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 (Appeal filed on May 17, 2018)

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

On December 23, 2015, the Court signed a judgment in the Antelope Valley Groundwater Cases which included a physical solution addressing the pumping of groundwater in a large area in northern Los Angeles County and southern Kern County. This judgment was the subject of three appeals recently decided by this Court. (Fifth District Court of Appeal Case Nos. F082094 (filed Dec. 19, 2020, ordered published in its entirety January 7, 2021), F082469 (filed March 16, 2021, ordered published April 6, 2021), and F082492 (filed March 16, 2021, ordered published April 14, 2021).)[1]

The judgment and physical solution were the product of settlement negotiations among many of the parties to the cases. After multiple phases of trial, including trial on whether the physical solution was fair just and equitable, the superior court adopted the physical solution as its own. While the physical solution provided for a watermaster, the

[1] Portions of the record for the appeals from the judgment, including both the appendix and the reporter's transcript, are the subject of a Request for Judicial Notice filed concurrently with this brief. References to the appendix for the appeals from the judgment are in the format [volume] JA [page]. References to the single-volume appendix that is specific to this appeal are in the format [volume] AA [page]. References to the reporter's transcript for the appeals from the judgment are in the format [volume] RT [page]. References to the reporter's transcript specific to this appeal are in the format RT2 [page:line].

superior court retained jurisdiction to interpret the judgment and review certain actions of the watermaster.

Among other things, the judgment established a "grace period" in the first two calendar years after the judgment was entered, during which no party would be liable for replacement water assessments imposed pursuant to the judgment. Notwithstanding this provision, in January 2018, the watermaster adopted a resolution stating that Phelan Piñon Hills Community Services District ("Phelan"), and only Phelan, must pay a replacement water assessment during the grace period. Phelan filed a motion in superior court, seeking declaratory relief invalidating that resolution, because the language of the judgment regarding the grace period was unambiguous and applied to Phelan as to every other party to the judgment. That motion was denied.

In ruling on Phelan's motion, the superior court never considered whether or not the grace period provision was ambiguous, that is, whether it was reasonably susceptible to the interpretation urged by Phelan, or the interpretation urged by the parties which opposed Phelan's motion. Instead, the superior court immediately went searching for reasons to deny Phelan the benefit of the grace period, and came up with reasons that are not supported by the facts, the evidence, or fairness and equity.

The judgment and physical solution were *stipulated to* by parties representing a substantial portion of the production of groundwater in the basin. This fact is important, because it should be inferred that the stipulating parties and the superior court knew *exactly* what the judgment said, including the simple statement that during the first two calendar years after entry of judgment, no party producing groundwater would be required to pay a replacement water assessment. Both the stipulating parties and the superior court had every opportunity prior to entry of the judgment to exclude Phelan from the grace period, but they did not.

The result is a ruling that amends the judgment, rather than interpreting it, making it say something neither the stipulating parties nor the superior court had seen fit to make it say before the judgment was entered. In doing so, the superior court ran against the admonition in Code of Civil Procedure section 1858, that it is not for the court, in interpreting a writing, "…to insert what has been omitted, or to omit what has been inserted…" Accordingly, the superior court's order denying Phelan's motion to invalidate the watermaster's resolution must reversed, and the case must be remanded to the superior court with direction to enter a new order granting Phelan's motion.

II. STATEMENT OF RELEVANT FACTS

A. The Judgment and Physical Solution

The Antelope Valley Groundwater Cases are a coordinated and consolidated case that sought to adjudicate the claims of numerous parties regarding the use of groundwater in the Antelope Valley Groundwater Basin west of the boundary between Los Angeles County and San Bernardino County. On December 23, 2015, a judgment was entered that adopted a physical solution for the adjudication area. (176 JA 157508-157803)

The judgment is comprised of multiple parts, two of which are pertinent to this appeal. It begins with a five-page document, signed by the judge, which states the superior court has adopted, as its own, a physical solution to which many of the parties had stipulated, but which is (a) applicable to all parties, (b) identifies the nature of the rights of certain parties under the physical solution, (c) establishes a method for giving notice to parties to the judgment, and (d) decrees that all real property within the adjudication area is subject to the terms of the judgment. (176 JA 157508-157512) Exhibit A to the judgment sets forth the terms of the physical solution, including a long list of definitions of terms used in Exhibit A. (176 JA 157513-157581; definitions at 176 JA 157527-157535)

The five-page document preceding Exhibit A will be referred to in this brief as the "Enabling Document."

Exhibit A will be referred to herein as the "Judgment" because that was how it was identified in the motion documents filed with the superior court. References to sections are to sections in Exhibit A, the Judgment, unless otherwise indicated. Portions of the Judgment are included in the Appellant's Appendix for this appeal at AA 32-50 and AA 70-138. However, to avoid referring to scattered pages in the Appellant's Appendix for different portions of the Judgment, references to the Judgment in this brief will cite the complete copy of the Judgment in Volume 176 of the Joint Appendix for the appeals from the judgment.

Section 3.5 of the Judgment contains numerous definitions, which will be cited only by reference to the section number. (176 JA 157527-157535) The first use of a defined term in this brief will be followed by a reference to the specific subsection in which the definition of the term is located.

B. Phelan and Well 14

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 ("CSA"). (127 JA 123835:19-28; 125 JA 122730-122737, 122897)

Among the assets Phelan acquired from the CSA was a well referred to by Phelan as Well 14. Well 14 is the only one of Phelan's wells located within the adjudication area. (127 JA 123836:16-17) Water pumped by Well 14 is distributed to customers in Phelan's jurisdiction, which is located in San Bernardino County and overlies a portion of the Antelope Valley Groundwater Basin as described in Department of Water Resources Bulletin 118. (127 JA 123836:8-9, 123839:14-16)

The CSA first delivered Well 14 water to customers in January 2006. (127 JA 123837:5) However, shortly after Well 14 came online, the CSA began having problems with the pump, which 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)

Paragraph 3.f. of the Enabling Document states Phelan "has no right to pump groundwater from the Antelope Valley Adjudication Area except under the terms of the Physical Solution," that is, the document referred to herein as the Judgment. (176 JA 157510:26-28) Under Section 6.4.1.2, Phelan may pump not more than 1,200 acre-feet per Year (Section 3.5.55), provided that it does so without causing Material Injury (Section 3.5.18) to the basin and pays a Replacement Water Assessment (Section

3.5.41) pursuant to Section 9.2 and other costs. (176 JA 157548:20-25) Nothing in Section 9.2 addresses the mechanism by which a Replacement Water Assessment owed by Phelan will be assessed or how the amount of the assessment will be determined. (176 JA 157553-157556)

C. The Two-Year "Grace Period" and Replacement Water Assessment Provisions of the Judgment

The Judgment provides no Party (Section 3.5.27) is obligated to pay a Replacement Water Assessment for water pumped during the first two calendar years after the entry of Judgment; that is, calendar years 2016 and 2017. Section 8.3 of Exhibit A to the Judgment begins: "During the first two Years of the Rampdown Period, no Producer [Section 3.5.30] will be subject to a Replacement Water Assessment [Section 3.5.41]." (176 JA 157550:22-23) The Rampdown Period (Sections 3.5.37, 8.2; 176 JA 157550:19-21) is a seven-Year (Section 3.5.55) period, commencing with the calendar year after entry of the Judgment, during which Parties (Section 3.5.27) with Production Rights (Section 3.5.32) are required to decrease their pumping of Native Safe Yield (Section 3.5.19) to their allocated share of the Native Safe Yield.

During the Rampdown (Section 3.5.37), a Replacement Water Assessment is due for "any amount

Produced over the required reduction." (Sections 3.5.30, 8.3; 176 JA 157550:26-157551:2)

The Judgment contains various provisions regarding which Parties must pay Replacement Water Assessments.

Except as determined to be exempt during the Rampdown Period pursuant to the Drought Program (Section 8.4; 176 JA 157551-157552), a Party must pay a Replacement Water Assessment for each acre-foot pumped in excess of the Party's Production Right (Section 3.5.32) plus Imported Water Return Flow (Section 3.5.16) available in that Year. (Sections 8.3, 9.2; 176 JA 157550-157551, 157553) A Replacement Water Assessment is not imposed on the Production (Section 3.5.31) of Stored Water (Section 3.5.49), In-Lieu Production (Section 3.5.17), or Production of Imported Water Return Flows. (Sections 5.2.2, 9.2; 176 JA 157545-157546, 157553:16-17)

Section 8.4 establishes a "Drought Program" to be implemented by some, but not all, of the Public Water Suppliers (Section 3.5.35), which is based on the premise the Drought Program participants will be able to purchase water from the Antelope Valley-East Kern Water District ("AVEK"). No Replacement Water Assessment is due for pumping such water. (176 JA 157551-157552) However, "[d]uring the Rampdown period, the Drought Program Participants will be exempt from the requirement to pay a Replacement Water Assessment for Groundwater

Production in excess of their respective rights to Produce Groundwater under this Judgment up to a total of 40,000 acre-feet over the Rampdown Period with a maximum of 20,000 acre-feet in any single Year for District No. 40 and a total of 5,000 acre-feet over the Rampdown Period for all other Drought Program Participants combined." (176 JA 157552:5-13)

The federal government does not pay a Replacement Water Assessment unless it consents and funds have been appropriated for such payment. (Section 9.2; 176 JA 157553:12-16) A Party that arranges a water substitution with the United States by providing Imported Water (Section 3.5.15) "may Produce a corresponding amount of Native Safe Yield free from Replacement Water Assessment in addition to their Production Right." (Section 11.2; 176 JA 157558:5-16)

A member of the Small Pumper Class (Section 3.5.44, also known as the "Wood Class") pays a Replacement Water Assessment for water pumped in excess of three acre feet per Year. (Section 5.1.3; 176 JA 157536:3-8) Richard Wood, as compensation for serving as class representative, may pump up to five acre feet per year before paying a Replacement Water Assessment. (Section 5.1.3.8; 176 JA 157539:17-20)

A member of the Non-Pumper Class (Section 3.5.22, also known as the "Willis Class") will pay a Replacement

Water Assessment if New Production (Section 3.5.20) is established, unless the New Production will not cause Material Injury (Section 3.5.18) or is found to be *de minimis*. (Sections 9.2.1, 9.2.3, 18.5.13.2; 176 JA 157554, 157573)

A right to pump in excess of a Production Right without paying a Replacement Water Assessment is granted to a Party through December 31, 2016 for the purpose of constructing a solar power facility located on land overlying the basin. (Section 5.1.9; 176 JA 157544)

D. Watermaster Adopts Resolution No. R-18-04

The Watermaster's draft annual report for 2017 indicated an intent to impose a Replacement Water Assessment on Phelan for 2016 and 2017. (AA 16:18-25, 52) Counsel for Phelan submitted a comment letter on the issue, attended the Watermaster's August 23, 2017 meeting and addressed the Watermaster Board on Phelan's behalf on that issue. (AA 16:18-25, 56-57)

The issue came up again when a proposed resolution regarding whether Phelan would be required to pay a Replacement Water Assessment for 2016 and 2017 was placed on the Watermaster's January 24, 2018 agenda. (AA 17:1-6)[2] Counsel for Phelan attended the January 24,

[2] The Watermaster's general counsel prepared a memorandum on the subject which was never made available to Phelan or the public. (RT2 14:25-15:2, 23:7-13)

2018 Watermaster Board meeting and spoke on Phelan's behalf in opposition to the resolution. (AA 17:1-6) Nevertheless, on January 24, 2018, the Watermaster adopted Resolution No. R-18-04 approving the imposition of a Replacement Water Assessment (unspecified in amount) on Phelan for 2016 and 2017. (AA 19)

E. The Public Water Suppliers' Motion for Declaratory Relief Regarding Rampdown

Section 6.5 of the Judgment states that the Court retains jurisdiction over its interpretation and enforcement. (176 JA 157548-157549) Pursuant to that section of the Judgment, the Public Water Suppliers filed a motion, heard on January 31, 2018, regarding whether the Rampdown provisions of Section 8.3 of the Judgment apply to them. (176 JA 157548-157549) The superior court concluded that the Public Water Suppliers are subject to the Rampdown provisions in an Order After Hearings on January 31, 2018 (the "January 2018 Order) entered on February 5, 2018. (AA 28:27-28) The superior court stated in its order "…the producers cannot pump water from the aquifer not knowing what the water replacement obligations are…" (AA 25:14-15)[3] In the January 2018 Order, the Court specifically found that "Producers" means Parties

[3] The amount of the Replacement Water Assessments due from any party had not yet been determined by the Watermaster.

that produce groundwater and that the term "Producers" is *unqualified*.

> The court concludes that the public water suppliers are included in the provisions of Section 8.3. The specification that "during the first two years of the Rampdown Period no *producer* shall be subject to a Replacement Water Assessment . . ." (emphasis added) is unqualified. *It does not limit the definition of "producers" to landowner or overlying owner parties.*

(AA 28:28-29:3 [emph. added])

The January 2018 Order further states:

> It must be emphasized that the court's approval of the physical solution in fact, based upon competent evidence, contemplated that *all parties* would have the benefit of the 7 year rampdown process and that the physical solution would achieve a balanced aquifer during the specified period. No party objected or provided contrary evidence or argument during the approval process.

(AA 30:3-8 [emph. added])

F. Phelan's Motion Challenging Resolution No. R-18-04

Section 20.3 of the Judgment states that the Court may review actions of the Watermaster via motion, and Section 20.3.3 states that motions regarding Watermaster actions may be made within 90 days after the action was taken. (176 JA 157578-157579) On March 20, 2018, within 90 days after Resolution R-18-04 was approved,[4] Phelan filed a motion seeking a declaration that, under the terms of the Judgment, it, like other Producers, was not required to pay a Replacement Water Assessment for water pumped in 2016 and 2017. (AA 7-58)

Phelan's motion was opposed by the Watermaster and by a group of parties referenced in a separate opposition as the "Water Suppliers."[5] (AA 60-180, 184-235) Palmdale

[4] Section 20.3.3 also states that motions to "review assessments" must be made within 30 days after mailing of notice of the assessment. (176 JA 157579) However, because no assessment amount had been specified or imposed as to Phelan for 2016 and 2017, there was no notice of assessment mailed and, hence, there was no assessment to be reviewed. The motion was for declaratory relief, not a challenge to an assessment amount. As such, the 90-day limitations period applied. None of the parties opposing Phelan's motion argued the motion was untimely.

[5] The "Water Suppliers" are Los Angeles County Waterworks District No. 40, Palmdale Water District, Rosamond Community Services District, Quartz Hill Water District, Littlerock Creek Irrigation District, and Palm Ranch Irrigation District.

Water District also filed a joinder in the opposition filed by the Watermaster. (AA 182)

Argument on the motion took place on April 18, 2018. (RT2 1:4-2:17-27:13) The superior court issued an order denying the motion on April 27, 2018 ("April 2018 Order" or "Order"). (AA 262-268) The gist of the April 2018 Order is that the Replacement Water Assessment grace period does not apply to Phelan because:

- Phelan does not have a Production Right or other traditional water right and does not have to ramp down its pumping. (AA 264:26-265:8, 265:22-266:6, 266:9-15, 266:19-22)
- Phelan is not a "producer." (AA 265:9-14, 267:5-12)
- Phelan exports water from the adjudication area. (AA 265:24-266:1)
- Phelan contributed to the overdraft of the basin. (AA 266:2-4)
- Phelan is not a stipulating or supporting party to the Judgment and therefore, pursuant to Section 5.1.10 of the Judgment, does not get the benefit of the Replacement Water Assessment grace period. (AA 266:24-28)
- The expert testimony at trial to the effect the physical solution would bring the basin into balance was dependent on Phelan being excluded from the

Replacement Water Assessment grace period. (AA 267:13-28)

- The superior court's statements of decision dictate the conclusion reached. (AA 267:25-268:3)

The April 2018 Order did not address the question whether the language of the first sentence of Section 8.3 of the Judgment was reasonably susceptible to the interpretation advanced by Phelan or to the interpretation advanced by the parties opposing Phelan's motion.

Phelan timely filed a Notice of Appeal from the April 2018 Order on May 17, 2018. (AA 284-286)

III. ARGUMENT

A. Standard of Review

While Phelan's motion challenging Resolution R-18-04 is styled as one for declaratory relief, due to the language of the Judgment regarding the superior court's continued jurisdiction, the April 2018 Order purports to be an interpretation of a judgment. The meaning of a court order or judgment is a question of law subject to the appellate court's independent review. (*In re Insurance Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429.) Similarly, declaratory relief, where the superior court's declaratory judgment involves interpretation of a written instrument without conflicting extrinsic evidence, is likewise reviewed *de novo*. (*Dolan-King v. Rancho Santa Fe Ass'n* (2000) 81 Cal.App.4th 965, 974.)

B. The Law of Interpretation of Judgments

The same rules apply to the interpretation of a judgment as to any other writing. (*In re Careaga's Estate* (1964) 61 Cal.2d 471, 475; *Smith v. Selma Community Hospital* (2008) 174 Cal.App.4th 1478, 1501.)

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(Code of Civil Procedure § 1858.)

Generally, the first issue that arises in interpreting a writing is whether the writing is ambiguous; that is, whether it is reasonably susceptible to more than one interpretation. (*Smith v. Selma Community Hospital, supra,* 174 Cal.App.4th at 1501.) Under the general rules for interpreting writings, whether an instrument is ambiguous is a question of law, and as such, it is subject to the appellate court's independent review. (*Id.* at 1502; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

When a judgment is ambiguous, reference to the entire record, including findings of fact and conclusions of law, is proper to clarify uncertainty. (*Verner v. Verner*

(1978) 77 Cal.App.3d 718, 724; *In re Careaga's Estate, supra,* 61 Cal.2d at 475; *In re Marriage of Rose and Richardson* (2002) 102 Cal.App.4th 941, 949.) However, findings of fact, conclusions of law and the entire record only come into play if the judgment is ambiguous. *In re Careaga's Estate, supra,* 61 Cal.2d at 475; *In re Marriage of Rose and Richardson, supra,* 102 Cal.App.4th at 949.) Subsequent actions by the superior court also may be considered as bearing upon the judgment's intended meaning and effect. (*In re Marriage of Rose and Richardson, supra,* 102 Cal.App.4th at 949.)

Where facts in aid of interpretation are established by undisputed or uncontradicted extrinsic evidence, the resolution of an ambiguity in a writing is a question of law and is reviewed *de novo*. (*Societe Civile Succession Richard Guino v. Redstar Corp.* (2007) 153 Cal.App.4th 697, 701; *see also, Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Smith v. Selma Community Hospital, supra,* 174 Cal.App.4th at 1501-1052; *In re Marriage of Rose and Richardson, supra,* 102 Cal.App.4th at 949.) Facts are "undisputed" for this purpose if they are "settled" or "not open to dispute or question." (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.)

C. The Judgment States, Without Ambiguity, That Phelan Is Not Subject To Replacement Water Assessments for 2016 and 2017

It is basic hornbook law that the plain meaning of a writing prevails when it is clear and unambiguous. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 905; *see also* Code of Civil Procedure § 1858.) The first sentence of Section 8.3 of the Judgment clearly and unambiguously states:

> During the first two Years of the Rampdown Period no Producer will be subject to a Replacement Water Assessment.

(176 JA 157550)

"Year" means a calendar year. (Section 3.5.55.) The "Rampdown Period" is "seven Years beginning on the January 1 following entry of this Judgment and continuing for the following seven (7) Years." The Judgment was entered on December 23, 2015. Thus, the "first two Years of the Rampdown Period" are calendar years 2016 and 2017. (Sections 3.5.55, 8.2; 176 JA 157550:19-21.)

A "Producer" is a "Party who Produces Groundwater." (Section 3.5.30.) A "Party(ies)" is "any Person(s) that has (have) been named and served or otherwise properly joined, or has (have) become subject to this Judgment and any prior judgments of this Court in this Action [Section 3.5.1] and all their respective heirs, successors-in-interest and

assigns. For purposes of this Judgment a 'Person' includes any natural person, firm, association, organization, joint venture, partnership, business, trust, corporation, or public entity." (Section 3.5.27.) Phelan became a Party by being named as a Doe defendant by other parties and by filing a cross-complaint. (2 JA 2766, 2778-2798, 3061, 3235) Neither Phelan nor anyone else has ever contended Phelan is not a Party or a Person.

Phelan is a Producer (Section 3.5.50), a Party that Produces Groundwater. "Groundwater" is "[w]ater beneath the surface of the ground and within the zone of saturation, excluding water flowing through known and definite channels." (Section 3.5.14.) "Produce(d)" means "[t]o pump Groundwater for existing and future reasonable [and] beneficial uses." (Section 3.5.29.) Note that the definition of "Produce" includes no other conditions. Pumping Groundwater for reasonable and beneficial uses is Producing without regard to where the water is used or whether the pumping is related to a "Production Right" (Section 3.5.32) or other water right. The domestic water use for which Phelan pumps Groundwater is a reasonable and beneficial use. (49 RT 26885:6-11 [all uses in the adjudication area are reasonable and beneficial]; 41 RT 22983:12-22985:10; 176 JA 157549:12-15, 157549:20-22)

The Stipulating Parties (Section 3.5.48) and the superior court were meticulous in defining terms applicable

to Section 8.3, specifically defining "Year," "Party," "Person," "Producer," "Produce(d)," and "Groundwater." There is no ambiguity or uncertainty in these definitions; in fact, the purpose of defining a term is to make sure the term is used in the manner intended. To the extent the definitions turn on facts, the facts show these terms apply to Phelan. Thus, there can be no doubt that Phelan is a "Producer," a Party that Produces Groundwater, and is within the scope of the "grace period" from Replacement Water Assessments during the first two Years the Judgment is in effect, as set forth in Section 8.3.

D. The Superior Court's Exclusion of Phelan From the Replacement Water Assessment Grace Period Is Not Consistent With the Language Of The Judgment, Principles of Interpretation, or Fairness and Equity

In the April 2018 Order, the superior court, in search of the result it and the opposing parties were seeking, misconstrues the language of the Judgment and misstates the evidence on whether the physical solution would be effective, fair, just and equitable. Despite having concluded Phelan's pumping was "in the public good and the public interest" (AA 264:17-18), the superior court relied most heavily on factors it believed justify excluding Phelan from the Replacement Water Assessment grace period, arriving at conclusions based on inaccuracies, inconsistencies and

inequities. The end result is not an interpretation of the first sentence of Section 8.3 of the Judgment, but an improper amendment of the Judgment, in derogation of Code of Civil Procedure § 1858.

1. The Superior Court Distorts the Context in Which the Replacement Water Assessment Issue Arose

The April 2018 Order begins with a summary of the nature and scope of the case and a brief description of the Signed Order and the Judgment. (AA 263:3-26) Next, the April 2018 Order describes the purpose of the Rampdown Period.

> The judgment provides for a seven year period commencing in 2016 within which to bring the aquifer into balance so that annual water production does not exceed the native safe yield of the aquifer. With a gradual reduction of pumping by all water producers, by the end of the rampdown period, the total amount of pumping is expected to not exceed the annual recharge, and to bring the aquifer into balance.

(AA 263:27-264:3)

The Order then characterizes Phelan's motion as "seek[ing] a declaration that it is entitled to the benefit of Paragraph 8.3 of the physical solution . . . which provides that 'during the first two years of the Rampdown Period, no

producer will be subject to a replacement water assessment." (AA 264:5-9)

The superior court makes it appear Phelan is claiming to have a Production Right or some claim to the Native Safe Yield. (AA 265:22-24) Phelan never contended that its "right to produce" under Section 6.4.1.2 of the Judgment amounts to a "Production Right" under the Judgment. Phelan's argument was and is that the Replacement Water Assessment grace period applies to all Producers, whether they have Production Rights, rights to produce, or otherwise qualify as a "Producer" (a Party that pumps Groundwater for reasonable and beneficial uses), and by the terms of the first sentence of Section 8.3 of the Judgment the Replacement Water Assessment grace period applies to it.

The Order makes it appear Phelan raised the issue of its liability for Replacement Water Assessments for 2016 and 2017 out of the blue. The Order never mentions that Phelan's motion was a challenge to a resolution adopted by the Watermaster determining Phelan was required to pay a Replacement Water Assessment for water pumped in 2016 and 2017.

The superior court then made sure Phelan and the world understood the great beneficence that had been bestowed on it by the Judgment. "Notwithstanding that it has no correlative water right, in view of the public good

and the public interest, the court deemed it equitable to permit Phelan the right to continue to pump water and export it for use of its customers with quantity limits so long as it paid for the water based upon its replacement cost and so long it was not causing damage to the aquifer. The amount of water the Phelan can pump is capped at 1200 acre feet per year based on its historical usage. See Paragraph 6.4.1.2." (AA 264:17-22)

The April 18 Order distorts the context in which the grace period issue arose. That distortion and the superior court's patronizing attitude toward Phelan infects the April 18 Order as a whole.

2. The Superior Court *Looked Beyond* the Plain Language of the Judgment Without Ever *Looking At* the Plain Language of the Judgment

The superior court never analyzed the plain language of the Judgment to determine whether Phelan's interpretation of the first sentence of Section 8.3 of the Judgment was one to which that language was susceptible. For that matter, the superior court never considered whether the interpretation advanced by Phelan's opponents was one to which the language was susceptible either. Instead, it immediately embarked upon an analysis of everything but the language of the first sentence of Section 8.3.

"The issue requires interpretation of the judgment and the court approved physical solution. All parties contend that the stipulation and judgment is clear on its face although they arrive at different conclusions. No party has offered parol or extrinsic evidence to interpret the stipulation or the judgment. However, in ascertaining the intent of the judgment and the language used in its interpretation, it is necessary to consider the court's statements of decision, the evidence upon which the court based the approval of the physical solution, and the entirety of the physical solution and the judgment." (AA 265:15-21)

Because such a search for meaning in things other than the language of the Judgment should be undertaken only when the language of the judgment is ambiguous (*In re Careaga's Estate, supra,* 61 Cal.2d at 475; *In re Marriage of Rose and Richardson, supra,* 102 Cal.App.4th at 949), the superior court erred in failing to consider the plain language of the Judgment and whether it is reasonably susceptible to either of the interpretations placed on that language by the parties disputing the matter.

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3. The Stipulating Parties and The Superior Court Had Ample Opportunity To Exclude Phelan from the Replacement Water Assessment Grace Period and Did Not Do So

The physical solution was formulated by a group of Parties to this Action and many, but not all, Parties to the Action stipulated to it. It was then presented to the superior court for its consideration and adoption.

> As the high court has recognized, stipulated judgments bear the earmarks both of judgments entered after litigation and contracts derived through mutual agreement . . . [A] stipulated judgment is indeed a judgment; entry thereof is a judicial act that a court has discretion to perform. Although a court may not add to or make a new stipulation without mutual consent of the parties . . . , it may reject a stipulation that is contrary to public policy . . . , or one that incorporates an erroneous rule of law . . . . "While it is entirely proper for the court to accept stipulations of counsel that appear to have been made advisedly, and after due consideration of the facts, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter."

(*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 663-664.)

Thus, the Judgment is not purely a stipulation such that an argument could be made that there is a contractual element to it. The superior court, as was within its power, considered its terms, heard evidence on whether it was fair, just and equitable, and, with minor modifications, adopted it as its own. (*California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480-481; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287-288.)

The Stipulating Parties (Section 3.4.58) submitted their stipulation and the proposed stipulated judgment and physical solution to the superior court on March 4, 2015. (129 JA 126125-126256) Nearly ten months passed while the superior court went through the process of hearing evidence and entering the Judgment. At any time during these ten months, the Stipulating Parties or the superior court could have proposed a change to make the first sentence of Section 8.3 inapplicable to Phelan. The Stipulating Parties or the superior court could have revised the Judgment to state that "no Producer except Phelan" will be subject to a Replacement Water Assessment during the first two Years the Judgment is in effect. Or the Stipulating Parties or the superior court could have changes the language to state that only Producers with a Production Right, or Producers subject to pumping restrictions during

the Rampdown Period, would be excused from paying a Replacement Water Assessment for water pumped during that period of time. They did not do so.

4. Section 5.1.10 of the Judgment is Irrelevant to the Question Whether the Replacement Water Assessment Grace Period Applies to Phelan

The Stipulating Parties' failure to expressly limit the Replacement Water Assessment grace period to exclude Phelan is made more significant by the fact the Stipulating Parties clearly had thought about what rights they did not want Non-Stipulating Parties (Section 3.5.24) to have. The Stipulating Parties "agreed to provisions in the Physical Solution which are only available by stipulation. These provisions include, without limitation, the right to transfer Production Rights [Section 3.5.32] and the right to Carry Over [Section 3.5.9] rights from years to year, as set forth in the Judgment. Non-Stipulating Parties, or any other Parties contesting the Judgment, shall not be entitled to the benefit of these provisions, and shall have only the rights to which they may be entitled by law according to proof at trial." (129 JA 126130)

Similar language appears in Section 5.1.10 of the Judgment with respect to Non-Stipulating Parties who are later found to have a Production Right. (176 JA 157544-157545) Notably, the superior court's statement of decision regarding the Judgment is silent about Section 5.1.10 as it

relates to Phelan and the Replacement Water Assessment grace period, as well as the meaning or application of Section 5.1.10 to "benefits" of the Judgment not enumerated in that section. (AA 152:2-21, 163:26, 166:23, 167:23) Nevertheless, Section 5.1.10 of the Judgment is cited by the superior court as a reason Phelan must pay a Replacement Water Assessment when no other Producer must do so. (AA 266:24-28; 267:28-268:3)

Section 5.1.10, however, identifies only Carry Over (Section 3.5.9) and Transfers (Section 16) as "benefits" that are denied to non-Stipulating Parties and non-Supporting Parties. (176 JA 157544:26-157545:4) While Section 5.1.10 purports to exclude Non-Stipulating Parties and non-Supporting Parties from other benefits by the phrase "including but not limited to" (176 JA 157545:3), the failure to identify any other specific benefits denied to Non-Stipulating Parties and Non-Supporting Parties would render Section 5.1.10 unconstitutionally vague, a denial of due process, if it were applied to other aspects of the Judgment. The opponents of Phelan's motion apparently recognized this issue, as in their oppositions to Phelan's motion they did not argue Section 5.10 of the Judgment as grounds for excluding Phelan from the "benefit" of the Replacement Water Assessment grace period.

No one reading the Judgment would guess that the Replacement Water Assessment grace period is a benefit

denied to Non-Stipulating or Non-Supporting Parties. Further, the potential exists for selective application of Section 5.1.10 to some parties, but not others, as is the case here. By the time the Judgment was entered, the identities of at least some Non-Stipulating Parties with pumping allocations were known. (176 JA 157510:5-18; AA 152:2-21) But the only Party identified in Resolution R-18-04 as being subject to a Replacement Water Assessment in 2016 and 2017 was Phelan. (AA 19) If Section 5.1.10 meant the Replacement Water Assessment grace period did not apply to Non-Stipulating Parties, the Watermaster should have named them in that resolution too. The Watermaster's failure to do so confirms that Section 5.1.10 has nothing to do with the first sentence of Section 8.3.

5. The Superior Court Seeks to Redefine The Terms "Produce" and "Producer" to Phelan's Disadvantage Without Regard to Its January 2018 Order

The superior court suggests it is Phelan that is misinterpreting the terms "Produce" and "Producer." "The essence of Phelan's theory is that because it pumps water from the aquifer it is a producer, and that Paragraph 8.3 is unqualified in its description of 'producer.'" (AA 264:22-24)

The superior court turned to the balance of Section 8.3 to support a different interpretation of the first sentence. "While the first sentence in paragraph 8.3 does specifically eliminate the replacement water assessment

during the first two years of the rampdown period, and in a vacuum might appear to support Phelan's argument, the second sentence makes clear to whom the relief applies." (AA 265:1-4) According to the superior court, it applies to parties with a right in the Native Safe Yield (AA 265:1-8) and apparently also to "Parties with a prescriptive or other appropriative or 'legacy' right to produce water from the native yield are described in paragraph 5.1 et sq. [sic]." (AA 265:9-12)

In an attempt to distinguish Phelan from other Producers, the superior court states: "While Paragraph 3.5.30 defines a producer as a party who produces groundwater, 'produce' is defined as pumping that is for reasonable and beneficial uses. Paragraph 3.5.29." (AA 265:12-14) The implication here, that Phelan does not pump for reasonable and beneficial uses, is completely at odds with the superior court's findings in its statements of decision and statements on the record to the effect that Phelan's use is reasonable and beneficial. (41 RT 22983:12-22985:10; 176 JA 157549:12-15, 157549:20-22)

Moreover, in the April 2018 Order itself, the superior court said it was equitable in view of "the public good and the public interest" for Phelan to be allowed to continue to pump. (AA 264:18-19) The superior court gives no indication of what had transpired in between the third and fourth pages of the Order to turn Phelan's pumping from an

activity in the public good and the public interest, into a use that is not reasonable and beneficial.

Previously, in its January 2018 Order, the superior court stated Section 8.3 "does not limit the definition of 'producers' to landowner or overlying parties. While Section 3.5.26 defines 'overlying production rights' as those rights held by the parties listed on Exhibit 4 to the judgment, which includes landowner parties, 'producers' is defined as 'a party who produces Groundwater.' Section 3.5.30." (AA 29:2-5) "Section 8.3 specifically refers to producers without qualification as to public water producers/purveyors or overlying owners. 'Producers' in [sic] defined in the judgment Section 3.5.30 'as a party who produces ground water.'" (AA 28:1-3) The superior court concluded in the January 2018 Order that the Public Water Suppliers are included in the provisions of Section 8.3, stating that it "specifically refers to producers *without qualification.*" (AA 27:22-28:1)

But despite the importance of consistency in interpretation of the Judgment, to ensure it is intelligible to those who are bound by it, the superior court rejected its own interpretation of "Producer" from just a few months prior. Despite having said in the January 2018 Order that the term "producer" in Section 8.3 was not qualified in any way, in the April 2018 Order, the superior court said the term "producer" in the first sentence of Section 8.3 "is not

unqualified. It limits the definition of 'producers' to parties having a right to pump from the native yield but who also have a duty to reduce pumping." (AA 268:7-9) The superior court makes no attempt at explaining this change of position regarding who is a "Producer."

The superior court concluded Phelan's lack of a "water right" in the traditional sense meant it is not a "Producer." (AA 265:22-26, 266:28-267:12) "Because Phelan has no right to pump water from the native yield without paying for the same, it is not a water producer as defined in Paragraphs 5.1 et seq." (AA 267:11-12) But Section 5 is not where "Producer" is defined. "Producer" is defined in Section 3.5.30 simply as "A Party who Produces Groundwater." There is nothing in that definition, or any of the definitions of defined terms within it, that requires a Party to have a right to pump water from the Native Safe Yield. The superior court recognized this in its January 2018 Order regarding the Public Water Suppliers' motion. (AA 28:2-3, 29:4-5) Moreover, even a Party that has a Production Right would not have been subject to a Replacement Water Assessment if it Produced more than its Pre-Rampdown Production (Section 3.5.28) during the first two Years of the Rampdown Period, even though it has no right under the Judgment to Produce more than its Pre-Rampdown Production in any event.

6. That Phelan Has No Rampdown Obligation Is Not A Valid Basis For Concluding Phelan Is Not A Producer

The superior court cites Phelan's lack of a Rampdown obligation as a reason Phelan must pay Replacement Water Assessments when no other Producer is required to do so. (AA 266:9-22) But there is no language in the first sentence of Section 8.3 that says it only applies to Parties with a Rampdown obligation. The reference to the Rampdown Period simply defines a period of time during which no Producer will pay a Replacement Water Assessment. Moreover, captions and headings appearing in the Judgment are solely "reference aids for ease and convenience" and "do not "define or limit the scope or substance of the provisions they introduce, nor shall they be used in construing the intent or effect of such provisions. (Section 20.12; 176 JA 157581:8-11) Thus, the fact Section 8.3 deals with other aspects of the Rampdown is not a factor properly considered in interpreting the first sentence of Section 8.3.

7. Another Party Uses Water Outside The Adjudication Area, Yet Still Participates in the Replacement Water Assessment Grace Period

The superior court cites Phelan's use of the water pumped outside the adjudication area as another reason Phelan is not a Producer, continuing to characterize Phelan as an exporter. (AA 265:26-266:1, AA 149:9-18)

Boron Community Services District also transports water out of the adjudication area, just like Phelan, but it is not excluded from the Replacement Water Assessment grace period by virtue of that fact. (176 JA 157548:17-19) It was not a target of Watermaster Resolution No. R-18-04. (AA 19) Moreover, Boron Community Services District is also entitled to Produce up to 78 acre-feet of Imported Water Return Flows each year, without ever having to pay a Replacement Water Assessment on those Imported Water Return Flows. (Sections 5.2.2, 6.4.1; 176 JA 157546:6-7, 157546:9-15) No reason is provided for the differential treatment of Boron Community Services District and Phelan with regard to their "export" of water from the adjudication area.[6]

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[6] 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 v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241; *City of San Bernardino v. City of* Riverside (1921) 186 Cal. 7, 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. Hutchins, *The California Law of Water* Rights (1956), p. 458, p. 492, fn. 57.) (*See also* 49 RT 26634:20-26635:7) No determination was ever made that Phelan "exports" water outside the watershed.

8. Other Parties Who Contributed To The Overdraft Of The Adjudication Area Participate in the Replacement Water Assessment Grace Period

The superior court recognized that everyone's pumping in 2016 and 2017 would "cause harm to the basin" if they did not reduce their pumping. (RT2 10:8-18) But "harm to the basin" is not the test for determining whether a Phelan gets the benefit of the Replacement Water Assessment grace period.[7] The only test under the terms of Section 8.3 of the Judgment is whether Phelan is a Producer, and it is indisputable that, under the definitions in the Judgment, Phelan is a Producer.

Nevertheless, the superior court concluded the overdrafted condition of the basin was a reason why Phelan must pay Replacement Water Assessments when no other Party is required to do so. (AA 266:2-6) If Phelan "is not required to pay for water pumped during 2016 and 1017 [sic], its pumping would contribute to the overdraft by pumping water to which it has no right." (AA 267:17-19)

The Overdraft (Section 3.5.25) existed long before Phelan began pumping Well 14 and would be further exacerbated during the first two Years of the Rampdown

[7] "Harm to the basin" is not the same as "Material Injury," which is a defined term in Section 3.5.18 of the Judgment. There has never been a finding that Phelan's production resulted in Material Injury as such term is defined in the Judgment.

Period by *all* Parties who Produce Groundwater, not just by Phelan. Phelan only began pumping in 2006 (127 JA 123837:5), in contrast to other Parties who had been pumping and overdrafting the basin for decades. (AA 141:25:26, 145:8-12, 146:19-23; 48 RT 26267:5-26268:1 [Boron Community Service District exporting water since 1953])

Everyone who pumped groundwater and contributed to the overdraft "harmed the basin" to some degree. All Producers contributed to the Overdraft, most to a much greater degree than Phelan, because it had been pumping for a much shorter period of time. Still, the superior court concluded that the other Producers, who were much greater contributors to the Overdraft, would benefit from the Replacement Water Assessment grace period, while Phelan would not. Nothing in the Judgment states, or even implies, that only Phelan should pay for contributing to the Overdraft during 2016 and 2017.

9. <u>There Is No Evidence In The Record That Phelan's Non-Payment of a Replacement Water Assessment for Two Years Would Prevent the Basin from Achieving Balance</u>

According to the superior court, the testimony of expert witnesses is yet another reason Phelan should have to pay the Replacement Water Assessment when no other Party is required to do so. "No expert opinion quantified

Phelan's water use as either a plus or a minus- it was intended to have no net impact." (AA 267:16-17) "The expert opinions were based on the provisions of the stipulation and court's various trial phase statements of decision, subject to the specifics in the proposed judgment and the stipulation. The testimony provided justification for the efficacy of the physical solution, showing how the rampdown process would be able to bring the basin into balance within 7 years. The entirety of the statements of decision and the findings of the court upon which the experts [sic] opinions were based included findings that Phelan had no water rights (and because all water pumped by it would be replaced by water purchased by water replacement assessments, Phelan's water use was not subject to the rampdown provisions)." (AA 267:21-28)

In fact, none of the experts who testified about the efficacy of the physical solution cited the statements of decision as a basis for their opinions. More importantly, none of the witnesses who testified that the physical solution would bring the basin into balance testified about the effect of the Replacement Water Assessment grace period on the basin achieving balance, or about the effect Phelan's participation in the Replacement Water Assessment grace period would have on the basin achieving balance. (46 RT 25332:5-25470:27; 47 RT 25601:23-25658:13) In fact, when Phelan's counsel attempted to ask

one of the experts, Dr. Williams, a question on cross-examination related to the Replacement Water Assessment, the objection that the question was outside the scope of the direct testimony was sustained. (47:25627:24-25628:1)

Further, Dr. Williams testified that the basin would come into balance whether Phelan pumped or not, and that Phelan's pumping prevented 500 acre feet per year from leaving the basin. (47 RT 25609:19-27) Dr. Williams looked at the Rampdown Period as five years, not seven, making the two-year Replacement Water Assessment grace period irrelevant to his opinion. (47 RT 25632:3-21)

Thus the superior court's statements about the expert testimony are incorrect. The expert testimony does not support the conclusions reached by the superior court in the April 2018 Order.

IV. CONCLUSION

For all of the foregoing reasons, the Court should find that the Judgment does not obligate Phelan to pay Replacement Water Assessments for 2016 and 2017 and that Watermaster Resolution No. R-18-04 is invalid and of no force and effect because it is inconsistent with the Judgment. Accordingly, the superior court's order denying Phelan's motion to invalidate the watermaster's resolution must reversed, and the case must be remanded to the superior court with direction to enter a new order granting Phelan's motion.

DATED: May 6, 2021

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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 8,102 words, excluding cover pages, tables of contents and authorities, and signature lines, as counted by the Microsoft Word for Office 365 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 May 6, 2021, 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 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 May 6, 2021, at Irvine, California.

/s/ Linda Yarvis
Linda Yarvis