

1 SURPLUS IS ALL THE MORE IMPORTANT, AS IT RELATES TO THE
2 OTHER WATER RIGHTS.

3 THE COURT: I UNDERSTAND YOUR THEORY. I THINK.

4 ALL RIGHT. MR. ZIMMER.

5 MR. ZIMMER: YOUR HONOR, I AGREE WHOLEHEARTEDLY
6 WITH MR. BUNN'S ARTICULATION OF THE ISSUE. I THINK THE
7 FIRST ISSUE IS WHETHER THEY ARE AN APPROPRIATOR OR NOT.
8 I'M A LITTLE CONCERNED ABOUT THE SURPLUS ISSUE, WHICH
9 HAS KIND OF EVOLVED LATER IN THIS PROCESS FROM THE
10 PHELAN SIDE.

11 BUT I THINK THAT -- I TOOK THE DEPOSITION
12 OF MR. MILIBAND'S EXPERT, AND I THINK THAT BASED UPON
13 THE RETURN FLOW ISSUE, AND PUTTING ASIDE THIS SURPLUS
14 ISSUE, THERE IS NOTHING LEFT TO BE DONE. THAT ISSUE OF
15 THE RETURN FLOW WAS TEED UP; HE DESIGNATED AN EXPERT. I
16 TOOK THE EXPERT'S DEPOSITION. THERE IS NOTHING LEFT TO
17 BE DONE. WE CAN EASILY ENTER INTO A STIPULATION AND
18 PROBABLY END UP IN A ONE-DAY TRIAL ON THAT ISSUE.

19 AS TO THE SURPLUS ISSUE, SOME PARTIES -- IF
20 SURPLUS IS GOING TO BE AN ISSUE, SOME PARTIES MAY WANT
21 TO CALL AN WITNESS ON WHETHER THERE IS IN FACT A SURPLUS
22 OR NOT. WHAT I WOULD SUGGEST TO THE COURT IS THAT, AS A
23 MATTER OF LAW, IF THE SURPLUS ISSUE DOESN'T GIVE A PARTY
24 A RIGHT TO PUMP BECAUSE THAT COULD APPLY TO ANYONE WHO
25 CLAIMED THAT THERE WAS A SURPLUS AROUND THEIR WELL THEY
26 COULD PUMP. OF COURSE THAT WOULD DEFEAT THE WHOLE
27 PURPOSE OF HAVING LITIGATED THIS TO BEGIN WITH. SO I
28 THINK MAYBE WE NEED A LEGAL RULING ON WHETHER THAT CAN

1 GIVE RISE TO SOME CLAIM THAT YOU CAN GO AHEAD AND PUMP
2 RATHER THAN LITIGATING IT. BECAUSE IF YOU LITIGATE THE
3 ISSUE, THEN SOME PARTIES MAY IN FACT WANT TO CALL AN
4 EXPERT ON WHETHER THERE WAS A SURPLUS OR NOT.

5 THE COURT: OKAY, I WOULD LIKE TO THINK THAT THE
6 LAST NINE YEARS WAS NOT A WASTE OF TIME.

7 LET'S SEE, COUNSEL HAVE A DUTY NOW TO SIT
8 DOWN AND ARRIVE AT SOME UNDERSTANDINGS AS TO STIPULATED
9 FACTS AND PROCEDURE HERE.

10 WE HAVE GOT A LOT OF OTHER ISSUES TO TALK
11 ABOUT IN THIS CASE. MR. BLUM HAS BEEN VERY PATIENT
12 ALSO.

13 MR. BLUM: THANK YOU, YOUR HONOR. SHELDON BLUM ON
14 BEHALF OF THE BLUM TRUST.

15 WHAT I WOULD LIKE TO ASK THE COURT TO
16 PROVIDE US IS WITH A BRIEFING SCHEDULE FOR THE MOTION
17 FOR SUMMARY JUDGMENT. WOULD YOU LIKE TO DO THAT AFTER
18 WE STIPULATE TO THE FACTS?

19 THE COURT: I DON'T WANT TO DO THAT IF I CAN AVOID
20 DOING IT. AND I'M NOT SURE THAT I HAVE TO DO THAT.
21 WE'LL SEE. BUT THE -- WE HAD A BIG SET THAT WE VACATED
22 FOR THE TRIAL, AND I AM LOATHE TO REOPEN ALL THE OTHER
23 INTERMEDIATE DATES THAT WERE CONTINGENT UPON THAT
24 ADMISSION OF TRIAL DATE FOR PHASE 6. BUT I'LL THINK
25 ABOUT IT.

26 MR. BLUM: YOUR HONOR, I JUST WANT THE COURT TO BE
27 MINDFUL THAT I HAVE BEEN PATIENTLY AWAITING PHASE 6;
28 THAT I -- WE WOULD ASK THAT MY CLAIM WOULD BE HEARD. SO

1 ALTHOUGH I SHARE YOUR THOUGHTS, I HAVE TO SAY THAT I
2 NEVER WAIVED MY RIGHTS.

3 THE COURT: NOBODY SUGGESTED THERE HAS EVER BEEN
4 ANY TRUST WAIVER. THE ORIGINAL DATE FOR THE PHASE 6
5 TRIAL WAS AUGUST 6. OR AUGUST 4 RATHER, I THINK IT WAS.

6 MR. BLUM: AUGUST 4. WHICH WAS VACATED.

7 THE COURT: AT THE REQUEST OF THE PARTIES I
8 VACATED THAT. AND I DIDN'T HEAR ANY OBJECTION TO
9 VACATING IT. I THINK IT WAS THE RIGHT THING TO DO. AND
10 IT TURNS OUT IF THIS SETTLEMENT IS GOING TO COME TO
11 FRUITION, I WOULD SAY IT WAS A SUPERLATIVE IDEA. SO I'M
12 MINDFUL OF YOUR THOUGHTS ON THAT. AND ON YOUR REQUEST.

13 I WANT YOU TO SIT DOWN AND SEE IF YOU CAN
14 ARRIVE AT A STIPULATION FOR FACTUAL DETERMINATIONS THAT
15 YOU'RE GOING TO ASK THE COURT TO MAKE IN TERMS OF THE
16 TRIAL. AND IF YOU CAN DO THAT, THAT WOULD CERTAINLY
17 SAVE EVERYBODY AND THE COURT AN ENORMOUS AMOUNT OF TIME
18 AND MONEY.

19 MR. BLUM: I APPRECIATE THAT, JUDGE, AND I WOULD
20 ALSO LIKE TO COMMENT THAT I HAVE EXHAUSTED EFFORTS IN
21 TRYING TO ESTABLISH UNDISPUTED FACTS AND UNRESOLVED --

22 THE COURT: BUT YOU'RE NOT THERE.

23 MR. BLUM: I ONLY HEARD ONE OBJECTION, AND IT WAS
24 A GENERIC. SO I DON'T THINK I'M TOO FAR FROM A MOTION
25 FOR SUMMARY JUDGMENT IN ESTABLISHING AS A MATTER OF LAW
26 BLUM TRUST RIGHTS.

27 THE COURT: OKAY. WELL, AS I HAVE INDICATED TO
28 YOU, MY PREFERENCE IS THAT YOU DO THIS BY TRIAL, WHICH

1 WOULD TAKE PROBABLY LESS TIME THAN A MOTION FOR SUMMARY
2 JUDGMENT TO PREPARE, IF YOU CAN DO SO.

3 MR. BLUM: OKAY, THANK YOU, YOUR HONOR.

4 THE COURT: MR. KUHS.

5 MR. KUHS: YOUR HONOR, I'D RESPECTFULLY REQUEST
6 THAT THE COURT ENTER INTO ITS MINUTE ORDER THE
7 REPRESENTATIONS OF MR. MILIBAND WITH RESPECT TO PHELAN
8 IT'S NOT PURSUING ITS PRESCRIPTION CLAIMS.

9 THE COURT: YEAH, THE MINUTE ORDER SHOULD REFLECT
10 THAT.

11 MR. KUHS: THANK YOU.

12 MR. MILIBAND: YOUR HONOR, JUST QUICK
13 CLARIFICATION. WES MILIBAND --

14 THE COURT: WE ALSO HAVE A TRANSCRIPT, YOU KNOW.

15 MR. KUHS: THANK YOU, YOUR HONOR.

16 MR. MILIBAND: I'M NOT GOING ANYWHERE. I'M NOT
17 GOING TO CHANGE MY POSITION ON THAT.

18 BUT FOR THE MEET-AND-CONFER, WHAT WE NEED
19 TO DO IS SPECIFICALLY, YOUR HONOR -- JUST FOR COMMON
20 CLARITY -- IS TO CONFIRM THE FACTS FOR THOSE FOUR ISSUES
21 AS I PUT INTO MY PAPERS FOR TODAY; IS THAT RIGHT, YOUR
22 HONOR?

23 THE COURT: YES.

24 MR. MILIBAND: OKAY.

25 THE COURT: ISSUES TO BE TRIED. THERE MAY BE AN
26 BIFURCATION. AND IF YOU'RE INTERESTED IN HAVING A
27 STIPULATION OF FACTS THAT RELATE TO FACTS RELATING TO A
28 TRIAL THAT MAY OCCUR, DEPENDING UPON THE DECISION OF THE

1 BIFURCATED SECTION.

2 MR. MILIBAND: RIGHT. THAT WOULD MEAN WE DON'T
3 NEED TO GET INTO THE SURPLUS ISSUE. IT'S THAT THE WATER
4 RIGHT, RETURN FLOW RIGHT BASICALLY IS A --

5 THE COURT: I DON'T KNOW WHAT THAT MEANS. YOU
6 NEED TO SIT DOWN WITH COUNSEL.

7 MR. MILIBAND: JUST SO I'M CLEAR, OCTOBER 7 DOES
8 PRESENT CONCERNS, BUT IF WE CAN STIPULATE SUFFICIENTLY,
9 THAT MIGHT BE WORKABLE. THAT'S JUST THE ONE CAVEAT I
10 WANTED TO HAVE OUT THERE. THANK YOU.

11 THE COURT: ALL RIGHT. GIVE IT YOUR BEST.

12 NOW, MR. LEININGER, YOUR VERY LUCID CASE
13 MANAGEMENT CONFERENCE STATEMENT TELLS ME THAT YOU WANT
14 TO SIT DOWN WITH OTHER COUNSEL AND SEE IF YOU CAN ARRIVE
15 AT SOME RESOLUTION OF THE WOODS CLASS FEES ISSUE?

16 MR. LEININGER: THAT'S CORRECT, YOUR HONOR. LEE
17 LEININGER FOR THE UNITED STATES.

18 I THINK IF WE CAN TAKE THIS OPPORTUNITY
19 THAT WE'VE SET ASIDE TWO DAYS, WITH THE SUGGESTION
20 THAT -- PERHAPS PROPER VENUE MIGHT BE BEST BEST &
21 KRIEGER'S OFFICE. I'M NOT QUITE SURE OF THE
22 AVAILABILITY. BUT THAT'S WHERE WE HAVE MET IN THE PAST.
23 I'M GETTING AN AFFIRMATIVE HEAD SHAKE FROM MR. DUNN.
24 AND THEN PERHAPS WE CAN ALSO REPORT BACK TO THE COURT AT
25 THE END OF THE DAY AS TO THE STATUS.

26 THE COURT: WHEN DO YOU WANT TO DO THAT?

27 MR. LEININGER: I THINK IMMEDIATELY CONCLUDING
28 THIS CONFERENCE.

1 THE COURT: OKAY. WELL, I HAVE A NUMBER OF OTHER
2 THINGS THAT I NOTED THAT ULTIMATELY ARE GOING TO HAVE TO
3 BE TALKED ABOUT, SOME OF WHICH RELATE TO THE WOOD CLASS.

4 ONE OF THE THINGS THAT CONCERNED ME,
5 MR. MCLACHLAN, WAS -- MR. MCLACHLAN, ONE OF THE THINGS
6 THAT CONCERNS ME HERE IS THERE ARE SEVERAL PARTIES WHO
7 ARE MEMBERS OF THE WOODS CLASS WHO HAVE CHOSEN TO OPT
8 OUT. AND I'M A LITTLE CONCERNED ABOUT THE TIMING FOR
9 THEIR OPT-OUT. IT SEEMS TO ME THAT WHAT THEY ARE DOING
10 IS SAYING: "WE HAVE HEARD WHAT THE PROPOSED SETTLEMENT
11 IS" -- I'M ASSUMING -- "AND WE DON'T WANT TO BE PART OF
12 THAT." BUT THE USUAL WAY IS NOT TO OPT OUT. THE USUAL
13 WAY IS TO OBJECT AND LET THE COURT DECIDE IT. BECAUSE
14 NOW THEY HAVE CREATED ANOTHER PROBLEM BECAUSE THEY HAVE
15 NOT BEEN SERVED INDIVIDUALLY, I TAKE IT. THEY WERE
16 SERVED AS A MEMBER OF THE CLASS. AND I'M JUST WONDERING
17 IF YOU HAVE SOME THOUGHTS ABOUT WHAT THE IMPACT OF THAT
18 WOULD BE ON THIS CASE.

19 MR. MCLACHLAN: I DO, YOUR HONOR, AND WE HAVE HAD
20 SOME EXTENSIVE DISCUSSIONS ABOUT THAT EVER SINCE THE
21 PARTIAL SETTLEMENT LAST YEAR. AND I BELIEVE WHAT YOUR
22 HONOR IS ALLUDING TO IS IN LAST DECEMBER OF 2013 IN SAN
23 JOSE, WE HAD THAT FINAL APPROVAL HEARING ON THE PARTIAL
24 SETTLEMENT. IN THAT PROCESS OF GIVING CLASS NOTICE, THE
25 CLASS MEMBERS HAD THE ABILITY TO OPT OUT ON THE
26 SUBSTANTIVE TERMS. AND SOMEWHERE BETWEEN SIX AND NINE,
27 I BELIEVE, DID OPT OUT. I DON'T KNOW THE EXACT NUMBER,
28 BUT IT WAS BETWEEN SIX AND NINE, A SMALL NUMBER. AND MY

1 UNDERSTANDING IS THAT DISTRICT 40 AND ITS PUBLIC WATER
2 SUPPLIER NONSETTLING CO-DEFENDANTS HAD IN FACT SERVED
3 ALL OF THOSE FOLKS. AND I HAVE SEEN MODEL ANSWERS FROM
4 A NUMBER OF THEM. I CAN'T SAY AS TO WHETHER EVERY ONE
5 OF THEM HAS ANSWERED, OR WHETHER IN FACT THEY HAVE ALL
6 BEEN SERVED. BUT I BELIEVE MOST OF THEM HAVE.

7 IF THE COURT'S QUESTION IS NOW WE HAVE GOT
8 POTENTIALLY A CLOSE-TO-GLOBAL SETTLEMENT, WHICH
9 WE GLOBAL IN TERMS OF AT LEAST THE CLASS COMPLAINTS, I
10 AM STILL OF THE MIND THAT THOSE WHO ARE HAVING
11 SUBSTANTIVE RIGHTS DETERMINED SHOULD HAVE THE RIGHT TO
12 OPT OUT.

13 BUT THAT IS OF COURSE ULTIMATELY A DECISION
14 FOR THE PERSON WEARING THE BLACK ROBE TO DECIDE. THAT'S
15 MY PERSONAL BELIEF IN A SITUATIONS WHERE THE CLASS
16 NOTICE IS GIVEN TO A GROUP TO SAY: "HEY, THERE IS A
17 CLASS THAT EXISTS. BUT THERE HAS BEEN NO DETERMINATION
18 OF YOUR RIGHTS. MONETARILY THAT'S AN ISSUE, OR OTHER
19 SORT OF SETTLEMENT REACHED. AND IT STRIKES ME THAT
20 ALTHOUGH THE LAW IS A LITTLE UNCLEAR ON THIS ISSUE AS TO
21 WHEN A SUBSTANTIVE RIGHT REALLY HAS BEEN DETERMINED;
22 THAT SOMEONE HAS TO BE GIVEN A RIGHT TO SAY, "OKAY.
23 THAT'S A FAIR DEAL OR NOT A FAIR DEAL."

24 AND SO WE HAVEN'T MADE A FIRM
25 DETERMINATION. MY PREDILECTION IS TO DO WHAT WE DID
26 LAST YEAR AND GIVE FOLKS A RIGHT TO OPT OUT. IF I HAD A
27 SIGNED ORDER FROM YOUR HONOR SAYING: "LET'S SAVE TIME
28 IN THE PRELIMINARY APPROVAL HEARING; THAT, NO,

1 MR. MCLACHLAN, THE CLASS IS NOT GIVEN A RIGHT TO OPT
2 OUT. THEIR SOLE RIGHT IS TO OBJECT," THEN I'VE MET MY
3 DUTY AND YOUR HONOR'S ORDER CARRIES THE DAY.

4 SO THOSE ARE MY THOUGHTS. IT WILL DELAY
5 THINGS SIGNIFICANTLY. BECAUSE IF SOMEBODY OPTS OUT AND
6 I CAN'T PRESENT A -- TIMING-WISE, LET'S SAY THE PUBLIC
7 AGENCIES ARE CORRECT, AND THIS THING SOMEHOW GETS
8 RESOLVED IN THE NEXT WEEK AND IS PRESENTED TO BOARDS,
9 AND IT'S NOT DONE UNTIL END OF SEPTEMBER, EARLY OCTOBER;
10 I CANNOT VERY WELL PRESENT YOUR HONOR WITH A PRELIMINARY
11 APPROVAL UNTIL I HAVE AN AGREEMENT WITH ALL THE PUBLIC
12 WATER SUPPLIERS' RIGHT. THAT'S A PROBLEM. SO THEN
13 WE'RE TALKING ABOUT DECEMBER, POTENTIALLY, OR
14 THEREABOUTS TO HAVE OBJECTORS COME IN. AND THEN WHEN
15 THEY DO THAT, THEN OF COURSE MR. DUNN HAS TO HAVE HIS
16 ASSOCIATE AND STAFF GO OUT AND SERVE THEM. AND THEN
17 WE'RE IN APRIL OR MAY.

18 AND, YOUR HONOR --

19 THE COURT: I'M INCLINED TO ASK YOU TO PREPARE AN
20 ORDER THAT INDICATES THAT THE CLASS IS FIXED. AND THAT
21 TO THE EXTENT THAT EVERYBODY WISHES TO OPT OUT, TIME HAS
22 RUN. AND I WOULD NOT EXPECT TO SEE ANY OPT-OUTS. I
23 WOULD EXPECT TO SEE OBJECTIONS, IF THERE IS ANY, TO THE
24 SETTLEMENT.

25 MR. MCLACHLAN: OKAY, THAT'S FAIR ENOUGH, YOUR
26 HONOR. I WILL DO THAT WITHIN THE NEXT WEEK, IF THAT'S
27 AGREEABLE.

28 THE COURT: THAT'S FINE.

1 MR. DUNN.

2 MR. DUNN: JUST A FOLLOW-UP QUESTION WITH THE
3 COURT. THERE WERE THESE SO-CALLED SIX TO NINE OPT-OUTS,
4 AND WE HAVE SERVED ALL OF THEM. COULD WE HAVE A
5 DISCUSSION WITH COUNSEL AND THE COURT ABOUT WHAT TO DO
6 ABOUT THAT SITUATION?

7 THE COURT: WELL, TO THE EXTENT THEY HAVE NOT
8 FILED AN ANSWER --

9 MR. DUNN: OKAY.

10 THE COURT: -- THEN I EXPECT YOU TO TAKE THEIR
11 DEFAULT WITHIN THE TIME SPECIFIED. TO THE EXTENT THAT
12 THEY HAVE FILED AN ANSWER, THEY'RE GOING TO BE ORDERED
13 TO PARTICIPATE IN TRIAL.

14 MR. DUNN: ALL RIGHT.

15 THE COURT: THERE IS ONE OTHER -- THERE IS A
16 LETTER POSTED THAT WAS SENT BY A COUPLE THAT I DON'T
17 HAVE THEIR NAMES.

18 MR. MCLACHLAN: BENNIE MOORE AND HIS WIFE, I
19 BELIEVE. MR. AND MRS. MOORE.

20 THE COURT: THEY INDICATE THEY HAVE SOMETHING LIKE
21 28 ACRES --

22 MR. MCLACHLAN: THEY HAVE TWO PARCELS IN THE
23 ADJUDICATION.

24 THE COURT: THEY HAVE PUMPED THREE OR FOUR WELLS,
25 AND THEY CLAIM THEIR WATER RIGHTS. AND I'M TAKING THAT
26 AS A PRO PER NOTICE OF SOME SORT. I WOULD LIKE THE
27 PUBLIC WATER PRODUCERS TO FOLLOW UP ON THAT. AND THEY
28 CLAIM THAT THEY HAVE TOO MUCH WATER TO BE A MEMBER OF

1 THE SMALL MEMBER CLASS.

2 MR. MCLACHLAN: I CAN'T SPEAK TO THAT. I HAVE HAD
3 A LENGTHY DISCUSSION WITH MR. MOORE BEFORE HE OPTED OUT
4 LAST YEAR. TO THE EXTENT I CAN BE OF ANY -- I TRIED TO
5 EXPLAIN TO HIM WHAT WOULD COME ALONG. HE KNEW HE WAS
6 GOING TO BE SUED. BUT TO THE EXTEND I CAN BE OF ANY
7 HELP, HE'S NOT TECHNICALLY MY CLIENT.

8 THE COURT: DID HE OPT OUT?

9 MR. MCLACHLAN: HE DID. THOSE THAT OPTED OUT WERE
10 TYPICALLY LARGER USERS. THOSE FOLKS, THEY'RE NOT
11 RESIDENTIAL. HE HAS A HOBBY FARM. I NEVER GOT TO THE
12 POINT OF HOW MUCH WATER HE USES.

13 I WILL NOTE ONE OF THOSE NINE, MR. DUNN, IS
14 AMONG THE EX PARTE. SO I'M GOING TO SEND AN E-MAIL TO
15 MS. WANG LATER TODAY, INDICATING THAT ONE OF THOSE NINE
16 PEOPLE DROPPED OFF THE LIST BECAUSE THEY'RE BACK IN THE
17 CLASS.

18 THE COURT: OKAY. ALL RIGHT.

19 MR. DUNN: WE'LL ADDRESS THE LETTER BY THE MOORES.

20 THE COURT: WHAT WAS THEIR NAME AGAIN?

21 MR. DUNN: IT'S BERNIE, MIDDLE INITIAL -- EXCUSE
22 ME. BENNIE, B-E-N-N-I-E; MIDDLE INITIAL E; MOORE,
23 M-O-O-R-E. AND ANNETTE, A-N-N-E-T-T-E; MOORE,
24 M-O-O-R-E.

25 THE COURT: OKAY, THANK YOU.

26 ALL RIGHT, MR. ZIMMER.

27 MR. ZIMMER: JUST A FEW COMMENTS, YOUR HONOR.

28 WE ARE VERY CLOSE TO A SETTLEMENT. I

1 THINK THAT DISTRICT 40 DID A GOOD JOB IN ITS CASE
2 MANAGEMENT ORDER OF IDENTIFYING THE ISSUES THAT NEED TO
3 BE RESOLVED TO GET THIS DONE. WE'RE TALKING ABOUT
4 PHELAN, BLUM, WE HAVE THE NONPUMPING CLASS TO DEAL WITH.
5 AND ON THIS ISSUE OF THE WOOD CLASS, THE SMALL PUMPERS,
6 ON THAT ISSUE -- JUST FOR -- BY WAY OF THOUGHT, I THINK
7 WE'RE ALL CONCERNED ABOUT GETTING THIS DONE AS QUICKLY
8 AS WE CAN. I THINK YOUR HONOR PICKED UP ON A PRETTY
9 SALIENT POINT IN TERMS OF THE CLASS. IN TERMS OF AN
10 OPT-OUT, IT DOES APPEAR TO BE A LITTLE LATE. BUT IN
11 TERMS OF AN OBJECTION -- AND THE COURT'S ORDERED
12 MR. MCLACHLAN TO PREPARE THAT ORDER -- AN OBJECTION CAN
13 BE DEALT WITH IN A MUCH QUICKER TIMEFRAME THAN TRYING TO
14 DEAL WITH A PARTY BY WAY OF ANSWER, DEMURRER, DISCOVERY,
15 ET CETERA.

16 SO I THINK THAT THE OBJECTION WOULD BE A
17 MUCH MORE STREAMLINED FASHION OF GETTING TO THE BOTTOM
18 OF THAT. I THINK THAT'S PROBABLY THE BETTER ROUTE.

19 THE COURT: YOU CANNOT SIT QUIETLY AS A CLASS
20 MEMBER UNTIL YOU SEE WHAT THE OUTCOME IS GOING TO BE AND
21 THEN DECIDE WHETHER YOU CAN OPT OUT OR NOT. THAT IS NOT
22 IN THE INTEREST OF JUDICIAL OR OTHER EFFICIENCY, OR EVEN
23 FAIRNESS TO THE DEFENDANTS. SO IT SEEMS TO ME THAT FAIR
24 PLAY MEANS YOU OPT OUT WITHIN A REASONABLE PERIOD OF
25 TIME WITHIN THE TIME SPECIFIED, OR YOU DON'T.

26 MR. MCLACHLAN: AND I'D WOULD LIKE TO MAKE JUST
27 ONE OTHER COMMENT FOR THE RECORD; ALTHOUGH IT IS
28 REFLECTED IN THE PAPERS FROM LAST YEAR ON THAT POINT.

1 AND I'M NOT TAKING A POSITION ON THIS EITHER WAY. BUT
2 THE RECORD IN THAT PARTIAL SETTLEMENT DID INCLUDE TERMS
3 THAT ARE ESSENTIALLY THE SAME AS WHAT WE'RE PROPOSING TO
4 SETTLE ON NOW. IN OTHER WORDS, THE CLASS MEMBERS DID
5 HAVE NUMBERS IN THAT AGREEMENT AS TO WHAT WOULD NOT BE
6 OBJECTED TO THAT ARE ALMOST IDENTICAL TO WHAT WE'RE
7 TALKING ABOUT NOW.

8 SO THEY WERE AWARE OF WHAT THEY WERE
9 LOOKING AT, WHICH IS WHY YOU GOT OPT-OUTS FROM SOME OF
10 THE BIGGER USERS AT THAT TIME.

11 THE COURT: ALL RIGHT. I UNDERSTAND. OKAY.

12 ALL RIGHT. SO LET'S TALK ABOUT WHAT WE'RE
13 GOING TO DO HERE THE REST OF THE AFTERNOON. ARE YOU
14 FREE TO TALK ABOUT THE WOODS CLASS, AT LEAST THE EFFORTS
15 TO STIPULATIONS WITH PHELAN PINON HILLS, AND THE BLUM
16 TRUST? AND I'M GOING TO GIVE YOU UNTIL THREE O'CLOCK.
17 IS THAT ENOUGH TIME? OKAY SO LET'S RECONVENE AT THREE
18 O'CLOCK. ALL RIGHT.

19

20 (PARTIES ANSWER IN THE AFFIRMATIVE.)

21

22 (THE PROCEEDINGS WERE ADJOURNED FOR
23 A NOON RECESS, TO RESUME AT 3:00
24 P.M.)

25

26

27

28

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: P.M. SESSION
8 APPEARANCES: (AS HERETOFORE NOTED.)
9

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

13 THE COURT: ALL RIGHT. WE'RE BACK ON THE RECORD
14 IN THE ANTELOPE CASE.

15 AND I UNDERSTAND YOU HAD SOMETHING YOU WISH
16 TO PRESENT TO THE COURT.

17 MR. MILIBAND: YES, YOUR HONOR. WES MILIBAND FOR
18 PHELAN PINON HILLS CSD.

19 AT THE DIRECTION OF THE COURT, A NUMBER OF
20 US MET OVER THE LAST COUPLE OF HOURS ADDRESSING VARIOUS
21 ISSUES. I WAS A PART OF IT AS IT RELATES TO PHELAN.
22 AND WE'VE AGREED TO A COUPLE OF THINGS, CERTAINLY IN
23 TERMS OF TRYING TO STIPULATE AS TO FACTS. WHAT WE'RE
24 HAVING DISAGREEMENT ABOUT IS THE SCOPE OF WHAT THE
25 ISSUES WOULD BE FOR THIS NEXT PHASE OF TRIAL, AND THE
26 TIMING AND PROCESS FOR THAT.

27 SO ESSENTIALLY WHAT THAT MEANS TO ME IS
28 THAT I REMAIN A PROPONENT OF THE PROCESS THAT I PROPOSED

1 TO THE COURT THIS MORNING THROUGH THE PAPERS.
2 ABSOLUTELY TAKING AT THE COURT'S DIRECTION, WANTING TO
3 BE ABLE TO PRESENT THE PLAN; THAT'S THE PLAN THAT I
4 PRESENTED. SOME OF THE COUNSEL FOR SOME OF THE PARTIES
5 WOULD LIKE TO PROCEED SIMPLY ON THE WATER RIGHT ISSUE,
6 NOT A RETURN FLOW CLAIM OR RIGHT -- HOWEVER IT'S BEST
7 CHARACTERIZED -- NOR THE OTHER TWO ISSUES THAT I PUT IN
8 AS PART OF OUR SIXTH AND EIGHTH CAUSES OF ACTION, WHICH
9 RELATE TO BEING ABLE TO USE THAT WATER WITHIN OUR
10 SERVICE AREA AND HAVING A PRIORITY AS A MUNICIPAL
11 PROVIDER.

12 SO THESE OTHER PARTIES WOULD LIKE TO LIMIT
13 IT STRICTLY TO THE APPROPRIATOR FOR PUBLIC USE RIGHT,
14 INCLUDING AS TO WHETHER THERE IS SURPLUS OR NOT SURPLUS
15 IN THAT PART OF THE AQUIFER. AND MY POSITION HAS BEEN,
16 AS IT WAS IN THE PAPERS AND AS STATED THIS MORNING, IS
17 THAT THE SURPLUS ISSUE IS TOO PROBLEMATIC TO GET INTO
18 FOR A NUMBER OF REASONS, AT LEAST IMMEDIATELY. AND ONE
19 AS A MATTER OF NECESSITY -- I DON'T THINK IT'S
20 ABSOLUTELY NECESSARY -- BUT PART OF THE COMPLEXITY COMES
21 DOWN TO LEGAL ISSUES; THE FACT THAT THERE ARE INVERSE
22 CONDEMNATION CLAIMS, OR AT LEAST ONE CLAIM OUT THERE IS,
23 TO WHAT EXTENT WOULD BE THEN GIVING IN TO THEM. AS ALSO
24 NOTED IN OUR PAPERS IS OUR SEVENTH CAUSE OF ACTION,
25 WHICH ALSO RELATES TO THE UNREASONABLE USE OF WATER BY
26 OTHERS, WHICH CORRELATES TO WHETHER THERE IS SURPLUS, OR
27 TO THE EXTENT THERE IS NOT, THERE COULD BE SURPLUS IF
28 OTHERS WERE USING THEIR WATER REASONABLY, AS DEFINED BY

1 CALIFORNIA LAW.

2 SO IT GETS INTO A HOST OF TECHNICAL ISSUES,
3 THAT QUITE FRANKLY SEEM TO BE BETTER DONE AS PART OF
4 EITHER WATERMASTER PROCEEDINGS, OR FURTHER COURT
5 PROCEEDINGS, OR WATERMASTER PROCEEDINGS SUBJECT TO COURT
6 APPROVAL OR HEARINGS; BUT SOMETHING THAT COULD BE DONE,
7 NOT AS A MATTER OF NECESSITY, BUT TAKEN GIVEN THE NUMBER
8 OF COMPLEXITIES IT PRESENTS.

9 SO THAT'S WHY I STILL REMAIN COMMITTED TO
10 THE PROPOSAL THAT I PREPARED IN ADVANCE OF TODAY'S
11 HEARING. AND AS PART OF THAT, THERE IS A PROCESS THAT I
12 WOULD LIKE TO BE IN PLACE, JUST AS A MATTER OF RIGHT,
13 AND NOT JUST FOR THE SAKE OF RIGHT, BUT FOR THE SAKE OF
14 TRYING TO HAVE A WAY TO STREAMLINE ISSUES.

15 SO THAT SAID, NEXT MONDAY WE DID SET
16 INFORMALLY AS A GROUP THAT WE WOULD BE DETERMINING, TO
17 WHAT EXTENT WE CAN'T STIPULATE, WHATEVER THE ISSUES ARE
18 THAT THE COURT SETS AS THOSE ISSUES. AND WE WOULD ALSO
19 LIKE TO POTENTIALLY LIKE TO HAVE A BRIEFING SCHEDULE, AT
20 LEAST THAT'S THE REQUEST OF SOME OF THE OTHER PARTIES,
21 AS TO SOME OF THESE LEGAL ISSUES I MENTIONED AS TO
22 BURDEN OF PROOF, OR INVERSE CONDEMNATION AS IT RELATES
23 TO SURPLUS. BUT AGAIN, SURPLUS IS NOT PART OF IT; IT
24 ALLOWS US TO AT LEAST ADDRESS APPROPRIATOR FOR PUBLIC
25 USE.

26 THE COURT: I'M TRYING TO UNDERSTAND WHERE INVERSE
27 CONDEMNATION BECOMES AN ISSUE IF YOU'RE NOT CLAIMING
28 PRESCRIPTION. YOU'RE NOT CLAIMING ANYBODY ELSE'S WATER.

1 MR. MILIBAND: THE POSITION I WOULD ANTICIPATE
2 FROM OTHER PARTIES, YOUR HONOR, PARTICULARLY, OVERLIERS
3 AND LANDOWNERS, IS THAT BY NOT PRESCRIBING THEIR
4 POSITION WOULD BE THAT PHELAN PINON HILLS IS TAKING
5 THEIR WATER. THAT'S WHY MR. ZIMMER THROUGH THIS
6 COMPLAINT THAT WAS FILED YEARS AGO ALLEGES INVERSE
7 CONDEMNATION AGAINST US.

8 SO I'M NOT JUST SPECULATING WHAT IT MIGHT
9 BE. I'M GOING OFF WHAT ONE OF THE OTHER PARTIES HAS
10 ACTUALLY ALLEGED AGAINST US IN ITS CROSS-COMPLAINT.
11 THAT WHAT'S CREATES SO MUCH COMPLEXITY THAT'S
12 PARTY-TO-PARTY, NOT NECESSARILY DOES PHELAN HAVE A WATER
13 RIGHT OR NOT.

14 THE COURT: IF WE WERE TO ATTEMPT TO ADJUDICATE
15 ALL OF THE ISSUES WHICH YOU JUST DESCRIBED, THERE IS NO
16 WAY THAT WE COULD DO THAT IN A SHORT PERIOD OF TIME.
17 AND THE QUESTION THAT I HAVE IS IF THE DETERMINATION OF
18 THE INITIAL QUESTIONS; THAT IS, THE APPROPRIATIVE RIGHT,
19 IF ANY -- AND I ALSO DON'T HAVE A PROBLEM WITH CONJOINED
20 WITH THAT A QUESTION OF WHAT IS THE CONSEQUENCE OF
21 YOUR -- WHAT IS THE VALIDITY OF YOUR CLAIM THAT SOMEHOW
22 THERE IS THE RETURN FLOW RIGHT THAT SOMEHOW OR OTHER
23 GOES BEYOND JUST THE APPROPRIATIVE RIGHT, EVEN THOUGH
24 IT'S THE SAME WATER.

25 MR. MILIBAND: RIGHT, YOUR HONOR. AND I THINK A
26 GOOD WAY OF TRYING TO THINK ABOUT THAT --

27 THE COURT: JUST A MINUTE. LET ME FINISH MY
28 THOUGHT. WHAT I WAS ASKING WAS IF THOSE ISSUES ARE

1 DETERMINED, IT SEEMS TO ME THAT EVERYTHING ELSE IS GOING
2 TO FLOW FROM IT -- PARDON THE EXPRESSION -- EITHER
3 ENDING ESSENTIALLY YOUR CLAIM, OR GIVING VITALITY TO
4 YOUR CLAIM, SUCH THAT THE OTHER PARTIES WOULD PROBABLY
5 BE INCLINED TO RESOLVE IT OR ENTER INTO SUFFICIENT
6 STIPULATIONS THAT THE CASE COULD END.

7 MR. MILIBAND: RIGHT.

8 THE COURT: I DON'T MEAN "END" BECAUSE IT'S NEVER
9 GOING TO END.

10 MR. MILIBAND: END FOR NOW.

11 THE COURT: WELL, IT'S NOT GOING TO END; IT'S
12 GOING TO BE IN EQUITY FOREVER, UNTIL THE LEGISLATURE
13 DOES SOMETHING, FOOLISH OR OTHERWISE.

14 MR. MILIBAND: YOUR HONOR, I THINK WHAT THE COURT
15 JUST INDICATED IS PRECISELY WHY I THINK THE WATER RIGHT
16 FOR -- AS AN APPROPRIATOR FOR PUBLIC USE DETERMINATION
17 IS TETHERED TO THE RETURN FLOW CLAIM, MIGHT BE A BETTER
18 WAY OF PUTTING IT. WE'RE NOT LOOKING TO DOUBLE-DIP TO
19 TO THAT. TO THE EXTENT WE DON'T HAVE A WATER RIGHT,
20 THAT ISSUE WAS PRIMED AND READY TO GO SIX MONTHS AGO. I
21 LITERALLY HAD MY PROJECTOR HERE READY FOR THAT.

22 THE COURT: I'M NOT QUARRELLING WITH THE
23 CONTENTION THAT YOU WANT TO GET AN ADJUDICATION OF THE
24 CLAIM OF THE RETURN FLOWS, HOWEVER THAT GETS DECIDED.
25 BUT HOWEVER IT GETS DECIDED IS GOING TO SET THE COURSE
26 FOR THE REST OF THE MATTER. BECAUSE IF YOU DON'T HAVE
27 ANY -- LET'S PUT IT THIS WAY -- AND THIS IS VERY
28 HYPOTHETICAL BECAUSE I CERTAINLY HAVE NO IDEA HOW THIS

1 IS GOING TO BE DETERMINED OR ADJUDICATED. BUT IF YOU DO
2 NOT HAVE AN APPROPRIATIVE RIGHT, OKAY, THEN THE QUESTION
3 BECOMES IS THERE ANY RIGHT WHATSOEVER FROM THE NATIVE
4 WATER THAT YOU WERE PUMPING. THAT'S THE RETURN FLOW
5 QUESTION. IF THOSE ARE DETERMINED ADVERSE TO YOU, WHERE
6 ARE YOU GOING NEXT?

7 MR. MILIBAND: WELL, I THINK AS IT RELATES TO THE
8 SIXTH CAUSE OF ACTION -- AND THE EIGHTH -- WHICH ARE
9 REALLY THE PLACE OF USE AND THE PRIORITY, I COULD SEE
10 THE ARGUMENT THAT THOSE ARE MOOT. BUT THIS WOULD BE MY
11 RESPONSE TO THAT -- JUST SPEAKING HYPOTHETICALLY TO YOUR
12 HONOR -- AND FRANKLY, THERE ARE OTHER CAUSES OF ACTION
13 BEING ALLEGED AND ARE PARTS OF WHAT MIGHT BECOME
14 PHYSICAL SOLUTION, THAT, DESPITE NOT HAVING A WATER
15 RIGHT, WE'RE STILL A PARTY TO THE ACTION AND POTENTIALLY
16 A JUDGMENT. SO POTENTIALLY WORST-CASE SCENARIO -- OR AT
17 LEAST ONE OF THOSE WORST-CASE SCENARIOS -- WOULD BE THE
18 COURT FINDS THAT PHELAN PINON HILLS DOES NOT HAVE A
19 WATER RIGHT. THE COURT THEORETICALLY COULD FIND THERE
20 IS NOT THIS RETURN FLOW RIGHT.

21 BUT AS A PARTY, WHAT WOULD THAT MEAN? IS
22 THE COURT THEN ENJOINING ANY PRODUCTION BY WELL 14, OR
23 IS THE COURT MAKING WELL 14 SUBJECT TO A REPLACEMENT
24 ASSESSMENT THAT'S TYPICALLY IMPOSED BY WATER MASTERS?

25 THE COURT: YOU SEE, THAT'S SOMETHING THAT'S GOING
26 TO BE AN ISSUE FOR EVERY PARTY HERE WHEN A WATERMASTER
27 HAS BEEN ESTABLISHED AND THERE ARE DISPARATE ALLOCATIONS
28 AND DEDUCTIONS IN WATER, DEPENDING UPON THE CONDITION OF

1 THE PARTICULAR PORTIONS IN THE AQUIFER AND SO ON, WHICH
2 IS WHAT I INDICATED IN MY STATEMENT OF DECISION, I THINK
3 IN WHAT, PHASE 3:

4 MR. MILIBAND: RIGHT. AND THAT'S PRECISELY ONE OF
5 THESE LEGAL QUESTIONS THAT SOME COUNSEL MAY LIKE TO HEAR
6 FROM THE COURT ON IS: DID THE PHASE 3 DECISION PRECLUDE
7 THIS TYPE OF ISSUE FROM BEING HEARD? AND MY
8 UNDERSTANDING IS THAT IT DOES NOT; BOTH BY THE LETTER OF
9 DECISION ITSELF, AND BY THE COURT RECOGNIZING THAT AT
10 SOME POINT PHELAN WOULD HAVE THE OPPORTUNITY TO ADDRESS
11 THAT.

12 BUT ALONG --

13 THE COURT: I'M NOT GOING TO PREJUDGE WHAT THE
14 EFFECT OF THE ULTIMATE JUDGMENT IS GOING TO BE, OR WHAT
15 POWERS AT THIS POINT OF THE WATERMASTER MIGHT BE, OR WHO
16 THAT IS, OR HOW THAT'S GOING TO OPERATE, OR ANYTHING
17 ELSE. AND I'M AT SOMEWHAT OF A DISADVANTAGE, NOT HAVING
18 REALLY SEEN ANY PART OF THE PROPOSED SETTLEMENT THE
19 OTHER PARTIES HAVE ENTERED INTO. THEY'LL BE BOUND BY
20 THAT. PEOPLE WHO DON'T ENTER INTO THAT SETTLEMENT ARE
21 NOT GOING TO BE BOUND BY IT, OBVIOUSLY, UNLESS THE COURT
22 IMPOSES THEM BASED UPON AN EVIDENTIARY HEARING THAT
23 JUSTIFIES THAT TYPE OF IMPOSITION.

24 SO LET ME HEAR -- I UNDERSTAND WHAT YOU'RE
25 ASKING. LET ME HEAR FROM PEOPLE WHO ARE OPPOSED TO
26 THAT.

27 MR. MILIBAND: AND, YOUR HONOR, MAY I JUST BRIEFLY
28 ADDRESS THE SCHEDULING?

1 THE COURT: YES.

2 MR. MILIBAND: BECAUSE THE PROCESS IS -- BELIEVE
3 ME, I'M GLAD TO HEAR THE COURT SEES THAT WE WANT TO GET
4 THIS ADJUDICATED. WE SAY THAT, BUT WE MEAN IT TOO. AND
5 THE FACT THAT WE WERE HERE FOR PHASE 5 ON OUR RETURN
6 FLOW CLAIM; WE WERE READY TO GO. BUT OCTOBER 7 IS JUST
7 NOT WORKABLE, UNLESS WE ARE ABLE TO SOMEHOW COME TO A
8 REALLY CLEAR GLOBAL STIPULATION AS TO THE ISSUES AND THE
9 SUBISSUES RELATED TO THE LEGAL QUESTIONS AND THE CORE
10 STIPULATED FACTS.

11 BUT SHORT OF THAT, YOUR HONOR, I JUST AM
12 NOT IN A POSITION TO WAIVE WHAT WOULD BE OUR PROCESS TO
13 DOING SOME PROPER DISCOVERY AND SOME TIME FOR IT.
14 TIMING-WISE, THE SETTLEMENT -- I KNOW THE BIG PUSH IS
15 LET'S FIGURE OUT WHAT PHELAN HAS SO THAT WE KNOW IF WE
16 CAN FIT THEM IN OR NOT, OR SHOULD. BUT THE SETTLEMENT
17 PROCESS IS GOING TO TAKE A LONG TIME ANYWAY BECAUSE OF
18 THE CLASS ISSUES; A SPAN OF A COUPLE OF MONTHS, OR
19 WHATEVER IT MIGHT BE. AND EVEN IF WE ARE DETERMINED TO
20 HAVE A RIGHT, IT'S A RELATIVELY SMALL AMOUNT OF WATER
21 THAT WOULD BE BUILT IN.

22 SO THERE IS PRACTICAL SOLUTIONS TO WHAT'S
23 BEING PROPOSED. AND ULTIMATELY WHAT I'M SUGGESTING IS A
24 ONLY A FEW MONTHS MORE OF WHAT HAS ALREADY BEEN A VERY
25 LONG TOO LONG OF A CASE, BUT A FEW MONTHS MORE SO WE'RE
26 IN A POSITION TO DO WHAT WE THINK WE NEED TO DO AS A
27 MATTER OF PROCESS.

28 THANK YOU, YOUR HONOR.

1 MR. DUNN: JEFFREY DUNN FOR DISTRICT 40.

2 YOUR HONOR, THE KEY ISSUE THAT HAS BEEN
3 DISCUSSED FOR THE LAST COUPLE OF HOURS FOCUSES ON
4 SURPLUS. AS THE COURT HAS JUST IDENTIFIED, IF THERE IS
5 NO SURPLUS, AS CLAIMED BY PHELAN, THE SURPLUS BEING A
6 SURPLUS OF GROUNDWATER IN THE AREA SURROUNDING THE
7 PHELAN WELL, THE SOUTHEAST PORTION OF THE ADJUDICATED
8 AREA, THEN WITHOUT THE SURPLUS, THERE IS NO ABILITY ON
9 PHELAN'S PART TO BE ABLE TO PUMP WATER AS AN
10 APPROPRIATOR. IT'S THAT SINGLE ISSUE THAT IS READY AND
11 NEEDED TO BE RESOLVED AS SOON AS POSSIBLE. AND THE
12 REASON BEING IS THAT, AS I INDICATED, IF THERE IS NO
13 SURPLUS, THEN THERE IS NO ABILITY TO PUMP AS AN
14 APPROPRIATOR. AND NOW WITH PHELAN NO LONGER PURSUING A
15 PRESCRIPTIVE CLAIM, IT WOULD BE HARD-PRESSED IN OUR VIEW
16 FOR PHELAN TO BE ABLE TO ESTABLISH ANY OTHER ABILITY, OR
17 ANY OTHER TYPE OF RIGHT TO PUMP.

18 SO WE SEE THIS AS BEING A KEY ISSUE. AND
19 AS THE COURT POINTED OUT, THE CONVERSE IS TRUE. IF THE
20 COURT WERE TO DETERMINE THAT THERE IS SOMEHOW A SURPLUS
21 IN THIS AREA AND THAT WOULD THEN TRIGGER OTHER ABILITIES
22 ON THE PART OF PHELAN'S PART, WHICH WOULD CERTAINLY BE
23 TAKEN INTO ACCOUNT IN A LARGER SETTLEMENT PROCESS. BUT
24 WE WANT TO EMPHASIZE TO THE COURT THAT WE DO THINK THAT
25 NOT ONLY IS THIS NEEDED TO BE RESOLVED, BUT IT NEEDS TO
26 BE RESOLVED, AND IT'S READY TO BE RESOLVED NOW. IN
27 DISCUSSIONS THAT WE HAD WITH PHELAN'S COUNSEL, WE TALKED
28 ABOUT WHAT WOULD NEED TO BE DONE TO ESTABLISH WHETHER OR

1 NOT THERE IS A SURPLUS IN THE AREA. MOST OF THE FACTS
2 ARE READILY SUBJECT TO STIPULATION: WE KNOW THAT PHELAN
3 IS A PUBLIC ENTITY; WE KNOW THAT PHELAN PUMPS
4 GROUNDWATER; WE KNOW THAT THEY PUMP FROM ONE WELL; WE
5 KNOW WHERE THAT WELL IS LOCATED; WE KNOW FOR HOW LONG
6 THEY HAVE BEEN PUMPING THE GROUNDWATER; AND WE KNOW IN
7 WHAT AMOUNTS. ALL OF THAT IS NOT SUBJECT TO ANY TYPE OF
8 REASONABLE DISPUTE. SO IT THEN BECOMES A CLAIM ON
9 PHELAN'S PART THAT SOMEHOW IN THAT AREA OF THE SOUTHEAST
10 CORNER, THERE IS A REASON TO TREAT IT DIFFERENTLY THAN
11 FROM THE BASIN AT-LARGE; THAT SOMEHOW THERE IS A
12 DISCONNECT IN ITS HYDROGEOLOGIC CONNECTIVITY; THAT
13 SOMEHOW IT JUSTIFIES BEING TREATED SEPARATELY. AND IN
14 THE CONVERSATIONS WE HAD IS THAT, AS THE COURT MIGHT
15 EXPECT IS SUBJECT TO EXPERT-WITNESS TESTIMONY, WE ARE
16 AWARE THAT PHELAN HAS AN EXPERT READY, MR. HARDER,
17 (PHONETIC) HE'S BEEN DEPOSED, GENERALLY, HE COULD BE
18 DEPOSED AGAIN HERE. WOULDN'T -- IT COULD BE DONE -- WE
19 HAVE A SCHEDULE THAT WE HAVE DISCUSSED AND WANT TO
20 PROPOSE TO THE COURT. WE THINK THAT FOR
21 COUNTER-EXPERTS, IT LOOKS LIKE THERE MIGHT BE JUST ONE,
22 DR. DENNIS WILLIAMS.

23 SO THE THREE-DAY ESTIMATE THAT WE'RE
24 PROPOSING AND HAD PROPOSED AFTER THIS DISCUSSION THIS
25 AFTERNOON, APPEARS TO BE MORE THAN ENOUGH TIME TO
26 ADEQUATELY RESOLVE ANY FACTUAL DISPUTE REGARDING THE
27 EXISTENCE OF NONEXISTENCE OF THE SURPLUS IN THAT
28 RELATIVELY SMALL SOUTHEAST CORNER. THERE MIGHT BE -- AS

1 WE DISCUSSED WITH COUNSEL FOR PHELAN, WE MIGHT HAVE ONE
2 ADDITIONAL PERCIPIENT, BUT WE'RE LOOKING AT HERE A
3 SERIES OF STIPULATED FACTS, AND LIMITED -- NOT LIMITED
4 SO MUCH, BUT LIMITED IN NUMBER -- TESTIMONY BY EXPERTS.
5 LOOKS LIKE THIS POINT THERE WOULD BE TWO: ONE FOR
6 PHELAN AND ONE OTHER EXPERT CALLED BY -- IN THIS CASE --
7 PUBLIC WATER SUPPLIERS. AND WE WOULD RESOLVE THAT ISSUE
8 OF WHETHER OR NOT THERE IS A SURPLUS. AND AGAIN, IF
9 THERE IS NO SURPLUS, THERE IS NO ABILITY TO PUMP AS
10 APPROPRIATOR, AND WE WOULD NEVER BE ABLE TO, AS A MATTER
11 OF LAW, GET TO THIS RETURN FLOW CLAIM. BECAUSE
12 FUNDAMENTALLY, IF THERE IS NO LAWFUL RIGHT TO TAKE THE
13 WATER OUT OF THE GROUND IN THE FIRST INSTANCE, YOU'RE
14 NOT ABLE THEN TO CLAIM THE RETURN FLOW.

15 THE COURT: THE QUESTION I HAVE AT THIS POINT IS
16 THERE A DIFFERENCE IN OPINION BETWEEN HARDER AND
17 WILLIAMS ON THIS ISSUE.

18 MR. DUNN: THERE APPEARS TO BE, YES.

19 THE COURT: AS TO THE WHOLE BASIN?

20 MR. DUNN: NO, WE'RE NOT --

21 THE COURT: BECAUSE WE'RE NOT GOING TO
22 RE-ADJUDICATE THAT. THAT'S BEEN DETERMINED.

23 MR. DUNN: NO, I WANT TO BE VERY CLEAR ON THAT.
24 WE'RE ONLY TALKING ABOUT AN AREA GENERALLY SURROUNDING
25 WHERE THE PHELAN WELL IS LOCATED. AND IF THE COURT CAN
26 PICTURE IN ITS MIND A MAP OF THE ADJUDICATION AREA,
27 WE'RE GOING TO GO ALL THE WAY DOWN ALONG THE BOTTOM --

28 THE COURT: I KNOW EXACTLY WHERE IT IS.

1 MR. DUNN: YEAH. SO IT'S A RELATIVELY SMALL AREA.

2 THE COURT: IT'S NOT UNCOMMON FOR AN AREA WITHIN
3 AN AQUIFER TO NOT BE REFLECTING AN OVERDRAFT; IN THE
4 SENSE THAT WATER LEVELS AREN'T CHANGING YEAR TO YEAR;
5 AND IN THE SENSE THAT THERE IS RECHARGE FOR THAT AREA
6 THAT EQUATES TO PUMPING, AND YET BE SUFFICIENTLY
7 CONNECTED TO THE REST OF THE BASIN, THAT ULTIMATELY THE
8 BASIN SUFFERS FROM PUMPING THROUGHOUT THE BASIN. NOW I
9 DON'T KNOW THAT THERE IS ANY EVIDENCE THAT ANYBODY WANTS
10 TO PRESENT THAT IS CONTRARY TO THAT. I DON'T KNOW.

11 MR. DUNN: I KNOW WE'RE NOT INTERESTED IN
12 PRESENTING ANY EVIDENCE THAT'S CONTRARY TO THAT.

13 THE COURT: AND -- BUT YOUR WITNESS WOULD TESTIFY
14 THAT THAT AREA IS SUFFERING DEGRADATION.

15 MR. DUNN: NO, IT'S MORE WHAT THE COURT DESCRIBED
16 IT: PUMPING IN THAT AREA NECESSARILY IMPACTS OTHER
17 PARTS OF THE BASIN. SO JUST BECAUSE FOR WHATEVER
18 REASONS THAT AREA MAY HAVE WELL LEVELS THAT LOOK OKAY,
19 THAT DOES NOT MEAN THAT WHAT PUMPING ACTIVITY TAKES
20 PLACE THERE DOESN'T HAVE A DETRIMENTAL IMPACT SOMEWHERE
21 ELSE. IT COULD SIMPLY BE BECAUSE IT'S A RECHARGE AREA
22 AND IF THE WATER GETS THERE FIRST AS IT GETS INTO THE
23 BASIN --

24 THE COURT: DIDN'T THE COURT MAKE FINDINGS
25 REGARDING CONNECTIVELY, CONDUCTIVELY, AND THE EFFECT OF
26 ONE OVER THE OTHER, EVEN THOUGH IT MAY NOT BE OCCURRING
27 AT A PARTICULAR MOMENT?

28 MR. DUNN: YES, YOUR HONOR. WE ARE -- AND I DO

1 NOT MEAN TO SUGGEST FOR A MOMENT THAT THOSE OF US ON THE
2 OTHER SIDE OF THE PHELAN CLAIM ARE SUGGESTING THAT WE
3 REOPEN THAT. WE ARE NOT. BUT WHAT WE'RE CONCERNED
4 ABOUT IS THAT THE PHELAN EXPERT MAY ATTEMPT TO COME IN
5 AND ATTEMPT TO SHOW, AND WE WANT TO BE ABLE TO RESPOND
6 TO THAT.

7 THE COURT: YOU KNOW WHAT MR. HARDER'S (PHONETIC)
8 TESTIMONY WOULD BE BECAUSE YOU DEPOSED HIM, CORRECT?

9 MR. DUNN: YES.

10 MR. MILIBAND: NO.

11 MR. ZIMMER: LET ME ADDRESS THIS.

12 MR. DUNN: LET ME HAVE MR. ZIMMER TALK TO YOU
13 ABOUT THAT. HE TOOK THE DEPOSITION.

14 MR. ZIMMER: YOUR HONOR, I AGREE WITH THE COURT'S
15 COMMENTS. THE COURT'S INQUIRY IS DO WE NEED AN EXPERT.
16 I THINK MR. DUNN WAS SIMPLY TRYING TO INDICATE THAT IF
17 MR. MILIBAND HAS AN EXPERT TESTIFY ON THE ISSUE, THAT
18 PEOPLE ON THE OTHER SIDE OF THE CASE WOULD WANT TO HAVE
19 THAT ABILITY. THAT'S ALL I THINK HE SAID. I DON'T
20 THINK HE'S SUGGESTING THAT WE NEED TO DO THAT.

21 WE DID HAVE A TRIAL, AND THE TRIAL IS
22 WHETHER THE BASIN, THE ENTIRE HYDRAULICALLY CONNECTED
23 AREA, WAS AN OVERDRAFT. THE COURT RULED THAT IT WAS.
24 ALL THE COURT DID WAS MAKE SOME COMMENTS ALONG THE WAY
25 THAT IN MANAGEMENT THE WATERMASTER MAY WANT TO LOOK AT
26 DIFFERENT AREAS DIFFERENTLY. AND NOTHING HAS CHANGED
27 SINCE THEN. THE ISSUE FOR MR. MILIBAND IS WHETHER HE
28 HAS A WATER RIGHT CLAIM. I THOUGHT MR. BUNN DID AN

1 EXCELLENT JOB THIS MORNING OF DISTILLING THAT ISSUE.

2 BUT TAKINGS CLAIMS -- OR FIRST OF ALL, THIS
3 COURT RULED THAT THE TAKINGS CLAIM -- ANY TAKINGS
4 CLAIMS -- WOULD ACROSS THE BOARD BE DETERMINED IN SOME
5 DIFFERENT PHASES. AS TO ALL TAKINGS CLAIMS. BUT TAKING
6 CLAIMS AREN'T AT ISSUE, BECAUSE SO FAR THERE HASN'T BEEN
7 A TAKING, AND I THINK YOU CORRECTLY POINTED OUT IF THERE
8 IS NO PRESCRIPTION, THERE HASN'T BEEN A TAKING.

9 SO THE QUESTION IS VERY SIMPLY WHETHER
10 MR. MILIBAND HAS A RIGHT TO TAKE WATER OUT OF THE BASIN.
11 AS MR. BUNN SAID THIS MORNING: YOU'RE EITHER AN
12 APPROPRIATOR, OR YOU'RE AN OVERLYING LANDOWNER. IF YOU'RE
13 NOT AN OVERLYING LANDOWNER EXCEPT FOR A SMALL CONCRETE
14 PAD, YOU ARE IN FACT AN APPROPRIATOR. SO THE QUESTION
15 FOR THE TRIAL IS WAS THERE ANY SURPLUS WATER TO
16 APPROPRIATE BECAUSE THERE IS NO SURPLUS WATER YOU CAN'T
17 BE AN APPROPRIATOR.

18 SO PERSONALLY, I DON'T THINK WE NEED TO TRY
19 ANYTHING OVER AGAIN. I THINK THE COURT HAS ALREADY
20 RULED ON WHAT THE HYDRAULIC RECONNECTED BASIN IS. I
21 THINK IT WAS VERY CLEAR WHAT IT WAS; WE HAVE AN
22 INDICATION OF WHAT IT WAS. MR. MILIBAND WAS GIVEN AN
23 OPPORTUNITY EARLIER ON TO CHALLENGE THAT, TO EXTEND IT,
24 TO CHANGE IT, THAT NEVER OCCURRED. SO I'M NOT SURE
25 EXACTLY WHAT'S HAPPENING HERE. I TOOK HARDER'S
26 DEPOSITION. AND HARDER TESTIFIED THAT THEY HAVE A WELL;
27 WELL 14 SITS ON IN OUR AREA OF ADJUDICATION, OVERLIES
28 OUR BASIN. THEY PUMP WATER FROM WELL 14. THEY EXPORT

1 IT OUTSIDE THE AREA OF ADJUDICATION TO THE RESIDENTIAL
2 AREA THAT GOES TO SOME EXTENT INTO THE MOHAVE
3 ADJUDICATION. THE AREA, ACCORDING TO HARDER'S
4 TESTIMONY, THAT EXTENDS INTO THE MOHAVE ADJUDICATION
5 GENERALLY DRAINS BACK INTO OUR GROUNDWATER BASIN.

6 SO THE ONLY QUESTION LEGALLY IS WHETHER YOU
7 CAN PUMP NATIVE WATER AND CREATE A GROUNDWATER RIGHT
8 BASED ON PUMPING NATIVE WATER. I DON'T THINK YOU CAN;
9 OTHERWISE WE WOULD ALL CLAIM RETURN FLOW RIGHTS. BUT
10 THE BOTTOM LINE TO ME IS THAT WHATEVER THE ISSUES THAT
11 THE PHELAN CLAIMS, AND I THINK THEY'RE FAIRLY NARROW.
12 IN ADDITION TO THAT, WITH RESPECT TO MR. MILIBAND, HE'S
13 GOT THIS PUBLIC-RIGHT THEORY. I DON'T THINK IT CHANGES
14 WHETHER YOU'RE AN APPROPRIATOR OR NOT.

15 SO REALLY ALL WE'RE TALKING ABOUT WHETHER
16 THEY'RE APPROPRIATOR, AND IF HE BECOMES AN APPROPRIATOR
17 BY WAY OF SOME PUBLIC USE, THEN I GUESS HE COULD TRY AND
18 PUT THAT ON.

19 BUT WE NEED ALL THOSE CLAIMS OTHER THAN THE
20 TAKINGS RESOLVED. THERE IS REALLY NO REASON THOSE CAN'T
21 BE RESOLVED BECAUSE WE TOOK MR. BARKS (PHONETIC);
22 MR. BARKS TESTIFIED AS TO WHAT THE PRODUCTION LEVEL WAS:
23 IT BASICALLY STARTED IN 2005 AT 1.1 ACRE-FEET, AND IT
24 RAMPED UP TO ABOUT 1,100 HUNDRED ACRE-FEET IN 2011,
25 2012. IT'S REALLY NOT SOMETHING THAT'S SUBJECT TO THAT
26 MUCH DISPUTE.

27 SO WE HAVE THAT TESTIMONY AND THEN WE HAVE
28 THE TESTIMONY OF MR. HARDER, WHICH IS AS I DESCRIBED

1 EARLIER: THEY'RE PUMPING OUT OF THE BASIN; THEY'RE
2 PUMPING OUT OF THIS WELL THEY'RE MOVING IT OUTSIDE THE
3 ADJUDICATION, AND THE RETURN FLOWS GO BACK INTO THE
4 BASIN.

5 THE COURT: OKAY, MR. MILIBAND -- AND ME JUST SAY
6 THIS TO ALL COUNSEL, IT'S NOT MY INTENT TO PRECLUDE
7 ARGUMENT OR THEORIES OF LAW BY ANY PARTY.

8 AND, MR. MILIBAND, I UNDERSTAND YOU WISH TO
9 ASSERT YOUR CLAIM FOR THE USE OF THE WATER THAT IS BEING
10 PUMPED AND THE EFFECT OF THE RETURN FLOWS; I UNDERSTAND
11 THAT. I DON'T KNOW THE ANSWER TO THE QUESTION UNTIL I
12 HEAR THE EVIDENCE AND THE ARGUMENTS. WHAT I'M TRYING TO
13 DO IS TO AVOID GETTING INTO A VERY LENGTHY EVIDENTIARY
14 HEARING WHEN THE FACTS ARE REALLY NOT IN DISPUTE; NOT
15 EVEN WHAT MR. HARDER MIGHT SAY, OR WHAT MR. WILLIAMS, OR
16 ANYBODY ELSE MIGHT SAY. AND I SAY THAT NOT HAVING ANY
17 KNOWLEDGE REALLY, OTHER THAN WHAT I'M TOLD AS TO WHAT
18 THEY'RE GOING TO SAY, BEYOND THERE ARE CERTAIN ISSUES
19 THAT WERE PREVIOUSLY ADJUDICATED IN THIS CASE THAT MAY
20 OR MAY NOT HAVE SOME EFFECT. AND I DON'T KNOW, AND I
21 WON'T KNOW UNTIL I HEAR THE ARGUMENTS AND READ YOUR
22 BRIEFS.

23 SO IT DOES SEEM TO ME THAT THIS IS THE KIND
24 OF AN ISSUE THAT YOU'RE ASSERTING THAT CAN BE -- IF YOU
25 CAN AGREE ULTIMATELY AS TO WHAT THE FACTS ARE -- AND I
26 THINK YOU PROBABLY CAN -- OR OUGHT TO BE ABLE TO -- WE
27 CAN AVOID A GREAT DEAL OF EXPENSE AND TIME AND
28 COMPLEXITY BY MAKING THOSE DETERMINATIONS AMONG

1 YOURSELVES SO THAT THE COURT CAN BE PRESENTED WITH A
2 SUFFICIENT STIPULATION. I CAN'T MAKE YOU STIPULATE. I
3 CAN'T MAKE YOU LIMIT YOUR ARGUMENT; I DON'T WANT TO MAKE
4 YOU LIMIT YOUR ARGUMENT. OR YOUR LEGAL THEORYS. BUT I
5 DON'T WANT TO WASTE EVERYBODY'S TIME AND MONEY, YOURS
6 INCLUDED.

7 AND I WOULD JUST MAKE ONE OTHER
8 OBSERVATION: IT IS NONSENSICAL TO ME THAT YOU AND THE
9 OTHER PUBLIC WATER SUPPLIERS AND LANDOWNERS HAVE NOT
10 BEEN ABLE TO ARRIVE AT A SETTLEMENT OF THE CASE THAT
11 PUTS EVERYBODY AT REST. I JUST DON'T UNDERSTAND WHY
12 THAT HASN'T HAPPENED. BUT I ACCEPT THE FACT THAT IT
13 HASN'T HAPPENED, BUT I WOULD URGE YOU NOT TO LET THAT
14 STOP YOU.

15 MR. MILIBAND: I ABSOLUTELY AGREE, YOUR HONOR.
16 IT'S NONSENSICAL TO MYSELF AND MY CLIENT, PARTICULARLY
17 WITH THE AMOUNT OF WATER WE'RE TALKING ABOUT.

18 THE COURT: ALL WE'RE DOING IS THROWING WORDS
19 AROUND HERE. FRANKLY, I WOULD LIKE TO SEE SOME ACTION.
20 OKAY? AND I WOULD REALLY MUCH LIKE TO SEE YOU, FIRST OF
21 ALL, GET TOGETHER AND AGREE AS TO WHAT THE FACTS ARE
22 WITH REGARD TO YOUR ISSUES OF WHETHER OR NOT YOU HAVE A
23 RIGHT TO PUMP EVEN. AND RETURN FLOWS. GET THOSE SORTED
24 OUT FACTUALLY, PRESENT THE COURT WITH A WRITTEN
25 STIPULATION IF YOU CAN, GIVE ME SOME LUCID, ASTUTE
26 BRIEFING ON THE ISSUES, AND SET IT UP FOR A TRIAL ON
27 THAT BASIS. AND I THINK THAT BETWEEN NOW AND OCTOBER
28 OUGHT TO BE AS A SUFFICIENT PERIOD OF TIME FOR YOU TO DO

1 THAT. AT THE SAME TIME -- BUT I DON'T WANT YOU TO DO IT
2 AT THE SAME TIME -- AFTER YOU HAVE ARRIVED AT THE
3 STIPULATION OF FACTS YOU REALLY OUGHT TO SEE HOW YOU CAN
4 SETTLE YOUR CLAIMS.

5 MR. ZIMMER: JUST SO THE COURT KNOWS, WE DID
6 DISCUSS THE SETTLEMENT PORTION IN THE PAST ON SEVERAL
7 OCCASIONS. BUT ON THE PORTION THAT DEALS WITH
8 DETERMINING THE FACTS, WE WOULD AGREE THAT WITHIN THE
9 NEXT WEEK, BY NEXT MONDAY, WE WILL HAVE AN AGREED
10 STATEMENT OF FACTS. AND THAT BY THE FOLLOWING MONDAY,
11 TWO WEEKS HENCE, WE WILL HAVE IDENTIFICATION OF BOTH
12 PERCIPIENT AND POTENTIAL EXPERT WITNESS.

13 THE COURT: IF ANY.

14 MR. MILIBAND: AND, YOUR HONOR, WHAT I WOULD --

15 THE COURT: I'M NOT DONE YET. WHAT I'M GOING TO
16 DO WITH THAT IN MIND IS I'M GOING TO SET A STATUS
17 CONFERENCE ON THE ISSUES THAT YOU JUST DISCUSSED. AND
18 WE'LL DO THAT IN TWO WEEKS.

19 MR. MILIBAND: YOUR HONOR, I BELIEVE TWO WEEKS
20 FROM TODAY IS LABOR DAY, IF I HAVE THAT --

21 THE COURT: THAT DOESN'T HAVE TO BE EXACT.

22 MR. MILIBAND: ACTUALLY, NO --

23 MR. ZIMMER: IT'S --

24 THE COURT: LET'S SHOW SOME FLEXIBILITY. TWO
25 WEEKS AND A DAY?

26 MR. MILIBAND: ACTUALLY, IT'S THREE WEEKS FROM
27 NOW.

28 THE COURT: OKAY.

1 MR. MILIBAND: SO AUGUST 18, YOUR HONOR, IS WHAT
2 THE PARTIES INDICATED THEY WILL TRY TO HAVE THE FACTS
3 STIPULATED TO.

4 THE COURT: RIGHT.

5 MR. MILIBAND: AUGUST 25 WOULD BE FOR DESIGNATION
6 OF WITNESSES --

7 THE COURT: WHAT DAY OF THE WEEK IS THAT?

8 MR. MILIBAND: A MONDAY. TWO MONDAYS FROM NOW.

9 PERHAPS WE CAN HOLD OFF ON THE DESIGNATION
10 PENDING OUR STATUS CONFERENCE, IF IT'S SET IN THE
11 MORNING, IF THAT'S AGREEABLE TO THE COURT.

12 MR. ZIMMER: I THINK IT WOULD BE BETTER OFF, YOUR
13 HONOR, HAVING DESIGNATION BEFORE THE STATUS CONFERENCE.
14 THEN YOU'LL KNOW WHERE WE ARE EXACTLY.

15 MR. MILIBAND: I WAS ALMOST THINKING ALONG THOSE
16 LINES TO DO A STATUS CONFERENCE SEPTEMBER 2, THAT
17 TUESDAY FOLLOWING LABOR DAY, WITHOUT HAVING AN OCTOBER 7
18 DATE. BECAUSE AS MUCH AS WE HAVE TRIED AND ARE OPEN TO
19 TRYING TO HAVE SETTLEMENT DISCUSSIONS, OUR INTEREST HAS
20 REMAINED THERE STEADFASTLY. IT TAKES MORE THAN JUST US.
21 I REALLY JUST AT THE SAME TIME HAVE TO BE THINKING FROM
22 THAT TRIAL PERSPECTIVE, AND I DON'T THINK OCTOBER 7 IS
23 WORKABLE. SO I WOULD LIKE TO AT LEAST NOT HAVE A TRIAL
24 DATE AS OF TODAY. LET'S SEE HOW FAR WE CAN GET.

25 THE COURT: NO, I'M GOING TO SET A TRIAL DATE.
26 I'M GOING TO SET IT FOR THE -- WHAT DID I SAY?

27 MR. ZIMMER: OCTOBER 7.

28 THE COURT: OCTOBER 7.

1 MR. DUNN: OCTOBER 7 IS A TUESDAY, YES.

2 MR. MILIBAND: IS THERE ANY WAY WE COULD DO THE
3 FOLLOWING WEEK, YOUR HONOR?

4 THE COURT: OCTOBER 14?

5 MR. ZIMMER: THAT'S MORE PROBLEMATIC FOR ME, AND
6 MR. DUNN HAS GOT AN ISSUE. PLUS WE DON'T HAVE ANY OF
7 THE OTHER PARTIES HERE.

8 THE COURT: LET ME DO THIS: I'M GOING TO SET IT
9 FOR THE 7TH AT NINE O'CLOCK, HERE. AND WE WILL TALK
10 ABOUT IT MORE ON THE --

11 MR. ZIMMER: MIGHT I SUGGEST, YOUR HONOR, MIGHT WE
12 DO IT EARLIER RATHER THAN LATER, AT THE COURT'S
13 PLEASURE, SOMETIME THE WEEK OF THE 25TH, 26TH, 27TH,
14 28TH? MR. DUNN INDICATES THAT'S --

15 THE COURT: OF SEPTEMBER?

16 MR. ZIMMER: OF AUGUST.

17 MR. DUNN: FOR THE STATUS CONFERENCE.

18 THE COURT: I CAN DO IT -- YES, I CAN DO IT THE
19 FOLLOWING WEEK.

20 MR. ZIMMER: WE'RE THINKING THAT SAME WEEK; 25TH
21 IS A MONDAY. ANY TIME AFTER MONDAY THAT WEEK: 26TH,
22 27TH, 28TH --

23 THE COURT: THAT'S FINE. STATUS CONFERENCE 8/26.

24 MR. DUNN: MAY WE HAVE ONE MOMENT, YOUR HONOR?

25 THE COURT: YES.

26 MR. ZIMMER: MR. DUNN AND I WERE DISCUSSING WE
27 WILL BE IN SAN JOSE ON THE 29TH. WE COULD DO IT THEN,
28 OR THE 26TH, 27TH, 28TH.

1 THE COURT: YOU'LL BE IN SAN JOSE ON THE 29TH?

2 MR. ZIMMER: YES, YOUR HONOR. ACCORDING TO
3 MR. DUNN. I HAVEN'T CHECKED MY CALENDAR, BUT I'LL TAKE
4 HIS WORD ON IT.

5 THE COURT: AUGUST 29.

6 MR. DUNN: YES, YOUR HONOR.

7 MR. ZIMMER: AUGUST.

8 THE COURT: LET'S TENTATIVELY SET IT FOR THAT.

9 MR. MILIBAND: FOR WHICH DATE FOR STATUS
10 CONFERENCE, YOUR HONOR?

11 THE COURT: AUGUST 29.

12 MR. MILIBAND: AND WOULD THIS STATUS CONFERENCE BE
13 IN SAN JOSE AS WELL? IS THAT 8/26 STATUS CONFERENCE
14 HERE IN LOS ANGELES, OR --

15 THE COURT: NO. THE 29TH IS GOING TO BE IN SAN
16 JOSE.

17 MR. MILIBAND: OKAY. AND, YOUR HONOR, I CAN'T
18 EMPHASIZE ENOUGH -- AND I FEEL COMPELLED TO DO IT FOR
19 THE RECORD TO STATE MY CONCERNS AND OBJECTIONS ABOUT
20 HAVING A TRIAL SET ON SCOPE OF ISSUES THAT HAVEN'T BEEN
21 DEFINED WITHOUT THE ABILITY TO DO ANY DISCOVERY.

22 THE COURT: YOU'RE GOING TO GIVE ME THE ISSUES TO
23 BE DEFINED.

24 MR. MILIBAND: THAT'S WHAT I'VE ALREADY TRIED TO
25 DO, YOUR HONOR. BUT PARTIES ARE NOT WILLING TO. THAT'S
26 WHY I'M ASKING THE COURT TO DO THAT.

27 THE COURT: YOU'RE STILL MEETING AND CONFERRING
28 REGARDING THOSE ISSUES. AND I'LL MAKE A DETERMINATION

1 AS TO WHICH ISSUES ARE GOING TO BE TRIED, CERTAINLY NO
2 LATER THAN THE 29TH OF AUGUST.

3 MR. MILIBAND: THAT CAUSES ME EVEN GREATER CONCERN
4 IF THERE IS A TRIAL FIVE WEEKS AFTER THAT.

5 THE COURT: I'LL BE HAPPY TO TALK WITH YOU ALL
6 SOONER.

7 MR. MILIBAND: I CAN'T JUST STATE IT ENOUGH, YOUR
8 HONOR. THIS ISN'T GIVING PHELAN THE ABILITY WHAT MAY
9 HAVE TO BE DONE TO THE EXTENT A STIPULATION CANNOT BE
10 REACHED. I UNDERSTAND WE NEED TO TRY FOR THAT, BUT THE
11 OCTOBER 7 TRIAL DATE BEING SET POSES REAL --

12 THE COURT: IF THERE IS NOT GOING TO BE A
13 PRODUCTION OF EVIDENCE BEYOND THE STIPULATION, I DON'T
14 UNDERSTAND THE NEED FOR ADDITIONAL TIME.

15 MR. MILIBAND: AGREED. THAT'S WHAT I WAS
16 INDICATING THIS MORNING. IF WE CAN STIPULATE TO
17 EVERYTHING THAT NEEDS TO BE STIPULATED TO. GREAT. THE
18 PROBLEM IS -- AND WHAT OUR MEET-AND-CONFER DEMONSTRATED
19 FROM JUST TODAY -- IS WE DON'T AGREE WHETHER SURPLUS
20 NEEDS TO BE A PART OF THIS UPCOMING TRIAL OR NOT. MY
21 POSITION IS IT DOES NOT NEED TO BE A PART OF THIS
22 UPCOMING TRIAL. OTHER COUNSEL ARE OF THE OPINION IT
23 SHOULD BE.

24 SO IT BECOMES CIRCULAR, BUT IT'S WHAT HELPS
25 DEFINE THE SCOPE.

26 THE COURT: I DON'T UNDERSTAND MAYBE WHAT YOUR
27 ARGUMENT IS IN TERMS OF SURPLUS. WHY -- WHERE DO YOU
28 THINK SURPLUS FITS INTO THIS?

1 MR. MILIBAND: WHAT SURPLUS POTENTIALLY WOULD DO
2 IS SPEAK TO WHATEVER LIABILITY WE MIGHT HAVE. SO AS A
3 MATTER OF THE RIGHT WE'RE TRYING TO ESTABLISH IN TERMS
4 OF THE WATER RIGHT, IT'S AN APPROPRIATOR FOR PUBLIC USE
5 RIGHT. AND EVEN WITHIN MR. ZIMMER'S CROSS-COMPLAINT BY
6 BOLTHOUSE AGAINST PHELAN IS THAT RECOGNITION IF
7 PRESCRIPTION EVEN FAILS, THERE IS THAT INTERVENING
8 PUBLIC USE RIGHT. AND THAT'S A RIGHT THAT EXISTS AS A
9 MATTER OF LAW THAT PEOPLE ARE USING TO TRY TO ESTABLISH
10 OUR WATER RIGHT. THE SURPLUS ISSUE BECOMES VERY
11 IMPORTANT. BEYOND THE RIGHT IS THE EXTENT TO WHICH
12 THERE IS ANY LIABILITY; LIABILITY TO THE WATERMASTER FOR
13 REPLACEMENT ASSESSMENT, OR LIABILITY TO A LANDOWNER WHO
14 HAS CLAIMED INVERSE CONDEMNATION. THIS IS WHERE THE
15 RETURN FLOW ISSUE COMES INTO PLAY IN A HYPOTHETICAL
16 SCENARIO OF HAVING -- OUR TYPICAL PRODUCTION BEING
17 AROUND A THOUSAND ACRE-FEET, YOUR HONOR, LET'S SAY THE
18 COURT FINDS THERE IS NOT THE RIGHT TO PUMP THAT WATER
19 LAWFULLY. THE COURT WOULD PROBABLY BE PRESENTED WITH
20 DIFFERENT IDEAS AS TO HOW THAT SHOULD BE DEALT WITH.
21 SOME MIGHT SAY, YOUR HONOR, THE COURT SHOULD ENJOIN ANY
22 FURTHER PRODUCTION, PERIOD. I WOULD ANTICIPATE MY
23 POSITION BEING ALONG MORE THE LINES OF IT'S A PUBLIC
24 USE; IT'S PUBLIC ASSET USED FOR SERVICE OF WATER TO THE
25 PUBLIC. THERE BECOMES -- TYPICALLY WHAT HAPPENS IS
26 REPLACEMENT ASSESSMENT OBLIGATION.

27 SO THAT'S POTENTIALLY ONE SCENARIO THAT
28 WOULD EXIST IF THERE IS NOT SURPLUS WATER. IF THERE IS

1 SURPLUS, THEN PHELAN SHOULD HAVE THE RIGHT TO PRODUCE
2 THAT AMOUNT OF WATER TO THE EXTENT THERE IS ANY SURPLUS.

3 THE COURT: I DON'T THINK ANYBODY WOULD ARGUE WITH
4 THAT.

5 MR. MILIBAND: BUT THEY ARE.

6 THE COURT: NO, THEY'RE NOT. NOT FROM WHAT I HAVE
7 HEARD. I HAVEN'T HEARD ANYBODY SAY IF THERE IS SURPLUS
8 IN THE AQUIFER THAT YOU'RE NOT ENTITLED TO PUMP. I
9 HAVEN'T HEARD THAT FROM ANYBODY.

10 MR. MILIBAND: RIGHT. I HAVEN'T HEARD THAT HERE.
11 BUT I HEARD SOME VARIATIONS DEALING WITH THAT. BUT
12 THAT'S GENERALLY OUTSIDE OF THIS COURTROOM.

13 BUT THAT'S GENERALLY BEEN MY POSITION THAT
14 I HAVE BEEN TRYING TO MAKE CLEAR IS THAT THIS
15 APPROPRIATOR FOR PUBLIC USE RIGHT IS A MATTER OF RIGHT.
16 THE OTHER PART OF IT, THE SURPLUS, IS A MATTER OF
17 POTENTIAL LIABILITY.

18 THE COURT: WELL, THE QUESTION OF PUBLIC RIGHT IS
19 AN ISSUE WE HAVE NOT ADJUDICATED IN THIS CASE. NOBODY
20 HAS RAISED IT, AND I EXPECT THAT THAT'S SOMETHING THAT,
21 FROM WHAT I'M HEARING FROM YOU, YOU'RE GOING TO RAISE.
22 AND THE OTHER SIDE IS GOING TO OBJECT TO IT. OR NOT
23 OBJECT TO IT, BUT OPPOSE.

24 IT IS TRUE?

25 MR. ZIMMER: YEAH. FIRST OF ALL, MR. MILIBAND
26 KEEPS REFERRING TO ME IN THE CROSS-COMPLAINT ISSUE. I
27 PUT IT IN THERE BECAUSE OTHER PEOPLE PUT IT IN THERE. I
28 DON'T THINK IT'S AT ISSUE CURRENTLY. I DON'T THINK THEY

1 HAVE RAISED IT CURRENTLY; IT'S A PROPHYLACTIC AROUND
2 THEIR DEFENSE. I THINK WHAT THE COURT SHOULD DO IS
3 SIMPLY ORDER THAT WE'RE GOING TO DO TO TRIAL ON THE 7TH
4 AND THE ISSUES ARE WHATEVER CLAIMS MR. MILIBAND HAS,
5 OTHER THAN -- AND IF HE THINKS THAT NEEDS SOME BRIEFING
6 TO CLARIFY, HE CAN CERTAINLY DO THAT. BUT AT LEAST HE'S
7 ON NOTICE THAT WE'RE GOING TO TRIAL ON THE 7TH. THE
8 ISSUE IS THIS RETURN FLOW THING I GUESS HE HAS, AND SOME
9 CLAIM THAT HE'S AN APPROPRIATOR BECAUSE HE'S CLAIMING
10 THIS SURPLUS. THAT WOULD --

11 THE COURT: HE'S CLAIMING APPROPRIATOR AS A RIGHT,
12 BASED UPON EITHER SURPLUS OR SOME OTHER THEORY.

13 MR. MILIBAND: EVEN NONSURPLUS. SURPLUS OR
14 NONSURPLUS FOR AN APPROPRIATOR.

15 THE COURT: RIGHT. OKAY, SO THE FACTS OUGHT TO BE
16 CLEAR. AND I DON'T KNOW THE ANSWER TO THE QUESTION THAT
17 THERE IS NO SURPLUS IN TERMS OF SOME OTHER THEORY THAN
18 AS AN APPROPRIATOR OF RIGHT. AND I'M ASSUMING THAT YOU
19 BELIEVE THERE IS; AND I PRESUME THAT'S GOING TO BE
20 BRIEFED AND ARGUED. AND ULTIMATELY WHATEVER THE FACTS
21 MAY BE, THEY'RE -- YOU'RE EITHER AN APPROPRIATOR OF
22 RIGHT, OR YOU'RE NOT. AND IF THERE IS SOME OTHER
23 THEORY, IT'S REALLY NOT DEPENDENT UPON THE FACTS, OTHER
24 THAN YOUR PUBLIC STATUS AND WHO YOU'RE PROVIDING FOR.
25 AND THAT SEEMS TO ME EASILY DEALT WITH AS PURELY A LEGAL
26 ISSUE. AND THAT'S WHY I DON'T UNDERSTAND WHY YOU CAN'T
27 ARRIVE AT AN AGREEMENT AS TO THE FACTS SO YOU CAN SUBMIT
28 THOSE ISSUES TO THE COURT AND GET IT RESOLVED. AS PART

1 OF BOTH OF THOSE, THE ISSUE OF WHETHER OR NOT YOU HAVE
2 SOME ADDITIONAL RIGHT THAT MIGHT BE AN OFFSET AGAINST
3 SOME CLAIM THAT THE WATERMASTER MIGHT MAKE BASED UPON
4 RETURN FLOWS FROM NATIVE WATER, I MEAN, I DON'T THINK
5 YOU'RE GOING TO BE PRECLUDED FROM RAISING THAT ISSUE
6 EVER WHEN A WATERMASTER MIGHT THEORETICALLY MAKE THAT
7 CLAIM UPON YOU. AND CERTAINLY, NOTHING THAT I'M GOING
8 TO DO AS THIS CASE IS PROGRESSING AT THIS POINT IS GOING
9 TO HAVE ANY IMPACT AT ALL ON YOUR RIGHT TO OPPOSE
10 WHATEVER WATERMASTER MIGHT TELL YOU TO DO AND TO TAKE IT
11 TO COURT. AND I AM GOING TO MAKE CERTAIN FINDINGS, AND
12 ONE OF THE THINGS THAT YOU MIGHT BE DOING IF MY FINDINGS
13 ARE ADVERSE TO YOU IS SETTING UP A SITUATION WHERE
14 YOU'RE GOING TO BE EITHER COLLATERALLY ESTOPPED OR RES
15 JUDICATA TO PRECLUDE YOU FROM RAISING THAT OBJECTION TO
16 THE WATERMASTER. I DON'T KNOW. I'M TALKING PURELY
17 HYPOTHETICALLY, PURELY ABOUT ISSUES AT THIS POINT. AND
18 I'M SAYING A LOT MORE THAN I REALLY WANT TO SAY.

19 MR. MILIBAND: UNDERSTOOD, YOUR HONOR. AND I
20 APPRECIATE YOUR CANDID DIALOG THAT WE'RE HAVING. I DO
21 THINK IT HELPS PROVIDE A FOCUS FOR THE PARTIES.
22 ULTIMATELY, IT SETS ALL OF US, INCLUDING THE COURT, TO
23 GET THESE ISSUES ADJUDICATED. FRANKLY, THAT'S WHY I
24 DON'T WANT TO JUST KICK THE CAN DOWN THE ROAD. PHELAN
25 HAS BEEN IN THIS TOO LONG. EVERYONE HAS BEEN IN LONGER,
26 FOR THE MOST PART EVEN. QUITE FRANKLY, ONE COUNSEL THAT
27 I HAVE TREMENDOUS RESPECT FOR IN THE CASE SAID: "WHY
28 DON'T WE JUST HAVE WATERMASTER DECIDE THESE ISSUES?" MY

1 RESPONSE HAS CONSTANTLY BEEN BECAUSE WE'RE TALKING ABOUT
2 LEGAL ISSUES THAT REQUIRE LEGAL DETERMINATIONS.

3 AND I FULLY AGREE WITH YOUR HONOR THAT
4 THERE IS AN ISSUE OR SOME KIND OF CLAIM THAT CAN LATER
5 BE RAISED THAT THERE IS RES JUDICATA OR COLLATERAL
6 ESTOPPEL IF I DIDN'T RAISE SOMETHING NOW THROUGH THIS
7 PROCEEDING. BUT IN ANY EVENT --

8 THE COURT: I DON'T THINK THAT'S WHAT I WAS
9 SAYING. I THINK IT'S THE OTHER WAY AROUND. YOU MAY
10 FIND YOURSELF BOUND ULTIMATELY THAT YOU COULD HAVE
11 AVOIDED BY NOT RAISING THAT THEORY AT THIS POINT.

12 YOU KNOW, WHEN THE WATERMASTER MAKES AN
13 ORDER, OF ANY KIND, IT IS ALWAYS SUBJECT TO THE
14 JURISDICTION OF THE COURT IN EQUITY TO EVALUATE. THAT'S
15 WHY I SAID THIS CASE WILL NEVER END. BECAUSE AS LONG AS
16 THERE IS A WATERMASTER, THE COURT IN EQUITY IS GOING TO
17 BE SITTING HERE, PROBABLY NOT ME, WAITING TO MAKE A
18 DECISION.

19 AND SO -- THE WAY YOU POSTULATE YOUR CASE
20 AT THIS POINT COULD HAVE A PROFOUND EFFECT ON YOU IN THE
21 FUTURE. OR NOT. BUT THAT'S NOT FOR ME TO DECIDE OR TO
22 GET INTO. I'M CERTAINLY NOT GIVING YOU ADVICE. BUT I
23 AM GOING TO SET THE MATTER FOR TRIAL. PERHAPS WE COULD
24 BIFURCATE THE TRIAL IF YOU HAVE OTHER ISSUES. BUT THE
25 ISSUES I WANT TO HEAR ARE THE ISSUES OF THE RIGHT THAT
26 YOU HAVE TO PUMP, WHICH IS BASED ON YOUR THEORIES, AS
27 WELL AS THE QUESTION OF YOUR RIGHT SOMEHOW -- AND THIS
28 MAY BE MORE -- IT MAY BE TOO HYPOTHETICAL -- TO RETURN

1 FLOWS IS IN THE EVENT SOMEBODY MAKES A CLAIM FOR
2 ASSESSMENTS AGAINST YOU.

3 MR. MILIBAND: SO ESSENTIALLY, YOUR HONOR, THAT
4 SOUNDS AS THOUGH THE COURT -- I'M NOT TRYING TO PUT
5 WORDS IN THE COURT'S MOUTH, BUT I WANT TO MAKE SURE I'M
6 UNDERSTANDING THE COURT CORRECTLY. BECAUSE THAT IS IN
7 LARGE PART WHAT I WAS REQUESTING AS TO THE SECOND AND
8 FOURTH CAUSES OF ACTION IN OUR CROSS-COMPLAINT, WHICH
9 RELATES TO THE APPROPRIATOR FOR PUBLIC USE RIGHT, AND TO
10 THE RETURN FLOW CLAIM. WITH THE ONE STILL UNKNOWN OUT
11 THERE, AT LEAST IN MY MIND, IS THE SURPLUS ISSUE, AND
12 ALL THESE RELATED COMPLEXITIES.

13 THE COURT: I DON'T SEE HOW YOU CAN AVOID THE
14 SURPLUS ISSUE BECAUSE IT'S PART AND PARCEL OF WHETHER OR
15 NOT YOU HAVE A RIGHT TO APPROPRIATE VERSUS WHETHER
16 YOU'RE TAKING ADVERSELY.

17 MR. MILIBAND: WELL, THAT OPENS UP THE SEVENTH
18 CAUSE OF ACTION WE HAVE. MR. ZIMMER, WHETHER DOING IT
19 AS A MATTER OF FORM OR NOT, I SUBSCRIBED TO THE APPROACH
20 MR. KUHS WAS TAKING EARLIER THIS MORNING ABOUT HOW AM I
21 ABANDONING PRESCRIPTION OR NOT. WELL, IS INVERSE
22 CONDEMNATION BEING ABANDONED OR NOT BY ANY PARTY THAT'S
23 ALREADY CLAIMED IT? IF IT HASN'T -- THEY'RE SO
24 INTERTWINED, AND THAT'S WHY I'M TRYING TO AVOID THAT
25 COMPLEXITY, AND PUTTING THE COURT IN THE POSITION OF
26 HAVING TO DECIDE MORE THAN IT NEEDS TO RIGHT NOW.

27 THE COURT: THAT'S ONE OF THE REASONS THESE FOLKS
28 SETTLED THEIR CASE.

1 MR. MILIBAND: I AGREE.

2 THE COURT: BECAUSE THEY RECOGNIZE THERE IS AN
3 ISSUE ABOUT PRESCRIPTION AND INVERSE CONDEMNATION VERSUS
4 A PRIOR-RIGHT CLAIM. AND NOTICE AND KNOWLEDGE AND ALL
5 THOSE THINGS, THAT'S WHY PEOPLE SETTLE CASES. BECAUSE
6 THEY RECOGNIZE THERE ARE RISKS WHEN YOU LITIGATE
7 SOMETHING. AND IT'S THE ELIMINATION OF THE RISK THAT
8 PROVIDES YOU THE BENEFIT. AND THAT'S THE CONSIDERATION
9 FOR THE SETTLEMENT.

10 SO I GUESS YOU'RE RAISING A CLAIM THAT'S
11 PURELY HYPOTHETICAL THAT CAN BE DECIDED IN ANOTHER
12 PORTION OF THIS ADJUDICATION IF SOMEBODY WISHES TO RAISE
13 IT. AND SO FAR, I HAVE NOT HEARD ANYBODY SUGGEST THAT
14 THEY HAVE AN INVERSE CONDEMNATION CLAIM THEY WANT TO
15 PURSUE AGAINST YOUR CLIENT. I KNOW THERE WERE SOME
16 PEOPLE THAT WANTED TO PURSUE AGAINST SOME OTHERS. BUT
17 THOSE ARE NOW HISTORICAL CLAIMS ONLY.

18 MR. MILIBAND: WELL, WITHOUT KNOWING THAT AS A
19 MATTER OF RECORD, I MEAN, IT LEAVES US IN THE SAME
20 POSITION. I JUST CAN'T STATE ENOUGH, YOUR HONOR.
21 IT'S -- WE WOULD LIKE TO --

22 THE COURT: I UNDERSTAND WHAT YOU'RE SAYING.

23 MR. KUHS.

24 MR. KUHS: YES. I JUST WANTED TO READ FROM
25 PHELAN'S SECOND CAUSE OF ACTION IN THE COMPLAINT ON FILE
26 THAT SQUARELY TEES UP SURPLUS.

27 PARAGRAPH 82 SAYS: APPROPRIATIVE RIGHTS --

28 THE REPORTER: I'M SORRY, COUNSEL, I CAN'T HEAR

1 YOU AND YOU NEED TO SLOW DOWN.

2 MR. KUHS: SORRY. ROBERT KUHS FOR TEJAN RANCH.

3 (AS READ:) PARAGRAPH 81 OF PHELAN'S
4 COMPLAINT SAYS THAT PHELAN ALLEGES THAT IN ADDITION TO
5 PRESCRIPTIVE AND OTHER RIGHTS SET FORTH HEREIN AS AN
6 APPROPRIATIVE RIGHT TO PUMP WATER FROM THE BASIN.

7 PARAGRAPH 82: APPROPRIATIVE RIGHTS
8 ATTACHED TO SURPLUS WATER FROM THE BASIN PUMPED AND PUT
9 TO REASONABLE AND BENEFICIAL USE.

10 I DON'T SEE HOW HE CAN TRY HIS APPROPRIATE
11 RIGHT WITHOUT TRYING SURPLUS BASED ON THE PLEADINGS.

12 THE COURT: BUT THEY DO GO HAND IN HAND.

13 MR. MILIBAND: AND THAT'S ACCURATELY READ FROM THE
14 CROSS-COMPLAINT, YOUR HONOR. IT'S -- BUT THAT WAS THE
15 WHOLE IDEA OF BIFURCATION WHEN WE DID OUR
16 MEET-AND-CONFER. AND I THINK MR. BUNN IN PARTICULAR
17 TRIED TO TAKE A PRAGMATIC APPROACH, BUT I DON'T WANT TO
18 COME TO THAT CONCLUSION --

19 THE COURT: AT THIS POINT I THINK WE'RE BEATING A
20 DEAD HORSE.

21 MR. MILIBAND: I AGREE, YOUR HONOR. IT JUST COMES
22 DOWN TO SURPLUS REQUIRED FOR PURPOSES OF PROVING THAT
23 APPROPRIATOR FOR PUBLIC USE RIGHT OR NOT. MY POSITION
24 IS IT'S NOT. IT CAN BE DEALT WITH AS A MATTER OF
25 BIFURCATION AND LIABILITY.

26 THE COURT: I TOLD YOU YOU HAVE TWO THEORIES AS I
27 HEAR THEM: ONE IS PUBLIC USE THEORY; AND THE OTHER ONE
28 IS IS THERE SURPLUS. THOSE ARE TWO THINGS YOU HAVE TO

1 ESTABLISH. THE FACTS ARE NOT IN DISPUTE. AND YOU CAN
2 AGREE AS TO WHAT THE FACTS ARE THAT UNDERLIE BOTH OF
3 THOSE THEORIES. AND THAT'S WHAT WE SHOULD TRY. AND I
4 INDICATED TO YOU AS WELL IF YOU WISH TO DURING THAT
5 TRIAL BRIEF AND PRESENT FOR ARGUMENT THE LEGAL THEORY
6 THAT SOMEHOW OR OTHER THE NATIVE RETURN FLOWS -- NATIVE
7 WATER RETURN FLOWS GIVE YOU SOME BENEFIT, I'M HAPPY TO
8 HAVE YOU DO THAT. AND I WILL DECIDE THAT TO THE BEST OF
9 MY ABILITY.

10 MR. MILIBAND: SOME COUNSEL DID EXPRESS AN
11 INTEREST IN HAVING A BRIEFING SCHEDULE SET ON SOME OF
12 THESE ISSUES IN ADVANCE OF TRIAL.

13 THE COURT: THAT'S THE NEXT THING TO DO. AND I
14 THOUGHT -- WE HAVE TO COME BACK FOR STATUS CONFERENCE
15 NOW BECAUSE WE'RE NOT CLEAR AS TO WHAT YOUR STIPULATION
16 IS GOING TO BE, AND SETTING UP A BRIEFING SCHEDULE
17 BEFORE I HAVE THAT IS VERY DIFFICULT, SINCE I DON'T KNOW
18 WHAT IT IS YOU'RE GOING TO BE BRIEFING.

19 SO AT THIS POINT, IT SEEMS TO ME THAT I
20 WILL TELL YOU WHAT I WANT TO HAVE BIFURCATED AND
21 ADJUDICATE ARE QUESTIONS OF YOUR RIGHT TO PUMP WATER AS
22 AN APPROPRIATOR OF RIGHT, NUMBER ONE; AND NUMBER TWO,
23 THAT YOU BRIEF AND PRESENT EVIDENCE AND ARGUMENT
24 CONCERNING YOUR RIGHT -- YOUR CLIENT'S RIGHT -- AS A
25 PUBLIC PRODUCER APART FROM WHETHER THERE WAS A SURPLUS
26 THAT WOULD PERMIT YOU TO BE AN APPROPRIATOR OF RIGHT.
27 IF YOU WANT TO ADD TO THAT A THIRD ISSUE, WHICH IS THE
28 QUESTION OF THE EFFECT OF RETURN FLOWS FROM YOUR PUMPING

1 THAT FLOW BACK INTO THE AREA OF YOUR WELL, THAT YOU MAY
2 DO TOO. AS I UNDERSTAND IT, FROM WHAT I HAVE HEARD FROM
3 YOU FOLKS HERE IS THAT THE PEOPLE THAT ARE BEING
4 PROVIDED THE USE OF THE WATER FROM THAT WELL ARE LOCATED
5 IN MOHAVE COUNTY OUTSIDE THE AREA OF THE ADJUDICATION
6 AREA, THE ANTELOPE ADJUDICATION AREA, BUT STILL OVER THE
7 AQUIFER.

8 MR. MILIBAND: CORRECT, YOUR HONOR.

9 THE COURT: SO, ONE OF THE REASONS WHY I DREW THE
10 LINE WHERE I DID -- IT'S AN ARTIFICIAL LINE,
11 OBVIOUSLY -- IS BASED UPON THE MOHAVE ADJUDICATION,
12 WHICH WAS VIABLE AND STILL IS, AND WHICH WOULD RESULT IN
13 A CONFLICT JURISDICTIONALLY WHICH THE COURT COULD NOT
14 DO. OTHERWISE, I WOULD HAVE EXTENDED THE LINE WELL
15 BEYOND THE COUNTY LINE, AND THEN SOME OTHER JUDGE AND I
16 WOULD BE AT LOGGERHEADS, WHICH I DON'T WANT TO BE. I
17 DON'T KNOW WHAT ELSE I COULD HAVE DONE, OTHER THAN TO
18 DRAW A LINE ON THE OTHER SIDE OF YOUR WELLS AS PART OF
19 OUR ADJUDICATION. BUT I DIDN'T THINK I COULD DO THAT.

20 MR. MILIBAND: THAT DOESN'T ALWAYS WORK OUT TOO
21 WELL EITHER, YOUR HONOR.

22 THE COURT: NOT REALLY. THAT'S WHY YOU GUYS
23 SHOULD SETTLE THIS CASE.

24 IN ANY EVENT, THAT'S WHAT WE'RE GOING TO
25 HAVE ADJUDICATED, AND I EXPECT YOU TO REPORT BACK WITH
26 SOME SORT OF AGREEMENT AS TO STIPULATED FACTS, AND WE'LL
27 APPLY THAT AND DO IT ON OCTOBER 7. AND I GUESS IT WILL
28 PROBABLY BE AT A PLACE TO BE DETERMINED ON THAT DATE.

1 SO THAT DEPENDS ON A LOT OF FACTORS.

2 MR. BUNN: ARE YOU SETTING IT FOR THREE DAYS, YOUR
3 HONOR?

4 THE COURT: I WILL.

5 MR. ZIMMER: ONE CLARIFICATION I WOULD LIKE TO
6 MAKE. YOUR HONOR, MR. ZIMMER.

7 YOU USED THE WORD "MAY PRESENT EVIDENCE
8 RETURN FLOWS." THIS IS HOLDING UP OUR SETTLEMENT. THIS
9 ISSUE OF RETURN FLOWS HAS BEEN AROUND FOR A YEAR. ALL
10 THE DISCOVERY WAS DONE ON THAT. IF HE HAS A CLAIM ON
11 RETURN FLOWS, IN MY VIEW, HE NEEDS TO MAKE IT ON THE
12 7TH, OR NOT AT ALL.

13 THE COURT: WHEN I SAID "MAY" WE'RE REALLY TALKING
14 ABOUT EVIDENCE. AND I THINK ALL THE EVIDENCE IS KNOWN.
15 AND THE LEGAL QUESTION -- SEE, I'M NOT SURE EXACTLY
16 WHERE IT'S GOING TO LEAD US. I NEVER HAVE FULLY
17 UNDERSTOOD THAT. AND MAYBE IT'S GOING TO TAKE THE
18 BRIEFING FOR ME TO DO THAT AND HAVE THAT UNDERSTANDING.
19 BUT THE DIFFICULTY THAT I HAVE WITH THAT IS THAT IF
20 YOU'RE ENTITLED TO BE PUMPING, THEN THAT INCLUDES WHAT
21 YOU'RE PUMPING. IF YOU'RE NOT ENTITLED TO BE PUMPING
22 AND YOU ARE PUMPING, THEN IT'S A WRONGFUL PUMP. IT'S A
23 WRONGFUL APPROPRIATION. I DON'T KNOW WHICH OF THOSE TWO
24 IS GOING TO BE THE ANSWER, BUT THAT'S TRUE WHETHER THERE
25 ARE RETURN FLOWS OR NOT. AND WHAT YOUR PEOPLE USE GOES
26 IN THE OTHER DIRECTION, AND IT GOES INTO THE MOHAVE, SO
27 BE IT. IF IT COMES BACK INTO THIS ADJUDICATION AREA, SO
28 BE IT. IT DOESN'T REALLY MAKE ANY DIFFERENCE. YOU

1 RAISED AN ISSUE ABOUT A WATERMASTER GIVING YOU AN
2 ASSESSMENT, AND YOU MIGHT WANT TO CREDIT FOR WHAT YOU
3 SEND BACK. BUT THAT'S THE ONLY POSSIBLE THEORY I CAN
4 THINK OF WHERE YOU MIGHT WANT TO ARGUE THAT SOMEHOW OR
5 OTHER THERE IS A RETURN FLOW RIGHT THAT HAS VALUE. BUT
6 EVEN SO, IT'S ALWAYS THE SAME WATER. AND IT'S THE WATER
7 THAT COMES FROM THE NATURAL RECHARGE; IT'S NATIVE WATER,
8 AND IT ALWAYS REMAINS NATIVE WATER.

9 MR. MILIBAND: RIGHT. AND, YOUR HONOR, JUST TO
10 TRY TO FILL IN THE BLANK QUICKLY THAT THE OTHER WAS IF
11 YOU HAVE NATIVE WATER COMING OUT, WHAT MR. HARDER
12 TESTIFIED TO WAS ESSENTIALLY THAT THIS -- AT LEAST IN
13 THIS PORTION OF THE SERVICE AREA THAT DOES LIE OVER THE
14 ANTELOPE VALLEY HYDROGEOLOGICAL BASIN -- THERE IS ALL
15 SEPTIC IN JUST ABOUT ALL RESIDENTIAL BY 98 PERCENT, GIVE
16 OR TAKE A PERCENT OR TWO. SO IT ESSENTIALLY PERCOLATES
17 RIGHT BACK IN THE GROUNDWATER CONTOURS, WHICH WERE NOT
18 CHALLENGED BY DR. WILLIAMS WHEN I ASKED HIM DURING HIS
19 DEPOSITION EARLIER THIS YEAR. IN FACT DO SHOW THAT THIS
20 WATER FLOWS BACK TOWARD THE ANTELOPE VALLEY GROUNDWATER
21 BASIN AND IS CAPTURED BY OUR WELLS. SO THAT ESSENTIALLY
22 IS AN OFFSET THAT COULD COME UP. THAT'S ESSENTIALLY THE
23 THEORY -- IT'S NOT TO TRY TO CREATE A DOUBLE ACCOUNTING;
24 IT'S TO TRYING TO LIMIT THE LIABILITY THAT COULD EXIST
25 IF WE'RE UNLAWFULLY APPROPRIATING, AS THE COURT SAID.

26 SO I THINK I UNDERSTAND THE COURT'S
27 DIRECTION. I DO HAVE THOSE CONCERNS AND OBJECTIONS
28 ABOUT PROCESS AND THE TRIAL DATE AND THE SCOPE AND SO

1 FORTH. BUT IN THE MEANTIME WHAT I WILL DO IS JUST IN A
2 MATTER OF OBLIGATION TO THE COURT AND PARTIES IS ALWAYS
3 HAVE THAT DOOR OPEN FOR ANY KIND OF SETTLEMENT
4 DISCUSSION. AND DESPITE THAT BEING AN INVITATION, IT
5 OBVIOUSLY TAKES SOMEONE TO WALK THROUGH THE DOOR AND
6 HAVE IT. SO THAT GOES WITHOUT SAYING. BUT ON THE
7 LITIGATION TRACK, I WILL ABSOLUTELY WORK TO GET AS FAR
8 AS WE CAN FOR THE STIPULATION FOR NEXT WEEK, AND I'LL
9 PLAN TO GET THAT CIRCULATED TO THE COURT SO THAT THE
10 COURT HAS AN UNDERSTANDING AS TO WHERE WE ARE. AND THE
11 COURT HAS THESE OTHER DATES OF AUGUST 25 FOR DESIGNATION
12 OF WITNESSES, PERCIPIENT AND EXPERT, AND WE ALSO STATED
13 THAT THAT WAS A NOTICE OF INTENT TIMELINE FOR THOSE
14 PARTIES TO IDENTIFY THEMSELVES AS TO WHO'S CHALLENGING
15 PHELAN.

16 THE COURT: ALL RIGHT. AFTER YOU'VE MET AND
17 CONFERRED SEND ME A PROPOSED SCHEDULE.

18 THE OTHER THING -- I JUST WANT TO MAKE ONE
19 OTHER OBSERVATION TO YOU: THAT IS THAT NOTHING EVER
20 GETS SETTLED WITHOUT SOMEBODY RELINQUISHING SOMETHING.
21 EVER. OTHERWISE IT'S NOT A SETTLEMENT. ALL RIGHT? SO
22 I'LL SEE YOU GENTLEMEN IN THE MORNING.

23 MR. ZIMMER: CAN WE HAVE THAT HEARING ON THE 29TH,
24 YOUR HONOR, AT LIKE 11 O'CLOCK? WE'LL BE WITH JUDGE
25 HUBER STARTING AT NINE. WE HAVE A COUPLE OF FAIRLY
26 WEIGHTY ISSUES TO DISCUSS.

27 THE COURT: OKAY. YOUR LOSS. ELEVEN O'CLOCK.

28 MR. KUHS: WOULD THE TELEPHONIC APPEARANCE BE

1 AVAILABLE?

2 THE COURT: YES. ANYBODY THAT CAN BE PRESENT IS
3 FINE. I DON'T EVEN KNOW IF YOU'LL HAVE A COURTROOM UP
4 THERE. THINGS ARE KIND OF FALLING APART. ECONOMICALLY
5 WE'LL LET YOU KNOW. MAYBE.

6 ALL RIGHT. SO WE HAVE OTHER THINGS TO TALK
7 ABOUT TOMORROW.

8 MR. ZIMMER: WE'RE PLANNING ON COMING BACK
9 TOMORROW. WE'RE GOING TO GO BACK AND MEET FOR A WHILE.

10 MR. DUNN: WE'LL PROVIDE AN UPDATE TO THE COURT IN
11 THE MORNING.

12 THE COURT: THAT'S FINE.

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14 (AT 4:01 P.M., THE PROCEEDINGS WERE
15 CONCLUDED.)

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