

Case No. F075451

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

ANTELOPE VALLEY GROUNDWATER CASES

PUBLIC WATER SUPPLIERS' RESPONDENTS' BRIEF

(Appeal of 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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ISSUE PRESENTED

To establish an appropriative groundwater right, appellant Phelan must prove that the groundwater it pumps from the Antelope Valley Basin is surplus water. A surplus exists when total pumping is less than the maximum amount of groundwater that could be withdrawn without adverse effects on the basin's long-term supply. If pumping exceeds that maximum, there is an overdraft and there is no surplus. There has been an overdraft in the basin since 1951. Does Phelan have an appropriative right?

STANDARDS OF REVIEW

The principal issue—whether Phelan has met its burden of proof to show the existence of a surplus—is a question of fact. The trial court expressly found that Phelan failed to meet its burden of proof. The courts have held that a special standard of review applies in such cases.

'In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment.' [Citation]

...

'Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes

whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." [Citation]¹

Phelan argues that because the trial court granted a motion for judgment at the conclusion of Phelan's case, "the judgment as it pertains to Phelan is functionally a judgment of non-suit." This is incorrect. The reason a stricter standard of review is applied in the case of a nonsuit is that the trial court has taken the case out of the hands of the trier of fact. Here, the decision was made by the trier of fact, on grounds that Phelan did not sustain its burden of proof. In such a case, the standard of review set forth above applies, even when the court has granted a motion for judgment.²

As to the issue whether Phelan has a right to recapture return flows from native water, the trial court based its decision on both the controlling law and on the facts. To succeed on appeal, Phelan would have to show both that the trial court applied the wrong legal rule (under de novo review), and that the factual findings were not supported by substantial evidence.

¹ *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465–466

² *Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732–733.

Phasing of trial is governed by an abuse of discretion standard.³

Finally, whether the physical solution is supported by the evidence is governed by a traditional substantial evidence standard. The trial court's resolution of disputed factual issues must be affirmed so long as supported by substantial evidence.⁴ The testimony of a single witness may suffice.⁵ The substantial evidence rule applies to the testimony of expert witnesses as well as that of lay witnesses.⁶

STATEMENT OF THE CASE

This is one of several appeals in this coordination proceeding. The coordinated cases comprise a comprehensive adjudication of the rights to groundwater in the Antelope Valley Adjudication Area ("Basin"). The cases were originally filed in 1999 and concerned a relatively small number of parties; they were broadened to a comprehensive adjudication of all groundwater rights in 2004.⁷

Appellant Phelan Piñon Hills Community Services District (Phelan) owns a well within the Basin, from which it pumps groundwater for service

³ *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.

⁴ *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.

⁵ *Marriage of Mix* (1975) 14 Cal.3d 604, 614.

⁶ *Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 750.

⁷ See Respondents' Appendix 1.

to its customers outside the Basin. It first served groundwater from this well to customers in 2006, over a year after the adjudication was commenced.⁸

The cases culminated in a stipulation by many parties—not including Phelan but representing the majority of groundwater production in the Basin—to a proposed judgment and physical solution.⁹ The court held a trial as to all remaining parties, including Phelan. The court adopted the proposed judgment and physical solution as its own physical solution and made additional findings. One of those findings was that Phelan had no right to pump groundwater from the Basin except under the terms of the physical solution.¹⁰ The physical solution provides that Phelan may produce (defined in the judgment to mean pump for reasonable and beneficial use) up to 1200 acre-feet of groundwater from the Basin and deliver it to its service area, but Phelan must pay the cost to replace this water with imported water.¹¹

Along the way, the court conducted multiple phases of trial, and issued a written ruling for each phase. These preliminary rulings are important to the resolution of this appeal.

⁸ 127 Joint Appellants' Appendix 123837:5 (JA) (stipulated fact).

⁹ The definition and legal basis for a physical solution in groundwater adjudications are discussed at pages 33 to 34 below.

¹⁰ 176 JA 157468:9–10.

¹¹ 176 JA 157531; 176 JA 157548.

- In Phase 1, the court defined the boundaries of the Basin.¹²
- In Phase 2, the court found that the Basin as so defined was hydrologically connected, which the court defined as “that condition where ground water actually or potentially moves from one part of the basin to the other with the potential to affect the water status or condition of the other portion of the basin aquifer.”¹³ As a result, the Basin constituted a single basin, not multiple basins.¹⁴
- In Phase 3, the court found the Basin was in overdraft, and had been since at least 1951, and determined the total safe yield of the Basin. “Overdraft” is defined in the judgment as “Extractions in excess of the Safe Yield of water from an aquifer, which over time will lead to a depletion of the water supply within a groundwater basin as well as other detrimental effects, if the imbalance between pumping and extraction continues.”¹⁵ “Safe Yield,” in turn, is defined as “The amount of annual extractions of water from the Basin over time equal to the amount of water needed to recharge the Groundwater

¹² 1 JA 1786, 1789:7–22.

¹³ 2 JA 2730:4–19.

¹⁴ Cf. *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 249–250 (*San Fernando*) (areas with no hydrologic connection constitute separate basins).

¹⁵ 176 JA 157531.

aquifer and maintain it in equilibrium, plus any temporary surplus.”¹⁶

- In Phase 4, the court determined each party’s groundwater production in the years 2011 and 2012.¹⁷
- The court conducted a Phase 5 trial on issues not relevant to this appeal but did not issue a ruling because of the pending settlement.

When it became clear that a settlement would not be reached with Phelan, the court conducted a separate trial on Phelan’s claims. This trial was itself bifurcated. The first part of the trial concerned Phelan’s second and sixth causes of action, for appropriative rights and return flow rights respectively. Following Phelan’s presentation of evidence, the court granted a motion for judgment and issued a partial statement of decision.¹⁸ As to the second cause of action, the court held that Phelan did not have an appropriative right to pump groundwater, because it did not show that it pumped surplus water.¹⁹ As to the sixth cause of action, the court held that Phelan did not have any right to produce return flows from the Basin.²⁰ The court acknowledged that it had not yet made a determination as to whether

¹⁶ 176 JA 157533.

¹⁷ 79 JA 75212.

¹⁸ 128 JA 125626–125637.

¹⁹ 128 JA 125633:26–28.

²⁰ 128 JA 125634–125365

each party's water use was reasonable and beneficial, and said that it would do so prior to the entry of final judgment.²¹

After this partial trial, the stipulating parties filed the stipulated judgment and physical solution with the court for approval. The second part of the Phelan trial was held in conjunction with the Phase 6 "prove-up" trial on the stipulated judgment, and the court issued its ruling as part of its final statement of decision.²² The court reiterated its conclusions that because of the long-standing overdraft, there was no surplus groundwater available for Phelan to pump and acquire or enlarge an appropriative right; that Phelan's appropriations of Basin groundwater invaded other parties' Basin rights; and that because Phelan had dismissed its prescriptive rights claim, it had no right to pump groundwater from the Basin except under the terms of the court-approved physical solution.²³

As part of the statement of decision, the court also made findings that each party claiming overlying water rights had used water reasonably and beneficially, as required by Article X, Section 2 of the California Constitution, and that the total amount of overlying water use exceeded the native safe yield.²⁴ "Native Safe Yield" is defined in the judgment as "Naturally occurring Groundwater recharge to the Basin, including 'return

²¹ 128 JA 125636:11–23.

²² 176 JA 157458, 157467–157468.

²³ 176 JA 157468:5–10.

²⁴ 176 JA 157468:15–157469:26.

flows' from pumping naturally occurring recharge, on an average annual basis. Imported Water Return Flows are not included in Native Safe Yield."²⁵

ARGUMENT

1. Phelan does not have a water right.

A. Phelan does not have an appropriative water right, because there was no surplus water in the Basin available for it to pump.

“Courts typically classify water rights in an underground basin as overlying, appropriative, or prescriptive.”²⁶ An overlying right arises out of the ownership of land, and is the right of a landowner to pump groundwater and use it on the overlying land.²⁷ Phelan does not have an overlying right because it does not use the water on its overlying land.

An appropriative right is one for non-overlying use, such as delivery to customers or use outside the basin. An appropriator only has a right to pump “surplus” water, as will be discussed below.²⁸

²⁵ 176 JA 157530.

²⁶ *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 278 (*Santa Maria*) (quoting *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240 (*Mojave*)).

²⁷ See *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 725.

²⁸ *Ibid.*

A prescriptive right is the result of an appropriator pumping groundwater that is not surplus for a continuous five-year period. “An appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right.”²⁹ Phelan alleged in its cross-complaint that it had a prescriptive right, but abandoned this claim before trial.³⁰

Thus, the only water right claim asserted and pursued by Phelan is for an appropriative right. The principal question for this appeal is whether there is surplus water in the Basin for Phelan to appropriate.

The burden of proof is on the appropriator to show the existence of surplus.³¹ Phelan did not sustain its burden of proof.

The California Supreme Court has defined surplus as follows: “A ground basin is in a state of surplus when the amount of water being extracted from it is less than the maximum that could be withdrawn without adverse effects on the basin’s long term supply. . . . Overdraft commences whenever extractions increase, or the withdrawable maximum decreases, or both, to the point where the surplus ends. Thus on the commencement

²⁹ *Id.* at p. 726.

³⁰ 124 JA 121290:16–18; see AOB 23, n. 7.

³¹ *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 381 (*Peabody*).

of overdraft there is no surplus available for the acquisition or enlargement of appropriative rights.”³²

In the Phase 3 trial, the court found the Basin was in overdraft, and had been since at least 1951. It reaffirmed this finding in its ultimate statement of decision and in the judgment. According to the Supreme Court’s definition in *San Fernando*, this means that since 1951, there has been no surplus groundwater available for Phelan or anyone else to appropriate.

Phelan does not contest the court’s finding of overdraft. Indeed, it alleged the existence of overdraft in its own cross-complaint. Instead, Phelan asserts rights based on a concept of “local surplus.” First, it cites its own definition of surplus water from its cross-complaint: “Surplus water is that amount that can be extracted without causing a drop in the water table or subsidence.”³³ It cites no legal authority for this definition, which omits two critical concepts from *San Fernando*: that surplus is a state of an entire groundwater basin, and that surplus disappears when the basin goes into overdraft. Next, Phelan claims there was “undisputed evidence” that there was surplus water under this definition in the Buttes Subunit, which is a subarea of the Basin: “[T]he evidence shows the Buttes Subunit has experienced generally stable water levels during the period of time studied

³² *San Fernando, supra*, 14 Cal.3d at pp. 277- 278.

³³ AOB 56.

for purposes of this case, and has even seen rising groundwater levels at times when groundwater levels elsewhere were declining.”³⁴

The trial court rejected this argument based on the *San Fernando* definition. After referring to its finding in the Phase 2 trial that there was hydraulic connectivity within the entire Basin,³⁵ the court stated:

Phelan Piñon Hills argues that surplus water exists in the Butte subbasin where Well 14 is located. In support of its contention, Phelan Piñon Hills offered testimony by Mr. Harder that the groundwater levels in the Butte subbasin remain relatively the same since the 1950’s and there is no land subsidence in the Butte subbasin. Mr. Harder’s testimony, however, does not contradict the Court’s finding in Phase 3 that the Adjudication Area is in overdraft and no surplus water exists.

...

[I]t is not surprising that the overall overdraft condition would impact the Butte sub basin differently than it impacts the Lancaster sub basin. Uneven impact from groundwater pumping is not an indication that an overdraft condition does not exist or that surplus water exists.³⁶

The court also rejected Phelan’s argument based on factual findings that Phelan’s pumping had more than local effects:

The Court finds that Phelan Piñon Hills’ pumping of groundwater from the Antelope Valley Groundwater Basin negatively impacts the Butte sub basin and the Adjudication Area. There was no credible testimony or evidence offered by Phelan Piñon Hills to the contrary.

³⁴ AOB 64.

³⁵ 128 JA 125628:23–26. Phelan did not dispute this finding.

³⁶ 128 JA 125633.

It is uncontested that Phelan Piñon Hills' Well 14 is located in an area of the Adjudication Area generally known as the Butte subbasin, which borders the Lancaster sub basin. [Citation] The Court finds that the Butte subbasin and the Lancaster sub basin are hydrologically connected. The Court also finds that groundwater from the Butte sub basin is a source of groundwater recharge for the Lancaster sub basin, and that groundwater pumping in the Butte sub basin could lower the groundwater level in the aquifer. The Court further finds that Phelan Piñon Hills' operation of its three groundwater wells located near Well 14 intercepts groundwater that would otherwise flow into and recharge the Adjudication Area. Based on these uncontroverted facts, the Court concludes that Phelan Piñon Hills' pumping of groundwater from the Antelope Valley Groundwater Basin as described in Bulletin 118 negatively impacts the Butte subbasin, the Lancaster subbasin, and the Adjudication Area.³⁷

Phelan has not challenged these factual findings, and they are supported by the testimony of its expert witness.³⁸

As the court recognized, the way to deal with local differences in groundwater levels and hydro-connectivity is ultimately a basin management decision.³⁹ Contrary to Phelan's contentions, the judgment and physical solution provides methods for dealing with these differences. For example, the judgment and physical solution requires the Watermaster to "use Replacement Water Assessment proceeds to purchase Replacement Water, and deliver such water to the area deemed most

³⁷ 128 JA 125635:15–28. See also 128 JA 125633:26–28.

³⁸ See 41 RT 22993:20–22996:19 (hydrologic connection, recharge, effect of pumping); 41 RT 23007:18–24 (interception of recharge by other wells).

³⁹ 14 JA 16379:1–13.

appropriate as soon as practicable.”⁴⁰ If groundwater levels are not going down in the Buttes subunit, it may be appropriate to deliver replacement water somewhere else.

The trial court’s decision to treat the Basin as a single unit for the purpose of determining the presence or absence of surplus was thus correct on both the facts and the law.

B. The court determined that existing overlying uses were reasonable and beneficial and exceeded the native safe yield, so there was no surplus available for Phelan to pump.

The California Constitution limits water rights to reasonable and beneficial uses.⁴¹ Courts have therefore stated that surplus water includes any water not needed for reasonable beneficial use of those having prior rights.⁴² Phelan argues that the court made no determination of the parties’ reasonable and beneficial use, which was required in order to determine whether there was a surplus. In *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, the trial court found that there was no surplus for an appropriator, but did not consider the reasonableness of the prior uses. The appellate court reversed, holding that under the then new constitutional requirement of

⁴⁰ 176 JA 157569:24–27.

⁴¹ *Mojave, supra*, 23 Cal.4th at p. 1241; *Santa Maria, Supra*, 211 Cal.App.4th at pp. 277- 278.

⁴² See, e.g., *Santa Maria* at p. 279.

reasonable and beneficial use, the trial court must determine whether the existing uses were reasonable and beneficial.⁴³ The court must then determine whether there is a surplus subject to appropriation. The appellate court found that some of the prior uses were unreasonable, such as using irrigation water to kill gophers.⁴⁴

In *Corona Foothill Lemon Co. v. Lillibridge*, the appellants relied on *Tulare* to argue that the trial court should have adjudicated, as between the overlying owners (who had priority rights), the amount to which each was entitled before determining whether there was a surplus. The court distinguished *Tulare*, stating that in the case before it, the trial court had found the overlying owners were putting all water in the field to reasonable beneficial use. The court held that this finding conclusively showed there was no surplus.⁴⁵

Similarly, in this case, the trial court devoted a section of its statement of decision to the reasonable and beneficial use of the overlying owners.⁴⁶ It concluded, based on “credible and undisputed” expert witness testimony, and substantial evidence from the Phase 4 and Phase 6 trials, that “each stipulating Landowner Party and each Public Overlier has

⁴³ *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 524–25 (*Tulare*)

⁴⁴ *Id.* at 567–68.

⁴⁵ *Corona Foothill Lemon Co. v. Lillibridge* (1937) 8 Cal.2d 522, 530-531.

⁴⁶ See 176 JA 157468–157469.

reasonably and beneficially used amounts of water which collectively exceeded the total native safe yield.”⁴⁷ The court went on to say, “The evidence further shows that the Basin’s native safe yield alone is insufficient to meet the reasonable and beneficial uses of all users”⁴⁸ These findings are virtually identical to the Supreme Court’s findings in *Corona*. And just as in *Corona*, the finding conclusively shows there is no surplus for appropriation.

Thus, Phelan’s contention that the court did not consider reasonable and beneficial use is wrong. Phelan nevertheless contends that the court should have determined reasonable and beneficial use first, before determining overdraft and safe yield in the Phase 3 trial. But 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.⁴⁹

Next, Phelan contends that reasonable and beneficial use must be determined before surplus, based on language from *Tulare*⁵⁰ and *Peabody v. City of Vallejo*.⁵¹ But language like “first” and “then” in those cases is

⁴⁷ 176 JA 157469:7–13.

⁴⁸ 176 JA 157469:16–17.

⁴⁹ 6 JA 6044:8–9.

⁵⁰ *Tulare, supra*, 3 Cal.2d at pp. 524–525.

⁵¹ *Peabody, supra*, 2 Cal.2d at pp. 368–369.

properly construed to refer to the order of consideration by the court, not the order of presentation of evidence. In this case, when the trial court issued its partial statement of decision on Phelan's second and sixth causes of action and found no surplus, it acknowledged that it had not yet determined whether each party's water use was reasonable and beneficial. The court stated that it would make that determination prior to the entry of final judgment.⁵² 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.⁵³

Phelan claims to have suffered harm as a result of the order of proof, but is vague about the nature of the harm, except to say that Phelan was prevented from presenting a portion of its case. Presumably, this means the court prevented it from presenting evidence of unreasonable use. An evaluation of that contention requires a chronology of the relevant events.

- Phelan put reasonable and beneficial use at issue in its cross-complaint, which contained a seventh cause of action for declaratory relief regarding unreasonable use of water.⁵⁴ This was after trial of Phases 1 (boundaries) and 2 (hydrologic

⁵² 128 JA 125636:11–23

⁵³ See *Phillips v. Phillips* (1953) 41 Cal.2d 869, 874 (court may change its findings of fact or conclusions of law at any time before entry of judgment).

⁵⁴ 2 JA 2795–2796.

connection), but before Phase 3 (safe yield and overdraft).

The parties were advised well before Phase 3 of the subject matter to be tried in that phase, but Phelan made no contention at that time that reasonable and beneficial use had to be determined first.⁵⁵

- As previously noted, the trial court reserved the issue of reasonable and beneficial use in its partial statement of decision on Phelan's second and sixth causes of action, for appropriative rights and recapture of return flows, respectively.
- Thereafter, Phelan filed a status conference statement in which it declared its intention to proceed to trial on its remaining causes of action, including its seventh cause of action for unreasonable use of water by cross-defendants pursuant to California Constitution Article X, Section 2.⁵⁶
- However, in its trial brief for its second trial, Phelan said it would not be presenting evidence on that cause of action but reserved the right to do so during the prove-up hearings for the physical solution.⁵⁷

⁵⁵ 6 JA 6044:8–9.

⁵⁶ 133 JA 131481:17–18.

⁵⁷ 139 JA 136259:3–12 & n. 1.

- The Public Water Suppliers filed a trial brief for Phelan's second trial, in which they informed the court that the settling parties intended to present evidence at the prove-up hearings that the groundwater had been put to reasonable and beneficial use pursuant to Article X, Section 2 of the California Constitution. They asked the court not to make any findings on reasonable use until first hearing that evidence.⁵⁸
- Phelan filed a response to this brief and also asked the court not to make a final decision as to Phelan until all the evidence was in.⁵⁹ (The court honored this request and put its final decision as to Phelan in its final statement of decision.)
- Trial was held on Phelan's remaining causes of action.⁶⁰
- Phelan filed a case management statement for the prove-up of the stipulation for judgment and physical solution. Contrary to its earlier statement, Phelan said it did not intend to present any additional evidence, except rebuttal evidence. Phelan did not mention reasonable and beneficial use.⁶¹

⁵⁸ 139 JA 136481:4–8.

⁵⁹ 141 JA 137442:8–11.

⁶⁰ 141 JA 137470–137472.

⁶¹ 141 JA 137612.

- Phelan filed a trial brief for the prove-up hearings, reiterated that it would only provide rebuttal testimony, and which did not mention reasonable and beneficial use.⁶²
- Phelan did not offer any evidence or argument at the prove-up hearings relating to reasonable and beneficial use.
- Following the prove-up hearings, Phelan objected to the Public Water Suppliers' proposed statement of decision, but did not object to the findings of reasonable and beneficial use.⁶³
- In fact, Phelan presented its own alternative statement of decision, which included the reasonable and beneficial use findings proposed by the Public Water Suppliers. These findings were adopted by the court in its final statement of decision.⁶⁴

As this chronology makes clear, the court never prevented Phelan from submitting evidence as to reasonable and beneficial use; Phelan just failed to do so. Thus, the trial court did not abuse its discretion in phasing the trial, and the court was justified in confirming in its final statement of decision that there was no surplus in the Basin for Phelan to pump.

⁶² 162 JA 148715.

⁶³ 175 JA 156590

⁶⁴ 175 JA 156779, 156789–156790.

C. Pumping outside the Basin as defined by the court does not give Phelan any rights.

Throughout its brief, Phelan refers to what it calls the Antelope Valley Groundwater Basin, or AVGWB. This uses a boundary, determined by the California Department of Water Resources, which differs near Phelan’s well from the boundary determined by the trial court in Phase 1.⁶⁵ Phelan argues that its pumping outside the Basin, but within the “AVGWB” must be taken into account in determining its water rights.⁶⁶

In areas where there is no “hard” boundary such as bedrock that is impervious to water, hydrologists and courts use other criteria for determining boundaries, including political boundaries.⁶⁷ Joseph Scalmanini, an expert witness in Phase 1, testified that this was the case in the southeast corner of the Basin, near Phelan’s wells, where there is a gap in the bedrock that would allow underground water flow to and from the adjacent basin. That gap had to be closed somehow, so Mr. Scalmanini proposed using the county line as the boundary.⁶⁸ Although it was only a political boundary, it had some technical support, based on Mr. Scalmanini’s conclusion that there was very little groundwater flow across

⁶⁵ See AOB 12 & n.1; 125 JA 123433.

⁶⁶ See, e.g., AOB 45.

⁶⁷ 1 RT 94:13–96:7; see Wat. Code § 12924; Schneider, *Groundwater Rights in California* 101 (Governor’s Commission to Review Water Rights Law 1977) (attached as Exhibit A); Bachman *et al.*, *California Groundwater Management* 144 (2d ed. 2005) (attached as Exhibit B).

⁶⁸ 1 RT 101:6–102:15, 117:5–21.

the county line⁶⁹ The court ultimately adopted the county line as the boundary of the Basin based both on this evidence and the fact that it coincided with the westerly boundary of the Mojave River Area, another adjudicated basin. Thus, there was no overlap or gap between the Basin as defined by the court and the Mojave River Area.⁷⁰

Despite the evidentiary support for the boundary chosen by the court, Phelan seems intent on using the boundary selected by the Department of Water Resources (which is equally arbitrary across that gap). Phelan was not a party during Phase 1, but it could have asked the court to reevaluate its boundary in this area. It declined to do so.⁷¹ Phelan is therefore bound to use the county line as the boundary of the Basin. This in turn means that its rights are determined based on its pumping within the Basin, not within the AVGWB.

D. Phelan has no right to recapture return flows of native water, because they are part of the native safe yield of the basin.

When water is pumped from a groundwater basin and used, a portion of the water sinks back into the basin and merges with the underground supply. This process is known as “return flow.”

⁶⁹ 1 RT 117:22–119:10.

⁷⁰ 22 RT 9778:28–9779:12, 9789:18–28.

⁷¹ 141 JA 137446:4–16.

The judgment awards rights to recapture “Imported Water Return Flows,” which are defined as “Imported Water that net augments the Basin Groundwater supply after use.”⁷² Phelan claims the right to recapture return flows from native (*i.e.* not imported) water it produces and distributes to its customers, which then flows into the Basin. The trial court rejected this claim.⁷³

The right to recapture imported water return flows was established in *San Fernando*.⁷⁴ The cities of Los Angeles, Glendale and Burbank all delivered water imported from outside the watershed to users within their respective territories. The Supreme Court held that they were all entitled to recapture the return flows from that delivered water.

The defendants in *San Fernando* claimed a right to the return flows from native water as well. The Supreme Court rejected that claim, stating:

Even though all deliveries produce a return flow, only deliveries derived from imported water add to the ground supply. The purpose of giving the right to recapture returns from delivered imported water priority over overlying rights and rights based on appropriations of the native ground supply is to credit the importer with the fruits of his expenditures and endeavors in bringing into the basin water that would not otherwise be there. Returns from deliveries of extracted native water do not add to the ground supply but only lessen the diminution occasioned by the extractions.⁷⁵

⁷² See 176 JA 157529, 157545–157546.

⁷³ 128 JA 125634–125635.

⁷⁴ *San Fernando, supra*, 14 Cal.3d at pp. 255–264.

⁷⁵ *Id.* at p. 261

The court went further, holding that there was no right to recapture return flows from water “imported” from another basin in the same watershed.⁷⁶

San Fernando is controlling here. Phelan is not entitled to recapture return flows from native water. These return flows are considered part of the native safe yield of the Basin,⁷⁷ all of which was allocated in the judgment. The judgment makes reference to this when it states, “Return Flows from Imported Water used within the Basin which net augment the Basin Groundwater supply are not a part of the Native Safe Yield.”⁷⁸ Thus, giving Phelan a right to return flows would result in allocating a portion of the native safe yield twice. Virtually every other party’s use generated return flows from native water, but pursuant to *San Fernando*, they were not given additional rights for that.

Finally, the trial court made findings to the effect that far from augmenting the native supply in the Adjudication Area with its native water return flows, Phelan’s pumping outside the Adjudication Area *reduced* that native supply.⁷⁹ These findings are supported by the evidence.⁸⁰

⁷⁶ *Id.* at p. 261 n. 55.

⁷⁷ See 176 JA 157530 (definition of Native Safe Yield).

⁷⁸ 176 JA 157545:17–18.

⁷⁹ 176 JA 157467:26–157468:4.

⁸⁰ See 41 RT 23007:18–24.

E. Phelan’s remaining claims to a water right are without merit.

Phelan opens its argument with a statement that a court in a groundwater adjudication should exercise its equitable power to do substantial justice. The California Supreme Court, however, has foreclosed the idea that a court may ignore water rights priorities in doing so. “Thus, although it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution’s general purpose cannot simply ignore the priority rights of the parties asserting them.”⁸¹

Phelan contends that the public-use doctrine provides it an appropriative water right, irrespective of whether surplus exists.⁸² Under the doctrine of intervening public use, injunctive relief is not available against a holder of a junior water right, if the water has been dedicated to a public use prior to the commencement of the action. Instead, the remedy is damages under a theory of inverse condemnation.⁸³ This doctrine is of no help to Phelan, however, for two reasons.

⁸¹ *Mojave, supra*, 23 Cal.4th at p. 1250.

⁸² AOB 61.

⁸³ See, e.g., *Peabody, supra*, 2 Cal.2d at pp. 377–78; *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 90-91.

First, the public use must have intervened prior to the commencement of the action.⁸⁴ Public use attaches through “construction and operation” of facilities.⁸⁵ In *Peabody*, a reservoir was completed in December, 1925; 6,908 acre-feet of water was stored in it prior to May 1, 1926, and the action was filed on October 13, 1926. The court held that “the public interest had intervened more than five months prior to the commencement of the action”—meaning the date the reservoir was filled, not the date the land was acquired or the reservoir constructed.⁸⁶ Here, the complaints for a comprehensive adjudication (later refiled as a cross-complaint in the coordinated cases) were filed in 2004.⁸⁷ Phelan did not begin using Well 14 to supply its customers until 2006, and Well 14 did not become fully operational until 2009.⁸⁸

Phelan contends that the public use of Well 14 began in 1999, when Phelan’s predecessor purchased the parcel on which Well 14 is situated.⁸⁹ Phelan cites no authority for this contention, and it is inconsistent with the “construction and operation” standard in *Peabody*. Phelan also contends that its public use began with its predecessor’s pumping from the

⁸⁴ *Id.* at p.90

⁸⁵ *Peabody, supra*, 2 Cal.2d at p. 378.

⁸⁶ *Id.* at 377–78.

⁸⁷ See Respondents’ Appendix 1.

⁸⁸ 127 JA 123837.

⁸⁹ AOB 60.

“AVGWB” in 1986.⁹⁰ This is incorrect because that pumping was outside the Basin, as discussed at pages 25-26 above.

Second, the doctrine of intervening public use does not establish a water right, it merely limits the remedy.⁹¹ Here, if the doctrine applied, it would allow Phelan to pump its historical amounts of water upon payment of damages. But that is exactly what the judgment already provides:

The injunction does not apply to any Groundwater Produced within the Basin by Phelan Piñon Hills Community Services District and delivered to its service areas, so long as the total Production does not exceed 1,200 acre-feet per Year, such water is available for Production without causing Material Injury, and the District pays a Replacement Water Assessment pursuant to Paragraph 9.2, together with any other costs deemed necessary to protect Production Rights decreed herein, on all water Produced and exported in this manner.⁹²

The replacement water assessment referred to is the cost to the Watermaster of acquiring imported water to replace the overproduction.⁹³

Phelan acknowledged during the proceedings that a replacement assessment was a typical way of dealing with an intervening public use.⁹⁴

Similarly, Water Code sections 106 and 106.5, giving preference to domestic and municipal uses, relate to the priority for such uses, and

⁹⁰ AOB 62.

⁹¹ See *Wright v. Goleta Water Dist.*, *supra*, 174 Cal.App.3d at p. 90 (“Intervention of a public use does not bar suit by the owner of a water right; it merely limits his remedy to damages in place of an injunction.”)

⁹² 176 JA 157548:20–25.

⁹³ 176 JA 157553–157554.

⁹⁴ 40 RT 21479:17–26.

perhaps to their reasonableness, but they do not establish a separate basis for a water right. For example, the court in *Santa Maria* used them in support of its holding that prescriptive water rights are not lost during times of surplus.⁹⁵

Finally, Phelan complains that it is being deprived of rights because it is characterized as an “exporter.” That is incorrect. Phelan was held to have no rights, not because it was an exporter, but because it was an appropriator and there was no surplus. The court’s partial statement of decision does say that Phelan “does not have water rights to pump groundwater and export it from the Adjudication Area ...”⁹⁶ But the remainder of the paragraph makes it clear that the reference to “export” is to distinguish Phelan’s appropriative use from an overlying use: “... to an area for use *other than on its property where Well 14 is located within the adjudication area*. All of its pumping from the inception from Well 14 is used on *other than the property from which it is pumped*. While it is entitled [as an overlying owner] 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.”⁹⁷

⁹⁵ See *Santa Maria, supra*, 211 Cal.App.4th at p. 297.

⁹⁶ 128 JA 125631:19–20.

⁹⁷ 128 JA 125631:20–24(emphasis added).

Phelan would be an appropriator whether or not it exported the water outside the Basin. A public agency serving water to the public is *ipso facto* an appropriator.⁹⁸ The same fact distinguishes Phelan from other parties identified in Section 6.4 of the judgment. All these parties were held to have overlying or prescriptive rights, or in the case of the United States, a federal reserved water right. The overlying owners do not export water; rather, they own and operate large tracts of land that straddle the Basin boundary. They are merely allowed to use water on land they own both inside and outside the Basin, consistent with their historical use.⁹⁹

2. The court’s conclusion that the physical solution contained in the judgment will result in sustainability over time is supported by substantial evidence.

The stipulated judgment in this case, as in most modern groundwater adjudications, contains two parts: a “decree” of water rights and obligations, and a physical solution. The physical solution was considered important enough to be made part of the title of the document.¹⁰⁰ “Physical solution” is defined as an “equitable remedy designed to alleviate overdrafts and the consequential depletion of water resources in a particular area, consistent with the constitutional mandate to

⁹⁸ See *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 29.

⁹⁹ 176 JA 157548.

¹⁰⁰ 176 JA 157514.

prevent waste and unreasonable water use and to maximize the beneficial use of the state's limited resource.”¹⁰¹ “[I]t is not only within the power but it is also the duty of the trial court to admit evidence relating to possible physical solutions, and if none is satisfactory to it to suggest on its own motion such physical solution.”¹⁰²

The court’s statement of decision contains an extensive discussion of the legal standards for a physical solution, the factors necessitating a physical solution in this case, and the reasons why the physical solution contained in the judgment is appropriate for this case. That discussion need not be repeated here.¹⁰³ The principal reason for a physical solution is the severely overdrafted condition of the Basin.¹⁰⁴ The court found: “The Physical Solution will protect all water rights in the Basin by preventing future overdraft, improving the Basin’s overall groundwater levels, and preventing the risk of new land subsidence.”¹⁰⁵ The court relied on the testimony of Dr. Dennis Williams, a certified groundwater hydrologist, whose testimony it summarized in part as follows: “Dr. Williams testified that pumping at existing levels will continue to degrade and cause undesirable results in the Basin, but that the Physical Solution will bring the

¹⁰¹ *Santa Maria, supra*, 211 Cal.App.4th at pp. 287-288.

¹⁰² *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 341.

¹⁰³ 176 JA 157475–157486.

¹⁰⁴ 176 JA 157476:21–25.

¹⁰⁵ 176 JA 157479:23–25.

Basin into balance and stop undesirable results including land subsidence. The ramp-down of groundwater production set forth in the Physical Solution will bring pumping in the Basin within its safe yield.”¹⁰⁶

Phelan challenges the sufficiency of the evidence supporting Dr. Williams’s conclusions. Dr. Williams based his opinions on the results of a groundwater model, which was originally developed by the U.S. Geological Survey.¹⁰⁷ Dr. Williams used the testimony of expert witnesses in the Phase 3 trial to adjust the pumping levels in this model to a more accurate level.¹⁰⁸ Using a process called calibration, he then tested the model to see if it accurately simulated groundwater levels throughout the Basin over a long period of time. A model is considered well calibrated if the relative error, which is a measure of the difference between model-simulated levels and measured historical levels, is less than 10%. The relative error of Dr. Williams’s model was 2.27%, making it very well calibrated.¹⁰⁹ Dr. Williams also noted that the historical record covered a long time period—between 1915 and 2005—“so that now you can feel comfortable predicting into the future.”¹¹⁰ Dr. Williams then used the model to do exactly that, to predict the future, by simulating groundwater levels over the next 50 years if the

¹⁰⁶ 176 JA 157479:25–157480:2.

¹⁰⁷ 46 RT 25340:21–25341:21.

¹⁰⁸ 46 RT 25357:16–25359:11.

¹⁰⁹ 46 RT 25355:6–25357:10.

¹¹⁰ 46 RT 25360:27–25362:4.

physical solution were implemented. The model showed that the physical solution would stabilize the Basin, even in a drought condition.¹¹¹

Even though Dr. Williams's model and his testimony covered the 400-square-mile Basin as a whole, Phelan focuses the southeast part of the Basin near its well. Phelan raises various issues concerning the model in this area. But Phelan provides no evidence that these issues would have any impact on the Basin as a whole or on Dr. Williams's conclusion that the physical solution will bring the Basin into balance, and Dr. Williams testified to the contrary.¹¹² The court was entitled to believe Dr. Williams's testimony, which provides substantial, unrefuted evidence to support the court's conclusion that the physical solution will bring the Basin into balance.

Phelan also contends that the model evidence does not support the trial court's alleged conclusion that Phelan's pumping substantially harms the Basin such that Phelan should be required to pay a replacement water assessment for every acre-foot it pumps. The trial court, however, did not use the standard of "substantial harm." The court did conclude that Phelan's pumping of groundwater from the Basin negatively impacts the

¹¹¹ 46 RT 25460:15–18.

¹¹² 46 RT 25647:22–26.

Basin, but it based that conclusion on the testimony of Phelan's own witness, not that of Dr. Williams.¹¹³

CONCLUSION

The trial court's approval of the stipulated judgment resulted in a fair allocation of water rights to the parties and a physical solution that will result in sustainability for the future. Phelan simply started pumping from the Basin too late to obtain any water rights. Nevertheless, under the physical solution, it can continue pumping from its Well 14, as long as it pays to replace the water it pumps. The Court should affirm the judgment.

Dated: 11/26/2019

/s/ Thomas S. Bunn, III
Lagerlof, Senecal, Gosney & Kruse,
LLP

Dated: 11/26/2019

/s/ Douglas Evertz
MURPHY & EVERTZ LLP

Dated: 11/26/2019

/s/ W. Keith Lemieux, Esq.
OLIVAREZ MADRUGA
LEMIEUX O'NEILL LLP

¹¹³ 128 JA 125633:26–28, 125635.

Exhibit A

**Governor's Commission
To Review California Water Rights Law**

**GROUNDWATER RIGHTS
IN CALIFORNIA**

Background And Issues

By Anne J. Schneider



Staff Paper No. 2

July 1977

C. COMMON GROUNDWATER CONCEPTS

1. Groundwater Basin Boundaries

Many different lateral and vertical boundaries can be used to define a groundwater basin.
 One compilation includes: ^{438/}

LATERAL PHYSICAL BOUNDARIES

1. Bedrock Contact
2. Zone of Low Permeability
3. Fault
4. Syncline Rim
5. Buried Bedrock Ridge
6. Constriction in Permeable Mtls.
7. Deep Underflow Constrictions
8. Aquifer Contacts
9. Crest of Anticline
10. Alluvial Embayment
11. Topographic Ridge or Divide

LATERAL HYDRAULIC BOUNDARIES

1. Ground Water Divide
2. Limit of Pressure Area
3. Shoreline of Ocean or Lake
4. Center of River or Stream
5. Unlined Canal or Reservoir

LATERAL POLITICAL BOUNDARIES

1. State
2. County
3. City
4. Irrigation District
5. Federal Installation
6. Park District

VERTICAL BOUNDARIES

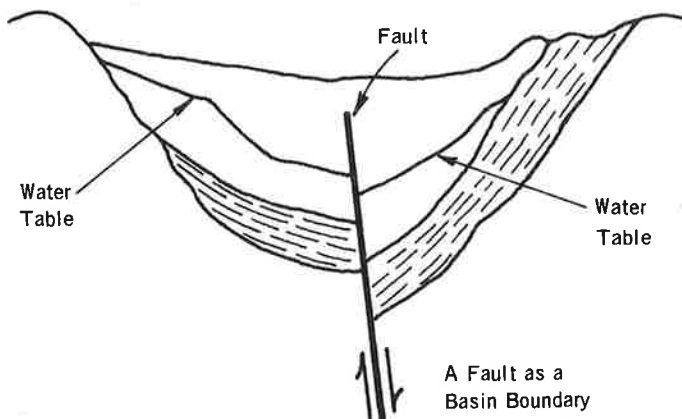
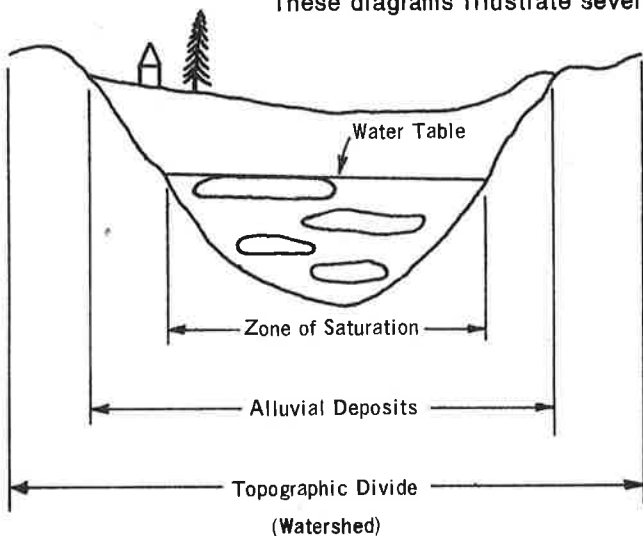
Unconfined Conditions

1. Water Table
2. Base of Water-Bearing Mtls.
3. Base of Fresh Water

Confined Conditions

1. Upper Confining Beds
2. Intermediate Confining Beds
3. Lower Confining Beds
4. Base of Water-Bearing Mtls.
5. Base of Fresh Water

These diagrams illustrate several of the possible boundaries:



2. Interrelationship Between Groundwater and Surface Water

The National Water Commission identified the problem of integrating the management of surface water and groundwater as one of three principal problems of groundwater law, management, and administration. ^{439/} The Commission outlined the need for integration:

Ground water is often naturally interrelated with surface water: ground water feeds springs and surface streams, and surface water charges ground water reservoirs. Nevertheless, there persists in the laws of many states myths (long ago abandoned by hydrologists) that ground water is separate from and unrelated to surface water. ^{440/}

The Commission recommended that "state laws . . . recognize and take account of the substantial interrelation of surface water and ground water. Rights in both sources of supply should be integrated... ." ^{441/}

438. Id. at 2-48

439. United States National Water Commission, Water Policies for the Future 232 (1973).

440. Id. at 233

441. Id.

Exhibit B



GROUNDWATER RESOURCES ASSOCIATION
OF CALIFORNIA

CALIFORNIA GROUNDWATER MANAGEMENT

SECOND EDITION, 2005

Bachman • Hauge • McGlothlin • Neese • Parker • Saracino • Slater

000042

Groundwater Basins

Groundwater basins, or sub-basins, are basic units of jurisdictional groundwater management in California. A groundwater basin is typically characterized as an aquifer or system of aquifers that has reasonably well-defined boundaries, areas of recharge and discharge.⁴⁰ Unfortunately, there is no single, widely-accepted definition, and the term "groundwater basin" may have different meanings in different contexts.⁴¹ Recognition of the hydrogeologic interconnection between aquifers has led water professionals to recommend basin-wide groundwater management and planning.

A variety of lateral boundaries can be used to define a groundwater basin related to physical, hydraulic and political parameters.⁴² Combinations of these boundary parameters offer virtually unlimited possibilities for acceptable basin boundaries for water rights and groundwater management purposes. For example, the lateral boundaries of the basin can be established based on physical characteristics such as bedrock contacts and limits of pressure areas. Lateral boundaries may also be set pursuant to political boundaries, like county, city, or district boundaries.⁴³

The California Department of Water Resources (DWR) Bulletin 118-2003 defines and updates basin boundaries on the basis of geologic and hydrologic conditions and a consideration of political boundary lines or groundwater management units whenever practical.⁴⁴ The Bulletin also identifies basin boundaries where management has already been initiated or anticipated. In sum, although efficient groundwater management mandates that arbitrary basin boundaries should be avoided, other compelling reasons may exist to establish basin boundaries on factors other than pure hydrogeology.

For example, the sheer size and magnitude of a basin suggests that conditions may differ dramatically from one location to another. Consequently, stakeholders may pursue management strategies and governing authorities that can accommodate those differences when establishing basin and management boundaries. To be successful some form of inter-basin or inter-sub-basin monitoring and flow assurances may be required. However, by establishing discrete management units within a larger basin it may be possible to achieve more local basin objectives without compromising more comprehensive strategies. Finally, the expense and pure logistics of joining a broader area into a single basin may be infeasible.

MATERIAL INJURY

The prior and paramount water right holder is entitled to protection against material injury.⁴⁵ Trivial injury, that does not result in substantial harm to the paramount right holder, also does not give rise to a damage claim.⁴⁶ In practice, the material injury or substantial harm requirement usually turns on the existence of an appreciable diminution in the quantity or quality of water available to the prior and paramount right holder. Where

⁴⁰ Todd, David K. and Mays, Larry W. 2004. *Groundwater Hydrology*. Third Edition. John Wiley and Sons, New York.

⁴¹ Freeze, R.A. and Cherry, J.A. 1979. *Groundwater*. p 47. Prentice Hall, Inc. New Jersey.

⁴² Schneider. 1977. *Groundwater Rights in California*. p 101. Governor's Commission to Review Groundwater Rights Law; United States National Water Commission. 1973. *Water Policies for the Future*. p 32.

⁴³ Schneider. 1977. *Groundwater Rights in California*. p 101. Governor's Commission to Review Groundwater Rights Law.

⁴⁴ California DWR. 2003. *California's Groundwater*. DWR Bulletin 118-2003.

⁴⁵ *Phoenix Water Co. v. Fletcher* (1863) 23 Cal. 481, 487; *Natoma Water & Min. Co. v. McCoy* (1863) 23 Cal. 490, 492.

⁴⁶ *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 374-75 [40 P.2d 486].

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 **PUBLIC WATER SUPPLIERS' RESPONDENTS' BRIEF** was produced on computer and contains 6211 words, excluding cover pages, table of contents and authorities, and signature lines, as counted by the Microsoft Word 2010 word processing program used to generate this brief.

/s/ Thomas S. Bunn, III

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 301 n. Lake Avenue, 10th Floor, Pasadena, CA 91101-5123.

On November 26, 2019, I served true copies of the following documents described as **PUBLIC WATER SUPPLIERS' RESPONDENTS' BRIEF** 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 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 November 26, 2019, at Pasadena, California.

/s/ Antonia Trinidad
Antonia Trinidad

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 301 n. Lake Avenue, 10th Floor, Pasadena, CA 91101-5123.

On November 26, 2019, I served true copies of the following documents described as **PUBLIC WATER SUPPLIERS' RESPONDENTS' BRIEF** on the interested parties in this action as follows: See Attached Mailing list.

X (BY REGULAR MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on November 26, 2019, at Pasadena, California.

/s/ Antonia Trinidad
Antonia Trinidad

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