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Landinv, Inc.; Bruce Burrows; 300 A 40 H, LLC;  
Little Rock Sand and Gravel, Inc.;  
The George and Charlene Lane Family Trust;  
The Frank and Yvonne Lane 1993 Family Trust;  
Monte Vista Building Sites, Inc., A.V. Materials, Inc.;  
Holliday Rock Co., Inc.; Littlerock Aggregate Co., Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

Coordination Proceeding Special Title  
(Rule 1550 (b))

Judicial Council Coordination No. 4408  
[Assigned to Hon. Jack Komar; Dept 17]

**ANTELOPE VALLEY GROUNDWATER  
CASES**

Santa Clara Case No.: 1-05-CV-049053

Included **CONSOLIDATED** Actions:

**LANDOWNERS' BRIEF IN RESPONSE  
TO AVEK'S AMENDED PHASE FIVE  
TRIAL BRIEF**

Los Angeles County Waterworks District No.  
40 vs. Diamond Farming Company  
Los Angeles Superior Court Case No.  
BC325201

**Trial Date: February 10, 2014**  
**Time: 9:00 a.m.**  
**Dept.: Old Dept. 1**

Los Angeles County Waterworks District No.  
40 vs. Diamond Farming Company  
Kern County Superior Court Case No. S-1500-  
CV-254348 NFT

1 Diamond Farming Company vs. City of )  
2 Lancaster Riverside County Superior Court )  
3 Lead Case No. RIC 344436 [Consolidated w/ )  
Case Nos. 344668 & 353840] )  
4 Willis v. Los Angeles County Waterworks )  
5 District No. 40; Los Angeles Superior Court )  
Case No. BC 364553 )  
6 Wood v. Los Angeles County Waterworks )  
7 District No. 40; Los Angeles Superior Court )  
8 Case No. BC 391869 )

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1 **Introduction**

2 The Landowners (listed on page one of this brief) previously filed a brief in response to  
3 AVEK's (and the Suppliers') phase five trial briefs. AVEK filed its "amended" brief on  
4 February 17, 2014. In this brief, the Landowners respond to certain new points made in AVEK's  
5 amended brief.

6 The phase five trial, to the extent it relates to reclaiming the augmented underground  
7 supply, depends as much on the facts and law relating to the supply, distribution, and use of  
8 surface water as it does on those relating to the subsequent reclamation thereof from the  
9 underground. DWR and the end users jointly own the appropriative right to the SWP surface  
10 water, but do not reclaim it after it is used. It is the overlyers, including the Landowners, who  
11 reclaim it, as permitted by Water Code Section 7075.

12 **1. DWR DEVELOPED AND IMPORTS THE SWP SURFACE WATER TO**  
13 **THE BASIN AND HOLDS LEGAL TITLE TO THE APPROPRIATIVE RIGHT**  
14 **TO DO SO**

15 AVEK does not dispute that DWR built numerous SWP facilities, including Oroville  
16 Dam, the Banks Pumping Plant, the California Aqueduct, and the East Branch Aqueduct, and  
17 thereby developed the SWP surface water supply. It seems to acknowledge (although not  
18 definitively) that DWR imports the SWP water to the Basin through the dam, the Feather River,  
19 the Sacramento River, the Delta, the pumps, the main aqueduct, and the east branch. AVEK  
20 Amended Brief, p. 14. It discusses the usufructuary appropriative right to use the SWP surface  
21 water. *Id.*, pp. 5-6. The SWP surface water has been "appropriated" within the meaning of  
22 Water Code Section 7075. (See also point 4 below.)

23 Large modern water projects are multi-party endeavors. One party builds and operates  
24 the main facilities and usually acquires the appropriative right. But others (irrigators and other  
25 landowners) use the water and perfect and preserve the right by applying the water to their lands  
26 for irrigating crops and landscapes and other comparable uses. In these cases the owner and  
27 operator of the main facilities holds a nominal interest (mere title) in the appropriative right.  
28 *Klamath Irrigation District v. U.S.*, 463 U.S. 110, 126, 127 (1983); *Ivanhoe Irrigation District v.*  
*All Parties*, 53 Cal.2d 693, 703-04 (1960); *Nevada v. U.S.*, 635F.3d 505, 517 (2011).

Thus, DWR built the SWP, and it operates it to deliver SWP surface water into the Basin for distribution by intermediaries to their customers for use. DWR also acquired and, throughout the development, importation, distribution, and initial use stages, hold legal title to the appropriative rights.<sup>1</sup>

**2. AVEK RECEIVES THE SWP SURFACE WATER, TREATS IT, AND DISTRIBUTES IT TO THE SUPPLIERS WITHIN THE BASIN, BUT OWNS NO INTEREST IN THE APPROPRIATIVE RIGHT**

AVEK buys, receives, treats, distributes, and resells to the Suppliers most of the SWP surface water in the Basin. AVEK Amended Brief, pp. 2, 5, 6, 11. AVEK also spreads a relatively small amount of such water. *Id.*, pp. 4, 12, 13. In 2006, it acquired 3000 acres of farmland equipped with wells in the Basin. *Id.*, pp. 5, 8, 12, 13.

Occasionally, the appropriative rights necessary to operate a large water project are acquired under state law by an intermediary, in which case it takes legal title to the right. *Bryant v. Yellen*, 447 U.S. 352, 371 (1980). But where the builder and operator of the major project features acquires the right, it has title to the right, and any intermediary has no interest in the appropriative right itself. *Truckee-Carson Irrigation District v. Department of Interior*, 742 F.2d 527, 530-31 (9th Cir. 1984).

Here, DWR acquired the appropriative rights to use the SWP surface water and holds title thereto. AVEK, as a middleman between DWR and the Suppliers, holds no interest in the rights.

**3. THE SUPPLIERS BUY, DISTRIBUTE, AND RESELL TO THE INITIAL USERS THE SWP SURFACE WATER, BUT OWN NO INTEREST IN THE APPROPRIATIVE RIGHTS**

AVEK characterizes the role played by the Suppliers as “middlemen.” AVEK Amended Brief, pp. 5, 11. The Landowners concur.

The Suppliers, as intermediaries between AVEK and the end users of the SWP water, hold no interest in the appropriative rights to use the water.

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<sup>1</sup> Points 5, 6, and 7 below discuss whether the SWP water reverts after such use to unappropriated status, whether the appropriators abandon the appropriative right by failing to reclaim it, and whether overlyers may reclaim the augmented groundwater supply.

1 **4. THE CUSTOMERS OF THE SUPPLIERS ARE THE USERS OF THE SWP**  
2 **SURFACE WATER**

3 AVEK acknowledges that an appropriative right is a usufructuary right to use water.  
4 AVEK Amended Brief, pp. 5-6. The Landowners agree.

5 A water project is built and operated as a means of facilitating beneficial use of the water  
6 managed thereby. Indeed, without persons putting the water to beneficial use, there is no  
7 appropriative right. *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 800-804  
8 (2006). In such cases, the irrigators and other users own equitable or beneficial interests in the  
9 right. *Nevada*, 436 U.S. at 126, 127; *Bryant v. Yellen*, 447 U.S. 352, 371 (1980); *Klamath*  
10 *Irrigation District*, 635 F.3d at 517, 519. The appropriative right is appurtenant to the lands  
11 watered with the water. *Nicoll v. Rudnick*, 160 Cal.App.4th 550, 558 (2008); *Fullerton v. State*  
12 *Water Resources Control Board*, 90 Cal.App.3d 590, 598 (1979).

13 **5. HAVING BEEN USED, THE SWP WATER FLOWS BACK INTO A BODY OF**  
14 **WATER AND BECOMES UNAPPROPRIATED WATER**

15 AVEK asserts that DWR never had “wells or any other means of recapturing return flows  
16 in the Basin.” AVEK Amended Brief, p.14. Because the SWP water is not reclaimed by any  
17 appropriator, it becomes unappropriated water. “[U]nappropriated water” includes water which,  
18 having been “used,” flows back into a stream, lake, or “other body of water.” Water Code  
19 § 1202(d).

20 Once the end users of SWP surface water apply it to the surface for landscape, irrigation,  
21 or other purposes, the water has been “used.” A portion of it then percolates down into the  
22 underlying aquifer. Some or all such water may flow in one or more underground channels,  
23 including any channel between one part of the aquifer and another. In such event, any  
24 appropriator would have no claim to the augmented supply. Furthermore, the Landowners  
25 concur with AVEK that DWR, the developer and importer of the SWP water and title holder of  
26 the appropriative right to use it, has no means of recapturing such flows. Nor, to the best of the  
27 Landowners’ knowledge, do the end users, the beneficial owners of the appropriative right  
28 engage in substantial recapture. The augmented groundwater supply has generally been unused  
by them, and is available for pumping and use by overlyers. Water Code § 1241.

1 **6. THE APPROPRIATORS OF THE SWP SURFACE WATER, BY IMPORTING**  
2 **AND USING BUT NOT RECLAIMING IT, HAVE ABANDONED IT**

3 AVEK discussed “abandonment” of SWP water after it has been applied, percolated, and  
4 mingled with native groundwater. AVEK Amended Brief, p. 13.

5 The possible application of the abandonment doctrine has been discussed in cases  
6 interpreting Section 7075. *Santa Maria*, 211 Cal.App.4th at 302 (citing *Glendale*).

7 In the case at bar, DWR imported the SWP water, the intermediaries distributed it, and  
8 the Suppliers’ customers used it, as permitted by the appropriative right. But neither the  
9 importer nor the users, those holding interests in the right, substantially reclaim the residual  
10 water from the aquifer. Thereby, they have abandoned any further use of the water. Water Code  
11 § 100.

12 **7. AS OWNERS OF OVERLYING RIGHTS TO BASIN GROUNDWATER,**  
13 **THE LANDOWNERS MAY RECLAIM THE AUGMENTED, AS WELL AS**  
14 **THE NATIVE, SUPPLY**

15 Here, DWR and the Suppliers, after importation and use of the SWP surface water, failed  
16 to reclaim the residual supply underground. The water became unappropriated and any right  
17 they once had to use the water was abandoned. A right must be used. Water Code § 100. Its  
18 nonuse results in reversion. *Id.* at § 1241. The overlyers, including the Landowners have the  
19 means of access to such supply (wells) and have long used them both to pump the native supply  
20 and to reclaim the former SWP water.

21 **Conclusion**

22 To the extent the fifth phase trial adjudicates the right to reclaim under Section 7075, the  
23 overlying right holders should prevail over the importer, distributors, and users of the SWP  
24 surface water.

25 Dated: February 24, 2014

Respectfully submitted

26 SMILAND CHESTER LLP  
27 RING & TAYLOR

28 By /s/ Theodore A. Chester, Jr.  
Theodore A. Chester, Jr.

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I, Felicia Herbstreith am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 601 West Fifth Street, Suite 1100, Los Angeles, California 90071.

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

/s/ Felicia Herbstreith  
Felicia Herbstreith