed Facts No. 57].
- 25 • Therefore, AVEK and its taxpayers have subsidized the cost of the water delivered to  
26 Waterworks District #40, by paying the additional cost of such water in the amount of  
27 \$161,901,135.20 (i.e., \$339,594,745.20 - \$177,693,610.00) [Undisputed Facts No. 58].  
28

1 • Considered in a slightly different way, Waterworks District #40 received 42% of the total water  
2 delivered to AVEK's customers (i.e.,  $808,790\text{AF} \div 1,923,039\text{AF}$ ), but paid only 22% of the total  
3 cost of that water (i.e.,  $\$177,693,610 \div \$807,440,269.84$ ) [Undisputed Fact No. 59].

4 Waterworks District #40 undoubtedly will argue that it also should be credited with the tax  
5 payments made by AVEK's taxpayers who are serviced by Waterworks District #40. However, even  
6 considering the contributions made by taxpayers located within the area of the adjudication serviced by  
7 Waterworks District #40, the result is the same, to wit: the amount of money paid directly by  
8 Waterworks District #40, combined with the payments made by taxpayers located within the area of  
9 adjudication serviced by both Waterworks District #40 and AVEK, is still less than the total actual cost  
10 of the water AVEK delivered to Waterworks District #40 [Undisputed Fact No. 60].

11 Confirming this, some of Waterworks District #40's customers are located outside of both  
12 AVEK's service area and the area of the adjudication; accordingly, those customers of Waterworks  
13 District #40 do **not** pay property taxes which support AVEK's importation of SWP water at all  
14 [Undisputed Facts No. 61]. Additionally, many of AVEK's taxpayers are "non-users," i.e., they either  
15 take water from wells or leave their properties fallow; as a result, such non-users do not benefit directly  
16 from the SWP, although their property taxes significantly subsidize the SWP water purchased by  
17 Waterworks District #40 and other AVEK customers [Undisputed Facts No. 62]. These two additional  
18 points demonstrates further that Waterworks District #40 and its taxpayers do not pay the full cost of the  
19 AVEK imported water they receive.<sup>7</sup>

20 If AVEK's customers (including Waterworks District #40) were to pay the full cost of the SWP  
21 water which AVEK has delivered and sold to them, they might be able to make a credible argument that  
22 they should be given the right to recapture the resulting return flows. However, because AVEK's  
23 customers (including Waterworks District #40) have paid only a part of the total cost of the AVEK  
24 imported SWP water, the return flows resulting therefrom rightly belong to the person(s) which actually

---

27 7 The same is true of AVEK's agricultural customers, to wit: their payments (including their property  
28 tax payments) for the AVEK water they receive do not cover the total cost of the AVEK imported SWP water  
they receive.

1 “imported” and paid all costs incurred to import the SWP water. Those persons are AVEK and its  
2 taxpayers, including AVEK’s “non-user” taxpayers.

3 Because AVEK and its taxpayers are the only parties which pay the full cost of the State Project  
4 Water which AVEK imports into the area of adjudication, for this additional reason they are entitled to  
5 control and/or use the resulting return flows.

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

9 (*City of San Fernando, supra*, 14 Cal.3d 199, at 261.)<sup>8</sup>

10 **XI.**

11 **CONCLUSION**

12 For the foregoing reasons, a triable issue of material fact does not exist as to the ownership, and  
13 right to recapture and use, the return flows which result from the State Water Project water which AVEK  
14 imports into the area of adjudication. Therefore, AVEK respectfully submits that the Court should grant  
15 AVEK’s motion for summary adjudication of the respective causes of action pled in this action relating  
16 to the ownership of return flows, and confirm in its Order granting the motion that AVEK is the only  
17 person entitled to recapture and use the return flows from the foreign water AVEK imports into the area  
18 of adjudication.

19 Dated: November 11, 2013

**BRUNICK, McELHANEY & KENNEDY**

21 By: William J. Brunick Leland P. McElhane  
22 WILLIAM J. BRUNICK  
23 LELAND P. McELHANEY  
24 Attorneys for Cross-Complainant,  
25 ANTELOPE VALLEY-EAST KERN WATER  
26 AGENCY

26 <sup>8</sup> Except when AVEK’s allocation of SWP water is insufficient to meet the critical needs of its  
27 customers (requiring AVEK to recapture return flows to meet those needs), AVEK’s preference is to maintain  
28 all return flows in the groundwater, to gradually augment and increase the groundwater supply in the area of  
adjudication [Undisputed Facts No. 35]. This will benefit AVEK’s existing and future customers and taxpayers,  
both inside and outside the area of adjudication [Undisputed Facts No. 36].

## **EXHIBIT 1**

**WATER SERVICE AGREEMENT  
BETWEEN  
ANTELOPE VALLEY-EAST KERN WATER AGENCY  
AND**

**LOS ANGELES COUNTY WATERWORKS DISTRICTS NOS.  
4 AND 34  
FOR WATER SERVICE**

**DATED JUL 17 1970**



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## WATER SERVICE AGREEMENT

THIS AGREEMENT, made and entered into this \_\_\_\_ day of \_\_\_\_ 19\_\_, by and between the Antelope Valley-East Kern Water Agency, established by Chapter 2146 of the 1959 Statutes of the State of California, hereinafter referred to as the "Agency" and Los Angeles County Waterworks Districts Nos. 4 and 34, hereinafter referred to as the "Consumer;"

## WITNESSETH:

WHEREAS, water is needed within the Agency to supplement existing water supplies and for new areas requiring water supplies; and

WHEREAS, groundwater supplies within the Agency are seriously depleted; and

WHEREAS, the Agency and the State of California entered into an agreement entitled "Water Supply Contract Between the State of California, Department of Water Resources, and Antelope Valley-East Kern Water Agency," dated September 20, 1962, as amended by Amendment No. 1, dated September 22, 1964; Amendment No. 2, dated August 24, 1965; Amendment No. 3, dated February 16, 1967; and Amendment No. 4, dated May 11, 1967, whereby the State of California will furnish a water supply to the Agency; and

WHEREAS, the Agency desires to make available under terms and conditions which, as far as practicable and consistent with the ultimate use of water made available pursuant to said Contract and Amendments, shall be fair and equitable; and

WHEREAS, the inhabitants and lands of the Consumer are in need of additional water for beneficial uses; and

**WHEREAS, the Consumer desires to contract with the Agency for a water supply to be for the use and benefit of the Consumer, and for which Consumer will make payment to the Agency upon the terms and conditions hereinafter set forth:**

**NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED by and between the parties hereto as follows:**

**Article I. Definitions**

When used in this Agreement, the following terms shall have the meanings hereinafter set forth:

(a) "Agency" as used herein shall mean Antelope Valley-East Kern Water Agency.

(b) "Consumer" as used herein shall mean any public body, including the United States of America and the State of California, and any of their agencies and departments empowered to contract, counties, cities, districts, local agencies or political subdivisions of the State of California; corporations, public utility water companies, mutual water companies or persons; or any other entity or individual able to and which does execute a Water Service Agreement with the Agency for a water supply; but shall not include any party with whom the Agency may contract to deliver water for a term of years and under special provisions which require the joint use of facilities for the particular benefit of said party and the Agency.

(c) "Agreement" as used herein shall mean this agreement for water service between Agency and Consumer.

(d) "Master Contract" shall mean the contract entitled "Water Supply Contract between the State of California Department of Water Resources and the Antelope Valley-East Kern Water Agency," dated September 20, 1962, as amended by Amendment No. 1, dated September 22, 1964, Amendment No. 2, dated August 24, 1965, Amendment No. 3, dated February 16, 1967, and Amendment No. 4, dated May 11, 1967, and any revisions, amendments or supplements thereto hereafter made.

(e) "Agency Law" shall mean the Antelope Valley-East Kern Water Agency Law, Chapter 2146, Statutes of 1959 of the State of California, as

amended and as the same may be hereafter amended, supplemented, re-enacted, or codified.

(f) "Project Water" shall mean water made available to the Agency by the State of California pursuant to the terms of the Master Contract.

(g) "Treatment and Distribution System" means all fixed installations owned and operated by the Agency having the purpose of treatment, conveyance, control, measurement, spreading and delivery of water.

(h) "Rules and Regulations" means the Rules and Regulations for Distribution of Water, Antelope Valley-East Kern Water Agency, as they may be amended and supplemented from time to time by the Board of Directors of the Agency. The Rules and Regulations set forth the conditions under which water will be distributed to the Consumer.

(i) "Year" means the same as the term "Year" means in the Master Contract.

**Article 2. Term of Agreement**

**This Agreement shall become effective on the date first above written and shall remain in effect during the period necessary to repay any bonds designed to finance the Agency's water system.**

**Article 3. Relationship to Master Contract, and Application of Agency Law**

(a) Consumer acknowledges having read the Master Contract and having general familiarity with its terms and that Agency's ability to supply water is governed by said Master Contract and any subsequent modification and supplements thereof.

(b) Consumer also agrees that this Agreement and the rights and obligations of the parties hereunder shall be subject to the Agency Law as it now exists and as it may be hereafter amended or codified by the Legislature of the State of California.

**Article 3a. Water Rights**

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.

Those Consumers who wish the assistance of the Agency, in the event there is an adjudication of the groundwater basin or any of its sub-units, shall submit evidence of the amount of water pumped from each individual well during at least the preceding five-year period and longer if the information is available. This information may be submitted to the Agency at the time of execution of this Agreement or to the State Water Resources Control Board. The Consumer shall also keep continuous records of the amount of water pumped from each individual well for each year following execution of this Agreement. Each year the Consumer may file this information in writing with the Agency, or with the State Water Resources Control Board.

Agency agrees that in the event of such an adjudication as is mentioned in this Article, the evidence of groundwater use of the basin by the Consumers as may have been filed with the Agency will be presented to the Court or other reviewing officer in aid of the Consumers' retention of their rights in the groundwater supply.

This section is not intended in any way to relieve Consumer of any rights or responsibilities it may have under the Recordation Act of 1955 (Water Code, Sec. 4999, et seq.).



**Article 4. Delivery of Water**

Agency will deliver water to Consumer through the Agency's treatment and distribution system at water service connections. Water delivered pursuant to this Agreement will be delivered to Consumer in accordance with the conditions and procedures set forth in the Rules and Regulations. Consumer shall make application for water delivery turn-ons and shut-offs in accordance with the procedures set forth in the Rules and Regulations. Consumer agrees to be bound by such Rules and Regulations insofar as the same pertain to the subject matter of this Agreement and by any subsequent amendments or supplements thereof that may be adopted by the Board of Directors of the Agency hereafter from time to time. Agency agrees that amendments or supplements to said Rules and Regulations shall not be made without providing Consumer at least 45 days prior written notice of each such proposed amendment or supplement and of the meeting of the Board at which such amendment or supplement is to be acted upon by said Board.

Despite the foregoing provisions and other terms and conditions contained in other Articles of this Agreement, it is understood and acknowledged that Agency's obligations to deliver water pursuant to this Agreement is conditioned upon its being able to provide a water distribution system with which Consumer can be served and that if Agency is unable to provide such a water system, neither it nor its officers, directors or agents shall have any liability to provide water to Consumer nor be subject to any claims, demands or causes of actions on such account.

Article 5. Water Service Connection(s).

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 connection(s) 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 connections and all appurtenances and facilities a part thereof and related thereto. The water service connection, appurtenances and facilities do not include any portion of consumer's water delivery system designed, constructed, acquired or otherwise owned, operated and maintained by Consumer.

**Article 6. Water Delivery Schedules**

On or before August 1 of each year, Consumer shall submit in writing to the Agency its requested water deliveries by month from each water service connection for the succeeding five years. All requests shall be submitted in the manner set forth in the Rules and Regulations. All water orders, emergency turnoff, and any other request by Consumer which may alter the requested water delivery schedule shall be reported to Agency so that Agency can revise its delivery schedule with the State pursuant to the Master Contract. Because of the fact that the Agency anticipates being in a position to first deliver water in 1972, a Schedule 1 is attached hereto and hereby made a part hereof by reference whereby Consumer indicates its requested water deliveries by month from each water service connection for the succeeding five-year period, such requests, if this contract is dated before 1972, being shown as zero for each of the months involved prior to 1972. If the contract is entered into after the Agency is in a position to deliver water then the requested water deliveries will reflect Consumer's anticipated water requirements for the entire five-year period. Consumer agrees to take from the Agency when the latter is in a position to deliver water to Consumer, the water requested for the first year of service, and the Agency agrees to deliver such water to the Consumer, subject to the other provisions contained in this Agreement and to the Agency's Rules and Regulations.

**Article 7. Measurement**

All water furnished pursuant to this Agreement shall be measured by the Agency at each water service connection established pursuant to Article 5 hereof with equipment satisfactory to the Agency. Said equipment shall be installed, owned, operated and maintained by the Agency. All determinations relative to the measuring of water shall be made by the Agency and upon request by the Consumer, the accuracy of such measurement shall be investigated by the Agency in the manner set forth in the Rules and Regulations. Any error appearing therein will be adjusted pursuant to conditions set forth in the Rules and Regulations. The Agency will install, or cause to be installed, backflow prevention devices in connection with such measuring devices to prevent water delivered to the Consumer or other consumers from returning to the Agency's treatment and distribution system.

**Article 8. Limitations on Obligation of Agency to Furnish Water.**

(a) Notwithstanding any provisions of this Agreement to the contrary, the obligation of the Agency to furnish water hereunder shall be limited to the times and to the extent that water and facilities necessary for furnishing the same are available to the Agency pursuant to the Master Contract with the State of California.

(b) The Agency shall not be liable for the failure to perform any portion of this Agreement to the extent that such failure is caused by the failure of the State of California to perform any obligation imposed on the State of California by the Master Contract, provided, however, that the Agency shall diligently and promptly pursue all rights and remedies available to it to enforce the rights of the Agency, the Consumer and other consumers against the State of California under the Master Contract relative to such failure to perform.

Article 9. Water Shortages

## (a) No Liability for Shortages.

Neither the Agency, nor any of its officers, agents or employees, shall be liable for any damage, direct or indirect, arising from any shortages which may occur from time to time in the amount of water to be made available for delivery to the Consumer pursuant to the Master Contract or any other cause beyond the control of the Agency.

## (b) Allocation of Water in Times of Shortage.

The Agency reserves the right in the event that at any time the quantity of water available to the Agency pursuant to the Master Contract is less than the aggregate of the requests of all consumers to allocate the quantity of water available to the Agency to the extent permitted by law.

**Article 10. Curtailment of Delivery for Maintenance Purposes**

The Agency may temporarily discontinue or reduce the amount of water to be furnished to the Consumer for purposes of maintaining, repairing, replacing and investigating or inspecting, any of the facilities necessary for the furnishing of such water to the Consumer. Insofar as it is feasible the Agency will give the Consumer due notice in advance of any such temporary discontinuance or reduction, except in the case of emergency, in which case no notice need be given. In the event of such discontinuance or reduction, the Agency will make available upon resumption of service, as nearly as may be feasible, and to the extent water is available to it, the quantity of water which would have been available to the Consumer in the absence of such discontinuance or reduction.

**Article 11. Responsibilities for Delivery and Distribution of Water Beyond Water Service Connection(s)**

After such water has passed the Water Service Connection(s) established in accordance with Article 5, neither the Agency nor its officers, agents, or employees shall 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 whatsoever, including but not limited to property damage, personal injury or death, arising out of or connected with the control, carriage, handling, use, disposal, distribution or changes occurring in the quality of such water beyond said Water Service Connection; and the Consumer shall indemnify and hold harmless the Agency and its officers, agents, and employees from any such damages or claims of damages, and including reasonable attorneys' fees incurred as against the unsuccessful party in defending against any claims or actions for damages on such account.



**Article 12. Water Quality**

The quality of water delivered by the Agency to the Consumer pursuant to this Agreement shall depend upon the quality of the water furnished to the Agency under the Master Contract, except as the same may be modified by the Agency's local treatment of water. The Agency undertakes no responsibility to Consumer to furnish water pursuant to this Agreement of any particular quality except as may result from the above-mentioned source of supply and any treatment provided by the Agency.

Article 13. Payments

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," as the same may be amended and supplemented from time to time by the Board of Directors of the 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. At this time, the Agency shall make available to the Consumers the estimated water rates in dollars per acre-foot to be charged for water to be delivered in the second and third succeeding years.

**Article 14. Excess Lands**

The provisions of Article 30 of the Master contract to the extent applicable shall be binding upon Consumer, and Consumer agrees to obtain and furnish to the Agency such certifications and information as are required to be furnished by the Agency to the State of California by said Article 30.

**Article 11. Default**

In the event of default by the Consumer in payment to the Agency of any money required to be paid hereunder and pursuant to the Rules and Regulations, the Agency may in its discretion, and in accordance with the Rules and Regulations, suspend delivery of water to the Consumer during the period that the latter is delinquent in its payments.

Article 16. Interest on Overdue Payments.

Upon each charge to be paid by the Consumer to the Agency pursuant to this Agreement which shall remain unpaid after the same shall have become due and payable, interest shall accrue at the rate of one-half of one percent ( $1/2\%$ ) per month of the amount of such delinquent payment from and after the date when the same becomes due until paid, and the Consumer hereby agrees to pay such interest. In no event shall such interest be compounded.

**Article 17. Changes in Organization of Consumer**

The Consumer will furnish the Agency with maps showing the territorial limits of the Consumer and the service area or areas of its water distribution system. Throughout the term of this Agreement, the Consumer will promptly notify the Agency of any changes, either by inclusion or exclusion, in said territorial limits and service area or areas. Consumer agrees to conform to the requirement of Article 15(a) of the Master Contract that any water wholly or partly delivered by the Agency to Consumer will not be delivered outside of the territorial boundaries of the Agency without written consent having first been obtained.

**Article 14. Remedies Not Exclusive**

Remedies provided in this Agreement for enforcement of its terms are intended and shall be construed as cumulative rather than exclusive and shall not be deemed to deprive the party using the same from also using any other remedies provided by this Agreement or by law.

**Article 19. Amendments**

This Agreement may be amended or supplemented at any time by mutual written agreement of the parties in any manner that may be consistent with the applicable law. In amending or supplementing this Agreement, however, the Agency will bear in mind that substantial uniformity of Agreements between the various Consumers of the Agency is thought to be desirable as to the main contracting concepts and principles that are to be used and therefore will attempt to maintain uniformity between the various Consumers' Agreements in such respects.



Article 20. Opinions and Determinations

Where the terms of this Agreement provide for action to be based upon opinion, judgment, approval, review, or determination of either party hereto, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious, or unreasonable. In the event legal action is brought to enforce or determine the rights of either party under this agreement, the prevailing party in such action shall be entitled to court costs and reasonable attorney's fees.

Article 21. Waiver of Rights

Any waiver at any time by either party hereto of its rights with respect to a breach or default, or any other matter arising in connection with this Agreement shall not be deemed to be a waiver with respect to any other breach, default or matter.

**Article 22. Notices**

All notices that are required either expressly or by implication to be given by any party to the other under this Agreement shall be signed for the Agency and for the Consumer by such officers and persons as they may, from time to time, authorize in writing to so act. All such notices shall be deemed to have been given and delivered if delivered personally or if enclosed in a properly addressed envelope and deposited in a United States Post Office for delivery by registered or certified mail. Unless and until formally notified otherwise, all notices shall be addressed to the parties at their addresses as shown on the signature page of this Agreement.

Article 23. Assignment

The provisions of this Agreement shall apply to and bind the successors and assigns of the respective parties, but no assignment or transfer of this Agreement, nor any part hereof nor interest herein by the Consumer shall be valid until and unless approved by the Agency, except an assignment to an affiliate of the Consumer, or to a party or parties, which by merger, consolidation, dissolution, purchase or otherwise, shall succeed to substantially all of the assets and business of the Consumer. Affiliate, as used herein, shall mean a corporation that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, the assigning party.

**Article 24. Inspection of Books and Records**

The proper officers or agents of the Consumer shall have full and free access at all reasonable times to the account books and official records of the Agency insofar as the same pertain to the matters and things provided for in this Agreement, with the right at any time during office hours to make copies thereof at the Consumer's expense, and the proper representatives of the Agency and designated personnel and agents shall have similar rights in respect to the account books and records of the Consumer.

Article 25. Validation

At any time after the execution of this Agreement, either party may if it so desires submit this Agreement to a Court of competent jurisdiction for a determination of its validity, and whichever party elects to follow such a procedure the other party agrees to cooperate therein to any extent that may be necessary or advisable and that shall be requested by the plaintiff. The plaintiff shall bear the costs and attorneys' fees incurred in such a proceeding.

**Article 26. Uniformity of Provisions**

It is intended by the parties that this Agreement shall be uniform as to form and content as between the Agency and the various Consumers entering into this Agreement with the Agency and for this reason any subsequent amendments and supplements hereof that may be entered into that will substantially affect the interests of Agency's Consumers generally in the Agency's opinion shall as provided in Article 19 hereof be made available to all Consumers entering into this Agreement with the Agency on an equal basis.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

Approved as to Form and Sufficiency

By: [Signature]  
Attorney for Agency

ATTEST:

By: [Signature]  
Secretary  
Antelope Valley-East  
Kern Water Agency

ANTELOPE VALLEY-EAST KERN  
WATER AGENCY  
554 West Lancaster Boulevard  
Lancaster, California 93534  
(805) 942-8439

By: [Signature]  
President

DISTRICTS:

LOS ANGELES COUNTY WATERWORKS  
DISTRICTS NOS. 4 AND 34

(SEAL)

ERNEST E. DESS

Chairman of the Board of  
Supervisors of the County of  
Los Angeles, State of  
California, as the governing  
body of said Districts.

Approved as to Form:

John D. Maharg, County Counsel

By: [Signature]  
Deputy

JUL 17 1970

Date Executed

(SEAL)

Attest:

James S. Mize, Executive  
Officer-Clerk of the Board  
of Supervisors of the County  
of Los Angeles

By: FRANCES L. HURRY  
Deputy

**ADOPTED**  
BOARD OF SUPERVISORS  
COUNTY OF LOS ANGELES



# ANTELOPE VALLEY - EAST KERN WATER AGENCY

## SCHEDULE NO. 1

### REQUESTED 5-YEAR WATER DELIVERY for

LOS ANGELES COUNTY WATERWORKS  
DISTRICTS NOS. 4 & 34

(Name of Consumer)

(Service Connection)

(Acres-Feet per Month)

Sheet 1 of 1

	1972	1973	1974	1975	1976
January	300	300	300	300	300
February	300	300	300	300	300
March	350	400	400	400	400
April	500	500	500	600	500
May	700	700	700	800	900
June	1,200	1,250	1,300	1,450	1,500
July	1,500	1,550	1,600	1,750	1,800
August	1,200	1,250	1,300	1,450	1,500
September	900	950	1,000	1,150	1,200
October	600	600	700	600	600
November	450	500	500	400	500
December	300	300	300	300	300
TOTAL	8,300	8,600	8,900	9,500	9,800

Submitted by James T. Rostron Division Engineer 7-3-70  
(Name) (Title) (Date)

FOR Approved: (Initial Year Only)

AGENCY

As submitted above

As amended above

(General Manager)

(Date)

USE

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

On November 11, 2013, I served the foregoing document(s) described as: **NOTICE OF MOTION AND MOTION OF ANTELOPE VALLEY-EAST KERN WATER AGENCY FOR SUMMARY ADJUDICATION OF ALL CAUSES OF ACTION RELATING TO OWNERSHIP OF RETURN FLOWS** [Code Civ. Proc. § 437(c)] on the interested parties in this action served in the following manner:

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

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

Executed on November 11, 2013, at San Bernardino, California.

  
P. Jo Anne Quihuis