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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, Presiding

ANTELOPE VALLEY-EAST KERN WATER AGENCY'S PHASE VI TRIAL BRIEF

Trial Date:

September 28, 2015
Time: 9:00 a.m.
Dept.: Room 222
Los Angeles Superior Court

Cross-complainant, the ANTELOPE VALLEY-EAST KERN WATER AGENCY (AVEK) submits the following brief for the next phase of trial scheduled to commence on September 28, 2015.

I.

INTRODUCTION

AVEK is a public agency and a state water contractor. In its role as a state water contractor, AVEK arranges and pays for the delivery of the lion's share of the State Water Project water (SWP water) that is imported into the Antelope Valley area of adjudication (the Basin). Throughout these proceedings, commencing with the August 30, 2006 filing of its cross-complaint, AVEK has contended that it alone is entitled to control and/or recapture the return flows which result from the SWP water AVEK imports into the Basin.

AVEK's claim is *factually* based on the undisputed fact that AVEK is the party which arranges and pays the State for the importation of SWP water into the Basin, and it has done so with the intention of controlling and/or recapturing the resulting return flows. AVEK's claim to return flows is *legally* based on: (1) the specific authorization granted AVEK under its enabling Act, "To . . . **recapture**" or retake such water; and (2) California appellate court decisions which unequivocally state that the person who brings or delivers foreign water into a watershed, with the intention of recapturing the return flows derived therefrom, has the right to such return flows.

AVEK contends further that the subsequent "use" of the imported water by AVEK's customers and others, before the water percolates into and augments the natural supply of ground water in the Basin, does not impair in any way AVEK's entitlement and right to the resulting return flows.

Nevertheless, in consideration of the other stipulating parties' agreement to the proposed Judgment and Physical Solution and conditioned thereon, AVEK has agreed in the Stipulation For Entry Of Judgment And Physical Solution, to effectively relinquish its entitlement and right to most, but not all, of the return flows derived from the imported water, to wit:

5.2.2 **Water Imported Through AVEK.** The right to Produce Imported Water Return Flows from water imported through AVEK belongs exclusively to the Parties identified on Exhibit 8, attached hereto . . . *All Imported Water Return Flows from water imported through AVEK and not allocated to Parties identified in Exhibit 8 belong exclusively to AVEK, unless otherwise agreed by AVEK.* . . .

(Proposed Judgment and Physical Solution, pp. 25-26; italics added.)

Accordingly, this trial brief addresses the bases for AVEK's entitlement and right to the return flows derived from the SWP water it brings and delivers into the Basin, along with certain other issues pertinent to the next phase of trial.

II.

THE LEGISLATURE HAS SPECIFICALLY AUTHORIZED AVEK TO "RECAPTURE" WATER

One of AVEK's primary functions is to directly arrange for the delivery of SWP water into the Basin which is then transported, treated and distributed by AVEK to its various agricultural, industrial and municipal customers.

Under AVEK's enabling Act (Water Code Appendix 98-49 et seq.), AVEK is specifically authorized "To . . . control . . . [and] **recapture . . . any water** . . .for the beneficial use or uses and protection of the agency . . ."[1]

The commonly understood meaning of "Recapture" is "The act of **retaking**" (Merriam-Webster Dictionary). When it authorized AVEK to "recapture" and retake water, the Legislature

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1 The Antelope Valley-East Kern Water Agency Law, Water Code Appendix 98-49 et seq., in pertinent part, provides:

"Sec. 61. The Antelope Valley-East Kern Water Agency, incorporated as herein provided, shall have power:

. . .

13. To . . . **control**, distribute, store, spread, sink, treat, purify, reclaim, **recapture**, and salvage **any water**, including sewage and storm waters, **for the beneficial use or uses and protection of the agency** or its inhabitants or the owners of rights to water therein;"

(Underscored bold print added.)

did not place any limitation or restriction on when, where or how AVEK may "recapture" or retake water. Accordingly, AVEK is authorized to recapture SWP water after it has been used and disposed of by AVEK's customers and other subsequent users, and after it has percolated into and augmented the Basin groundwater.

Thus, whether AVEK's customers or other subsequent users ultimately deposit the imported water into a stream, into a sewer or septic system, or onto the ground (before it percolates into and augments the natural supply of groundwater in the Basin), the Legislature has specifically empowered AVEK to "**recapture**" or retake such water. That includes the resulting return flows.

Therefore, AVEK's enabling Act authorizes AVEK to "recapture" the return flows which result from the SWP water it acquires and causes to be brought into the Basin.

III.

CASE LAW ALSO ESTABLISHES AVEK'S RIGHT TO RETURN FLOWS

In addition to AVEK's specific authorization in the Water Code to "recapture" water, the California Supreme Court has repeatedly explained that the person who "brings" or "delivers" foreign water into a watershed has the right to the return flows resulting from such imported water (see *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-78 [*Glendale*]; *City of Los Angeles v. City of San Fernando* 14 Cal.3d 199, 257-259, 262-263 [*San Fernando*]).

This Court recognized the same principle in its February 3, 2015 PARTIAL STATEMENT OF DECISION FOR TRIAL RELATED TO PHELAN PINON HILLS COMMUNITY SERVICES DISTRICT (2nd AND 6th CASES OF ACTION), wherein the Court quoted from the decision in *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 301, as follows:

> "[O]ne who **brings** water into a watershed may retain a prior right to it even after it is used. . . . 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.'"

(Statement of Decision, Page 9, lines 17-21; bold print added.)[2]

Therefore, AVEK's contention that it is entitled to control and/or recapture the return flows from the SWP water it causes to be brought into the Basin is clearly supported by case law.

IV.

AVEK HAS MANIFESTED THE REQUIRED INTENT TO RECAPTURE RETURN FLOWS

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

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

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

The Fourth Cause of Action of AVEK's August 30, 2006 cross-complaint filed in these proceedings adequately manifests the required intent to recapture the return flows derived from the SWP water AVEK causes to be brought and delivered into the Basin, to wit:

> As the primary importer of supplemental State Project water 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

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2 On the same page of its Statement of Decision, the Court also quoted virtually identical language from the Supreme Court's decision in *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 261.

own imported water, and do not extend to groundwater attributable to [AVEK's] return flows.

(AVEK August 30, 2006 Cross-Complaint, ¶ 38)

Further manifesting that same intention, in 2008, AVEK purchased approximately 3,000 acres of farmland. Thirty-two (32) operational water wells are located on those properties, giving AVEK more than ample ability to extract the return flows derived from the SWP water it causes to be brought and delivered into the Basin.[3]

Thus, AVEK has adequately manifested its intention to recapture the return flows derived from the foreign water it brings into the Basin.

V.

THE IMPORTER NEED NOT MAKE ANY PARTICULAR "USE" ITSELF OF THE IMPORTED WATER

AVEK's right to the return flows derived from the SWP water it brings into the Basin is not conditioned or dependent, in any way, upon AVEK's own "use" of the imported water. This point is again made perfectly clear by the case decisions.

In *Glendale*, *supra*, Los Angeles spread a portion of its imported Owens River Valley water in gravel pits and ponds. "The remainder of the water was sold to the farmers of the San Fernando Valley . . ." (23 Cal.2d 68, 76.) Thus, except for its spreading operations, Los Angeles made no other "use" of the imported water beyond selling and delivering the imported water to its agricultural customers.

Nonetheless, the *Glendale* Court held that Los Angeles had the right to ALL resulting return flows. In support of its decision, the Court cited *Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 264 (*Stevens*), and noted that, ***"the importer brings** the water to the land of the farmer, and **the farmer uses it.**"* (Id., at 78; emphasis added.) Thus, the "use" of imported water which

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3 AVEK also has an additional 9 water wells located elsewhere in the Basin.

caused the groundwater in the basin to be augmented was manifestly *the farmer's use*, not the City's use. Notwithstanding that fact, the *Glendale* 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 farmers' subsequent "use" of the imported water was the direct cause of the return flows resulting from such use, not the importer's "use" of the 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.)

(*Id.*, at 260; emphasis added.)

> . . . *an alteration in the type of use from which imported water is returned to the ground does not impair the importer's claim to it as return water*.

(Id., at 258-259; italics added.)

And as noted above, in its February 3, 2015 Partial Statement of Decision, the Court affirmed and quoted the holding in *City of Santa Maria* that, ""[O]ne who brings water into a watershed may retain a prior right to it *even after it is used*." (Page 9, lines 17-21).

The foregoing controlling decisions consistently hold that to establish the right to return flows an importer need satisfy only two requirements: (1) "bring" or "deliver" foreign water into a watershed; and (2) do so, with the intention of later recapturing or controlling the resulting return flows. Nothing more is required *of the importer*! The importer itself need not make any

particular "use" of the imported water, and the use of the water by others does not impair in any way the importer's right to return flows.

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 the importer's use.

As an aside, however, AVEK does make "use" of the imported water in ways that augment the Basin groundwater, to wit:

- Like the City of Los Angeles in *Glendale*, AVEK spreads and banks a portion of the SWP water it brings into the Basin;
- SWP water has also been used for agricultural operations on farmland owed by AVEK;
- In its treatment facilities, AVEK also converts raw aqueduct water into potable water suitable for human consumption (while in *Glendale*, Los Angeles merely provided untreated water to its farmer customers); and
- AVEK delivers the treated water directly into the water systems of the PWS and Edwards AFB.[4]

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4 AVEK also is mandated to distribute and apportion the State water it imports on an equitable basis, *based on taxes collected.* AVEK must assure to each area within the Agency's service area receives a fair share of the imported water, and may contract and take all acts necessary to exercise the Agency's powers to accomplish this equitable apportionment. (Appendix 98-61, subdivisions 13, 14, and 15, and 98-61.1 [Equitable distribution and apportionment of water; determination of fair share].)

> Section 61.1. The agency shall whenever practicable, distribute and apportion the water purchased from the State of California or water obtained from any other source as equitably as possible on the basis of total payment by a district or geographical area within the agency regardless of its present status, of taxes, in relation that such payment bears to the total taxes and assessments collected from all other areas.
>
> It is the intent of this section to assure each area or district its fair share of water based upon the amounts paid into the agency, as they bear relation to the total amount collected by the agency.

Therefore, although not being required to do so to perfect its claim to return flows, AVEK's multiple "uses" of the SWP water it brings into the Basin, in fact, do result in the Basin being recharged, either through AVEK's banking and agricultural operations on AVEK owned properties, or through use of imported water by others after AVEK has processed, treated and delivered the water so that it can be consumptively used.

In summary, AVEK is statutorily authorized to "recapture" the SWP water it brings into the Basin. In addition thereto, under controlling case law AVEK is entitled to the resulting return flows because: AVEK is the party which has the contractual right to import SWP into the Basin; AVEK has ordered and paid the State for the lion's share of the SWP water imported into the Basin; and it has done so with the intention of recapturing the resulting return flows. Accordingly, in the event the Court accepts and implements the provisions of the proposed Judgment and Physical Solution, AVEK is entitled (as provided therein) to an award of "All Imported Water Return Flows from water imported through AVEK and not allocated to Parties identified in Exhibit 8."

VI.

THE PROPOSED PHYSICAL SOLUTION SHOULD BE APPROVED

At trial, AVEK will offer and submit testimony from expert witnesses (including Charles Binder and Robert Wagner) demonstrating that the proposed Physical Solution will benefit the Basin and, over time, succeed in bringing the Basin into balance, and that the stipulating parties' historical uses of groundwater have been both reasonable and beneficial.

VII.

WILLIS CLASS CLAIMS

In response to the claims made by the Willis Class, AVEK notes the following:

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A. The conditions imposed on the exercise of dormant rights to groundwater apply equally to both stipulating parties and non-stipulating parties, and are not unreasonable or unduly burdensome

Many of the stipulating parties also own dormant parcels. Under the terms of the proposed Judgment and Physical Solution, those stipulating parties likewise will be required to (a) seek permission from the Watermaster or this Court before being allowed to pump groundwater on their dormant parcels, and (b) pay a replacement assessment for the new water so pumped (unless determined to be *de minimis* use).

Therefore, the members of the Willis Class are not treated unfairly or any differently that the stipulating parties who likewise also own dormant parcels. Both categories of overlying landowners will be required under the Judgment to satisfy the requirements set forth therein before being allowed to pump new groundwater.

Moreover, the Court has pointed out that it is not now possible to quantify the amount of water that will be required by members of the Willis Class. That is true also as to those stipulating parties who likewise own dormant parcels within the area of adjudication. The only fair and practical solution which preserves the correlative rights of both groups of overlying landowners is that which is set forth in the proposed Judgment and Physical Solution.

As the Court has also pointed out, many of the members of the Willis Class should encounter little or no difficulty, and no undue burden, in applying for and receiving from the Watermaster permission to pump on their properties *de minimis* amounts of groundwater. As to large landowners and possible developers within the Class, the conditions imposed under the Judgment are appropriate, reasonable, not unduly burdensome, and necessary to protect this fragile Basin.

VIII.

PROVE-UP OF AVEK PUMPING OF GROUND WATER

In the Phase IV trial, the Court found that AVEK pumped groundwater in the amount of 11,463 acre feet in 2011, and 2,792 acre feet in 2012 (see AMENDED STATEMENT OF

PARTIAL DECISION FOR PHASE IV TRIAL WITH PARTY NAME CORRECTIONS, filed July 19, 2013).

The Barnes, Flory, Chisam, Flood and Qiu declarations (4-AVEK-1 and 4-AVEK-3), AVEK's trial exhibits (4-AVEK-2), and the related stipulation (4-AVEK-4), all of which were received into evidence during the Phase IV trial demonstrate further that: (a) AVEK also used 5,027 acre feet of *in lieu* water in 2011 on AVEK owned property (for a total of 16,491 acre feet in 2011), and 3,641 acre feet of *in lieu* water in 2012 (for a total of 6,430 acre feet in 2012); and (b) the significant decline in water use in 2012 was the result of AVEK taking acreage out of agricultural production and devoting that acreage to water banking operations.

The referenced declarations and exhibits also demonstrate groundwater pumping and water use on AVEK owned properties during the years 2000 through 2004. To avoid duplication of evidence and an unnecessary expenditure of trial time to establish these undisputed facts, and because the AVEK declarations and exhibits were already received into evidence during the Phase IV trial, AVEK will rely upon such already admitted evidence for this next phase of the trial, absent other direction from the Court.[5]

IX.

BASED ON THE PARTIES' STIPULATION, AVEK WILL NOT PRESENT AT THIS NEXT PHASE OF TRIAL DEFENSES IT WOULD OTHERWISE PRESENT

As previously noted in the JOINT CASE MANAGEMENT STATEMENT OF UNDERSIGNED OVERLYING PUBLIC AND PRIVATE LANDOWNER PARTIES, filed on July 7, 2015 (which is incorporated herein by this reference), many of the stipulating parties, including AVEK, will not assert defenses otherwise available to them during this phase of the

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5 In its May 28, 2013 Fourth Amendment to Case Management Order for Phase Four Trial, "to eliminate, to the extent possible, the necessity of presenting evidence through witnesses at Trial," the Court established a procedure whereby parties could present declarations and stipulations as to the amount of groundwater pumping, other parties could object thereto, and ""Any portion of a Stipulation or Declaration to which no objection has been made by the time set forth in paragraph 3 hereof will be accepted by the Court in the Trial as competent evidence of the facts stated therein, without the necessity to call a witness to establish the fact" (paragraph 5).

trial, including without limitation defenses to the PWS' prescription claim, the claimed federal reserve right, etc. Because of the agreements memorialized in the parties' stipulation for entry of the proposed Judgment and Physical Solution, such defenses are not advanced at this time. However, should the Court determine not to enter the proposed Judgment and Physical Solution as a final judgment in this action, AVEK requests an opportunity and, to the extent it has a right to do so, reserves the right to submit evidence in support of such defenses.

IX.

CONCLUSION

For the foregoing reasons, AVEK respectfully submits that the Court should determine and hold that: (1) "All Imported Water Return Flows from water imported through AVEK and not allocated to Parties identified in Exhibit 8 belong exclusively to AVEK, unless otherwise agreed by AVEK," as set forth in the proposed Judgment and Physical Solution; (2) the proposed Physical Solution will benefit the Basin and, over time, should succeed in bringing the Basin into balance; (3) the correlative rights of the members of the Willis Class are appropriately confirmed, conditioned and protected under the terms of the proposed Judgment and Physical Solution; and (4) AVEK has submitted adequate evidence of its groundwater pumping and use of in lieu water for agricultural operations to establish and prove its entitlement to the groundwater allocation assigned to AVEK in Exhibit 4 of the proposed Judgment and Physical Solution.

Dated: September 22, 2015

Respectfully submitted,

BRUNICK, McELHANEY & KENNEDY

By: _____

WILLIAM J. BRUNICK
LELAND P. McELHANEY
Attorneys for Cross-Complainant,
ANTELOPE VALLEY-EAST KERN
WATER AGENCY

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO}

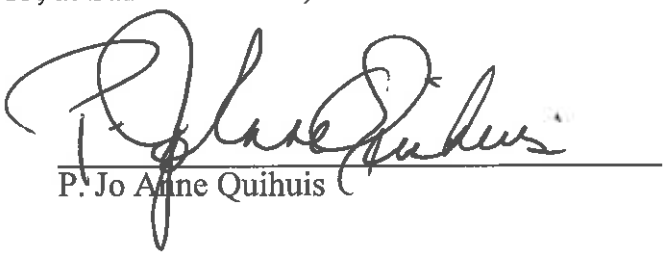
I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California.

On September 22, 2015, I served the foregoing document(s) described as: **ANTELOPE VALLEY-EAST KERN WATER AGENCY'S PHASE VI TRIAL BRIEF** 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 September 22, 2015, at San Bernardino, California.



P. Jo Anne Quihuis