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EXEMPT FROM FILING FEES
[Gov. Code, § 6103]

8
9 ADDITIONAL PARTIES LISTED ON PAGE 2 HEREOF

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES
12

13 **Coordination Proceeding
Special Title (Rule 3.550(c))**

14 **ANTELOPE VALLEY GROUNDWATER
15 CASES**

16 **Included Actions:**

17 **Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.
Superior Court of California County of Los
18 Angeles, Case No. BC 325 201**

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

21 **Wm. Bolthouse Farms, Inc. v. City of
22 Lancaster, Diamond Farming Co. v. City of
Lancaster, Diamond Farming Co. v.
23 Palmdale Water Dist. Superior Court of
California, County of Riverside,
24 consolidated Actions, Case Nos. RIC 353
840, RIC 344 436, RIC 344 668**
25 -----

26 **AND RELATED ACTIONS.**
27
28

Judicial Council Coordination
Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053

**JOINT TRIAL BRIEF OF STATE OF
CALIFORNIA, CITY OF LOS ANGELES,
AND COUNTY SANITATION DISTRICTS
OF LOS ANGELES COUNTY NOS. 14 &
20 FOR PHELAN PIÑON HILLS
COMMUNITY SERVICES DISTRICT
TRIAL ON SECOND AND SIXTH
CAUSES OF ACTION**

[Assigned for All Purposes to the Honorable
Jack Komar]

Trial Date: November 4, 2014
Time: 9:00 a.m.

Place: Los Angeles County Superior Court
Department: 56

Action Filed: October 26, 2005

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INTRODUCTION

Cross-Defendants, State of California, State of California 50th District Agricultural Association (collectively, State of California), the City of Los Angeles, by and through its Department of Airports, Los Angeles World Airports (LAWA) and the County Sanitation Districts of Los Angeles County Nos. 14 and 20 (LA County Sanitation) (collectively, Public Overliers) submit the following Trial Brief for the trial of Phelan Piñon Hills Community District's (Phelan) Second and Sixth Causes of Action in its Cross-Complaint filed on December 30, 2008 (Cross-Complaint).

As stated in Phelan's *Ex-Parte* Application for Continuance of Trial Date and Adoption of Litigation Schedule and implied in the Court's minute order dated August 29, 2014, this trial will resolve the second and sixth causes of action in Phelan's Cross-Complaint. The second cause of action in Phelan's Cross-Complaint is for Declaratory Relief seeking a declaration that Phelan has an appropriative right to pump water from the Antelope Valley Groundwater Basin as it is defined in the "Revised Order After Hearing on Jurisdictional Boundaries" issued by this Court on March 12, 2007 (Basin). (Cross-Complaint p. 15.) The sixth cause of action in Phelan's Cross-Complaint is for Declaratory Relief seeking a declaration that Phelan has the right to recapture its return flows and export those waters from the Basin. (Cross-Complaint p. 18.)

As demonstrated herein below, Phelan does not have an appropriative right to groundwater in the Basin, or the right to the return flows which result from its pumping in the Basin, because: (1) the Basin is overdrafted and, accordingly, "surplus" groundwater does not exist; (2) Phelan admits that connectivity exists between the area in which it pumps groundwater and other parts of the Basin; (3) Phelan cannot demonstrate that its pumping will not reduce the amount of water available to other parts of the Basin, or will not exacerbate the Basin's overdraft condition; (4) no right to return flows exists without an underlying appropriative right; and (5) no right exists to return flows from native groundwater.

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ARGUMENT

1. Phelan Cannot Prove That It Is Entitled To An Appropriative Right In This Overdrafted Basin, Especially When Its Pumping May Reduce The Groundwater Recharge Outside The Subunit Where Well 14 Is Located.

“Courts typically classify water rights in an underground basin as overlying, appropriative, or prescriptive.” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.) Groundwater pumped for a public use by a municipal water supplier is considered an appropriative right. (*San Joaquin & Kings River Canal & Irr. Co. v. James J. Stevenson* (1912) 164 Cal. 221, 226.) Appropriative rights to groundwater can attach only to water in the Basin that is surplus to the needs of all overlying landowners and other prior and paramount rights holders. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 278-279.) The burden of proof is on the appropriator to prove that a surplus exists beyond the amount needed to satisfy the reasonable and beneficial uses of those holding prior and paramount rights. (*Allen v. Cal. Water and Tel. Co.* (1946) 29 Cal.2d 466, 474, 481.) Further, if overlying landowners and other prior and paramount rights holders are using the full safe yield of the basin for reasonable and beneficial use, then no surplus exists, and no water is available for appropriation. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-926; *Corona Foothill Lemon Co v. Lillibridge* (1937) 8 Cal.2d 522.)

This Court, in its Statement of Decision Phase Three Trial signed on July 13, 2011 (Phase Three Decision), found that in the Antelope Basin “the current extractions exceed recharge and therefore that the basin is in a state of overdraft.” (Phase Three Decision at p. 5.) It concluded: “the adjudication area aquifer is in a state of overdraft.” (*Ibid.*) Therefore, by definition, no surplus exists, and no water is available for appropriation.

Further, the Court found that the Basin's overdraft is due to the combined pumping of all the pumpers in the Basin exceeding the recharge, and is not due to any one individual pumper's extractions from the Basin. (*Ibid.*) Any individual pumper (especially some of the smaller pumpers in the Basin) might argue, like Phelan does here, that its individual pumping is not causing harm to others, or to the Basin. That is not, however, what determines if there is surplus in the Basin, or any subunit of the Basin. The combined pumping of all pumpers in the Basin is determinative, and is the basis of the Court's determination that the Basin is in overdraft.

1 Finally, the Court found that the Basin is in overdraft, notwithstanding the rise in
2 groundwater levels in some areas of the Basin (Phase Three Decision, at p. 6), and based its
3 determination on the condition of the Basin as a whole. This is the proper frame of reference for
4 determination of overdraft or surplus. Cyclical precipitation patterns, limited recharge sources
5 and differing soil transmissivities will always mean that some wells will exhibit stable or rising
6 groundwater levels at various times. Nonetheless, the determination of safe yield and overdraft
7 must be based upon an evaluation of long-term recharge and pumping trends. Only a
8 comprehensive consideration of recharge and extraction assures the health of the Basin over the
9 long term. This was the Court's reasoning in its Phase Three Decision, and should be adhered to
10 in the consideration of Phelan's Well 14 pumping.

11 Even if Well 14 is located in an area of stable or rising groundwater levels, its interception
12 of recharge through pumping decreases inflow to the Basin and exacerbates overdraft.
13 All Parties agree that Phelan's Well 14, the well at issue in this trial, overlies and extracts water
14 from the Basin. (See Undisputed Fact No. 26.) As Phelan's expert, Mr. Harder, will testify Well
15 14 is located in the Buttes subunit of the Basin. (Deposition of Thomas Harder, October 20, 2014
16 (Harder Depo.) at p. 26, attached hereto as Exhibit A.) Significantly, however, Phelan admits that
17 the Buttes subunit is hydrologically connected to the Lancaster subunit and the rest of the Basin.
18 (Harder Depo p. 32.) As a result, Phelan's expert necessarily admits that groundwater moves
19 across the boundary from the Buttes subunit into the Lancaster subunit and recharges that subunit
20 as well as other parts of the Basin. (*Id.* at pp. 73-74.) Therefore, Phelan's interception of
21 recharge through pumping decreases the inflows to the Basin and exacerbates the overdraft. (*Id.*
22 at p. 75.) And this is so, notwithstanding the fact that Well 14 is allegedly located in an area of
23 rising groundwater.

24 As the Court noted in its Phase Three Decision, "all the experts could agree on the
25 definition of 'Darcy's Law' and the physics principle of 'conservation of mass' . . . " (Phase Three
26 Decision at p. 9.) Under these accepted principles, the water pumped by Phelan must come from
27 somewhere, and that "somewhere" is groundwater in the Basin and the recharge inflow to the
28 Basin.

1 Phelan's expert is expected to further testify that a local surplus exists in the vicinity of
2 Phelan's Well 14, allowing the establishment of an appropriative right based on the pumping from
3 that well. He also is expected to opine that Well 14 does not impact other wells in the Basin, due
4 to unique hydrology and the distance between Well 14 and other wells in the Basin. However,
5 this testimony misses the point. The Court found, and the law states, that overdraft exists where,
6 as here, the draw on the groundwater exceeds the recharge over the long term, **Basin-wide**. Here
7 there is no such surplus--there is overdraft, because the **Basin-wide** draw on the groundwater
8 exceeds the recharge over the long term.

9 In fact, Phelan's expert admits that he has not analyzed how much groundwater is flowing
10 from the Buttes subunit to the Lancaster subunit. (Harder Depo p. 74-75.) He has also not
11 analyzed the impact Phelan's pumping has had and will have on the amount of groundwater that
12 is flowing from the Buttes subunit to the Lancaster subunit. Therefore, he cannot opine on the
13 true effect that Phelan's pumping has had or will have on the Basin as a whole. Mr. Harder
14 concedes, however, that pumping in the Buttes subunit—where Well 14 is located—can, in fact,
15 impact the amount of water that recharges the Lancaster area. (*Ibid.*)

16 The evidence that Phelan will offer does not come close to that needed to support a finding
17 that Phelan's pumping will not diminish the groundwater in the Basin as a whole or exacerbate
18 the Basin's overdraft condition. Without such proof, Phelan cannot even begin to meet its burden
19 to prove a surplus exists that entitles it to an appropriative right in this case.

20
21 **2. Phelan Is Not Entitled To A Return Flow Right, When It Has No Appropriative
Right To Begin With And When It Has Not Imported Any Water Into The Basin.**

22 Having failed to prove any appropriative right to pump from the Basin, Phelan cannot
23 prove any right to "native return flow" which, in any event, does not exist in California law. Only
24 one who brings imported water into a groundwater basin is entitled to the return flows resulting
25 therefrom, as the fruits of its labor. *City of Los Angeles v. San Fernando* (1975) 14 Cal.3d 199,
26 257-258; *City of Santa Maria v. Adam, supra*, 211 Cal.App.4th at 301-302. The importers in *City*
27 *of Los Angeles* and *City of Santa Maria* had augmented the Basin through their delivery of
28

1 imported water; their right to the resulting return flows were based upon that augmentation. *Ibid.*
2 Further, in the case of native waters, once the water returns to the common source, the
3 appropriator ceases to have any right to it. (*Eddy v. Simpson* (1853) 3 Cal. 249 252; *Kelly v.*
4 *Natoma Water Co.* (1856) 6 Cal. 105, 108.)¹

5 In addition, the return flow right must be based on a property right, a possessory right, that
6 one who claims the return flow right has an exclusive right to use that water in the manner for
7 which it is being used. *City of Santa Maria v. Adam*, *supra*, 211 Cal.App.4th at 301-302. It is not
8 a “primary” right to use water, but a secondary one derived from the remnants of water rightfully
9 used pursuant to another right, such as the possessory right an importer maintains to its imported
10 water.

11 Here, Phelan claims a right to the return flows resulting from the native water it pumps
12 (i.e., water which it did not import or bring into the Basin). Accordingly, Phelan’s activities do
13 not augment the Basin’s groundwater in any way. To the contrary, Phelan’s pumping removes
14 native water from the Basin. Moreover, the return flows resulting from Phelan’s customers’ use
15 of the pumped water returns less water to the Basin than is pumped, at a cost to all other pumpers
16 in the Basin.

17 As noted earlier, Phelan admits that the Buttes subunit is hydrologically connected to the
18 Lancaster subunit and the rest of the Basin. (Harder Depo p. 32.) As a result, Phelan’s expert
19 necessarily admits that groundwater flows across the boundary from the Buttes subunit into the
20 Lancaster subunit and recharges that subunit as well as other parts of the Basin. (*Id.* at pp. 73-
21 74.) Therefore, Phelan’s interception of recharge through pumping decreases the inflows to the
22 Basin and exacerbates the overdraft. (*Id.* at p. 75.) This is so, notwithstanding the fact that Well
23 14 is allegedly located in an area of rising groundwater.

24 Finally, even if such a right existed to return flows from the native supply, it is a
25 secondary right that must flow from an already existing right to pump and use water from the

26 ¹ A “right” to “native return flow”—distinct from the right of an appropriator to recapture
27 appropriated water before it leaves the appropriator’s property—would also be contrary to the
28 dictates of California Constitution Article X, Section 2, for it would encourage unwarranted use
of water in order to enhance the “native return flow” credit.

1 native supply. Phelan cannot demonstrate an appropriative right, as discussed above, and
2 therefore has no right to pump and use water from this overdrafted Basin to begin with. This
3 Court must therefore find that Phelan is not entitled to declaratory relief in its favor on its Sixth
4 Cause of Action relating to its right to native return flows.

5 CONCLUSION

6 This Court, in its Phase 3 decision, ruled that the current extractions from the Antelope
7 Valley Groundwater Basin exceed recharge and that the Basin is in a state of overdraft. Phelan's
8 only claim to a groundwater right, as an appropriator, requires the existence of a surplus. Because
9 the finding of overdraft necessarily precludes the existence of a surplus, Phelan's claim to an
10 appropriative right, its second cause of action, must also necessarily be precluded.

11 Because Phelan cannot establish a valid appropriative right to the water it pumps, for the
12 reasons noted above, Phelan has no basis to claim any return flows generated from this same
13 water. Furthermore, regardless of whether Phelan has a valid right as an appropriator, California
14 law does not allow the recapture of native return flows that have recharged the Basin. It is for
15 these reasons that the court must deny both Phelan's second and sixth causes of action.

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1 Dated: October 31, 2014

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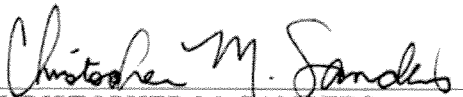
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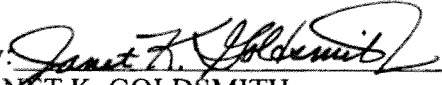
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CERTIFICATE OF SERVICE

Case Name: **Antelope Valley Groundwater
Cases**

No. **JCCP 4408**

I hereby certify that on October 31, 2014, I electronically filed the following document(s) with the Clerk of the Court by using the CM/ECF system:

**JOINT TRIAL BRIEF OF STATE OF CALIFORNIA, CITY OF LOS ANGELES,
COUNTY SANITATION DISTRICT OF LOS ANGELES COUNTY NOS. 14&20, FOR
PHELAN PIÑON HILLS COMMUNITY SERVICES DISTRICT TRIAL ON SECOND
SIXTH CAUSES OF ACTION**

on the interested parties in this action, by posting the document(s) listed above to the Santa Clara County Superior Court e-filing website (<http://www.scefiling.org>) under the Antelope Valley Groundwater matter pursuant to the Court's Order dated October 27, 2005.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 31, 2014, at Los Angeles, California.

Gwen Blanchard

Declarant



Signature