Case No. F075451

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES

OPENING BRIEF OF APPELLANT PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT

On Appeal From the Superior Court for the State of California, County of Los Angeles, Case No. JCCP 4408, Hon. Jack Komar

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I. INTRODUCTION

Phelan Piñon Hills Community Services District ("Phelan") is a community services district, the successor to a county services area which provided water to communities at the west end of San Bernardino County. Phelan became involved in what is likely the largest and most complex groundwater adjudication in the history of the state through events over which it had little control. First, the State Department of Health Services informed Phelan's predecessor it did not have sufficient pumping capacity, leading to the drilling of a new well, referred to as Well 14, on a site acquired from the County of Los Angeles, just barely inside Los Angeles County. Then, two courts chose to define groundwater adjudication areas on the basis of political, rather than hydrogeologic, boundaries.

Phelan was brought into this case several years after it began, after the trial court had already made critical decisions about the geographic scope of the adjudication and hydroconnectivity in the adjudication area. While the trial court's statements of decision appeared to leave open a path for Phelan to establish an appropriative right to pump water for municipal purposes, the subsequent progress of the case foreclosed that opportunity, as well as the opportunity for Phelan to at least pump native water return flows without paying a replacement water assessment.

What began as a trial involving all parties devolved into a series of stipulations, settlement discussions from which Phelan was largely excluded, and a stipulated judgment and physical solution. This path eliminated trial court consideration of whether all parties' water use was reasonable and beneficial, which impacted decisions regarding the existence of overdraft, the safe yield, and the existence of surplus – factors in whether Phelan has an appropriative water right.

A trial ultimately was held on the question whether the stipulated judgment and physical solution were fair, just and equitable, and whether the physical solution would achieve the objective of bringing the adjudication area into hydrologic balance. The trial court's conclusion regarding whether the physical solution would be effective, however, is not supported by substantial evidence. One of the expert witnesses whose testimony was offered on this issue relied on a computer model flawed in both scope and application. The other examined not the groundwater adjudication area, but the watershed as a whole, although the watershed was not the adjudication area.

In addition to these fundamental problems, the phasing of the trial, inconsistency in the trial court's decision making and management of the case, and the trial court's disregard of undisputed evidence supporting Phelan's positions, prejudicially denied Phelan due process.

The end result was a proposed judgment and physical solution requiring Phelan to pay a replacement water assessment for every acre-foot of water it pumps, even on return flows from its own pumping.

For reasons set forth below in greater detail, Phelan requests the entire judgment and physical solution be reversed. Alternatively, Phelan requests a new trial on the causes of action raised in its pleadings and a proper determination of its rights.

II. FACTUAL BACKGROUND

A. Establishment and Purpose of Phelan Piñon Hills Community Services District

Phelan is a community services district organized and operating pursuant to California Government Code section 61000 et seq. (127 JA 123835:16-18) It was created in 2008 to assume the assets, liabilities, and public service responsibilities of San Bernardino County Community Services Area 70 Improvement Zone L (the "CSA"). The process by which the County divested itself of those assets, liabilities and responsibilities involved a vote of the people and proceedings before the San Bernardino County Local Agency Formation Commission ("LAFCO"). (127 JA 123835:19-28; 125 JA 122730-122737, 122897)

LAFCO charged Phelan with the responsibility to "[s]upply water for any beneficial use as outlined in the Municipal Water District Law of 1911." (125 JA 122732;

(Government Code § 61100(a); Water Code §§ 71000 *et seq.*) This includes the authority to "acquire, control, distribute, store, spread, sink, treat, purify, recycle, recapture, and salvage any water, including sewage and storm waters, for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district." (Water Code § 71610(a).)

LAFCO also decreed Phelan was the successor to the CSA in all respects and had all rights and priorities which formerly belonged to the CSA, including "all water and capacity rights and interests" and "the priorities of use or rights of use of water or capacity rights in any public improvements or facilities or any other property." (125 JA 122732)

Among the assets to which Phelan succeeded were six water wells in the Antelope Valley Groundwater Basin ("AVGWB") as defined by the Department of Water Resources' Bulletin 118 ("Bulletin 118").[1] (125 JA 123433) The pumping history of those wells shows the CSA began pumping in the AVGWB in 1986, 13 years before the

[1] Bulletin 118 defines the boundaries of the AVGWB, which is larger than the area subject to this groundwater adjudication. The adjudication area is bounded on the east by the Los Angeles/San Bernardino County line, although the AVGWB extends into San Bernardino County. The area of adjudication is referred to in this brief as the "Antelope Valley Adjudication Area" or "AVAA".

earliest case filing that led to these consolidated proceedings. (139 JA 136362)

As of October 2014, Phelan provided municipal water service to more than 21,576 residents through approximately 6,778 service connections. (127 JA 123836:20-22) Phelan's exclusive water source is groundwater. Approximately 97% of the water delivered by Phelan is used for domestic purposes. The remaining 3% is used for commercial purposes. (127 JA 123838:3-10)[2]

The area in which Phelan distributes water to customers is located entirely in San Bernardino County, although the service area includes a portion of the AVGWB. (127 JA 123836:8-9, 123839:14-16) Phelan's service area spans three groundwater sources – the AVGWB, the El Mirage Valley, and the Mojave Groundwater Basin. Phelan pumps water from all three and delivers water in all three. (125 JA 123433) All of Phelan's groundwater production wells, including Well 14, pump into a collective distribution system interconnected with pipelines, reservoirs, and booster pumps. (127 JA 123836:23-25)

The use of water for outdoor irrigation within Phelan's service area is limited because many of its customers have natural desert landscaping which does not require irrigation. (127 JA 123838:25-27; 125 JA 123010-123013)

[2] A small, unquantified amount of water is used for emergency fire protection, within Los Angeles County, as needed. (127 JA 123837:5-7)

Phelan's service area has no sewer system; all sewage disposal goes to individual private septic systems. (127 JA 123839:9-10)

B. Well 14

Well 14 is the only one of Phelan's wells located within the AVAA. (127 JA 123836:16-17) It was drilled because the CSA was informed by the State Department of Health Services, Drinking Water Field Operations Branch, it did not have sufficient capacity, raising concerns the public water supply was inadequate. (127 JA 123834:1-3; 125 JA 122745-122793)

The CSA purchased the site for Well 14 from the County of Los Angeles in September 1999. (127 JA 123834:5-123834:18; 125 JA 122739, 122741, 122749, 122795, 122799) Phelan first delivered Well 14 water to customers in January 2006. (127 JA 123837:5) However, shortly after Well 14 came online, Phelan began having problems with Well 14. The pump installed by the CSA could not operate at full capacity. The pump was replaced toward the end of 2008 and Well 14 became fully operational in 2009. (127 JA 123837:7-10; 52 JA 50555:12-14; *see* 127 JA 123837 for Well 14 production amounts for 2005 through 2013)

III. PROCEDURAL BACKGROUND

A. The Underlying Action

On October 29, 1999, Diamond Farming Company initiated litigation to establish water rights in the Antelope Valley. The original complaint named seven defendants. As additional complaints and cross-complaints were filed regarding water rights in the Antelope Valley, the list of parties grew exponentially, ultimately involving thousands of public and private entities and individuals.

On June 17, 2005, the Superior Court for the County of Orange entered an order coordinating the cases. (1 JA 1425-1429) On August 31, 2005, the Judicial Council assigned the cases, as Coordination Proceeding No. 4408, to the Honorable Jack Komar of the Superior Court for the County of Santa Clara. (1 JA 1430-1436) The coordinated cases were consolidated on February 19, 2010. (6 JA 5987-5994)

Two classes of plaintiffs were formed early on to more effectively manage a tremendous number of landowners claiming water rights. One class was dubbed the "non-pumper class" (as large as 65,000 landowners) (the "Willis Class"), while the other class is known as the "small-pumper class" (the "Wood Class"). (2 JA 1901-1908, 1994-2002, 2113, 2088-2108, 3808-3810)

B. Trial Phases

The case was tried in multiple phases.

Phase One of the trial, regarding the establishment of the geographical boundaries for the adjudication, took place on October 10-12, 2006. (2 JA 1889-1896) The trial court's revised order following Phase One begins by stating the nature of the case and the affected parties over whom the trial court required jurisdiction. "The relief sought in this coordinated case is the adjudication of the claims of all parties who assert a right to the ground water within the Antelope Valley basin based upon the various causes of action and defenses stated by the parties. The court must have jurisdiction of all parties who may have a claim to the ground water at issue and accordingly must determine the geographical boundaries of the ground water basin. All overlying land owners with correlative usufructuary rights and appropriators who produce water from the aquifer are necessary parties." (2 JA 1890:7-12)

The trial court concluded that "generally the alluvial basin as described in California Department of Water Resources Bulletin 118-2003 should be the jurisdictional boundaries for purposes of this litigation." (2 JA 1892:7-9) However, the eastern boundary would be "the jurisdictional line on the east which was established as the westernmost boundary in the Mojave litigation." (2 JA 1892:17-18) The boundaries, described and depicted in Exhibit A to the order, were established "for purposes of ensuring that the most reasonably inclusive boundaries will be used to

ensure a complete and final adjudication of rights to the ground water." (2 JA 1892:20-22, 1895)

The trial court encouraged the inclusion of parties who obtained groundwater from the basin but are not within the jurisdictional boundaries. However, the trial court declined to establish the watershed as the boundary of the adjudication area, notwithstanding the United States' involvement in the case pursuant to its waiver of sovereign immunity pursuant to the McCarran Amendment. (2 JA 1891:4, 1891:20-24, 1892:27-1893:1)

In Phase Two of the trial, which took place on October 6-10 and November 3-5, 2008, the trial court considered claims that certain areas within the boundaries established in Phase One should be treated as separate unconnected basins. (2 JA 2729:1-2 and 9-20) The trial court rejected these claims, but found it would be premature to determine the effect of hydrologic connection on any claims made in the case. (2 JA 2730:13-28)

Phelan was not a party to the case during Phases One and Two. Phelan was brought into the case as a fictitiously named defendant by several parties who filed Doe amendments to their pleadings after Phase Two in late 2008 and early 2009 following Phelan's expression of interest in joining the case. (2 JA 2742-2744, 2766, 3061, 3235)

Phelan filed its cross-complaint, alleging eight causes of action, on December 31, 2008. Those causes of action, all for declaratory relief, were as follows:

- First Cause of Action – for a prescriptive water right
- Second Cause of Action – for an appropriative water right
- Third Cause of Action – for a physical solution
- Fourth Cause of Action – for priority as a municipal provider
- Fifth Cause of Action – for a right to use storage space
- Sixth Cause of Action – for a right to capture return flows
- Seventh Cause of Action – for a judicial declaration regarding the unreasonable use, and methods of use, of water, and waste of water, by other parties
- Eighth Cause of Action – for a judicial declaration regarding the boundaries of the AVGWB

(2 JA 2778-2798)

Various other parties subsequently cross-complained against Phelan. (*See, e.g.,* 2 JA 2855-2898, 3061-3062, 3235, 3247-3248, 3445-3465, 3567-3598)[3]

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[3] The parties opposing Phelan's claims, referred to in this brief as the "Opposition Group," included, among others, Los Angeles County Waterworks District 40 ("District 40"); Bolthouse Properties, LLC; Wm. Bolthouse Farms, Inc.; Antelope Valley Groundwater Agreement Association; City of Lancaster; Rosamond Community Service District; City

In the Phase Three trial, which took place in 2011, the trial court addressed the questions of whether the basin was in a state of overdraft[4] and what the safe yield[5] is. Phelan attempted to offer evidence regarding groundwater conditions within the Southeast area of the AVGWB where Phelan's service area is located, as well as return flow from water pumped by Phelan and used by its customers, but the trial court deferred Phelan's presentation of evidence specific to the Southeast area to be heard at some later proceeding. (22 RT 9763:14-9778:2, 9794:3-9799:25, 9799:20-9799:22, 9800:11-9800:18)

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of Los Angeles; Los Angeles World Airports; County Sanitation Districts of Los Angeles County Nos. 14 and 20; Little Rock Sand and Gravel, Inc.; Littlerock Creek Irrigation District; Palm Ranch Irrigation District; North Edwards Water District; Desert Lake Community Services District; Palmdale Water District; Tejon Ranchcorp; Tejon Ranch Company; Granite Construction Company; and the United States.

[4] "Overdraft" is the condition that exists when total extraction exceeds the safe yield and any available temporary surplus. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 929; *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1272; Slater, *Cal. Water Law* § 1.13, p. 1-30 (2018).)

[5] The "safe yield" is the maximum quantity of water which can be withdrawn from a basin on an annual basis without causing an undesirable result. (*City of Pasadena v. City of Alhambra, supra,* 33 Cal.2d at 929; Slater, *California Water Law & Policy* (2012) § 1.13, p. 1-31 (2018).)

The Phase Three Statement of Decision was entered on July 18, 2011. (14 JA 16375) On the basis of evidence regarding pumping and subsidence, the trial court found the basin was in overdraft. (14 JA 16379:15-16380:27)

The trial court determined the safe yield was 110,000 acre-feet per year ("AFY")[6] (14 JA 16383:27-16384:2) on the basis of expert testimony regarding "the selection of a base study period, lag time, agricultural water duties evapotranspiration, specific yield, runoff quantities, well level contours, bedrock infiltration, return flows, playa evaporation relating to run off and bedrock infiltration, chloride measurements, satellite imaging, and agricultural and municipal pumping estimates." (14 JA 16382:14-20)

Geology was a factor as well. "The selection of a safe yield number for an aquifer the size of the Antelope Valley is made difficult because of not only its size but because of the complexity of its geology. As reflected above, hydro-connectivity and conductivity varies considerably between various parts of the aquifer. **The hydro-connectivity between some portions of the adjudication area aquifer and others is so slight as to be almost (apparently) nonexistent. Pumping in those areas may have little or no effect on other areas of the aquifer.** The Antelope

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[6] An acre-foot is 43,560 cubic feet, the quantity of water that will cover one acre to a depth of one foot. (Slater, *California Water Law & Policy* (2012) § 1.13, p. 1-26 (2018).)

Valley basin is not like a bathtub where lowering and raising of water levels is equal in all parts of the 'tub.' [¶] Therefore, assigning a safe yield number (what quantity of pumping from the basin will maintain equilibrium in the aquifer) may require different numbers for different parts of the aquifer (and clearly may also provide for some level of separate management). No attempt has been made in this phase of trial to define geological differences in the valley that would justify different safe yield numbers for different parts of the valley in light of the decision in Phase Two regarding connectivity (the Phase Two trial focused on hydro-connectivity for purposes of determining necessary parties to the action)." (14 JA 16383:13-26 [emph. added])

The subject of the Phase Four trial, which extended over several months in 2013 was "current groundwater production of all parties for the calendar year 2011 and January 1 through November 30, 2012, proof of claimed reasonable and beneficial use of water for each parcel to be adjudicated, claimed return flow from imported water, and federal reserved rights." (20 JA 22535:10-14) The scope of the Phase Four trial was later amended to include evidence regarding "alternative nontributory waters in lieu of" groundwater and optional production of evidence of pumping during the years 2000 through 2012. No determination was to be made as to the "reasonableness of that type of use, of the manner in which the party applied

water to that use, or any determination of a water right." It would also address federal reserved rights. (36 JA 37723:5-17)

What began as a trial of ambitious scope was reduced to a set of stipulations and declarations, including Phelan's, as to each party's total groundwater production within the AVAA during calendar years 2011 and 2012. (79 JA 75212-75217) Phelan presented evidence Well 14 pumped 1,053.14 AF in 2011 and 1,035.26 AF in 2012. (39 RT 20342:13-15)

The subject of the Phase Five trial, which started on February 10, 2014, was the United States' federal reserved right and return flow rights to imported water. Phelan claimed a right to native groundwater return flows. (93 JA 87099:18)

During the Phase Five trial, various parties resurrected settlement discussions, causing trial to be recessed and ultimately taken off calendar in lieu of case management hearings to facilitate either global settlement or further trial proceedings, which included a stay on all discovery. (124 JA 121004, 121029)

Phelan became one of a few parties not included in the settlement effort. The trial court requested Phelan offer a litigation and trial plan for resolving Phelan's causes of action. (124 JA 121107, 121217)

On August 6, 2014, Phelan offered a detailed litigation schedule, scope, and plan in which Phelan proposed trial of its Phelan's Second, Fourth, Sixth, and Eighth Causes of Action.[7] (123 JA 121238, 121287, 121294)

Some parties opposed Phelan's plan, stating Phelan's issues were "holding up settlement" and needed to be determined first, because, if Phelan had no water rights "then they don't have any ability to challenge what the other people's rights are." (40 RT 21433:20-25)

As a result of a series of case management conferences, the judge identified the issues related to Phelan to be bifurcated and tried as follows: Phelan's "right to pump water as an appropriator of right, number one; and number two, . . . [Phelan's] right – as a public producer apart from whether there was a surplus that would permit [Phelan] to be an appropriator of right. If you want to add to that a third issue, which is the question of the effect of return flows from your pumping that flow back into the area of your well, that you may do too." (40 RT 21487:19-21488:2) The trial court later added the question whether there was surplus in the area in which Phelan was pumping as an issue to be dealt with in this bifurcated trial, which was set for October 7, 2014. (40 RT 21478:26-21480:17, 22004:20-22011:8)

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[7] Phelan abandoned its cause of action for a prescriptive water right. (124 JA 121290:16-18)

Concerned about the trial court's refusal to lift the stay on discovery, and the inability to reach agreement (pursuant to trial court direction) on a factual stipulation with Opposition Group parties who indicated intent to participate in the trial, Phelan made an ex parte motion for a continuance, which the trial court initially indicated would be denied. (40 RT 22301:18-22319:22; 124 JA 121993-122007)

After further argument, the trial court granted a two-week continuance and lifted the discovery stay for the limited purpose of deposing an opposing expert, then extended the continuance to November 4, 2014 to accommodate the schedules of counsel. (40 RT 22328:2-23330:4; 124 JA 122137-122138)

The trial took place on November 4-5, 2014. Phelan introduced a stipulation of facts with exhibits and transcripts of prior testimony. (127 JA 123832-123848, 123105-123106; 41 RT 22674:22-22679:17, 22902:10-23012:27) Phelan's Exhibits 1-35 (125 JA 123402-123451), 37-40 (125 JA 123454-126 JA 123467), 43-49 (126 JA 123472-123485) and 52 (126 JA 123491) were admitted into evidence. (41 RT 22673:6-22674:6, 23013:1-23014:28)

Don Bartz, Phelan's general manager, testified Well 14 provides approximately 1,100 AFY, about one-third of Phelan's total production. (41 RT 22687:25-22688:3) Testimony regarding the significance of the location of Well 14 to Phelan's operations was excluded (41 RT 22688:13-22689:15), as was testimony regarding Bartz's evaluation of Well 14's performance (41 RT 22689:24-22690:7), accompanied by the trial court's remark: "It's a little bit like asking a thief why he stole thousands of dollars, what he was going to use it for, why was it important to him and so on." (41 RT 22690:3-7)

Bartz testified Well 14 is located in a known producing aquifer, in the vicinity of other wells Phelan operates. Well 14 is a good producer and Phelan's most efficient well from a power standpoint. It ties into Phelan's transmission and distribution lines well. It is downstream from residences in the AVGWB in a location where it would recapture effluent from septic systems. (41 RT 22692:10-24, 22695:2-15) There are a couple of private wells in the area, but they are not major producers. (41 RT 22692:28-22693:9)

Phelan also offered testimony from Tom Harder, an expert hydrogeologist. (41 RT 22902:10-22905:9) Harder was retained by Phelan to analyze and testify regarding the condition of the aquifer from which Phelan pumps groundwater. (41 RT 22908:7-12) Harder studied the entire AVGWB, including the portion to the east of the Los

Angeles/San Bernardino County boundary, which encompasses the Buttes Subunit. Phelan's wells are located in the Buttes Subunit. (41 RT 22910:10-22911:17) Harder described a map of the area his office prepared depicting the locations of Phelan's wells relative to not only the AVAA, but the eastern portion of the AVGWB and its sub-basins, the El Mirage Groundwater Basin, and the Mojave River Valley Groundwater Basin. (125 JA 123432-123435; 41 RT 22908:13-22909:24, 22918:25-22922:11) He described the work undertaken to gain an understanding of the physical setting of Phelan's wells. (41 RT 22911:18-22913:10, 22914:9-22918:20)

Harder testified the Buttes Subunit extends across the Los Angeles/San Bernardino County line and three other parties to the adjudication pump from it. (41 RT 22921:17-22924:11, 22924:28-22926:7) Harder prepared groundwater elevation maps depicting the flow of groundwater in the Buttes Subunit and adjacent area. (125 JA 123436-123437; 41 RT 22926:11-22929:8) Based on the work done in preparing those maps, Harder concluded groundwater in the area flows first to the northeast, then to the north, and finally to the northwest, into the AVAA. (41 RT 22929:9-22930:14, 22949:19-22951:5)

Harder also prepared hydrographs, based on water level data from wells in the Buttes Subunit. (125 JA

123437; 41 RT 22930:20-22935:10) From 1980 to 2006, groundwater levels in the Buttes Subunit were rising or stable in the vicinity of Well 14. From 2006 to 2009, groundwater levels in the Buttes Subunit varied in different areas, but were stable or increasing in some areas. Groundwater levels rose and fell, reflecting the impacts of pumping, but were relatively stable, in contrast to conditions in the Lancaster Subunit. (41 RT 22936:15-22947:23, 22953:11-22956:14, 22956:26-22960:1, 22961:2-22962:8; 125 JA 123440-123455)

While there is hydrologic connectivity between the Buttes Subunit and the Lancaster Subunit of the AVGWB, there is a groundwater flow barrier which impedes groundwater flow from the Buttes Subunit to the Lancaster Subunit. As a result, the Buttes Subunit has had rising groundwater levels and pumping from Well 14 is not likely to have a direct or significant impact on groundwater levels in the Lancaster Subunit. (41 RT 22947:24-22949:18, 22985:12-20, 22993:26-22994:2, 22994:27-22996:8) Pumping in the Buttes Subunit, in theory, could affect the groundwater level in the Lancaster Subunit, but that has not happened since 1951. (41 RT 22996:9-22997:11)

Harder identified parcels of property whose water use would result in return flows which could be pumped by Well 14. In the Lancaster area, 55% of domestic water is used outdoors and 45% is used indoors. However, outdoor

water use in Phelan's service area is approximately 11%, significantly less than the 55% of outdoor water use in the Palmdale/Lancaster area because in Phelan's service area the landscaping is typically native landscape and there are fewer lawns. However, all of the homes in Phelan's service area (97% of the land being in residential use, 127 JA 123838:3-10) are on septic systems for wastewater, rather than sewer. He estimated 45 percent of indoor water use would flow into the septic systems and ultimately into the ground. He added the 11% outdoor use to the 45% indoor use flowing into septic systems to conclude approximately 56% of the water delivered by Phelan returns to the ground. (41 RT 22962:2-22970:17, 22976:1-22979:18; 126 JA 123464, 123468-123469, 123476-123483) In addition, all water systems lose water due to leaks and this lost water would also contribute to return flow. (41 RT 22970:18-22973:13, 22975:1-28, 22992:14-26; 126 JA 123465, 123473) Harder conservatively estimated the total average return flow to be approximately 426 AFY. (41 RT 22972:3-22974:23; 126 JA 123475)

Phelan's pumping exceeds the amount of return flow, but the return flow likely would not reach the Lancaster Subunit. (41 RT 22986:28-22987:13, 23000:9-23001:22) The Buttes Subunit is recharged from a variety of sources – precipitation, infiltration and storm runoff – but it does not

all come from the Lancaster Subunit. (41 RT 23001:23-23002:12)

Phelan's counsel attempted to elicit testimony from Harder regarding whether Phelan's use of water was reasonable and beneficial, but the trial court considered that testimony unnecessary, stating "the court would be prepared on its own knowledge and common sense that water is necessary for people to thrive" (41 RT 22984:19-21) and "it seems to me this last issue that you are raising is really irrelevant to his testimony and something that needs no expert opinion testimony for" (41 RT 22985:7-10).

The Opposition Group members did not offer any evidence. Instead, counsel for the Opposition Group members made a motion for judgment. Phelan's counsel argued in opposition to the motion and requested the opportunity to file briefs, but the trial court rejected that request. At the conclusion of oral argument, the trial court granted the motion and directed a statement of decision be prepared. (41 RT 23015:7-23055:2)

On February 3, 2015, the trial court issued its statement of decision. (128 JA 125626) The statement of decision includes the following conclusions:

- Although the trial court acknowledged Phelan is pumping for municipal purposes (128 JA 125630:26-27), and "[w]hile [Phelan] is entitled to use the water from Well 14 on its land within the adjudication area,

so long as there is no surplus within the Adjudication Area aquifer, it is an appropriator without a right to pump." (128 JA 125631:23-24)

- "To establish an appropriative right, Phelan Piñon Hills bears the burden of proof to establish that the water it pumped from the Antelope Valley Adjudication Area is ***surplus*** water, that the aquifer from which it is pumped is not in overdraft, and that its use is reasonable and beneficial." (128 JA 125632:7-11 [emphasis in original])
- "This Court has already determined, after considering extensive oral and documentary evidence and hearing arguments, that there is hydraulic connectivity within the entire Adjudication Area, that the Adjudication Area has sustained a significant loss of groundwater since 1951, that the Adjudication Area has been in a state of overdraft since at least 2005 and that no surplus water has been available for pumping at least since then. (Statement of Decision, Phase 3 Trial (Jul. 18, 2011) at 5:17-6:4; 5:15-5:22, and 9:4-9:11.)" 128 JA 125633: 1-8)
- "Mr. Harder's testimony [that the groundwater levels in the Buttes Subunit remain relatively stable and there is no land subsidence in the subunit] does not contradict the Court's finding in Phase 3 that the

Adjudication Area is in overdraft and no surplus water exists." (128 JA 125633:13-15)

- Phelan has no right to return flows, which is a right limited to imported water. (128 JA 125634:3-7)
- Phelan's pumping negatively impacts the Buttes Subbasin. (128 JA 125635)

Further trial took place on August 25, 2015.

Phelan introduced evidence regarding the process by which it acquired the well site from the County of Los Angeles in 1999. (44 RT 24755:14-24757:21; 125 JA 122738-122743, 1122794-122802; 128 JA 123834:5-18; 140 JA 137224-137239)

Harder again testified regarding Phelan's wells, their location and pumping history. (44 RT 24763:21-24764:28, 24766:4-24767:28; 140 JA 137240-137241, 137168-137169) Harder testified the volume of water Phelan distributes to customers located in the AVGWB ranges from 579 to 679 AFY. (44 RT 24768:9-21; 140 JA 137222-137223)

Harder testified in detail regarding the groundwater flow barrier at the west end of the Buttes Subunit and its impact. Well 14 is located about 20 miles from the western boundary of the Buttes Subunit and about 5 miles from S&J Rowan Ranch's wells which are located northwest. (44 RT 24779:3-27; 140 JA 137170-137171) The impact on groundwater levels caused by pumping at Well 14 would be

less than one foot at a distance of a mile from the well and would be negligible at two miles. (44 RT 24780:15-24781:12) There are no wells close enough to Well 14 to be affected by pumping from Well 14. (44 RT 24781:13-24782:8) Subsidence resulting from pumping at Well 14 would be so negligible it would not be measureable. (44 RT 24782:11-28)

Based on the absence of impact from past pumping from Well 14, Harder concluded future pumping would not have a different impact, notwithstanding drought conditions, because static non-pumping groundwater levels in the Buttes Subunit had been stable from 2009 to 2014. (44 RT 24783:3-24784:12)

Exhibits 53 (regarding the quantity of water delivered by Phelan in 2009-2013) and 56 (regarding annual groundwater production from all of Phelan's wells) were admitted into evidence. (44 RT 24794:13-20; 140 JA 137222-137223, 137224-137231) The trial court granted District 40's request for the trial court to take judicial notice of facts related to the extent of Phelan's service area. (44 RT 24800:24-24801:23; 141 JA 137374)

District 40, as in the previous Phelan trial, made a motion for judgment pursuant to Code of Civil Procedure § 631.8. Following argument, the trial court deferred ruling on the motion. (44 RT 24785:11-24798:24)

While the various trial phases were ongoing, the parties engaged in extended settlement negotiations, from which Phelan felt it was being excluded. (124 JA 121108:17-121109:2) Those settlement negotiations led to a stipulation to a proposed judgment and physical solution which was submitted to the trial court by District 40 and the United States on March 4, 2015. (129 JA 126125-126447) The proposed judgment and physical solution provided Phelan would be allowed to pump up to 1200 AFY from Well 14, provided the pumping did not have a material adverse effect on the AVAA and Phelan paid a water replenishment assessment for all of the water it pumped. (129 JA 126290:20-25) The proposed judgment also provided for a two-year period, commencing on the January 1 following entry of judgment, in which parties would decrease their pumping (the "ramp down"). (129 JA 126292:19-21) No party to the judgment would pay a water replenishment assessment during the first two calendar years the judgment was in effect, unless the party's pumping was greater than the amount it was allowed to pump during the ramp down. (129 JA 126292:22-126293:2)

The subject of the final phase of trial, on September 29 through October 2, 2015, was the presentation of evidence regarding whether the proposed judgment and

physical solution was fair, just and equitable, and whether it would restore the AVAA to hydrologic balance.

Dr. Dennis Williams, a groundwater hydrologist, testified regarding whether the proposed physical solution would bring the AVAA into balance and how Phelan's pumping from Well 14 would impact it. (46 RT 25332:5-25335:2, 25336:5-19, 25339:6-12) Williams testified the physical solution would bring the basin back into balance through a reduction in pumping, the importation of supplemental water and monitoring and management. (46 RT 25336:20-25337:4)

This opinion was based in large part on use of a groundwater model developed by the U.S. Geological Survey in 2003. The model is a "distributed parameter" model, as opposed to a "lump sum" model; that is, it is capable of taking into account varying conditions rather than treating a groundwater basin as one large bathtub. The model defines "cells" for studying groundwater conditions. Each cell is approximately a third of a mile square. The model covers a larger area than just the AVAA. In the copy of the model Williams used, not all of the cells were active or "turned on." Because Williams was not interested in the area outside the AVAA, the USGS "turned off" cells outside the AVAA. However, the cells in the model which are turned on do not cover the entire adjudication area. (46 RT 25340:20-25343:19, 25344:13-16, 25362:13-25363:6; 47

RT 25614:16-19, 25614:20-23) Among the inactive cells are the cell where Well 14 is located and the cells where the general head boundary between the AVGWB and the El Mirage Valley is located. (47 RT 25608:13-25609:3, 25625:14-22) The USGS determined which cells would be turned on. Williams did not consider having additional cells turned on. (47 RT 25613:26-25614:6)

Williams testified the AVAA includes five subbasins. They are all hydrogeologically connected, but there are faults and groundwater level differences affecting the flow of groundwater. There is also outflow at the edges of the area. (46 RT 25344:20-25346:10, 25346:28-25347:20) Geologic conditions in the basin are important to the analysis because the location of bedrock, and the type and permeability of the soils, impact the flow of groundwater. (46 RT 25346:28-25347:20)

The model was calibrated to reflect actual historical groundwater levels based on information ("hydrographs") regarding groundwater levels over a long period of time. (46 RT 25352:9-26, 25354:3-25357:10, 25359:17-27)

Williams input data into the model regarding the natural recharge to the basin, the native safe yield and supplemental safe yield, the proposed reduction in pumping, the import of water, return flows from native and imported water, existing pumping of water and the proposed reduced (or "ramped down") pumping, to create

four projections, or scenarios, of the outcome of the physical solution, using different data to simulate different quantities of imported water and pumping. (46 RT 25366:22-25390:25, 25448:15-25456:17) The results of the four scenarios were compared on slide 68 of Exhibit PWS 543 used to illustrate his testimony. Scenario 1 assumes existing pumping with supplemental water in drought conditions. Scenario 1A assumes existing pumping plus supplemental imported water. Scenario 2 assumes a ramp down in pumping under drought conditions. Scenario 2A assumes a ramp down with the supplemental sustainable yield. (46 RT 25456:18-25457:1; Ex. PWS 543, slide 68)

On direct examination, it appeared Williams' testimony regarding scenarios 1, 1A, 2 and 2A included the assumption Phelan pumps 1200 AFY from Well 14. (46 RT 25383:25-25384:3) However, on cross-examination, Williams testified his model did not include Phelan's pumping. (47 RT 25613:3-16)

Under scenarios 1 and 1A, which do not assume a reduction in pumping, the basin does not stabilize. Under scenarios 2 and 2A, which do assume a reduction in pumping as contemplated by the physical solution, the basin stabilizes "right away." (46 RT 25457:1-25466:19) Scenarios 1 and 1A took into account the effects of evapotranspiration, but models 2, 2A and 2B did not. (47

RT 25619:10-25621:13) Williams testified pumping from Well 14 would not prevent the basin from stabilizing. (47 RT 25627:19-23)

To depict the impacts of Phelan's pumping, Williams also created a scenario 2B. He assumed Phelan would pump 1,200 AFY, all of which would be "exported from the basin without any return flow," which he opined would result in a net loss of 700 to 900 AFY from the basin. (47 RT 25608:1-12, 25609:28-25611:21) Pumping from Well 14 would not lead to a 1,200 AFY reduction in water in the basin because, without Well 14 pumping, 3,400 AFY would flow out to the El Mirage Valley. Phelan's pumping reduces that outflow by 500 AFY. (47 RT 25609:19-27)

However, when the model was created, it did not include Well 14. (47 RT 25608:13-26) In order to simulate the effects of pumping from Well 14, "we actually moved this well to the nearest active cell within the model and then ran our simulations on that." (47 RT 25608:28-25609:3) There were no wells in the Southeast area used for calibrating the model. The closest well to Well 14 used for purposes of calibrating the model is about eight miles from Well 14. That well is not located in the same subunit of the basin as Well 14. None of the wells Phelan operates were used in calibrating the model. (47 RT 25616:26-25618:12)

Phelan's Well 14 was not the only well "moved" to a different cell in the model in Williams' analysis. Native return flow related to other "relocated" wells was "moved" along with the well. Like Well 14, these were wells at the edges of the area covered by the model. (47 RT 25614:25-25616:15; Ex. PWS 543, slides 6, 48, 51) For purposes of the model, where pumping is occurring matters because the geology is variable and each cell is about one-third of a mile square. (47 RT 25616:19-25)

Phelan's counsel made a motion to strike Williams' testimony because of deficiencies in the groundwater model and the way it was used, because the model does not cover all wells and return flows, because wells were "moved" to different cells despite the importance of the geology each cell, because of the lack of monitoring wells in the Southeast area for use in calibration, and because of the inconsistent treatment of the impact of evapotranspiration. The motion was denied. (47 RT 25649:9-25652:21)

Charles W. Binder, a civil engineer who serves as the watermaster for the Santa Margarita watershed, also testified to opinions regarding whether the physical solution and the proposed management of the AVAA would be effective. (49 RT 26801:21-26809:17) He concluded the objectives of the physical solution would be achieved and the ramp down provisions of the proposed physical solution would reduce production to the native safe yield and bring

the AVAA into hydrologic balance. (49 RT 26810:7-26815:6) He considered current water requirements. (49 RT 26815:11-26816:21) With regard to whether there would be sufficient supply to meet the demand, he considered the availability of water from the State Water Project (49 RT 26816:18-26823:6) and direct deliveries of State Water Project water to some water users (49 RT 26823:16-26817:26824:23).

Between the taking of his deposition and his trial testimony, figures used by Binder to determine water demand had been changed substantially. In his deposition, his number for water use by overlying land owners was 84,650 AF, while for purposes of trial testimony it was 114,720 AF. He attributed the difference to an error in the information he had at the time of his deposition. The number used in his trial testimony came from the trial court's Phase Four statement of decision. (49 RT 26863:17-26864:24) This resulted in a decrease in current water requirements from 248,243 AF in his deposition testimony to 218,173 AF in his trial testimony. (49 RT 26864:25-26865:8) A similar change in his testimony regarding water supplies occurred between deposition and trial as well. (49 RT 26865:18-28) A change in current water requirements also caused Binder to reduce his estimate of additional State Water Project water needed. (49 RT 26866:1-28) Binder also considered 4,000 AF of

surface water in his calculations. (49 RT 26867:19-26869:5)

The trial court entered a statement of decision concluding the proposed judgment and physical solution were fair, just and equitable, and would bring the AVAA into hydrologic balance. (176 JA 157458-157486) The judgment, with the proposed physical solution attached as Exhibit A, was entered on December 28, 2015 as originally proposed. (176 JA 157508-157802)

IV. STANDARD OF REVIEW

The applicable standard of review on appeal depends on whether the issue is one of law or fact. Whether an issue is one of law or fact is generally a question of whether its resolution turns on the evidence or application of law. "In theory, a determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles." (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn. 3; *see also, Uniroyal Chem. Co., Inc. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 292 ["A question of law cannot be one where the question is answered by considering conflicting evidence."].)

A. The Substantial Evidence Standard Applies To Questions Regarding The Sufficiency Of Evidence

Phelan contends the trial court's conclusion the physical solution will bring the AVAA into hydrologic balance is not supported by substantial evidence. In addition, the judgment as it pertains to Phelan is functionally a judgment of non-suit. In that context, any conflict in the evidence must be resolved in Phelan's favor and the judgment must be reversed if there is substantial evidence tending to prove all elements of Phelan's case and if the state of the law supports the claim. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124-1125.)

"Substantial evidence" is evidence "of ponderable legal significance, ... reasonable in nature, credible, and of solid value." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873; *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) A reviewing court does not resolve credibility issues or evidentiary conflicts. Those are the exclusive province of the trier of fact, as is the credence to be given to expert testimony. Moreover, unless the testimony is physically impossible or inherently improbable, the testimony of a single witness is sufficient. (T*oscano Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal. App.

4th 456, 465-466; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.)

B. Issues Regarding Questions of Law, Including Interpretation of Constitutional and Statutory Provisions, and Their Application to Undisputed Facts, Are Subject to *De Novo* Review

The proper interpretation of constitutional or statutory provisions is a question of law, subject to the court of appeal's *de novo* review. (*Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.) Likewise, the application of a statute or constitutional provision to undisputed facts is a question of law, reviewed *de novo*. (*Lozada v. City & County of San Francisco* (2006) 145 Cal.App.4th 1139, 1149.)

This standard of review applies to the trial court's application of California Constitution, Article X, Section 2 and of cases such *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, and *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, to the undisputed facts regarding Phelan's creation, history, pumping from Well 14, and to groundwater conditions in the Buttes Subunit.

C. Due Process Issues Are Subject to *De Novo* Review

One of the issues Phelan is raising in this appeal is the impact of the order in which the trial court addressed

the issues in the case had on Phelan's ability to present its case. This is a due process issue. Due process issues are reviewed *de novo*. (*Granowitz v. Redlands Unified School District* (2003) 105 Cal.App.4th 349, 354.)

To the extent matters of judicial discretion are involved in the trial court's decisions regarding the progress and organization of trial, that discretion is not unlimited. It is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. (*Sargon Enterprises, Inc. v. University of Southern Calif*. (2012) 55 Cal.4th 747, 773.) A proper exercise of judicial discretion requires the exercise of discriminating judgment within the bounds of reason, and an absence of arbitrary determination, capricious disposition, or whimsical thinking. A court must know and consider all the material facts and legal principles essential to an informed, intelligent, and just decision in the particular case before it. (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246.)

V. ARGUMENT

In addressing a groundwater adjudication, the courts of this state sit as courts of equity which possess broad powers and should exercise them so as to do substantial justice. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 574 ("*Tulare Irr.*

Dist"); *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 481 ("*City of Seaside*").) While the courts, in water cases, typically do not work out physical solutions unless such solutions have been suggested by the parties, the courts are not bound or limited by the suggestions or proposals made by parties to the action. (*Tulare Irr. Dist.,* 3 Cal.2d at 574.) In ordering a physical solution, the court must consider the rights and priorities of the parties ***in relation to the reasonable use doctrine***. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250 ("*City of Barstow*").) The objective is to reach a fair, just and equitable remedy to relieve overdraft and ensure the reasonable and beneficial use of water. (*City of Seaside,* 183 Cal.App.4th at 480-481; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288 ("*City of Santa Maria*").)

> "The object of equity is to do right and justice. It 'does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. "It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to

> them for adjudication." [Citation.]' [Citation.] 'The powers of a court of equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity, a wide play is left to the conscience of the chancellor in formulating his decrees.... **It is of the very essence of equity that its powers should be so broad as to be capable of dealing with novel conditions.** [Citation.]' [Citation.] Equity acts "'in order to meet the requirements of every case, and **to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising**, and new kinds of wrongs are constantly committed." ' "

(Toscano v. Greene Music (2004) 124 Cal.App.4th 685, 693–694.)

Phelan's circumstances are unique. Phelan's history of pumping from a hydrogeologic basin that lies both within and without the AVAA, and Phelan's status as a municipal water provider, argue in favor of a court of equity exercising its creativity to enable Phelan to continue to meet the needs of those who depend on it for water.

A. The Trial Court's Conclusion The Physical Solution Will Bring The Adjudication Area Into Balance Is Not Supported By Substantial Evidence

The evidence presented to the trial court in the final phase of the trial regarding whether the proposed physical solution would bring the AVAA into balance is discussed at pages 34-340 of this brief. This evidence is fatally flawed and does not support either the trial court's conclusion the physical solution will bring the basin into balance, or the conclusion Phelan's pumping substantially harms the AVAA such that Phelan should be required to pay a replacement water assessment for every acre foot it pumps.

Williams relied on a model which included areas not part of the AVAA, but also did not include all of the areas which are part of the AVAA. (46 RT 25340:20-25343:19, 46 RT 25344:13-16, 46 RT 25362:13-25363:6; 47 RT 25614:16-19, 25614:20-23) Areas at the margins of the AVAA, where water may flow in or flow out of the AVAA depending on hydrologic conditions, which are subject to change, were not included. Cells in the model representing the locations of multiple wells – not just Phelan's Well 14 – were not activated. Whether to activate additional cells to address these issues was not even considered. Although geology is critical to the movement of groundwater, wells in areas not covered by the model were "moved" to simulate

their pumping. There is no evidence that Williams gave any consideration to whether the geology of the actual location of the well was similar to the cell to which it was "moved" or to how "moving" the well would affect the results of the model.

Williams' testimony regarding Phelan's Well 14 highlights the importance of these factors in determining whether the model actually works. Williams concluded pumping from Well 14 actually prevents approximately 500 AFY from leaving the AVGWB and flowing into the El Mirage Basin. (47 RT 25609:19-27) What happens at the margins of the AVAA is extremely important to determining how much water is available, but what happens at the margins was not fully considered by the model. Nevertheless, Williams concluded Phelan's pumping would not prevent the AVAA from achieving balance under the proposed judgment and physical solution. (47 RT 25627:19-23)

Because the model does not accurately depict the workings of the groundwater basin, particularly at critical locations, Williams' testimony does not provide substantial evidence to support the trial court's conclusion the physical solution will bring the AVAA into hydrologic balance.

Binder's testimony on whether the physical solution will bring the AVAA into balance is also flawed, but for different reasons. Binder included in his analysis non-groundwater sources which would not directly replenish the

AVAA, such as a substantial amount of surface water available to an unnamed licensee of Palmdale Water District and State Water Project deliveries made directly to customers rather than deliveries used for purposes of recharging groundwater. In addition, Binder's conclusions changed between his deposition and his trial testimony in order to "work" with the trial court's conclusion regarding safe yield.

Moreover, although the trial court rejected the idea of looking into the watershed as a whole, rather than just the groundwater component of it (1 JA 1891:2-4, 1891:20-22), Binder, by including non-groundwater sources in his analysis, was, in effect, looking at the watershed rather than the AVAA. His testimony was therefore irrelevant and is not substantial evidence to support the trial court's conclusion the physical solution would bring the AVAA into hydrologic balance.

Accordingly, the judgment approving the physical solution must be reversed, because there is no substantial evidence in the record to support the trial court's conclusion the physical solution will be effective.

B. The Manner In Which The Proceedings In This Case Were Phased Was Improper And Was Prejudicial To Phelan

The factual issues critical to reaching a conclusion in this case were taken up by the trial court in the following order:

- Boundaries of the AVAA
- Possible exclusion of areas without hydrologic connection to other areas within the AVAA
- Whether the AVAA was in overdraft
- What is the safe yield
- How much water the parties were pumping
- The United States' federal reserved right
- Return flow rights of parties importing water
- Whether the proposed physical solution was fair, just and equitable and would be effective

(*See,* pages 16-40 above.)

California Constitution, Article X, Section 2 dictates "that no one can have a protectible interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially." (*City of Barstow,* 23 Cal.4th at 1242.)

> Although the law at one time was otherwise, it is now clear that an overlying owner or any other person having a legal right to surface or ground water may take only such

> amount as he reasonably needs for beneficial purposes. (*Katz v. Walkinshaw,* 141 Cal. 116 [70 P. 663, 74 P. 766, 99 Am.St.Rep. 35, 64 L.R.A. 236]; *Peabody v. City of Vallejo,* 2 Cal.2d 351 [40 P.2d 486]; Cal. Const., art. XIV, § 3.) Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority. (*Peabody v. City of Vallejo,* 2 Cal.2d 351, 368 [40 P.2d 486].) Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water.

(*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925–926 ("*City of Pasadena*").) Thus, what uses are reasonable and beneficial is a central question in any analysis of safe yield, overdraft and prioritization of water rights. The objective is to maximize reasonable and beneficial use. The corollary of this concept is that unreasonable use which is not beneficial should be discouraged. (*See, City of Santa Maria,* 211 Cal.App.4th at 278-279.)

Eliminating water use which is not reasonable and beneficial may open up the potential for a larger safe yield, less overdraft, and the possibility of the existence of

surplus. The existence of surplus was central to Phelan's claim to an appropriative right, as without surplus water, Phelan cannot establish it has an appropriative right. (*City of Pasadena,* 33 Cal.2d at 925-926.)

After determining the boundaries of the AVAA, the trial court should have taken evidence on and determined whether all pumpers were pumping for reasonable and beneficial uses. Only then should the trial court have determined whether the AVAA was in overdraft and what the safe yield is. This approach would also have allowed for a determination whether there was surplus water in parts of the AVAA, an issue critical to Phelan's argument it has an appropriative water right. (*See,* pages 56-65 below.)

The trial court's failure to address the reasonable and beneficial use issue before making determinations regarding overdraft and safe yield thus turned a fundamental constitutional issue on its head.

The Phase Four trial was originally intended to address not only the amount of pumping by the parties, but also whether their use of water was reasonable and beneficial. (17 JA 22535:10-14) But issues regarding reasonable and beneficial use were later deliberately eliminated from the trial, when the scope of the Phase Four trial was amended to exclude determinations as to the "reasonableness of the type of use, of the manner in which

the party applied water to that use, or any determination of a water right." (36 JA 37723:13-17)

While the last phase of trial did include some testimony regarding crop duties (46 RT 25399:28-25407:117-22) there was never any real focus on whether any party or parties, other than the Nellie Tapia Family Trust ("Tapia") (48 RT 26281:12-26282:5; 46 RT 25412:23-25427:9), was putting water to a reasonable and beneficial use and was not wasting it. Phelan's Seventh Cause of Action questioning whether water use by other parties was reasonable and beneficial was never heard. (2 JA 2795:24-2796:15; 40 RT 21487:19-21488:2) The questions of beneficial use and waste are critical to the overall analysis, including whether the physical solution was fair, just and equitable, but these questions were never really addressed.

Respondents may contend it was not necessary to address these issues, because there was a stipulation to a judgment and physical solution and the rampdown element of the physical solution would eliminate uses which were not reasonable and beneficial.

That is all well and good if all parties ultimately stipulate to the judgment and physical solution, but that did not happen in this case. Phelan, and, ultimately, the Willis Class, did not stipulate to the judgment and physical solution. The physical solution was imposed on the non-stipulating parties, who were denied the opportunity to

attempt to prove their case. The end result is a physical solution that was not shown to be fair, just and equitable.

The failure to fully consider reasonable and beneficial use was particularly damaging to Phelan, as it prevented Phelan from presenting a substantial portion of its case on the appropriative rights issue. Until a determination has been made as to whether water is being put to reasonable and beneficial use, it is not possible, really, to determine what the safe yield is, whether overdraft exists, or whether surplus exists. The elimination of the reasonable and beneficial use issue from the proceedings prevented Phelan from presenting its case. Denial of the right to present evidence is reversible error per se. (*Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291; *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677; *Fatica v. Sup.Ct. (Liljegren)* (2002) 99 Cal.App.4th 350, 351 [trial court must not elevate notions of efficiency over due process].)

In seeking to establish it has an appropriative water right, Phelan was deprived of due process *and* equity by the trial court's concluding the AVAA was in overdraft before *first* requiring all parties establish their water use is reasonable and beneficial. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 366-369 ("*Peabody*").) The trial court stated it would "make such a determination [regarding reasonable and beneficial use] prior to the entry of final judgment." (128 JA 125636:20-22) In fact, the trial court made such a

determination before entry of judgment only as to Tapia. (50 RT 27566:27-27577:9)

The trial court's decisions were not consistent across the various trial phases, which was also prejudicial to Phelan. On the one hand, the trial court said in its Phase Three Statement of Decision, "having heard evidence about the aquifer as a whole, ***the Court is not making historical findings that would be applicable to specific areas of the aquifer or that could be used in a specific way to determine water rights in particular areas of the aquifer."*** (14 JA 16378:21-24) Phelan relied upon this explicit statement, that the ***overdraft finding does not preclude establishing a particular type of water right***, in proceeding with its case. (127 JA 124566:22-124567:2)

On the other hand, the trial court stated in the Statement of Decision regarding the November 2014 trial, that Phelan "…bears the burden of proof that the water it pumped from the Antelope Valley Adjudication Area is ***surplus*** water, that the aquifer from which it is pumped is not in overdraft, and that its use is reasonable and beneficial." (128 JA 126122:7-11) By imposing this burden of proof, the trial court, in effect, decreed that the Phase Three Statement of Decision precluded a favorable outcome for Phelan, when Phelan had reasonably relied on the Phase Three statement of decision, which left open the

potential for Phelan to establish an appropriative right based on local surplus in the Buttes Subunit. (128 JA 125633:1-28)

The trial court's statement of decision regarding the November 2014 trial was flawed in other respects as well. It does not explain, in light of *Peabody,* 2 Cal.2d at 366-369, why all parties were not first required to establish their water use is reasonable and beneficial or why *Peabody* does not support Phelan's theory for as an "appropriator for public use," and does not take into account undisputed evidence surplus water existed when Phelan's Well 14 commenced pumping during 2006 for municipal purposes. (*See, e.g.,* 127 JA 123935:1-2, 123935:15-16, 123935:19-20; 125 JA 123437, 123440-123455; 41 RT 22930:20-22935:10, 22936:15-22947:23, 22953:11-22956:14, 22956:26-22960:1, 22961:2-22962:8) Instead, the trial court dismissed the question of how to deal with differences in hydro-connectivity as "a basin management decision." (14 JA 16379:12-13; *see also* 14 JA 16383:20-22) The judgment and physical solution, however, which provides for set pumping allocations and requires Phelan to pay a replacement water assessment for every acre-foot it pumps, does not provide a mechanism for basin management to take such differences into account.

C. In Light of the Priority of Municipal Use, Phelan's Pumping History, And Evidence Of Surplus Water, Phelan Has An Appropriative Right

For purposes of determining Phelan's municipal priority as an appropriator, the trial court should have taken into account Phelan's years of pumping, not just from Well 14, but from all of its wells. That history, the conditions in the Buttes Subunit, the lack of adverse impact of Phelan's pumping demonstrated by the existence of surplus, or at least stability, of groundwater levels in the Buttes Subunit, all demonstrate Phelan has rights which should be recognized in the physical solution. Such recognition requires Phelan be allowed to pump up to the amount of its historical use, approximately 1,100 AF per year, without paying a replenishment assessment.

Phelan's Second and Fourth Causes of Action sought to establish a right to pump from Well 14 as an appropriator for public use of surplus water, *or* alternatively, as an appropriator for public intervening use (if there was no surplus during Well 14's production history). Phelan pleaded in its cross-complaint "…it has an appropriative right to pump water from the Basin" (2 JA 2792:6-7) and that "Surplus water is that amount that can be extracted without causing a drop in the water table or subsidence." (2 JA 2792:10-11)

Surplus or no surplus, the common denominator is Phelan provides water as an appropriator for municipal public use, which entitles Phelan to priority.

Water Code section 106 provides: "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." Water Code section 106.5 provides: "It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses...." Depriving Phelan of a production right is inconsistent with these State policies when Phelan is attempting to meet the limited needs of its municipal customers in response to the State's demand on Phelan's predecessor to increase its pumping capacity. (127 JA 123834:1-3; 125 JA 122745-122793)

An "appropriator" is a party that diverts or extracts water for use on nonriparian or nonoverlying land or for nonriparian or non-overlying uses. (Scott S. Slater, *California Water Law and Policy* (2012) ("Slater, *Cal. Water Law*") § 1.13, p. 1-19.) An appropriator intends to pump or divert water; does pump or divert water; and applies that water to beneficial use. (*See,* Slater, *Cal. Water Law* § 2.09, p. 2-22, § 2.10, p. 2-27; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 20, 30-31; *see also, Turlock*

Irrigation District v. Zanker (2006) 140 Cal.App.4th 1047, 1054.) "Public use of percolating water is a non-overlying use, whether the lands that receive such public service are overlying lands or ***whether they are located outside of the groundwater area. Such public use is therefore an appropriative use of the water***." (Wells A. Hutchins, *The California Law of Water Rights* (1956), p. 458 [emphasis added]; *see also* p. 492, fn. 57.)

In *Peabody,* 2 Cal.2d at 377-379, the California Supreme Court explained:

> When public interests are involved "a prohibitive injunction should be granted only if it shall appear that no other relief is appropriate." (*Montecito* Valley *Water Co. v. Santa Barbara,* 144 Cal. 578 [77 Pac. 1113].) . . . The defendant alleged in its answer that the water impounded by means of said reservoir was then being distributed in the City of Vallejo for public purposes, and that it was necessary that the city and its inhabitants continue to so use the same. This allegation was sufficient to raise the issue of intervention of public use; and on the trial it appeared beyond question, although apparently not seriously urged, that the public interest had intervened more than five months prior to the commencement of this action. . . .

[I]t was established by decision of this court long prior to the trial that when public interests had intervened through the construction and operation of public agencies before the actions were commenced, any right of the parties to disturb them in their possession of the property was thereby lost, and only an action to recover compensation for the land taken could be available. . . . [¶] **There is much argument and citation of authority on both sides as to the foundation for the doctrine that intervention of public use will foreclose the right to an injunction, the plaintiffs insisting that it rests solely on waiver and estoppel which must be pleaded and proved in the trial court, and the defendant contending that it is grounded in public policy of which the court even on appeal may take cognizance when the fact appears. This court has referred to both as a foundation for the doctrine. It has noted the claim or applied the theory of waiver and estoppel** . . . In *Gurnsey v. Northern Cal. Power Co.,* 160 Cal. 699 [117 Pac. 906, 36 L.R.A (N.S.) 185], quoted with approval in *Miller & Lux v. Enterprise Canal etc. Co.,* 169 Cal. 425 [147 Pac. 567], the court took

> the position that "this rule is not based so much on the application of the doctrine of estoppel. . . . It is based mainly on the great principle of public policy under which the rights of the citizen are sometimes abridged in the interests of public welfare." There is little doubt that that application of the doctrine may be invoked on either ground when public use has attached prior to the commencement of the action and depending on the circumstances of the case.

[Emph. added.]

The public use of Well 14 began when Phelan's predecessor purchased from Los Angeles County in 1999 the parcel on which Well 14 is situated. (127 JA 123834:5-123834:18; 125 JA 122739, 122741, 122749, 122795, 122799)

Under the common law, *intent* is critical – the appropriator must intend to appropriate and then do so. (*Inyo Consolidated Water Co. v. Jess* (1911) 161 Cal. 516, 520.) The estoppel basis pronounced by *Peabody* looks to the circumstances involved with factors such as: (1) notice to and knowledge of the overliers; (2) a lengthy time of the overliers or parties "letting" an appropriator pump the water; and (3) detrimental reliance by the appropriator's customers on the water so taken. (*Peabody,* 2 Cal.2d at 378-379.)

In addition, prevalent public policy bases are set forth in various case authorities, supporting *Peabody's* decree of the "public use" doctrine. (*See*, *Tulare Irr. Dist.*, 3 Cal.2d at 535, 538; *Hillside Water Co. v. Los Angeles* (1938) 10 Cal.2d 677, 688; *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 90-94; *Miller & Lux v. San Joaquin Light & Power Corp.* (1937) 8 Cal.2d 427, 435-436; *see also, Gurnsey v. Northern California Power Co.* (1911) 160 Cal. 699, 711-712.)

As explained in *Peabody,* lack of surplus is what exposes the appropriator to inverse condemnation claims. (*Peabody,* 2 Cal.2d at 378-379; *see also, Allen v. California Water & Telephone Co.* (1946) 29 Cal.2d 466, 490.) "[The] burden of proving surplus does not come into existence until the existing appropriators, or overlying owners first provide satisfactory evidence that a valid property right has been impaired." (*Peabody,* 2 Cal.2d at 381; *see also,* Slater, *Cal. Water Law & Policy* § 11.04, pp. 11-20 to 11-21 [emphasis added], *citing Tulare Irr. Dist.*, 3 Cal.2d at 566-567.)

Ultimately, the public-use doctrine – whether based on estoppel or public policy – provides an appropriative water right for a public appropriator such as Phelan – irrespective of whether surplus exists (or existed when the well commenced pumping for municipal purposes).

Phelan's pumping history establishes it was not the latecomer to pumping from the AVGWB it was portrayed to be in this case. In fact, Phelan's predecessor, the CSA, had begun pumping from the AVGWB in 1986, almost 20 years before Well 14 came on line and approximately 13 years before this litigation began. Thus, Phelan established both its appropriative rights generally and its municipal priority before this case commenced.

Moreover, notwithstanding the trial court's partial statement of decision regarding Phelan, there is undisputed evidence there was surplus in the Buttes Subunit and Phelan's pumping did no harm. (41 RT 22936:15-22947:23, 22953:11-22956:14, 22956:26-22962:8, 22996:9-22997:11, 23000:9-23001:22; 44 RT 24779:3-24782:28; 125 JA 123440-123455; 140 JA 137170-137171) The conflict between this evidence and the trial court's earlier partial statement of decision appears to explain why the trial court did not rule on the nonsuit motion made at the conclusion of the second trial on Phelan's issues.

Based on this evidence, municipal priority and the public policy recognized in *Peabody,* Phelan must be permitted to continue to pump water and serve its municipal customers.

Phelan has been characterized as an "exporter"[8] of water from the AVAA to justify requiring Phelan to pay a replenishment assessment for every acre-foot of water it pumps. (128 JA 125631:19-21) Case law on exactly what constitutes "export" of water is not voluminous, but to the extent such case law exists, the focus is on removal of water from a watershed or groundwater basin, not from an artificial, politically determined, adjudication area. (*City of Barstow,* 23 Cal.4th at 1241; *City of San Bernardino v. City of Riverside, supra,* 186 Cal. at 15-16.) Hutchins recognizes public use is justified even when the area served does not overlie the area from which the water is obtained. (Wells A.

[8] Even if Phelan were an "exporter" of water, it receives less favorable treatment than other exporters who are given production rights by the Judgment and Physical Solution, without explanation. Section 6.4 allows the United States to "transport" produced water to any portion of Edwards Air Force Base, "whether or not the location of use is within the Basin." Saint Andrew's Abbey, Inc., U.S. Borax, and Tejon Ranchcorp/Tejon Ranch Company are permitted to "transport" produced water for "those operations and for use on those lands outside the Basin and within the watershed of the Basin…." Boron Community Services District, whose service area, like Phelan's, is outside the AVAA, is permitted to transport outside the AVAA 50 AFY from safe yield and 78 AFY of imported water return flows, without paying a replacement water assessment. Phelan, on the other hand, must pay a replacement water assessment for every acre-foot it pumps. (176 JA 157612, 157629, 157546, 157548) The record is devoid of any evidence to support this disparate treatment of "exporters."

Hutchins, *The California Law of Water* Rights (1956), p. 458, p. 492, fn. 57.) However, approximately one-third of Phelan's service area *is* within the AVGWB and approximately one-third of the water Phelan delivers to its customers is delivered within the AVGWB. (125 JA 123433) At least as to that water, Phelan should not be required to pay a replenishment assessment.

Phelan produced undisputed evidence of surplus water in the Buttes Subunit. While the portion of the AVAA to the northwest of the Buttes Subunit is in overdraft and has experienced significant subsidence, the evidence shows the Buttes Subunit has experienced generally stable water levels during the period of time studied for purposes of this case, and has even seen rising groundwater levels at times when groundwater levels elsewhere were declining (125 JA 123433-123439, 125443-123447) Its pumping will not prevent the AVAA from stabilizing. (47 RT 25627:19-23)

Interestingly, Wm. Bolthouse Farms, Inc. alleged in its cross-complaint against Phelan that there is surplus water. "Cross-complainants are informed and believe, and on the basis of such information and belief, allege that [Phelan] began pumping appropriated surplus water from the Antelope Valley to provide water for their municipal and industrial water customers. At the onset of pumping by [Phelan], the same was lawful and permissive and did not

immediately nor prospectively invade or impair an overlying right." (2 JA 2859:6-13)

One indication of overdraft is declining water levels in a groundwater basin. Surplus is not an indicator of overdraft. (*See, City of Pasadena,* 33 Cal.2d 908; *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 277-278, 280 ("*City of San Fernando*").) Thus, surplus is established by constant or increasing water levels, as is the case in the Buttes Subunit.

The existence of some small, unknown amount of connectivity throughout the AVAA in general does not in and of itself mean the appropriation of water from the Buttes Subunit by Phelan has any significant impact on the AVAA as a whole on any time frame relevant to human occupation. The fact stable groundwater levels persist in the Buttes Subunit in the face of the many years Phelan has been pumping from it indicates Phelan's pumping is not harming the AVAA and therefore there is no justification for requiring Phelan to pay a replenishment assessment for every acre-foot it pumps.

As the successor to the CSA, there can be no doubt Phelan, which succeeded to all of the CSA's rights and priorities, is a municipal water provider. As such, it is entitled to the municipal priority afforded by Water Code sections 106 and 106.5.

D. Alternatively, Phelan Should Be Allowed To Recapture Return Flows Without Paying An Assessment

Phelan's Sixth Cause of Action sought to establish a right to recapture return flows of the native water produced by and distributed to Phelan's customers, namely those within the portion of Phelan's service area lying over the AVGWB. (126 JA 123465, 123475, 123491)

Phelan's pumping does not diminish native water to the extent of its entire production; rather, a significant portion of its production results in recharge to the Basin. (41 RT 22972:10-22973:15; 126 JA 123475) As to such water, Phelan should not be required to pay a replenishment assessment.

The idea of native water return flows is not new; normally, it is factored into calculations of the natural recharge. (46 RT 25451:13-25452:21) Various authorities support Phelan's cause of action for recapturing return flows from native groundwater, as a matter of science and law. Phelan's cause of action regarding return flow claims a "return flow right" to pump native water return flow without paying an assessment.

The "science" establishes several pertinent circumstances, including: (1) the AVGWB extends east of the Los Angeles/San Bernardino County line (2 JA 1892:7-9); (2) a portion of Phelan's service area lies over the

AVGWB (125 JA 123433); (3) Phelan produces groundwater from the AVGWB, which Phelan distributes to customers who are almost exclusively residential and unsewered users located within the portion of the service overlying the AVGWB (127 JA 123836:20-22, 123838:3-10); (4) native groundwater return flow results from Phelan's production and distribution to these customers (41 RT 22972:10-22973:15; 126 JA 123475); and, (5) this return flow flows toward the AVAA and Well 14, placing Well 14 in a position to recapture the native groundwater used by customers in the portion of Phelan's service area overlying the AVGWB.

There is legal authority for a right to natural return flows of water, from other state courts, and federal courts, including the United States Supreme Court, the latter being controlling authority in all California appellate courts. (*See, Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456.) Where California law is uncertain, such as here, the decision of a court of last resort of another state, though not binding as authority, is persuasive authority. (*People ex rel. Morgan v. Hayne* (1890) 83 Cal. 111, 119.) Likewise, the decisions of federal courts are persuasive. (*See, Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 770.)

The California Supreme Court has relied on out-of-state and federal law in water cases. In a landmark decision by the California Supreme Court, the high court

referred with approval to cases from other jurisdictions in which the recapture of seepage water after leaving project boundaries was authorized where it had been planned in advance. (*See, Los Angeles* v. *Glendale* (1943) 23 Cal.2d 68, 77-78, *citing Ide* v. *United States* (1924) 263 U.S. 497 and *United States* v. *Haga* (1921) 276 F. 41.)

The United States Supreme Court re-affirmed the "doctrine of recapture" in an inter-state dispute. (*State of Montana* v. *State of Wyoming* (2011) 131 S. Ct. 1765, 1774-1775, and fn. 7 (*"State of Montana"*).) The recaptured water was "runoff and seepage water" from surface water. In looking to other cases, including those discussed herein, Justice Thomas explained that an appropriator retains the right to recapture, and in some narrow circumstances, retains that right even after the water leaves the appropriator's property. (*State of Montana, supra,* 131 S. Ct. at 1774-1775; *see,* 1 Wiel, *Water Rights in the Western States* §§ 38-40, at 37-43 and at fn. 7 (3d ed. 1911).)

As explained by the Supreme Court for the State of Washington in *Department of Ecology v. U.S. Bureau of Reclamation* (1992) 118 Wash.2d 761, 770 ("*Department of Ecology*"), the test is one of "control and possession":

> We conclude that an appropriator's rights in particular molecules of water do not end while the water remains within the boundaries of the appropriator's property, and that after water has

> left those boundaries, the termination of the appropriator's rights depends on the "control and possession" test. Accordingly, once an appropriator has discharged water from his or her own property, then the issue becomes whether the appropriator nevertheless retains an intent to recapture that water, whether downstream on another piece of property or otherwise.

Similarly, in *Strawberry Water Users Association* v. *United States,* 2006 WL 538933 at *19 (*"Strawberry"*), in which Utah District Judge Jenkins, after quoting the same from *Department of Ecology*, said:

> The Washington court's synthesis may reflect the broadest current reading of an appropriator's continuing right to return flows available in current Western water law. *Cf. 45 Am. Jur. 2d Irrigation § 33* (1999) ("Generally, escaped water is not subject to recapture where nothing is done to reclaim it before it reaches a stream."). Yet its analysis is grounded entirely upon *state* law, without any suggestion that the Reclamation Act, the specific federal project legislation, or the federal reclamation contracts confer any greater reach upon appropriators of water delivered by federal projects–including the Bureau of

> Reclamation itself–in recapturing waste, seepage or return flow of project waters.

[Emphasis in original].) Thus, *Strawberry* further affirms a native water return flow right, while also demonstrating the native return flow right is not limited to federal project water.

Though *State of Montana* involved surface water, the analogous approach in California with respect to the rules for groundwater and surface water is well known. Moreover, as to appropriation, there is no distinction between return flows from native water and return flows from imported water. "An overlying right is considered analogous to that of the riparian owner in a surface stream." (Slater, *Cal. Water Law* § 3.01, *citing to, City of Barstow,* 23 Cal.4th at 1240.) Likewise, "[t]he rules applicable to appropriation of percolating ground water are generally those arising under common-law appropriation of surface water and subterranean flow within known and defined channels." (*Ibid.* § 2.15.) "Water that returns to a stream groundwater basin, after having been applied to beneficial use, is subject to further appropriation. The water remains subject to appropriation irrespective of whether the return flows are traced to native or foreign water supplies." (*Ibid.* § 2.08[7].) Thus, that the water at issue in *State of Montana* was surface water does not alter the applicability of that case

here to groundwater, particularly given the full force of the Supreme Court and other authorities.

In addition, California statutory authority exists for Phelan's return flow right. Water Code section 71610(a) states: "Except as provided in subdivision (b), a district may acquire, control, distribute, store, spread, sink, treat, purify, recycle, **recapture**, and salvage **any water**, including sewage and storm waters, for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district." (Emphasis added.) Water Code section 71610(a) relates to municipal water districts. Phelan has all of the powers of a municipal water district under Government Code section 61100(a), which states a community services district may "[s]upply water for any beneficial uses, in the same manner as a municipal water district, formed pursuant to the Municipal Water District Law of 1911, Division 20 (commencing with Section 71000) of the Water Code." Accordingly, "any water" (including return flows resulting from use of native water) can be supplied for beneficial uses, thereby allowing Phelan to recapture return flows from its customers' use of native water, consistent with allowing "water resources of the State be put to **beneficial use to the fullest extent possible of which they are capable**…" (Cal. Const., Art. X, Sec. 2.) Note also, Williams considered return flows from

native water in analyzing whether the physical solution would be effective. (46 RT 25451:13-25452:21)

In addressing Phelan's claim to a right to natural return flow, the trial court proceeded from the assumption "[t]he right to return flows is limited to return flows from imported water." (128 JA 125634:6) Making reference to *City of Santa Maria,* the trial court relied on *City of San Fernando,* as allowing *only* for an imported water return flow right, as well as contending the doctrine of recapture "as applied in a federal court litigation" is precluded from consideration based upon *stare decisis*. (128 JA 125364:3-125365:2)

City of Santa Maria echoes *City of San Fernando,* but neither case precluded a native groundwater return flow right, and neither involved the circumstance presented here for a native groundwater return flow right. Instead, *City of San Fernando* established a priority to imported water return flows, whereas a native return flow right does not have the same priority because "[r]eturns from deliveries of extracted native water do not add to the ground supply but only lessen the diminution occasioned by the extractions." (*San Fernando, supra,* 14 Cal.3d at 261.) This language confirms native returns exist, albeit not as a priority. Thus, neither *City of San Fernando* nor *City of Santa Maria*, nor any other California decision, holds that a native return flow right does not exist.

Accordingly, *State of Montana* is binding here, as such a decision on a federal question is binding on all California state courts. (*McLaughlin v. Walnut Properties, Inc.* (2004) 119 Cal.App.4th 293, 297.) Even if *State of Montana* and the other cited federal authorities are deemed to be only persuasive authority, these authorities are entitled to great weight. (*See, Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321.)

Moreover, even if *City of San Fernando* (or *City of Santa Maria*) were precedent for precluding a native groundwater return flow right, intermediate appellate courts may depart from the precedent of older supreme court authority that, although not yet expressly overruled, has dissipated by later developments in California law. (*See, Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1131.)

Case in point is the more recent development of California water law in the California Supreme Court's opinion in *City of Barstow,* wherein the Court stated: "Equity demands that similarly situated parties be treated fairly." In that case, the Hesperia Water District and approximately twenty-five other aquaculture operators "returned well over 50 percent of the [ground] water they produced to the basin." (*City of Barstow,* 23 Cal.4th at 1255, fn. 16.) Here, Phelan is not one of a group of twenty-

six, but instead a "group" of one, but nonetheless is entitled to equity as held by *City of Barstow, supra*. Moreover, Phelan is similarly situated in that almost forty percent of Phelan's Well 14 production returns to and/or toward the Antelope Valley. (*See,* 126 JA 123475; 41 RT 22972:10-22973:15 [Harder's estimate that on average approximately 426 AFY of return flow exists out of Phelan's pumping from Well 14].)

Phelan's right to native water return flows should be recognized because there is a statutory basis for such a right, and there is no California law *precluding* recognition of such a right. Further there are federal (including U.S. Supreme Court) and state judicial authorities that recognize such a right. The law should evolve in the face of Phelan's unique circumstances. Phelan should be allowed to pump the native water return flow of water pumped by Phelan without having to pay a replacement water assessment. Failure to recognize this return flow right would result in Phelan being required to repeatedly pay a replacement water assessment for pumping and re-pumping what is functionally the same water.

VI. CONCLUSION

For reasons set forth above, Phelan requests the entire judgment and physical solution be reversed. Alternatively, Phelan requests a new trial on the causes of action raised in its pleadings and a proper determination of its rights.

DATED: June 14, 2019

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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, rule 8.204(c)(1)]

I certify pursuant to Rule 8.204(c) of the California Rules of Court, the attached Opening Brief of Phelan Piñon Hills Community Services District was produced on a computer and contains 13,998 words, excluding cover pages, tables of contents and authorities, and signature lines, as counted by the Microsoft Word 2010 word-processing program used to generate this brief.

/s/ June S. Ailin
June S. Ailin

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA 92612.

On June 14, 2019, I served true copies of the following document(s) described as **OPENING BRIEF OF APPELLANT PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT** on the interested parties in this action as follows:

BY TRUEFILING (EFS): I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling portal operated by ImageSoft, Inc. Participants in the case who are registered EFS users will be served by the TrueFiling EFS system. Participants in the case who are not registered TrueFiling EFS users will be served by mail or by other means permitted by the court rules.

BY ELECTRONIC SERVICE: By posting the document(s) to the Antelope Valley WaterMaster website in regard to Antelope Valley Groundwater matter with e-service to all parties listed on the websites Service List. Electronic service and electronic posting completed through www.avwatermaster.org via Glotrans.

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

Executed on June 14, 2019, at Irvine, California.

/s/ Linda Yarvis
Linda Yarvis