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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

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

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

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

AND RELATED CROSS-ACTIONS

Case No. Judicial Council Coordination Proceeding No. 4408

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

PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT'S TRIAL BRIEF

Date: August 25-27, 2015
Time: 10:00 a.m.
Location/Dept.: 191 North First Street
San Jose, CA 95113
Dept. 12

Assigned for All Purposes to:
Hon. Jack Komar

Date/Time: 08/25-27/15, 10:00 a.m., San Jose
(Trial/Hearing on claims by Phelan Piñon Hills CSD)
Date/Time: 09/28-10/16/15, 10:00 a.m., TBD
(Prove-up Hearings [evidentiary hearing for a physical solution])

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I. INTRODUCTION

The purpose of the August 25-27, 2015 trial dates is for Phelan Piñon Hills Community Services District ("Phelan") to present evidence on its remaining causes of action. The remaining causes of action on which Phelan will present evidence are the following:

- Third Cause of Action for a physical solution. It is Phelan's understanding that, in the context of this cause of action, it should present whatever additional evidence it would like the Court to consider with regard to the history of Phelan's pumping of water in the Antelope Valley Groundwater Basin.
- Fourth Cause of Action for declaratory relief regarding the appropriative rights of Phelan as a municipal water provider.
- Eighth Cause of Action for declaratory relief regarding the boundaries of the Antelope Valley Groundwater Basin.[1]

In connection with those causes of action, the brief will also highlight certain unusual particulars of Phelan's situation, some evidence of which is already in the record in the form of oral testimony, exhibits and a stipulation of facts. In that regard, attached to this brief as Exhibit A are portions of the transcript of the trial that took place on November 4 and 5, 2014 (the "November 2014 Trial"), specifically, Reporter's Transcript of November 4, 2014, page 74, line 22 through Page 78, line 28, and Reporter's Transcript of November 5, 2014, page 102, line 10 through page 163, line 1 and page 185, lines 12-20.

II. PHELAN'S HISTORY

Phelan was created in 2008 to assume the responsibilities for providing public services, as well as the assets and liabilities, of San Bernardino County Community Services Area 70 Improvement Zone L (the "CSA"). (November 2014 Trial, Exhibit PhelanCSD 1; Stipulation of Facts for Phelan Piñon Hills Community Services District Trial Set for November 4, 2014 ("Stipulation of Facts"), items 17-21 (copy attached as Exhibit B).) The process by which the County divested itself of those

[1] Phelan's Fifth Cause of Action for declaratory relief for use of storage space is discussed in Section III.D.2., *infra*. Phelan reserves the right to present evidence on its Seventh Cause of Action for declaratory relief to unreasonable use of water during the prove up hearings set for September 28, 2015 – October 16, 2015.

responsibilities, assets and liabilities involved a vote of the people and various proceedings before the San Bernardino County Local Agency Formation Commission ("LAFCO"). LAFCO's Resolution No. 2994 charged Phelan with the responsibility to "[s]upply water for any beneficial use as outlined in the Municipal Water District Law of 1911." (November 2014 Trial, Exhibit PhelanCSD 1, page 3.) LAFCO also decreed Phelan was the successor to the CSA in all respects and had all rights and priorities that formerly belonged to the CSA.

> The Phelan Piñon Hills CSD shall succeed to all water and capacity rights and interests of CSA 70 Improvement Zone L, whether wholly or partially owned or held by the district, and **shall succeed to the priorities of use or rights of use of water or capacity rights in any public improvements** of facilities or any other property, whether real or personal to which CSA 70 Zone L is entitled to [sic] upon the effective date of this reorganization.

(November 2014 Trial, Exhibit PhelanCSD 1, page 3 [emph. added].)

Among the assets to which Phelan succeeded were a number of water wells. Among those wells were six in the Antelope Valley Groundwater Basin ("AV Groundwater Basin") as defined by the Department of Water Resources' Bulletin 118. (November 2014 Trial, Exhibit PhelanCSD 26.) The pumping history of those wells, including Well 14, is shown in Exhibit C to this brief. Exhibit C is Table 1 from the report prepared by Phelan's expert witness, Thomas Harder, about which testimony will be provided at trial. Exhibit C shows the CSA had begun pumping in the AV Groundwater Basin by at least 1986.

While the focus in this case to date has been on Well 14, which is the only well Phelan has in the Antelope Valley Adjudication Area ("AV Adjudication Area"), the existence and history of the other five wells shows that Phelan was not the latecomer to pumping from the AV Groundwater Basin that it has been portrayed to be in this case. In fact, Phelan has been pumping from the AV Groundwater Basin for over 29 years and had been pumping from the AV Groundwater Basin for approximately 13 years when this litigation began.

Well 14 was drilled to meet a specific need, not simply to expand the CSA's horizons. The CSA was informed by the State Department of Health Services, Drinking Water Field Operations Branch, that it did not have sufficient capacity, raising concerns that the public water supply was inadequate. (November 2014 Trial, Exhibit PhelanCSD 5; Stipulation of Facts, item 6.)

That the CSA was going to be drilling this well was known to the County of Los Angeles prior to the commencement of drilling because the CSA (whose governing body was the San Bernardino County Board of Supervisors) purchased the well site from the County of Los Angeles. (November 2014 Trial, Exhibits PhelanCSD 2, 3, 4, 6, 7; Stipulation of Facts, items 7-10.) At the time, this litigation had already commenced, but rather than reject the proposal to purchase the well site on the grounds the AV Groundwater Basin was in overdraft, or on the grounds an additional well in the AV Groundwater Basin would further complicate this pending litigation, the Board of Supervisors of the County of Los Angeles approved the sale of the well site and imposed no conditions on its use.

Waterworks District No. 40 no doubt will object that the County of Los Angeles and the Waterworks District are separate legal entities and therefore the approval of the sale of the well site by the Board of Supervisors, which also is the governing body of Waterworks District No. 40, has no significance. While Phelan does not dispute that the County and Waterworks District No. 40 are separate legal entities, for purposes of notice, the separate identities of the legal entities is not significant. (*See, e.g., Elias v. San Bernardino County Flood Control Dist.* (1977) 68 Cal.App.3d 70, 75 (plaintiff could satisfy the claim filing requirement of the Government Claims Act by filing a claim with either the county or the county flood control district because the county board of supervisors sat as the governing board for both entities) and *Carlino II v. Los Angeles County Flood Control Dist.* (1992) 10 Cal.App.4th 1526, 1534-1535 (same).)

Phelan is also unusual in that it spans multiple groundwater sources – the AV Groundwater Basin, the El Mirage Valley, and the Mojave Groundwater Basin – pumping water from all three and delivering water in all three. (November 2014 Trial, Exhibit PhelanCSD 26.) Water from all but two of Phelan's wells is blended and distributed throughout the district.

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III. ARGUMENT

A. Phelan's History Of Pumping In the Antelope Valley Groundwater Basin, Not Just In The Antelope Valley Adjudication Area, Should Be Considered By The Court In Arriving At A Judgment And Physical Solution

As shown by Exhibit C, and as will be shown further in testimony offered at trial, Phelan began pumping in the AV Groundwater Basin by at least 1986, not in 2005-2006 when Well 14 first began producing water. This fact is significant in several ways.

First, it establishes an earlier priority for Phelan as an appropriator, dating back almost 20 years before Well 14 came on line. This is significant both for appropriative rights generally and for municipal priority.

Second, some parties in this case seek to cast Phelan in the role of an "exporter" of water from the AV Adjudication Area because the area in which Phelan distributes water is not within the AV Adjudication Area and, on that basis, those parties contend Phelan should pay a replenishment assessment for every acre-foot of water it pumps. Case law on exactly what constitutes "export" of water is not voluminous, but to the extent it is mentioned the focus is on removal of water from a watershed or groundwater basin, not from an artificial, somewhat politically determined, adjudication area. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 15-16.) However, approximately one-third of Phelan's service area *is* within the AV Groundwater Basin and approximately 700 AFY of the water Phelan delivers to its customers is delivered within the AV Groundwater Basin. At least as to that 700 AFY, Phelan should not be required to pay a replenishment assessment.

Third, from a practical perspective, all pumping from the AV Groundwater Basin needs to be considered to eventually achieve water balance, particularly in light of the Public Water Suppliers' insistence the minimal connectivity between the Buttes Subunit and the rest of the AV Groundwater Basin is somehow significant.

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B. <u>As A Municipal Water Provider, Phelan Is Entitled To Priority As An Appropriator</u>

As the successor to the CSA, there can be no doubt that Phelan, which succeeded to all of the CSA's rights and priorities, is a municipal water provider. As such, it is entitled to the municipal priority afforded by Water Code sections 106 and 106.5.

Municipal appropriative rights are often based on estoppel. However, even where estoppel cannot be established, the cases do not result in use of a well or water source being enjoined. Instead, for public policy reasons, the rights of the municipal appropriator are recognized and the issue becomes one of priority of use and whether the use of the water is prescriptive. In *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 377-379 [emph. added], the California Supreme Court explained:

> When public interests are involved "a prohibitive injunction should be granted only if it shall appear that no other relief is appropriate." (*Montecito Valley Water Co. v. Santa Barbara,* 144 Cal. 578 [77 Pac. 1113].) . . . The defendant alleged in its answer that the water impounded by means of said reservoir was then being distributed in the City of Vallejo for public purposes, and that it was necessary that the city and its inhabitants continue to so use the same. This allegation was sufficient to raise the issue of intervention of public use; and on the trial it appeared beyond question, although apparently not seriously urged, that the public interest had intervened more than five months prior to the commencement of this action. . . . **[I]t was established by decision of this court long prior to the trial that when public interests had intervened through the construction and operation of public agencies before the actions were commenced, any right of the parties to disturb them in their possession of the property was thereby lost**, and only an action to recover compensation for the land taken could be available. . . . [¶] There is much argument and citation of authority on both sides as to the foundation for the doctrine that intervention of public use will foreclose the right to an injunction, the plaintiffs insisting that it rests solely on waiver and estoppel which must be pleaded and proved in the trial court, and the defendant contending that it is grounded in public policy of which the court even on appeal may take cognizance when the fact appears. This court has referred to both as a foundation for the doctrine. It has noted the claim or applied the theory of waiver and estoppel . . . In *Gurnsey v. Northern Cal. Power Co.,* 160 Cal. 699 [117 Pac. 906, 36 L.R.A (N.S.) 185], quoted with approval in *Miller & Lux v. Enterprise Canal etc. Co.,* 169 Cal. 425 [147 Pac. 567], the court took the position that "this rule is not based so much on the application of the doctrine of estoppel. . . . It is based mainly on the great principle of public policy under which the rights of the citizen are sometimes abridged in the interests of public welfare". **There is little doubt that that application of the doctrine may be invoked on either ground when public use has attached prior to the commencement of the action and depending on the circumstances of the case.**

The CSA had begun pumping in the AV Groundwater Basin in 1986, 13 years before this adjudication proceeding commenced. Based on municipal priority and the public policy recognized in *Peabody*, Phelan must be permitted to continue to pump water and serve its municipal customers.

Water Code section 106 provides that: "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." Water Code section 106.5 provides: "It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses…." Depriving Phelan of a production right is inconsistent with these State policies when Phelan is solely attempting to meet the limited needs of its municipal customers. Moreover, it makes no sense for some municipal customers to pay astronomically more for water than other municipal customers overlying the same groundwater basin, especially when those customers live in an area where water is actually available in the aquifer and is regularly recharged by runoff from the San Gabriel Mountains.

C. Phelan's Pumping In The Antelope Valley Groundwater Basin Is From The Buttes Subunit, Which Is Hydrogeologically Distinct From The Rest Of The Basin And Which Is Not In Overdraft

Phelan's wells in the AV Groundwater Basin are in the Buttes Subunit of the AV Groundwater Basin. (November 2014 Trial, Exhibit PhelanCSD 26.) While the Court has concluded the AV Adjudication Area generally is in overdraft, the Court has also recognized that there are areas within it where conditions are different. (Statement of Decision Phase Three Trial, 4:21-24 ["But having heard evidence about the aquifer as a whole, the Court is not making historical findings that would be applicable to specific areas of the aquifer or that could be used in a specific way to determine water rights in particular areas of the aquifer."], 5:4-5 ["The degree of hydro-connectivity within the Antelope Valley adjudication area varies from area to area."].)

The Buttes Subunit (as well as the Pearland Subunit adjacent to the south) is one of those areas, particularly the southeastern portion where Phelan's wells are located. While the portion of the AV Groundwater Basin to the northwest of the Buttes Subunit is in overdraft and has experienced significant subsidence, the evidence will show the Buttes Subunit has experienced generally stable water levels during the period of time studied for purposes of this case, and has even seen rising groundwater levels at times when groundwater levels elsewhere in the AV Groundwater Basin have been declining. (November 2014 Trial, Exhibit PhelanCSD 27, 28, 29, 31, 32, 33.)

Interestingly, Bolthouse has alleged in its complaint that there is surplus water, which suggests no harm is being done by Phelan's pumping. (Cross-Complaint of Bolthouse Properties, LLC and Cross-Complaint of WM. Bolthouse Farms, Inc. Against Phelan Piñon Hills CSD, 5:6-13 ("Cross-complainants are informed and believe, and on the basis of such information and belief, allege that [Phelan] began pumping appropriated surplus water from the Antelope Valley to provide water for their municipal and industrial water customers. At the onset of pumping by [Phelan], the same was lawful and permissive and did not immediately nor prospectively invade or impair an overlying right.").)

While the Public Water Suppliers no doubt will contend there is connectivity between the Buttes Subunit and the rest of the AV Groundwater Basin, the simple fact of some small, unknown amount of connectivity does not in and of itself mean the appropriation of water from the Buttes Subunit by Phelan has any significant impact on the AV Groundwater Basin as a whole on any time frame relevant to human occupation. The fact stable groundwater levels persist in the Buttes Subunit in the face of the many years Phelan has been pumping from it indicates Phelan's pumping is not harming the AV Groundwater Basin and therefore there is no justification for requiring Phelan to pay a replenishment assessment for every acre-foot it pumps, as provided in the Proposed Judgment and Physical Solution promoted by the Public Water Suppliers.

D. <u>A Physical Solution Should Recognize Phelan's History Of Pumping From The Antelope Valley Groundwater Basin</u>

Phelan opposes the Stipulated Judgment and Physical Solution promoted by the Public Water Suppliers in two respects:

1. To the extent it is inconsistent with settlements reached by other parties, including Phelan's settlement with the Wood Class. Phelan addressed this issue in its objections to the Stipulation for Settlement and proposed Wood Class Settlement and will not repeat the grounds for that opposition here.

2. To the extent it requires Phelan to pay for every acre-foot of water Phelan pumps from Well 14.

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For purposes of determining the significance of Phelan's municipal priority as an appropriator, this Court should take into account Phelan's years of pumping, not just from Well 14, but from the AV Groundwater Basin, and specifically the Buttes Subunit. That history, the particular conditions in the Buttes Subunit, the lack of adverse impact of Phelan's pumping on the existence of surplus, or at least stability, in the Buttes Subunit, demonstrates Phelan has rights that should be recognized in the physical solution by allowing Phelan to pump without paying a replenishment assessment. Phelan contends, in light of the overall history of its pumping in the AV Groundwater Basin and the timing of that pumping, that it should be allowed to pump up to 1,100 AFY without a replenishment assessment. Alternatively, Phelan could accept a lower allocation based on the Court's consideration of all of the evidence, as low as 700 AFY, without a replenishment assessment.

1. Necessary Revisions to the Public Water Suppliers' Proposed Physical Solution

Phelan understands the Court will consider all the evidence in this case and enter a final Judgment and Physical Solution. A Proposed Judgment and Physical Solution was submitted by several parties, including the Public Water Suppliers, on March 4, 2015. (*See* Exhibit A.1 to the Declaration of Michael D. McLachlan In Support Of Motion For Preliminary Approval Of Class Settlement.) If the Court utilizes this as a foundation for its final Judgment, the following modifications must be incorporated in order for the Physical Solution to be consistent with California law, due process, and principles of equity.

First, Exhibit 3 to the Proposed Physical Solution should include "non-overlying production rights" in an amount of at least 700 AFY for Phelan, consistent with Sections 3.5.21 and 5.1.6.

Second, Section 3.5.8 defines Basin without an explanation of the hydrogeologic reality of the AV Groundwater Basin. Phelan requests the following language be added to the end of that Section: "The Basin as so defined excludes some areas that are, in fact, hydrogeologically connected to and part of the basin, pursuant to Department of Water Resources Bulletin 118."

Third, the following language in Section 5.1.10 should be stricken, as there is no basis for it under the law:

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> **Production Rights Claimed by Non-Stipulating Parties.** Any claim to a right to Produce Groundwater from the Basin by a Non-Stipulating Party shall be subject to procedural or legal objection by any Stipulating Party. Should the Court, after taking evidence, rule that a Non-Stipulating Party has a Production Right, the Non-Stipulating Party shall be subject to all provisions of this Judgment, including reduction in Production necessary to implement the Physical Solution and the requirements to pay assessments~~, but shall not be entitled to benefits provided by Stipulation, including but not limited to Carry Over pursuant to Paragraph 15 and Transfers pursuant to Paragraph 16~~. […]

No legal or other basis exists to support certain parties being excluded from some terms or benefits available in the Physical Solution. As a party subject to the ultimate Physical Solution for this case, Phelan should be entitled to Carry Over and Transfers like any other party.

2. Additional Revisions If Phelan's Production Right Is Not Recognized

If the Court is not inclined to grant a production right to Phelan, then Phelan requests the following, additional modifications be made to the Proposed Physical Solution.

First, the Proposed Physical Solution should be modified so as not to characterize Phelan as an "exporter." Section 6.4 allows the United States to "transport" produced water to any portion of Edwards Air Force Base, "whether or not the location of use is within the Basin." It also does not prevent Saint Andrew's Abbey, Inc., U.S. Borax, and Tejon Ranchcorp/Tejon Ranch Company from "transporting" produced water for "those operations and for use on those lands outside the Basin and within the watershed of the Basin…."

In contrast, Phelan is included in the next Section 6.4.1 entitled "Export by Boron and Phelan Pinon Hills Community Services Districts." For the reasons discussed above, Phelan should not be characterized as an "exporter" since portions of its service area overlie the AV Groundwater Basin. Moreover, the term "export" is not defined anywhere in the Proposed Physical Solution, which could lead to unintended consequences due to the many potential definitions and implications of the term export. Phelan should be shifted from Section 6.4.1.2 into Section 6.4.1, and any references to export with regard to Phelan should be removed.

Second, in Section 6.4.1.2, the phrase "together with any other costs deemed necessary to protect Production Rights decreed herein" should be stricken. As drafted, that Section would already require Phelan to pay a Replacement Water Assessment on every acre-foot of water produced from the Basin. This additional language is vague, unsupported, and has no reasonable justification. This

Section already requires the Watermaster to make a determination regarding whether Phelan's pumping would cause Material Injury. However, no reasonable standard exists by which the future Watermaster could evaluate whether a cost is "deemed necessary to protect" Production Rights. This language greatly increases the risk of future disputes between Phelan, the Watermaster, and any number of parties, even after the final Judgment has been entered. In the event that Phelan has to pay a replacement water assessment for some or all of the water it pumps, it should only have to pay the assessment, as is the condition for any other party subject to the ultimate judgment.

Finally, it should be noted that Phelan supports the language in Section 14 of the Proposed Physical Solution on Storage, which provides all parties with the right to store water in the Basin pursuant to a storage agreement with the Watermaster.[2] For this reason, Phelan finds it unnecessary to present additional evidence or argument on its Fifth Cause of Action for declaratory relief for use of storage space.

IV. CONCLUSION

For the reasons set forth above and as demonstrated by evidence already in the record, Phelan respectfully requests that the Court enter judgment as follows in its favor:

1. On the Third Cause of Action, providing for a physical solution consistent with existing settlements and a free pumping allocation for Phelan of 1,100 AFY, but in any event, not less than 700 AFY.

2. On the Fourth Cause of Action, recognizing Phelan is a municipal water provider and recognizing Phelan's priority pursuant to Water Code sections 106 and 106.5.

3. On the Eighth Cause of Action, declaring that, notwithstanding the boundaries of the AV Adjudication Area, Phelan's history of pumping in the AV Groundwater Basin should be reflected

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[2] "Courts have held that available groundwater storage capacity is a public resource, not one owned by the overlying landowners, and thus their permission is not required to store water. (*Central and West Basin Water Replenishment District v. Southern California Water Co.* (2003) 109 Cal.App.4th 891.) An agency can import water, store it underground by percolation from spreading basins or by injections wells, keep title to that water, and extract an equivalent amount at a later time. (*City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68; *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199.)" (Littleworth & Garner, California Water II (2007), at 81.)

in determination of its municipal priority rights as an appropriator and in determining the amount of Phelan's free pumping allowance.

DATED: August 17, 2015

ALESHIRE & WYNDER, LLP
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By: _____
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Judicial Council Coordination Proceeding No. 4408
For Filing Purposes Only: Santa Clara County Case No.: 1-05-CV-049053

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Linda Yarvis,

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

On August 17, 2015, I served the within document(s) described as **PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT'S TRIAL BRIEF** on the interested parties in this action as follows:

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

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

Executed on August 17, 2015, at Irvine, California.

Linda Yarvis

ALESHIRE & WYNDER LLP ATTORNEYS AT LAW