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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

**ANTELOPE VALLEY
GROUNDWATER CASES**

Included Actions:

*Los Angeles County Waterworks District
No. 40 v.
Diamond Farming Co., et al.*
Los Angeles County Superior Court, Case
No. BC 325 201

*Los Angeles County Waterworks District
No. 40 v.
Diamond Farming Co., et al.*
Kern County Superior Court, Case No.
S-1500-CV-254-348

*Wm. Bolthouse Farms, Inc. v. City of
Lancaster*
Diamond Farming Co. v. City of Lancaster
*Diamond Farming Co. v. Palmdale Water
Dist.*
Riverside County Superior Court,
Consolidated Action, Case Nos. RIC 353
840, RIC 344 436, RIC 344 668

AND RELATED CROSS-ACTIONS

Case No. Judicial Council Coordination
Proceeding No. 4408

(For Filing Purposes Only: Santa Clara
County Case No.: 1-05-CV-049053)

**PHELAN PIÑON HILLS COMMUNITY
SERVICES DISTRICT'S TRIAL BRIEF
FOR PHELAN PIÑON HILLS
COMMUNITY SERVICES DISTRICT
TRIAL SET FOR NOVEMBER 4, 2014**

Assigned for All Purposes to:
Hon. Jack Komar

Trial Date: November 4, 2014
(Trial Related to Phelan Piñon
Hills Community Services
District)

Time: 10:00 a.m.
Location: Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, California
Dept: 56 / Room 514 (5th Floor)



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ALESHIRE &
WYNDER^{LLP}
ATTORNEYS AT LAW





TO THE HONORABLE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF
 RECORD HEREIN:

Cross-Defendant and Cross-Complainant, Phelan Piñon Hills Community Services District
 (“Phelan Piñon Hills”), submits the following trial brief for the trial set for November 4, 2014.

I. INTRODUCTION

“The history of California is written on its waters...”
 Justice Ronald B. Robie
(State Water Resources Control Board Cases (2006) 136 Cal.App.4th 674)

Phelan Piñon Hills Community Services District has rights to water it produces from the
 Antelope Valley Groundwater Basin. These rights of Phelan Piñon Hills Community Services District
 (“Phelan Piñon Hills”) include rights to produce water from the portion of the Antelope Valley
 Groundwater Basin (“Basin”) commonly referred to as the Antelope Valley Adjudication Area
 (“AVAA”).¹ Phelan Piñon Hills’ rights include producing native water as an appropriator, and,
 recapturing return flows from native water produced, distributed, and used by Phelan Piñon Hills’
 customers.

Having formed in 2008 as a successor agency to public-agency districts previously organized
 under and operated by the Special Districts Department of San Bernardino County (“SB County”),
 Phelan Piñon Hills provides municipal water service to more than 21,576 residents through
 approximately 6,778 service connections, within Phelan Piñon Hills’ existing service area shown in
Exhibit A attached hereto.

///

¹ “Groundwater basin” is not subject to a single definition. The Court stated as part of its Phase I
 Order dated November 3, 2006 (“Phase I Order”), “ ... that the alluvial basin as described in
 California Department of Water Resources [DWR] Bulletin 118-223 should be the basic jurisdictional
 boundary for purposes of this litigation.” (See, Exhibit 1, Phase I Order, p. 4, lines 6-8.) DWR
 Bulletin 118 (2003 update) illustrates (as does Exhibit 2, *infra*) that the hydrogeologic Antelope
 Valley Groundwater Basin extends east of the Los Angeles/San Bernardino County line, into San
 Bernardino County, extending to within the area adjudicated in the Upper Mojave River Valley
 Groundwater Basin Adjudication (“Mojave Valley Adjudication”), in which a final judgment was
 reached and a watermaster appointed. (See, *City of Barstow, et al. v. Mojave Water Agency, et al.*
 (2000) 23 Cal.4th 1224.)



Specific to this trial, Phelan Piñon Hills seeks judicial determinations for two of its eight causes of action placed at issue for this trial.²

A. Second Cause of Action for Declaratory Relief – Appropriative Rights

This second cause of action seeks to establish a right to pump from Well 14, specifically, as an appropriator for public use of surplus water, *or* alternatively, as an appropriator for public intervening use (if the Court determines that surplus did not exist during Well 14’s production history).³ Surplus or no surplus, the common denominator is that Phelan Piñon Hills provides water as an appropriator for public use.

B. Sixth Cause of Action for Declaratory Relief – Recapture of Return Flows

This sixth cause of action seeks to establish a right to recapture return flows of the native water produced by and distributed to Phelan Piñon Hills’ customers, namely those within the portion of Phelan Piñon Hills’ service area that lies over the portion of the Basin. (*See Exhibit C* attached hereto.)

This right is particularly critical to limiting the liability of Phelan Piñon Hills to overlayers that have sued Phelan Piñon Hills for inverse condemnation, as well as liability to a potential Watermaster for replacement water assessments to the extent surplus does not exist and/or Phelan Piñon Hills’ use of Well 14 water is deemed an “export” from the Basin, despite a portion of Phelan Piñon Hills’ service area lying over a portion of the Basin. The premise is that Phelan Piñon Hills does not diminish native water to the extent of its production; rather, a significant portion of its production results in recharge to the Basin. No other party appears to be in the position of Phelan Piñon Hills as it relates to the liabilities described above.

² Through its 8/29/14 Minute Order, Phelan Piñon Hills’ Second and Sixth Causes of Action from its cross-complaint filed on or about December 30, 2008 are in issue for this trial; *see Exhibit B* attached hereto.

³ The “burden of *proving surplus* does *not come into existence until* the existing appropriators, riparians, or *overlying owners first* provide satisfactory evidence that a valid property right has been impaired.” (*California Water Law & Policy* (Slater), Sec. 11.04, pp. 11-20 to 11-21 [emphasis added], *citing to, Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal. 2d 489, 566-567; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 381.)



Ultimately, SB County had not been named in this case despite SB County owning Well 14's parcel since 1999, and Well 14 being drilled during 2004. Shortly after Phelan Piñon Hills' formation and learning of this case, Phelan Piñon Hills sought to intervene for determination of its rights to ensure sustainability of the public's reliance on Phelan Piñon Hills' water supply derived from Well 14.

II. LEGAL AUTHORITIES AND EQUITABLE BASES RELATED TO PHELAN PIÑON HILLS' CAUSES OF ACTION

Phelan Piñon Hills' causes of action are supported by legal authority and principles of equity, particularly significant with this Court presiding as a court of equity. Much continues to evolve with water law among the western states, particularly with California, evident from California being among the last of the western states to develop a statewide regulatory system for groundwater through the recent enactment of the Sustainable Groundwater Management Act.

Phelan Piñon Hills requests the opportunity to further brief the issues through closing briefs or as otherwise directed by the Court following the presentation of evidence, due to uncertainty of precisely what evidence will be admitted and so that the Court and/or counsel can augment briefly on particular issues as deemed necessary.

A. The Appropriative Right

1. The Phase Three Statement of Decision

Water rights of individual parties have yet to be determined in this case.

In its Phase Three Statement of Decision, the Court found that "[t]he evidence is persuasive that current extractions exceed recharge and therefore that the basin is in a state of overdraft," but *the Court also did leave open for later resolution the question as to whether there was overdraft in a specific area of the aquifer, ruling that "[b]ut having heard evidence about the aquifer as a whole, the Court is not making historical findings that would be applicable to specific areas of the aquifer or that could be used in a specific way to determine water rights in particular areas of the aquifer."* The Court also recognized that the aquifer is not like a "bathtub" due to "regional" (local) differences and that "we have been talking about the basin as a whole but sub-parts exist." (Phase Three Statement of Decision, Tab No. 4523, 07/13/11, p. 4.)



2. The Water Right: Appropriator for Public Use

Phelan Piñon Hills claims an appropriative right, which in this case means Phelan Piñon Hills was/is pumping as an appropriator of *surplus* for public use, or, was/is pumping as an appropriator of *non-surplus* for public use. Case law often distinguishes the phrases above as being for surplus or non-surplus water, but the common denominator is that the water is appropriated for *public use*.

(a) Elements of an Appropriative Right

An “appropriator” is a party that diverts or extracts water for use on nonriparian or nonoverlying land or for nonriparian or non-overlying uses.⁴ More specifically, an appropriator *intends to pump or divert water; does pump or divert water;*⁵ and *applies* that water to *beneficial* use.⁶

“Reasonable” use does not have any single definition, though with California Constitution Article X, Section 2 requirements for utilizing water resources for “beneficial use to the fullest extent of which they are capable,” which is “primarily thought to refer to the method, manner, or means of use” and which is “generally thought to be consistent with the custom of similarly situated users.”⁷

(b) Public Use and Surplus

In *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 378-379, the California Supreme Court stated: “There is little doubt that the application of the doctrine [of public use] may be invoked on either ground [estoppel or public policy] when public use has attached prior to the commencement of the action and depending on the circumstances of the case.”⁸ No clear line exists in this complex case as to when the “action commenced,” but the “public use” of Well 14 is as early as when Phelan Piñon

⁴ Scott S. Slater, *California Water Law and Policy* (2012) § 1.13, p. 1-19.

⁵ Meaning, the exercise of dominion and control by obtaining possession of the water by separating the water from the rest of source of supply. See, Scott S. Slater, *California Water Law and Policy* (2012) § 2.10, p. 2-27. “Extraction of water from a well or diversion of water...usually fulfills this requirement.” (*Id.*, citing to, *Katz v. Walkinshaw* (1903) 141 Cal. 138, 135; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 20, 30-31.)

⁶ Scott S. Slater, *California Water Law and Policy* (2012) § 2.09, p. 2-22; see also, *Turlock Irr. Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1054.

⁷ California Constitution, Article X, Section 2; Scott S. Slater, *California Water Law and Policy* (2012) § 1.13, p. 1-23.

⁸ Hutchins, *supra*, at 492, fn.57.



Hills' predecessor purchased from Los Angeles County in 1999 the parcel on which Well 14 is situated, all of which went through various public processes in Los Angeles and San Bernardino Counties. Phelan Piñon Hills was not actually named by an overlier (i.e., Bolthouse) until February 2009.⁹

Under the common law, *intent* is critical – the appropriator must intend to appropriate and then do so.¹⁰

The estoppel basis pronounced by *Peabody* looks to the circumstances involved with factors such as: (i) notice to and knowledge of the overlies; (ii) a lengthy time of the overlies or parties "letting" an appropriator pump the water; and, (iii) detrimental reliance by the appropriator's customers on the water so taken.¹¹ In addition, prevalent public policy bases are set forth in various case authorities, in furtherance of *Peabody's* decree of the "public use" doctrine.¹² Similarly reflecting the mighty magnitude of "public use" is the "public policy of the State of California" as proclaimed by Water Code Sections 106 and 106.5, which are the domestic and municipal preference statutes.¹³

As explained in *Peabody*, lack of surplus is what exposes the appropriator to inverse condemnation, however, the burden of proof that a property right has been impaired is on the party

⁹ Bolthouse, as commonly referred to for simplicity in this case, sued Phelan Piñon Hills in this case for inverse condemnation, which in effect, concedes the water that Phelan Piñon Hills is appropriating is in fact for "public use."

¹⁰ *Inyo Consolidated Water Co. v. Jess* (1911) 161 Cal. 516, 520 [As work began for a ditch, with the intent thereby to take and use the water, a right was acquired with respect to the water.]

¹¹ *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 378-379.

¹² See, *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 573-574; *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 90-94; *City of Vallejo* (1935) 2 Cal.2d 351, 379-380; *Miller & Lux v. San Joaquin Light & Power Corp.* (1937) 8 Cal.2d 427, 436; *Gurnsey v. Northern California Power Co.* (1911) 160 Cal. 699, 711-712.

¹³ Phelan Piñon Hills' fourth cause of action claims "municipal priority" with a "prior and paramount" right to pump for current and future municipal demands. Read together with its second cause of action, the two counts clearly count as a claim for an appropriation for public use, first for surplus and, if none, per the prior and paramount "public policy of the State of California," as legislatively authorized in Water Code Sections 106 and 106.5. These references fit tight with the public-policy basis for appropriation for public use. Phelan Piñon Hills sought to include its fourth cause of action in this trial as reflected in its August 11, 2014 Case Management Statement.



claiming inverse condemnation, with such party bearing its burden to first prove the validity of its right and that such right has been impaired.¹⁴

On a more “technical” basis, “surplus” “exists as that “condition which exists when the draft on the ground water supply is less than the safe yield.”¹⁵ “Safe yield” is defined as “the maximum quantity of water which can be withdrawn annually from a ground water supply under a given set of conditions without causing an undesirable result.”¹⁶ “Undesirable result” refers to a “gradual lowering of the ground water levels resulting eventually in depletion of the supply.”¹⁷

Ultimately, the public-use doctrine – whether based on estoppel or public policy – provides an appropriative water right for a public appropriator.

B. The Right to Recapture Native Water Return Flows

The idea of native water return flows is nothing new; normally, native water return flow is factored into calculations of the natural recharge. As for the Court’s basis for seeking a native water return flow or recapture right, some earlier briefing was done by Phelan Piñon Hills’ wherein the United State Supreme Court ruled an appropriator may have a right to recapture native water. Phelan Piñon Hills prior briefing on this issue was in opposition to Bolthouse’s Motion *In Limine* No. 2 for the Phase 5 trial, with that motion denied.

Summary of Phelan Piñon Hills’ position for the right to recapture return flows is as follows:

(1) The Court presides as a Court of Equity, and given the additional unique nature of this litigation being a groundwater adjudication, and one that must be “comprehensive” for purposes of the McCarran Amendment, the Court should find Phelan Piñon Hills has this right.

(2) Various authorities establish the legitimacy of Phelan Piñon Hills’ cause of action for recapturing return flows from *native groundwater*, as a matter of law, science, and fact. To be clear, Phelan Piñon Hills’ cause of action regarding return flow is *not* claimed as a “water right” but instead

¹⁴ *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 378-379. *See also, Allen v. California Water & Telephone Co.* (1946) 29 Cal.2d 466, 490

¹⁵ *Los Angeles v. San Fernando* (1975) 14 cal. 3d 199, 278-279.

¹⁶ *Id.*

¹⁷ *Id.*

1 a “return flow right” and Phelan Piñon Hills does *not* question an importer’s right to return flows
2 resulting from *imported water*.

3 (3) The “science” establishes several pertinent circumstances, including: (i) the Antelope
4 Valley Groundwater Basin (“Basin”) extends east of the Los Angeles/San Bernardino
5 County line;¹⁸ (ii) a portion of Phelan Piñon Hills’ service area lies over the Basin; (iii) Phelan
6 Piñon Hills produces groundwater from the Basin, which Phelan Piñon Hills distributes to customers
7 who are almost exclusively residential and unsewered users located within that portion of the service
8 that lies over the Basin; (iv) native groundwater return flow results from Phelan Piñon Hills’
9 production and distribution to these customers; and, (v) this return flow flows toward the AVAA and
10 Well 14, with Well 14 located hydrologically downgradient, placing Well 14 in a position to recapture
11 the native groundwater that was used by customers in that portion of Phelan Piñon Hills’ service area
12 that lies over the Basin.

13 (4) Neither Phelan Piñon Hills’ production nor its native groundwater return flow have
14 been factored into the evidence (despite Phelan Piñon Hills’ earlier efforts during Phase III, but
15 objections by overliers were sustained, with the Court stating Phelan Piñon Hills reserves the
16 opportunity to later offer evidence), meaning that part of the natural recharge to the Basin is
17 unaccounted.

18 (5) Subsequent trial phase(s) or proceedings may lead to determinations that subject Phelan
19 Piñon Hills to liability, whether that be liability based upon existing complaints or cross-complaints of
20 other parties for alleged “takings,” or, some other basis for potential liability such as potential claims
21 or concerns that Phelan Piñon Hills is “exporting” groundwater it produces from Well 14 in the
22 AVAA that is distributed to and used by Phelan Piñon Hills customers in the portion of service area
23 that lies over part of the Basin. Such circumstances make the return flow right sought by Phelan
24 Piñon Hills an appropriate measure to offset any such liability.

25 _____
26 ¹⁸ Court’s Order After Hearing on Jurisdictional Boundaries (November 3, 2006, Document No. 325
27 on the Court’s website), p. 4:6-8 [“The court concludes that the alluvial basin as described in
28 California Department of Water Resources Bulletin 118-2003 should be the basic jurisdictional
boundary for purposes of this litigation.”]



Ultimately, Phelan Piñon Hills' cause of action for a return flow right serves to be part of the overall water balance with Phelan Piñon Hills' receiving an offset against potential future assessments or liabilities, anti-export provisions, or otherwise arising from the anticipated physical solution to be fashioned by the Court.

A strong legal basis for Phelan Piñon Hills to have this return flow right exists.¹⁹ "The doctrine of physical solution is a practical way to carry out the mandate of Article X, Section 2, that the state's water resources be put to use 'to the fullest extent of which they are capable'; "[u]nder the doctrine, as one text states, '[s]olution of water rights problems by use of all available information and expertise is attempted in order that the best possible use is made of the waters in their apportionment among contending parties.'"²⁰

Decisions of the United States Supreme Court constitute controlling authority in all California appellate courts.²¹ Also, where California law is uncertain, such as here, the decision of a court of last resort of another state, though not binding as authority, is persuasive.²² Likewise, the decisions of federal courts are persuasive.²³

Starting at the top, the United States Supreme Court recently re-affirmed the "doctrine of recapture" in an inter-state dispute.²⁴ The recaptured water was "runoff and seepage water" from surface water. In looking to other cases, Justice Thomas explained that an appropriator retains the

¹⁹ Prior briefing on this issue has been filed with the Court during February 2014, including Phelan Piñon Hills' Opposition and Sur-Reply identified on the Court's website as Document Nos. 8496 and 8606, respectively.

²⁰ Littleworth & Garner, *California Water II* (2d ed. 2007) Equitable Apportionment and the Doctrine of Physical Solution, ch. 7, pp. 173-174; *see also*, at p. 174, *citing to*, Rogers and Nichols, pp. 547-548.

²¹ *See, Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.

²² *People ex rel. Morgan v. Hayne* (1890) 83 Cal. 111, 119.

²³ *See, Estate of Sloan* (1963) 222 Cal.App.2d 283, 293; *Silman v. Reghetti* (1935) 7 Cal.App.2d 726, 729; *People v. Herbert's of Los Angeles, Inc.* (1935) 3 Cal.App.2d 482, 484.

²⁴ *State of Montana v. State of Wyoming* (2011) 131 S. Ct. 1765, 1774-1775, and fn. 7 ("State of Montana").



right to recapture, and in some narrow circumstances, even after the water leaves the appropriator's property.²⁵

Ultimately, return flow from imported water typically adds to (or "augments") the supply of a groundwater basin, while return flow from native water limits the depletion of the supply to the extent part of the produced groundwater returns to the basin. This is precisely why a "water balance" evaluates imported and native water sources, which explains, at least in part, why a return flow right from native water is recognized by the United State Supreme Court, with Phelan Piñon Hills having a legitimate basis for establishing such a right for itself, particularly when uniquely situated in this case such as being subjected to inverse condemnation claims.

III. THE EVIDENCE

At the direction of the Court, counsel for Phelan Piñon Hills and other parties have worked toward a stipulation of facts for this trial. The stipulation has yet to be signed by all counsel who previously indicated participation in this trial. However, the following summarizes some pertinent facts from the stipulation:

(1) Phelan Piñon Hills (and its predecessor) is a public agency providing water service to the public.

(2) Phelan Piñon Hills' predecessor commenced efforts to drill Well 14 during 1999, by acquiring surplus property from Los Angeles County, completing regulatory compliance including environmental compliance with "CEQA", and drilling and testing during 2004 and 2005, and making Well 14 operational during 2006.

(3) Well 14 water is used for municipal purposes, and provides nearly 1/3 of Phelan Piñon Hills' annual water supply for public use.

(4) Groundwater levels within the Buttes subunit from which Well 14 produces water has been relatively stable – as far back to 1951 according the authors of the *Summary Expert Report* and as far forward as 2006 and 2009, further supported by anticipated testimony from expert Thomas Harder.

²⁵ *State of Montana, supra*, 131 S. Ct. at 1774-1775; *see*, 1 Wiel §§ 38-40, at 37-43 and at fn.7.



(5) Part of Phelan Piñon Hills' service area lies over a portion of the Antelope Valley Groundwater Basin as described and illustrated in Department of Water Resources Bulletin 118 (2003).

(6) Phelan Piñon Hills distributes water to customers in that portion of Phelan Piñon Hills' service area that lies over a portion of the Antelope Valley Groundwater Basin as described and illustrated in Department of Water Resources Bulletin 118 (2003).

(7) Phelan Piñon Hills' distribution of water to customers in that same portion of the service area generates on average 426 acre-feet per year of water returning to the Basin and returning toward the AVAA before being recaptured by Phelan Piñon Hills.

Ultimately, legal authorities and equitable principles, coupled with the anticipated evidence, demonstrate the Court should find for Phelan Piñon Hills by declaring an appropriative water right and recapture of return flow right exist for Phelan Piñon Hills.

IV. CONCLUSION

Phelan Piñon Hills requests the Court to exercise its powers to establish this appropriative water right and return flow right. Doing so allows for maximization of the beneficial use of all water resources for the benefit of the residents and customers who rely on the Antelope Valley Groundwater Basin.

DATED: October 31, 2014

ALESHIRE & WYNDER, LLP
 WESLEY A. MILIBAND
 MILES P. HOGAN

By: _____


 WESLEY A. MILIBAND
 Attorneys for Defendant and Cross-Complainant
 Phelan Piñon Hills Community Services District

2 **PROOF OF SERVICE**

3 **STATE OF CALIFORNIA, COUNTY OF ORANGE**

4 I, Linda Yarvis,

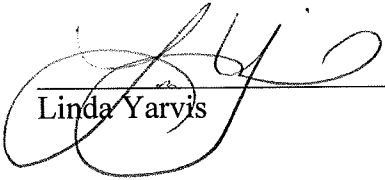
5 I am employed in the County of Orange, State of California. I am over the age of 18 and not a
6 party to the within action. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA
92612.

7 On October 31, 2014, I served the within document(s) described as **PHELAN PIÑON HILLS**
8 **COMMUNITY SERVICES DISTRICT'S TRIAL BRIEF FOR PHELAN PIÑON HILLS**
9 **COMMUNITY SERVICES DISTRICT TRIAL SET FOR NOVEMBER 4, 2014** on the interested
parties in this action as follows:

10 **BY ELECTRONIC SERVICE:** By posting the document(s) listed above to the Santa Clara
County Superior Court website in regard to Antelope Valley Groundwater matter pursuant to the
11 Court's Clarification Order. Electronic service and electronic posting completed through
www.scefiling.org.

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

14 Executed on October 31, 2014, at Irvine, California.

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16 
17 Linda Yarvis
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