

1 Q BY MR. MILIBAND: MR. HARDER, IF I CAN  
2 DIRECT YOU TO EXHIBIT 45, PLEASE. IS THIS ALSO PREPARED  
3 BY YOU OR AT THE DIRECTION OF YOUR STAFF?

4 A YES.

5 Q WHAT DOES EXHIBIT 45 ILLUSTRATE TO YOU?

6 A IT'S AN AERIAL PHOTO OF THE LANCASTER  
7 AREA, I BELIEVE. AND WE IDENTIFIED -- WE PREPARED THIS  
8 MAP JUST TO SHOW A TYPICAL LANDSCAPE IRRIGATION SCENARIO  
9 IN THIS AREA WHICH WAS THE BASIS OF THE SUMMARY EXPERT  
10 REPORT ASSUMPTIONS ON INDOOR AND OUTDOOR WATER USE.

11 Q WHY WAS IT IMPORTANT TO YOU TO DO THAT AND  
12 FORMULATE THIS ILLUSTRATION AS WE SEE IN EXHIBIT 45?

13 A WELL, WE DISCUSSED THIS A LITTLE BIT  
14 EARLIER. BUT THE SUMMARY EXPERT REPORT ASSUMPTIONS ON  
15 INDOOR AND OUTDOOR WATER USE WERE IN LARGE PART BASED ON  
16 THE LANCASTER AREA WHERE THERE IS MORE OUTDOOR LANDSCAPE  
17 IRRIGATION THAN IN PHELAN. SO WE PREPARED THESE  
18 ILLUSTRATIONS TO SHOW THAT.

19 Q LET'S MOVE TO THE NEXT EXHIBIT IN ORDER,  
20 PLEASE, EXHIBIT 46. IS THIS, ESSENTIALLY, A MORE OR  
21 LESS ZOOMED IN PHOTO OF THE LANCASTER AREA THAT WAS FROM  
22 A HIGHER AERIAL VIEW WITHIN EXHIBIT 45?

23 A RIGHT.

24 Q WAS THIS ZOOMED IN FOR A SIMILAR PURPOSE  
25 TO BE ABLE TO ILLUSTRATE THE OUTDOOR LANDSCAPING  
26 PATTERN?

27 A YES. THAT'S CORRECT. THIS IS ONE OF THE  
28 SQUARES THAT WAS SHOWN ON THE PREVIOUS MAP.

1 Q IN THE WORK THAT YOU HAVE DONE IN THIS  
2 CASE THAT YOU WERE TALKING ABOUT TOWARD THE BEGINNING OF  
3 THIS MORNING, YOU HAVE DRIVEN AROUND THE PHELAN AREA IN  
4 DIFFERENT PARTS OF THE ANTELOPE VALLEY; IS THAT CORRECT?

5 A THAT'S CORRECT.

6 Q ASIDE FROM THESE AERIAL PHOTOS, HOW WOULD  
7 YOU DESCRIBE THE LANCASTER/PALMDALE AREA AS YOU  
8 UNDERSTAND IT IN TERMS OF RESIDENTIAL LANDSCAPING VERSUS  
9 RESIDENTIAL LANDSCAPING WITHIN THE PHELAN SERVICE AREA?

10 A WELL, IN LANCASTER/PALMDALE IT'S A LITTLE  
11 BIT MORE -- YOU TYPICALLY HAVE SOME LAWNS. YOU CAN SEE  
12 THERE ARE SOME POOLS AND MORE TREES AND MORE DECIDUOUS  
13 TREES. THEY TYPICALLY HAVE A LITTLE BIT MORE OF WHAT  
14 APPEARS TO BE A HIGHER LANDSCAPE IRRIGATION DEMAND.

15 Q IF I CAN DIRECT YOU TO EXHIBIT 48, PLEASE.  
16 EXCUSE ME. IF WE CAN GO BACK TO EXHIBIT 47, PLEASE.

17 MR. HARDER, THIS APPEARS TO BE A SIMILAR  
18 ILLUSTRATION IN EXHIBIT 47 AS SOME OF THE OTHER  
19 ILLUSTRATIONS YOU HAVE PREPARED AND DISCUSSED THIS  
20 MORNING; IS THAT CORRECT?

21 A YES.

22 Q IS THE SIGNIFICANT DIFFERENCE THAT THERE  
23 IS A LARGE AIR PHOTO SQUARE AS WRITTEN INTO EXHIBIT 47?

24 A RIGHT.

25 Q AND WAS THIS DONE BY YOU OR AT YOUR  
26 DIRECTION TO THE STAFF?

27 A AT MY DIRECTION.

28 Q AND FOR WHAT PURPOSE?

1           A       WELL, IN THE FOLLOWING EXHIBIT WE JUST  
2 WANTED TO SHOW THE LOCATION OF THE BLOWUP OF THE AREA  
3 THAT WE WERE GOING TO ILLUSTRATE FROM THE AERIAL PHOTO  
4 SHOWING A TYPICAL LANDSCAPE IRRIGATION AREA.

5           Q       CAN YOU TURN NOW TO EXHIBIT 48, PLEASE.

6           A       THAT'S JUST THE AREA THAT THE FOLLOWING  
7 EXHIBIT SHOWS.

8           Q       IS EXHIBIT 48 AN AERIAL ILLUSTRATION OF  
9 THAT BLACK BOX OR SQUARE THAT WAS WITHIN EXHIBIT 47?

10          A       IT IS.

11          Q       AND, AGAIN, TO ILLUSTRATE THE TYPE OF  
12 LANDSCAPING AND HOW IT'S DIFFERENT FROM THE TYPICAL  
13 OUTDOOR RESIDENTIAL LANDSCAPING WITHIN THE LANCASTER  
14 AREA; IS THAT CORRECT?

15          A       RIGHT.

16          Q       HOW WOULD YOU DESCRIBE THAT DIFFERENCE IN  
17 THE SIMPLEST OF TERMS?

18          A       WELL, AS YOU CAN SEE, THERE ARE NOT AS  
19 MANY TREES AND LANDSCAPING. I WILL POINT WITH A LASER  
20 POINTER TO AN AREA BETWEEN HOMES IN THE CENTER OF THIS.  
21 THESE AREAS ARE NATIVE. THEY HAVE NOT BEEN DEVELOPED  
22 WHATSOEVER.

23                   I AM POINTING TO AN AREA OF A TYPICAL  
24 HOME. THEY CLEARED THE LAND IN THE NATIVE LANDSCAPE,  
25 BUT THEY DON'T TYPICALLY PLANT LAWNS. THEY DON'T HAVE  
26 OUTDOOR IRRIGATION.

27                   I HAVE INCLUDED THIS VIEW, BECAUSE I THINK  
28 THIS IS THE ONE EXCEPTION WHICH I AM NOT SURE IF IT'S A

1 PARK OR A SCHOOL. THAT IS THE ONE EXCEPTION IN THE AREA  
2 WHERE THERE IS OUTDOOR LANDSCAPE IRRIGATION, BUT THE  
3 HOMES DON'T TYPICALLY HAVE IT.

4 Q IF WE CAN TURN TO THE NEXT IN ORDER,  
5 PLEASE, EXHIBIT 49. DOES EXHIBIT 49 ILLUSTRATE WHAT YOU  
6 WERE JUST REFERENCING AS A HOME TYPICAL WITHIN THE  
7 PHELAN SERVICE AREA?

8 A YES, IT DOES.

9 Q AND, AGAIN, WHAT PURPOSE DID YOU WANT TO  
10 BE ABLE TO PROVIDE SOMETHING AS SPECIFIC AS ILLUSTRATED  
11 WITHIN EXHIBIT 49?

12 A WELL, IT'S JUST TO ILLUSTRATE A TYPICAL  
13 HOME AND THEIR TYPICAL LANDSCAPE. IT DOES NOT INCLUDE  
14 LAWNS. THE TREES ARE NATIVE JOSHUA TREES; THEY ARE NOT  
15 IRRIGATED. THEY DO TYPICALLY HAVE A FEW DECIDUOUS TREES  
16 HERE AND THERE THAT MIGHT BE ON A DRIP SYSTEM. BUT THE  
17 OUTDOOR IRRIGATION, THEY DO NOT TYPICALLY HAVE OUTDOOR  
18 IRRIGATION SYSTEM OF SIGNIFICANCE.

19 Q SO IF WE BRING THAT BACK TO YOUR RETURN  
20 FLOW CHART AS YOU HAD EXPLAINED WITHIN EXHIBIT 44, BY  
21 UTILIZING RETURN FLOW FIGURES THAT YOU FOUND TO BE  
22 REASONABLE AT THE 45 PERCENTAGE AND 20 PERCENTAGE, 20  
23 PERCENT FOR OUTDOOR IRRIGATION, THOSE FIGURES THAT YOU  
24 DISCUSSED ON THE DRIER OUTDOOR LANDSCAPE, DOES THAT MAKE  
25 YOUR 426 ACRE-FOOT AVERAGE HIGHER OR LOWER THAN WHAT THE  
26 ACTUAL RETURN FLOW MIGHT BE DUE TO A DRIER OUTDOOR  
27 LANDSCAPING?

28 A WELL, I THINK IT'S WHAT I WOULD CONSIDER

1 CONSERVATIVE. IN OTHER WORDS, I THINK THERE IS PROBABLY  
2 MORE RETURN FLOW THAT IS OCCURRING IN THIS AREA. I  
3 THINK THE 426 ACRE- FEET IS PROBABLY LOW.

4 Q AND WHY BECAUSE OF THE DRIER OUTDOOR  
5 LANDSCAPING DO YOU COME TO THAT CONCLUSION THAT 426  
6 ACRE- FOOT FIGURE IS CONSERVATIVE OR LOWER THAN WHAT IT  
7 MIGHT ACTUALLY BE?

8 A WELL, BECAUSE MORE OF THE WATER THAT IS  
9 DELIVERED TO THE HOMES IS BEING DISCHARGED BY THE  
10 INDIVIDUAL SEPTIC SYSTEMS. AND 100 PERCENT OF THAT  
11 WATER BECOMES RETURN THROW. SO IF WE WERE GOING TO  
12 INCREASE THE RETURN FLOW FACTOR ON HERE, THEN THE RETURN  
13 FLOW NUMBER WOULD BECOME HIGHER. AND THE RETURN FLOW  
14 ITSELF WOULD BECOME HIGHER.

15 Q IF I CAN DIRECT YOUR ATTENTION TO EXHIBIT  
16 52, PLEASE. MR. HARDER, WHAT DOES EXHIBIT 52 ILLUSTRATE  
17 TO YOU?

18 A THIS IS AN ILLUSTRATIVE CONCEPTUAL CROSS  
19 SECTION THAT SHOWS A TYPICAL PHELAN HOME WITH THEIR  
20 WATER SUPPLY, THE SEPTIC TANKS, PERCOLATION OF RETURN  
21 FLOW FROM THE SEPTIC TANKS INTO THE GROUNDWATER, THE  
22 GROUNDWATER FLOW DOWNGRADIENT TOWARD A DOWNGRADIENT  
23 WELL, IN THIS CASE, WELL 14 AND THEN RECAPTURE THROUGH  
24 THE PUMPING OF WELL 14.

25 Q BASED UPON YOUR EXPERIENCE AND THE WORK  
26 THAT YOU HAVE DONE IN THIS CASE, DOES EXHIBIT 52 FAIRLY  
27 AND ACCURATELY REPRESENT MORE OR LESS THAT WATER CYCLE  
28 OF WELL 14 WATER PRODUCTION THAN GOING INTO THE PHELAN

1       DISTRIBUTION SYSTEM TO THE HOMES THROUGH THE SEPTIC AND  
2       THEN RETURNING BACK INTO REPORT ANTELOPE VALLEY?

3               A       THIS CONCEPTUALLY IS -- YES, IT IS. THIS  
4       CONCEPTUALLY ILLUSTRATES THAT PROCESS.

5               Q       BASED UPON ALL OF THE WORK THAT YOU HAVE  
6       DONE IN WHICH YOU TESTIFIED TO THIS MORNING, YOU  
7       FORMULATED A NUMBER OF OPINIONS; IS THAT CORRECT,  
8       MR. HARDER?

9               A       I HAVE.

10              Q       IF I CAN DIRECT YOU TO EXHIBIT 50, PLEASE.  
11       DOES EXHIBIT 50 CONTAIN SOME OF THE OPINIONS THAT HAVE  
12       BEEN FORMED IN THIS CASE AS IT RELATES TO PHELAN?

13              A       IT DOES.

14              Q       WOULD YOU PLEASE, SINCE WE HAVE THE  
15       OPINIONS ENUMERATED -- I AM HAPPY TO DO THIS IF THE  
16       COURT HAS A PARTICULAR PREFERENCE, OTHERWISE I CAN HAVE  
17       THE WITNESS GO THROUGH ONE BY ONE STATING THESE VERBATIM  
18       FROM EACH EXHIBIT, AND THAT IS 50 AND 51.

19              THE COURT: WELL, THIS IS NOTHING MORE THAN A  
20       SUMMARY OF WHAT HIS TESTIMONY HAS BEEN, ISN'T IT?

21              MR. MILIBAND: IT IS, BUT IT'S ALSO PROVIDING  
22       SPECIFICALLY THE OPINIONS HE HAS FORMED SO THAT THERE IS  
23       A CONCISE SET OF OPINIONS.

24              THE COURT: I DON'T THINK IT'S APPROPRIATE. IT'S  
25       REALLY AN ARGUMENTATIVE DOCUMENT. IF THERE ARE OPINIONS  
26       IN HERE THAT HE HAS NOT TESTIFIED TO THEN YOU SHOULD  
27       ELICIT THOSE OPINIONS FROM HIM DIRECTLY, OTHERWISE IT'S  
28       JUST AN ARGUMENTATIVE DOCUMENT.

1 Q BY MR. MILIBAND: MR. HARDER, DIRECTED TO  
2 EXHIBIT 50, NUMBER ONE, YOU ESSENTIALLY PROVIDED THESE  
3 OPINIONS IN ADVANCE --

4 MR. GOLDEN-KRASNER: OBJECTION. IS THIS TO  
5 REFRESH HIS RECOLLECTION, OR IS HE ASKING THE WITNESS'  
6 OPINION ASIDE FROM --

7 THE COURT: I THINK HE IS ASKING HIM TO AFFIRM  
8 THIS IS HIS OPINION, BUT I THINK IT HAS ALREADY BEEN  
9 TESTIFIED TO.

10 Q BY MR. MILIBAND: I WAS ACTUALLY GOING TO  
11 ASK THESE WERE PREPARED IN ADVANCE FOR YOUR DEPOSITION  
12 ON OCTOBER 20TH; IS THAT CORRECT?

13 A THAT'S CORRECT.

14 Q AND WHEN YOU LOOK AT NUMBER ONE AS  
15 DEPICTED THERE WITHIN EXHIBIT 50, DO YOU HAVE AN OPINION  
16 AS TO WHETHER OR NOT PHELAN'S WELL 14 IS A CRITICAL  
17 WATER SUPPLY SOURCE FOR PHELAN?

18 MR. GOLDEN-KRASNER: OBJECTION, YOUR HONOR.  
19 AGAIN, NOAH GOLDEN-KRASNER. HE IS ASKING HIM TO READ  
20 THE DOCUMENT THAT CONTAINS HIS OPINIONS INSTEAD OF  
21 ASKING HIM FOR HIS OPINIONS OUTSIDE OF AN ACTUAL  
22 DOCUMENT THAT MAY OR MAY NOT REFRESH HIS RECOLLECTION.

23 THE COURT: WELL, THIS LAST QUESTION SEEMS TO ME  
24 IS ASKING HIM FOR A VALUE JUDGMENT THAT IS REALLY NOT AN  
25 APPROPRIATE QUESTION FOR THE ENGINEER, IS IT CRITICALLY  
26 IMPORTANT. WATER IS CRITICALLY IMPORTANT. MR. BARTZ  
27 HAS TESTIFIED THAT ONE THIRD OF THEIR WATER FOR THEIR  
28 SERVICE DISTRICT COMES FROM WELL 14.

1 SO YOU ARE ASKING HIM TO ARGUE FOR YOU.  
2 IT SEEMS TO ME THE EVIDENCE IS WHAT THE EVIDENCE IS.

3 MR. MILIBAND: FAIR ENOUGH, YOUR HONOR.

4 Q BY MR. MILIBAND: MR. HARDER, BASED UPON  
5 THE VARIOUS WORK THAT YOU HAVE DONE THROUGHOUT SOUTHERN  
6 CALIFORNIA THAT YOU HAVE TALKED ABOUT HERE TODAY, HOW  
7 MUCH OF YOUR WORK HAS BEEN WITH PUBLIC AGENCIES THAT  
8 HAVE A WATER DISTRIBUTION SYSTEM?

9 A HOW MUCH IN TERMS OF THE PERCENTAGE?

10 Q APPROXIMATELY, IF YOU CAN.

11 A YOU KNOW, IN GENERAL 70, 80 PERCENT.

12 Q AND WOULD YOU SAY THAT BASED UPON YOUR  
13 EVALUATION OF PHELAN AND ITS WATER SYSTEM AND THE  
14 OPERATIONS AS YOU HAVE TALKED ABOUT THE DIFFERENT  
15 DOCUMENTS THAT YOU HAVE REVIEWED IS PHELAN'S OPERATION  
16 OF ITS SYSTEM CONSISTENT WITH WHAT YOU HAVE SEEN WITH  
17 OTHER MUNICIPAL WATER DISTRIBUTION SYSTEMS?

18 MR. KUHS: OBJECTION, YOUR HONOR. VAGUE AS TO  
19 "CONSISTENT."

20 THE COURT: SUSTAINED. IN WHAT RESPECT?

21 Q BY MR. MILIBAND: IN TERMS OF THE  
22 OPERATIONS.

23 THE COURT: IN WHAT RESPECT?

24 MR. MILIBAND: DISTRIBUTION.

25 THE COURT: IS IT EFFICIENT, YOU MEAN? IS IT  
26 WELL MAINTAINED? WHAT IS THAT RELEVANCE TO THE ISSUE  
27 THAT WE HAVE HERE WHICH IS ENTITLEMENT TO PUMP AS A  
28 MATTER OF RIGHT OR APPROPRIATOR OR PRESCRIBER OR



1           WHATEVER THEORY MIGHT BE?  PRESCRIBER IS NOT ONE OF THEM  
2           SINCE YOU HAVE WITHDRAWN THAT.  IT SEEMS TO ME THE  
3           QUESTION ASKS FOR AN IRRELEVANT FACT AT THIS POINT.

4           MR. MILIBAND:  I DON'T WANT TO CHALLENGE THAT  
5           PHELAN DOES NOT REASONABLY USE WATER.

6           THE COURT:  I DON'T THINK THERE IS ANY DOUBT THAT  
7           PEOPLE NEED WATER.  THAT IS NOT THE ISSUE HERE.

8           MR. MILIBAND:  THAT WAS NOT STIPULATED TO, AND  
9           THERE HAVE BEEN OUT-OF-COURT DISCUSSIONS.  SO IN MY  
10          JUDGMENT I HAVE SEEN THE NEED TO AT LEAST ASK THAT  
11          QUESTION AND ELICIT SOME OF THAT TESTIMONY.

12          THE COURT:  WHAT DISCUSSIONS?

13          MR. MILIBAND:  OUT-OF-COURT DISCUSSIONS WITH  
14          OTHER COUNSEL WHEN FORMULATING THE STIPULATION OF FACTS.  
15          AND THAT WAS NOT SPECIFICALLY STIPULATED TO.  SO HERE  
16          WITH AN EXPERT THAT HAS DONE A LOT OF WORK WITH  
17          MUNICIPAL WATER SYSTEMS, I AM SIMPLY TRYING TO  
18          ELICIT WHETHER THAT --

19          THE COURT:  THE COURT WOULD BE PREPARED ON ITS  
20          OWN KNOWLEDGE AND COMMON SENSE THAT WATER IS NECESSARY  
21          FOR PEOPLE TO THRIVE.

22          MR. MILIBAND:  BUT WHAT I AM TALKING ABOUT IS  
23          REASONABLE AND BENEFICIAL USE AS IT RELATES TO  
24          ESTABLISHING A WATER RIGHT.

25          THE COURT:  MR. DUNN, DO YOU WANT TO SAY  
26          SOMETHING ABOUT THIS?  I DON'T WANT TO BE OBJECTING FOR  
27          EVERYBODY.  I AM CONCERNED ABOUT MAKING SURE WE DEAL  
28          WITH RELEVANT EVIDENCE AND RELEVANT OPINIONS.  AND THIS

1 WITNESS HAS PROVIDED MANY OPINIONS ABOUT THE  
2 CONFIGURATION, WATER USE, INCLUDING RETURN FLOWS, THE  
3 CONDITION OF THE AQUIFER, THE CONNECTION OF THE AQUIFER  
4 TO OTHER PORTIONS OF THE BASIN.

5 HE HAS GIVEN VERY, IT SEEMS TO ME,  
6 COMPETENT OPINIONS AND SUBJECT TO WHATEVER CHALLENGES  
7 MIGHT BE OFFERED BY OTHER PARTIES. IT SEEMS TO ME THIS  
8 LAST ISSUE THAT YOU ARE RAISING IS REALLY IRRELEVANT TO  
9 HIS TESTIMONY AND SOMETHING THAT NEEDS NO EXPERT OPINION  
10 TESTIMONY FOR.

11 MR. MILIBAND: OKAY, YOUR HONOR.

12 Q BY MR. MILIBAND: MR. HARDER, HOW WOULD  
13 YOU CHARACTERIZE THE IMPACTS ASSOCIATED WITH WELL 14  
14 PUMPING ON GROUNDWATER LEVELS IN THE LANCASTER SUB-UNIT?

15 A WELL, 14, DUE TO ITS DISTANCE AND, LIKE I  
16 HAVE TALKED ABOUT, THE UNIQUE QUALITIES OR DISTINCT  
17 QUALITIES OF THE BUTTE SUB-UNIT, DOES NOT LIKELY HAVE A  
18 SIGNIFICANT IMPACT -- DIRECT OR SIGNIFICANT IMPACT ON  
19 GROUNDWATER LEVELS IN THE NEIGHBORING LANCASTER  
20 SUB-UNIT.

21 Q IN GOING BACK TO RETURN FLOWS IN WELL 14'S  
22 LOCATION AND THE DIFFERENT ANALYSIS IN THE WORK THAT YOU  
23 HAVE DONE, YOU HAD INDICATED EARLIER THAT WHEN A WELL  
24 PUMPS IT CREATES A CONE DEPRESSION; IS THAT CORRECT?

25 A YES.

26 Q OF THE 426 ACRE-FEET ON AVERAGE OF RETURN  
27 FLOW, ARE YOU ABLE TO QUANTITY HOW MUCH THAT IS CAPTURED  
28 OR RECAPTURED BY WELL 14?

1           A           YOU KNOW --

2           THE COURT:   IT GOES INTO THE AQUIFER.

3           MR. MILIBAND:  IT DOES.

4           THE WITNESS:  YEAH.

5           MR. MILIBAND:  BUT RECAPTURE IS AN ISSUE, YOUR  
6 HONOR, FOR THE RETURN FLOW.

7           THE COURT:  I UNDERSTAND THAT.  IT'S A LEGAL  
8 ISSUE.

9           MR. MILIBAND:  RIGHT.  BUT EVIDENTIARY-WISE, I AM  
10 TRYING TO ELICIT WHETHER THE WITNESS HAS ANY ADDITIONAL  
11 OPINIONS AS IT RELATES TO THE EXTENT TO WHICH A PHELAN  
12 WELL IS RECAPTURING THAT RETURN FLOW THAT IS RETURNING  
13 TO THE AQUIFER.

14          THE COURT:  YOU MEAN HOW MUCH OF THE PUMPING OF  
15 WELL 14 COMES FROM THE RETURN FLOWS VERSUS THE WATER  
16 THAT IS GENERALLY IN THE AQUIFER AS OPPOSED TO THE  
17 RETURN FLOW?  IT DOESN'T MAKE A LOT OF SENSE TO ME.

18          MR. MILIBAND:  IT'S SOMEWHAT OF A VARIATION OF  
19 WHAT I WAS TRYING TO DRIVE OUT WITH MR. HARDER WHICH IS  
20 TO WHAT EXTENT OF THE RETURN FLOW GENERATED BY THOSE  
21 PHELAN CUSTOMERS AND THE SYSTEM LOSSES IS THEIR  
22 RECAPTURE BY PHELAN'S WELL 14.

23          MR. DUNN:  OBJECTION.  LACKS FOUNDATION.  CALLS  
24 FOR SPECULATION.

25          THE COURT:  WELL, HE JUST SAID HE CAN'T GIVE YOU  
26 THAT NUMBER, SO SUSTAINED, UNLESS HE WANTS TO CLARIFY  
27 THAT.

28                           WHAT PERCENTAGE OF THE PUMPING FROM WELL

1 14 COMES FROM RETURN FLOWS?

2 THE WITNESS: YEAH. AND I WAS GOING SAY THAT IT  
3 IS NOT -- I DON'T KNOW THAT THE TECHNOLOGY IS THERE TO  
4 ATTRACT THE MOLECULES OF WATER AND PUT A NUMBER ON THE  
5 PERCENTAGE OF WATER THAT WELL 14 IS -- THE RETURN FLOW  
6 THAT WELL 14 IS PUMPING. FROM A WATER BALANCE  
7 STANDPOINT, WELL 14 IS PUMPING IN EXCESS OF THE AMOUNT  
8 OF WATER THAT IS RETURN FLOW. SO FROM THAT STANDPOINT,  
9 IT'S PUMPING THAT RETURN FLOW AND THEN SOME.

10 THE COURT: SOME OF THOSE MOLECULES MIGHT EVEN GO  
11 UP INTO THE LANCASTER AREA; IS THAT RIGHT?

12 THE WITNESS: BASED ON WHAT I HAVE SEEN, PROBABLY  
13 NOT.

14 MR. DUNN: I'M SORRY, YOUR HONOR. I RENEW THE  
15 EARLIER OBJECTION TO THE WITNESS' RESPONSE. HIS  
16 TESTIMONY WAS JUST THAT WELL 14 IS PUMPING THAT RETURN  
17 FLOW. THERE HAS BEEN NO BASIS TO ESTABLISH THAT.

18 MR. MILIBAND: I WOULD CONTEND DIFFERENTLY BASED  
19 UPON THE EXHIBITS PRESENTED HERE THIS MORNING, YOUR  
20 HONOR.

21 THE COURT: WELL, CAN YOU CLARIFY THAT FOR US?

22 THE WITNESS: CLARIFY?

23 THE COURT: THE MOLECULAR STRUCTURE OF THE WATER  
24 IN THE AQUIFER AND ITS MOVEMENT INTO THE VARIOUS PARTS  
25 OF THE AQUIFER.

26 THE WITNESS: MAYBE WHAT WE CAN HAVE IS THE  
27 GROUNDWATER CONTOUR MAP.

28 MR. MILIBAND: SURE. I THINK THAT MIGHT BE 28.

1 THE WITNESS: OKAY. SO WHAT WE ARE LOOKING AT  
2 HERE IS THE GROUNDWATER CONTOUR MAP WE HAVE SEEN. I AM  
3 GOING TO POINT TO THE AREA WHERE THE RETURN FLOW IS  
4 OCCURRING THAT IS IN THE PHELAN SERVICE AREA THAT  
5 OVERLIES THE ANTELOPE VALLEY GROUNDWATER BASIN.

6 THAT RETURN FLOW, THAT DISCHARGE FROM  
7 THOSE SEPTIC SYSTEMS IS GOING TO ENTER THE SUBSURFACE,  
8 PERCOLATE DOWN INTO THE GROUNDWATER, MIGRATE  
9 DOWNGRADIENT AND ULTIMATELY EITHER BE CAPTURED  
10 DOWNGRADIENT OR MOVE INTO THE ANTELOPE VALLEY  
11 ADJUDICATION AREA.

12 RIGHT NOW, WE DO HAVE INDICATIONS FROM THE  
13 WATER QUALITY IN WELL 14. THERE ARE NITRATE  
14 CONCENTRATIONS IN THE WATER THAT IS PRODUCED FROM THAT  
15 WELL. AND THERE ARE INDICATIONS THAT RETURN FLOW FROM  
16 THIS AREA OF PHELAN SERVICE AREA THAT OVERLIES OR LIES  
17 OVER, I SHOULD SAY, THE ANTELOPE VALLEY GROUNDWATER  
18 BASIN IS MAKING ITS WAY TO WELL 14.

19 LIKE I SAID, I DON'T BELIEVE THE  
20 TECHNOLOGY EXISTS TO TRACK THE MOLECULES OF WATER THAT  
21 ARE ACTUALLY BEING CAPTURED BY WELL 14.

22 THE COURT: WHERE DO NITRATES COME FROM?

23 THE WITNESS: NITRATES ARE TYPICAL IN SEPTIC  
24 EFFLUENT. IN HUMAN WASTE, IT DISCHARGES AMMONIUM IONS  
25 UNDER ANAEROBIC CONDITIONS. THEY ENCOUNTER THE AIR,  
26 BECOME OXIDIZED AS A NITRATE AND ENTER THE SUBSURFACE.

27 Q BY MR. MILIBAND: MR. HARDER, IN TERMS OF  
28 THE CONE OF DEPRESSION CREATED BY WELL 14 AND BASED UPON

1 WHAT YOU KNOW WITH THAT WELL AND OTHER WELLS OF PHELAN  
2 THAT ARE PRODUCING WATER, ARE YOU ABLE TO SAY WHETHER  
3 IT'S MORE LIKELY THAN NOT THAT WELL 14 CAPTURES MOST OF  
4 THAT RETURN FLOW?

5 MR. DUNN: OBJECTION. LACKS FOUNDATION. CALLS  
6 FOR SPECULATION.

7 THE COURT: SUSTAINED.

8 Q BY MR. MILIBAND: SO WHILE YOU SAY,  
9 MR. HARDER, THAT THERE IS NOT THE TECHNOLOGY AS FAR AS  
10 YOU ARE AWARE FOR TRACKING THE MOLECULES, AND AS YOU SIT  
11 HERE AND WE HAVE EXHIBIT 28 BEFORE US, DO YOU HAVE AN  
12 OPINION AS TO WHAT EXTENT WELL 14 CAPTURES RETURN FLOW?

13 MR. DUNN: SAME OBJECTION. SPECULATION AND  
14 FOUNDATION. LACK OF FOUNDATION.

15 THE COURT: I WILL LET HIM RENDER AN OPINION IF  
16 HE CAN AND SUPPORT IT.

17 GO AHEAD.

18 THE WITNESS: WELL 14, I AM POINTING WITH A LASER  
19 POINTER TO IT ON THE GROUNDWATER CONTOUR MAP. IT'S  
20 LOCATED DIRECTLY DOWNGRAIENT OF THE AREA WHERE THE  
21 RETURN FLOW IS OCCURRING. AND THERE IS A KNOWN  
22 GROUNDWATER DEPRESSION THERE. IN OTHER WORDS, IT'S A  
23 PUMPING DEPRESSION THAT HAS BEEN OBSERVED.

24 SO WELL 14 IS POSITIONED TO CAPTURE A  
25 SIGNIFICANT PORTION OF THE RETURN FLOW THAT OCCURS IN  
26 THIS AREA. YOU KNOW, I HAD PREVIOUSLY SAID IN THIS  
27 OPINION THAT IT'S MOST MORE LIKELY THAN NOT MOST. LIKE  
28 I SAID JUST NOW, I THINK IT'S HARD TO QUANTIFY.

1 IT'S POSITIONED TO CAPTURE IT. WELL 6-A  
2 IS GOING TO CAPTURE SOME OF THE RETURN FLOW. SOME OF IT  
3 MAY GET BY. BUT AT THIS TIME, I DON'T -- I COULDN'T PUT  
4 A PERCENTAGE ON IT.

5 MR. KUHS: YOUR HONOR, I WOULD OBJECT. MOVE TO  
6 STRIKE FOR LACK OF FOUNDATION. THE WITNESS HAS NO  
7 FOUNDATION TO ESTABLISH WHETHER IT'S SIGNIFICANT OR  
8 INSIGNIFICANT.

9 THE COURT: WELL, HE JUST SAID HE CAN'T QUANTIFY  
10 IT AND DOESN'T KNOW. THAT'S SUFFICIENT FOR ME.

11 Q BY MR. MILIBAND: MR. HARDER, BASED UPON  
12 YOUR EXPERIENCE, DO YOU NEED TO QUANTIFY SOMETHING IN  
13 ORDER TO STATE QUALITATIVELY WHETHER SOMETHING IS A  
14 LITTLE, SOME, MOST OR ALL?

15 MR. DUNN: OBJECTION; VAGUE.

16 THE COURT: SUSTAINED. THAT'S REALLY AN  
17 OXYMORONIC STATEMENT.

18 Q BY MR. MILIBAND: MR. HARDER, WHEN YOU  
19 TALKED ABOUT THE 426 ACRE-FEET AVERAGE OF RETURN FLOW,  
20 IS THERE ESSENTIALLY A RANGE THAT ALLOWS YOU TO COME TO  
21 THAT AVERAGE?

22 A YES. I BELIEVE IT'S LISTED IN THAT TABLE.

23 Q BACK IN EXHIBIT 44?

24 A YES. THE RANGE IS 387 TO 458 ACRE-FEET.

25 MR. MILIBAND: YOUR HONOR, I DON'T THINK I HAVE  
26 ANY FURTHER DIRECT AT THIS POINT. I WOULD LIKE TO  
27 SUGGEST, GIVEN THE FEW MINUTES BEFORE THE LUNCH HOUR, I  
28 WOULD ANTICIPATE WE WOULD START AT NOON.

1 IF WE JUST KEEP DIRECT OPEN UNTIL JUST  
2 AFTER THE LUNCH HOUR IN CASE I HAVE ONE OR TWO CLEANUPS,  
3 BUT I DON'T ANTICIPATE MUCH IF ANY. AND WHETHER THEN OR  
4 NOW I WOULD LIKE TO BE ABLE TO MOVE INTO EVIDENCE ALL OF  
5 THESE EXHIBITS.

6 THE COURT: ALL RIGHT. THAT'S FINE,  
7 MR. MILIBAND. WE WILL RECESS, HOWEVER, AND RESUME AT  
8 1:30. AND I EXPECT CROSS-EXAMINATION TO START SHORTLY.

9 MR. MILIBAND: THANK YOU, YOUR HONOR.

10  
11 (THE NOON RECESS WAS TAKEN.)  
12  
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1 CASE NUMBER: 1-05-CV-049053  
2 CASE NAME: ANTELOPE VALLEY GROUNDWATER CASES  
3 LOS ANGELES, CA WEDNESDAY, NOVEMBER 5, 2014  
4 DEPARTMENT 56 HON. JACK KOMAR, JUDGE  
5 REPORTER: JEANETTE COYLE, CSR NO. 12665  
6 TIME: AFTERNOON SESSION  
7 APPEARANCES: (AS HERETOFORE NOTED.)  
8

9 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT.)  
10

11 THE COURT: ALL RIGHT. GOOD AFTERNOON,  
12 EVERYBODY. MR. MILIBAND, DO YOU HAVE ANYTHING FURTHER?

13 MR. MILIBAND: JUST ONE QUESTION, YOUR HONOR.

14 Q BY MR. MILIBAND: MR. HARDER, WHAT IS YOUR  
15 UNDERSTANDING AS TO THE AGE OF THE PHELAN WATER  
16 DISTRIBUTION SYSTEM THAT IS LOCATED WITHIN YOUR RETURN  
17 FLOW AREA THAT YOU DISCUSSED THIS MORNING?

18 A WELL, IT'S MY UNDERSTANDING IN DISCUSSIONS  
19 WITH DON BARTZ WHO IS THE GENERAL MANAGER OF PHELAN THAT  
20 THE PINON HILLS AREA IS THE OLDER PORTION OF THEIR  
21 SERVICE AREA, AND THAT PART OF THEIR DISTRIBUTION SYSTEM  
22 IS OLDER. SO THAT IS MY UNDERSTANDING.

23 Q OKAY. AND BASED UPON YOUR EXPERIENCE, DO  
24 OLDER PIPES TEND TO LEAK MORE THAN NEWER PIPES?

25 A YEAH. I MEAN, IN GENERAL THERE ARE AGED  
26 PIPES; THAT WOULD BE THE EXPECTATION.

27 MR. MILIBAND: THANK YOU. NOTHING FURTHER AT  
28 THIS TIME.

1 THE COURT: ALL RIGHT. THANK YOU. I JUST WANT  
2 TO MAKE ONE COMMENT BEFORE WE START CROSS-EXAMINATION.  
3 I SUSTAINED AN OBJECTION AS BEING OXYMORONIC. THAT WAS  
4 NOT INTENDED TO BE A REFLECTION AT ALL ON THE  
5 QUESTIONER. THE QUESTION ASKED TO QUANTIFY QUALITY.  
6 THAT IS NOTHING THAT I THINK IS UNDERSTANDABLE IN MY  
7 LEXICON IN ANY EVENT.

8 I WANT TO APOLOGIZE IF YOU TOOK IT THAT  
9 WAY; YOU SHOULDN'T. IT WAS NOT PERSONAL.

10 MR. DUNN.

11 MR. DUNN: YES, YOUR HONOR. THANK YOU.

12  
13 CROSS-EXAMINATION

14 BY MR. DUNN:

15 Q GOOD AFTERNOON, MR. HARDER.

16 A GOOD AFTERNOON.

17 Q COULD WE PLEASE TURN TO PHELAN'S EXHIBIT  
18 NO. 27. DO YOU HAVE THAT BEFORE YOU?

19 A I DO.

20 Q MR. HARDER, WHAT I WOULD LIKE TO DO WITH  
21 EXHIBIT NO. 27 IS ASK YOU QUESTIONS ABOUT THE BUTTES  
22 SUB-UNIT AND ITS RELATIONSHIP TO THE LANCASTER SUB-UNIT.  
23 AND WHEN I TALK ABOUT "RELATIONSHIP," SPECIFICALLY I AM  
24 REFERRING TO HYDRAULIC CONNECTIVITY?

25 A OKAY.

26 Q DO YOU HAVE AN UNDERSTANDING AS TO WHAT  
27 HYDRAULIC CONNECTIVITY IS?

28 A WELL, I WOULD ASSUME IT IS THE SAME AS

1 HYDRAULIC CONNECTIVITY WHICH IS THE ABILITY OF THE WATER  
2 TO FLOW FROM ONE SIDE TO THE NEXT.

3 Q THANK YOU.

4 A IS THAT CORRECT?

5 Q YES, IT IS. THANK YOU VERY MUCH.

6 NOW, WITH REGARDS TO HYDRAULIC  
7 CONNECTIVITY, LET ME START WITH SOME OF YOUR EARLIER  
8 TESTIMONY. YOU REFERENCED AS PART OF YOUR INVESTIGATION  
9 THAT YOU LOOKED AT A SERIES OR NUMBER OF REPORTS, SOME  
10 FROM THE USGS, SOME FROM DWR, AND FROM OTHER INDIVIDUALS  
11 AND SOURCES; IS THAT CORRECT?

12 A THAT'S CORRECT.

13 Q IN YOUR REVIEW OF THAT MATERIAL, DID YOU  
14 FIND REFERENCE TO THE HYDRAULIC CONNECTIVITY BETWEEN THE  
15 BUTTES SUB-UNIT AND THE LANCASTER SUB-UNIT?

16 A SPECIFIC IN -- SO BY CONTEXT, LET ME  
17 REFERENCE BLOYD 1967.

18 Q YES.

19 A WHICH IS THE FIRST PERSON, TO MY  
20 KNOWLEDGE, THAT IDENTIFIED THAT BOUNDARY. AND THE  
21 BOUNDARY WAS IDENTIFIED BASED ON GROUNDWATER LEVEL  
22 DIFFERENCES ON EITHER SIDE OF A FAULT THAT SEPARATES THE  
23 BUTTE SUB-UNIT FROM THE LANCASTER.

24 IN TERMS OF A DISCUSSION OF THE HYDROLOGIC  
25 OR HYDRAULIC CONNECTIVITY BETWEEN THOSE TWO, I DON'T  
26 RECALL ANYTHING IN HIS DISCUSSION OF THAT SPECIFICALLY.

27 Q ALL RIGHT. GENERALLY, IN MATERIALS  
28 THAT YOU REVIEWED FOR YOUR PREPARATION OF YOUR TESTIMONY

1           TODAY, DID YOU NOT FIND THAT THERE IS HYDRAULIC  
2           CONNECTIVITY BETWEEN THE BUTTE SUB-UNIT AND THE  
3           LANCASTER SUB-UNIT, REFERENCES TO THAT?

4           A           WELL, REFERENCES, MY OWN REVIEW OF  
5           GROUNDWATER CONTOUR MAPS THAT ARE PRESENTED IN THE  
6           SUMMARY EXPERT REPORT IN APPENDIX E SHOW THAT THERE IS  
7           A -- THE CONTOURS, WHAT I WOULD SAY, BUNCH UP ALONG THAT  
8           BOUNDARY. AND THAT IS VERY TYPICAL OF WHAT HAPPENS  
9           ALONG THE LOWER PERMEABILITY BOUNDARY, THE HYDRAULIC  
10          CONDUCTIVITY, WHICH IS THE ABILITY OF WATER TO FLOW  
11          THROUGH AN AQUIFER, IS LOWER ALONG THOSE FAULTS.

12          THE FAULTS MOVE TOGETHER. THEY GRIND THE  
13          SOIL INTO A CLAY WHICH IS LOWER PERMEABILITY. SO IN  
14          LOOKING AT THOSE CONTOUR MAPS THERE IS A STEEPER  
15          GRADIENT ALONG THAT BOUNDARY, BUT THERE IS NOTHING TO  
16          SUGGEST THAT THERE IS NOT CONNECTIVITY. I THINK THERE  
17          IS CONNECTIVITY BETWEEN THE TWO.

18          Q           SO THAT MEANS TO YOU THAT WATER FLOWS FROM  
19          THE BUTTE SUB-UNIT GROUNDWATER?

20          A           YES.

21          Q           AND FLOWS THROUGH THE BUTTE SUB-UNIT INTO  
22          THE LANCASTER SUB-UNIT?

23          A           YES.

24          Q           ALL RIGHT. AND THE FLOW GENERALLY GOES,  
25          AGAIN, FROM THE BUTTE SUB-UNIT TO THE LANCASTER  
26          SUB-UNIT. THAT'S THE DIRECTION OF THE FLOW?

27          MR. MILIBAND: OBJECTION. VAGUE AS TO LOCATION.

28          THE COURT: OVERRULED.

1                                    YOU MAY ANSWER.

2                                    THE WITNESS:    BASED ON THE CONTOURS THAT I HAVE  
3                                    SEEN THAT IS CORRECT.

4                                    Q            BY MR. DUNN:    NOW, THE LANCASTER SUB-UNIT,  
5                                    WOULD YOU AGREE THAT ONE OF ITS SOURCES OF GROUNDWATER  
6                                    RECHARGE WOULD BE GROUNDWATER COMING FROM THE BUTTE  
7                                    SUB-UNIT?

8                                    A            YES.

9                                    Q            WOULD YOU ALSO AGREE, MR. HARDER, THAT  
10                                    PUMPING THAT OCCURS IN THE BUTTE SUB-UNIT CAN IMPACT THE  
11                                    FLOW OF WATER FROM THIS BUTTE SUB-UNIT INTO THE  
12                                    LANCASTER SUB-UNIT?

13                                    MR. MILIBAND:    OBJECTION; VAGUE.

14                                    THE COURT:    OVERRULED.

15                                    THE WITNESS:    PUMPING IN THE BUTTE SUB-UNIT WHICH  
16                                    WOULD LOWER THE GROUNDWATER LEVEL IN THE BUTTE SUB-UNIT  
17                                    WOULD RESULT IN A DIFFERENT GRADIENT WHICH WOULD AFFECT  
18                                    THE FLOW.    YES, IT WOULD AFFECT THE FLOW ACROSS THE  
19                                    BOUNDARY.

20                                    Q            BY MR. DUNN:    AND TO CONTINUE A BIT  
21                                    FURTHER WITH YOUR ANSWER, PUMPING CAN OCCUR WITHIN THE  
22                                    BUTTE SUB-UNIT TO SUCH AN EXTENT THAT IT COULD DRAW  
23                                    WATER FROM THE LANCASTER SUB INTO THE BUTTE SUB-UNIT; IS  
24                                    THAT CORRECT?

25                                    MR. MILIBAND:    OBJECTION.    LACKS FOUNDATION.  
26                                    INCOMPLETE HYPOTHETICAL.

27                                    THE COURT:    OVERRULED.

28                                    THE WITNESS:    IN THEORY, YES.    BASED ON MY REVIEW

1 OF THE GROUNDWATER CONTOUR MAPS, THAT HAS NEVER HAPPENED  
2 SINCE 1951. BUT IN THEORY THAT COULD HAPPEN. YES.

3 Q BY MR. DUNN: BUT IT'S FAIR TO SAY THAT IT  
4 HAS HAPPENED HISTORICALLY?

5 A HISTORICALLY, NO. IN MY REVIEW OF THE  
6 SUMMARY EXPERT REPORT, THE GROUNDWATER FLOW DIRECTION AS  
7 INDICATED BY THEM HAS NEVER CHANGED SIGNIFICANTLY IN THE  
8 BUTTE SUB-UNIT OR THE SOUTHEAST AREA AND THAT IN MY  
9 REVIEW OF THE CONTOURS, THEY HAVE ALWAYS BEEN FROM THE  
10 BUTTE SUB-UNIT INTO THE LANCASTER SUB-UNIT. TO MY  
11 KNOWLEDGE THAT HAS NEVER BEEN REVERSED.

12 Q NOW, MR. HARDER, IF A WELL LOCATED IN THE  
13 BUTTE SUB-UNIT TAKES WATER OUTSIDE OF THE BUTTE SUB-UNIT  
14 AND EVEN OUTSIDE THE ANTELOPE VALLEY AREA OF  
15 ADJUDICATION, COULD THAT PERMANENTLY DEPRIVE THE  
16 ANTELOPE VALLEY AREA OF ADJUDICATION OF THAT  
17 GROUNDWATER?

18 MR. MILIBAND: OBJECTION. VAGUE AND INCOMPLETE  
19 HYPOTHETICAL. CALLS FOR SPECULATION.

20 THE COURT: I THINK HE IS ASKING ABOUT A THEORY  
21 WHICH IS DIFFERENT. OVERRULED.

22 THE WITNESS: YOU KNOW, I AM SORRY. I AM NOT SURE  
23 I UNDERSTAND YOUR QUESTION.

24 Q BY MR. DUNN: LET'S USE WELL 14 AS AN  
25 EXAMPLE. IF I UNDERSTAND THE TESTIMONY THIS MORNING,  
26 THE TESTIMONY IS THAT WELL 14 IS LOCATED WITHIN THE  
27 BUTTE SUB-UNIT IN THE ANTELOPE VALLEY AREA OF  
28 ADJUDICATION; IS THAT CORRECT?

1 A YES.

2 Q WATER IS PUMPED BY PHELAN PINON HILLS  
3 SERVICES DISTRICT BY WELL 14; IS THAT RIGHT?

4 A YES.

5 Q THE WATER THAT IS PUMPED FROM WELL 14 IS  
6 TAKEN TO A LOCATION OR LOCATIONS OUTSIDE THE ANTELOPE  
7 VALLEY AREA OF ADJUDICATION FOR CUSTOMER USE BY PHELAN  
8 CUSTOMERS; IS THAT CORRECT?

9 A THAT'S CORRECT.

10 Q AND IF I RECALL CORRECTLY YOUR TESTIMONY  
11 IT IS THAT SOME PORTION OF THAT WATER RE-ENTERS THE  
12 BASIN IN TERMS OF WHAT YOU CALL A RETURN FLOW?

13 A YES.

14 Q AND YOU HAVE ATTEMPTED TO QUANTIFY THAT  
15 AMOUNT ON AVERAGE AS BEING, I BELIEVE, 460 SOME-ODD  
16 ACRE-FEET ANNUALLY; IS THAT CORRECT?

17 A NO. IT'S 426, I BELIEVE.

18 Q THANK YOU. SO YOUR TESTIMONY IS THAT  
19 THERE IS A RECHARGE AMOUNT OF 426 ACRE-FEET ANNUALLY ON  
20 AVERAGE?

21 A CORRECT.

22 Q AND THAT AMOUNT IS GROUNDWATER THAT IS  
23 FLOWING FROM THE EAST SIDE OF THE ADJUDICATION LINE INTO  
24 THE ADJUDICATION AREA IN OR AROUND THE WELL 14 AREA; IS  
25 THAT CORRECT?

26 A IF I UNDERSTAND YOUR QUESTION, THE RETURN  
27 FLOW ENTERS THE ANTELOPE VALLEY GROUNDWATER BASIN ON THE  
28 EAST SIDE OF THE COUNTY BOUNDARY, FLOWS TO THE NORTH AND

1 THEN ULTIMATELY SHORT OF BEING INTERCEPTED IT WOULD FLOW  
2 INTO THE ANTELOPE VALLEY ADJUDICATION AREA.

3 Q AND ON AVERAGE AT LEAST FOR THE YEARS  
4 GIVEN WHICH WAS, WHAT, 2010 THROUGH 2013?

5 A FOR THE -- I'M SORRY. I DON'T UNDERSTAND.

6 Q FOR THE 426 ANNUAL AVERAGE.

7 A CAN I CHECK MY NOTES?

8 Q OF COURSE.

9 A I JUST WANT TO TELL YOU THE RIGHT ANSWER.  
10 IT'S 2009 TO 2013.

11 Q THANK YOU. SO, MR. HARDER, IF WE WANTED  
12 TO COMPARE -- STRIKE THAT.

13 YOU HAVE THE MEASUREMENTS OF THE AMOUNT OF  
14 WATER TAKEN BY WELL 14 FOR EACH YEAR, 2009 THROUGH 2013;  
15 IS THAT CORRECT?

16 A DO YOU MEAN TAKEN, LIKE PRODUCED?

17 Q YES.

18 A YES, WE DO.

19 Q AND FOR THE RECORD THERE IS A STIPULATED  
20 FACT. IT'S NUMBER 29. AND I AM SORRY, MR. HARDER. YOU  
21 PROBABLY DON'T HAVE THE STIPULATED FACTS BEFORE YOU.  
22 BUT I WILL REFER TO THEM FROM THE STIPULATION ITSELF. I  
23 WILL START WITH THE YEAR 2009. I WILL GIVE THE NUMBER,  
24 THE PRODUCTION NUMBER FOR WELL 14 AND ASK YOU TO COMPARE  
25 IT TO THE ANNUAL AVERAGE OF THE RECHARGE AMOUNT THAT YOU  
26 CALCULATED.

27 CAN WE DO THAT?

28 A SURE.



1 Q SO FOR 2009 UNDER STIPULATED FACT NUMBER  
2 29, WELL 14 PRODUCED 558.65 ACRE-FEET.

3 A OKAY.

4 Q IF WE COMPARE THAT TO THE ANNUAL AVERAGE  
5 RECHARGE THAT YOU CALCULATED WHAT WOULD BE THE  
6 DIFFERENCE? IT'S A MATHEMATICAL QUESTION.

7 A DO YOU WANT ME TO DO THE MATH?

8 Q NO. THAT'S NOT NECESSARY. I DON'T MEAN  
9 TO PUT YOU THROUGH THAT TROUBLE. WOULD YOU AGREE WITH  
10 ME THAT THE WELL FOR THAT YEAR, WELL 14, IS PUMPING MORE  
11 THAN THE AVERAGE ANNUAL RECHARGE AMOUNT THAT YOU  
12 CALCULATED?

13 A WELL, I WOULD CLARIFY THAT AS THE AVERAGE  
14 ANNUAL RETURN FLOW RECHARGE AMOUNT THAT WE CALCULATED,  
15 AND THAT WOULD BE CORRECT.

16 Q AND FOR 2010, IF WE DO THE SAME  
17 COMPARISON, THE PRODUCTION NUMBER FOR WELL 14 IN 2010  
18 ALMOST DOUBLES FROM 2009 TO 1,110.45 ACRE-FEET.

19 A RIGHT.

20 Q SO YOU WOULD AGREE WITH ME THAT THE  
21 DIFFERENCE BETWEEN THE AVERAGE GROUNDWATER RECHARGE  
22 AMOUNT OF 426 ACRE-FEET IS APPROXIMATELY ALMOST 600  
23 ACRE-FEET LESS THAN THE TOTAL AMOUNT OF GROUNDWATER  
24 PRODUCTION FOR WELL 14 FOR THAT YEAR?

25 A AGAIN, IT WOULD BE RETURN FLOW. AND, YES,  
26 APPROXIMATELY.

27 Q AND IF WE WERE TO DO THE SAME COMPARISON  
28 FOR YEARS 2011, WHICH WELL 14 PRODUCED 1,053 ACRE-FEET,

1 POINT 14, FOR 2012 WHICH IS 1,035.26 ACRE-FEET AND 2013  
2 WHICH IS 1,28.02 ACRE-FEET, FOR THOSE LAST THREE YEARS,  
3 THE PRODUCTION FROM WELL NUMBER 14 EXCEEDS BY ALMOST  
4 DOUBLE THE AVERAGE AMOUNT OF RECHARGE THAT YOU  
5 CALCULATED; IS THAT CORRECT?

6 A THE AVERAGE AMOUNT OF RETURN FLOW RETURNS.  
7 THAT IS CORRECT.

8 Q YES. THANK YOU. AND SO MY QUESTION,  
9 MR. HARDER, IS THIS, IS IT NOT FAIR OR ACCURATE TO SAY  
10 THAT THE AMOUNT OF ACTUAL WELL PRODUCTION FOR WELL 14  
11 FOR THE YEARS SAY FROM 2010 TO 2013 EXCEEDS THE  
12 ESTIMATED RECHARGE AMOUNT THAT YOU CALCULATED?

13 A YES.

14 Q AND DOESN'T THAT MEAN THEN THAT WELL 14 IS  
15 DRAWING MORE WATER OR TAKING MORE WATER ON AN ANNUAL  
16 BASIS THAN THE RECHARGE AMOUNT THAT YOU BELIEVE THAT IT  
17 COULD BE DRAWING UP BY WELL 14?

18 A WELL, YOU KNOW, RETURN FLOW RECHARGE IS  
19 ONE COMPONENT OF RECHARGE THAT IS REPLENISHING THE  
20 AQUIFER SYSTEM IN THAT AREA. WELL 14 IS PUMPING MORE  
21 THAN THE RETURN FLOW RECHARGE THAT OCCURS IN THE AREA.  
22 THAT IS A CORRECT STATEMENT.

23 Q AND SO ALL OF THE OTHER WATER THAT IS  
24 BEING PUMPED, THE DIFFERENCE IS COMING FROM THE ANTELOPE  
25 VALLEY AREA OF ADJUDICATION WHERE WELL 14 IS LOCATED;  
26 CORRECT?

27 MR. MILIBAND: OBJECTION. MISSTATES THE  
28 TESTIMONY.

1 THE COURT: OVERRULED.

2 YOU CAN ANSWER THE QUESTION.

3 THE WITNESS: YES. SOME OF THE RECHARGE COMES  
4 FROM ANTELOPE VALLEY. THERE IS A PORTION OF THE  
5 ANTELOPE VALLEY GROUNDWATER BASIN THAT EXTENDS ACROSS  
6 THE COUNTY BOUNDARY TO THE EAST. AND THERE IS SOME  
7 RECHARGE THAT OCCURS, MOUNTAIN FRONT RECHARGE THAT  
8 OCCURS IN THAT AREA AS WELL.

9 SO TO SAY THAT ALL OF THE RECHARGE, THE  
10 NATURAL RECHARGE FROM PRECIPITATION, INFILTRATION AND  
11 STORM RUNOFF, ET CETERA COMES FROM THE ANTELOPE VALLEY  
12 WOULD BE INCORRECT.

13 Q WOULD IT BE CORRECT TO SAY THAT OTHER THAN  
14 WHATEVER AMOUNT OF RECHARGE IS COMING FROM THE USE OF  
15 PHELAN'S CUSTOMERS THE REST OF THE WATER BEING PUMPED  
16 FROM WELL 14 IS WATER THAT'S PUMPED LITERALLY FROM THE  
17 ANTELOPE VALLEY AREA OF ADJUDICATION?

18 A WELL, WELL 14 IS IN THE ANTELOPE VALLEY OF  
19 ADJUDICATION, SO IT'S PUMPING FROM THE ANTELOPE VALLEY.  
20 YES.

21 Q AND, MR. HARDER, MY QUESTION FOR YOU IS  
22 THIS: WHEN YOU LOOK AT THE DIFFERENCE BETWEEN THE  
23 RECHARGE ESTIMATE THAT YOU CALCULATED AND THE ACTUAL  
24 PRODUCTION OF THAT WELL, FOR THE LAST THREE YEARS OF  
25 DATA THAT WE HAVE, ISN'T IT TRUE THAT THE WELL IS TAKING  
26 MORE WATER THAN IS POSSIBLY BEING RECHARGED BY THE  
27 PHELAN CUSTOMER USE?

28 A IT IS TAKING MORE WATER THAN IS BEING

1 RECHARGED AS A RESULT OF RETURN FLOW FROM CUSTOMER USE.  
2 YES. THAT IS CORRECT.

3 Q AND DOESN'T THAT MEAN THAT WHEN THE WATER  
4 IS DRAWN FROM WELL 14 AND USED ENTIRELY OUTSIDE THE  
5 ANTELOPE VALLEY AREA OF ADJUDICATION IN THE PHELAN  
6 SYSTEM THAT MUCH OF IT, IN FACT, MORE THAN HALF FOR THE  
7 YEARS 2010 THROUGH 2013 IS PERMANENTLY LOST FROM THE  
8 ADJUDICATION AREA? IT DOESN'T COME BACK IN THE  
9 ADJUDICATION AREA, DOES IT?

10 MR. MILIBAND: OBJECTION. YOUR HONOR, THIS GOES  
11 TO ONE OF THOSE MOTIONS IN LIMINE WHERE PERHAPS A  
12 CLARIFICATION OF THE QUESTION IS NEEDED, BECAUSE WE HAVE  
13 ONLY THE TWO CAUSES OF ACTION AT ISSUE IN THIS TRIAL.  
14 THE EIGHTH CAUSE OF ACTION IS PLED WITHIN THE PHELAN  
15 CROSS-COMPLAINT, ADDRESSES THE BOUNDARY ISSUE, MORE OR  
16 LESS.

17 PLACE OF USE OR EXPORT SOMETIMES HAS BEEN  
18 CHARACTERIZED OR REFERRED TO. AND THE QUESTION SEEMS TO  
19 REALLY SPEAK MORE POTENTIALLY TO THAT CAUSE OF ACTION AS  
20 TO PERMANENTLY LOST EVEN IF THIS WITNESS COULD ANSWER  
21 THIS QUESTION.

22 I THINK MY OBJECTION IS THAT IT EXCEEDS  
23 THE SCOPE OF THIS TRIAL. AND I THINK THAT THE COURT  
24 MIGHT TAKE THE MOST APPROPRIATE ACTION OF HAVING THE  
25 QUESTION REPHRASED IN A WAY THAT LIMITS IT SPECIFICALLY  
26 TO ONE OF THESE TWO CAUSES OF ACTION THAT ARE AT ISSUE  
27 IN THIS TRIAL.

28 MR. DUNN: MAY I BE HEARD BRIEFLY, YOUR HONOR?

1 THE COURT: YES.

2 MR. DUNN: THE WITNESS' TESTIMONY ON DIRECT  
3 WAS -- HIS OPINION IS THAT THE PUMPING OF WELL 14 DOES  
4 NOT HAVE A SIGNIFICANT IMPACT ON THE ANTELOPE VALLEY  
5 AREA OF ADJUDICATION OR AT LEAST IN THE LANCASTER AREA  
6 SUB-UNIT.

7 THE POINT OR PURPOSE OF MY LINE OF  
8 QUESTIONING IS TO ESTABLISH THAT WHEN WELL 14 IS  
9 OPERATED BY PHELAN PINON HILLS COMMUNITY SERVICES  
10 DISTRICT, THE WATER IS EXPORTED FROM THE ANTELOPE VALLEY  
11 AREA OF ADJUDICATION AND IS PERMANENTLY DEPRIVED. IT IS  
12 GONE EXCEPT POSSIBLY, POSSIBLY FOR A SMALLER AMOUNT OF  
13 RECHARGE AS TESTIFIED BY THIS WITNESS.

14 IN OTHER WORDS, EVEN ASSUMING THAT THIS  
15 WITNESS' TESTIMONY IS CORRECT THAT THE PHELAN CUSTOMER  
16 USE IN SAN BERNARDINO COUNTY CONSTITUTES ON AVERAGE 426  
17 ACRE-FOOT ANNUAL RECHARGE TO WELL 14, IT STILL PROVES  
18 THAT WELL 14 IS PUMPING WELL IN EXCESS OF THAT 426  
19 ACRE-FEET.

20 IN FACT, FOR EACH OF THOSE THREE YEARS  
21 FROM 2010 THROUGH 2013 THAT WELL ALONE IS PUMPING MORE  
22 THAN A THOUSAND ACRE-FEET. AND SO AT A MINIMUM, THERE  
23 IS ON AVERAGE ABOUT 600 ACRE-FEET THAT HAS BEEN LOST  
24 PERMANENTLY FROM THE BASIN JUST IN THOSE LAST THREE  
25 YEARS.

26 THE COURT: ALL RIGHT. I AM GOING TO OVERRULE  
27 THE OBJECTION. I WOULD JUST NOTE THAT WE ARE ONLY  
28 DEALING WITH THE SECOND AND SIXTH CAUSES OF ACTION. AND

1 THIS EVIDENCE RELATES TO THOSE CAUSES OF ACTION ONLY.

2 MR. DUNN: ALL RIGHT. THANK YOU.

3 MR. MILIBAND: YOUR HONOR, IS THE COURT'S RULING  
4 THEN THAT THE WITNESS' TESTIMONY MAY BE USED ONLY AS IT  
5 RELATES TO THE SECOND AND THE SIXTH CAUSE OF ACTION?

6 THE COURT: NO. IF HE TESTIFIES TO THE CONTRARY  
7 IN ANOTHER PHASE OF THE PROCEEDING, IT MAY WELL BE  
8 OFFERED AS PRIOR AND INCONSISTENT OR OTHER EVIDENCE  
9 CONCERNING CREDIBILITY, AND I DON'T KNOW WHAT OTHER  
10 ISSUES. I WILL NOT RULE ON THAT IN ADVANCE.

11 MR. MILIBAND: AND I UNDERSTAND THAT. MY  
12 QUESTION IS REALLY MORE TO THIS PHASE, OF COURSE, IT'S  
13 PRIOR TESTIMONY BEING RECORDED THAT COULD POTENTIALLY BE  
14 USED IN A LATER PROCEEDING. BUT AS IT RELATES TO THIS  
15 PHASE, TO THE EXTENT THAT THE TESTIMONY IN THIS PHASE  
16 SPEAKS TO THE EIGHTH CAUSE OF ACTION --

17 THE COURT: I DON'T THINK YOU CAN LIMIT IT,  
18 MR. MILIBAND.

19 MR. MILIBAND: WELL, THEN I WILL MAKE A RELEVANCY  
20 OBJECTION THAT I DON'T THINK TALKING ABOUT PERMANENT  
21 LOSS IS RELEVANT TO ESTABLISHING THE WATER RIGHT OR THE  
22 RETURN FLOW RIGHT AS ONE IN THE SAME.

23 THE COURT: I DISAGREE WITH YOU, BECAUSE WE ARE  
24 TALKING ABOUT THE STATUS OF THE PUMPER. AND WHAT THE  
25 PUMPER IS DOING IS CERTAINLY RELEVANT IN THIS CASE. YOU  
26 ARE CONTENDING THAT YOUR CLIENT HAS A RIGHT TO PUMP.

27 MR. MILIBAND: CORRECT.

28 THE COURT: AND ONE OF THE FACTORS THAT THE COURT

1 WILL CONSIDER, OBVIOUSLY, IS HOW MUCH IS YOUR CLIENT  
2 PUMPING, WHAT IS HAPPENING WITH THE WATER, WHERE IS IT  
3 GOING, AND OUT OF WHAT SOURCE IS THE PUMPING OCCURRING.  
4 AND WHAT THE CONSEQUENCES MAY BE TO THE PUMPING IS  
5 SOMETHING THAT THE COURT WILL OBVIOUSLY TAKE INTO  
6 CONSIDERATION.

7 THE WITNESS: OKAY.

8 THE COURT: NEXT QUESTION. ASK A NEW ONE.

9 MR. DUNN: ALL RIGHT.

10 Q BY MR. DUNN: MR. HARDER, WELL 14 IS IN  
11 PROXIMITY TO WELLS 10, 11 AND 12; IS THAT CORRECT?

12 A WELL 14 IS WITHIN A MILE OF THOSE THREE  
13 WELLS. THAT'S CORRECT.

14 Q THE OTHER THREE WELLS, ARE THEY  
15 OPERATIONAL?

16 A THEY ARE.

17 Q IS IT FAIR TO SAY THAT THOSE FOUR WELLS  
18 THAT WOULD BE PHELAN'S WELLS NUMBERS 10, 11, 12 AND 14  
19 ARE OPERATIONAL; CORRECT?

20 A YES.

21 Q THEY ARE WITHIN APPROXIMATELY ONE MILE OF  
22 EACH OTHER?

23 A UH-HUH.

24 Q AND TOGETHER THEY CREATE A GENERAL CONE OF  
25 DEPRESSION WITHIN THAT WELL AREA; IS THAT FAIR?

26 A I THINK THAT'S A FAIR STATEMENT.

27 Q THAT CONE OF DEPRESSION, HOW WOULD YOU  
28 DESCRIBE THAT? WOULD YOU DESCRIBE THAT GENERALLY AS

1 SORT OF, IF YOU WERE TO DRAW CONTOURS, WOULD THEY BE  
2 LIKE CONCENTRIC CIRCLES AROUND THAT WELL AREA?

3 A YOU KNOW, I DON'T KNOW. I THINK IT SHOWS  
4 UP IN THE GROUNDWATER CONTOUR MAPS AS MORE AS A  
5 FLATTENED GRADIENT. I SUPPOSE IF WE HAD MORE  
6 INFORMATION WE CAN DRAW IN MORE DETAIL IN BETWEEN THE  
7 WELLS.

8 Q AND I BELIEVE THAT YOU POINTED OUT THAT  
9 THERE IS REALLY POOR INFORMATION AVAILABLE IN THIS AREA;  
10 IS THAT CORRECT?

11 A IN GENERAL, YES. I THINK THE U.S  
12 GEOLOGICAL SURVEY IS ACTUALLY IN THE PROCESS OF  
13 CONDUCTING A STUDY TO COLLECT MORE INFORMATION ON THE  
14 TRANSITION BETWEEN THE MOJAVE GROUNDWATER BASIN AREA AND  
15 THE ANTELOPE VALLEY GROUNDWATER BASIN AREA. YES. BUT  
16 DIRECT INTERFERENCE, IN OTHER WORDS, HOW MUCH ONE WELL  
17 IS INTERFERING WITH THE OTHER, WE DID NOT DO THAT.

18 Q DO YOU BELIEVE THAT THE CURRENT OPERATION  
19 OF WELLS 10, 11, 12 AND 14 DRAWS EVEN MORE WATER FROM  
20 THE ANTELOPE VALLEY AREA OF ADJUDICATION THAN IF WELL 14  
21 ALONE IS OPERATING?

22 A THOSE WELLS INTERCEPT WATER THAT WOULD  
23 OTHERWISE FLOW INTO THE ANTELOPE VALLEY AREA OF  
24 ADJUDICATION.

25 THE COURT: BUT THOSE WELLS ARE IN THE ANTELOPE  
26 VALLEY, AREN'T THEY?

27 THE WITNESS: THEY ARE IN THE ANTELOPE VALLEY  
28 GROUNDWATER BASINS.



1 THE COURT: RIGHT. THAT'S WHAT I'M REFERRING TO,  
2 NOT THE ADJUDICATION AREA. I UNDERSTAND THAT.

3 THE WITNESS: THAT'S CORRECT.

4 THE COURT: SO WHAT DIFFERENCE DOES IT MAKE IN  
5 TERMS OF THE IMPACT ON THE AQUIFER ITSELF.

6 THE WITNESS: THE AQUIFER DOESN'T RECOGNIZE THE  
7 COUNTY BOUNDARY.

8 MR. DUNN: I HAVE NO FURTHER QUESTIONS. THANK  
9 YOU, YOUR HONOR.

10 THE COURT: MR. BUNN?

11 MR. BUNN: NO, YOUR HONOR.

12 THE COURT: MR. KUHS?

13  
14 CROSS-EXAMINATION

15 BY MR. KUHS:

16 Q GOOD AFTERNOON, MR. HARDER. MY NAME IS  
17 ROBERT KUHS.

18 A GOOD AFTERNOON.

19 Q I WANT TO REFER BRIEFLY TO SOME OF YOUR  
20 EXHIBITS AND A POINT OF CLARIFICATION.

21 MR. MILIBAND, WOULD YOU BE KIND ENOUGH TO  
22 BRING UP 31.

23 MR. HARDER, YOU HAVE INDICATED ON  
24 EXHIBIT 31 WELL 14 IN THE LOWER RIGHT-HAND CORNER?

25 A YES.

26 Q BUT WELL 14 WAS NOT ACTUALLY IN EXISTENCE  
27 DURING THE TIME FRAME OF THAT; IS THAT ACCURATE?

28 A THAT IS CORRECT.

1 Q DO YOU RECALL WHEN WELL 14 FIRST CAME  
2 ONLINE?

3 A DURING 2006.

4 Q I'M SORRY?

5 A DURING 2006.

6 Q OKAY. IT'S SHOWN HERE SIMPLY FOR A POINT  
7 OF REFERENCE?

8 A IT IS.

9 Q SO NONE OF THE PRODUCTION FROM WELL 14  
10 WOULD HAVE AN INFLUENCE ON WHETHER OR NOT THERE WAS A  
11 BALANCE OR, STATED DIFFERENTLY, STABLE WATER CONDITIONS  
12 IN THE SOUTH EAST PORTION OF THE BASIN?

13 A THAT'S CORRECT.

14 Q CAN I HAVE EXHIBIT 28.

15 THE COURT: WHAT NUMBER?

16 MR. KUHS: EXHIBIT 28, YOUR HONOR. THIS IS YOUR  
17 GROUNDWATER ELEVATION CONTOUR MAP FOR 2013. DID YOU  
18 PREPARE A GROUNDWATER ELEVATION CONTOUR MAP FOR ANY  
19 OTHER YEARS?

20 A WE DID.

21 Q FOR WHAT YEARS?

22 A IN OUR JULY 2010 REPORT THAT WE FILED WITH  
23 THE COURT WE PREPARED CONTOUR MAPS FOR 1985, 2004 AND  
24 2010.

25 Q AND WERE THE CONTOURS FOR 2004 AND 2010  
26 LARGELY CONSISTENT WITH WHAT IS SHOWN IN EXHIBIT 28?

27 A YES. THE GROUNDWATER FLOW -- BY  
28 CONSISTENT, THE GROUNDWATER FLOW DIRECTION --

1 Q YES.

2 A -- DID NOT CHANGE SIGNIFICANTLY.

3 Q AM I CORRECT THAT IN TERMS OF YOUR  
4 ANALYSIS OF THE GROUNDWATER BASIN AS DEFINED BY BULLETIN  
5 118 THAT THERE IS -- THE FLOW DIRECTION IS TOWARDS  
6 PHELAN'S WELLS 6-A, 10, 11, 12 AND 14?

7 A THE GENERAL DIRECTION OF FLOW IN THE  
8 ANTELOPE VALLEY GROUNDWATER BASIN EAST OF THE COUNTY  
9 LINE IS TOWARD TO THE NORTH AND THEN TOWARDS WELL 14,  
10 10, 11 AND 12.

11 Q I AM TALKING ABOUT THAT PORTION OF THE  
12 BASIN WHICH IS EAST OF THE COUNTY LINE. THE FLOW  
13 DIRECTION WOULD BE TO THE NORTH AND THEN TO THE WEST?

14 A YES. TO THE NORTH AND THEN TO THE  
15 NORTHWEST.

16 Q IS IT ACCURATE THEN THAT ALL OF PHELAN'S  
17 WELLS IN THAT AREA SHOWN ON EXHIBIT 28 INTERCEPT FLOW  
18 WHICH WOULD OTHERWISE RECHARGE THE ANTELOPE VALLEY AREA  
19 OF ADJUDICATION?

20 A YES.

21 Q HAD YOU QUANTIFIED AT ALL WHAT THAT AMOUNT  
22 OF FLOW IS?

23 A NO. YOU KNOW, I WOULD ADD TO THAT JUST  
24 THAT THE AMOUNT OF THE PUMPING, YOU CAN LOOK AT THE  
25 AMOUNT OF THE PUMPING, AND THAT IS THE AMOUNT OF WATER  
26 THAT IS INTERCEPTED. IN OTHER WORDS, IF THAT IS YOUR  
27 QUESTION.

28 Q THAT IS THE AMOUNT OF THE WATER

1 INTERCEPTER. YOU ARE SAYING 100 PERCENT THEN OF THE  
2 PRODUCTION OF THESE PARTICULAR WELLS WOULD OTHERWISE  
3 FLOW INTO THE ANTELOPE VALLEY AREA OF ADJUDICATION?

4 A YES.

5 MR. KUHS: NO FURTHER QUESTIONS.

6 THE COURT: ANY OTHER CROSS-EXAMINATION?

7 MS. GOLDSMITH: I HAVE NO QUESTIONS.

8 THE COURT: THANK YOU.

9 ANY REDIRECT?

10 MR. MILIBAND: JUST BRIEFLY, YOUR HONOR.

11  
12 REDIRECT EXAMINATION

13 BY MR. MILIBAND:

14 Q MR. HARDER, IF I CAN DIRECT YOUR ATTENTION  
15 BACK TO EXHIBIT 39, PLEASE. IT'S ESSENTIALLY THE PARCEL  
16 MAP WE TALKED ABOUT THIS MORNING; IS THAT CORRECT?

17 A YES. THAT'S CORRECT.

18 Q WELL 14 IS NOT IDENTIFIED ON THIS  
19 PARTICULAR EXHIBIT, BUT IF YOU WOULDN'T MIND USING YOUR  
20 LASER POINTER AND DESCRIBING APPROXIMATELY FOR THE  
21 RECORD WHERE YOU ARE POINTING WITH THE LASER POINTER  
22 WHERE WELL 14 IS OR WHERE YOU WOULD PLACE IT ON  
23 EXHIBIT 39.

24 A OKAY. SO HERE IS THE COUNTY BOUNDARY AND  
25 PHELAN'S SERVICE AREA BOUNDARY. IF YOU CAN SEE THIS  
26 FAINT DARK LINE RIGHT THERE, THAT IS THE CALIFORNIA  
27 AQUEDUCT. AND WELL 14 IS ABOUT WHERE MY LASER POINTER  
28 IS ABOUT 100 FEET WEST OF THE COUNTY, 150 FEET WEST OF

1 THE COUNTY BOUNDARY AND ABOUT 150 FEET NORTH OF THE  
2 AQUEDUCT.

3 Q SO APPROXIMATELY WHERE WOULD THAT BE IN  
4 RELATION TO WHAT YOU IDENTIFIED AS THE AQUEDUCT AND THE  
5 COUNTY LINE ON EXHIBIT 39?

6 A IT WOULD BE WHERE MY LASER POINTER IS  
7 RIGHT HERE WHICH ON THIS MAP ON THIS SCALE WOULD BE  
8 RIGHT NEXT TO THE COUNTY LINE.

9 Q AND ON THE HARD COPY WITH THE EXHIBIT  
10 BINDER IN FRONT OF YOU, HOW FAR FROM THE TOP OF  
11 EXHIBIT 39 IN THE EXHIBIT BINDER WOULD YOU ESTIMATE WELL  
12 14 TO BE?

13 A IN TERMS OF THE SCALE ON THE MAP OR IN  
14 TERMS OF INCHES?

15 Q INCHES FOR SIMPLICITY.

16 A APPROXIMATELY ONE INCH.

17 Q HOW FAR FROM THE COUNTY LINE AGAIN LOOKING  
18 AT THE HARD COPY WITHIN THE EXHIBIT BINDER WOULD YOU  
19 ESTIMATE WELL 14 TO BE?

20 A APPROXIMATELY AN EIGHTH OF AN INCH OR  
21 LESS.

22 MR. MILIBAND: NOTHING FURTHER. THANK YOU.

23 THE COURT: OKAY. ANYTHING ELSE?

24 MR. KUHS, ANYTHING ELSE?

25 MR. KUHS: NO, YOUR HONOR.

26 THE COURT: ALL RIGHT. THANK YOU, MR. HARDER,  
27 FOR COMING. YOU ARE EXCUSED.

28 MR. MILIBAND: YOUR HONOR, PHELAN DOESN'T HAVE

1 ANY FURTHER WITNESSES AT THIS TIME. I WOULD LIKE TO  
2 MOVE INTO EVIDENCE EXHIBITS 25 THROUGH 52.

3 THE COURT: OKAY. ANY OBJECTION?

4 MR. GOLDEN-KRASNER: YOUR HONOR, I WOULD OBJECT  
5 TO THE --

6 THE COURT: YOU ALWAYS HAVE TO TELL THE REPORTER  
7 YOUR NAME.

8 MR. GOLDEN-KRASNER: NOAH GOLDEN-KRASNER, STATE  
9 OF CALIFORNIA. THERE WERE TWO EXHIBITS THAT JUST  
10 PROVIDED A LIST OF HIS OPINIONS. I DON'T BELIEVE THAT  
11 THOSE SHOULD BE INTRODUCED.

12 THE COURT: YOU ARE TALKING ABOUT EXHIBIT 50?

13 MR. MILIBAND: 50 AND 51, YOUR HONOR.

14 MR. GOLDEN-KRASNER: YES, YOUR HONOR.

15 THE COURT: THOSE ARE REALLY ARGUMENTATIVE  
16 EXHIBITS. YOU CAN USE THOSE IN YOUR CLOSING ARGUMENT IF  
17 YOU WISH, BUT THEY WON'T BE ADMITTED IN AS EVIDENCE.

18 MR. MILIBAND: UNDERSTOOD, YOUR HONOR.

19 MR. KUHS: YOUR HONOR, ROBERT KUHS. I WOULD  
20 OBJECT ON HEARSAY GROUNDS TO EXHIBITS 36, 41 AND 42.  
21 THOSE ARE THOSE EXCERPTS FROM THE SUMMARY EXPERT REPORT.

22 THE COURT: 36 AND 42?

23 MR. KUHS: 36, 41 AND 42. AND THOSE, AS FAR AS  
24 I'M AWARE, ARE NOT IN EVIDENCE IN THE PRIOR PHASE OF THE  
25 TRIAL.

26 THE COURT: WELL, THE SUMMARY EXPERT REPORT WAS  
27 IN EVIDENCE, WASN'T IT?

28 MR. KUHS: NO. WE OBJECTED ON HEARSAY GROUNDS TO

1 THE ENTIRE REPORT COMING INTO EVIDENCE. I HAVE NOT  
2 OBJECTED HERE TODAY TO THE DEMONSTRATIVE EVIDENCE THAT  
3 CAME IN, FOR EXAMPLE, HYDROGRAPHS. BUT WE OBJECTED TO  
4 THE TEXT OF THE REPORT COMING INTO EVIDENCE.

5 MR. MILIBAND: AND MY RESPONSE TO THAT, YOUR  
6 HONOR, WOULD BE, AS THE COURT IS WELL AWARE, THERE IS  
7 WELL SETTLED LAW THAT AN EXPERT CAN RELY UPON HEARSAY  
8 EVIDENCE. THIS IS CLEARLY RELIABLE ON THAT EVIDENCE.

9 THE COURT: HE CAN RELY ON IT BUT ONLY THE  
10 OPPOSITE PARTY CAN OFFER IT INTO EVIDENCE, AND THEY ARE  
11 OBJECTING.

12 MR. MILIBAND: WELL, IN THIS TRIAL PHASE ONE OF  
13 THE OPPOSITE PARTIES TO ME NOW WAS ATTEMPTING --

14 THE COURT: NO. YOU ARE THE PROPONENT,  
15 MR. MILIBAND IN EVERY RESPECT WITH REGARD TO YOUR  
16 COMPLAINT. SO THE OBJECTION IS SUSTAINED. THEY WON'T  
17 BE ADMITTED. BUT THE PARAGRAPHS HAVE BEEN READ INTO  
18 EVIDENCE, AND SO THEY ARE IN THAT SENSE IN EVIDENCE.

19 ALL RIGHT. ANYTHING ELSE?

20 NOW, THE DEFENDANTS HAVE AN OPPORTUNITY TO  
21 PRESENT EVIDENCE.

22 MR. MILIBAND: YOUR HONOR, DOES THAT MEAN ALL OF  
23 25 THROUGH 52 ARE IN --

24 THE COURT: EVERYTHING EXCEPT 36, 41, AND 42 AND  
25 50 AND 51.

26 MR. MILIBAND: THANK YOU, YOUR HONOR.

27 (EXHIBITS 25 THROUGH 52 ARE ADMITTED INTO  
28 EVIDENCE, EXCLUDING EXHIBITS 36, 41, 42, 50, 51.)

1 MR. KUHS: YOUR HONOR, WE HAD ONE DUPLICATE  
2 EXHIBIT ACCORDING TO MY NOTES.

3 THE COURT: I THINK THERE WAS.

4 MR. MILIBAND: IT WAS EXHIBIT 40.

5 THE COURT: IT'S REDUNDANT OF 28, IS IT?

6 MR. MILIBAND: THAT'S CORRECT.

7 MR. DUNN: YOUR HONOR, I AM ABOUT TO BE JOINED BY  
8 OTHER COUNSEL. WE WISH TO BRING A MOTION AT THIS TIME  
9 BEFORE THE COURT, AN ORAL MOTION FOR JUDGMENT ON THE  
10 CONCLUSION OF PHELAN PINON HILLS CASE IN CHIEF. IT'S A  
11 JOINT MOTION BY COUNSEL WHO ARE PRESENT IN COURT TODAY.  
12 AND WE ARE PREPARED TO MAKE THAT MOTION NOW IF THE COURT  
13 WILL HEAR IT.

14 THE COURT: SURE.

15 MR. DUNN: I CAN BEGIN, AND I AM SURE I WILL BE  
16 JOINED BY OTHER COUNSEL. THE BASIS FOR OUR MOTION FOR  
17 JUDGMENT IS AS FOLLOWS: IT HAS BEEN DETERMINED BY THE  
18 COURT AFTER THE PHASE THREE TRIAL THAT THE ANTELOPE  
19 VALLEY AREA OF ADJUDICATION IS AND HAS BEEN IN A STATE  
20 OF OVERDRAFT.

21 THE PARTY PHELAN PINON HILLS COMMUNITY  
22 SERVICES DISTRICT OPERATES ITS WELL 14 WITHIN THE  
23 ANTELOPE VALLEY AREA OF ADJUDICATION. THE WATER THAT IS  
24 PUMPED FROM THAT WELL IS EXPORTED IN ITS ENTIRETY  
25 OUTSIDE THE AREA OF ADJUDICATION TO THE PHELAN SERVICE  
26 AREA FOR USE BY ITS CUSTOMERS.

27 THE EXPORT BY PHELAN PINON HILLS OF  
28 GROUNDWATER FROM THE ANTELOPE VALLEY AREA OF



1 ADJUDICATION WOULD BE A CLAIMED APPROPRIATIVE USE OF  
2 GROUNDWATER. WE NOTE THAT PHELAN HAS ABANDONED OR  
3 OTHERWISE IS NO LONGER PURSUING A PRESCRIPTIVE RIGHTS  
4 CLAIM AS TO ITS USE OF GROUNDWATER FROM WELL NUMBER 14.

5 IT HAS NOT CLAIMED ANY OTHER POSSIBLE OR  
6 LEGALLY VIABLE RIGHT TO TAKE THE GROUNDWATER FOR USE  
7 OUTSIDE THE ADJUDICATION AREA OTHER THAN A CLAIMED  
8 APPROPRIATIVE RIGHT. AS A MATTER OF LAW, THEIR  
9 APPROPRIATIVE RIGHT CANNOT BE EXERCISED OR DOES NOT  
10 EXIST IN THE OVERDRAFT CONDITION.

11 IN OTHER WORDS, ONCE THE BASIN IS IN  
12 OVERDRAFT, THERE IS NO SURPLUS WITHIN THE ADJUDICATION  
13 AREA. THEREFORE, THERE IS NO WATER AVAILABLE FOR  
14 APPROPRIATIVE USE.

15 AS A MATTER OF LAW, EVEN BEFORE THE  
16 PRESENTATION OF EVIDENCE BY PHELAN, THEIR CLAIMED  
17 APPROPRIATIVE USE OF GROUNDWATER IS NOT ALLOWABLE AS A  
18 MATTER OF LAW GIVEN THE FACT THAT THE BASIN IS AND HAS  
19 BEEN FOUND BY THE COURT TO BE IN A STATE OF OVERDRAFT.  
20 THERE IS NO SURPLUS AVAILABLE FOR APPROPRIATIVE USE.  
21 THERE IS NO PRESCRIPTIVE RIGHT BEING CLAIMED AS THE  
22 BASIS FOR USING THE GROUNDWATER FROM WELL 14 TO EXPORT  
23 OUTSIDE THE BASIN.

24 FURTHERMORE, WHEN WE LOOK AT THE TESTIMONY  
25 PRESENTED BY MR. BARTZ AND MR. HARDER, IT CONFIRMS NOT  
26 ONLY THE USE OF THE GROUNDWATER FROM WELL 14 OUTSIDE THE  
27 BASIN BUT IT ALSO THROUGH THE TESTIMONY OF MR. HARDER  
28 CONFIRMS THAT THE WATER THAT IS TAKEN FROM WELL 14 FOR

1 USE OUTSIDE THE BASIN IS A USE OF GROUNDWATER THAT WOULD  
2 OTHERWISE GO INTO THE REST OF THE ADJUDICATION AREA  
3 EITHER FOR USE WITHIN THE BUTTE SUB-UNIT ITSELF OR  
4 POTENTIALLY AS IT MIGRATES THE UNDERGROUND FLOW OF THE  
5 GROUNDWATER TO THE LANCASTER AREA.

6 SO WHAT WE HAVE LEARNED IS THAT THE  
7 OPERATION -- THIS IS THROUGH THE TESTIMONY OF PHELAN'S  
8 EXPERT WITNESS MR. HARDER THAT 100 PERCENT OF THE WATER  
9 THAT IS TAKEN FROM WELL 14 WOULD OTHERWISE BE AVAILABLE  
10 FOR USE WITHIN THE ADJUDICATION AREA.

11 AND THEN FINALLY, WHEN WE GO TO THE  
12 TESTIMONY OF MR. HARDER ABOUT THE RETURN FLOW COMPONENT  
13 OF THE CUSTOMER -- THE PHELAN CUSTOMER USE OF THE WELL  
14 14 WATER, THE TESTIMONY WAS THAT ON AVERAGE IT HAS  
15 RECENTLY BEEN APPROXIMATELY 426 ACRE-FEET ANNUALLY.

16 WHEN WE COMPARE THAT TO THE ANNUAL  
17 PRODUCTION JUST USING THE LAST THREE YEARS THAT WE HAVE  
18 USED IN EVIDENCE, THAT IS YEARS 2010 THROUGH 2013, IN  
19 EACH OF THOSE FOUR YEARS, WELL NUMBER 14 HAS PRODUCED  
20 MORE THAN A THOUSAND ACRE-FEET ANNUALLY.

21 THE POINT IS THAT EVEN IF PHELAN COULD  
22 ESTABLISH THAT THERE IS A RETURN FLOW COMPONENT THAT IS  
23 PUMPED BY WELL 14, IT IS LESS THAN HALF OF WHAT WELL 14  
24 PUMPS WHICH IN AND OF ITSELF IS A PERMANENT DEPRIVATION  
25 OF WATER FROM THE ANTELOPE VALLEY ADJUDICATION AREA.  
26 THAT WATER IS LOST PERMANENTLY AS EXPORT TO THE OTHER  
27 SIDE, TO THE EAST SIDE OF THE LOS ANGELES COUNTY,  
28 SAN BERNARDINO COUNTY LINE FOR USE OUTSIDE OF THE BASIN.

1 WE SUBMIT IT WOULD HAVE TO BE A LEGALLY  
2 PROPER APPROPRIATIVE USE, AND IT CANNOT BE UNDER THE  
3 FACTS AS DECIDED IN THIS CASE. AND THEN FINALLY, AS  
4 MR. HARDER CANDIDLY ADMITTED, THERE IS NO WAY OF  
5 REASONABLY KNOWING WITH A REASONABLE DEGREE OF CERTAINTY  
6 WHETHER THAT RETURN FLOW COMPONENT IS ACTUALLY TAKEN UP  
7 BY WELL NUMBER 14. WE JUST DON'T EVEN KNOW IF THAT IS  
8 THE CASE.

9 SO AT THE END OF THE DAY WE BRING THIS  
10 MOTION FOR JUDGMENT BECAUSE AS A MATTER OF LAW EVEN  
11 BEFORE THE PRESENTATION OF THE EVIDENCE THAT PHELAN IS  
12 IMPROPERLY EXPORTING WATER OUTSIDE OF THE BASIN. THEY  
13 DO NOT HAVE AN ALLOWABLE APPROPRIATIVE RIGHT. AND BASED  
14 UPON THE EVIDENCE PRESENTED BY THE PHELAN WITNESSES, THE  
15 WATER IS IMPROPERLY APPROPRIATED OUTSIDE THE BASIN.

16 THERE IS ACTUAL HARM TO THE BASIN BY THE  
17 PERMANENT DEPRIVATION OF THAT WATER AS IT'S LOST WITHIN  
18 THE PHELAN SERVICE AREA, EITHER THROUGH CONSUMPTION OR  
19 EVAPORATION TRANSPORTATION OR LOSS WITHIN THEIR SYSTEM  
20 OR WHATEVER THE REASON MAY BE. BUT AS A MATTER OF LAW  
21 THEY ARE NOT ENTITLED FOR AN APPROPRIATIVE RIGHT HERE.

22 THE COURT: WHEN YOU SAY "PERMANENT LOSS TO THE  
23 BASIN," YOU REALLY MEAN PERMANENT LOSS TO THE  
24 ADJUDICATION AREA?

25 MR. DUNN: CORRECT, YOUR HONOR.

26 THE COURT: NOT THE BASIN?

27 MR. DUNN: THAT'S CORRECT. TO THE ADJUDICATION  
28 AREA.

1 THE COURT: ONE OF THE THINGS THAT IS CURIOUS TO  
2 ME IS THESE OTHER WELLS THAT PHELAN HAS AND PUMPS FROM.  
3 THOSE ALSO GENERATE RETURN FLOWS, DON'T THEY?

4 MR. DUNN: AS USED IN THE TESTS WITH MR. HARDER,  
5 PRESUMABLY, YES.

6 THE COURT: AND WE DON'T KNOW WHAT THE NUMBERS  
7 ARE FOR THE PUMPING OF THOSE OTHER WELLS. I THINK THERE  
8 ARE FIVE OTHERS, MAYBE SIX, BUT I THINK FIVE. AND THERE  
9 IS A PERCENTAGE OF THAT WATER, PRESUMABLY, IS USED IN  
10 THE PHELAN SERVICE DISTRICT WITHIN THE AQUIFER.

11 MR. DUNN: PRESUMABLY.

12 THE COURT: AND THAT WATER COULD FLOW BACK INTO  
13 THE ADJUDICATION AREA, PRESUMABLY. SO THE QUESTION THAT  
14 I HAVE IS WHAT IMPACT DOES THAT HAVE ON THE PERMANENT  
15 DEPRIVATION OF THE ADJUDICATION AREA?

16 I WOULD JUST LIKE TO OBSERVE THAT THE  
17 DETERMINATION OF THE BOUNDARIES FOR THIS ADJUDICATION  
18 WERE MADE AT A TIME VERY EARLY ON SEVERAL YEARS AGO WHEN  
19 THE INFORMATION THAT WE HAD INDICATED THAT THE MOJAVE  
20 ADJUDICATION WENT RIGHT UP TO THE COUNTY LINE. AND THIS  
21 COURT WAS VERY MINDFUL OF THE FACT THAT WE SHOULDN'T  
22 MAKE ANY KINDS OF JUDGMENTS THAT WOULD IMPACT THE OTHER  
23 ADJUDICATION AREA WHERE THERE WAS A FINAL JUDGMENT. I  
24 PRESUME IT WAS FINAL. IT WENT UP ON APPEAL AND SO ON.

25 I AM NOT SURE WHAT THE IMPACT OF THOSE  
26 OTHER WELLS MIGHT BE IN TERMS OF AFFECTING THE  
27 ADJUDICATION AREA TO THE EXTENT THAT THERE IS A RETURN  
28 FLOW, ASSUMING THERE IS, FROM THE PHELAN SERVICE

1 DISTRICT RECOGNIZING THAT WE ARE NOT REALLY VALUING  
2 RETURN FLOW SO MUCH AS WE ARE VALUING A REDUCED PUMPING  
3 CONCEPT.

4 MR. DUNN: YES.

5 THE COURT: AND EFFECT.

6 MR. DUNN: YES.

7 THE COURT: I AM SURE MR. MILIBAND WILL ARGUE THE  
8 LAW ON THIS, BUT I HAVEN'T READ OR HEARD ANYTHING THAT  
9 WOULD GIVE INDEPENDENT RECOGNITION TO A RETURN FLOW  
10 OTHER THAN AS A REFLECTION OF THE CONSEQUENCE OF  
11 PUMPING.

12 MR. DUNN: YES.

13 THE COURT: SO IF I HAVE CONFUSED YOU WITH MY  
14 QUESTION.

15 MR. DUNN: NOT AT ALL, YOUR HONOR. NOT AT ALL.  
16 WE HAVE GIVEN A LOT OF THOUGHT TO THOSE TYPES OF  
17 COMMENTS. I MADE TWO OBSERVATIONS.

18 THE FIRST ONE TAKES US BACK IN TIME TO AN  
19 EARLIER PHASE OF TRIAL TO ESTABLISH THOSE BASIN -- OR  
20 THE ADJUDICATION AREA BOUNDARIES. AND WHAT TOOK PLACE  
21 WHICH LED TO THE COURT'S DETERMINATION OF THE COUNTY  
22 LINE BEING THE ADJUDICATION AREA OF BOUNDARY IS A  
23 RECOGNITION THAT IN GROUNDWATER ADJUDICATIONS, THE LINES  
24 CAN AND ARE DRAWN BY THE COURT SUBJECT TO DIFFERENT  
25 CONSIDERATIONS INCLUDING LEGAL CONSIDERATIONS.

26 FOR EXAMPLE, HERE, THE MOJAVE ADJUDICATED  
27 AREA GOES TO THE VERY BOUNDARY LINE THAT HAS BEEN A  
28 SUBJECT HERE IN THIS PROCEEDING. IN OTHER WORDS, WHEN

1 THE COURT SET THE BASIN BOUNDARY LINE AT THE COUNTY  
2 LINE, IT DID SO WITH THE UNDERSTANDING THAT ACROSS THAT  
3 LINE ON THE EAST SIDE IN THE SAN BERNARDINO COUNTY LINE  
4 IS AN ONGOING COURT JURISDICTION AREA OF AN ADJUDICATED  
5 AREA, THE MOJAVE ADJUDICATED AREA.

6 IT WAS AND IT STILL IS APPROPRIATE FOR THE  
7 COURT TO MAINTAIN THE BOUNDARY LINE THERE. SO WHAT THAT  
8 MEANS FOR THE SECOND POINT IS THAT WE HAVE IN THIS LEGAL  
9 PROCEEDING THESE COORDINATED AND CONSOLIDATED  
10 PROCEEDINGS, THE JURISDICTION OVER WELLS ON THE LOS  
11 ANGELES COUNTY OR WEST SIDE OF THE COUNTY LINE. SO WELL  
12 14 FALLS WITHIN THE JURISDICTION OF THIS CASE.

13 WITH REGARDS TO PHELAN WELLS NUMBERS 10,  
14 11, 12, AND 6-A AND 6-B WHICH ARE IN SAN BERNARDINO  
15 COUNTY, THOSE ARE NOT WITHIN OUR ABILITY IN THIS CASE TO  
16 SORT OF DEAL WITH. THOSE ISSUES REGARDING THEIR  
17 OPERATION AND THEIR IMPACT BOTH WITHIN SAN BERNARDINO  
18 COUNTY AND POTENTIALLY WITHIN OUR AREA ARE PROBABLY  
19 SOLELY RESOLVED BY THE ONGOING CASE THAT IS PENDING IN  
20 RIVERSIDE COUNTY SUPERIOR COURT.

21 HAVING SAID ALL OF THAT, WHAT IS TELLING  
22 FROM MR. HARDER'S TESTIMONY IS, AS HE PUT IT, WITH  
23 REGARDS TO ANY WELL THERE IS A CONE OF DEPRESSION. IT  
24 MAKES SENSE THAT IF THERE IS A WELL IT'S GOING TO DRAW  
25 THE WATER FROM AROUND THE WELL GENERALLY. THAT'S THE  
26 CONE OF DEPRESSION THAT EXISTS AROUND ANY WELL. WE  
27 WOULD SEE THAT NOT JUST FOR WELL 14. WE WOULD SEE IT  
28 FOR WELLS 10, FOR WELLS 11 AND WELLS 12.

1 THE POINT IS, ALTHOUGH WE HAVE NO EVIDENCE  
2 BEFORE US OTHER THAN THE TESTIMONY BY MR. HARDER THAT  
3 WELL DRILLING CREATES A CONE OF DEPRESSION AND OTHER  
4 THAN THE FACT THAT THOSE WELLS ARE JUST ON THE OTHER  
5 SIDE, THE EAST SIDE OF THE COUNTY LINE, THE BASIN AND  
6 COUNTY LINE, IT IS SAFE TO ASSUME THAT THERE IS LIKELY A  
7 NEGATIVE IMPACT UPON THE GROUNDWATER SUPPLY IN THIS  
8 ADJUDICATION AREA CAUSED BY THAT OPERATION OF WELLS 10,  
9 11 AND 12.

10 THAT IS NOT AN ISSUE THAT WE'RE GOING TO  
11 DEAL WITH TODAY. IT MAY NOT EVER BE APPROPRIATELY  
12 RESOLVED HERE. SO WHAT WE ARE REALLY LEFT WITH IS JUST  
13 LOOKING AT WELL 14 BASED ON THE EVIDENCE THAT WE HAVE.  
14 AND THAT TAKES ME BACK TO MY COMMENTS TODAY. WHEN WE  
15 LOOK AT WELL 14, AND WE WILL NOT BE IN A POSITION TO  
16 LOOK AT 10, 11 AND 12 AND THEIR IMPACT.

17 THE COURT: NOT EVER IN THIS PROCEEDING.

18 MR. DUNN: PROBABLY NOT. THEN WE LOOK AT WELL  
19 14, AND IT'S UNDISPUTED THAT IT CREATES A CONE OF  
20 DEPRESSION; THAT IT TAKES WATER FROM THE ANTELOPE VALLEY  
21 AREA OF ADJUDICATION WHICH IS IN A STATE OF OVERDRAFT.  
22 IT HAS BEEN IN OVERDRAFT AND EXPORTS IT AS AN IMPROPER  
23 APPROPRIATIVE USE.

24 THERE IS NO OTHER LEGAL BASIS. THERE IS  
25 NO LEGAL BASIS THAT ALLOWS FOR THAT TYPE OF EXPORT. IT  
26 JUST SIMPLY DOESN'T EXIST. COUNSEL MAY ARGUE, AND WE  
27 HAVE HEARD THIS IN THE OPENING PART OF THIS CASE THAT  
28 PERHAPS UNDER COUNSEL'S VIEW OF THE INTERVENING PUBLIC

1 USE DOCTRINE THAT SOMEHOW YOU CAN DO THAT.

2 THE PROBLEM WITH THAT ARGUMENT IS THAT YOU  
3 CAN'T TAKE WATER FROM AN OVERDRAFTED BASIN WITHOUT A  
4 PRESCRIPTIVE RIGHT AND USE IT AS AN APPROPRIATIVE RIGHT  
5 WITHOUT PAYING COMPENSATION FOR IT.

6 THE COURT: OKAY. WELL, MY QUESTION REALLY IS  
7 NOT ADDRESSING THE IMPACT OF PUMPING IN THE ADJACENT  
8 JURISDICTIONAL AREA AS HAVING SOME IMPACT ON THE STATUS  
9 OF THE PUMPING IN THIS AREA. IT MAY HAVE SOME IMPACT AT  
10 A LATER TIME WHEN WE ARE DEALING WITH A WATER MASTER AND  
11 PHYSICAL SOLUTION.

12 AT THIS POINT, IT DOESN'T APPEAR TO ME TO  
13 IMPACT THE STATUS OF THE PUMPING IN THE ANTELOPE VALLEY  
14 ADJUDICATION AREA. WE WILL GIVE MR. MILIBAND A CHANCE  
15 TO ADDRESS THAT.

16 MR. DUNN: AND I WOULD SAY THE REASON WHY WE ARE  
17 COMING BEFORE THE COURT WITH THIS MOTION IS, IT GOES  
18 BACK TO WHAT THE COURT HAS SAID ALONG THE WAY BEFORE WE  
19 STARTED THIS PROCEEDING IS THAT THE FACTS DON'T REALLY  
20 SEEM TO BE IN DISPUTE. AND THEY REALLY ARE NOT HERE.

21 THERE ARE NO DISPUTED FACTS THAT I CAN  
22 THINK OF THAT ARE IN ANY WAY MATERIAL THAT WOULD CAUSE  
23 ME TO PUT DR. WILLIAMS ON AND GIVE YOU A DIFFERENT  
24 STORY. THERE IS AN OFFER OF PROOF HE WILL TAKE THE  
25 STAND. HE WILL TALK ABOUT MANY OF THE SAME THINGS THAT  
26 MR. HARDER SAID.

27 THE TESTIMONY IS GOING TO BE THE SAME.  
28 IT'S GOING TO TALK ABOUT THERE IS A FLOW OF GROUNDWATER



1 FROM THIS ONE AREA UP FROM THE BUTTES INTO THE LANCASTER  
2 AREA; THAT THE WELLS HAVE AN IMPACT, ALL OF THE THINGS  
3 THAT HAVE BEEN ESTABLISHED HERE. WE HAVE NEVER REALLY  
4 HAD FACTS IN DISPUTE.

5 WHAT WE HAVE WHICH CAN BE RESOLVED NOW IS  
6 A DIFFERENCE OF LEGAL OPINION OR VIEW ABOUT THESE  
7 UNDISPUTED FACTS. AND OUR VIEW OF THIS IS NOW STATED  
8 BEFORE THE COURT. IT'S SIMPLY NOT LEGALLY POSSIBLE TO  
9 DO -- NOT LEGALLY ALLOWABLE TO DO WHAT THEY ARE DOING.

10 THE COURT: OKAY. THANK YOU.

11 MR. BUNN?

12 MR. BUNN: YOUR HONOR, IF I MAY, I WOULD LIKE TO  
13 RETURN TO THE COURT'S QUESTION AND JUST ADD MAYBE A  
14 LITTLE CLARIFICATION. MY UNDERSTANDING OF THE COURT'S  
15 QUESTION HAD TO DO WITH THE RETURN FLOWS FROM THE  
16 VARIOUS WELLS FROM ONE WELL 14 ON ONE HAND AND WELLS 10,  
17 11 AND 12 ON THE OTHER.

18 ACCORDING TO MR. HARDER'S TESTIMONY, HE  
19 DIDN'T DISTINGUISH BETWEEN THE RETURN FLOWS CAUSED BY  
20 THE VARIOUS WELLS. WHAT HE DID WAS FIGURE OUT WHAT THE  
21 RETURN FLOWS WERE FROM THAT PORTION OF PHELAN'S SERVICE  
22 AREA THAT OVERLAID THE ANTELOPE VALLEY GROUNDWATER  
23 BASIN. I THINK I AM FAIRLY SUMMARIZING WHAT HE DID.

24 AND, IN FACT, THERE IS A STIPULATED FACT  
25 NUMBER 28 THAT SAYS ALL OF THE PHELAN PINON HILLS'S  
26 GROUNDWATER PRODUCTION WELLS PUMP INTO A COLLECTIVE  
27 DISTRIBUTION SYSTEM THAT IS INTERCONNECTED. SO  
28 REGARDLESS OF THE SOURCE OF THE WATER, THAT IS HOW THE

1 AMOUNT OF RETURN FLOW WHEN HE CAME TO HIS 426 ACRE-FEET  
2 PER YEAR.

3 AND THE POINT, I BELIEVE, THAT MR. DUNN  
4 WAS MAKING WAS THAT NO MATTER WHAT THE SOURCE OF THAT  
5 RETURN FLOW IS, WELL 14 PUMPS OUT MORE THAN COULD COME  
6 BACK INTO THAT AQUIFER. SO IT'S A NET DRAIN ON THE  
7 ANTELOPE VALLEY ADJUDICATION AREA.

8 THE COURT: I ASSURE YOU, MR. BUNN, I UNDERSTOOD  
9 EXACTLY WHAT MR. DUNN SAID.

10 MR. BUNN: OKAY. AND I JUST WANT TO ADD TO ALL  
11 THAT OR TO MAKE EXPLICIT WHAT WE SAID IN OUR TRIAL  
12 BRIEF. THAT IS THAT THERE IS NO RIGHT TO NATIVE RETURN  
13 FLOWS IN THE FIRST PLACE.

14 THE COURT: OKAY. THANK YOU. MR. KUHS, DID YOU  
15 HAVE ANY COMMENTS OR OPPOSING ARGUMENT WITH REGARD TO  
16 THIS ISSUE, THE MOTION?

17 MR. KUHS: NO, THANK YOU.

18 THE COURT: OH, OKAY.

19 MS. GOLDSMITH?

20 MS. GOLDSMITH: I JOIN IN WATER WORKS 40'S  
21 MOTION. I ALSO WOULD LIKE TO MAKE A COUPLE OF COMMENTS  
22 IN ADDITION TO THOSE THAT HAVE BEEN MADE BY MR. DUNN AND  
23 MR. BUNN. AS WE STATED IN OUR TRIAL BRIEF, THE BURDEN  
24 OF PROOF FOR APPROPRIATION IS ON PHELAN, AND I DON'T  
25 BELIEVE THEY HAVE CARRIED IT.

26 SECONDLY, A POINT THAT IS IN OUR BRIEF IS  
27 THAT IN ORDER TO HAVE A RIGHT TO A RETURN FLOW, YOU HAVE  
28 TO HAVE CONTINUOUS CONTROL OF THE WATER. THE TESTIMONY

1 HAS BEEN UNDISPUTED TODAY THAT THE WATER IS DELIVERED TO  
2 THEIR CUSTOMERS. PHELAN LOOSES IT. THE CUSTOMERS PUT  
3 IT IN THEIR SEPTIC SYSTEMS.

4 IT GOES DOWN INTO THE GROUNDWATER. IT'S  
5 UNDISTINGUISHED FROM THE REST OF THE GROUNDWATER. THERE  
6 IS NO PIPE THAT CARRIES IT FROM THESE SEPTIC SYSTEMS TO  
7 ANY OF THE WELLS. IT MAY BE INTERCEPTED BY WELL 11, 12,  
8 6-A, 6-B. IT MAY BE INTERCEPTED BY WELL 14.

9 IT MAY BE INTERCEPTED BY BOLTHOUSE AS  
10 WELL. IT'S UNDISTINGUISHED AND DISTINGUISHABLE AS PART  
11 OF THE COMMON SOURCE. SO THERE IS NO LEGALLY RECOGNIZED  
12 RIGHT TO RETURN FLOW TO WHICH YOU HAVE LOST CONTROL  
13 WHICH IS THE UNDISPUTED EVIDENCE.

14 THE COURT: OKAY. THANK YOU.

15 MR. LEMIEUX: YOUR HONOR, KEITH LEMIEUX, LEMIEUX.  
16 I JUST WANT TO MAKE IT CLEAR FOR THE RECORD THAT WE ARE  
17 JOINING IN THIS MOTION.

18 THE COURT: ALL RIGHT.

19 MR. KUHS: ROBERT KUHS AS WELL.

20 THE COURT: OKAY. THE RECORD WILL SO SHOW.

21 ALL RIGHT. MR. MILIBAND?

22 MR. MILIBAND: FIRST OF ALL, IT'S CLEAR THAT THIS  
23 IS AN ORAL MOTION BEING MADE AT THE CONCLUSION OF THE  
24 PRESENTATION OF PHELAN'S EVIDENCE. AND, QUITE FRANKLY,  
25 YOUR HONOR, GIVEN WHAT WE HAVE HAD AS A GROUP AND WITH  
26 THE COURT, YOU KNOW, DIFFERENT DIALOG OVER THE MONTHS  
27 AND MAYBE EVEN THE YEARS, THERE ARE SOME UNIQUE ISSUES  
28 THAT ARE PRESENTED, WHETHER IT'S FACTUALLY, TECHNICALY

1 AND/OR LEGALLY.

2 THIS, QUITE FRANKLY, IS A MOTION THAT  
3 WOULD BE BETTER RESOLVED THROUGH ADDITIONAL BRIEFING.  
4 AND WHAT I HAVE ENVISIONED IS THAT WE GO WOULD GO  
5 THROUGH THIS TRIAL. WE REACHED A STIPULATION TO THE  
6 EXTENT WE COULD ON FACTS, WHETHER EVIDENTIARY FACTS OR  
7 ULTIMATE FACTS WITH THE UNDERSTANDING THAT THERE WAS  
8 LIKELY TO STILL BE SOME NEED FOR ADDITIONAL TESTIMONY.

9 AS THE COURT HEARD BRIEFLY FROM MR. BARTZ,  
10 THERE WAS ADDITIONAL PERCIPIENT TESTIMONY. BUT, REALLY,  
11 IT GETS INTO THESE EXPERT ISSUES. AND THAT IS WHY WE  
12 SPENT THIS MORNING WITH MR. HARDER AND HEARING HIS  
13 TESTIMONY.

14 THE REALITY IS, IF DR. WILLIAMS DOESN'T  
15 HAVE ANYTHING DIFFERENT TO SAY, THEN HE PROBABLY  
16 SHOULDN'T BE CALLED. BUT WE SHOULD STILL GET TO THAT  
17 POINT WHERE WE CONCLUDE THE EVIDENTIARY PHASE OF THIS  
18 TRIAL AND HAVE SOME SORT OF DIALOG AS TO WHAT THE ISSUES  
19 ARE WITH THE COURT HAVING SEEN SOME BRIEFING THROUGH THE  
20 TRIAL BRIEFS, HAVING HEARD EVIDENCE, AND PERHAPS  
21 PROVIDING A DIRECTION OR OBSERVATIONS AS THE COURT  
22 RIGHTFULLY DOES TO TRY TO HELP FOCUS WHAT THE ISSUES  
23 ARE. WE CAN BRIEF THOSE THINGS.

24 BEYOND THAT, THAT ALONE IS A REASON I  
25 THINK TO DENY THIS MOTION. BEYOND THAT THOUGH, I WOULD  
26 GO BACK TO PAGE THREE OF MY TRIAL BRIEF WHICH CITES  
27 DIRECTLY THE PHASE THREE STATEMENT OF DECISION.

28 I WOULD LIKE TO READ THIS LITTLE PORTION

1 INTO THE RECORD THAT WITHIN THE PHASE THREE STATEMENT OF  
2 DECISION WHICH APPEARS ON THE COURT'S WEBSITE AND IS TAB  
3 NUMBER 45 AND 23 THAT'S DATED JULY 13TH, 2011. AND ON  
4 PAGE 4, THIS COURT THROUGH THAT DECISION HAD STATED:

5 THE COURT ALSO DID LEAVE OPEN FOR LATER  
6 RESOLUTION THE QUESTION AS TO WHETHER THERE WAS  
7 OVERDRAFT IN A SPECIFIC AREA OF THE AQUIFER RULING THAT,  
8 QUOTE, BUT HAVING HEARD EVIDENCE ABOUT THE AQUIFER AS A  
9 WHOLE, THE COURT IS NOT MAKING HISTORICAL FINDINGS THAT  
10 WOULD BE APPLICABLE TO SPECIFIC AREAS OF THE AQUIFER OR  
11 THAT COULD BE USED IN A WAY SPECIFICALLY TO DETERMINE  
12 WATER RIGHTS IN PARTICULAR AREAS OF THE AQUIFER, END  
13 QUOTE.

14 THAT LANGUAGE, YOUR HONOR, LEAVES PHELAN  
15 ESPECIALLY WITH PHELAN HAVING ATTEMPTED TO PRESENT  
16 EVIDENCE IN PHASE THREE ON SOME OF THESE MORE LOCALIZED  
17 ISSUES PLACES PHELAN IN THE POSITION OF BEING ABLE TO  
18 SHOW THAT THE BUTTE SUB-UNIT HAS LIMITED CONNECTIVITY.

19 IT'S NOT THAT WE ARE TRYING TO RE-LITIGATE  
20 PHASE TWO BUT DOES HAVE LIMITED CONNECTIVITY, DOES HAVE  
21 HISTORICAL DIFFERENCES, PARTICULARLY FOR THE YEAR IN  
22 WHICH WELL 14 BEGAN TO PRODUCE WATER. AND THAT IS OF  
23 LEGAL SIGNIFICANCE THAT I WOULD LIKE TO BRIEF THE COURT  
24 ABOUT. AND IN 2006 WHEN THIS WELL NOT WAS PUMPING WATER  
25 FOR THE FIRST TIME BUT PUMPING WATER FOR THE FIRST TIME  
26 INTERCONNECTED TO THIS INTERCONNECTED WATER DISTRIBUTION  
27 SYSTEM WAS SERVING THE PUBLIC.

28 THE FACT THAT HE HAVE PRESENTED EVIDENCE

1 THAT I RESPECTFULLY DISAGREE WITH MS. GOLDSMITH DOES  
2 ESTABLISH BASED ON THE BODY OF EVIDENCE NOW AND THE  
3 TESTIMONY OF MR. HARDER TODAY THAT THERE HAS BEEN A  
4 SURPLUS CONDITION AT LEAST AS OF 2006 THAT THE SURPLUS  
5 HAS BEEN UTILIZED AND DEFINED BY SAN FERNANDO AND OTHER  
6 CASE AUTHORITIES.

7 THE FACT THAT RECHARGE GREATER OR EQUAL TO  
8 DISCHARGE, THE FACT THAT HYDROGRAPHS GENERALLY TELL A  
9 STORY, AND THE STORY TOLD IS TOLD HERE TODAY BY  
10 MR. HARDER WAS THAT AT SINCE AT LEAST 1951 AS THE  
11 SUMMARY EXPERT REPORT AUTHORS FOUND AND AS MR. HARDER  
12 INDEPENDENTLY REVIEWED AND ALSO CONCLUDED, THERE HAS  
13 BEEN RELATIVE STABILITY IF NOT INCREASING WATER LEVEL  
14 WITHIN THE BUTTE SUB-UNIT.

15 SO AS A MATTER OF LAW WHAT DOES THAT MEAN?  
16 WHAT THAT MEANS IS FOR THE SECOND CAUSE OF ACTION WHERE  
17 WE ARE ESTABLISHING OR SEEKING TO ESTABLISH A WATER  
18 RIGHT AND SPECIFICALLY AN APPROPRIATIVE WATER RIGHT, TO  
19 ME THAT MEANS WHAT ARE THE ELEMENTS OF AN APPROPRIATIVE  
20 WATER RIGHT.

21 THE FACT THAT WE ARE HEARING SO MUCH ABOUT  
22 PERMANENT DEPRIVATION CROSSING THE COUNTY LINE AND  
23 EXPORT, TO ME, IS GOING BEYOND THE SCOPE OF THE TRIAL  
24 EVEN THOUGH THERE ARE LIMITED NEEDS FOR THIS TRIAL TO  
25 LOOK BEYOND THE COUNTY LINE, THOSE SPECIFIC ARGUMENTS IN  
26 SUPPORT OF THIS MOTION ARE MISPLACED GIVEN THE LIMITED  
27 SCOPE OF THIS TRIAL.

28 INSTEAD, THE APPROPRIATIVE WATER RIGHT

1 THAT IS AT ISSUE UNDER OUR SECOND CAUSE OF ACTION LOOKS  
2 TO, ESSENTIALLY, THERE IS WATER BEING PRODUCED BY  
3 PHELAN. IT IS NOT USED ON THAT PARCEL ON WHICH THE WELL  
4 IS LOCATED. INSTEAD, AS THE COURT IS WELL AWARE AT THIS  
5 POINT, IT'S DISTRIBUTED TO CUSTOMERS. AND THAT IS WHAT  
6 PHELAN IS PARTLY IN BUSINESS TO DO IS TO PROVIDE WATER  
7 SERVICE TO THE PUBLIC. I THINK THERE IS VERY LITTLE  
8 QUESTION ABOUT THAT.

9 SO, LEGALLY, THESE UNDISPUTED FACTS OR  
10 WHATEVER EXTENT THAT ARE DISPUTED ESTABLISH THAT THERE  
11 HAS BEEN AN APPROPRIATION. SO THE NEXT STEP OF THE  
12 ANALYSIS GETS INTO, MORE OR LESS, HOW DO YOU DEAL WITH  
13 THAT WHEN THERE HAS BEEN A GENERALIZED FINDING OF  
14 OVERDRAFT. THAT IS AT LEAST WHY I AM HEARING HE HAVE  
15 THIS MOTION IS THERE HAS BEEN A FINDING OF OVERDRAFT.  
16 THAT IN AND OF ITSELF CUTS IT OFF.

17 I DON'T THINK THAT IS A DIRECT RATIONAL TO  
18 ESSENTIALLY END THE SECOND CAUSE OF ACTION FOR PHELAN  
19 ESPECIALLY WITHOUT FURTHER BRIEFING GIVEN THE FACT THAT  
20 APPROPRIATIVE LAW IS DEFINED BY DIFFERENT CALIFORNIA  
21 AUTHORITIES, LOOKS AT SPECIFIC ELEMENTS THAT WE HAVE  
22 SATISFIED, LOOKS AT THE PUBLIC USE DOCUMENT, WHICH I  
23 PROVIDED SOME BRIEFING ON, BUT, QUITE FRANKLY, I WOULD  
24 LIKE TO PROVIDE ADDITIONAL BRIEFING ON.

25 IT SPOKE TO ISSUES THAT WERE MUCH MORE  
26 DETAILED AND MUCH MORE OF SUB ISSUES THAN THIS MORE  
27 GENERALIZED TRIAL BRIEFS SAYING OVERDRAFT, THEREFORE,  
28 NOT APPROPRIATIVE. IT'S NOT THAT SIMPLE. THAT IS WHY

1 THERE NEEDS TO BE ADDITIONAL BRIEFING.

2 ON THE RETURN FLOW ISSUE, I HAVE SPOKEN OF  
3 THIS A LITTLE BIT BEFORE THE COURT BEFORE AND ALSO  
4 THROUGH PRIOR BRIEFING. AND THAT RETURN FLOW ISSUE,  
5 THERE IS A BODY OF LAW THAT WE HAVE PARTLY PRESENTED TO  
6 THE COURT THAT I THINK PROVIDES AN OVER ARCHING UMBRELLA  
7 THAT STARTS WITH THE UNITED STATES SUPREME COURT'S  
8 OPINION WHERE IT WAS LOOKING AT THE RECAPTURE DOCTRINE.

9 THAT IS WHERE JUSTICE THOMAS TOOK A CLOSE  
10 LOOK AT IT WORKING CLOSELY WITH THE SPECIAL MASTER WHO  
11 HAPPENS TO BE PROFESSOR THOMPSON FROM STANFORD  
12 UNIVERSITY. AND THE SPECIAL MASTER BASICALLY FOUND THAT  
13 WESTERN STATES HAVE NOT REALLY DONE WHAT NEEDS TO BE  
14 DONE WHEN IT COMES TO THE APPROPRIATIVE DOCTRINE AS IT  
15 RELATES TO THE RECAPTURE DOCTRINE. THAT IS SOMEWHAT OF  
16 A ROUGH SUMMARY OF WHAT PROFESSOR THOMPSON SAID.

17 THE POINT IS, AS WE HAVE SEEN IN RECENT  
18 EVENTS IN CALIFORNIA WITH THE SUSTAINABLE GROUNDWATER  
19 MANAGEMENT ACT AND THINGS EVOLVE, WELL, AS THE COURT  
20 WELL KNOWS, CASES DO THE SAME THING. HERE WE HAVE A  
21 BODY OF LAW.

22 SAN FERNANDO AS DECIDED BY THE CALIFORNIA  
23 SUPREME COURT IN 1975 DID NOT DISALLOW A NATIVE  
24 GROUNDWATER RETURN FLOW RIGHT. WHAT IT WAS DOING WAS  
25 ALLOWING THE IMPORTED WATER RETURN FLOW RIGHT. SO I  
26 WOULD SUBMIT TO THE COURT AS A MATTER OF LAW, THAT THE  
27 NATIVE GROUNDWATER RETURN FLOW RIGHT NET CONSUMPTIVE USE  
28 OR RECAPTURE, HOWEVER WE CHARACTERIZE IT, IS AN AREA OF



1 LAW THAT HASN'T FULLY EVOLVED HERE IN CALIFORNIA, BUT  
2 THERE IS A BASIS FOR IT.

3 AS THIS COURT HAS RECOGNIZED, IT'S SITTING  
4 AS A COURT OF EQUITY. AND PHELAN HAS BEEN SUED AT LEAST  
5 BY BOLTHOUSE FOR INVERSE CONDEMNATION. SO THIS ISN'T  
6 JUST A HYPOTHETICAL POTENTIAL SCENARIO. THIS IS A REAL  
7 LIFE CAUSE OF ACTION THAT JUST HASN'T BEEN ACTIVE  
8 DESPITE BEING AN ISSUE IN THE CASE, IT'S AN ACTIVE CAUSE  
9 OF ACTION AGAINST US EXPOSING US TO LIABILITY. SO  
10 BECAUSE OF THAT, IT'S NEVER BEEN OUR CONTENTION THAT THE  
11 PHELAN WATER AMOUNT PRODUCED BY WELL 14 MUST MATCH  
12 WHATEVER THE RETURN FLOW.

13 THE POINT TO OUR RETURN FLOW CLAIM IS THAT  
14 WE ARE NOT DIMINISHING THE SUPPLY TO THE EXTENT THAT  
15 PRODUCTION WOULD OTHERWISE SUGGEST. AND BECAUSE OF THAT  
16 LIABILITY, THAT IS REAL SO LONG AS THAT CAUSE OF ACTION  
17 IS AROUND, PRESENTS A REAL THREAT. AND THERE SHOULD BE  
18 SOME SORT OF OFFSET, BECAUSE THERE IS A RETURN OF WATER.

19 BUT, AGAIN, I COME BACK TO, YOUR HONOR,  
20 THAT THIS ISN'T THE TYPE OF TRIAL THAT SHOULD BE  
21 RESOLVED AS AN ORAL MOTION AS REQUESTED.

22 THE COURT: WELL, YOU ARE CONCEDING THAT YOU ARE  
23 DEPRIVING THE AQUIFER OF A CERTAIN AMOUNT OF WATER;  
24 TRUE?

25 MR. MILIBAND: YOU KNOW, I AM NOT REALLY TOO  
26 COMFORTABLE WITH SAYING "DEPRIVING THE AQUIFER."

27 THE COURT: WHEN YOU PUMP WATER OUT OF AN  
28 AQUIFER, A PORTION OF IT IS NOT GOING BACK. YOU ARE

1 TAKING WATER AND DEPRIVING THE AQUIFER OF THAT AMOUNT,  
2 AREN' T YOU?

3 MR. MILIBAND: I THINK I WOULD PACKAGE THE  
4 WORDING DIFFERENTLY, YOUR HONOR. NUMBER ONE, TAKING --  
5 WHAT I WOULD SAY IS THAT THERE IS A CONSUMPTIVE USE OF  
6 THAT WATER THAT DOESN' T RETURN. SO THERE IS A PORTION  
7 OF WATER THAT IS PUMPED FROM WELL 14.

8 THE COURT: WELL, EVEN BY YOUR OWN WITNESS'  
9 TESTIMONY, NOT ALL OF THE WATER THAT IS PUMPED RETURNS  
10 TO THE AQUIFER.

11 MR. MILIBAND: CORRECT. AND HIS RETURN FLOW  
12 FACTOR OF --

13 THE COURT: NOW, WHAT WOULD HAPPEN TO THAT WATER  
14 IF YOU WEREN' T PUMPING?

15 MR. MILIBAND: FROM WELL 14 ALONE?

16 THE COURT: YES.

17 MR. MILIBAND: WELL, IF I RECALL THE TESTIMONY  
18 CORRECTLY --

19 THE COURT: I DON' T THINK IT EVEN REQUIRES  
20 TESTIMONY. I THINK THE QUESTION IS, IF YOU ARE NOT  
21 PUMPING, THAT WATER IS NOT BEING REMOVED, IS IT?

22 MR. MILIBAND: WELL, I AM NOT CONVINCED OF THAT  
23 BECAUSE OF WELLS 10, 11 AND 12 AND WHAT WE HEARD OF  
24 ABOUT FROM MR. HARDER THROUGH SOME BRIEF  
25 CROSS-EXAMINATION. I MEAN, THERE IS WATER THAT WOULD GO  
26 INTO THE ANTELOPE VALLEY AREA OF ADJUDICATION BUT FOR  
27 PUMPING.

28 THE COURT: THERE IS WATER THAT WOULD STAY IN THE

1 ADJUDICATION AREA IF WELL 14 WERE NOT PUMPING. ISN'T  
2 THAT AN IPSO FACTO?

3 MR. MILIBAND: I THINK THAT IS GENERALLY  
4 CONSISTENT WITH MR. HARDER'S TESTIMONY.

5 THE COURT: WELL, IT'S SPECIFICALLY CONSISTENT  
6 WITH HIS TESTIMONY. AND IT'S ALSO CONSISTENT WITH  
7 LOGIC. IF YOU DON'T TAKE SOMETHING OUT, IT REMAINS  
8 WHERE IT WAS; RIGHT?

9 MR. MILIBAND: RIGHT. BUT THAT IS MORE TO THE  
10 IMPACT.

11 THE COURT: WELL, THAT'S TRUE. WE ARE NOT  
12 DEALING WITH IMPACT. WHAT WE ARE DEALING WITH IS  
13 WHETHER SOMETHING HAS BEEN TAKEN OR NOT AND THE RIGHT TO  
14 TAKE IT. THOSE ARE THE QUESTIONS IN MY MIND; OKAY? I  
15 THINK THAT FOR US TO TALK ABOUT WHAT THE LAW IS WITH  
16 REGARD TO THE RIGHT OF AN APPROPRIATOR TO TAKE WATER,  
17 IT'S PREDICATED UPON SEVERAL PRINCIPALS; RIGHT?

18 FIRST OF ALL, THAT THERE BE SURPLUS WATER  
19 IN THE AQUIFER. AND THE COURT HAS MADE FINDINGS THAT  
20 THIS IS NO GENERALIZED SURPLUS. WATER LEVELS FLUCTUATE  
21 FROM VARIOUS PARTS OF THE AQUIFER TO OTHERS. THERE IS  
22 NO QUESTION THAT THE BASIN, THE COURT FOUND, HAS BEEN IN  
23 SUBSTANTIAL OVERDRAFT FOR MANY, MANY YEARS.

24 AND EVEN LOOKING AT THE GRASS THAT MR.  
25 HARDER IS PRESENTED DEMONSTRATES THAT CONCEPT. AND IT  
26 SHOWS THAT THERE HAS GENERALLY BEEN A DECLINE  
27 EVERYWHERE, BUT THERE IS SUFFICIENT CONNECTIVITY AND  
28 CONDUCTIVITY BECAUSE THERE ARE NO PERMANENT IMPERMEABLE

1 BARRIERS THAT CREATE SUB-UNITS. SUB-UNITS ARE MERELY  
2 DESIGNATED TO DEFINED AREAS. AND THERE ARE LOTS OF  
3 VARIABLES WITHIN ALL OF THOSE.

4 IT SEEMS TO ME THAT PRINCIPAL OF SURPLUS  
5 WATER HAS TO BE FROM THE GENERALIZED BASIN. AND NOBODY  
6 HAS PRESENTED ANY EVIDENCE THAT SHOWS PUMPING IN ONE  
7 AREA DOES NOT ULTIMATELY HAVE AN IMPACT ON OTHER AREAS.

8 THAT IS WHY I ASKED WHAT WOULD HAPPEN IF  
9 PHELAN CEASED PUMPING. I AM CERTAINLY NOT SUGGESTING  
10 THAT THEY SHOULD OR ANYTHING ELSE. BUT IF THEY CEASED  
11 PUMPING, WHAT WOULD HAPPEN TO THE WATER THAT WAS IN THE  
12 AQUIFER. IT WOULD MOVE, PRESUMABLY, AND PROCEED TO  
13 OTHER AREAS NOT WASTEFULLY BUT MOVING TO OTHER AREAS  
14 THAT FOLLOW THE FLOW GRADIENTS WHICH DIFFERENTIATES THIS  
15 CASE FROM SOME OF THE LANGUAGE IN THE VALEJO CASE.

16 MR. MILIBAND: ONE THINGS I WOULD LIKE TO POINT  
17 OUT ALONG THOSE LINES, YOUR HONOR, IS, AGAIN, HOPEFULLY  
18 I AM RECALLING MR. HARDER'S TESTIMONY, PART OF IT FROM  
19 THIS MORNING CORRECTLY. I THINK THE COURT HAD A  
20 QUESTION TO MR. HARDER WHEN WE ARE LOOKING AT ONE OF THE  
21 EXHIBITS TOWARD THE TOP OF THE SCREEN ABOUT LAKE  
22 LOS ANGELES AND WHERE THE DRY LAKE BEDS ARE.

23 MY RECOLLECTION WAS MR. HARDER HAD  
24 TESTIFIED THAT HE DID NOT THINK THAT THE WATER WOULD  
25 FLOW THAT FAR.

26 THE COURT: NO. I MISSPOKE WHEN I REFERENCED  
27 LANCASTER IN MY QUESTION. THAT IS NOT WHAT I WAS  
28 THINKING ABOUT. WHAT MY QUESTION WAS REALLY -- I DON'T

1 THINK I EVER GOT A REAL ANSWER TO IT -- WAS THAT WATER  
2 WOULD FLOW NORTH IN THE EVENT THE WATER WAS NOT  
3 EXTRACTED. WHATEVER THE WATER WAS THAT WAS FLOWING  
4 WOULD BE FLOWING TO THE NORTH.

5 I MISSPOKE WHEN I TALK ABOUT LANCASTER,  
6 BECAUSE THAT CLEARLY IS OFF IN THE OTHER DIRECTION. IF  
7 YOU WANT TO HAVE HIM COME BACK AND ANSWER THAT QUESTION,  
8 I WILL CERTAINLY LET YOU DO THAT.

9 MR. MILIBAND: WELL, THAT IS WHAT I AM TRYING TO  
10 UNDERSTAND CORRECTLY, YOUR HONOR. I APPRECIATE THAT.  
11 THE TESTIMONY THAT I AM THINKING OF -- AND I DON'T  
12 RECALL THE COURT SAYING LANCASTER WHEN WE WERE TALKING  
13 ABOUT A VERY SEPARATE AREA FAR NORTH. THERE WAS A VERY  
14 CLEAR ANSWER THAT, NO, HE DID NOT THINK THAT WATER WOULD  
15 FLOW THERE.

16 THE COURT: I THOUGHT IT WAS TOO FAR, AND THAT'S  
17 BECAUSE LANCASTER WAS OFF TO THE NORTHWEST. I MISSPOKE.  
18 IF YOU WANT TO HAVE HIM CLARIFY THAT, YOU CAN CERTAINLY  
19 DO THAT. HE IS STILL HERE.

20 MR. MILIBAND: RIGHT. I JUST DON'T KNOW THAT I  
21 UNDERSTAND WHAT THE COURT IS INVITING TO BE CLARIFIED.

22 THE COURT: JUST THE BASIC PRINCIPLE,  
23 MR. MILIBAND, THAT IF THE WATER WERE NOT BEING PUMPED IT  
24 WOULD BE AVAILABLE FOR THE AQUIFER TO SOME EXTENT. WE  
25 DON'T KNOW TO WHAT EXTENT. IT WOULD CERTAINLY NOT BE  
26 WASTED.

27 MR. MILIBAND: AND BY NOT WASTED JUST GENERALLY?

28 THE COURT: SUBJECT TO REASONABLE AND BENEFICIAL

1 USE.

2 MR. MILIBAND: OKAY. BECAUSE I THINK HIS  
3 TESTIMONY WAS LOOKING MORE, AS THE COURT KNOWS, TO A  
4 SPECIFIC STUDY AREA SOUTH. WHAT TRIGGERED THAT LINE OF  
5 QUESTIONING WAS TALKING NORTH AND THEN A LITTLE BIT OF  
6 LANCASTER FAR AWAY. BUT, REALLY, IT BRINGS ME BACK TO  
7 WHERE I STARTED.

8 REALLY, THIS OPPOSITION AND THIS ORAL  
9 MOTION IS APPROPRIATELY RESOLVED BY ORAL ARGUMENT. I  
10 THINK JUST LOOKING AT THE TRIAL BRIEFS ALONE, WHAT HAS  
11 NOT BEEN FULLY RESOLVED IS THE EFFECT OF THIS LANGUAGE  
12 FROM THE PHASE THREE STATEMENT OF DECISION.

13 WHAT HAS NOT BEEN FULLY BRIEFED OR  
14 RESOLVED ARE SOME OF THE SUB ISSUES AS I'LL CHARACTERIZE  
15 THEM AS PRESENTED THROUGH THE TRIAL BRIEF. THOSE ARE  
16 THINGS THAT NOW THAT THERE IS A BODY OF EVIDENCE BEFORE  
17 THE COURT COULD ALLOW FOR BRIEFING WHETHER THAT MEANS IN  
18 OPPOSITION TO THIS MOTION OR DISTRICT 40 OR OTHER  
19 PARTIES DECIDING TO PRESENT EVIDENCE OR NOT.

20 THIS IS NOT SOMETHING THAT I THINK SHOULD  
21 BE SUMMARILY DECIDED BASED UPON AN ORAL MOTION.

22 THE COURT: ALL RIGHT. THANK YOU.

23 MR. DUNN, WOULD YOU LIKE TO REPLY?

24 MR. DUNN: YES. I WOULD LIKE TO RESPOND, YOUR  
25 HONOR. WHAT WAS FUNDAMENTAL TO THIS CASE IS THE CONCEPT  
26 OF AN AQUIFER. IT IS, BY DEFINITION, A COMMON SOURCE OF  
27 SUPPLY FOR THE AREA. THERE HAS NEVER BEEN A DISPUTE  
28 THAT PHELAN PINON HILLS' S WELL NUMBER 14 LIES WITHIN THE

1 ANTELOPE VALLEY AREA OF ADJUDICATION WITHIN WHAT IS  
2 GENERALLY DESCRIBED AS A GROUNDWATER BASIN.

3 IT HAS BEEN AFFIRMED TODAY BY PHELAN PINON  
4 HILLS THAT ITS WELL 14 IS LOCATED IN THE BUTTE SUB-UNIT  
5 AREA WHICH IS PART OF THAT COMMON SUPPLY OF WATER WITHIN  
6 THE BASIN. MR. HARDER TESTIFIED AT LEAST ONCE THAT  
7 WATER FROM THE BUTTE SUB-UNIT GOES INTO THE LANCASTER  
8 SUB-UNIT. WATER THAT IS NOT PUMPED BY WELL 14 WOULD BE  
9 PART OF THAT COMMON SUPPLY OF WATER THAT EXISTS FOR THE  
10 LANCASTER SUB-UNIT AND FOR THE BUTTE SUB-UNIT FOR THE  
11 BASIN.

12 THERE HAS BEEN NO CLAIM LET ALONE A  
13 SHOWING THAT THIS AREA, THE BUTTE SUB-UNIT, IS A  
14 SEPARATE HYDROGEOLOGICALLY HYDRAULICALLY DISCONNECTED  
15 AREA FROM THE BASIN. ALL OF THE TESTIMONY BY PHELAN HAS  
16 BEEN TO THE OPPOSITE; THAT THERE IS CONNECTIVITY, THERE  
17 IS CONDUCTIVITY. IT IS WITHIN THE BASIN.

18 ALL OF THE AUTHORITIES EVEN REVIEWED BY  
19 MR. HARDER THAT HE RELIED UPON AFFIRMED THAT. THERE HAS  
20 NEVER BEEN ANYTHING TO SUGGEST THAT THIS AREA SHOULD BE  
21 DRAWN OUT AND TREATED AS A SEPARATE BASIN FOR WATER  
22 RIGHTS DETERMINATION. THE PRECEDENT OF DOING THAT WOULD  
23 BE THE VERY TROUBLING TO SAY THE LEAST.

24 SOMEHOW WITHIN THE COMMON SUPPLY OF WATER  
25 WHERE AREAS, FOR WHATEVER THE REASON, MAY NOT BE AS  
26 IMPACTED AS OTHER AREAS. PROBABLY ONE OF THE REASONS  
27 WOULD BE BECAUSE THERE IS JUST NOT AS MUCH PUMPING  
28 TAKING PLACE THERE, NOT THAT THERE IS NOT CONDUCTIVITY.

1 BUT TO ALLOW THAT TO THEN BECOME SORT OF ITS OWN LITTLE  
2 MINI AREA OF ADJUDICATION TO BE CARVED OUT WOULD CREATE  
3 A NIGHTMARE OF PROBLEMS, NOT INTO THIS CASE BUT IN ALL  
4 TYPES OF GROUNDWATER DISPUTES.

5 THERE IS NO EVIDENCE TO SUGGEST THAT THEY  
6 SHOULD BE TREATED SEPARATELY AS A SEPARATE SUB BASIN OR  
7 NEW BASIN OR WHATEVER. THEY ARE HYDRAULICALLY  
8 CONNECTED. THEY ARE INEXTRICABLY CONNECTED. THEY ARE A  
9 SOURCE OF SUPPLY, THAT SUB-UNIT, FOR THE REST OF THE  
10 BASIN.

11 THE EVIDENCE IS UNDISPUTED THAT THE IMPACT  
12 OF THIS WELL IS AN OVERALL NEGATIVE IMPACT ON THE BASIN  
13 IT DEPRIVES THE BASIN OF WATER. MY LAST COMMENT SIMPLY  
14 IS THIS. WHEN WE DETERMINE OVERDRAFT, WE DO IT ON A  
15 BASIN-WIDE BASIS. THAT IS WHAT WE DO. THAT IS WHAT THE  
16 COURT HAS DONE, AND THAT IS WHAT WE HAVE HERE.

17 THEY ARE IN THE BASIN. THE BASIN IS IN  
18 OVERDRAFT. THIS IDEA THAT WE WANT TO DRAG THIS OUT  
19 FURTHER FOR BRIEFING, WHATEVER, I HAVE YET TO HEAR FROM  
20 PHELAN ANY RECOGNIZED LEGAL RIGHT UNDER CALIFORNIA LAW  
21 THAT ALLOWS THEM TO DO WHAT THEY UNDISPUTABLY DO.

22 THIS REQUIRES, I BELIEVE, A DETERMINATION  
23 BY THE COURT THAT IT'S READY TO BE DECIDED.

24 MR. GOLDEN-KRASNER: NOAH GOLDEN-KRASNER. YOUR  
25 HONOR, I BELIEVE THAT --

26 THE COURT: WHY DON'T YOU COME UP A LITTLE  
27 CLOSER.

28 MR. GOLDEN-KRASNER: THANK YOU, YOUR HONOR.



1 FIRST OF ALL, IT'S CERTAINLY NOT UNCOMMON TO DO A MOTION  
2 FOR NONSUIT AT THE CLOSE OF THE PLAINTIFF'S PRESENTATION  
3 OF EVIDENCE. DOING THAT ORALLY IS CERTAINLY DONE QUITE  
4 OFTEN.

5 I BELIEVE THAT THERE WAS TRIAL BRIEFING  
6 DONE. ONE OF THE CENTRAL FACTUAL DISPUTES THAT WE HAD  
7 THE FIRST HALF OF THIS TRIAL ABOUT IS WHETHER THERE IS  
8 SOME KIND OF SURPLUS IN THIS BUTTE SUB-UNIT, SOME KIND  
9 OF SPECIAL FACT FOR THIS SUB-UNIT THAT WOULD MAKE IT SO  
10 THAT IT DIDN'T DEPRIVE THE REST OF THE BASIN FROM THE  
11 WATER THAT MAKES UP THE NATIVE SAFE YIELD, THE RECHARGE  
12 THAT MAKES UP THE NATIVE SAFE YIELD.

13 WITHOUT THAT KIND OF A SURPLUS, AS THE  
14 COURT SAID, THERE CAN BE NO APPROPRIATION. PHELAN HAS  
15 NOT MET THAT BURDEN OF PROOF. THAT IS WHAT YOUR HONOR  
16 WAS TALKING ABOUT IN THE PHASE THREE TRIAL DECISION.  
17 THAT IS WHAT WAS LEFT OPEN. AND I SUBMIT THAT PHELAN  
18 HAS NOT MET THAT BURDEN OF PROOF.

19 THE COURT: SO IF I WERE TO MOVE THE COUNTY LINE  
20 200 FEET AND PUT THE WELL IN MOJAVE COUNTY, WE WOULDN'T  
21 BE HAVING THIS ARGUMENT.

22 MR. GOLDEN-KRASNER: THERE IS STILL THE  
23 EXPORTING, YOUR HONOR. PART OF THE PHELAN AREA IS  
24 TOTALLY OUTSIDE OF BASIN COMPLETELY.

25 THE COURT: I UNDERSTAND THAT. SO IS WELL 6-A  
26 AND B, 10, 11, 12, THEY BEING THE SAME CATEGORY,  
27 WOULDN'T THEY?

28 MR. GOLDEN-KRASNER: WELL, IF THE WATER MASTER

1 WANTS TO GO INTO RIVERSIDE COUNTY COURT AND MAKE AN  
2 ARGUMENT THERE, THAT IS POSSIBLE.

3 THE COURT: WELL, THAT IS ONE OF THE THINGS I  
4 ALWAYS CONSIDERED IS WHETHER WE SHOULD ASK THE MOJAVE  
5 ADJUDICATION TO RELINQUISH AUTHORITY OVER THE WELLS AND  
6 THE PUMPING THAT IS IN THE ANTELOPE VALLEY AQUIFER.  
7 THAT IS NOT ANYTHING THAT WE HAVE DONE, AND IT WOULD BE  
8 PURELY HYPOTHETICAL.

9 I GUESS THE THING THAT I AM CONCERNED  
10 ABOUT HERE IS MAKING SURE THAT WE DON'T HAVE ANY  
11 EXCEPTIONS TO THIS PRINCIPLE OF APPROPRIATION OUT OF  
12 SURPLUS OR NOT OUT OF SURPLUS. A SINGLE EXCEPTION THAT  
13 I CAN THINK OF THAT MIGHT HAVE APPLICATION BUT WOULD NOT  
14 HEAR WOULD BE IF THE WATER WOULD OTHERWISE WE WASTED.  
15 AND THAT COMES FROM THE PRINCIPLE OF THE VALEJO LAWSUIT.

16 THE SUPREME COURT ADDRESSED THAT, I  
17 THOUGHT, VERY CAREFULLY. AND I THINK THAT DECISION  
18 MAKES A LOT OF SENSE UNDERSTANDING THAT THE SUPREME  
19 COURT IS NOT MAKING FINDINGS OF FACT BUT IS STATING A  
20 PRINCIPLE OF LAW THAT SAYS THAT IF WATER IS OTHERWISE  
21 GOING TO BE GOING TO WASTE, THE CONSTITUTIONAL  
22 PROVISIONS SUPERSEDE THE BASIC PRINCIPLE OF WHO HAS THE  
23 RIGHT TO CONTROL OF WATER. BUT WE DON'T HAVE ANY  
24 EVIDENCE IN THIS CASE OF THAT AND OF WASTE. NOR DO I  
25 SEE ANY REAL POSSIBILITY THAT IT COULD BE GENERATED. I  
26 DON'T HAVE ANY OTHER LEGAL PRINCIPLES IN MIND. NONE  
27 HAVE BEEN CITED TO ME THROUGHOUT ANY OF THIS LITIGATION  
28 THAT WOULD JUSTIFY THE COURT FINDING THAT THERE IS AN

1           EXCEPTION TO THE APPROPRIATION FROM SURPLUS RULE.

2                           AND, MR. MILIBAND, YOU HAVEN'T CITED  
3           ANYTHING TO ME. YOU HAVE BEEN VERY CAREFUL ABOUT YOUR  
4           CITATIONS OF LAW; I APPRECIATE THAT VERY MUCH. AND I  
5           THINK THAT YOUR LEGAL ARGUMENTS MAKE SENSE TO THE SENSE  
6           THAT THEY ARE FOUNDED ON CASE LAW AND STATUTE AND THE  
7           CONSTITUTION.

8                           I DON'T FIND ANY BASIS THAT HAS BEEN  
9           PRESENTED IN THE EVIDENCE HERE THAT WOULD JUSTIFY THE  
10          COURT FINDING THAT THERE IS ANYTHING OTHER THAN PURE  
11          APPROPRIATION GOING ON HERE. IT'S NOT OUT OF SURPLUS;  
12          IT'S OUT OF THE GROUNDWATER THAT WOULD OTHERWISE REMAIN  
13          IN THE ADJUDICATION AREA.

14                       MR. MILIBAND: MAY I BE HEARD, YOUR HONOR?

15                       THE COURT: YES, YOU MAY. I AM ANXIOUS FOR YOU  
16          TO PERSUADE ME TO THE CONTRARY, BECAUSE MY INCLINATION  
17          IS, FRANKLY, TO GRANT THE MOTION.

18                       MR. MILIBAND: UNDERSTOOD. WELL, FIRST, AS TO NO  
19          EVIDENCE AS TO WASTE, THIS GOES BACK TO DIALOG THAT WE  
20          HAD JUST AND SPECIFICALLY AUGUST 11 OF THIS YEAR WHERE  
21          WE WERE IN ANOTHER COURTROOM HERE IN THIS COURTHOUSE. I  
22          PREPARED A DETAILED PROPOSAL AS REQUESTED BY THE COURT  
23          THROUGH A MEET-AND-CONFER PROCESS OF HOW TO TRY TO  
24          ADJUDICATE THESE CAUSES OF ACTION.

25                       WHAT I WANTED TO INCLUDE WERE TWO OTHER  
26          CAUSES OF ACTION AND BIFURCATE THE SURPLUS ISSUE. THE  
27          SURPLUS ISSUE CREATES A REAL CHALLENGE, A REAL CHALLENGE  
28          IN THAT NO OTHER WATER RIGHT HAS BEEN ADJUDICATED YET IN

1 THIS LAWSUIT. A LOT OF GOOD WORK HAS BEEN DONE AND A  
2 LOT OF DIFFICULT LENGTHY TIME CONSUMING DETERMINATIONS.  
3 BUT NO OTHER WATER RIGHT HAS BEEN DETERMINED.

4 AND TO THE EXTENT THAT THERE IS A USER,  
5 PARTICULARLY BOLTHOUSE WITHIN THE BASIN, WITHIN THE  
6 BUTTE SUB-UNIT, WITHIN THAT GENERAL AREA INCLUDING  
7 DOWNGRADING IT FROM PHELAN'S WELL 14 THAT IS IN THE HIGH  
8 VISTA AREA THAT MR. HARDER TESTIFIED ABOUT. TO THE  
9 EXTENT THERE IS NOT REASONABLE AND BENEFICIAL USE OF  
10 THAT WATER THAT SHOULD BE DETERMINED TO BE WASTE. AND  
11 THAT'S WATER THAT GOES BACK REALLY INTO THE SUPPLY THAT  
12 ACCOUNTS TOWARD POTENTIAL SURPLUS. SO THAT HAS NOT  
13 HAPPENED. AND THAT CONCERNED ME. I VOICED THAT THEN.

14 BUT THE TRIAL EVOLVED TO WHERE THESE ARE  
15 THE TWO CAUSES OF ACTION. AND IN TERMS OF TRYING TO  
16 PRESENT LEGAL AUTHORITY, I APPRECIATE THE COURT'S  
17 COMMENTS. BUT ON THE APPROPRIATIVE WATER RIGHT ISSUE,  
18 WHAT IS VERY IMPORTANT TO ALSO BEAR IN MIND IS ONE OF  
19 THOSE OTHER CAUSES OF ACTION.

20 BUT EVEN INDEPENDENT FROM IT THAT I WANTED  
21 TO INCLUDE IN THIS TRIAL RELATES TO WATER CODE SECTIONS  
22 106 AND 106.5. THERE ARE AUTHORITIES RELATED TO THOSE  
23 STATUTES. THERE ARE AUTHORITIES THAT MAY NOT EXPLICITLY  
24 BE RELATED TO THOSE STATUTES BUT DISCUSSED THE MUNICIPAL  
25 USE AND THE INTERVENING USE. SO WHEN THE COURT IS  
26 SAYING THIS AFTERNOON THAT THERE IS PURELY APPROPRIATIVE  
27 USE, THAT'S TRUE.

28 NOW, WHETHER THERE IS SURPLUS OR NOT, THAT

1 IS WHAT I THINK THE COURT WOULD HAVE TO MAKE A  
2 DETERMINATION UPON. THERE IS EVIDENCE PRESENTED TO THE  
3 COURT THAT THERE HAS BEEN SURPLUS AT LEAST AS OF 2006  
4 WHEN WELL 14 BEGAN TO PUMP FROM THE BUTTE SUB-UNIT. NOW  
5 WHETHER LEGALLY THE COURT CAN LOOK SPECIFICALLY AT A  
6 SUB-UNIT OR NOT, THAT REALLY HASN'T BEEN PRESENTED AS  
7 THE LEGAL ISSUE THAT NEEDS TO BE DECIDED.

8 BEYOND THAT, EVEN IF WE MEET ALL OF THOSE  
9 APPROPRIATIVE ELEMENTS WHICH THERE IS ADEQUATE AND  
10 SUFFICIENT EVIDENCE THAT PHELAN IS AN APPROPRIATOR AND  
11 THERE IS EVIDENCE THAT THERE HAS BEEN SURPLUS, THERE IS  
12 AN INTERVENING PUBLIC USE. THAT IS WHAT THAT RELEVANCE  
13 IS TO SO MANY OF THOSE DIFFERENT FACTS THAT WERE  
14 STIPULATED TO.

15 IT WAS GREAT TO BE ABLE TO WORK WITH  
16 COUNSEL ON THAT, BECAUSE WE SHOULD HAVE BEEN ABLE TO  
17 AGREE ON REALLY MOST OF THOSE FACTS. AND THAT  
18 DEMONSTRATES THAT EVEN AS EARLY AS 1999, THERE WERE  
19 EFFORTS UNDERTAKEN BY PHELAN'S PREDECESSOR TO ESTABLISH  
20 WHAT WE NOW KNOW TO BE WELL 14, AND THAT PUBLIC USE IS  
21 AN INTERVENTION THAT OCCURRED.

22 AND IF THAT MEANS THAT THE COURT FINDS  
23 THAT THERE IS NOT AN APPROPRIATIVE BASIS TO WHERE YOU  
24 CAN JUST PUMP WITHOUT PAYING, THAT'S A DIFFERENT  
25 DISCUSSION. BUT JUST TO SAY THERE IS NO RIGHT  
26 WHATSOEVER, THAT IS REALLY MORE OF THIS DISCUSSION.

27 SO IF WE ARE NOT AN APPROPRIATOR OF  
28 SURPLUS, WE ARE USING WATER AS AN INTERVENING PUBLIC USE

1 OR FOR AN INTERVENING PUBLIC USE THAT STARTED ARGUABLY  
2 BACK IN 1999.

3 THE COURT: WELL, THE QUESTION PRESENTED TO ME  
4 WITH THIS SECOND CAUSE OF ACTION IS NOT WHETHER YOU ARE  
5 INTERVENING USE. THE ONLY QUESTION THAT HAS BEEN  
6 PRESENTED IS WHETHER YOU ARE PUMPING AS A MATTER OF  
7 RIGHT FROM SURPLUS AS AN OVERLYING OWNER AND  
8 APPROPRIATOR FOR PUBLIC USE. THERE IS NO QUESTION IF  
9 THIS BASIN WERE IN SURPLUS, IF THE AQUIFER WERE IN  
10 SURPLUS, YOU WOULD HAVE A RIGHT TO PUMP FROM SURPLUS ONE  
11 AS AN APPROPRIATOR SO LONG AS YOU WERE NOT INFRINGING  
12 UPON ANYBODY ELSE'S RIGHTS BY DOING THAT. SO THAT IS  
13 REALLY NOT THE ISSUE HERE.

14 I AM NOT TELLING YOU THAT YOU HAVE TO STOP  
15 PUMPING. THEY ARE NOT TELLING YOU THAT IS WHAT I AM  
16 SAYING. WHAT THEY ARE TELLING YOU IS THAT YOU ARE NOT  
17 PUMPING OUT OF SURPLUS; THEREFORE, YOU FALL INTO A  
18 DIFFERENT CATEGORY WHEN IT COMES TO THE COST OF THE  
19 WATER OR WHATEVER OTHER RULES THE WATER MASTER MIGHT  
20 ULTIMATELY MAKE IF WE EVER REACH THAT POINT. BUT THAT  
21 IS A DIFFERENT QUESTION THEN WHAT YOU ARE ASKING OR  
22 SUGGESTING.

23 MR. MILIBAND: WELL, THAT IS WHY I WANTED THAT  
24 CAUSE OF ACTION IN THIS SCOPE OF TRIAL WAS TO BE ABLE TO  
25 ADDRESS THOSE BOTH AT THE SAME TIME. BECAUSE IF NOT AS  
26 AN APPROPRIATOR OF SURPLUS AN APPROPRIATOR AND FOR AN  
27 INTERVENING PUBLIC USE.

28 THE COURT: I'M GOING TO TAKE YOU BACK FOR A

1 COUPLE OF YEARS AND REMIND YOU THAT ONE OF THE THINGS  
2 THAT HAVE YOU ALWAYS RAISED WITH THE COURT IN ASKING FOR  
3 ADJUDICATION IS THE RIGHT TO THE RETURN FLOWS. THAT HAS  
4 BEEN ALMOST A MANTRA. I'VE HAVE HEARD IT A LOT. AND I  
5 APPRECIATED YOUR DESIRE AND NEED TO HAVE THAT  
6 ADJUDICATION.

7 I DON'T HAVE ANY PROBLEM AT THIS POINT IN  
8 THINKING THAT THE RIGHT TO RETURN FLOWS REALLY ISN'T A  
9 RIGHT TO RETURN FLOWS AS MUCH AS IT IS A REFLECTION ON  
10 WHAT THE NET PUMPING IS THAT YOU ARE DOING SINCE SOME OF  
11 IT COMES BACK INTO THE AQUIFER. BUT THAT IS A DIFFERENT  
12 ISSUE.

13 I AM GOING TO TAKE A RECESS. IT'S THREE  
14 O'CLOCK. THE COURT REPORTER IS LOOKING WEARY; BLESS  
15 HER. I THINK WE WILL TAKE ABOUT A 15-MINUTE RECESS, AND  
16 I'M GOING TO EVALUATE WHERE WE SHOULD BE GOING FROM HERE  
17 AND WHAT HAPPENS NEXT.

18 (A RECESS WAS TAKEN.)

19 THE COURT: ALL RIGHT. IS THERE ANYTHING FURTHER  
20 THAT EITHER OF YOU WANT TO OFFER AT THIS POINT, ANY OF  
21 YOU WISH TO OFFER AT THIS POINT?

22 MR. DUNN: NO, YOUR HONOR.

23 THE COURT: MR. MILIBAND?

24 MR. MILIBAND: JUST BRIEFLY, YOUR HONOR. IF THE  
25 COURT IS INCLINED TO GRANT THIS MOTION, I DO THINK THERE  
26 IS BRIEFING THAT CAN BE DONE THAT WOULD NOT JUST BE  
27 REPEATING THE SAME AUTHORITY AS PRESENTED THROUGH THE  
28 TRIAL BRIEF. THE REALITY IS, AND THIS IS WHY I MADE

1 THIS REQUEST IN THE TRIAL BRIEF IS THAT, OF COURSE,  
2 THROUGH EVERY EVIDENTIARY PHASE, THERE IS GOING TO BE  
3 UNCERTAINTY AS TO WHAT ALL OF THAT EVIDENCE MIGHT BE,  
4 PARTICULARLY FROM THE ADVERSARY.

5 SO BASED UPON THAT, IT MAKES SENSE TO AT  
6 LEAST HAVE AN OPPORTUNITY TO BRIEF SOME OF THESE ISSUES.  
7 I'VE CITED, AS THE COURT RECOGNIZED, I MEAN, IT'S NOT  
8 JUST VALEJO, BUT THERE ARE OTHER FOOTNOTES REFERRED TO,  
9 GOLETA WATER DISTRICT, IN WHERE THERE ARE VERY SPECIFIC  
10 ISSUES THAT MAY RELATE TO THIS.

11 I WILL JUST COME BACK TO TWO SIMPLE  
12 THINGS. ONE, AS I SAID MANY, MANY TIMES, APPROPRIATOR  
13 FOR PUBLIC USE IS WHAT THAT CAUSE OF ACTION PURPORTS  
14 PHELAN TO BE. THAT'S THE COMMON DENOMINATOR. THE ONE  
15 ISSUE THAT WOULD DISTINGUISH IT IS SURPLUS OR NO  
16 SURPLUS.

17 SO WHETHER THE COURT'S GOING TO FIND THAT  
18 THIS BASIN -- AND DESPITE MR. DUNN'S CONCERN ABOUT THE  
19 PRECEDENTIAL VALUE, THE FACT OF THE MATTER IS NO ONE  
20 ADJUDICATION IS REALLY THE SAME. THEY ARE ALL DIFFERENT  
21 IN SO MANY WAYS. AND THE ANTELOPE VALLEY IS ONE THAT  
22 WILL BE TALKED ABOUT FOR A VERY LONG TIME. IT'S A VERY  
23 LARGE BASIN.

24 SO IF THE COURT IS INCLINED TO ESSENTIALLY  
25 WHAT I WOULD SAY IS DISREGARD THAT PHASE-THREE LANGUAGE,  
26 THEN WE NEED TO BE LOOKING BEYOND THAT AS TO WHY THERE  
27 WAS EVEN THE OPPORTUNITY TO PRESENT SURPLUS. SO I DON'T  
28 MEAN TO BE CIRCULAR OR CHALLENGE THE COURT



1 I INAPPROPRIATELY. I AM JUST TRYING TO PROVIDE REASONS  
2 THAT WOULD JUSTIFY DENYING THIS MOTION. BUT OBVIOUSLY  
3 HAVING THESE ISSUES RESOLVED THROUGH A MORE APPROPRIATE  
4 MECHANISM WHICH I THINK WOULD BE A BRIEF.

5 THE COURT: THERE ARE ONLY TWO REASONS WHY I  
6 WOULD AGREE WITH YOU. ONE IS IF YOU HAD SOME VERY  
7 SPECIFIC LAW TO PRESENT TO THE COURT THAT WOULD JUSTIFY  
8 ON THE FACTS OF THIS CASE A FINDING THAT THIS SUB-UNIT  
9 WHERE WELL 14 IS IS HAVING ABSOLUTELY NO IMPACT ON ANY  
10 OTHER PART OF THE AQUIFER.

11 OR IF YOU HAD SOME ADDITIONAL FACTUAL  
12 EVIDENCE THAT WOULD ESTABLISH THAT THAT IS THE CASE.  
13 AND I DON'T THINK THAT YOU HAVE EVER OFFERED ANY  
14 SUGGESTION THAT THAT WAS THE CASE. I HAVE NOT HEARD  
15 ANYBODY IN THIS CASE SAY THAT THERE IS NOT CONNECTION  
16 WITH EVERY PART OF THE JURISDICTIONAL BASIN FOR THE  
17 ANTELOPE VALLEY.

18 THEY ARE ALL CONNECTED. THERE IS NO  
19 QUESTION ABOUT THAT. THAT MEANS THAT EVERY FACET  
20 AFFECTS EVERY OTHER FACET OR AREA OR SUB-UNIT OF THE  
21 BASIN IN ONE WAY OR ANOTHER. AND YOU MAY BE  
22 CONTENDING -- AND I DON'T THINK YOU ARE -- THAT YOUR  
23 PUMPING IS DE MINIMIS, THEREFORE, NOT WITHIN THE PURVIEW  
24 OF THE LAW. THAT IS THAT IT IS SO DE MINIMIS THAT IT  
25 HAS NO IMPACT, AND THAT IS CERTAINLY NOT THE CASE BASED  
26 UPON THE EVIDENCE THAT HAS BEEN PRESENTED.

27 I HAVE READ YOUR BRIEF. I HAVE LOOKED AT  
28 YOUR AUTHORITIES. THEY ARE FINE AUTHORITIES AS FAR AS

1       THEY GO, BUT THEY DON'T REALLY COVER THE CIRCUMSTANCES  
2       HERE.  NOW, YOU DO HAVE OTHER CAUSES OF ACTION.  AND THE  
3       RULING ON THIS CAUSE OF ACTION UNDER 631.8 DOES NOT  
4       IMPACT ANY OTHERS.

5                       YOU ARE ENTITLED TO A STATEMENT OF  
6       DECISION, BECAUSE THIS IS A MOTION FOR JUDGMENT.  IT'S  
7       NOT A MOTION FOR NONSUIT AS I WILL HEAR THE MOTION.  ALL  
8       I WOULD ASK THAT YOU DO IS PROVIDE THE COURT WITH YOUR  
9       VERY SPECIFIC REQUEST FOR FINDINGS OF FACT AND DECISION  
10      ON THE ISSUES.  LET'S BE CLEAR ABOUT THE ISSUES THAT THE  
11      COURT CAN FIND.

12                      I AM INCLINED TO GRANT THIS MOTION,  
13      BECAUSE I DON'T THINK I REALLY HAVE ANY ALTERNATIVE  
14      BASED ON THE FACTS WHICH ARE REALLY NOT IN DISPUTE.  THE  
15      FACTS THAT HAVE BEEN PRESENTED ARE THE FACTS THAT I  
16      EXPECTED YOU TO PRESENT, AND I HOPED COULD BE PROVIDED  
17      IN THE STIPULATION, AND MOST OF THEM ARE.  I THANK YOU  
18      FOR THAT, BECAUSE I THINK THAT WAS THE RIGHT THING TO  
19      DO.  BUT I CAN'T THINK OF ANY OTHER BASIS UPON WHICH I  
20      CAN DENY THE MOTION.

21                      CAN YOU GIVE ME ANY?

22                      MR. MILIBAND:  WELL, I PROBABLY COULD, YOUR  
23      HONOR.  I MEAN, AS TYPICAL AS IT MIGHT BE FOR A MOTION  
24      OF THIS NATURE TO BE MADE, WE HAVE ALL BEEN THROUGH  
25      TRIALS.  WE KNOW THERE'S TYPICALITIES LIKE THAT.  THE  
26      REALITY IS -- I COME BACK TO, IF WE ARE FOCUSSED ON THE  
27      SECOND CAUSE OF ACTION.  AND BECAUSE THE COURT IS  
28      INDICATING ITS INCLINED TO GRANT THE MOTION WHICH IS TO

1 THE SECOND AND THE SIXTH CAUSE OF ACTION, IT'S REALLY AS  
2 TO BOTH.

3 BUT ON THE SECOND FOR THE WATER RIGHT, THE  
4 ISSUE THERE, IT'S JUST NOT BEING ADDRESSED LEGALLY AND I  
5 DON'T THINK SUFFICIENTLY BY WAY OF THIS MOTION IS THE  
6 PUBLIC USE COMPONENT TO IT. SO THERE IS AN APPROPRIATOR  
7 FOR PUBLIC USE. AND WHETHER THERE IS SURPLUS OR NO  
8 SURPLUS, THAT IS WHAT CREATES, AS THE COURT HAS USED A  
9 VERY GOOD PHRASE TO TRY TO COMPARTMENTALIZE THINGS,  
10 LEGAL CONSEQUENCES.

11 SO IF THE COURT IS DEFINED THERE IS NOT  
12 SURPLUS BECAUSE OF THERE GENERALLY BEING OVERDRAFT, I  
13 DISAGREE WITH THAT RESPECTFULLY. BUT IF THAT IS THE  
14 COURT'S FINDING --

15 THE COURT: WHAT PART DO YOU DISAGREE WITH?

16 MR. MILIBAND: IF THE COURT WERE TO FIND THAT  
17 THERE IS NOT SURPLUS WITHIN THE BUTTE SUB-UNIT BECAUSE  
18 THE BASIN IS GENERALLY IN OVERDRAFT, THAT I WOULD  
19 DISAGREE WITH. BUT EVEN BEYOND THAT, MY POINT IS -- THE  
20 COURT I THINK HAS BEEN CLEAR IN TRYING TO INVITE ME TO  
21 PERSUADE THE COURT THROUGH LEGAL AUTHORITY.

22 WHAT I WOULD REQUEST IS WHAT I REQUESTED  
23 THROUGH THE TRIAL BRIEF. IF THAT IS A SPECIFIC ISSUE, I  
24 CAN DO THAT BRIEFING QUICKLY AND EFFICIENTLY, AND WE CAN  
25 RESOLVE THIS THROUGH SOME LAW AND MOTION WORK. BUT THE  
26 REALITY IS THAT THE SECOND CAUSE OF ACTION IS LOOKING  
27 FOR AN APPROPRIATIVE RIGHT. AND AS AN APPROPRIATIVE FOR  
28 PUBLIC USE RIGHT, THERE IS THIS QUESTION OF SURPLUS OR

1 NO SURPLUS.

2 REGARDLESS OF THAT FINDING FOR WHATEVER  
3 REASONS, THE UNDISPUTABLE FACT THAT EXISTS IS THAT PHELAN  
4 PROVIDES WATER FOR PUBLIC USE. BUT NOW WHAT DOES THAT  
5 MEAN AS A MATTER OF LAW? THE CONSEQUENCE OF THAT GETS  
6 INTO THE COST CONSIDERATIONS, WHETHER THERE IS THAT  
7 TAKINGS CLAIM AND THINGS OF THAT NATURE THAT WE WOULD  
8 HAVE TO DEAL WITH SHORT OF A SETTLEMENT.

9 THE COURT: YOU ARE GOING TO HAVE TO DEAL WITH  
10 THAT NO MATTER WHAT HAPPENS HERE.

11 MR. MILIBAND: BUT THE APPROPRIATIVE RIGHT IS  
12 ESTABLISHED BY THE DIFFERENT ELEMENTS THAT AN  
13 APPROPRIATOR MUST ESTABLISH. IT'S BEEN FOR A PUBLIC  
14 USE. WHETHER THE COURT THINKS THEY ARE SURPLUS OR NOT  
15 HAS AN EFFECT ON WHETHER AND TO WHOM OR TO WHAT AND TO  
16 WHAT EXTENT PHELAN WOULD HAVE TO PAY FOR THAT WATER.  
17 AND THAT IS SOMETHING OUTSIDE OF THIS TRIAL WHICH I  
18 THINK WE ALL AGREE UPON.

19 THE REALITY IS, IF WE ARE LOOKING FOR AN  
20 APPROPRIATIVE RIGHT, THOSE ELEMENTS FOR APPROPRIATION  
21 HAVE BEEN ESTABLISHED. PUBLIC USE EXISTS. AND THERE  
22 ARE THESE OTHER AUTHORITIES UNDER 106 AND 106.5 OF THE  
23 WATER CODE THAT ALSO STAND FOR THAT PROPOSITION.

24 THE QUESTION THEN BECOMES IF THERE IS NOT  
25 SURPLUS, WHAT DOES THAT MEAN IN TERMS OF THE LEGAL  
26 CONSEQUENCES FOR PHELAN AS PRODUCING AND DISTRIBUTING  
27 WATER FOR PUBLIC USE. THAT IS WHAT TETHERS TO THE  
28 RETURN FLOW CLAIM AND THE SIXTH CAUSE OF ACTION AS TO

1 WHY THAT CAUSE OF ACTION IS SO IMPORTANT AS MORE OR LESS  
2 AN OFFSET.

3 MR. DUNN'S QUESTIONS WERE APPROPRIATE  
4 QUESTIONS THAT WELL 14 PRODUCES MORE. WE NEVER  
5 CONTENTED THAT IT WAS EQUAL TO THE RETURN FLOW THAT IS  
6 RECHARGING OR CONTRIBUTING TO RECHARGE.

7 BY THE WAY, ONE THING THAT HAS BEEN  
8 MENTIONED AT VARIOUS TIMES BY SOME COUNSEL IS THAT  
9 PHELAN MAY BE TRYING TO RE-LITIGATE THE PRIOR PHASE  
10 WHETHER IT'S PHASE TWO OR THREE. I THINK IT HAS BECOME  
11 CLEAR THAT IS NOT WHAT WE WERE TRYING TO DO. WE WEREN'T  
12 TRYING TO GO BACK TO PHASE TWO AND ESTABLISH THAT THERE  
13 IS NOT ANY CONNECTIVITY. THAT IS NOT WHAT THE EVIDENCE  
14 FROM OUR PERSPECTIVE SHOWS WHEN MR. HARDER, A HIGHLY  
15 COMPETENT AND HIGHLY REGARDED WITNESS, A HYDROGEOLOGIST  
16 CAN'T SAY THAT IN GOOD CONSCIOUS.

17 THE REALITY IS WHAT HE SAID AND WHAT HE  
18 DEMONSTRATED IS THAT THERE IS VERY LIMITED CONNECTIVITY.  
19 THERE SHOULD BE CONSIDERATION GIVEN TO THAT,  
20 PARTICULARLY IN LIGHT OF THAT LANGUAGE IN THE STATEMENT  
21 OF DECISION FROM PHASE THREE. WHAT THIS ALL COMES BACK  
22 TO IS --

23 THE COURT: DID YOU MEAN TO SAY THAT THERE IS  
24 LIMITED CONDUCTIVITY OR LIMITED CONNECTIVITY?

25 MR. MILIBAND: I MEANT TO SAY CONNECTIVITY, LIKE  
26 I SAID CONNECTIVITY. CONDUCTIVITY, IF I RECALL  
27 CORRECTLY, IS THE ACTUAL MOVEMENT OF THE GROUNDWATER.

28 THE COURT: BASED UPON PERMEABILITY OF THE

1 MATERIALS THAT SEGREGATE SUB AREAS, THE FAULT LINE, FOR  
2 EXAMPLE.

3 MR. MILIBAND: RIGHT. BUT IN THE FAULT LINES,  
4 LIKE YOU TALKED ABOUT, THAT SEPARATE THE BUTTES AND  
5 LANCASTER SUB-UNITS, HIS EVIDENCE WAS THAT IT'S VERY,  
6 VERY LIMITED AND THAT THERE IS --

7 THE COURT: CONDUCTIVITY.

8 MR. MILIBAND: WELL, HE DID TESTIFY ABOUT IT BOTH  
9 WAYS. YES. WHAT HE SHOWED WAS THAT RECHARGE -- HIS  
10 TESTIMONY WAS RECHARGE IS GREATER THAN DISCHARGE. AND  
11 WHEN RECHARGE IS GREATER THAN DISCHARGE, THERE IS A  
12 SURPLUS.

13 THE COURT: WELL, THERE IS ABSOLUTELY NO QUESTION  
14 IN MY MIND THAT THE DEFENDANT IS ENTITLED TO A JUDGMENT  
15 ON YOUR RETURN FLOW CLAIM, NO DOUBT IN MY MIND. YOU ARE  
16 NOT ENTITLED TO RETURN FLOWS. YOU MAY BE ENTITLED TO  
17 COUNT SOME OF THAT AS A REDUCTION IN THE AMOUNT OF YOUR  
18 PUMPING, BUT THAT'S A DIFFERENT ISSUE. AND YOUR CAUSE  
19 OF ACTION SEEKS RETURN FLOW, BASICALLY, A RIGHT TO  
20 RETURN FLOWS. I DON'T THINK YOU ARE.

21 I THINK THE FACT THAT SOME OF THAT MAY GO  
22 BACK INTO THE AQUIFER MAY HAVE SOME IMPACT ON WHAT THE  
23 EFFECT OF BEING AN APPROPRIATOR NOT OF RIGHT AND NOT OF  
24 SURPLUS, BUT THAT IS A DIFFERENT ISSUE. I THINK AS FAR  
25 AS THE SECOND CAUSE OF ACTION, YOU ARE AN APPROPRIATOR,  
26 NO QUESTION ABOUT THAT IN MY MIND.

27 AND THE SECOND FINDING THAT I WOULD MAKE  
28 IS THAT YOU ARE NOT PUMPING OUT OF SURPLUS IN THE

1       AQUIFER AS A WHOLE. AND, THEREFORE, THERE ARE LEGAL  
2       CONSEQUENCES TO PUMPING OF THAT NATURE. I THINK THAT IS  
3       BASED UPON THE FACTS THAT HAVE BEEN PRESENTED BY YOU AND  
4       BY EVIDENCE, WITNESS TESTIMONY AS WELL AS STIPULATED  
5       FACTS. OKAY.

6               MR. MILIBAND: SO, ESSENTIALLY, YOUR HONOR IS  
7       GRANTING THE MOTION AS TO BOTH CAUSES OF ACTION, THOSE  
8       FINDINGS?

9               THE COURT: I DIDN'T SAY THAT EXPRESSLY. THAT IS  
10       CERTAINLY WHAT I INTEND AND MEAN. OKAY. SO WHAT I WILL  
11       ASK YOU TO DO IS TO PREPARE A WRITTEN REQUEST TO THE  
12       COURT TO ADDRESS PARTICULAR ISSUES IN A STATEMENT OF  
13       DECISION. I WOULD LIKE THAT WITHIN TEN DAYS.

14              MR. MILIBAND: UNDERSTOOD.

15              THE COURT: I WANT THE DEFENDANTS TO PREPARE A  
16       PROPOSED STATEMENT OF DECISION ON THESE TWO CAUSES OF  
17       ACTION. I WOULD LIKE THAT WITHIN 20 DAYS OF THE DATE  
18       THAT YOU FILE YOUR REQUEST FOR SPECIFIC ISSUES TO BE  
19       DISCUSSED IN THE STATEMENT OF DECISION. SO LET'S HAVE  
20       YOUR REQUEST. TODAY IS THE 5TH OF NOVEMBER.

21              MR. MILIBAND: THE 17TH WOULD BE THE MONDAY  
22       FOLLOWING.

23              THE COURT: THAT WOULD BE A GOOD TIME. AND 20  
24       DAYS AFTER THAT WOULD TAKE US TO WHAT DATE?

25              MR. MILIBAND: THE 7TH WOULD BE A SUNDAY,  
26       YOUR HONOR. I THINK THE 8TH OF DECEMBER WOULD BE 21  
27       DAYS.

28              THE COURT: THE 8TH OF DECEMBER. OKAY, AND THEN

1 YOU WILL HAVE TEN DAYS TO FILE AN OPPOSITION WHICH WOULD  
2 TAKE YOU TO AROUND THE 18TH.

3 OKAY. ANYTHING ELSE THAT WE SHOULD DO  
4 HERE THIS AFTERNOON?

5 MR. MILIBAND: NOT THAT I CAN THINK OF AT THE  
6 MOMENT, YOUR HONOR.

7 MR. DUNN: NO, YOUR HONOR.

8 THE COURT: ALL RIGHT. I GUESS WE ARE DONE FOR  
9 THE DAY AS WELL AS TOMORROW. NOTHING GOING ON TOMORROW.  
10 THANK YOU.

11 MR. DUNN: THANK YOU, YOUR HONOR.

12  
13 (PROCEEDINGS CONCLUDED.)  
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1 PSUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF LOS ANGELES

3 DEPARTMENT NO. 56

HON. JACK KOMAR, JUDGE

4  
5 COORDINATION PROCEEDING  
SPECIAL TITLE (RULE 1550(B))

6 ANTELOPE VALLEY GROUNDWATER CASES

7 INCLUDED ACTIONS:

8 LOS ANGELES COUNTY WATERWORKS DISTRICT  
9 NO. 40 V. DIAMOND FARMING CO., ET AL,  
10 LOS ANGELES COUNTY SUPERIOR COURT,  
CASE NO. BC325 201

11 LOS ANGELES COUNTY WATERWORKS DISTRICT  
12 NO. 40 V. DIAMOND FARMING CO., ET AL,  
KERN COUNTY SUPERIOR COURT, CASE NO.  
S-1550-CV-254-348

13 WM. BOLTHOUSE FARMS, INC. V. CITY OF  
14 LANCASTER

15 DIAMOND FARMING CO. V. CITY OF LANCASTER  
16 DIAMOND FARMING CO. V. PALMDALE WATER DIST  
RIVERSIDE COUNTY SUPERIOR COURT,  
17 CONSOLIDATED ACTION, CASE NOS. RIC 353  
840, RIC 344 436, RIC 344 668

AND RELATED CROSS-ACTIONS

)  
)  
) JUDICIAL  
COUNCIL  
COORDINATION

) PROCEEDING  
NO. 4408

) CASE NO.  
1-05-C-049053

) REPORTER'S  
CERTIFICATE

18  
19 I, JEANETTE COYLE, CSR #12665, OFFICIAL  
20 REPORTER PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE  
21 OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY  
22 CERTIFY THAT THE FOREGOING PAGES, 1 THROUGH 255,  
23 COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE  
24 PROCEEDINGS TAKEN ON NOVEMBER 4 AND 5, 2014, IN THE  
25 MATTER OF THE ABOVE-ENTITLED CAUSE, THIS 8TH DAY OF  
26 NOVEMBER, 2014.

27 \_\_\_\_\_, CSR #12665  
28 JEANETTE COYLE, OFFICIAL REPORTER PRO TEMPORE