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1 CASE NUMBER: JCCP4408  
2 CASE NAME: IN RE THE ANTELOPE VALLEY  
3 GROUNDWATER CLASS  
4 LOS ANGELES, CA MONDAY, AUGUST 11, 2014  
5 DEPARTMENT 1 HON. JACK KOMAR, JUDGE  
6 REPORTER: NADIA S. GOTT, CSR NO. 12597  
7 TIME: A.M. SESSION  
8 APPEARANCES: (AS NOTED ON APPEARANCE PAGES.)  
9

10 (THE FOLLOWING PROCEEDINGS WERE HELD  
11 IN OPEN COURT:)  
12

13 THE COURT: ALL RIGHT, GOOD MORNING.

14 GOOD MORNING. THIS IS IN THE ANTELOPE  
15 VALLEY GROUNDWATER CASES. IT'S A CASE MANAGEMENT  
16 CONFERENCE. WE HAVE TWO DAYS SET ASIDE. I HAVE  
17 RECEIVED A NUMBER OF CASE MANAGEMENT STATEMENTS.

18 I THINK THAT WE HAVE GOT A NUMBER OF THINGS  
19 TO TALK ABOUT HERE THIS MORNING.

20 SO LET ME ASK MR. MCLACHLAN. ARE YOU HERE?  
21 WOULD YOU MAKE YOUR APPEARANCE, PLEASE.

22 MR. MCLACHLAN: I'M GOING TO SWIVEL THIS AROUND  
23 BECAUSE I THINK YOU WANT ME TO TALK TO YOU.

24 GOOD MORNING, YOUR HONOR. MICHAEL  
25 MCLACHLAN FOR RICHARD WOOD IN THE SMALL LUMBER CLASS.

26 THE COURT: MR. MCLACHLAN, YOU FILED SEVERAL  
27 PAPERS REGARDING THE STATUS OF THE SETTLEMENT. THERE IS  
28 ALSO AN EX PARTE THAT YOU HAVE NOTICED FOR THIS MORNING.

1 MR. MCLACHLAN: THAT'S TRUE, YOUR HONOR.

2 THE COURT: WHY DON'T WE TAKE THAT UP FIRST. DO  
3 YOU HAVE THOSE PAPERS THAT -- I RECEIVED THAT SO LATE, I  
4 WAS UNABLE TO GET THEM COPIED.

5 MR. MCLACHLAN: THE EX PARTE PAPERS?

6 THE COURT: YES.

7 MR. MCLACHLAN: I DO NOT, YOUR HONOR. I E-MAILED  
8 THEM TO ROWENA, BUT I DO NOT HAVE A FULL SET OF THOSE  
9 COPIES. I APOLOGIZE.

10 THE COURT: DO YOU HAVE YOUR OWN COPY?

11 MR. MCLACHLAN: NO, I HAVE EVERYTHING ELSE, BUT  
12 UNFORTUNATELY, I LEFT IT ON MY DESK YESTERDAY AT THE  
13 OFFICE.

14 THE COURT: WHY DON'T YOU STATE ESSENTIALLY FOR  
15 THE RECORD WHAT THE REQUEST IS.

16 MR. MCLACHLAN: SO WE HAD FIVE INDIVIDUALS IN THE  
17 EX PARTE. ALL OF ONE OF WHICH WERE TRANSFERS DURING THE  
18 LAST FIVE OR SIX YEARS. AND SO ESSENTIALLY WE WERE  
19 SWAPPING OUT ONE CLASS MEMBER WHO NO LONGER OWNS THE  
20 REAL ESTATE FOR THE CURRENT OWNER. IN ONE INSTANCE,  
21 THERE WAS A PERSON WHO, FOR WHATEVER REASON -- I THINK  
22 IT WAS BECAUSE THE HOUSE WAS CONSTRUCTED AROUND 2008.  
23 AND SO WHEN THIS CLASS LIST WAS MADE, THE PROPERTY -- I  
24 DIDN'T CHECK -- BUT IT WAS LIKELY IN THE WILLS CLASS.  
25 BUT I DID VERIFY THE FACT THAT IT IS IMPROVED. AND YOU  
26 HAVE THE DECLARATION FROM THAT PERSON THAT WHEN HE  
27 BOUGHT IT, IT HAD THE WELL AND HAD BEEN PRODUCING WATER.  
28 SO THERE IS FIVE PROPERTIES, ESSENTIALLY,

1 THE SAME THAT IS TWO OR THREE OTHER APPLICATIONS WE HAVE  
2 OVER THE LAST 12 MONTHS.

3 THE COURT: DO YOU HAVE A PROPOSED ORDER?

4 MR. MCLACHLAN: I DID. I SUBMITTED THAT IN WORD  
5 AND PDF FORM TO MS. WALKER. I APOLOGIZE AGAIN FOR NOT  
6 HAVING A COPY OF IT HERE.

7 THE COURT: MR. DUNN HAS A COPY.

8 MR. DUNN: PERMISSION TO APPROACH, YOUR HONOR.

9 THE COURT: YES.

10 MR. MCLACHLAN: ALL RIGHT. THANK YOU, MR. DUNN.  
11 THIS IS -- MAY I, YOUR HONOR?

12 THE COURT: YES.

13 MR. MCLACHLAN: THIS IS THE EX PARTE, BUT NOT THE  
14 ORDER.

15 THE COURT: THE ORDER IS NOT ATTACHED?

16 MR. MCLACHLAN: NO, IT IS -- WELL, IT WAS A  
17 SEPARATE FREE-STANDING DOCUMENT, YOUR HONOR, AND  
18 MR. DUNN MAY NOT HAVE PRINTED THAT OUT.

19 THE COURT: IT DOES NOT APPEAR TO BE IN THERE.  
20 THE REQUEST IS APPROVED.

21 MR. MCLACHLAN: THAT'S FINE, YOUR HONOR.

22 THE COURT: YOU'LL GET A COPY OF THE ORDER  
23 SOMEWHERE AND GET IT SIGNED.

24 MR. MCLACHLAN: YEAH, MS. WALKER HAS THAT.

25 THE COURT: WELL, WE HAVE THE ABILITY TO PRINT IT  
26 OUT HERE. LOS ANGELES IS TECHNICALLY CAPABLE TO DEAL  
27 WITH THAT. ALL RIGHT, OKAY. THANK YOU.

28 NOW LET'S TALK ABOUT THE REQUEST THAT



1 MR. DUNN HAS MADE -- MULTIPLE REQUESTS ACTUALLY -- IN  
2 THE CASE MANAGEMENT STATEMENT CONCERNING WHAT WE'RE  
3 GOING TO DO HERE. IT'S MY UNDERSTANDING THAT NONE OF  
4 THE ENTITIES ON THE BOARDS INVOLVED WITH THOSE ENTITIES  
5 HAVE YET HAD AN OPPORTUNITY TO SIGN OR APPROVE THE  
6 PROPOSED SETTLEMENT; IS THAT RIGHT?

7 MR. DUNN: YES, YOUR HONOR.

8 THE COURT: AND YOU'RE ASKING FOR A DATE IN  
9 OCTOBER TO PRESENT THOSE SIGNED DOCUMENTS; IS THAT  
10 CORRECT?

11 MR. DUNN: YES, YOUR HONOR.

12 THE COURT: WHAT ARE WE GOING TO DO ABOUT THE  
13 WOODS CLASS ISSUES THAT MR. MCLACHLAN HAS RAISED WITH US  
14 IN WRITING; IN PARTICULAR, WE'RE TALKING ABOUT THE  
15 ATTORNEYS' FEES ISSUE. AND HE QUOTES RATHER ACCURATELY  
16 FROM STATEMENTS THE COURT MADE AT THE TIME THAT THESE  
17 MATTERS WERE CONSOLIDATED.

18 MR. DUNN: MY UNDERSTANDING IS THAT BECAUSE THE  
19 COURT HAS RESPONSIBILITY OVER BOTH THE CLASS AND CLASS  
20 COUNSEL, AND IN PARTICULAR THE AMOUNT OF THE ATTORNEY  
21 FEES THAT WOULD BE AWARDED TO CLASS COUNSEL, THAT THIS  
22 NECESSARILY COMES WITHIN THE PURVIEW OF THE COURT. AND  
23 THE SHORT ANSWER TO THE COURT'S QUESTION IS IT WOULD BE  
24 UP TO THE COURT TO DECIDE THAT ISSUE.

25 THE COURT: YEAH. ALL RIGHT. I DON'T HAVE ANY  
26 QUARREL WITH THAT STATEMENT. IT'S CLEARLY WITHIN  
27 DISCRETION OF THE COURT. BUT THE DISCRETION IS  
28 OBVIOUSLY LIMITED BY THE LAW, NOT JUST IN TERMS OF THE

1 AMOUNT THE REASONABLENESS, BUT AS TO WHICH PARTIES  
2 SHOULD BE OBLIGATED FOR THOSE FEES. THAT'S THE LEGAL  
3 QUESTION. AND ABSENT THE PARTIES COMING TO AN AGREEMENT  
4 AS TO WHAT THAT NUMBER SHOULD BE AND WHO SHOULD PAY IT,  
5 THE COURT OBVIOUSLY WOULD HAVE TO HAVE AN EVIDENTIARY  
6 HEARING AND BRIEFING.

7 BUT IT'S MY UNDERSTANDING THAT UNLESS THE  
8 PARTIES HAVE AN AGREEMENT, THE WOODS CLASS IS NOT GOING  
9 TO PARTICIPATE IN THE SETTLEMENT.

10 IS THAT AN ACCURATE STATEMENT,  
11 MR. MCLACHLAN?

12 MR. MCLACHLAN: YOUR HONOR, MICHAEL MCLACHLAN  
13 AGAIN FOR RICHARD WOOD AND THE CLASS.

14 I KIND OF VIEW MYSELF AS SWITZERLAND IN  
15 SOME SENSE IN THIS ISSUE. IT'S ALREADY OUT THERE; IT'S  
16 A LANDOWNER/NONPUBLIC WATER SUPPLIER VERSUS WATER PUBLIC  
17 SUPPLIER ISSUE. AND I CAN'T DO ANYTHING ABOUT IT; IT'S  
18 NOT MY CHOICE. I WILL SETTLE PUBLIC WATER SUPPLIERS  
19 WITHOUT THE GLOBAL SETTLEMENT WITH THE TERMS THAT ARE AS  
20 NEGOTIATED AT ANY POINT IN TIME; IT'S BEEN THE CASE FOR  
21 A LONG TIME. THAT'S NOT WHAT THE ISSUE IS. IT'S PURELY  
22 AN ISSUE OF WHO IN THE ROOM IS GOING TO BE MADE  
23 POTENTIALLY TO BE AT RISK FOR OUR FEES. AND AFTER SEVEN  
24 YEARS, YOUR HONOR -- YOU HAVE SEEN THOSE BILLS LAST  
25 YEAR -- THEY'RE NOT SMALL.

26 THE COURT: THE IMPRESSION THAT I HAVE -- I WANT  
27 TO MAKE SURE THAT I UNDERSTAND WITH SOME CLARITY HERE.  
28 MY IMPRESSION IS THAT THE OTHER PARTIES ARE NOT WILLING

1 TO ENTER INTO THE SETTLEMENT UNLESS THERE IS A  
2 STIPULATION AS TO THOSE ISSUES; AND THAT IS AS OPPOSED  
3 TO ENTERING INTO THE SETTLEMENT AND SUBMITTING THE  
4 ISSUES OF FEES TO THE COURT. AND I UNDERSTAND THAT YOU  
5 WOULD BE AMENABLE TO THAT; IS THAT CORRECT --

6 MR. MCLACHLAN: WELL, AS TO THE FIRST PART, I  
7 THINK YOUR HONOR HAS IT CORRECT. AS TO THE SECOND PART,  
8 I DON'T TOTALLY FOLLOW. THE QUESTION IS WHETHER I WOULD  
9 BE AMENABLE AS TO WHAT MR. DUNN WANTS, WHICH IS LEAVE  
10 EVERYBODY OPEN BEING SUBJECT TO IT --

11 THE COURT: LEAVE IT UP TO THE COURT TO DECIDE WHO  
12 HAS THE OBLIGATION AS A MATTER OF LAW AND FACT TO  
13 SATISFY CLASS FEES.

14 MR. MCLACHLAN: WELL, PERSONALLY I'M NOT IN FAVOR  
15 OF THAT SOLUTION BECAUSE I THINK IT CREATES AN  
16 UNBELIEVABLY COMPLICATED SCENARIO OF ME HAVING TO  
17 COLLECT THOSE FEES FROM HUNDREDS, PERHAPS THOUSANDS OF  
18 PEOPLE. BUT, PROFESSIONALLY AS CLASS COUNSEL, I THINK  
19 THAT IF I WAS FORCED TO IT, I PROBABLY WOULD HAVE AN  
20 OBLIGATION TO PROTECT THE INTEREST OF THE CLASS AND  
21 ENTER INTO THAT SUBJECT AND APPEAL IT IF IT WAS A REALLY  
22 BAD SITUATION.

23 SO I THINK MY HANDS ARE A BIT TIED  
24 ETHICALLY. IF WE WERE TO PRESENT IT AND WHAT WAS FAIR  
25 FOR THE CLASS, AND THE COURT AGREED THAT THE SUBSTANTIVE  
26 TERMS IS FAIR, THEN I WOULD PROBABLY HAVE TO PROCEED.

27 THE COURT: WELL, MR. LEININGER HAS STATED IN HIS  
28 PAPERS THAT HE THINKS THE COURT SHOULD ORDER THE PARTIES

1 TO MEET AND CONFER REGARDING THAT ISSUE WHILE WE'RE HERE  
2 TODAY AND POTENTIALLY TOMORROW. QUITE FRANKLY IF THERE  
3 IS NO OTHER UNDERSTANDING, THAT'S WHAT I'M GOING TO DO.  
4 BUT I'M HOPING THAT THE PARTIES WOULD BE ABLE TO WORK IT  
5 OUT ONE WAY OR THE OTHER OVER THE PERIOD TODAY, SO WHILE  
6 WE'RE HERE TODAY.

7 SO, MR. DUNN?

8 MR. DUNN: YES. THE COURT'S INQUIRY TO THE CLASS  
9 COUNSEL WAS REGARDING SORT OF THE CURRENT POSTURE OR  
10 POSITION. AND THAT IS -- IF I RECALL IT NOW -- IS IT A  
11 SITUATION WHERE THE CLASS COUNSEL WOULD BE WILLING TO  
12 HAVE THE ENTITLEMENT OF CLASS COUNSEL FEES SUBMITTED TO  
13 THE COURT FOR ITS DECISION? IN OTHER WORDS, TO BRING  
14 THAT ISSUE TO THE COURT, THEREBY ALLOW THAT ISSUE TO NOT  
15 BE AN OBSTACLE -- IF I CAN USE THAT TERM -- TO THE  
16 COMPLETION OF THE SETTLEMENT AGREEMENT THAT INVOLVES THE  
17 PRIMARY ISSUES THAT THE WOOD CLASS ATTORNEY FEE CLAIM IS  
18 NOT SUBSTANTIVE IN NATURE AS PART OF THE UNDERLYING  
19 DISPUTE IS SOMETHING I INDICATED EARLIER WITHIN THE  
20 PURVIEW OF THE COURT.

21 I CAN'T SPEAK FOR CLASS COUNSEL, BUT MY  
22 UNDERSTANDING IS THAT THE ISSUE COULD BE BROUGHT BEFORE  
23 THE COURT FOR ITS RESOLUTION, WHICH WOULD THEREBY ALLOW  
24 THE PARTIES TO ESSENTIALLY FINISH THE PROCESS THAT  
25 THEY'RE ENGAGED IN.

26 THE COURT: OKAY.

27 MR. DUNN: I'M SORRY, YOUR HONOR. THAT'S WHAT WE  
28 ARE PROPOSING IS THAT THE ISSUE IN ITS ENTIRETY BE

1 DECIDED BY THE COURT.

2 THE COURT: OKAY. WELL, I DON'T WANT TO GET INTO  
3 A SETTLEMENT DISCUSSION HERE ON THE RECORD AT THIS  
4 POINT. BUT I WANT THE SOME CLARITY AS TO POSITIONS OF  
5 THE VARIOUS PARTIES HAVE TAKEN WITH REGARD TO THAT  
6 ISSUE.

7 WE HAVE A NUMBER OF OTHER THINGS THAT WE  
8 ALSO HAVE TO DEAL WITH. BUT CERTAINLY, THAT MAY END UP  
9 BEING -- I THINK SOMEBODY DESCRIBED IT AS A STRAW THAT  
10 COULD BREAK THE CAMEL'S BACK. I'M GOING TO TRY TO HELP  
11 YOU TO NOT HAVE THAT OCCUR. SO AT THE VERY LEAST, ALL  
12 OF YOU WHO ARE HERE -- AND SOME OF YOU WHO MAY NOT BE  
13 HERE -- MAY EXPECT TO ENGAGE IN FURTHER MEET-AND-CONFER  
14 SETTLEMENT DISCUSSIONS TODAY AND TOMORROW. THANK YOU.

15 ALL RIGHT. THERE ARE A NUMBER OF OTHER  
16 THINGS THAT WE NEED TO TALK ABOUT.

17 MR. BLUM, AND MR. ZIMMER, WOULD YOU MAKE  
18 YOUR APPEARANCES, PLEASE.

19 MR. BLUM: GOOD MORNING, YOUR HONOR. SHELDON BLUM  
20 ON BEHALF OF THE BLUM TRUST.

21 MR. ZIMMER: GOOD MORNING, YOUR HONOR. RICHARD  
22 ZIMMER ON BEHALF OF THE BOLTHOUSE ENTITIES.

23 THE COURT: APPARENTLY, THE BLUM TRUST HAS NOT  
24 BEEN INCLUDED AS PART OF THE GLOBAL SETTLEMENT; IS THAT  
25 CORRECT?

26 MR. BLUM: THAT'S CORRECT, YOUR HONOR.

27 THE COURT: AND A MAJOR DISPUTE IS BETWEEN YOU AND  
28 BOLTHOUSE FARMS; IS THAT CORRECT?

1 MR. BLUM: I DON'T SEE IT THAT WAY, YOUR HONOR.

2 THE COURT: WHAT DO YOU SEE IT?

3 MR. BLUM: WELL, I SEE IT AS A MATTER OF RIGHT TO  
4 BE ABLE TO HAVE THE WATER RIGHT AS A MATTER OF LAW.

5 MR. ZIMMER ACKNOWLEDGES LONG STANDING THAT THERE IS A  
6 WATER RIGHT. HE HAD IDENTIFIED BLUM TRUST HAS HAVING  
7 118 ACRES, AND HAVING THE CROPS SCHEDULE SET OUT. HE'S  
8 ANSWERED INTERROGATORIES THAT HAVE STATED THAT THERE IS  
9 A -- THAT BOLTHOUSE FARMS IS LEASING THE WATER RIGHTS ON  
10 BLUM TRUST PROPERTY. WE ALSO KNOW THAT BOLTHOUSE FARMS  
11 IS NOT CLAIMING ANY WATER RIGHTS IN THIS ACTION, WHICH  
12 IS CONSISTENT WITH THE LEGAL POSITION OF BLUM TRUST.  
13 AND I WOULD ALSO LIKE TO SAY THAT MR. ZIMMER'S CLIENTS  
14 ARE NOT CLAIMING ANY WATER RIGHTS ON BLUM TRUST PARCELS,  
15 AND BLUM TRUST IS CLAIMING WATER RIGHTS ON DIFFERENT  
16 YEARS THAN WHAT IS BEING CLAIMED BY THE BOLTHOUSE FARMS  
17 AND BOLTHOUSE PROPERTIES, AS FAR AS THEIR PRODUCTION  
18 RIGHT.

19 SO I SEE IT AS A SIMPLE FARMING COMMUNITY  
20 BASIN STANDARD OF PRACTICE.

21 THE COURT: WELL, THAT GOES BEYOND THE QUESTION I  
22 ASKED. BUT I THINK THAT WHAT I'M ANTICIPATING DOING IS  
23 SETTING IT DOWN FOR HEARING, FOR EVIDENTIARY OR FACTUAL,  
24 LEGAL OR FACTUAL ISSUES REGARDING WHATEVER CLAIM IT IS  
25 THAT YOU ARE MAKING ON BEHALF OF THE TRUST.

26 MR. BLUM: I WOULD LIKE TO DO A MOTION FOR SUMMARY  
27 JUDGMENT FIRST, YOUR HONOR.

28 THE COURT: WELL, I DON'T THINK YOU HAVE TIME FOR

1     THAT.  THERE IS STATUTORY TIME FOR THE FILING OF SUCH A  
2     MOTION.  IT WOULD PUT OFF OUR TRIAL ON YOUR ISSUES FOR  
3     AN EXTENDED PERIOD OF TIME.  IT'S MY UNDERSTANDING THAT  
4     THERE ARE NOT A LOT OF FACTUAL DISPUTES; IT'S REALLY A  
5     LEGAL ISSUE.  AND THAT CAN CERTAINLY BE HANDLED IN A  
6     TRIAL THAT WILL NOT TAKE MUCH LONGER AND A LOT LESS  
7     PREPARATION THAN A MOTION FOR SUMMARY JUDGMENT.

8             MR. BLUM:  WELL, I DON'T NECESSARILY AGREE WITH  
9     THE COURT ON THAT ISSUE, YOUR HONOR.  IT WOULD BE LESS  
10    COSTLY FOR ME TO BE ABLE TO DO THE MOTION FOR SUMMARY  
11    JUDGMENT.  I DO HAVE AN EXPERT WHO WOULD BE PROVIDING A  
12    DECLARATION IN LIEU OF PERSONAL APPEARANCE.  AND THIS  
13    IS --

14            THE COURT:  THE REASON I --

15            MR. BLUM:  A --

16            THE COURT:  THE REASON, MR. BLUM, THAT I SUGGEST  
17    NOT IS -- FROM WHAT YOU DESCRIBE AND FROM WHAT I HEARD  
18    FROM MR. ZIMMER IN THE PAST -- THERE IS NO REAL FACTUAL  
19    DISPUTE.  IT'S A QUESTION OF LAW.

20            MR. BLUM:  THAT'S TRUE.

21            THE COURT:  IF THAT'S TRUE, IT SEEMS TO ME  
22    REASONABLE LAWYERS OUGHT TO BE ABLE TO ENTER INTO A  
23    STIPULATION AS TO WHAT THE FACTS ARE, BRIEF IT, AND LET  
24    THE COURT DECIDE IT.  SO THAT EVIDENTIARY TESTIMONY  
25    IS -- IT WOULD BE VERY NOMINAL, IF ANY.

26            MR. BLUM:  WELL, THERE IS REALLY NO DISPUTE ON THE  
27    FACTS, YOUR HONOR.  THERE IS NO DISPUTE AS WELL ON THE  
28    EVIDENTIARY MATTERS.  THOSE ARE PRETTY MUCH RESOLVED AS

1 TO COMPETENCY, AUTHENTICATION, FOUNDATION. MY POINT IS  
2 THAT I HAVEN'T GIVEN -- I HAVEN'T BEEN -- YOU KNOW, YOU  
3 MENTION ABOUT THE CODE. THE CODE SAYS THERE HASN'T BEEN  
4 A TRIAL DATE SET ON PHASE 6 YET, AND I HAVE ALWAYS BEEN  
5 A PARTICIPANT ON PHASE 6. AND I'M WILLING TO SAY THAT I  
6 WOULD STIPULATE FOR AN ORDER SHORTENING TIME. I CAN PUT  
7 OUT THE MOTION WITHIN 30 DAYS AND LET ANYONE ELSE WHO  
8 WANTS TO RESPOND WITHIN THE NEXT 30 DAYS.

9 THE COURT: LET ME HEAR FROM MR. ZIMMER.

10 MR. ZIMMER: THANK YOU, YOUR HONOR. THE ONE THING  
11 I WOULD AGREE WITH MR. BLUM ON IS THAT THIS IS NOT AN  
12 ISSUE BETWEEN BOLTHOUSE AND MR. BLUM. BOLTHOUSE AND  
13 MR. BLUM SETTLED ANY CLAIMS THEY HAD AGAINST ONE ANOTHER  
14 BACK IN 2008 IN A SETTLEMENT AGREEMENT. MR. BLUM IS  
15 MAKING A CLAIM AS AN OVERLYING LANDOWNER; HE'S ONE OF  
16 THE NONSTIPULATING LANDOWNERS. THE NONSTIPULATING  
17 LANDOWNERS, WHO HAVE BEEN IDENTIFIED, HAVE PRESENTED  
18 THEIR CLAIMS TO THE SETTLING PARTIES. AND OUTSIDE OF  
19 SETTLEMENT NEGOTIATIONS, I CAN TELL YOU THAT I DON'T  
20 THINK THERE IS ANY LANDOWNER THAT AGREES THAT ANY OF THE  
21 NONSTIPULATING PARTIES WHO HAVE NOT ENTERED INTO THE  
22 SETTLEMENT AGREEMENT -- I DON'T THINK ANY OF THE PARTIES  
23 THINK THAT THEY HAVE A LEGAL RIGHT TO GROUNDWATER,  
24 WHETHER IT'S PHELAN, OR WHETHER IT'S BLUM. SOMEHOW --  
25 BECAUSE I TOOK THE DEPOSITIONS ON PHELAN -- THAT SOMEHOW  
26 I'VE BECOME THE LIGHTENING ROD FOR THAT. THAT'S A BASIN  
27 RIGHT ISSUE; IT'S A QUESTION OF WHETHER PHELAN HAS A  
28 LEGAL RIGHT TO WATER. SAME THING IS TRUE FOR MR. BLUM,



1 WHETHER HE HAS ANY BASIS FOR A CLAIM TO GROUNDWATER.

2 THE OTHER THING I AGREE WITH MR. BLUM,  
3 THERE IS A DIFFERENCE BETWEEN A WATER RIGHT AND A  
4 SETTLED WATER RIGHT. A SETTLED WATER RIGHT RESULTS IN  
5 SOME KIND OF DETERMINATION BETWEEN PARTIES THAT THEY  
6 AGREE TO. WE DID NOT SETTLE OUR CLAIM, WHICH THE OTHER  
7 STIPULATING PARTIES BASED UPON THE TIME PERIOD MR. BLUM  
8 IS TALKING ABOUT. SO I AGREE WITH HIM ON THAT.

9 BUT AS TO BOTH PHELAN AND BLUM, I THINK  
10 THERE IS A CONSENSUS THAT NEITHER ONE OF THOSE PARTIES  
11 HAS A PROPER LEGAL BASIS FOR A WATER RIGHT. MR. BLUM'S  
12 CLAIM, LEGALLY SPEAKING, IS WHETHER HE CAN CLAIM WATER  
13 USE BY AN ADJACENT LANDOWNER TO AN ADJACENT LANDOWNER'S  
14 WELL ON HIS PROPERTY TO GROW THE ADJACENT LANDOWNER'S  
15 CROPS, WHETHER LEGALLY THAT CREATES SOME KIND OF A -- IN  
16 HIS WORDS -- ALLOCATED GROUNDWATER RIGHT. IN OTHER  
17 WORDS, THEY WENT OFF AND SAID YOU CREATED AN ALLOCATED  
18 GROUNDWATER RIGHT BASED UPON THOSE FACTS. I THINK OTHER  
19 COUNSEL THAT ARE IN FRONT OF ME AGREE WITH THAT BASED  
20 UPON DISCUSSIONS WE HAVE HAD. BUT THAT'S MR. BLUM'S  
21 ISSUE. BUT IT'S --

22 THE COURT: MAYBE I'M NOT UNDERSTANDING WHAT  
23 EITHER OF YOU ARE SAYING. THE BLUM TRUST IS AN  
24 OVERLYING LANDOWNER, CORRECT?

25 MR. ZIMMER: CORRECT.

26 THE COURT: THE BLUM TRUST THEREFORE HAS THE SAME  
27 RIGHTS ANY OTHER OVERLYING LANDOWNER HAS IN TERMS OF  
28 USING IT AS BENEFICIAL USE; IS THAT CORRECT?

1           MR. ZIMMER: I'M NOT SURE THAT'S CORRECT. BUT I  
2 THINK IT WOULD BE PREMATURE TO GET INTO THAT DISCUSSION  
3 NOW BECAUSE THERE ARE RAMIFICATIONS IN TERMS OF THE  
4 RESOLUTION -- THE BIGGEST ISSUE IN THE ROOM RIGHT NOW IS  
5 THE NONPUMPING CLASS, AND HOW THAT IS. I'M SURE WE'RE  
6 GOING TO TAKE THIS UP LATER, BUT THERE ARE THREE PRIMARY  
7 ISSUES IN TERMS OF SETTLEMENT. THE SETTLEMENT HAS BEEN  
8 WORKED OUT OVER MANY, MANY YEARS, BETWEEN A LOT, A LOT  
9 OF LAWYERS, AND A LOT OF PARTIES; AND IN PART STEMS FROM  
10 DISCUSSIONS WE HAD WITH JUSTICE ROBIE. THERE IS A  
11 PHYSICAL SOLUTION CONTAINED IN THAT, JUST AS A PHYSICAL  
12 SOLUTION, AND THAT IS FOUNDATIONAL TO THE SETTLEMENT.

13           THE COURT: I'M ASKING YOU ABOUT THE GENERAL  
14 PRINCIPLE THAT AN OVERLYING OWNER HAS A RIGHT TO THE  
15 REASONABLE BENEFICIAL USE OF THE WATER UNDERLYING HIS,  
16 HER, OR ITS LAND.

17           MR. ZIMMER: YES, I AGREE WITH THAT. BUT WE ARE  
18 DEALING WITH AN OVERDRAFTING BASIN ARGUABLY --

19           THE COURT: THERE ARE OTHER ISSUES THAT DEVELOP  
20 WHEN WE START TALKING ABOUT WHAT THE ALLOCATION IS; IS  
21 THAT TRUE?

22           MR. ZIMMER: RIGHT.

23           THE COURT: WE'VE CERTAINLY LEARNED FROM THE  
24 APPELLATE COURT IN THE SANTA MARIA CASE THAT THE COURT  
25 IS OBLIGATED WHEN THE ISSUE IS RAISED TO DETERMINE THAT  
26 A PARTY OR TO STATE THAT A PARTY HAS SUCH A RIGHT, TRUE,  
27 WHEN THEY ASK FOR IT WITHOUT SPECIFYING THE AMOUNT TRUE.

28           MR. ZIMMER: I THINK THE COURT HAS TO ADDRESS WHAT

1 THE WATER RIGHT IS OF ALL PARTIES, AND HOW THAT WOULD  
2 WORK UNDER THE PHYSICAL SOLUTION, YES.

3 THE COURT: OKAY. SO IF A PARTY HAS NOT BEEN  
4 PUMPING, THAT DOESN'T MEAN THAT THE PARTY DOESN'T HAVE  
5 THE REASONABLE AND BENEFICIAL USE OF THE WATER  
6 UNDERLYING ITS LAND SUBJECT TO OTHER ISSUES RELATING TO  
7 OVERDRAFT, PRESCRIPTION, AND THE LIKE, TRUE?

8 MR. ZIMMER: THE SUBJECT TO THE OVERDRAFT,  
9 PRESCRIPTION, AND EQUITABLE ISSUES, THEY HAVE SOME  
10 RIGHTS. IT'S JUST A QUESTION OF HOW THAT'S ARTICULATED  
11 IN A PHYSICAL SOLUTION.

12 THE COURT: SO THE ISSUE HERE IS BETWEEN THE BLUM  
13 TRUST'S CLAIM -- I SHOULD SAY AS TO THE BLUM TRUST  
14 CLAIM. I WANT TO MAKE SURE I UNDERSTAND WHAT ISSUES  
15 WE'RE TALKING ABOUT FOR TRIAL. THE ISSUE IS WHETHER OR  
16 NOT THE BLUM TRUST IS ENTITLED TO A SPECIFIC ALLOCATED  
17 RIGHT SUBJECT TO OTHER POTENTIAL ISSUES, SUCH AS  
18 OVERDRAFT, PRESCRIPTION, ET CETERA, ET CETERA, AND WHAT  
19 THE EFFECT IS OF THE IRRIGATION THAT OCCURRED ON BLUM  
20 TRUST'S LAND WHEN IT WAS UNDER LEASE.

21 MR. ZIMMER: I THINK THAT'S CORRECT.

22 THE COURT: AREN'T THOSE FACTS UNDISPUTED?

23 MR. ZIMMER: I THINK IT'S UNDISPUTED THAT THERE  
24 WAS -- CERTAIN FACTS ARE UNDISPUTED, YES. THE PART OF  
25 THE PROBLEM --

26 THE COURT: WHAT ARE THE DISPUTED FACTS?

27 MR. ZIMMER: WELL, YOUR QUESTION PRESUPPOSES AN  
28 AGREEMENT ON WHAT MR. BLUM'S CLAIM IS EXACTLY. THAT --

1           THE COURT: I'M NOT TRYING TO DETERMINE THE  
2 RIGHTNESS OR WRONGNESS. I'M TRYING TO DETERMINE WHAT  
3 THE ISSUES ARE THAT HAVE TO BE TRIED. AND FROM WHAT I'M  
4 GATHERING FROM HEARING FROM BOTH OF YOU, THERE ARE  
5 REALLY NOT ANY FACTUAL DISPUTES.

6           SO IF THE PARTIES RATIONALLY CAN SIT DOWN  
7 AND ENTER INTO A STIPULATION OF FACTS, THE COURT WOULD  
8 BE ABLE TO DETERMINE, WITH YOUR HELP -- AND I WOULD YOU  
9 EXPECT SOME SUBSTANTIAL BRIEFING FURTHER -- WHAT THE  
10 RIGHTS ARE. IF ANY.

11          MR. ZIMMER: THAT -- SINCE IT'S A CLAIM AGAINST  
12 THE BASIN AT LARGE, ALL PARTIES WOULD NEED TO AGREE TO  
13 THOSE STIPULATION OF FACTS.

14          THE OTHER SLIGHT WRINKLE IN THAT IS THAT  
15 MR. BLUM IS ALSO CLAIMING THAT HE HAS THE SAME RIGHTS AS  
16 THE NONPUMPING CLASS, WHICH NEEDS TO BE DEALT WITH  
17 EITHER AT THE SAME TIME OR AFTER THE SMALL PUMPING CLASS  
18 EVALUATION IS MADE.

19          THE COURT: THAT'S SOMETHING WE CAN TAKE UP. BUT  
20 AT THIS POINT, IF WE GO TO TRIAL, OR IF HE FILES A  
21 MOTION FOR SUMMARY JUDGMENT, EVERY OTHER LANDOWNER  
22 OVERLYING THE LAND IS GOING TO HAVE A RIGHT TO WEIGH IN  
23 ON THAT MOTION, TRUE?

24          MR. ZIMMER: TRUE.

25          THE COURT: IF THE TWO OF YOU CAN AGREE AS TO WHAT  
26 THE FACTS ARE AND PERMIT THE OTHER LANDOWNERS TO WEIGH  
27 IN AS TO WHETHER THERE ARE OTHER FACTS OR ADDITIONAL  
28 FACTS, OR THE FACTS ARE NOT CORRECTLY STIPULATED, THAT'S

1 A PROCESS THAT CAN OCCUR.

2 BUT IT SEEMS TO ME THAT THIS CASE HAS GONE  
3 ON FOR A LONG TIME. EVERYBODY IS SPENDING A HUGE AMOUNT  
4 OF MONEY, AND I DON'T THINK THAT ANYBODY IS PARTICULARLY  
5 INTERESTED -- I HOPE -- IN INCREASING THOSE AMOUNTS THAT  
6 ARE BEING SPENT.

7 SO THAT WHAT I'M TRYING TO DO IS TO SUGGEST  
8 TO THE TWO OF YOU AND EVERYBODY ELSE HERE THAT YOU OUGHT  
9 TO MAKE AN EFFORT TO CAPSULIZE THE ISSUE SO THE COURT  
10 CAN DECIDE IT, SINCE THAT'S WHAT'S ULTIMATELY GOING TO  
11 HAPPEN ANYWAY, AND DO SO IN THE MOST EFFICIENT WAY  
12 POSSIBLE. AND I THINK THE MOST EFFICIENT WAY POSSIBLE I  
13 WOULD SUGGEST TO YOU IS FOR YOU TO AGREE WHAT THE FACTS  
14 ARE AND THEN EVERYBODY ELSE WEIGH IN ON THAT IF THEY  
15 THINK THE FACTS ARE NOT CORRECT AND THEN BRIEF THE LEGAL  
16 ISSUE, AND LET THE COURT DECIDE IT.

17 MR. ZIMMER: I THINK THAT'S A GOOD SUGGESTION, AND  
18 THAT'S WHAT WE ALREADY STARTED. WE HAVE STARTED THAT  
19 PROCESS. WE DISCUSSED AS A GROUP OBTAINING A  
20 STIPULATION AS TO FACTS. IT WAS ON THE PRECISE NATURE  
21 OF THE LEGAL CLAIM FROM MR. BLUM THAT WE HAD DIFFICULTY  
22 DECIDING WHAT FACTS TO STIPULATE TO. WE NEED A CLEAR  
23 ARTICULATION OF THE ENTIRE CLAIM MR. BLUM IS MAKING IN  
24 ORDER TO INTELLIGENTLY DECIDE WHAT THE STIPULATED FACTS  
25 WOULD BE.

26 THE COURT: WELL, YOU KNOW, IT MAY WELL BE -- I  
27 THINK I UNDERSTAND THAT, YOUR CONCERN WITH THE TIME  
28 PERIOD TO SOME EXTENT. BUT IT MAY WELL BE THAT YOU

1 STIPULATE TO FACTS THAT YOU -- SOME OF WHICH YOU THINK  
2 ARE INVALID AND REALLY NOT GERMANE TO THE ULTIMATE  
3 ISSUE. BUT IF THE FACTS ARE WHAT THEY ARE, THEN YOU CAN  
4 CERTAINLY ARGUE TO THE LIMIT OF THE DECISION, IF YOU  
5 THINK THAT'S WHAT THE POSITION OUGHT TO BE SO THE COURT  
6 CAN DECIDE IT.

7 SO I GUESS WHAT IT COMES DOWN TO -- AND IF  
8 SOMEBODY WOULD LIKE TO WEIGH ON THIS ISSUE I WOULD BE  
9 HAPPY TO HEAR FROM YOU -- BUT SEEMS TO ME IF YOU WANT TO  
10 GET THIS CASE ULTIMATELY SETTLED, THAT'S ONE OF THE  
11 THINGS YOU NEED TO DO AND YOU NEED TO DO IT TODAY SO  
12 THAT WE CAN SET THIS MATTER FOR HEARING ON -- OR TRIAL  
13 OR OTHERWISE AT THAT TIME.

14 MR. ZIMMER: I AGREE WITH THE COURT'S COMMENTS ON  
15 THAT. THE ONLY PROVISION IS IN THE TERMS OF THE TIMING.  
16 WE CAN WORK OUT THAT STIPULATION, BUT THERE COULD BE  
17 POTENTIALLY IRRELEVANT FACTS IN THERE. THE INCIDENT  
18 CLAIM DOES OVERLAP INTO THE NONPUMPER CLASS ISSUES, THEN  
19 IT'S MY VIEW CERTAINLY -- I THINK IT'S THE VIEW OF OTHER  
20 PARTIES -- THAT THAT ISSUE NEEDS TO BE TEED UP AT THE  
21 SAME TIME OR BEFORE THAT ISSUE IS TEED UP, YOUR HONOR.

22 THE COURT: OKAY. I WOULD ACTUALLY LIKE TO DO  
23 THAT SOMETIME IN OCTOBER.

24 MR. ZIMMER: OCTOBER MIGHT BE A PROBLEM FOR ME. I  
25 HAVE A LATE VACATION IN OCTOBER. WE CAN TALK ABOUT THE  
26 DATE, IF IT'S ACCEPTABLE WITH THE COURT.

27 THE COURT: WHAT I'M REALLY TRYING TO TELL YOU IS  
28 SOONER IS BETTER THAN LATER.

1 MR. BLUM: YOUR HONOR, IF I MAY ADD -- SHELDON  
2 BLUM ON BEHALF OF BLUM TRUST. I DID COMPLY WITH THIS  
3 COURT'S ORDER IN HAVING A LETTER SUBMITTED TO ALL  
4 PARTIES E-FILED ON THE DISCOVERY WEBSITE STATING 20  
5 STATEMENT OF FACTS WITH THE 23 EXHIBITS. I SUPPLEMENTED  
6 THAT WITH ANOTHER LETTER ON THE 20TH, AND I ALSO  
7 SUBMITTED A LETTER ON JULY 30, 2014 OF ESTABLISHED 15  
8 STATEMENT OF FACTS WITH EXHIBITS, FOOTNOTES OF LEGAL  
9 ANALYSIS. THERE WAS ONLY ONE PARTY THAT CAME FORWARD  
10 AND HAD INQUIRIES, AND THAT WAS MR. MCLACHLAN. I  
11 THOUGHT I REPLIED IN RESPONSE TO THIS LETTER.

12 SO I'M NOT AWARE OF ANYONE ELSE OTHER THAN  
13 MR. ZIMMER WHO HAS VOICED ANY OBJECTION OVER THE CLAIM.

14 THE COURT: WELL, ALL RIGHT, YOU HAVE HEARD WHAT I  
15 WOULD LIKE YOU TO DO.

16 MR. BLUM: SURE.

17 THE COURT: OKAY.

18 MR. MILIBAND: GOOD MORNING, YOUR HONOR. WES  
19 MILIBAND FOR PHELAN PINION HILLS COMMUNITY SERVICES  
20 DISTRICT.

21 JUST -- I WAS JUST TAKING THE COURT'S  
22 INVITATION TO CHIME IN ABOUT THE PROCESS OF STIPULATION.  
23 I'M HAPPY TO ADDRESS THAT NOW, OR SIT BACK --  
24 WHATEVER THE COURT WOULD LIKE TO DO.

25 THE COURT: NO, I THINK YOU KNOW WHAT I WANT YOU  
26 TO DO.

27 MR. MILIBAND: YOUR HONOR, I'M ABSOLUTELY  
28 AGREEABLE AND FOR LONG HAVE BEEN AGREEABLE TO TRY TO

1 COME UP WITH SOME KIND OF STIPULATION AS TO THE MATERIAL  
2 FACTS. WE THOUGHT WE TRIED THAT IN ADVANCE WITH PHASE 4  
3 WHEN PHASE 4 WAS MUCH BROADER THAN WHAT IT BECAME FOR  
4 TRIAL. WE'VE TRIED THAT EVER SINCE. AND MR. ZIMMER TO  
5 HIS CREDIT HAS BEEN CANDID ENOUGH TO SAY THAT HE'S NOT  
6 WILLING TO STIPULATE AS TO ANY FACTS AS IT RELATES TO  
7 PHELAN'S CLAIMS.

8 SO IT PUTS ME IN A POSITION OF WANTING TO  
9 TAKE THE COURT'S DIRECTION OR ENCOURAGEMENT TO DO THAT.  
10 I CANNOT BECAUSE THERE IS AT LEAST ONE PARTY UNWILLING  
11 TO DO. AND ALL IT TAKES IS JUST THAT ONE PARTY. SO  
12 SIMILARLY, AS IT WAS PUT INTO THE PAPERS I FILED FOR  
13 THIS MORNING'S HEARING, IS THAT I THINK THERE IS A  
14 VIABLE WAY TO TRY TO AT LEAST RESOLVE SOME OF PHELAN  
15 CAUSES OF ACTION BY WAY OF MOTION FOR SUMMARY  
16 ADJUDICATION. I UNDERSTAND THAT DOES CREATE A  
17 PROTRACTED PROCESS UNDER THE CODE, BUT I WOULD ALSO  
18 SUBMIT THAT THERE IS ISSUES THAT HAD NOT BEEN SUBJECT TO  
19 PRIOR DISCOVERY. SO THERE IS A NECESSITY FOR SOME  
20 DISCOVERY TO BE DONE. THE GIST OF IT ESSENTIALLY GETS  
21 TO WHO REALLY IS CHALLENGING PHELAN AND ON WHAT BASIS.  
22 GENERICALLY, I KNOW IT'S VIRTUALLY EVERY COUNSEL AND  
23 PARTY IN THIS ROOM, BUT THAT MAKES IT ALL THE MORE  
24 NECESSARY FOR ME TO BE ABLE TO DO THE PROPER PREPARATION  
25 FOR WHATEVER KIND OF HEARING OR MOTION OR TRIAL TO KNOW  
26 SPECIFICALLY WHO IT IS AND ON WHAT BASIS. I KNOW THERE  
27 ARE SOME IN THE ROOM WHAT DISAGREE ACADEMICALLY, BUT ARE  
28 NOT LOOKING TO ACTIVELY CHALLENGE PHELAN. THERE ARE



1 SOME WHO EVEN AGREE, BUT ARE NOT IN A POSITION TO  
2 ACTIVELY SUPPORT. THERE ARE SOME WHO DISAGREE OUTRIGHT  
3 AND WILL ACTIVELY CHALLENGE PHELAN. I DON'T KNOW THE  
4 SCOPE OF THOSE PARTIES, MUCH LESS THE BASIS FOR EACH OF  
5 THOSE PARTIES TO CHALLENGE PHELAN, AND THAT'S WHY I  
6 WOULD LIKE AN OPPORTUNITY FOR SOME ABBREVIATED  
7 DISCOVERY.

8 DURING OUR MEET-AND-CONFER CALL ALMOST TWO  
9 WEDNESDAYS AGO, I THOUGHT IT WAS PRODUCTIVE, IN THAT WE  
10 COULD AT LEAST -- WE AGREED TO DISAGREE TO A LARGE  
11 EXTENT AS OFTEN HAPPENS. BUT WE COULD AGREE THAT A CASE  
12 MANAGEMENT ORDER WAS AN APPROPRIATE VEHICLE FOR CREATING  
13 STRUCTURE AND MANAGEMENT, IT BECOMES A QUESTION IN MY  
14 MIND AS TO THE SCOPE OF THE CAUSES OF ACTION AND ISSUES  
15 TO REALLY BE DEALT WITH IN THIS NEXT HEARING OR TRIAL.  
16 I PREFER TO CALL IT A TRIAL BECAUSE THAT'S WHAT I  
17 CONSIDER IT TO BE AND TO BE AFFORDED THAT PROCESS THAT  
18 GOES ALONG WITH IT.

19 SO THAT'S WHY I TRIED TO DO THIS IN A WAY,  
20 YOUR HONOR, THAT WOULD MAKE SENSE. AGAIN JUST FROM MY  
21 PERSPECTIVE, WE'RE TRYING TO CREATE A MANAGEABLE WAY FOR  
22 THE COURT AND THE PARTIES TO KNOW SPECIFICALLY -- EVEN  
23 THOUGH I'VE PUT IT OUT THERE IN PLEADINGS MANY TIMES  
24 BEFORE IN FORMAL AND INFORMAL SETTINGS -- BUT TO  
25 SPECIFICALLY KNOW WHAT PHELAN PINON HILLS WOULD LIKE TO  
26 ESTABLISH AS ITS PRIMARY RIGHTS. AND I SAY THAT  
27 CAUTIOUSLY BECAUSE WE HAVE MULTIPLE CAUSES OF ACTION.  
28 BUT I THINK IF WE DEAL THOSE FOUR CAUSES OF ACTION THAT

1 I PUT INTO THE PAPERS FOR TODAY, THAT WOULD GIVE WHAT I  
2 UNDERSTOOD FROM OUR MEET-AND-CONFER TO REALLY BE IN  
3 FURTHERANCE OF DETERMINING THOSE PRIMARY ISSUES.

4 THE COURT: WELL, AS I UNDERSTAND YOUR CLAIM, AND  
5 THE CLAIM THAT'S AT ISSUE WITH REGARD TO PHELAN, IS THE  
6 QUESTION OF WHETHER SOMEHOW OR OTHER YOU'RE ABLE TO  
7 COUNT THE RETURN FLOWS FROM THE WATER THAT YOU PUMP IN  
8 DETERMINING WHAT YOUR ALLOCATION SHOULD BE.

9 IS THAT A FAIR STATEMENT?

10 MR. MILIBAND: IT IS, YOUR HONOR. IT'S PART OF  
11 IT. I'LL ADMIT IT'S UNIQUE; IT'S SIMPLE IN SOME WAYS,  
12 COMPLEX IN OTHERS, WHETHER LEGALLY OR TECHNICALLY. BUT  
13 THE WAY I'M TRYING TO FRAME IT, IF FOR NO OTHER REASON  
14 THAN FOR MY UNDERSTANDING TO TRY TO CLEARLY ARTICULATE  
15 IT BEFORE THE COURT AND OTHER PARTIES, IS THAT THERE IS  
16 A WATER RIGHT, AND MR. ZIMMER SAID WHEN TALKING ABOUT  
17 THE BLUM TRUST ISSUES, A SETTLEMENT RIGHT. I AGREE WITH  
18 THAT. IF WE'RE LOOKING STRICTLY UNDER WHAT IS A WATER  
19 RIGHT, I THINK THERE IS PRETTY CLEAR CASE LAW ON WHAT IS  
20 A CALIFORNIA WATER RIGHT VERSUS SOME OTHER TYPE OF RIGHT  
21 BY WAY OF CONTRACT OR SETTLEMENT.

22 SO THE WATER RIGHT THAT WE'RE PURSUING IS  
23 NOT PRESCRIPTION. THAT'S SOMETHING THAT I TRIED TO  
24 PRESENT THROUGH KIND OF A BROADER DISCUSSION LAST  
25 SEPTEMBER WHEN WE WERE SCOPING OUT FOR PHASE 5. AND  
26 THAT'S SOMETHING THAT I MORE AND MORE HAVE BEEN PUTTING  
27 INTO ISSUE IS THAT WE ARE A PUBLIC AGENCY AND WE  
28 APPROPRIATE WATER. THERE IS AN APPROPRIATOR FOR PUBLIC

1 USE RIGHT. THAT'S THE WATER RIGHT THAT WE'RE LOOKING TO  
2 ESTABLISH. THERE IS A COMPONENT TO THAT THAT DEALS WITH  
3 SURPLUS, BUT I WOULD LIKE TO TABLE THAT FOR A MOMENT  
4 BECAUSE I KNOW -- UNLESS THE COURT WANTS TO DISCUSS  
5 THAT.

6 THE COURT: BEFORE YOU GO ON TOO FAR, THE  
7 QUESTION, AS I GATHER IT, IS SET UP BY THE FACT THAT YOU  
8 DID ESTABLISH THE AMOUNT OF PUMPING THAT YOU HAVE DONE  
9 IN PHASE 4 TRIAL, CORRECT?

10 MR. MILIBAND: CORRECT, YOUR HONOR. FOR YEARS  
11 2011 AND '12.

12 THE COURT: THAT NUMBER IS THERE AND THAT'S WHAT  
13 YOU HAVE BEEN PUMPING AT VARIOUS TIMES. AND I DON'T  
14 THINK THAT THERE IS ANYTHING THAT IS DISPUTED ABOUT  
15 THAT; THAT IS, THAT THAT'S THE AMOUNT THAT YOU WERE  
16 PUMPING. THE QUESTION BECOMES HOW MUCH ARE YOU ENTITLED  
17 TO PUMP? AND IT SEEMS TO ME -- AND I DON'T KNOW THE  
18 WHERE THIS IS ULTIMATELY GOING TO GO -- BUT THE ISSUE  
19 FOR YOU TO PRESENT TO THE COURT IS JUSTIFICATION FOR  
20 YOUR PUMPING, AND WHETHER IT BE AN APPROPRIATIVE RIGHT,  
21 A PRESCRIPTIVE RIGHT OR SOME OTHER RIGHT, AN UNDERLYING  
22 OWNERS' RIGHT, THAT WOULD FORM THE BASIS FOR THE AMOUNT  
23 THAT YOU'RE ENTITLED TO.

24 SO THAT'S WHAT YOU NEED TO PROVE. AND I'M  
25 NOT SURE THAT THE QUESTION OF WHAT HAPPENS TO THE WATER  
26 AFTER YOU HAVE PUMPED IT IS GOING TO BE SOMETHING THAT  
27 IS PARTICULARLY RELEVANT. I DON'T KNOW. IT MIGHT BE.  
28 BUT THAT BECOMES THE LEGAL ISSUE.

1                   AND THE AMOUNT OF PUMPING IS NOT IN  
2     DISPUTE.   THE QUESTION OF WHAT RIGHTS YOU HAVE WITH  
3     REGARD TO THAT IN TERMS OF WHAT YOUR ALLOCATION RIGHTS  
4     ARE IS RELEVANT, AND THAT'S SOMETHING THAT IF EVERYBODY  
5     AGREES AS TO HOW MUCH YOU'RE PUMPING AND AGREES THAT YOU  
6     MAY ARGUE THAT BECAUSE THERE IS NEGATIVE GRADIENT FROM  
7     WHERE THE WATER IS BEING USED TO THE WELL SITE SOMEHOW  
8     OR OTHER THAT AFFECTS THE AQUIFER AND SHOULD AFFECT THE  
9     AMOUNT OF YOUR PUMPING AND YOUR PUMPING ALLOCATION.  
10    THAT'S SOMETHING THAT'S A LEGAL ISSUE FOR YOU TO ARGUE.

11                  SO THAT -- I DON'T QUITE UNDERSTAND WHAT  
12    OTHER DISCOVERY, ASSUMING THOSE FACTS ARE AGREED TO, IS  
13    REALLY NECESSARY IN ORDER FOR YOU TO PRESENT THE LEGAL  
14    ISSUE TO THE COURT.

15                 MR. MILIBAND:   YOUR HONOR, THAT'S -- IT TURNS ON  
16    WHAT IS THE SCOPE OF ISSUES THE COURT WANTS TO HEAR FOR  
17    THIS NEXT TRIAL.   IF IT'S ON THE WATER RIGHT, THE WATER  
18    RIGHT FOR THE APPROPRIATOR FOR PUBLIC USE COMES DOWN TO  
19    ESSENTIALLY IS THERE SURPLUS WATER OR NOT.   THAT BECOMES  
20    A QUESTION OF LIABILITY.   SO THERE IS -- IN MY MIND I  
21    LOOK IT AT THE WATER RIGHT TO BE ESTABLISHED AS AN  
22    APPROPRIATOR FOR PUBLIC USE WATER RIGHT.   THERE IS A  
23    LIABILITY SECTION THAT THE COURT HAS SEEN FROM ITS  
24    EXPERIENCE ON THE BENCH.   THERE IS A BIFURCATION PROCESS  
25    FOR THAT, AND THAT WAS PART OF THE MEET-AND-CONFER TOO  
26    WAS TO TRY TO HAVE A WAY THAT ALLOWS FOR AN EXPEDITED  
27    DETERMINATION, BUT NOT AT THE DETRIMENT OR SACRIFICE TO  
28    ANYONE'S RIGHTS, BUT IN A WAY THAT MAKES SENSE.   THAT'S

1 WHY I TRIED TO FRAME THIS AS: WHY DON'T WE HAVE  
2 DETERMINATION ON AN APPROPRIATOR FOR PUBLIC USE RIGHT.  
3 ARE WE THAT OR NOT? ON THE SURPLUS, THERE IS HIGHLY  
4 TECHNICAL ISSUES INVOLVED WITH THAT THAT RELATE TO  
5 ALMOST MORE OF PARTY-TO-PARTY ISSUES, IN THAT IF THERE  
6 IS PROOF ISSUES AS TO WHO IS MAKING INVERSE CONDEMNATION  
7 CLAIM AGAINST PHELAN AND WHO BEARS THAT BURDEN OF PROOF.  
8 THAT'S WHY I WAS LOOKING FOR A WAY TO HAVE THAT WATER  
9 RIGHT DETERMINED; WE CAN FIGURE OUT THAT LIABILITY IN A  
10 DIFFERENT PROCEEDING.

11 ON THE RETURN FLOW RIGHT, YOUR HONOR, THAT  
12 DOES TETHER DIRECTLY; THAT'S A SEPARATE TYPE OF RIGHT  
13 I'M TRYING TO ESTABLISH.

14 THE COURT: THAT'S ALL PART OF YOUR ALLOCATION  
15 RIGHT. SO IT'S REALLY NOT SEPARATE. AND YOU EITHER --  
16 WHAT THE EFFECT OF THAT RETURN FLOW OR GRADIENT IS ON  
17 THE GRADIENT IS A QUESTION THAT PERHAPS IS A LEGAL ISSUE  
18 THAT NEEDS TO BE RESOLVED SINCE YOU REQUESTED IT.

19 HERE IS THE STATUS OF THIS CASE NOW. THE  
20 VAST MAJORITY OF THE PARTIES HAVE SETTLED OR HAVE  
21 ENTERED INTO A METHOD OF SETTLING THE ALLOCATION RIGHTS  
22 THAT YOU EACH MAY HAVE. THERE IS SOME EXCEPTIONS. THE  
23 BLUM TRUST REMAINS AT ISSUE. YOU HAVE NOT DIRECTLY  
24 PARTICIPATED IN THAT SETTLEMENT PROCESS AS I UNDERSTAND.  
25 FOR WHATEVER REASON. AND I'M NOT FAULTING ANYBODY. YOU  
26 CAN DO WHAT YOU HAVE TO DO. AT THIS POINT THEN, ALL THE  
27 ISSUES IN A CONSOLIDATED CASE ARE VIABLE AS FAR AS YOU  
28 ARE CONCERNED.

1                   BUT IT SEEMS TO ME THAT GIVEN WHAT  
2   EVERYBODY ELSE HAS DONE HERE -- AND I WILL CONCEDE  
3   YOU'RE NOT A LEMMING -- WHAT EVERYBODY ELSE HAS DONE IT  
4   SEEMS TO ME THERE IS A VERY EASY PATH TO NARROW WHATEVER  
5   REMAINING ISSUE THERE MAY BE FOR YOU, ASSUMING YOU  
6   CANNOT AGREE AS TO THE ALLOCATED AMOUNT AND RESOLVE ALL  
7   THOSE OTHER ISSUES. IF THERE IS A QUESTION THAT YOU  
8   CAN'T RESOLVE WITH REGARD TO YOUR ALLOCATIONS BECAUSE OF  
9   YOUR CONCERN ABOUT THE RETURN FLOW FROM THE PUMP WATER,  
10  IT SEEMS TO ME THAT CAN BE VERY NARROWLY TRIED WITH THE  
11  LEAST AMOUNT OF EXPENSE TO YOUR CLIENTS AND EFFORT FOR  
12  YOU. BUT IT SEEMS TO ME THAT YOU CAN'T REACH THAT POINT  
13  UNLESS YOU SIT DOWN WITH THOSE PARTIES AND MAYBE THE  
14  LIAISON COMMITTEE IS WHERE YOU NEED TO START, TO SEE IF  
15  YOU CAN ARRIVE AT THAT UNDERSTANDING SO THAT YOU CAN TRY  
16  WHATEVER ISSUE THERE IS TO BE TRIED. I MEAN, TO MY  
17  KNOWLEDGE THERE WAS A STIPULATION BY EVERYBODY AS TO THE  
18  AMOUNT OF WATER THAT YOU'RE PUMPING.

19               MR. MILIBAND: I AGREE, YOUR HONOR.

20               THE COURT: SO THAT'S NOT IN DISPUTE.

21               MR. MILIBAND: I DON'T SEE HOW IT'S DISPUTABLE  
22  THAT WE'RE A PUBLIC AGENCY; THAT WE APPROPRIATE.

23                   SO I SHARE IN A LOT OF THAT, BUT THE  
24  PROBLEM HAS BEEN, EVEN GOING BACK TO SETTLEMENT, YOUR  
25  HONOR -- I'D LIKE TO ADDRESS THAT BRIEFLY BECAUSE PHELAN  
26  HAS BEEN ACTIVELY ENGAGED, WELL BEFORE EVEN MY  
27  PREDECESSOR WAS RETAINED THERE WERE EFFORTS; CERTAINLY  
28  SHE MADE HER EFFORTS, AND CERTAINLY I HAVE, AS HAVE A

1 NUMBER OF BOARD MEMBERS AND THE GENERAL MANAGER. SO  
2 CERTAINLY NOT FOR LACK OF EFFORT OR SINCERITY. I THINK  
3 IT COMES DOWN TO THERE IS A LOT OF GOOD WATER KNOWLEDGE  
4 IN THIS ROOM, AND A LOT OF FOLKS TAKE ISSUE WITH IT.  
5 AND TO ME, IT'S ALMOST A FUNCTION OF HUMAN NATURE WHERE  
6 THERE IS VERY LIMITED SUPPLY OF THIS NATURAL RESOURCE,  
7 AND --

8 THE COURT: MR. MILIBAND, NONE OF THOSE MATTERS I  
9 THINK ARE DISPUTED. THERE IS A SINGLE ISSUE DISPUTED,  
10 AND FROM WHAT YOU'RE TELLING ME AND WHAT I HAVE HEARD  
11 FROM EVERYBODY ELSE IS A QUESTION OF ARE YOU ENTITLED TO  
12 SOME ENHANCED WATER RIGHT AS A RESULT OF RETURN FLOWS  
13 FROM WATER THAT YOU HAVE PUMPED FROM THE NATIVE YIELD?

14 MR. MILIBAND: THAT'S NOT QUITE HOW I'D ARTICULATE  
15 IT, BUT IT DOES COME DOWN TO -- AND I WAS ONLY TALKING  
16 ABOUT THE OTHER PARTS. I WOULD JUST LIKE THE COURT TO  
17 UNDERSTAND WE'RE NOT PART OF THIS; IT'S NOT BY OUR  
18 CHOOSING, IT'S BY THE CHOOSING OF OTHERS. SO NOW I'M  
19 JUST TRYING TO COME UP WITH A PROCESS THAT NOT ONLY  
20 CONFORMS TO THE PROCESS, BUT ALLOWS US TO BE IN THAT  
21 POSITION FOR THE COURT TO MAKE ITS DETERMINATION, BUT IN  
22 A WAY THAT MAKES SENSE TOO.

23 SO I'M NOT TRYING TO PROTRACT THINGS  
24 UNNECESSARILY, BUT I JUST DON'T -- I DON'T FOLLOW THE  
25 COURT'S DIRECTION, OR ORDER, OR ENCOURAGEMENT TO SIT  
26 DOWN WITH THE LIAISON COMMITTEE OR OTHERS, BUT HISTORY  
27 HAS PROVEN ITSELF JUST THAT NOT BEING ABLE TO HAPPEN.  
28 AND MR. ZIMMER, I AGAIN STATE IT BECAUSE AT LEAST HE WAS

1 CANDID TO SAY HE'S NOT WILLING TO STIPULATE TO ANY  
2 FACTS.

3 SO TO ME, THE MOTION, DESPITE BEING A  
4 PROTRACTED PROCESS FOR RESOLUTION, IS A VEHICLE FOR  
5 ESSENTIALLY DOING THAT BECAUSE I THINK THERE ARE FACTS  
6 THAT ARE NOT SUBJECT TO REASONABLE DISPUTE, MATERIAL  
7 FACTS. SO THAT'S WHY I REALLY STAND BY -- AND I  
8 APPRECIATE THE COURT'S COMMENTS -- BUT I STAND BY THE  
9 SCOPE AND SUGGESTED SCHEDULE THAT I PUT OUT THERE.

10 THE COURT: I HAVE NO PROBLEM UNDERSTANDING WHAT  
11 YOUR TRUE POSITION IS. BUT IT SEEMS TO ME THAT THERE IS  
12 A MUCH MORE DIRECT WAY OF GETTING TO THE ANSWER. AND I  
13 WOULD SUGGEST TO YOU THAT YOU TAKE MY ENCOURAGEMENT; YOU  
14 TALK WITH THE LIAISON COMMITTEE ABOUT WHAT'S REALLY AT  
15 ISSUE HERE.

16 MR. MILIBAND: THAT WOULD BE FINE, YOUR HONOR.

17 THE COURT: I WANT TO HEAR FROM MR. ZIMMER. HE'S  
18 STANDING BEHIND YOU WITH A SMILE ON HIS FACE.

19 MR. MILIBAND: AS USUAL.

20 MR. ZIMMER: AS I SAID, YOUR HONOR, SOMEHOW I'VE  
21 BECOME THE LIGHTENING ROD ON THIS ISSUE AS WELL, SIMPLY  
22 BECAUSE WE CHOOSE STRAWS, AND I GOT TO TAKE THE  
23 DEPOSITIONS OF THE PHELAN EXPERTS.

24 THE LAST TIME WE WERE BEFORE THE COURT,  
25 MR. MILIBAND WAS SAYING, "MR. ZIMMER IS WILLING TO  
26 STIPULATE AND NOBODY ELSE IS." NOW HE'S SAYING I'M NOT  
27 WILLING TO STIPULATE, SO LET ME KIND OF CLARIFY WHAT'S  
28 HAPPENING.



1 I TOOK THE DEPOSITIONS ON BEHALF OF MANY  
2 LANDOWNERS AS TO THE PHELAN CLAIM. AT THAT TIME, THE  
3 PHELAN CLAIM WAS A CLAIM TO RETURN FLOW RIGHTS AS A  
4 RESULT OF PUMPING NATIVE WATER, AS THE COURT CORRECTLY  
5 POINTED OUT. I DON'T THINK THERE IS ANY WATER LAWYER IN  
6 THE ROOM WHO THINKS YOU HAVE A CLAIM RETURN FLOWS FROM  
7 PUMPING NATIVE WATER. IF WE DID, WE WOULD ALL BE THE  
8 BENEFICIARY OF A HUGE RETURN FLOW CLAIM.

9 SO THAT'S A LEGAL ISSUE THAT NEEDS TO BE  
10 DECIDED. AND I THINK THAT RATHER THAN REFERRING IT TO  
11 THE LIAISON COMMITTEE, I THINK WHAT THE COURT SHOULD DO  
12 IS HAVE THAT DECIDED TODAY.

13 AS TO THE ISSUE OF STIPULATION, THE REASON  
14 THAT THAT BECAME AN ISSUE IS -- I'M PERFECTLY WILLING  
15 NOW, AND I WAS PERFECTLY WILLING THEN, AND I THINK OTHER  
16 COUNSEL ARE AS WELL TO STIPULATE TO THE FACTS UPON WHICH  
17 THIS RETURN FLOW CLAIM IS BASED. I KNOW WHAT THEY ARE  
18 BECAUSE WE TOOK THE DEPOSITIONS. AND I STILL STAND BY  
19 THAT; I DON'T HAVE ANY PROBLEM WITH STIPULATING THOSE  
20 FACTS.

21 BUT WHAT'S HAPPENED MORE RECENTLY IS THAT  
22 MR. MILIBAND HAS RUN THESE FACTS OF THE RETURN FLOW  
23 CLAIM BY OTHER COUNSEL AND NOBODY IS PICKING UP ON THIS  
24 IDEA; NOBODY AGREES THAT THAT GIVES YOU A RETURN FLOW  
25 RIGHT. SO WHAT HAS HAPPENED IS PHELAN HAS NOW EXPANDED  
26 THEIR ARGUMENT, SCRAMBLING TRYING TO FIND SOME WAY TO  
27 CLAIM AN OVERLAYING GROUNDWATER RIGHT. AND THERE HAVE  
28 BEEN RECENT CLAIMS FOR PRESCRIPTION, PUBLIC USE, AND

1 SURPLUS, I BELIEVE.

2 NOW, LET'S TAKE THE SURPLUS CLAIM FIRST.  
3 THE SURPLUS CLAIM IS BASED UPON THE THEORY THAT THE  
4 SOUTHEAST PORTION OF THE BASIN IS SOMEHOW A SEPARATE  
5 BASIN; THAT THEREFORE THERE IS A SURPLUS OF WATER THERE,  
6 AND THAT THEY AS APPROPRIATOR GET TO USE THE SURPLUS  
7 WATER. NOW MY CLIENT HAS WATER OUT IN THE SOUTHWEST  
8 PART OF THE BASIN. IF THAT WAS A SEPARATE BASIN, MY  
9 CLIENT COULD PUMP IN AN UNFETTERED MANNER OUT THERE.  
10 THE FACT OF THE MATTER IS THAT WE HAD A TRIAL; WE HAD A  
11 TRIAL ON THE AREA OF ADJUDICATION. WE DETERMINED WHAT  
12 THE AREA WAS; WE HAD A TRIAL ON SAFE YIELD, INCLUDING  
13 THE ENTIRE AREA. WHEN MR. PHELAN -- OR WHEN MISTER --  
14 WHEN THIS ISSUE WAS FIRST RAISED A LONG TIME AGO AS TO  
15 THERE BEING A DIFFERENT BASIN IN THAT AREA, YOUR HONOR  
16 INVITED A MOTION: IF YOU THINK THIS GROUNDWATER BASIN  
17 NEEDS TO BE CHANGED OR BROADENED OR SOMEHOW CHANGED, YOU  
18 CAN BRING THAT TO THE ATTENTION OF COURT. THAT NEVER  
19 HAPPENED.

20 SO IF THERE WAS SOME CLAIM -- AND OTHER  
21 PARTIES TALK ABOUT THIS SURPLUS ISSUE AS WELL, THE WEST  
22 SIDE, EAST SIDE -- AND THE COURT DETERMINED IT WAS ONE  
23 HYDRAULICALLY CONNECTED BASIN, AND THAT ISSUE WAS  
24 DECIDED. SO I DON'T THINK THAT WE GO BACK THERE,  
25 PARTICULARLY BECAUSE THERE WAS NEVER ANY MOTION TO  
26 EXPAND THE BASIN. I DON'T THINK WE'RE GOING BACK THERE.  
27 SO I DON'T THINK THAT'S A VIABLE CLAIM ANYWAY.

28 IT WAS REPRESENTED TODAY THAT THERE WAS NO

1     PRESCRIPTION CLAIM.   BUT APPARENTLY THERE IS A  
2     PRESCRIPTION CLAIM IN THE PLEADING.   SO I DON'T KNOW  
3     WHETHER THAT'S AT ISSUE OR NOT.   THE REASON THAT FOLKS  
4     GOT SIDEWAYS WITH PHELAN WAS BECAUSE PHELAN WAS  
5     ORIGINALLY SAYING, "WE HAVE GOT RETURN FLOW RIGHTS,"  
6     THEN SUDDENLY SAID, "WE WANT YOU TO STIPULATE TO THAT,"  
7     AND IN THE SAME BREATH SAID, "ANYBODY THAT OPPOSES ME,  
8     I'M GOING TO MAKE SOME KIND OF CLAIM AGAINST THEM."   AND  
9     THOSE CLAIMS WERE AMORPHOUS; NOBODY KNEW WHAT THEY WERE.  
10    THERE WAS THE SENSE THAT MR. MILIBAND WAS USING THAT AS  
11    SOME KIND OF A CLUB TO TRY TO SAY, "IF YOU OPPOSE ME I'M  
12    GOING TO MAKE SOME KIND OF UNSTATED CLAIM AGAINST YOU."  
13    AND THAT'S WHEN -- AND HE SAID, "I'M GOING TO OPPOSE  
14    BOLTHOUSE."   HE USED THAT AS THE EXAMPLE.   AND I MADE  
15    THE STATEMENT AT THAT TIME:   "IF YOU'RE GOING TO OPPOSE  
16    WE WANT TO KNOW WHAT IT IS BECAUSE IF YOU'RE GOING TO  
17    OPPOSE US, WE'RE GOING TO OPPOSE YOU."

18                   BUT IT DOESN'T CHANGE THE FACT THAT AS I  
19    SIT HERE RIGHT NOW, WE WILL STIPULATE TO THE FACTS ON  
20    RETURN FLOWS.   I THINK THOSE FACTS ARE VERY WELL-KNOWN;  
21    I ACTUALLY KNOW WHAT THEY ARE; OTHER PARTIES WILL BE IN  
22    AGREEMENT TO WHAT THOSE FACTS ARE, AND WE CAN CERTAINLY  
23    TRY THAT ISSUE.   BUT IF THERE ARE SOME OTHER CLAIMS THAT  
24    PHELAN HAS OUT THERE, WE CERTAINLY NEED TO KNOW WHAT  
25    THEY ARE.   THIS CLAIM ABOUT THE SURPLUS CLAIM NEEDS TO  
26    BE DEALT WITH.   IF THEY'RE NOT CLAIMING PRESCRIPTION,  
27    THAT NEEDS TO BE ADMITTED ON THE RECORD, AND HE NEEDS TO  
28    TELL US THAT HE'S NOT CLAIMING PRESCRIPTION.

1           OTHER THAN THAT, I THINK THE COURT SHOULD  
2 ORDER US TODAY, WHILE WE HAVE EVERYBODY HERE, TO WORK  
3 OUT THAT STIPULATION AND EXACTLY WHAT CLAIMS HE'S  
4 MAKING, OR WHAT WE'RE TRYING AND THEN WE CAN HAVE A  
5 TRIAL ON IT.

6           THE COURT: WELL, IN AN EARLIER PHASE, THE COURT  
7 FOUND THAT THERE WAS A SINGLE AQUIFER; THAT THERE WAS A  
8 DIFFERENCE IN THE NATURE OF THE WATER LEVELS IN VARIOUS  
9 PARTS OF THE AQUIFER. THERE WERE NOT SUB-BASINS, BUT  
10 SUBPARTS THAT WOULD BE DIFFERENT, AND THOSE MIGHT HAVE  
11 SOME IMPACT ON ORDERS REGARDING THE INDUCTION OF PUMPING  
12 IN THE END OF THE CASE, WHEN YOU HAVE A WATERMASTER AND  
13 THE COURT REVIEWING THOSE DECISIONS. I DON'T KNOW WHAT  
14 THE TERMS OF THE SETTLEMENT ARE. SO I DON'T KNOW WHAT  
15 THE IMPACT IS ON CLAIMS OF PRESCRIPTION THAT ARE ALLEGED  
16 IN THE PLEADINGS. SO I DON'T KNOW THAT I CAN REALLY  
17 ANSWER THE QUESTION WITH REGARD TO WHAT IS AT ISSUE WITH  
18 REGARD TO THE PHELAN HILLS AND/OR WHAT THE PARTIES WANT  
19 TO DO WITH REGARD TO ADJUDICATING THOSE ISSUES BECAUSE I  
20 SUSPECT THEY COULD BE HANDLED VERY SIMILARLY TO THE  
21 MANNER IN WHICH THE SETTLEMENT ITSELF PROPOSES. BUT I  
22 DON'T KNOW WHAT THE SETTLEMENT IS, SO I CANNOT REALLY  
23 ADDRESS THAT.

24           BUT IT DOES SEEM TO ME AT THIS POINT, THE  
25 MAIN ISSUE THAT I'M HEARING IS THAT THERE IS SOME EFFECT  
26 OF THE RETURN FLOWS FROM NATIVE YIELD. THAT'S A LEGAL  
27 QUESTION THAT THE COURT CAN HAVE PRESENTED IN A VERY  
28 NEAT WAY I THINK, AND I CAN DECIDE IT.

1                   MR. MILIBAND, BEFORE WE GO BACK TO YOU, I  
2                   WANT MR. BUNN TO HAVE AN OPPORTUNITY TO ADDRESS THE  
3                   COURT. HE'S BEEN VERY, VERY PATIENT.

4                   MR. BUNN: THANK YOU, YOUR HONOR. TOM BUNN FOR  
5                   PALMDALE WATER DISTRICT.

6                   I THINK THAT THE PARTIES ON BOTH SIDES HAVE  
7                   CONCLUDED THAT AS THINGS STAND NOW, THERE IS NOT GOING  
8                   TO BE A SETTLEMENT WITH PHELAN PINON HILLS, AND IT'S  
9                   GOING TO BE NECESSARY FOR THEM TO PUT ON THEIR CASE AND  
10                  TRY THEIR CASE. I BELIEVE IN ADDITION TO THE  
11                  RETURN-FLOW ISSUE THAT'S BEEN DISCUSSED SO FAR, THERE IS  
12                  AN ISSUE ABOUT WHETHER PHELAN PINON HILLS HAS ANY WATER  
13                  RIGHT AT ALL TO PUMP WATER AND REMOVE IT FROM THE BASIN  
14                  AND USE IT ON THEIR SERVICE AREA. PHELAN PINON HILLS  
15                  DOES PUMP WATER FROM THE BASIN NOW, BUT DID NOT DO SO  
16                  BEFORE THE ACTION WAS FILED. AND IT'S THE POSITION OF  
17                  MY CLIENT -- AND I DON'T KNOW ANY STIPULATING PARTY THAT  
18                  DISAGREES WITH THIS -- THAT PHELAN PINON HILLS DOES NOT  
19                  HAVE ANY WATER RIGHTS.

20                  AND SO THAT COMES DOWN TO A FAIRLY SIMPLE  
21                  QUESTION: DID THE TYPES OF WATER RIGHTS ARE OVERLYING,  
22                  APPROPRIATIVE, PRESCRIPTIVE -- AND IF YOU WANT TO CALL  
23                  IT ANOTHER TYPE OF WATER RIGHT -- A RETURN FLOW RIGHT,  
24                  MR. MILIBAND HAS SAID IN HIS RECENTLY FILED CASE  
25                  MANAGEMENT STATEMENT THAT HE NO LONGER CLAIMS  
26                  PRESCRIPTIVE RIGHTS. SO THE REAL QUESTION IS WHETHER  
27                  HIS CLIENT HAS AN APPROPRIATIVE RIGHT TO WATER. THE  
28                  POSITION OF THE STIPULATING PARTIES THAT HE DOES NOT,

1 BECAUSE ANY PUMPING THAT PHELAN PINON HILLS DID WAS AT A  
2 TIME WHEN THERE WAS NO SURPLUS IN THE BASIN; THE COURT  
3 HAS DETERMINED IT TO BE AN OVERDRAFT. AND YOU CAN ONLY  
4 ACQUIRE AN APPROPRIATE RIGHT WHEN THERE IS A SURPLUS IN  
5 THE BASIN.

6 I'M RECITING ALL OF THIS BECAUSE I THINK  
7 THAT THE FOCUS NOW SHOULD BE ON HOW TO EFFICIENTLY TRY  
8 PHELAN PINON HILLS' CLAIMS TO WATER. I BELIEVE THAT  
9 THAT CAN BE DONE WITHIN A SHORT PERIOD OF TIME BECAUSE I  
10 BELIEVE THAT IT DOES RAISE PURELY LEGAL ISSUES, THE ONE  
11 THAT THE COURT IDENTIFIED ABOUT THE RETURN FLOWS, AND  
12 THE OTHER QUESTION ABOUT WHETHER ONE CAN APPROPRIATE  
13 WATER IF THERE IS NO SURPLUS IN THE BASIN.

14 SO I WANTED TO ADDRESS THOUGH  
15 MR. MILIBAND'S PROPOSAL --

16 THERE IS ONE OTHER THING. MR. MILIBAND HAS  
17 INDICATED THAT IF THERE IS NOT A COMPLETE SETTLEMENT AS  
18 TO HIS CLIENT, THERE IS NOT A SETTLEMENT ON ANYTHING.  
19 HE WANTS TO RESERVE THE RIGHT TO CHALLENGE OTHER PEOPLE  
20 WATER RIGHTS, AND THAT'S HIS RIGHT TO DO SO. IT'S OUR  
21 THOUGHT THOUGH THAT THE MOST EFFICIENT WAY TO GO ABOUT  
22 THIS IS TO DETERMINE WHAT PHELAN PINON HILLS' WATER  
23 RIGHTS ARE FIRST AND WHETHER THEY HAVE ANY WATER RIGHTS.  
24 BECAUSE IF THEY DON'T, THEN THEY DON'T HAVE ANY ABILITY  
25 TO CHALLENGE WHAT THE OTHER PEOPLE'S WATER RIGHTS ARE.

26 SO OUR SUGGESTION MADE TO HIM WAS THAT WE  
27 ALLOW HIM TO PUT ON HIS CASE AS TO WHATEVER HIS WATER  
28 RIGHTS ARE, AND THAT WOULD BE CONTESTED. AND THEN ONLY

1 IF THE COURT DETERMINED PHELAN PINON HILLS HAD ANY WATER  
2 RIGHTS WOULD WE GO ON TO HIS CHALLENGE OF OTHER PEOPLE'S  
3 WATER RIGHTS.

4 MR. MILIBAND, AS YOU SAW IN HIS CASE  
5 MANAGEMENT STATEMENT, ACCEPTED SOME OF THAT AND IS  
6 WILLING TO BIFURCATE THE CLAIMS. BUT WHAT CONCERNS ME  
7 IS THAT HE WANTS TO POSTPONE THE QUESTION OF WHETHER  
8 THERE IS ANY SURPLUS. HE HAS A THEORY THAT HE CAN  
9 EXPLAIN TO THE COURT BETTER THAN I ABOUT WHETHER  
10 THERE -- THAT THERE IS A -- WHAT I'M GOING TO CALL "THE  
11 LOCAL SURPLUS." I DON'T KNOW IF YOU WOULD CALL THAT AN  
12 ACCURATE CHARACTERIZATION. IT'S OUR POSITION THAT  
13 BASIN-WIDE -- THERE IS ONLY ONE BASIN, AS THE COURT  
14 SAID, AND THAT'S AN OVERDRAFT. THERE IS NO SUCH THING  
15 AS LOW-FLOW SURPLUS FROM WHICH HE CAN PUMP. THAT ISSUE  
16 NEEDS TO BE TRIED. IT'S OUR BELIEF THAT IT CAN BE TRIED  
17 QUICKLY. I'M WARY OF GETTING INTO THE TRAP OF -- AS I  
18 VIEW IT -- THAT MR. ZIMMER SAID WE HAVE TO KNOW EXACTLY  
19 WHAT PHELAN PINON HILLS IS CLAIMING. I FEEL LIKE WE DO  
20 HAVE A GOOD IDEA WE KNOW WHAT HE'S CLAIMING; HE DID FILE  
21 PAPERS THAT BASICALLY SAYING WHAT HIS CLAIMS ARE. WE  
22 KNOW THAT. I THINK THAT FURTHER MEET AND CONFERRING IS  
23 NOT LIKELY TO BE PRODUCTIVE. WHERE WE OUGHT TO FOCUS  
24 NOW IS HOW TO EFFICIENTLY RESOLVE THOSE CLAIMS. AND  
25 IT'S MY POSITION THAT THOSE CAN BE DONE QUICKLY, WITHIN  
26 THE 60 DAYS THAT WAS SUGGESTED BY THE PUBLIC WATER  
27 SUPPLIERS, AND THAT THE COURT CAN SCHEDULE A TRIAL ON  
28 THOSE ISSUES IN OCTOBER, IF THAT'S THE PLEASURE OF THE

1 COURT, AND GET THEM RESOLVED. IT WOULD BE MY PREFERENCE  
2 TO DO PHELAN'S OWN CLAIMS FIRST, AND THEN DEPENDING ON  
3 THE RESULTS OF THAT, WE'LL SEE WHETHER WE HAVE ANYTHING  
4 ELSE TO TRY.

5 THE COURT: THANK YOU, MR. BUNN.

6 MR. KUHS: GOOD MORNING, YOUR HONOR. ROBERT KUHS  
7 FOR TEJAN RANCH AND GRANITE CONSTRUCTION.

8 I WOULD CONCUR WITH MOST OF WHAT MR. BUNN  
9 SAID. I WANTED TO ADDRESS A COUPLE OF SPECIFIC POINTS:  
10 ONE IS I HEARD MR. MILIBAND SAY THIS MORNING THAT HE WAS  
11 NOT PURSUING PRESCRIPTION CLAIMS, WHICH IS HIS FIRST  
12 CAUSE OF ACTION. I SAW THAT IN HIS CASE MANAGEMENT  
13 STATEMENT TO THE COURT --

14 THE COURT: I'M SORRY, NOT PURSUING WHAT?

15 MR. KUHS: HIS FIRST CAUSE OF ACTION FOR  
16 PRESCRIPTION. SO I'M WONDERING WHETHER OR NOT WE CAN  
17 TAKE THAT REPRESENTATION AS AN ORAL MOTION TO DISMISS.  
18 IF NOT, IT SEEMS THAT THAT CLAIM NEEDS TO BE ADDRESSED  
19 AT THE SAME TIME AS ANY OTHER CLAIMS SO THERE IS NOT  
20 INCONSISTENT PROOF IN THE CASE.

21 SECOND --

22 THE COURT: WELL, IT SEEMS TO ME IF HE CAN  
23 ESTABLISH WHEN HE STARTED PUMPING AND THAT'S AGREED TO,  
24 THAT ELIMINATES A LOT OF DISCUSSION ABOUT THAT  
25 PRESCRIPTION.

26 MR. KUHS: I WOULD THINK SO TOO, YOUR HONOR.

27 THE SECOND POINT IS THOUGH, IF I UNDERSTAND  
28 ONE OF MR. MILIBAND'S THEORIES, IS EVEN IF HE HAS NO



1 RIGHT TO PUMP WATER IN THE BASIN, WHETHER IT BE  
2 PRESCRIPTIVE OR APPROPRIATIVE, NONETHELESS HE INTENDS TO  
3 ACQUIRE THAT RIGHT EITHER BY INVERSE CONDEMNATION OR  
4 DIRECT CONDEMNATION. THAT'S HIS PUBLIC-USE ARGUMENT  
5 THAT SOMEHOW THERE IS A PUBLIC USE WHICH ATTACHED BEFORE  
6 THE ADJUDICATION STARTED, AND THAT THIS COURT IS  
7 POWERLESS TO ENJOIN THAT USE. I THINK THE LIABILITY  
8 NEEDS TO BE DECIDED BEFORE THE DAMAGE PHASE, IF THAT'S  
9 WHERE HE'S GOING WITH THAT CLAIM.

10 THE COURT: INVERSE CONDEMNATION IS MORE A  
11 PLAINTIFF'S CLAIM AGAINST THE GOVERNMENT, RATHER THAN  
12 THE GOVERNMENT'S CLAIM.

13 MR. KUHS: THAT'S ABSOLUTELY TRUE. IF YOU LOOK AT  
14 THE AUTHORITIES CITED, THE BARONZY (PHONETIC) CASE,  
15 WHICH WAS A 1911 SUPREME COURT CASE. AND THE COURT WAS  
16 FACED WITH -- I'LL CALL IT A SIMILAR SET OF FACTS, WHERE  
17 YOU HAD A TELEPHONE COMPANY WHICH BUILT ITS LINES ACROSS  
18 PRIVATE PROPERTY. AND THE LANDOWNER SOUGHT INJUNCTION  
19 AND INJECTION. THE COURT SAID ONCE THE PUBLIC USE  
20 ATTACHED, I'M POWERLESS TO ENJOIN THAT USE; RATHER I'M  
21 GOING TO CONVERT THIS ACTION INTO ONE OF DAMAGES.  
22 THAT'S WHAT THE COURT DID ON REMAND.

23 THE COURT: THAT'S WHAT INVERSE CONDEMNATION  
24 ESSENTIALLY IS.

25 MR. KUHS: TRUE. ALL I'M SAYING IS THAT IF THERE  
26 IS A PUBLIC USE WHICH ATTACHED BEFORE THIS ACTION WAS  
27 FILED, THEN WE NEED TO ESTABLISH THAT. AND AT THAT  
28 POINT, MR. MILIBAND IS AT CROSSROADS. IT SEEMS TO ME IF

1     THERE IS NO PUBLIC USE THAT HAS ATTACHED AND THE COURT  
2     ENJOINS PHELAN FROM PUMPING FURTHER FROM THAT WELL SITE,  
3     IF THERE IS A PUBLIC USE ATTACHED, THEN WE NEED TO --  
4     HE'S GOING TO HAVE TO GO THROUGH THE PRECONDEMNATION  
5     PROCEDURES, AND I HAVE TO APPRAISE THE RIGHT THAT HE'S  
6     SEEKING TO CONDEMN. HE'S GOING TO HAVE TO POST JUST  
7     COMPENSATION AND WE GET INTO A WHOLE ANOTHER AREA OF THE  
8     BALL.

9                 AND SO I THINK PART OF HIS APPROACH WAS TO  
10    BIFURCATE THOSE ISSUES OF LIABILITY AND COMPENSATION. I  
11    WOULD AGREE WITH HIM THAT THAT MAKES SOME SENSE, AND I  
12    WOULD SUGGEST THAT WE START WITH HIS CASE MANAGEMENT  
13    ORDER AS AN OUTLINE, AND GO BACK AND ADDRESS SOME OF  
14    THESE ISSUES; SEE IF WE CAN GET DISMISSAL OF THE  
15    PRESCRIPTION CLAIM, AND SEE HOW WE TEE UP THE REST OF  
16    THESE ISSUES THAT PHELAN WANTS TO TRY.

17                THE COURT: MR. MILIBAND.

18                MR. MILIBAND: THANK YOU, YOUR HONOR. WES  
19    MILLIBAND FOR PHELAN PINON HILLS.

20                I'M JUST GOING TO PUT ASIDE MR. ZIMMER'S  
21    COMMENTS. THERE IS A LOT OF PERSONAL THINGS SAID, AND I  
22    DON'T WANT TO GO THERE --

23                THE COURT: THIS IS NOT A PERSONAL MATTER --

24                MR. MILIBAND: I KNOW --

25                THE COURT: THIS IS NOTHING MORE THAN THE COURT  
26    ATTEMPTING TO HELP THE PARTIES GET THIS MATTER RESOLVED  
27    OR TRIED, ONE OR THE OTHER.

28                MR. MILIBAND: I APPRECIATE THAT, YOUR HONOR, BUT

1     THERE WERE STATEMENTS ABOUT ME PERSONALLY THAT JUST  
2     AREN'T TRUE.

3                 BUT AS TO THAT PROCESS, I ABSOLUTELY AM  
4     HEARING CONSENSUS, FROM WHAT MR. BLUM WAS DESCRIBING IN  
5     A LARGE PART, AND PARTICULARLY MR. KUHS.  AND THAT'S  
6     PRECISELY WHAT I'M TRYING TO DO IS TO FRAME UP WHAT  
7     THESE KEY ISSUES ARE.

8                 AND THEN ON THAT SURPLUS ISSUE, THERE IS SO  
9     MUCH TECHNICAL AND LEGAL COMPLEXITY GOING INTO THAT --  
10    AS THE COURT WAS JUST TALKING OF THE INVERSE  
11    CONDEMNATION -- THAT'S WHY I'M LOOKING FOR A WAY THAT  
12    MAKES SENSE, HAVE AN APPROPRIATOR FOR PUBLIC USE RIGHT  
13    DETERMINED AS BEING A RIGHT OR NOT, AND THAT WOULD THEN  
14    BE ABLE TO ALLOW FOR SOME OTHER PROCEEDING, IF NEEDED,  
15    ON THAT LIABILITY ON EXTENDED DAMAGES FOR SURPLUS OR  
16    NONSURPLUS.

17                THE RETURN FLOW RIGHT IS NOT WHAT WE'RE  
18    CLAIMING AS A WATER RIGHT.  THAT'S THAT SEPARATE RIGHT  
19    THAT WE STARTED TO TALK ABOUT IN FEBRUARY, WITH SOME  
20    DISCUSSION WITH THE U.S. SUPREME DECISION IN 2011  
21    INVOLVING *MONTANA V. WYOMING*.  AND THAT'S SOMETHING I'M  
22    HAPPY TO FURTHER BRIEF ON; IT'S A LEGAL ISSUE.  THAT IS  
23    THE ISSUE OUR EXPERT WAS DEPOSED ON, AND MR. ZIMMER TOOK  
24    A PRETTY THOROUGH DEPOSITION ON THAT PARTICULAR POINT.

25                THE COURT:  OKAY.

26                MR. DUNN.

27                MR. DUNN:  WITH REGARDS TO PHELAN PINON HILLS AND  
28    THE COMMENTS OF COUNSEL, I'M HERE BEFORE THE COURT TO

1 REQUEST THAT EVEN THOUGH THERE HAVE BEEN A NUMBER OF  
2 ISSUES RAISED IN DISCUSSION INVOLVING PHELAN PINON  
3 HILLS, MR. BUNN'S POINT IS WELL-TAKEN; THAT IS, THERE IS  
4 A FUNDAMENTAL ISSUE TO BE QUICKLY AND READILY DECIDED BY  
5 THE COURT. AND THAT IS AS AN APPROPRIATOR IS THERE A  
6 RIGHT THAT PHELAN PINON HILLS CAN EXERCISE? IN OTHER  
7 WORDS, CAN THEY SIMPLY TAKE THE WATER OUT OF THE BASIN  
8 AS AN APPROPRIATOR. AND THE FACTS ARE NOT IN DISPUTE.  
9 WE KNOW WHO PHELAN PINON HILLS IS; THEY'RE A LOCAL  
10 GOVERNMENTAL ENTITY. WE KNOW HOW MUCH THEY'VE PUMPED;  
11 WE KNOW WHEN THEY PUMPED IT; AND WE KNOW WHERE THEY  
12 PUMPED IT.

13 SO THAT ISSUE IN TERMS OF CAN THEY TAKE THE  
14 WATER OUT OF THE GROUND AS AN APPROPRIATIVE RIGHT IS  
15 READY NOW FOR THE COURT TO DECIDE. AND THIS IS CRITICAL  
16 FOR US TO RESOLVE SOONER INSTEAD OF LATER, AS THE COURT  
17 POINTED OUT. WE HAVE PROPOSED A SCHEDULE FOR THE COURT  
18 TO CONSIDER THAT WOULD HAVE THIS ISSUE DECIDED  
19 APPROXIMATELY IN MID-OCTOBER, ROUGHLY 60 DAYS. THERE IS  
20 NO QUESTION THAT IN THE MANY YEARS OF BOTH SETTLEMENT  
21 DISCUSSION AND LITIGATION, THAT THE PARTIES' POSITIONS  
22 ARE KNOWN. THERE HAS BEEN DISCOVERY; THERE HAVE BEEN  
23 EXPERTS DESIGNATED; THERE HAVE BEEN DEPOSITIONS.  
24 WHATEVER ELSE IS NEEDED, TO THE EXTENT THAT SOME OTHER  
25 FACTUAL PRESENTATION STILL NEEDS TO BE DEVELOPED FOR  
26 THIS SINGLE-FOCUSED ISSUE, CAN EASILY BE DONE IN THE  
27 NEXT 30 TO 40 DAYS. THERE IS NO REASON WHY THIS ISSUE  
28 SHOULD LINGER ANY LONGER. IF THERE ARE AFTER THAT OTHER

1 ISSUES INVOLVING PHELAN PINON HILLS IN TERMS OF INVERSE  
2 AND ALL THAT, THAT CAN BE DECIDED LATER.

3 BUT FOR PURPOSES OF GETTING OUR SETTLEMENT  
4 AGREEMENT DONE AND PRESENTED TO THE COURT, THIS CORE  
5 ISSUE OF DO THEY HAVE A RIGHT AS AN APPROPRIATOR TO TAKE  
6 WATER OUT OF THIS ADJUDICATION AREA IS READY FOR THE  
7 COURT TO DETERMINE. AND I'M HERE ON BEHALF OF DISTRICT  
8 40 AND OTHER PARTIES IN THE CASE TO RESPECTFULLY REQUEST  
9 THAT AS TO THAT ISSUE WE WANT TO -- WE WOULD LIKE TO GET  
10 THAT ISSUE RESOLVED AS SOON AS POSSIBLE. WE THINK 60  
11 DAYS IS AMPLE TIME TO GET THAT DONE.

12 THE COURT: YOU'RE ASKING FOR OCTOBER 7?

13 MR. DUNN: YES, I'M SORRY. I DON'T HAVE MY COPY  
14 HERE. MY CO-COUNSEL HAS THE SCHEDULE.

15 THE COURT: THE PHASE 6 SCHEDULE THAT YOU HAVE  
16 INDICATED IS THREE-DAY COURT TRIAL ON OCTOBER 7.

17 MR. DUNN: YES, AS TO PHELAN PINON HILLS. YES.

18 THE COURT: ALL RIGHT.

19 MR. DUNN: AND WE WOULD ENGAGE COUNSEL FOR PHELAN  
20 IN A PROCESS OF DEVELOPING STIPULATED FACTS,  
21 PRESENTATION OF THE CASE, WORKING OUT THE TIMING, AND  
22 ALL THE ISSUES THAT WE HAVE AMPLE EXPERIENCE BEFORE THIS  
23 COURT IN PRESENTING EVIDENCE. CONFIDENT WE CAN DO THAT.

24 THE COURT: ALL RIGHT. ONE OF THE THINGS THAT I  
25 THINK I WOULD LIKE YOU TO DO IS -- IF YOU CAN -- IS  
26 ENTER INTO A STIPULATION FOR THE COURT TODAY, SETTING  
27 FORTH THE ISSUES, SPECIFIC ISSUES TO BE TRIED IN THAT  
28 BIFURCATED TRIAL, WITH THE BALANCE OF THE ISSUES TO BE

1 RESERVED. AND I THINK OCTOBER 7 FOR THREE DAYS WOULD  
2 WORK FOR THE COURT.

3 MR. DUNN: YES, YOUR HONOR. WE WILL DO THAT.

4 THE COURT: NOW, WE ALSO HAVE THE BLUM TRUST  
5 ISSUES THAT HAVE TO BE SIMILARLY STATED SO THAT WE CAN  
6 TRY THOSE ISSUES, TO THE EXTENT THAT THEY NEED TO BE  
7 TRIED; TO THE EXTENT THAT TRIAL IS NECESSARY.

8 AND LET ME ASK THIS FIRST OF ALL WITH  
9 REGARD TO THE PHELAN PINON HILLS CASE: IS THERE A NEED  
10 FOR FURTHER DISCOVERY OF ANY KIND?

11 MR. DUNN: NO, YOUR HONOR. NOT IN MY VIEW.

12 THE COURT: ON THE PORTION THAT'S GOING TO BE  
13 BIFURCATED?

14 MR. MILIBAND: YOUR HONOR, IF I MAY BRIEFLY.

15 THE COURT: YOU MAY.

16 MR. DUNN: LET ME JUST FINISH THIS ONE QUESTION.  
17 THERE MAY BE -- MAY BE A NEED TO UPDATE THE DEPOSITION  
18 OF THE PHELAN EXPERT. BUT ABSENT THAT -- AND MAYBE A  
19 DEPOSITION OF ONE OF OUR EXPERTS. BUT VERY LIMITED  
20 FOCUS, GIVEN THAT THOSE EXPERTS HAVE BEEN DEPOSED.

21 SO WITH THAT EXCEPTION, I DON'T REALLY SEE  
22 MUCH TO DO TO GET READY FOR THAT.

23 THANK YOU.

24 THE COURT: MR. MILIBAND.

25 MR. MILIBAND: WES MILIBAND, YOUR HONOR.

26 GENERALLY, I THINK IF WE CAN STIPULATE TO  
27 THINGS, WHICH AGAIN I'M AGREEABLE TO TRY TO DO THAT ON  
28 WHAT REALLY SEEMS SHOULD BE SUBJECT TO STIPULATION, I

1 THINK THAT STREAMLINES IT; I THINK THAT COULD REMOVE  
2 THAT NEED FOR SOME OTHER TYPE OF BRIEFING, AND THE ONLY  
3 OTHER VEHICLE I COULD THINK OF WAS THE DISPOSITIVE  
4 MOTION. DISCOVERY-WISE, I REALLY -- ESPECIALLY BEING  
5 ONE PARTY AGAINST POTENTIALLY 30 TO 50 IN THIS ROOM OR  
6 THIS CASE, NEED TO KNOW WHO IS CHALLENGING US. IT'S NOT  
7 ENOUGH JUST TO KNOW GENERICALLY. I NEED TO KNOW, OKAY,  
8 IT MIGHT BE PARTY "X," BUT DOES PARTY "X" HAVE A WITNESS  
9 THAT'S GOING TO CHALLENGE? BUT IT COMES BACK HAVE WE  
10 STIPULATED OR NOT.

11 SO I THINK IF WE CAN REALLY SIT DOWN AND  
12 FIGURE OUT THAT STIPULATION, NUMBER ONE, AS TO THE  
13 FOUR -- AS I PROPOSED IT EXPLICITLY IN WRITING -- IF  
14 IT'S DONE THAT WAY WITH THE SURPLUS AND THOSE OTHER  
15 ISSUES BIFURCATED, WE HAVE OUR PLAYING FIELD SET. NOW  
16 IF WE CAN DETERMINE THOSE FACTS, I THINK WE'RE LOOKING  
17 AT MORE OR LESS A BRIEFING SCHEDULE. BUT WHATEVER WE  
18 CAN'T STIPULATE, I FEEL FORCED TO KNOW WHO IS  
19 CHALLENGING AND DO YOU HAVE A WITNESS BECAUSE I WOULD  
20 WANT TO POTENTIALLY DEPOSE THAT WITNESS.

21 THE COURT: WELL, IF THE FACTS ARE STIPULATED OR  
22 AGREED TO, IT KIND OF ENDS THAT INQUIRY.

23 MR. MILIBAND: IT DOES, YOUR HONOR.

24 THE COURT: THAT'S YOUR FIRST CHORE.

25 MR. MILIBAND: WILL DO.

26 THE COURT: MR. DUNN.

27 MR. DUNN: YES, YOUR HONOR.

28 IN THE MEET-AND-CONFER THAT WE'VE HAD

1 RECENTLY WITH PHELAN PINON HILLS, THIS ISSUE HAS  
2 SURFACED, THE ISSUE RAISED BY PHELAN AS TO IT NEEDS TO  
3 KNOW FROM THE PARTIES -- ALL THE PARTIES, OR WHICH GROUP  
4 OF PARTIES, OR A PARTY THAT'S CHALLENGING; WE CAN DO  
5 THAT PRETTY QUICKLY. I WOULD SAY BY THIS AFTERNOON.  
6 BUT CERTAINLY BY THE END OF THE WEEK, PROBABLY BY  
7 TOMORROW.

8 BUT THE POINT IS, WE HAVE IN THIS CASE  
9 PURSUANT TO COURT ORDER AS PARTIES BEEN DIRECTED TO MAKE  
10 THOSE TYPES OF REPRESENTATIONS. I KNOW AS ONE OF THE  
11 PUBLIC WATER SUPPLIERS, WE HAVE HAD AT LEAST ONE,  
12 POSSIBLY TWO COURT ORDERS, DIRECTING US IN THE PAST TO  
13 MAKE KNOWN WHAT OUR POSITIONS ARE; WHO WE'RE ADVERSE  
14 AGAINST. I SEE THIS IS AN EVEN MORE SIMPLE TASK, A  
15 QUICK TASK.

16 BUT WITHOUT GETTING TOO FAR AHEAD HERE, AS  
17 THE COURT MIGHT IMAGINE, GIVEN THE LENGTH OF TIME THAT  
18 WE HAVE BEEN INVOLVED IN THESE SETTLEMENT DISCUSSIONS,  
19 I'M COMFORTABLE IN SAYING THAT AT LEAST AMONGST THE  
20 PARTIES WHO ARE INVOLVED IN THE SETTLEMENT AGREEMENT  
21 THAT'S IN PLACE IN WRITING, YET TO BE APPROVED, THOSE  
22 PARTIES WILL NOT AGREE WITH THE PHELAN CLAIM.

23 SO I DON'T MEAN TO TAKE UP MUCH TIME HERE,  
24 BUT MY POINT IS THIS SHOULD NOT BE AN ISSUE TO HOLD UP  
25 THE RESOLUTION. THIS IS SOMETHING WE CAN QUICKLY DO,  
26 AND WE CAN GET THAT INFORMATION TO PHELAN.

27 THE COURT: WELL, NOT AGREEING TO THE CLAIM IS  
28 DIFFERENT THAN AFFIRMATIVELY PRESENTING EVIDENCE TO



1 OPPOSING.

2 MR. DUNN: YES.

3 THE COURT: AND I THINK THAT'S THE REAL CONCERN  
4 HERE. AND I THINK MR. MILIBAND IS ENTITLED TO KNOW IF  
5 ANYBODY IS GOING TO WANT TO PRESENT EVIDENCE IN  
6 OPPOSITION TO THEIR CLAIM. AND THE ISSUE -- ACTUALLY,  
7 SOME INTERESTING ISSUES IN TERMS OF THE RIGHT TO PUMP.  
8 IF THERE IS NO SURPLUS, AND -- IN THE BASIN AS A WHOLE,  
9 AND IF THERE IS A SURPLUS IN A PORTION -- OR AS  
10 MR. BUNN CALLS IT "A LOCAL SURPLUS" -- WHAT IS THE  
11 IMPACT OF THAT ON A PRESCRIPTION CLAIM?

12 BUT IF THERE IS NO PRESCRIPTION CLAIM BEING  
13 MADE, I'D LIKE TO GET THAT CLARIFIED, MR. MILIBAND, AND  
14 WE NEED TO KNOW THAT NOW.

15 MR. MILIBAND: SURE. YOUR HONOR, I HADN'T THOUGHT  
16 IT THROUGH AS IN TERMS OF WANTING TO DISMISS THAT. BUT  
17 I CAN ABSOLUTELY REPRESENT TO THE COURT AND TO THE  
18 PARTIES WE'RE NOT PURSUING PRESCRIPTION. TO ME, IT'S A  
19 MATTER OF FORMALITY. BUT I'M NOT DOING BAIT-AND-SWITCH  
20 AND LOOKING TO SAY APPROPRIATOR FOR PUBLIC USE, AND THEN  
21 A MONTH OR SIX MONTHS FROM NOW, LOOK TO ESTABLISH A  
22 PRESCRIPTION.

23 THE COURT: SO WE'RE NOT REALLY TOO CONCERNED  
24 ABOUT A LOCAL SURPLUS, ARE WE?

25 MR. MILIBAND: WELL, THAT'S ABSOLUTELY WHAT MAKES  
26 IT THE KEY ISSUE.

27 THE COURT: WITH REGARD TO PRESCRIPTION.

28 MR. MILIBAND: WITH REGARD TO PRESCRIPTION. BUT