

1 Thomas S. Bunn III (CSB #89502)
2 LAGERLOF, SENEAL, GOSNEY & KRUSE, LLP
3 301 N. Lake Avenue, 10th Floor
4 Pasadena, CA 91101-5123
5 Telephone: (626) 793-9400
6 Facsimile: (626) 793-5900

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8 Attorneys for Palmdale Water District

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

11 Coordination Proceeding
12 Special Title (Rule 1550 (b))

Judicial Council Coordination
Proceeding No. 4408

13 **ANTELOPE VALLEY GROUNDWATER**
14 **CASES**

[Assigned to The Honorable Jack Komar,
Santa Clara County Superior Court]

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

Public Water Suppliers' Trial Brief

Date: November 4, 2014

Time: 10:00 a.m.

Place: Dept. 56, Los Angeles

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22 **I. Introduction**

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24 The sole issue presented in this trial is whether Phelan Piñon Hills Community Services District
25 (Phelan Piñon Hills) has any rights to produce groundwater from the Antelope Valley adjudication area.
26 It does not. Phelan Piñon Hills' predecessor began pumping after the cross-complaint for adjudication
27 was filed. At that time, and up to now, there is no surplus water available for pumping, because the
28 adjudication area is in overdraft. The doctrine of intervening public use, which Phelan Piñon Hills cites

1 to support its claim, is a limitation on remedies and does not operate to create any water rights. Finally,
2 under California law, there is no water right to pump return flows from native groundwater.

3 4 **II. Statement of Facts**

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6 Phelan Piñon Hills is a community services district, formed in 2008 and operating pursuant to
7 California Government Code sections 61000 *et seq.* It is the successor agency to San Bernardino
8 County’s County Service Area 70L (CSA 70L). It provides municipal water service to the Phelan and
9 Piñon Hills areas. Phelan Piñon Hills’ entire service area is within San Bernardino County and outside
10 the Antelope Valley adjudication area.

11 Phelan Piñon Hills’ only supply of water is groundwater from wells. Prior to 2005, all CSA
12 70L’s operating wells were within the boundary of the Mojave River Basin Area and subject to the
13 Mojave adjudication. In 2004, CSA 70L drilled Well 14, immediately over the county line. This was
14 outside the boundary of the Mojave adjudication and within what was later designated as the Antelope
15 Valley adjudication area.

16 CSA 70L began producing water from Well 14 in September, 2005, which was after the filing of
17 this action in 1999, and after the filing of Los Angeles County Waterworks District No. 40’s cross
18 complaint, which broadened the action to a basin-wide adjudication, in 2004.

19 20 **III. Discussion**

21 22 **A. *Phelan Piñon Hills does not have an overlying right because it does*** 23 ***not produce groundwater for use on its overlying land.***

24
25 “Courts typically classify water rights in an underground basin as overlying, appropriative, and
26 prescriptive.” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.) “[A]n overlying
27 right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to
28 take water from the ground underneath for use on his land within the basin or watershed; the right is

1 based on ownership of the land and is appurtenant thereto.” (*City of Pasadena v. City of Alhambra*
2 (1949) 33 Cal.2d 908, 925 (“*Pasadena*”).)

3 In this case, Phelan Piñon Hills does not use groundwater on its overlying land; instead, it
4 delivers the water to its customers. When a public agency pumps water and sells it through a municipal
5 system, the public agency does not exercise overlying rights of its inhabitants. Instead, the use is
6 characterized as an appropriative use. (*City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7,
7 25, 29-30.) Therefore, Phelan Piñon Hills does not have an overlying right.

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9 ***B. Phelan Piñon Hills abandoned its claim to a prescriptive right; in any***
10 ***event, it did not pump for five continuous years prior to the filing of***
11 ***the action.***

12
13 Phelan Piñon Hills is no longer claiming a prescriptive right. (See Phelan Piñon Hills’ Case
14 Management Statement filed Aug. 7, 2014 at p. 4, ll. 16-18; minute order of Aug. 11, 2014.) In any case,
15 it is not entitled to a prescriptive right. “Prescriptive rights arise when an appropriator continues to pump
16 water during times of overdraft.” (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 279
17 (“*Santa Maria*”).) ““An appropriative taking of water which is not surplus is wrongful and may ripen
18 into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original
19 owner, continuous and uninterrupted for the statutory period of five years, and under claim of right.””
20 (*Ibid.* (citation omitted).) The filing of an action interrupts the running of the prescriptive period. (*Yorba*
21 *v. Anaheim Union Water Co.* (1953) 41 Cal.2d 265, 270.) Here, Phelan Piñon Hills’ predecessor did not
22 even start pumping until after the cross complaint for adjudication was filed. Therefore, Phelan Piñon
23 Hills does not have a prescriptive right.

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2 **C. Phelan Piñon Hills does not have an appropriative right because there**
3 **is no surplus groundwater available to appropriate.**
4

5 **1. The court has already determined that the Antelope Valley Basin is in overdraft.**

6 To establish an appropriative right, Phelan Piñon Hills needs to prove that the water it pumped
7 from the Antelope Valley Basin is surplus water. (*Pasadena, supra*, 33 Cal.2d at p. 926; *City of Los*
8 *Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 278, 293 (“*San Fernando*”); *Santa Maria, supra*,
9 211 Cal.App.4th at p. 279.)

10 The California Supreme Court has summarized the interplay between surplus water and overdraft
11 in a groundwater basin as follows:

12 A ground basin is in a state of surplus when the amount of water being
13 extracted from it is less than the maximum that could be withdrawn
14 without adverse effects on the basin's long term supply. While this state of
15 surplus exists, none of the extractions from the basin for beneficial use
16 constitutes such an invasion of any water right as will entitle the owner of
17 the right to injunctive, as distinct from declaratory, relief. (*City of*
18 *Pasadena v. City of Alhambra, supra*, 33 Cal.2d at pp. 926-927; *City of*
L.A. v. City of Glendale, supra, 23 Cal.2d at p. 79.) Overdraft commences
whenever extractions increase, or the withdrawable maximum decreases,
or both, to the point where the surplus ends. **Thus on the commencement**
of overdraft there is no surplus available for the acquisition or
enlargement of appropriative rights.

19 (*San Fernando, supra*, 14 Cal.3d at pp. 277-78 (emphasis added).)

20 This court has already determined during Phase 3 that the Basin has been in a state of overdraft
21 since 1951 and no surplus water has been available for pumping since then. Specifically, the Statement
22 of Decision for Phase 3 Trial provides:

23 The preponderance of the evidence presented establishes that the
24 adjudication area aquifer is in a state of overdraft. Reliable estimates of
25 the long-term extractions from the basin have exceeded reliable estimates
26 of the basin's recharge by significant margins, and empirical evidence of
27 overdraft in the basin corroborates that conclusion. Portions of the aquifer
28 have sustained a significant loss of groundwater storage since 1951. . . .
Since 1951 there is evidence of periods of substantial pumping
(principally agricultural in the early years of the period) coinciding with
periods of drought, with almost continuous lowering of water levels and
severe subsidence in some areas extending to the present time, with
intervals of slight rises in water levels in some areas.

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Thus, the Antelope Valley adjudication area is in a state of overdraft based on estimates of extraction and recharge, corroborated by physical evidence of conditions in the basin, and while the annual amount of overdraft has lessened in recent years with increased precipitation and recharge, the effects of overdraft remain and are in danger of being exacerbated with increased pumping and the prospective cyclical precipitation fluctuations shown by the historical record. The physical evidence establishes that there was significant subsidence occurring in parts of the adjudication area ranging from two to six feet or more in certain areas of the valley caused by such pumping and that measurable water levels fell in a substantial part of the valley.

...

Some of the experts opined that the basin was not in overdraft and that recharge was excess of or in balance with extractions so that there was a surplus in the aquifer. One expert opined that loss of storage was merely space for temporary storage. Observable conditions in the valley are inconsistent with those conclusions. If there were a surplus, even in the shortened base periods used by the some experts, there should not be subsidence of land, nor the need to drill for water at deeper and deeper levels in those parts of the aquifer most affected by the overdraft. The physical condition of the valley is inconsistent with those estimates that there is and has been a surplus of water in the aquifer.

(Statement of Decision, Phase 3 Trial (Jul. 18, 2011) at 5:17–6:4, 5:15–5:22, and 9:4–9:11.) In short, the Basin as has been in overdraft for over 60 years, and had no surplus water for Phelan Piñon Hills to pump in 2005 or thereafter.

2. Surplus is determined on a basin-wide basis, not a local basis.

Phelan Piñon Hills asserts that there is a surplus of groundwater within its sub-area of the Basin, based on evidence that groundwater levels in that sub-area are stable or increasing. However, surplus or overdraft is determined on a basin-wide basis, not a local basis. For example, in *San Fernando*, landowners argued that their respective wells, although located in the same basin, drew upon groundwater separate from the basin’s water source. The court rejected this argument, and stated that “each basin . . . ‘contain[s] a common source of water supply to parties pumping or otherwise taking water [there]from’ and that ‘[t]he extractions of water in [the basin] affect the other water users within that basin.’” (*San Fernando, supra*, 14 Cal.3d at p. 251.)

Here, the court determined in Phase 2 that all areas of the Basin are hydrologically connected and constitute a single groundwater basin. “The Court defined the boundaries of the valley aquifer based

1 upon evidence of hydro-connection within the aquifer. If there was no hydro-connectivity with the
2 aquifer, an area was excluded from the adjudication.” (Statement of Decision, Phase 3 Trial (Jul. 18,
3 2011) at p. 5.) It is not uncommon for areas within a groundwater basin—especially on the periphery of
4 the basin—to have stable or even rising groundwater levels. This was graphically demonstrated by Mr.
5 Wildermuth during his Phase 3 trial testimony. But that does not mean that the basin has surplus
6 groundwater, as that term is used in *San Fernando*.

7 Phelan Piñon Hills does not dispute that the Buttes sub-basin, in which its well is located, is
8 hydrologically connected with the rest of the Basin, and its expert has admitted that lowering well levels
9 in the Buttes sub-basin would lessen the groundwater flow into the adjacent Lancaster sub-basin.

10 Accordingly, there is no surplus groundwater available for appropriation, and Phelan Piñon Hills
11 has not established an appropriative right.

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13 ***D. The doctrine of intervening public use does not give Phelan Piñon***
14 ***Hills a right to pump groundwater.***

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16 Phelan Piñon Hills cites cases to the effect that injunctive relief is not available against a holder
17 of a junior water right, if the water has been dedicated to a public use prior to the commencement of the
18 action. Instead, the remedy is damages under a theory of inverse condemnation. (*See, e.g., Peabody v.*
19 *Vallejo* (1935) 2 Cal.2d 351, 377-81; *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 90-91.)
20 This principle has been called the doctrine of intervening public use. (*See S. Slater, California Water*
21 *Law and Policy* (2013) pp. 9-50 to 9-52.) This principle is of no help to Phelan Piñon Hills, however, for
22 two reasons. First, the principle does not establish a water right, it merely limits the remedy. (*See Wright*
23 *v. Goleta Water Dist., supra*, 174 Cal.App.3d at p. 90 (“Intervention of a public use does not bar suit by
24 the owner of a water right; it merely limits his remedy to damages in place of an injunction.”).) Second,
25 the public use must have intervened prior to the commencement of the action. (*Id.*) Here, as previously
26 stated, CSA 70L did not start pumping groundwater until after the cross-complaint was filed.

27 Similarly, Water Code sections 106 and 106.5, giving preference to domestic and municipal
28 uses, relate to the priority for such uses, and do not establish a separate basis for a water right.

1 **E. Phelan Piñon Hills does not have a right to pump return flows,**
2 **because the return flow right is limited to imported water.**
3

4 Phelan Piñon Hills asserts that it has a right to pump return flows from the portion of its service
5 area that overlies the Antelope Valley hydrologic basin. “[O]ne who brings water into a watershed may
6 retain a prior right to it even after it is used.” (*Santa Maria, supra*, 211 Cal.App.4th at p. 301.) However,
7 the right to return flows is limited to return flows from imported water. In *San Fernando*, the supreme
8 court expressly rejected a return flow right from native water, stating:

9 Even though all deliveries produce a return flow, only deliveries derived
10 from imported water add to the ground supply. The purpose of giving the
11 right to recapture returns from delivered imported water priority over
12 overlying rights and rights based on appropriations of the native ground
13 supply is to credit the importer with the fruits of his expenditures and
endeavors in bringing into the basin water that would not otherwise be
there. Returns from deliveries of extracted native water do not add to the
ground supply but only lessen the diminution occasioned by the
extractions.

14 (*San Fernando, supra*, 14 Cal.3d at p. 261.) Here, Phelan Piñon Hills has never imported any water into
15 the watershed, and has not added anything to the supply. To the extent return flows from native water
16 pumped by Phelan Piñon Hills enter the adjudication area, they merely “lessen the diminution
17 occasioned” by Phelan Piñon Hills’ extraction and do not augment the basin. (*Id.*) Phelan Piñon Hills is
18 like any other party pumping native groundwater and is not entitled to the return flows for the native
19 water it pumped.
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