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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 RESPONSE TO TRIAL BRIEFS OF THE PUBLIC WATER SUPPLIERS AND BOLTHOUSE PROPERTIES, LLC AND WM. BOLTHOUSE FARMS, INC.

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])

Phelan Piñon Hills Community Services District ("Phelan") respectfully submits the following response to the trial briefs filed by Los Angeles County Waterworks District No. 40, City of Palmdale, City of Lancaster, Rosamond Community Services District, Littlerock Creek Irrigation District, Palm Ranch Irrigation District, Desert Lake Community Services District, North Edwards Water District, Llano Del Rio Water Company, Llano Mutual Water Company, Big Rock Mutual Water Company, Palmdale Water District, Quartz Hill Water District, and California Water Service Company (collectively, "Public Water Suppliers") and Bolthouse Properties, LLC and Wm. Bolthouse Farms, Inc. ("Bolthouse").

I. INTRODUCTION

The trial brief filed by the Public Water Suppliers on Phelan's remaining causes of action provides their limited view on California groundwater law, unsupported by citations or evidence, to the parties and the court, but it does nothing to aid the Court in fashioning an equitable physical solution that incorporates Phelan's rights as a historical and ongoing municipal water provider in the Antelope Valley Groundwater Basin ("AV Groundwater Basin"). The Public Water Suppliers also attempt to command and dictate to the Court what it is allowed to do in developing a final Judgement and Physical Solution. In fact, the Court has complete authority and discretion to consider the evidence in the record and new evidence to be presented in the context of Phelan's entire cross-complaint and remaining causes of action.

Bolthouse incorrectly asserts that Phelan lacks standing to object to the Proposed Judgment and Physical Solution. It is elementary that Phelan has standing as a party in this action, and a party that will be subject to the final Judgment and Physical Solution. Bolthouse also brazenly asserts that Phelan has unclean hands and failed to join this action in a timely manner. To the contrary, Phelan through its predecessor has been pumping in the AV Groundwater Basin since 1986, and drilled Well 14 in a hydrogeologic structure it was already pumping from, because the State Department of Public Health directed it to find additional supply.

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 1,200 AFY[1] 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.

Phelan requests the Court take all of the evidence and argument under submission, as it did with the Wood Class Settlement, and wait to make a final determination as to Phelan until all evidence is heard during the prove-up hearings and evidence is heard on the Proposed Judgement and Physical Solution and any alternate proposed physical solutions that may be introduced into evidence.

II. ARGUMENT

A. The Court Has Inherent Authority To Reach Conclusions Different From Those It Previously Announced

The Public Water Suppliers assume Phelan is seeking to retry issues previously heard by the Court. This is not the case. However, this Court has the inherent authority, on hearing additional evidence and argument on other topics, and considering how evidence already in the record affects Phelan's causes of action, to reach conclusions different from those previously announced. Until judgment is entered, the Court is free to reconsider earlier rulings and even revise statements of law and fact previously issued by the Court. (*Phillips v. Phillips* (1953) 41 Cal.2d 869, 874 ["Until a judgment is entered, it [a statement of decision] is not effectual for any purpose, . . . and at any time before [judgment] is entered, the court may change its conclusions of law and enter a judgment different from that first announced. [Citations.] Moreover, a judge who has heard the evidence may at any time before entry of judgment amend or change his findings of fact."]; *Bernstein v. Consolidated American Ins. Co.* (1995) 37 Cal.App.4th 763, 774 [in considering motion for clarification of minute order denying summary adjudication motion, court has the authority to change its ruling and grant the

[1] Phelan listed 1,100 AFY instead of 1,200 AFY at 8:6-8 and 10:16-18 of its trial brief in error.

motion; "'Until entry of judgment, the court retains complete power to change its decision as the court may determine; it may change its conclusions of law or findings of fact. . . .' Code of Civil Procedure section 1008 does not preclude the actions taken by the trial court in this case."]; *Bay World Trading, Ltd. v. Nebraska Beef, Inc.* (2002) 101 Cal.App.4th 135, 141 [prior to entry of judgment, trial court had inherent power to amend its statement of decision; "Even after a court has issued a written decision, the court retains the power to change its findings of fact or conclusions of law until judgment is entered."].)

The final sentence in the Court's Partial Statement of Decision for Trial Related to Phelan is as follows: "The decision here only determines that at this time Phelan Piñon Hills is an appropriator without a priority as to overlying owners and appropriators with prescribed rights (if any)." (12:4-6.) The decision did not foreclose any rights for Phelan in the final Judgment and Physical Solution, it only impacted its priority relative to other pumpers in the Basin. This trial on Phelan's remaining causes of action will shed additional light on Phelan's priority and position as an appropriator.

B. <u>A Physical Solution Should Recognize The Needs Of All In The Basin</u>

The Public Water Suppliers rely on *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 ("*Barstow*"), to argue that courts, in adopting a physical solution, "are not to give water rights that parties do not otherwise have." (Public Water Suppliers' Brief, 4:3-4.) This overstates the ruling in *Barstow* and disregards other relevant case law in an inappropriate attempt to bind the Court into approving the proposed Judgment and Physical Solution without modification. The Public Water Suppliers' position fails for several reasons.

First, in the context of fashioning a physical solution, this Court is not foreclosed from modifying its previous orders and decisions by granting Phelan an appropriative right. As explained by the California Supreme Court in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383-384 [emph. added]:

> [I]f a physical solution be ascertainable, the court has the power to make and should make reasonable regulations for the use of the water by the respective parties, provided they be adequate to protect the one having the paramount right in the substantial enjoyment thereof and to prevent its ultimate destruction, and in this connection **the court has the power to and should reserve unto itself the right to change and modify its orders and decree as occasion may demand**, either on its own motion or on motion of any party.

Second, as a court in equity, the Court is guided by broad, equitable power in developing and imposing a physical solution.

> Moreover, the trial court should not lose sight of the fact that this is an equity case. **The equity courts possess broad powers and should exercise them so as to do substantial justice**. Heretofore, the equity courts, in water cases, apparently have not seen fit to work out physical solutions of the problems presented, unless such solutions have been suggested by the parties. But it should be kept in mind that **the equity court is not bound or limited by the suggestions or offers made by the parties to this, or any similar, action**, [sic] (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 574 [emph. added].)

Third, the *Barstow* Court explained that:

> Thus, although it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution's general purpose cannot simply ignore the priority rights of the parties asserting them. [Citation.] In ordering a physical solution, therefore**, a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine**. [Citation.] (23 Cal.4th at 1250.)

Phelan is not asking the Court to "simply ignore the priority rights of the parties asserting them," or to "eliminate vested rights." (*See id.*) It is asking the Court to recognize its rights in the Basin along with the rights of the other parties.

The Public Water Suppliers boldly assert what the Court can or cannot do: "Thus, the Court cannot allocate 1,200 acre-feet of Basin groundwater to Phelan unless its [sic] pays an assessment to the watermaster in an amount sufficient to allow the watermaster to purchase sufficient replacement supplemental water." (Public Water Suppliers' Brief, 4:24-26.) However, this Court is a court of equity, and "equity courts possess broad powers and should exercise them so as to do substantial justice." (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 574.) The Public Water Suppliers have not presented any evidence that if Phelan were granted an assessment-free allocation, the other parties' rights would not be "substantially enjoyed." (*See Peabody, supra*, 2 Cal.2d at 383-384.)

The Public Water Suppliers repeatedly argue that Phelan is seeking a right "superior to" the rights of the Settling Parties. Phelan is not seeking superiority to the other parties – quite the opposite, Phelan merely seeks to be treated equitably in the fashioning of a physical solution.

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The Public Water Suppliers also repeatedly highlight that the Court has made a finding that pumping by Phelan's Well 14 "negatively impacts the Butte sub basin and the Adjudication Area." (Public Water Suppliers' Brief, 5:13-15 [quoting the Partial Statement of Decision, 12:4-7].) This finding says nothing about the amount of Phelan's pumping that is negatively impactful. Moreover, if the Basin is in overdraft, then doesn't *every* party's pumping negatively impact the Basin? This assertion of harm is irrelevant to the current trial, especially when the Public Water Suppliers have presented zero evidence on this alleged harm.

Finally, the Public Water Suppliers claim they are unaware of any other adjudicated basin with a physical solution that provides a replacement assessment discount based on native water potentially re-entering the basin. (Public Water Suppliers' Brief, 5:17-19.) However, Phelan is not seeking a "discount" on its replacement assessment – it seeks a free pumping allowance on some or all of the water it pumps for its municipal uses, not a reduced assessment rate for water on which it is required to pay an assessment.

In light of the overall history of Phelan's pumping in the AV Groundwater Basin and the timing of that pumping, the final Judgment and Physical Solution should entitle Phelan to pump up to 1,200 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.

C. Phelan Is Entitled To Municipal Priority In Connection With Its Appropriative Pumping

Phelan is not suggesting that Water Code section 106 and 106.5 "establish a right to export groundwater from an overdrafted basin." (Public Water Suppliers' Brief, 5:27-28.) As explained further below, Phelan is not exporting from the Basin.

Phelan is entitled to the municipal priority afforded by Water Code sections 106 and 106.5 in connection with its appropriative right. Furthermore, as explained in Phelan's trial brief, municipal appropriative rights are often based on estoppel, and even where estoppel cannot be established, the rights of the municipal appropriator are recognized as a matter of public policy and the issue becomes one of priority of use. (*See Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 377-379.)

Bolthouse argued that Water Code section 106.5 does not apply to water uses involved in the present action. However, Bolthouse offers no citation or explanation of why that section does not apply. This argument should be deemed waived.

D. Phelan Is Not Asking The Court To Revise The Boundaries Of The Basin

The Court does not need to worry about the parade of horribles described by the Public Water Suppliers if the boundaries of the adjudication area were to be revised to conform with the AV Groundwater Basin as defined in Department of Water Resources' Bulletin 118. Phelan has not and is not asking the Court to revise the boundaries of the Basin. Instead, Phelan is seeking not to be characterized as an "exporter" and for the final Judgment and Physical Solution to recognize the discrepancy in the AV Adjudication Area and the AV Groundwater Basin in such a way that recognized Phelan's rights as a party in the Basin.

Bolthouse argues that the Court provided Phelan with the opportunity to request a change in the Area of Adjudication boundaries and that Phelan declined to make this request. Bolthouse offers no citation to any ruling or transcript indicating such an opportunity actually existed. (Bolthouse's Brief, 2:17-21, 4:13-16.) Phelan is not aware of any such invitation or opportunity, however, it does not make that request at this time.

E. If Phelan Is An "Exporter" It Is Also An "Importer;" Ultimately, This Is Not An Issue That Should Impact The Final Judgment And Physical Solution

The Public Water Suppliers admit in their trial brief that part of Phelan's service area overlies the AV Groundwater Basin as defined in Department of Water Resources' Bulletin 118. This demonstrates that Phelan should not be characterized as an "exporter" because it pumps water from the AV Groundwater Basin and utilizes that water in its service area that overlies the Basin. The Public Water Suppliers make no attempt to define "export" – most likely because the facts surrounding Phelan's position do not support the concept of export in the law or based on hydrogeologic reality.

But the Public Water Suppliers ignore the fact Phelan also has wells outside of the AV Groundwater Basin and the water from those wells is blended with the water pumped from the AV Groundwater Basin and distributed throughout Phelan's service area, just like the water from the

AV Groundwater Basin. The Public Water Suppliers cite to no authority to support the notion that Phelan's use and delivery of water in each respective basin must be exactly proportional to its pumping from each basin. Thus, if Phelan is going to be characterized as an "exporter," it should also be recognized as an "importer." In any event, Phelan's "importing" and "exporting" is not conscious or deliberate; it is simply a function of its unique location and jurisdiction and should have no impact on the physical solution.

F. Phelan's Position Is Consistent With The Public Water Suppliers' On Use Of Storage Space

The Public Water Suppliers allege that, "Section 14 of the proposed Physical Solution provides 'the right to store water in the Basin pursuant to a Storage Agreement with the Watermaster.' The proposed Physical Solution would apply to all groundwater users and there is no basis for a different or superior set of rights to use storage space." (Public Water Suppliers' Brief, 6:13-17.) This is consistent with Phelan's position on use of storage space, and, therefore, these issues do not need to be addressed further at trial. (*See* Phelan's Brief, 10:8-12.)

G. Phelan Has Standing To Object To The Proposed Judgment And Physical Solution

Bolthouse argues that Phelan lacks standing to object to the Proposed Judgment and Physical Solution, without citing to any authority to support this blanket assertion. (Bolthouse's Brief, 2:9-10, 3:20-22.) This is the first time this argument has ever been raised, and it makes no sense given that Phelan is a party to this action, a trial is being held on its remaining causes of action, and it will be subject to the final Judgment and Physical Solution entered in this case. Phelan is even specifically referenced in the Proposed Judgment and Physical Solution, to which Bolthouse is a stipulating party. All parties to this case have standing to object to the proposed Physical Solution, including Phelan.

III. CONCLUSION

For the reasons set forth above, in its trial brief, and as demonstrated by evidence already in the record, Phelan respectfully requests that the Court enter judgment as follows in its favor, following the completion of the prove-up and other hearings in this action:

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

DATED: August 21, 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 24, 2015, I served the within document(s) described as **PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT'S RESPONSE TO TRIAL BRIEFS OF THE PUBLIC WATER SUPPLIERS AND BOLTHOUSE PROPERTIES, LLC AND WM. BOLTHOUSE FARMS, INC.** 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 24, 2015, at Irvine, California.

Linda Yarvis

ALESHIRE & WYNDER LLP ATTORNEYS AT LAW