Case No. F075451

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

ANTELOPE VALLEY GROUNDWATER CASES

REPLY 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

This Reply Brief addresses all three Respondents' Briefs[1] filed with respect to the appeal from the judgment filed by Phelan Piñon Hills Community Services District ("Phelan"). While the details of the briefs vary, the gist of each one is that Phelan failed to prove its case. In making their arguments, the respondents disregard the impediments to Phelan's cause thrown up by the trial court's decisions regarding the phasing of the case and the order of proof. Respondents also contend Phelan did not make an issue of the phasing of the case and the order of proof. In fact, Phelan addressed these issues in objections to statements of decision adopted by the trial court and even went so far as to file a petition for writ of mandate that encompassed these issues, which, like most such petitions, was denied.

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[1] The first Respondents' Brief was filed on or about November 26, 2019 and was given the title "Public Water Suppliers' Respondents' Brief" by its author. The respondents who filed this brief are referred to herein as the "Public Water Suppliers" and references to their brief take the form "PWS RB at [page]." The second Respondent's Brief was filed on or about December 19, 2019 by Los Angeles County Waterworks District No. 40, which is referred to herein as "District 40" and references to that brief take the form "District 40 RB at [page]." The third Respondents' Brief was filed on or about February 22, 2020 by a mixed group of public water providers and private overliers. These parties are referred to in this brief as the "Assorted Producers Group" and references to their brief take the form "APG RB at [page]."

Respondents also rely heavily on the presumption of correctness of the judgment. This presumption, however, is not irrebuttable and where, as arguably happened here, the trial court does not weigh the evidence and document that process in some way, the presumption does not apply.

Phelan, like many, if not most, of the parties in this case, is a public water supplier. It is not using water to make a profit. The site for its one well in the Antelope Valley Adjudication Area was purchased from the County of Los Angeles, subsidiary entities of which are parties to this case. (125 JA 122739, 122741, 122749, 122795, 122799.) Phelan's intentions in purchasing the well site were made known. (125 JA 122739) Despite the contention, now purportedly made fact by the judgment in this case, that, by the time Phelan's predecessor, San Bernardino County Community Services Area 70 Improvement Zone L, purchased the well site in 1988, "everyone knew" this groundwater basin had been in a state of overdraft since the 1950s, there was no outcry that Phelan should not be allowed to drill the well, no objection that the basin was in overdraft and the well would be used to "export" water to the next county. Phelan's predecessor drilled its one well in what later became the Antelope Valley Adjudication Area before this litigation began because it was mandated by the state to increase its water supply, but due to problems with the drilling of the well was not fortunate enough to be able

to begin substantial pumping before various cases to which it was not then a party were made a coordinated case. (AOB at 11-14.) If the judgment in this case remains in place and without modification, Phelan will spend millions of dollars, which ultimately must come from its ratepayers, pumping essentially the same water over and over again, and paying for replacement water from which Phelan and its customers are not likely to benefit. This would not be a fair, just and equitable result.

II. RESPONSE TO RESPONDENTS' BRIEFS

A. THE PRESUMPTION OF CORRECTNESS DOES NOT APPLY IF THE RECORD DOES NOT ESTABLISH THE TRIAL COURT WEIGHED THE EVIDENCE

The Public Water Suppliers disagree with Phelan's position regarding the applicable standard of review in this appeal. (PWS RB at 6-7.) By contrast, District 40 accepts Phelan's position on the applicable standard of review with regard to Phelan's particular issues, but then defaults to applying a substantial evidence standard. (District 40 RB at 17-18, 27) The Assorted Producers Group relies on the presumption of the correctness of the judgment. (APG RB at 36.) All of the Respondents contend the judgment is supported by substantial evidence and that all inferences must be made to support the judgment. (PWS RB at 8; District 40 at 18, 19, 22; APG RB at 36.) None of the

Respondents recognize that the existence of statements of decision affects the standard of review.

Where there is no statement of decision, and substantial evidence supports the record, the judgment is presumed correct and all inferences necessary to support the judgment are made. However, where there is a statement of decision, review goes beyond the question whether there is substantial evidence to support the decision and includes review of the judge's reasons for the decision. Where there is a statement of decision, the presumption of correctness of the judgment is not absolute and inferences drawn from the evidence must be supported.

> Ordinarily, when the court gives an incorrect legal reason for its ruling, we look for any other correct legal basis on which to sustain the order. (*Rapplyea v. Campbell* (1994) 8 Cal. 4th 975, 980–981, 35 Cal.Rptr.2d 669, 884 P.2d 126; *Mayflower Ins. Co. v. Pellegrino* (1989) 212 Cal.App.3d 1326, 1332, 261 Cal.Rptr. 224 ["a correct decision of the trial court must be affirmed, even if the grounds upon which the trial court reached its conclusion are not correct"].) One of the "other" bases for affirmance is substantial evidence, which allows us to make certain presumptions supporting the

result. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610, 109 Cal.Rptr.2d 256.) However, where, as here, a respondent argues for affirmance based on substantial evidence, the record must show the court *actually performed* the factfinding function. Where the record demonstrates the trial judge did not weigh the evidence, the presumption of correctness is overcome. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384, 46 Cal.Rptr.2d 542 ["When the record clearly demonstrates what the trial court did, we will not presume it did something different"].) As stated in *Estate of Larson* (1980) 106 Cal.App.3d 560, 567, 166 Cal.Rptr. 868, 'The [substantial evidence] rule thus operates only where it can be presumed that the court has performed its function of weighing the evidence. If analysis of the record suggests the contrary, the rule should not be invoked."

(*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1477–1478.)

Weighing the evidence includes making determinations regarding the credibility of witnesses, drawing reasonable inferences from the evidence, deciding

what weight to give those inferences, and resolving conflicts in the evidence. (*See, e.g., Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 303, 315, 316-317, 321, as modified on denial of reh'g (June 9, 2014); *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784.) The record in this case does not demonstrate that the trial court weighed the evidence on any issue. Generally speaking, the various orders and statements of decision stating the grounds for the trial court's decisions on specific issues cite evidence in only the most general terms. They do not address conflicting evidence providing explanations for the trial court's choices with regard to what evidence it relied on and what evidence it discounted or ignored. While the Public Water Suppliers may attempt to fill in the gaps by citing oral comments the judge made about the witnesses and the evidence, that does not suffice. "'An oral . . . opinion by a trial judge, discussing and purporting to decide the issues, . . . is merely an informal statement of his views. . . . [I]t is not itself the decision of the court or a judgment.'" (*Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1206)[2]

[2] However, if oral comments are relevant, we must also look at the trial court's comparing Phelan to a thief (41 RT 22690:3-7), suggesting that Well 14 be capped (22 RT 9799:26-27), and at one point making District 40's closing argument for it (50 RT 27542:20-27543:15).

In *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, the plaintiff condominium owners' unit had been damaged by sewage that backed up into their unit due to plumbing problems in the common area that the homeowners association had not properly and effectively addressed. The plaintiffs' complaint alleged five causes of action against the homeowners association. If the plaintiffs' prevailed on certain of those causes of action, they would be entitled to recover attorneys' fees as well. After a court trial, the judge issued a statement of decision, finding for plaintiffs on only one cause of action which was not one that would lead to an award of attorneys' fees. The trial court's rejection of most of the plaintiff's legal theories was based on a "judicial deference" defense, created by case law holding a court should defer to the homeowners association board's judgment in selecting among means for discharging an obligation to maintain and repair common areas, provided the board's decision was based on a reasonable investigation, undertaken in good faith and with regard for the best interests of the association and its members. (*Id.* at 933, 937-938, 939-940, 940-941.)

In its statement of decision, the trial court cited the relevant case authority, but did not make explicit findings that the evidence supported the judicial deference defense. (*Id.* at 941.) The court of appeal inferred the trial court found the defendants met their burden of proving the

judicial deference rule applied, and considered whether substantial evidence supported that conclusion. The court of appeal concluded the association had not established the factual prerequisites to the application of the judicial deference defense. (*Id.* at 941, 942-944.)

> As the court explained in *Kemp, supra,* 146 Cal.App.4th 1474, 53 Cal.Rptr.3d 673, "[W]here … a respondent argues for affirmance based on substantial evidence, the record must show the court *actually performed* the factfinding function. **Where the record demonstrates the trial judge did not weigh the evidence, the presumption of correctness is overcome.** [Citation.] … 'The [substantial evidence] rule thus operates only where it can be presumed that the court has performed its function of weighing the evidence. If analysis of the record suggests the contrary, the rule should not be invoked.' " (*Id.* at pp. 1477–1478, 53 Cal.Rptr.3d 673, original italics.) Here, the trial court did not weigh the evidence, but instead ruled the defendants had no liability based on the rule of judicial deference. Because that conclusion was erroneous, we must reverse the judgment for defendants.

(*Id.* at 944-945 [italic emphasis in original, bold emphasis added].) Note that, while the *Affan* court inferred the trial court had made the necessary factual findings, *it did not infer that those findings were supported by substantial evidence*.

Respondents here argue for affirmance based on substantial evidence. In this case, there are many instances of conclusions of fact in the trial court's orders and statements of decision that are not shown to be the product of the trial court weighing the evidence. Here are a few examples pertinent to the grounds for Phelan's appeal from the judgment:

- The final statement of decision refers to "voluminous" evidence of overdraft, but never describes that evidence, other than a brief reference to two items (176 JA 157464:19-23). While there was contrary evidence (29 RT 13001-13008), one would not know it from this statement of decision. In particular, the judge did not address evidence showing that, in the Southeast, there was evidence of stable and rising water levels, which is contrary to a conclusion there was overdraft. (176 JA 157463:10-12; 41 RT 22936:15-22948:10)
- The trial court's discussion of its conclusion Phelan does not have an appropriative right (176 JA 157467:9-21) does not discuss evidence. Instead, the

final statement of decision cites to the statement of decision that followed the November 14, 2014 trial on some of Phelan's causes of action.

- At 176 JA 157467, at line 21, the final statement of decision states "the entire Basin [not the AVAA] is hydrologically connected as a single aquifer." Presumably, the trial court was actually talking about the adjudication area. In any event, there was conflicting evidence on this, heard in Phase Two, but none of that evidence is cited or discussed in any statement of decision, not a single witness's name is mentioned and no attempt is made to explain how the court resolved conflicts in the evidence, or why those conflicts were resolved the way they were. (2 JA 2729:9-20)
- At 176 JA 157467, at lines 22-25, the trial court states its conclusion Phelan's pumping negatively impacts the Buttes subbasin. The trial court refers to Harder's testimony, but not to Williams' contrary testimony that pumping from Well 14 would not prevent the AVAA from stabilizing and in fact reduces outflow to the El Mirage Valley by 500 acre feet per year. (47 RT 25609:19-27, 25627:19-23). The trial court makes no effort to explain why Harder's testimony on this issue was more persuasive than Williams' when the trial court otherwise accepted

Williams' testimony about the efficacy of the physical solution, despite deficiencies in that testimony pointed out on cross-examination. (47 RT 25613-25628)

- These deficiencies raised on cross-examination are also ignored in the portion of the statement of decision citing Williams' conclusion that "pumping at existing levels will continue to degrade and cause undesirable results in the Basin, but . . . the Physical Solution will bring the Basin into balance and stop undesirable results including subsidence. The ramp-down of groundwater production set forth in the Physical Solution will bring the Basin within its safe yield." (176 JA 157479:25-157480:2) The statement of decision describes Williams' testimony as "credible and undisputed" (176 JA 157480:19) without explaining the grounds on which the court dismissed the issues raised on cross-examination of Williams regarding the use of the groundwater model. (AOB at 46-48.)
- The trial court stated it received evidence of each stipulating Landowner Party's, each Public Overlier's and the Small Pumper Class's reasonable and beneficial use of Basin groundwater. (176 JA 157468:25-26) The statement of decision refers generally to the testimony of four water engineers.

(176 JA 157469:7-9) How that evidence supports the trial court's conclusion with respect to each and every user within these three broad categories of users is a complete mystery. Phelan's objections to the statement of decision following the November 2014 trial in which counsel repeatedly asked "what evidence" supported statements in that statement of decision are a contemporaneous reflection of the trial court's failure to weigh the evidence. (127 JA 124567:4-9, 124571:24-124574:21)

In the absence of a record that substantiates that the trial court weighed the evidence, this Court should not apply the presumption of the correctness to the judgment and physical solution, nor conclude the judgment is support by substantial evidence.

B. RELYING ON THE PRESUMPTION OF CORRECTNESS, RESPONDENTS URGE THIS COURT TO IGNORE SERIOUS DEFICIENCIES IN THE EVIDENCE PROFFERED REGARDING THE EFFECTIVENESS OF THE PHYSICAL SOLUTION

The Public Water Suppliers defend the use of the USGS groundwater model primarily on the grounds it was "very well calibrated" and that data from the summary expert report was used to modify the pumping levels assumed by the model. (PWS RB at 35-36.) They reject the

issues raised by Phelan on the grounds Phelan's criticisms were focused on the Southeast and would not impact "the Basin as a whole or . . . Williams's conclusion that the physical solution will bring the Basin into balance." (PWS RB at 35-36.)

This gives short shrift to Williams' admissions to changes to the model, which in fact were not limited to the Southeast. Other wells besides Phelan's Well 14 were "moved" to a different cell in the model, which means the geology and hydrogeologic characteristics of those cells were changed. (47 RT 25614:25-25616:15; Ex. PWS 543, slides 6, 48, 51 [166 JA 152213]). Where pumping occurs in the model is significant because the geology is variable and each cell is about one-third of a mile square. (47 RT 25616:19-25). What is the relevance of calibration when the data regarding pumping is moved to areas where the geology is completely different? Williams' conclusions, supposedly reached in reliance on the model, are actually based on distortions of the model.

Further, calibration of the model is suspect because there are some areas of the AVAA where there are no wells that can be used for purposes of calibration. (Ex. PWS 543, slides 48, 51, 53, 54, 57 [166 JA 152213]) But even if the issues regarding the model were limited to the Southeast area, dismissing these issues would be completely contrary to the idea that there is hydroconnectivity throughout the

AVAA such that it should be treated as a single basin. If the entire basin is interconnected (128 JA 125628:23-26), then defects in any part of the model are significant for the entire basin. It is contradictory to claim, for example, that the flow barrier between the Lancaster subbasin and the Buttes subunit does not protect the Lancaster subbasin from Phelan's pumping (128 JA 125631:8-11), but errors introduced by "moving" wells within the model have no impact.

C. THE CONCLUSION THAT PHELAN HAS NO WATER RIGHT IS THE PRODUCT OF THE TRIAL COURT'S ABUSE OF DISCRETION IN PHASING THE TRIAL AS IT DID

The Public Water Suppliers, District 40 and Various Suppliers all correctly note that the phasing of trial is within the discretion of the trial court. However, that discretion is abused when the court allows a party with the burden of proof to present evidence at an inappropriate point in the progress of the case.

In *People v. Rodriguez* (1943) 58 Cal.App.2d 415, the defendant was on trial before the court for robbery, having waived a jury. In its case in chief, the prosecution presented evidence regarding a visit to the scene of the crime with the defendant, but did not present evidence of a voluntary confession by the defendant. The defendant took the stand as part of his case in chief and testified that

police officers had begun beating him shortly after he was arrested and that he agreed to take police officers "to the scene of the alleged robbery and to confess 'to any crime in the United States' if they would cease beating him." On cross-examination, the prosecutor asked the defendant "whether he had not given to officer Story a complete account" of having committed the crime with which he was charged. The defendant denied having made such a confession. After the defense rested, the prosecutor called officer Story as a witness and he testified the defendant had made a complete and detailed confession. (*Id.* at 418.) The court of appeal rejected the introduction of this confession on rebuttal.

> The alleged confession to officer Story was not offered as a part of the People's case in chief. It was held back, to be offered in rebuttal and in the guise of impeachment of defendant after his denials upon cross–examination. Apparently both counsel and the court considered this to be a proper procedure. Not only that, but it appears to have been assumed that a confession elicited by way of impeachment was admissible without proof that it had been given voluntarily. The procedure was entirely wrong. If the defendant had confessed, proof of the confession was a part of the case of the People and it was the duty

> of the District Attorney to offer it before resting his case, when the testimony was then available and there was no reason for not offering it in chief. . . . The People have no right to withhold a material part of their evidence which could as well be used in their case in chief, for the sole purpose of using it in rebuttal. . . . The alleged confession was offered to establish facts constituting guilt; the impeachment feature was incidental and comparatively unimportant. It was no more proper for the District Attorney to offer the evidence as rebuttal after defendant's denial of the alleged statements, under the pretense that it was offered to impeach the defendant, than it would have been to offer it in rebuttal if the defendant had not been questioned about it at all. . . . The practice of allowing the District Attorney to withhold a part of his case in chief and to offer it after the defense has closed cannot be approved, but the obvious error in permitting that procedure does not appear to have been prejudicial in this instance and is not the vital one involved.

(*Id.* at 418-419.)

The court of appeal went on to reverse the verdict in the *Rodriguez* case, the "vital error" having been the coerced

nature of the confession. (*Id.* at 419-420.) No effort had been made, as would have been required if the confession had been introduced as part of the prosecution's case in chief, to establish that the confession was voluntary. (*Id.* at 420.) The *Rodriguez* case establishes that the order in which evidence is introduced can result in an abuse of discretion if the result is that necessary elements of the crime or cause of action are not introduced as part of the case in chief of the party with the burden of proof.

Under California law, water must be put to reasonable and beneficial uses. (California Constitution, Art. 10, Section 2.) The Public Water Suppliers and other parties in this case sought to have the trial court determine the safe yield and the existence of overdraft so that they could establish their prescriptive rights to water. Other private parties also sought to have the trial court determine the extent of their water rights and the determination of safe yield and overdraft was critical to their objectives as well. Determinations of safe yield and the existence of overdraft, however, are necessarily dependent on water being put to reasonable and beneficial uses,[3] as is the question of

[3] District 40, in the middle of a discussion of the standard of review, says "The lower court found that Phelan failed to meet its burden of proof to establish that the water it pumped from the Basin is surplus water, that the Basin from which it is pumped is not in overdraft, and that its use is reasonable and beneficial." (District 40 RB at 17, citing 128 JA 125636-37.) It may well be the trial court made

whether there was surplus water[4] that would be the basis of Phelan's claim of an appropriative right. If some uses being made of water are not reasonable and beneficial, then much of the analysis behind a physical solution would change.

The Public Water Suppliers say that "Phelan contends that reasonable and beneficial use must be determined before surplus, based on language from *Tulare* and

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such a statement somewhere, but not at the location cited. What the trial court actually said there was that Phelan did not meet its burden of proof on *surplus*, that the trial court had not made a determination of any party's reasonable and beneficial use, but that it would do so before entry of judgment. The trial court, however, clearly did not say Phelan failed to meet the burden of proving its own use is reasonable and beneficial. In fact, the trial court said no evidence was necessary to establish that Phelan's use was reasonable and beneficial. (41 RT 22983:12-22985:10)

[4] The Public Water Suppliers critique the way in which Phelan defined "surplus water" in its cross-complaint on the grounds no legal authority is cited for the definition. (PWS RB at 15, citing AOB at 56.) There is no citation to authority because the citation is to Phelan's cross-complaint. Viewed fairly, however, phrasing the definition in this way is not inconsistent with the law. The typical definition of "safe yield" is the amount of water than can be withdrawn without causing an undesirable result. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 278, 280, 282. If additional water remains, then surplus exists. Specifically identifying the possible undesirable results – a drop in the water table or subsidence – is simply more specific than the usual statement of the definition, but it is not wrong or inconsistent with the law.

Peabody v. City of Valejo. But language like "first" and "then" in those cases is properly construed to refer to the order of consideration by the court, not the order of presentation of evidence." (PWS RB at 20 [footnotes omitted].)

The question of when reasonable and beneficial use was to be addressed highlights the problem with the order of trial. The Public Water Suppliers point to the trial court's statement a determination on reasonable and beneficial use would be made prior to entry of final judgment, saying "The court implicitly conditioned its conclusions on the results of that determination. If the court found that some of the prior uses were unreasonable, it would be necessary to revisit its conclusion that no surplus existed." (PWS RB at 21).

While the trial court stated the ruling on overdraft was subject to the ruling on reasonable and beneficial use, by deferring this fundamental issue to the very last phase of a case that went on for 15 years, the trial court's incentive and stamina to really address it were lost in the desire to finally wrap things up. The trial court's resistance to addressing this issue at the very end of the case was manifested by the trial court's refusal to allow counsel for the Willis Class to engage in cross-examination regarding reasonable and beneficial use that could have led to a reconsideration of safe yield due to the elimination or

curtailment of uses that were not reasonable and beneficial. (46 RT 25442:13-25443:5)

In reality, the trial court never really addressed the issue of reasonable and beneficial use. The rulings regarding reasonable and beneficial use were made as to broad categories of parties. The Willis Class had no reasonable and beneficial use because they were not pumping. (176 JA 157474:10-11.) Ruling generally as to the Landowner Parties and the Public Overliers, the trial court found their use reasonable and beneficial.[5] (176 JA 157267:14-20) No ruling was ever made on reasonable and beneficial use as to any specific party other than Tapia. (176 JA 157471:23-157472:5)

The Public Water Suppliers assert that "Phelan filed a case management statement before the Phase 3 trial, concurring that 'the next phase of trial be a determination of Basin characteristics including its safe yield and overdraft (past or present).' Phelan made no mention of reasonable and beneficial use." (PWS RB at 20.) The Assorted Producers Group joins the Public Water Supplier

[5] The Public Water Suppliers claim that "the trial court devoted a section of its statement of decision to the reasonable and beneficial use of the overlying owners," citing in their footnote 46 to 176 JA 157468-157469. (PWS RB at 19.) However, the subject actually under discussion at those pages is the establishment of overlying rights, not reasonable and beneficial use.

in making this claim and also asserts that Phelan actually requested that Phase Three address safe yield and overdraft. (APG at 27.) In fact, the Assorted Producers Group's citation to the record to support this latter assertion leads to an excerpt from a reporter's transcript clearly showing it was the judge's desire to address those issues in Phase Three, not Phelan's. (9 JA 9628:27-9629:2, 9629:9-14.)

At this point in the phased trial, however, there was no reason Phelan would not have expected the issue of reasonable and beneficial use to be part of the analysis of safe yield and overdraft, which would have provided Phelan the context and opportunity to make its case as to what uses were not reasonable and beneficial. Once Phelan understood the trial court's approach to the order of proof was to defer the issue of reasonable and beneficial use (as it had already done by determining overdraft and safe yield first), Phelan protested this approach in its objections to the proposed statement of decision for the November 2014 trial. (127 JA 124564:18-22, 124565:11-14, 124568:26-124569:2, 124569: 5-11, 124571:13-23, 124579:18-28)[6] These objections were incorporated by reference into

[6] These issues were raised by Phelan in a petition for writ of mandate filed with the court of appeal to which this case was then assigned in 4th District Case No. E063153, which was denied.

Phelan's objections to the trial court's final statement of decision. (175 JA 156593:17-19, 127 JA 124563)

D. CALIFORNIA AUTHORITIES DO NOT PROHIBIT RECOGNITION OF NATIVE WATER RETURN FLOWS NOR DO THEY REQUIRE REJECTION OF FEDERAL AUTHORITIES THAT RECOGNIZE NATIVE WATER RETURN FLOWS

All of the Respondents[7] take the position California law does not recognize Phelan's right to pump return flows of native water without payment of a water replenishment assessment. This position is overstated.

In recognizing a right to pump imported water return flows, neither *City of Santa Maria* nor *City of San Fernando*

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[7] Statements in Respondents' briefs about the effects of Phelan's pumping are not supported by the evidence or are based on distortion of the evidence. District 40 cites the trial court's final statement of decision to claim none of the return flow from Phelan's water use returns to "the Basin." (District 40 RB at 25, citing 176 JA 157467:157468:4.) The Public Water Suppliers say "Phelan's pumping outside the Adjudication Area *reduced* that native supply." (PWS RB at 28, citing 41 RT 23007:18-24.) Yet, the Public Water Suppliers' own expert, Williams, testified that Phelan's pumping resulted in more water remaining with the AVAA. (47 RT 25609:13-16) What all of this shows is that the impacts of pumping at the margins of a groundwater basin has complicated impacts that do not lend themselves to the simple solutions the Respondents and the trial court sought to apply here.

holds that a native return flow right does not exist. Instead, *City of San Fernando* established a priority right in favor of the water importer to imported water return flows. Rather than rejecting the native water return flow right in its entirety, *City of San Fernando* gives such a right a lower 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.

Respondents also ignore the California statutory authority for Phelan's right to pump native water return flows. Water Code section 71610(a), applicable to Phelan by virtue of Government Code section 61100(a), states: "Except as provided in subdivision (b), a district may . . . **recapture**, and salvage **any water**, . . . for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district." (Emphasis added.) "Any water" includes return flows resulting from use of native water, 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.)

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 from Phelan's own pumping 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.

According to Respondents, federal and out-of-state authorities recognizing native water return flow rights have no impact in California courts. However, that is not the case with U.S. Supreme Court authorities, such as *State of Montana* v. *State of Wyoming* (2011) 131 S. Ct. 1765, which is arguably controlling authority. (*McLaughlin v. Walnut Properties, Inc.* (2004) 119 Cal.App.4th 293, 297.) Even if it is not controlling, this U.S. Supreme Court case and other federal authorities cited by Phelan in its Appellant's Opening Brief are persuasive authority entitled to great weight. (*See, Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321; *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 770.) Similarly, the decision of the 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.)

The Public Water Suppliers' attitude toward Phelan is that Phelan and its customers are not harmed because Phelan can still pump from Well 14, it just has to pay a water replenishment assessment, and if the replacement water is not needed in the Southeast because it has more stable water levels, well then, it will just go into some other part of the AVAA. (PWS RB at 18 ["If groundwater levels are not going down in the Buttes subunit, it may be appropriate to deliver replacement water somewhere else."] The end result is that Phelan pays repeatedly for pumping the same 426 acre feet of water over and over again, notwithstanding that repeated pumping of that amount has no real impact on the AVAA. Phelan is thereby made to pay a replacement water assessment, not for the benefit of its own customers (who ultimately pay the assessment through their water rates), but for the benefit of customers in the Lancaster Subunit, because of the low permeability of flow barriers between those two subunits. (41 RT 22947:24-22949:18, 22985:12-20, 22993:26-22994:2, 22994:27-22996:11) This absurd result is anything but fair, just and equitable.

III. CONCLUSION

For reasons set forth in Phelan's Appellant's Opening Brief and 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.

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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 Reply Brief of Phelan Piñon Hills Community Services District was produced on a computer and contains 5,690 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 March 11, 2020, I served true copies of the following document(s) described as **REPLY 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 website's 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 March 11, 2020, at El Segundo, California.

/s/ Beverly Mikell
Beverly Mikell