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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

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

Los Angeles County Waterworks District 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

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S TRIAL BRIEF FOR PHASE V TRIAL RE RETURN FLOW OWNERSHIP AND PERCENTAGES

Date: February 18, 2014 (Phase V)
Time: 9:00 a.m.
Dept.: To be determined

Judge: Hon. Jack Komar

The Antelope Valley - East Kern Water Agency (AVEK) submits this brief for the Phase 5 trial on the issues of imported water return flow ownership and percentages.

The California Supreme Court has repeatedly stated that the person who "brings" or "delivers" foreign water into a watershed has the rights to the return flows resulting from such imported water. Nonetheless, in denying AVEK's motion for summary adjudication, this Court in pertinent part stated:

> The return flows result from *use* of imported water; not just from importation. . . . water *users* who have imported the water into the basin and who have augmented the water in the acquifer *through use* are entitled [to] rights to the amount of water augmenting the acquifer. If on the trial of this matter AVEK can establish some quantity of water augments the acquifer *because of its use*, beyond what it may sell to other water producers/providers, it may establish such rights.

(Italics added.)

Responding to the aforesaid statement, i.e., that to establish a right to return flows an importer must itself make some "use" of the water such that the acquifer is augmented *because of its use,"* AVEK makes the following points:

- Like AVEK, the Public Water Suppliers (PWS) do not make any *use* of the SWP water they receive from AVEK *beyond selling and delivering the water to their customers* – just as AVEK does. There is no material difference in AVEK's and the PWS' *use* of the imported water, i.e., each delivers and sells SWP water to their respective customers. Therefore, because the PWS' *use* of imported water is no different that AVEK's use, the PWS have no greater claim to return flows based on their "use" of the imported water.
- Also like AVEK, the PWS' contracts with their customers do not include any statement reserving the right to return flows from the water they sell to their customers.
- Additionally, the Court's foregoing analysis also seems to fly in the face of the Supreme Court's decision in *City of Los Angeles v. City of Glendale* (1943), 23 Cal.2d 68 (*Glendale*), and its progeny. In *Glendale*, Los Angeles spread in gravel pits and spreading ponds some of the water it imported from the Owens River Valley, and "The remainder of the water was sold

to the farmers of the San Fernando Valley . . ." (Ibid., at 76.) Therefore, except for its spreading operations, *Los Angeles made no other "use" of the imported water beyond selling and delivering the imported water to its farmer customers*. Nonetheless, Los Angeles was given all rights to the resulting return flows.

Citing the decision in *Stevens v. Oakdale Irr. Dist.*, the Court in *Glendale* also noted that, "It is immaterial whether the farmers who use the imported water acquire their rights through a transfer of land that include a water right . . . or by some other means. . . . In any event ***the importer brings*** *the water to the land of the farmer, and* ***the farmer uses it.***" (Id., at 78; emphasis added.) Manifestly, in *Glendale* the "use" which caused the basin to be augmented was the farmer's use. Nonetheless, the Court made it quite clear that,

> *The use by others* of this water as it flowed to the subterranean basin does not cut off [the importer's] rights. In *Stevens* . . ., 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* (Id., at 77; emphasis added).

Based on the foregoing analysis, the Court in *Glendale* ruled that the importer is entitled to the resulting return flows, notwithstanding the undeniable fact that the subsequent "use" thereof which resulted in return flows was the farmer's use of the water, not the importer's use of the water. Following this same logic, it makes no difference how many persons "use" the imported water before it reaches the groundwater as return flow.

The foregoing demonstrates that an importer need only "bring" or "deliver" foreign water into a watershed to be entitled to the return flows, notwithstanding the fact that the return flows result from its customers' or other persons' subsequent "use" of the imported water. This same principle was reaffirmed in *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199, 257 (*San Fernando*):

> 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 plaintiff's right to recapture the return flow *which is in fact* ***produced by deliveries*** *of its imported water*. (*City of L.A. v. City of Glendale*, *supra*, 23 Cal.2d at p. 78.)

(*San Fernando*, *supra*, at 260; emphasis added.)

This same principle was again reaffirmed in *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266 (*Santa Maria*), wherein that Court stated,

> . . . one *who **brings** water into a watershed* may retain a prior right to it even after it is used. [citing *Glendale*]. The practical reason for the rule is that the importer should be credited with the 'fruits . . . of his endeavors ***in bringing** into the basin* water that would not otherwise be there.' [citing *San Fernando*]

(Id., at 301; emphasis added.)

These controlling decisions uniformly and consistently hold that to retain the right to return flows an importer need only "bring" or "deliver" foreign water into a watershed. Nothing more is required *of the importer*! These decisions do not state that an importer retains return flow rights only if, in addition to bringing foreign water into a watershed, it also makes some other *use* of the water which augments the groundwater *because of its use*. In short, the controlling decisions do not impose a requirement that the importer itself make some "use" of the foreign water which augments the basin groundwater *because of its use*.

Additionally, once the return flows reach groundwater, the importer has the right to recapture the return flow for its own use or, if it chooses, to retain the return flow in the groundwater to help alleviate overdraft conditions. The importer also has the right to convey or transfer to others this distinct and specific property right (*Haun v. De Vaurs,* 97 Cal.App.2d 841, 844; see, also, Hutchins, *The California Law of Water Rights*, at 397-400, noting of the Supreme Court's decision in *Stevinson Water Dist. v. Roduner*, 36 Cal.2d 264, 267-270 (1950) that "this decision sanctioned the right of the producer of imported water to provide by contract for its recapture"); provided the requirements of the Statute of Frauds are satisfied, i.e., the instrument must identify the specific property right being conveyed or transferred, and clearly indicate an intention to convey that specific property right (Civ. Code § 1624(a)(1) and (3)*; Alameda Belt Line v. City of Alameda* (2003), 113 Cal.App.4th 15, 20-210; *Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769, 774 ["Preferably, the writing should disclose a description which is itself definite and certain"]).

> "As described by our Supreme Court, the right to return flows of imported water 'is an *undivided right to a quantity of water* in the ground reservoir equal to the net amount by which the reservoir is augmented by such deliveries.' (*San Fernando*, *supra*, 14 Cal.3d at p. 262, italics added [in original].) Thus, the importers of SWP water may retain a right to the volume of water made available through their efforts. **That right is separate** from others' usufructuary right in the Basin's native supply."

(*Santa Maria*, supra, 211 Cal.App.4th at 302; bold print added; see, also, *San Fernando,supra*,14 Cal.3d 199, 262 .)

Summarizing the points made above, if an importer is itself required to make some "use" of imported water which, "because of its use," augments the basin's groundwater, then neither AVEK nor the PWS are entitled to the return flows, because none of them makes any "use" of the SWP water beyond delivering and selling it to their respective customers.

If, on the other, an importer has the right to return flows simply because it "brings" or "delivers" foreign water into the watershed (as held in *Glendale*, *San Fernando* and *Santa Maria)*, then AVEK has the right to return flows from the foreign water it brings and delivers to its customers in the area of adjudication.

As previously noted, based upon its contract with the State, AVEK owns a State Water Project "entitlement." This gives AVEK the right to arrange for, order and schedule *deliveries* of SWP water into the area of adjudication. AVEK is the person who makes payments to the State for the "fixed" costs associated with the State Water Project, as well as the energy costs charged by the State for the transport and delivery of SWP water to the area of adjudication. Upon receipt of that portion of the SWP water which is destined for its municipal and industrial customers, AVEK first treats the water to make it potable, and then delivers the treated water to its customers through AVEK's distribution systems.

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Based on these undisputed facts, AVEK must be deemed to be "the importer" of the SWP water it "brings" and "delivers" to its customers, many of which are located in the area of adjudication. As such, AVEK is entitled to the ensuing return flows.

AVEK also will present evidence at trial as to the actual amount or percentage of return flows from imported water.

Respectfully submitted,

BRUNICK, McELHANEY & KENNEDY

By: _____
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ANTELOPE VALLEY-EAST KERN
WATER AGENCY

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}

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.

On January 31, 2014, I served the foregoing document(s) described as: **ANTELOPE VALLEY-EAST KERN WATER AGENCY'S TRIAL BRIEF FOR PHASE V TRIAL RE RETURN FLOW OWNERSHIP AND PERCENTAGES** on the interested parties in this action served in the following manner:

__XX__ **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 January 31, 2014, at San Bernardino, California.

P. Jo Anne Quihuis