IN THE COURT OF APPEAL OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE

WILLIAM H. MOORES, et al., Plaintiffs, Respondents, and Cross-Appellants v. IRISH BEACH WATER DISTRICT, Defendant, Appellant, and Cross-Respondent.	Case No. A151867 Civil Case Mendocino County No. SCUKCVG09-54665

On Appeal From the Superior Court of
California, County of Mendocino
Judge: Hon. Ann Moorman

APPELLANT IRISH BEACH WATER DISTRICT'S OPENING BRIEF

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INITIAL
CERTIFICATE OF INTERESTED
ENTITIES OR PERSONS
(CAL. RULES OF COURT, RULE 8.208)

This form is being submitted on behalf of Defendant, Appellant, and Cross-Respondent IRISH BEACH WATER DISTRICT.

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of ten percent (10%) or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

DATED: March 20, 2019

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By: 
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IRISH BEACH WATER DISTRICT

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INTRODUCTION

In 2008, appellant Irish Beach Water District (the "District"), a public entity, drilled a well on property on which it had been granted easements "WELL," and "water system appurtenances. (7 CT 1360.) The servient tenement subject to the easement was a 60 by 60 plot owned by respondents, William and Tona Moores (collectively, "Moores"). That sparked this action, which has been in litigation for the past ten years.

The case went to a trifucated trial on causes of action and counts for inverse condemnation, trespass, and unjust enrichment relating to the well; breach of a settlement agreement in prior litigation; and claims of improper levy and use of special assessment funds. The trial court entered judgment awarding Moores damages on the inverse condemnation tort and contract claims. (22 CT 4687-4697.) With pre-judgment interest, attorney fees, and costs, the court held the District liable for more than $2 million. (*Ibid*.) The judgment also included judicial declarations of the District's rights and duties with respect to portions of the special assessment; a permanent injunction against further collection of the assessments; and an order to refund portions that the court found that the District had over collected since 2008. (*Ibid*.)

Each of those rulings was rife with error.

The inverse condemnation finding was based on a finding of uncompensated taking of Moores's property for the well, even though Moores had granted the District easements that encompassed the right to drill the well. The court also found inverse condemnation with respect to the water the District pumped from the well and used to provide water service to property owners in the District, including Moores, who owned a substantial amount of the property. That ruling directly contravened the

District's right under California water law to appropriate groundwater, even though the water was in a basin under, and appurtenant to, Moores's land.

The award of damages for the taking, over $564,000 including pre-judgment interest, was erroneous because the court did not award the value of what the court found, erroneously, that the District had taken. Instead, the court awarded compensation that included damages for water the district pumped from the well, water that Moores did not own or have possessory interest; and damages for the value of the well, awarding Moores damages for what the District gained, not what he may have lost by the "taking," and violating Code of Civil Procedure section 1263.330, subdivision (a), which prohibits including in the award of compensation for a taking increase in the value of the property taken attributable to the project for which the property was taken.

The findings of trespass and unjust enrichment are erroneous because, as the trial found, they address the same harm as and are "duplicative" of the inverse condemnation claim and, for that reason, fall with the erroneous finding and award of damages for inverse condemnation. Furthermore, under Government Code section 815(a), a public entity cannot be liable for a tort except as provided by statute applicable to public entities. Both trespass and unjust enrichment arising from tortious conduct are common law, not statutory, claims. And, there is no trespass cause of action for appropriating water the appropriator has the right to take, and a majority of cases hold that there is no cause of action for unjust enrichment.

The order to refund over-collected assessments is erroneous because the court improperly measured the period for which it could order a refund, requiring the District to refund two years of assessments beyond the period allowed by Code of Civil Procedure section 388, subdivision (a).

Finally, the court erred in awarding damages for breach of contract because there were no damages. The District fully performed its contractual obligation to provide Moores all that he was entitled to receive under the parties' agreement, and the Moores received the benefit of their bargain.

The judgment should be reversed and remanded for a new trial.

SUMMARY OF FACTS

Since 1967, Moores has developed real estate parcels in the Mendocino coastal community of Irish Beach. (2 RT 261:9-14, 383:25-384:4, 597:13-19.) When this action began, Moores still owned many parcels which were largely undeveloped. (7 CT 1281, ¶¶ 2, 3; see also Phase 1 Exh. 2, 7 CT 1293.) One parcel is known as "Unit 9." (*Id*., 9 CT 1925.) It is at an elevation of about 800 feet. (2 RT 310:2-5.)

The District was formed by Moores and his father in 1967. (2 RT 264:1-15.) It is a public agency that operates wells and facilities to provide water to properties within its boundaries, which now encompass approximately 1,400 acres. (2 RT 409:25-410:7; 7 CT 1281, ¶ 1, 1282, ¶ 6; 1283, ¶ 12.) Moores's properties are within the District. (7 CT 1281, ¶ 4.)[1]

In about 1974, Moores drilled a well, the "Unit 9 well", to the east of and about 200 feet above Unit 9 to serve the property so that he could develop it. (2 RT 308:16-25, 309:25-310:5.) It was the only well on Moores's property until the events giving rise to portions of this action. (9 CT 1928.)

Water Development Agreement

In 1988, the parties entered into a Water Development Agreement ("WDA") under which Moores and his wife, Tona, conveyed and assigned

[1] An aerial photograph of the District excerpted from Exhibit 99, a drone video, is attached (See California Rules of Court, rule 8.204(d).)

to the District all right, title and interest in the Unit 9 well. (9 CT 1925; Phase I Exh. 6, 7 CT 1308-1372.) The conveyance of the Unit 9 well included a surrounding 30-foot easement and associated easements for water distribution lines and utilities to operate and service the well. (9 CT 1924-1925; see also 7 CT 1297-1298, 1302-1304, 1359-1360, 1365-1367 [deeds].) Moores also conveyed water distribution facilities for Unit 9 to the District, including a water-storage tank, water pumping station, water transmission facilities, and related easements. (*Ibid*.; see also 7 CT 1334-1335, ¶ 8(a); Phase I Exh. 9, 7 CT 1379 [deed].)

As part of the WDA, Moores further conveyed to the District a separate easement, the "Soderberg easement," on a 60 by 60-foot plot on Moores property about 150-200 yards from the Unit 9 well. (7 CT at pp. 1281-1282, ¶¶ 5, 7; 9 CT 1927.) A water storage tank sat on the easement. (*Ibid*.) The deed stated the grant as, "SODERBERG TANK SITE, WELL, AND PIPELINE EASEMENT," and it included a "water system appurtenance Easement. . . ." (7 CT 1298, 1360.) Moores also granted an easement "for road access and water system facilities and appurtenances." (7 CT 1304, 1367.)

The Unit 9 well and the Soderberg easement are adjacent to a private section of Alta Mesa Road that Moores built on his property. (7 CT 1282-1283, ¶¶ 7.) Moores granted the District an easement to use the road for access to the well and the Soderberg easement. (*Ibid*.; see also *id*. at pp. 1283, ¶¶ 9, 11; Phase 1 Exhs. 1, 2 and 3, 7 CT 1291, 1293, 1295 [aerial photograph and maps of property].)

Mallo Pass

Under the WDA, Moores also assigned to the District his right, title and interest in a permit he had obtained from the State Water Resources Control Board (the "Board") for diversion of water from Mallo Pass Creek, which is not on Moores's land. (7 CT 1308, ¶ 1;

Phase 1 Exh. 18, 8 CT 1550-1557.) The District agreed to integrate water from Mallo Pass Creek into its water supply system. (*Ibid*.)

In July 2000, Moores sued the District on claims regarding "service water rights" and construction of the Mallo Pass Creek diversion, which had not yet begun. (7 CT 1385.) The WDA gave the District "sole discretion" to determine the timing for constructing the Mallo Pass facilities. (7 CT 1337, ¶ 10.) In 2002, the parties reached a settlement agreement. (7 CT 1384-1389.) The District agreed to hook up and provide water service to 54 parcels that Moores owned, and to provide Moores up to 21 more residential connections to additional "acreage parcels" that he owned. (7 CT 1386-1387, ¶¶ 4-6.)

The District also agreed to obtain additional water by developing and connecting a diversion from Mallo Pass. (7 CT 1387, ¶ 7.) The project, however, did not come to fruition. In 2009 under the circumstances that then existed, the District abandoned the Mallo Pass project. (Exhs. 57, 1 Exh. CT 396.)

Moores had agreed in the WDA to fund construction of the Mallo Pass project and had deposited the money with the District; in the settlement agreement the District refunded the deposit with interest, around $357,000. (11 RT 1744:1-1775:2; CT 1386, ¶ 1.)

T5 well

In August 2008, the District drilled a new well, the "T5" well, on the Soderberg easement. (7 CT 1283-1284, ¶ 13.) The District accesses the well over its easement on the private portion of Alta Mesa Road adjacent to the easement. (7 CT ¶ 15.) The District uses the well for public purposes as part of its water system to provide water to

properties within its service area, including properties that Moores owns. (7 CT ¶¶ 17, 18, 19.)[2]

The present action is based in large part on the drilling of and drawing water from well T5 and the failure to develop the Mallo Pass project. Additional facts will be presented subsequently with the arguments to which they are relevant.

PROCEDURAL HISTORY

Moores brought this action for damages, injunctive and declaratory relief in September 2009. (1 CT 3.) The third amended complaint alleged causes of action for inverse condemnation, trespass, and unjust enrichment relating to the T5 well; breach of the 2002 settlement agreement; and claims of improper levy and use of special assessment funds, a portion of which had been assessed for the Mallo Pass project. (5 CT 916-948; see also 4 CT 771-5 CT 914 [exhibits in support of third amended complaint].)

Moores filed a supplemental complaint that mainly expanded the claims of improper levy and use of special assessment funds. (6 CT 1211-1253, esp. p. 1212-1216, ¶¶ 1-24.) He filed a second supplemental complaint again incorporating the third amended complaint and portions of the initial supplemental complaint, further expanding the claims regarding levy and use of the special assessment funds. (15 CT 3113-3123.)

The court trifurcated the trial. (6 CT 1255-1256.) Phase 1 was to determine liability for inverse condemnation. (*Ibid*.) If the court found the District liable, Phase 2 would be on damages for wrongful taking, and Phase 3 would be on the remaining causes of action for improper collection and use of special assessment funds, trespass and unjust enrichment. (*Ibid*.)

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[2] A photograph of the T5 well and 4 by 4 foot base is attached. The photograph was included in Exhibit 90.

The Phase 1 trial to determine the inverse condemnation liability claim was not a trial per se. The claim and the defenses were presented on stipulated facts and exhibits. (7 CT 1280-1404; 8 CT 1497-9 CT 1819; 9 CT 1921-1922.) Counsel filed extensive briefs on the legal issues and the only courtroom proceedings were for oral argument. (7 CT 1410-8 CT 1496 [briefs]; 1 RT 12-118 [oral argument].)

The court found the District liable for inverse condemnation. (9 CT 1923-1924.) The court held that the terms of the Moores's conveyances to the District under the WDA granted the District an easement only to the Unit 9 well (9 CT 1931-1933, 1935-1936). The court adjudged the District liable for taking, without just compensation, the T5 well, water pumped from the well, and use of the private portion of Alta Mesa Road and other improvements to operate and service well T5. (9 CT 1939-1940.)[3]

Damages and valuation of the takings were reserved for Phase 2 of the trial. (*Id*. at p. 1940.)

STANDARD OF REVIEW

This Court has de novo review of issues in the Phase 1 proceeding as the case was presented on stipulated facts and exhibits and there was no testimony or conflicting extrinsic evidence. (*Nguyen v.*

[3] The court initially held that the District's pumping water through the T5 well from beneath Moores's property was illegal because the District had not obtained a permit from the Board pursuant to Water Code sections 1200, et seq. (9 CT 1937-1938.) Following objections, the court issued a supplemental statement of decision that eliminated that holding.

The supplemental statement of decision was not in the Clerk's Transcript, although both parties designated it. It has now been filed as the Augmented Clerk's Transcript pursuant to a joint motion.

Calhoun (2003) 105 Cal.App.4th 428, 437; *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 719.)

Liability for inverse condemnation turned on whether the WDA, the implementing documents, and the 2002 settlement agreement gave the District the right to drill and draw water from the T5 well. The court based its interpretation of the documents on "the 'four corners'" and "the express terms of the grant deeds and other written instruments by which Moores' conveyances were made. . . ." (9 CT 1926.) When the interpretation of deeds and contracts does not turn on extrinsic evidence, proper construction of the instruments is a question of law subject to independent appellate review. (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238; *Parsons v. Bristol Development Company* (1965) 62 Cal.2d 861, 862; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 382-383.)

And, when there is no dispute regarding the use to which an easement is put, whether that use complies with the terms of governing instruments is a question of law that the appellate court reviews independently. (*Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 361.)

I. THE RIGHTS TO GROUNDWATER

A brief primer on groundwater rights will aid in understanding the inverse condemnation, trespass, and unjust enrichment claims in the present case. There are two types of groundwater rights under California law: (1) overlying rights and (2) appropriative rights. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240 ["*Barstow*"].) An overlying right is a landowner's right to take water from an appurtenant basin the land overlies for use on that land. (*Ibid.*) The right is superior to other water rights to the basin, but it is not unlimited; it is "restricted to a reasonable beneficial use." (*Id.* at pp. 1240-1241.)

Importantly, a holder of overlying rights does not "own" the groundwater itself. The State owns all the water in California. (Wat. Code §§ 100, 102.) Water rights, including overlying rights, are usufructuary only. They confer rights to a property holder to use groundwater below, but "confer no right of private ownership" in the water. (*Barstow*, *supra*, 23 Cal.4th at p. 1237, fn.7; (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1271.) An overlying property holder owns only the right to use the water for reasonable beneficial purposes. (*Turlock Irrigation Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1051.) The trial court recognized this rule: "The Moores do not own the water underneath their property; they simply have the same rights of any overlying user: to the reasonable and beneficial use of the water." (9 CT 1936.)

The second type of groundwater rights, appropriative rights, are created when groundwater is pumped from a basin for use on land outside the basin. (*Barstow*, *supra*, 23 Cal.4th at p. 1241.) The appropriator does not have to be an overlying landowner. An appropriative user is entitled to take surplus water—i.e., "water not needed for the reasonable beneficial use of those having prior rights. . . ." (*Ibid.*) "Any water not needed for the reasonable beneficial uses of those having prior rights" is surplus or excess water that the appropriator has the right to take. (*Id.* at p. 1244.) The appropriator may take the surplus water "'without giving compensation.'" (*People v. Shirokow* (1980) 26 Cal.3d 301, 320, quoting *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.) A public agency has the same appropriative rights as any other user. (*Ibid*.)

There is no particular procedure to establish an appropriative right to groundwater. The appropriator need only drill a well into the groundwater basin, extract the water, and put it to a beneficial use. (See *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 410.) Neither the place of taking nor the place or character of use are

necessary factors in acquiring appropriative rights. (*City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 29.)

Unless the appropriation invades the overlying holder's rights to reasonable beneficial use, the overlying holder cannot complain. "'It is the policy of the state to foster the beneficial use of water and discourage waste, and when there is a surplus, whether of surface or ground water, the holder of prior rights may not enjoin its appropriation. . . . .'" (*Barstow*, *supra*, 23 Cal.4th at p. 1241, quoting *Sidebotham*, *supra*, 224 Cal.App.2d at p. 725; see also *Barstow*, *supra,* 23 Cal.4th at p. 1245, quoting *City of Pasadena v. City of Alhambra*, *supra*, 33 Cal.2d at p. 926 [same].)

To the extent that the holder of overlying rights contends that his or her rights are injured by the appropriation, it is the overlying rights holder's burden to prove that there is no surplus and the appropriator is taking more water than the appropriator is entitled to take. (*Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1366.)

II. THERE WAS NO INVERSE CONDEMNATION (PHASE 1).

To prevail on an inverse condemnation claim, a plaintiff must establish that: (1) it has a protectable property interest; (2) there has been a taking of the property by a government agency; and (3) the taking was for a public purpose. (*Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988, 1030.) Under the stipulated facts and applicable law, the District took nothing from Moores. The Soderberg easement that he granted the District gave the District the right to drill T5 well and make beneficial use of water pumped from it for the public purpose of serving the District's property owners.

A. The District did not take Moores's property in constructing the T5 well.

1. The Moores expressly granted the District a well easement and water system appurtenances easement.

With deeds, as with contracts, the primary purpose of interpretation is to ascertain and carry out the intention of the parties. (*City of Manhattan Beach v. Superior Court*, *supra*, 13 Cal.4th 232, 238.) The language granting an easement determines the scope of the easement. (Civ. Code § 806; *Haley v. Los Angeles County Flood Control District* (1959) 172 Cal.App.2d 285, 290.) Doubtful clauses are construed "most strongly against the grantor and as favorably to the grantee as the language will justify. . ." (*City of Manhattan Beach*, *supra*, 13 Cal.4th at pp. 242-243.)

The grant stated in the deed to the Soderberg easement is, "SODERBERG TANK SITE, *WELL*, AND PIPELINE EASEMENT." (7 CT 1298 [emphasis added].) The grant includes a "water system appurtenances Easement. . . ." (*Ibid*.) The deed does not specify or limit the type of water system appurtenances for which the easement is granted.

The word "appurtenance" means "something that belongs or is attached to something else and especially something that is part of something else that is more important." (Black's Law Dictionary (10th ed. 2014), "appurtenance.") For example, in *Trask v. Moore* (1944) 24 Cal.2d 365, the court held that pipes attached to a pumping works are an appurtenance to the pumping works because they are "indispensable in the supply of water to the neighboring homes." (*Id*., 24 Cal.3d at p. 368.)

In the Soderberg easement deed, the word "appurtenance" is preceded by the words "water system." (7 CT 1360; Exh. 10, 1 Exh. CT 101.) Accordingly, the only limitation of appurtenances that may be used on the Soderberg easement is that they must appertain to a "water system." (*See Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43

Cal.3d 1379, 1391 n.14 ["the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used"].) The T5 well, like the pipes in *Trask*, is appurtenant to the water system here. As the trial court acknowledged (and common sense dictates), "a water storage tank and easement for the tank site have no function or purpose without water to store." (9 CT 1932.)

2. The court disregarded the clear, plain and unambiguous provisions of the Soderberg easement conveyance.

The trial court noted that the Unit 9 well was part of the grant under the WDA, and, while that agreement referred to developing "other water sources," the only other source the agreement mentioned was Mallo Pass. (9 CT 1932.) From that, the court inferred that the easement rights Moores granted the District did not include the right to drill a new well on the Soderberg easement as "the parties knew the difference between granting rights to water and granting rights to an existing well." (*Id.*) The inference is faulty.

The Soderberg deed and the Unit 9 well deed conveyed different interests in two different properties. The deed to the Unit 9 well conveyed all rights in the well and a 30-foot surrounding service easement. (7 CT 1282, ¶ 5.a, 1379, 1382.) The Soderberg deed conveyed easement rights to a separate parcel about 450 to 600 feet away. (7 CT 1284, ¶ 14.) The grant of the "WELL" and "water system appurtenance" easement on the Soderberg plot were to provide the District with water to serve the needs of the property owners in the District. The Soderberg deed did not limit the scope of the well or appurtenance easement. It did not provide that the easement was *only* to the then-existing water tank and water system appurtenances. (*See City of Manhattan Beach*, *supra*, 13 Cal.4th at 243-

244 [language relating to an intended purpose indicates a limited conveyance when there is some qualification such as the word "only."].)

The trial court's reading of the deeds here violates the rule that language in a deed is to be liberally construed as favorably to the grantee as the language will justify. (*City of Manhattan Beach*, *supra*, 13 Cal.4th at 242-243.) The court's narrow reading of the Soderberg easement deed treats the words of grant as if they did not exist.

3. The parties necessarily contemplated that the District would use another water source than the Unit 9 well.

The trial court largely treated the express terms of the Soderberg easement as if they did not exist. Throughout the Statement of Decision, the Court focuses on the words "existing well," referring to the Unit 9 well, to exclude the possibility that another well could be drilled on the Soderberg easement. (9 CT 1925, 1232; see also 1926 ["existing 276.5-foot water well ('Unit 9 Well']".) The words "existing well" do not appear in the Soderburg deed. (7 CT 1297-1299.) The words appear only in portions of the WDA and other documents referring to the Unit 9 well. (7 CT 1309 ¶ 2(a); 7 CT 1351, 1353.)

It is natural that the parties would reference the "existing" Unit 9 well in the WDA, as it was the only well in the District at the time they made the agreement. (7 CT 1282, ¶ 7; 9 CT 1928.) The use of "existing" also implies that other wells not yet in existence were within the parties' contemplation. This is particularly true given that the District agreed to "integrate the No. 9 well into the District's existing water supply system," (7 CT 1309, ¶2(b)) and took on the obligation to provide water so that Moores could develop many parcels. (7 CT 1311, ¶ 2(d), 1333, ¶ 7(a).)

The trial court found that the parties contemplated in the WDA that the Unit 9 well would fail. (9 CT 1933.) They provided for the

contingency of failure within the first 10 years. (*Ibid*.; 7 CT 1333.) But the trial court found it significant that the parties did not provide what would happen if the well stopped functioning after that. (9 CT 1932-1933.) In the court's view, the WDA's "silence" on the subject "leaves this Court with no other conclusion to reach but that Moores did not grant the District any other right to develop a well." (9 CT 1933.)

But if that were so, then what would happen if the well failed after 10 years? As the trial court found, the District took on "the obligation to provide water to Moores. [sic] and to persons to whom Moores had previously granted water rights in the Moores Property. [sic] for Moores' continued use." (9 CT 1928.) It would hardly be reasonable to infer that, since the WDA did not address what the District would do if the Unit 9 well failed after 10 years, the parties intended that the District would not continue to perform that obligation. That would render the provisions obligating the District to provide water to the properties ineffective after 10 years. It would have the absurd result of leaving the property owners on the 500-foot high ridge where Unit 9 was located literally high and dry.

The only logical and reasonable inference is that the parties intended that the District would have or find another source of water. The Soderberg "WELL" and "water system appurtenance" easement was an obvious source of water the District would need to perform its obligation should the Unit 9 well fail.

Grant deeds are interpreted like contracts. (Civ. Code § 1066.) The trial court's interpretation, which would render the WDA provisions obligating the District to provide water ineffective, violates the rule of Civil Code section 3541: "An interpretation which gives effect is preferred to one which makes void." Courts also avoid an interpretation that creates absurd or unreasonable results. (*Sequeira v. Lincoln Nat. Life Ins. Co*. (2015) 239 Cal.App.4th 1438, 1445.)

In focusing almost exclusively on the provisions of the WDA and deeds regarding the Unit 9 well, the trial court disregarded the Soderberg deed, which, contrary to trial court's view, is not silent on the issue. It grants a "SODERBERG TANK SITE, *WELL*, AND PIPELINE EASEMENT," which includes a "water system appurtenances Easement." (7 CT 1298 [Emphasis added.]) By definition, that broad grant includes anything necessary for the functioning of the water system and the performance of the District's obligation to provide water to the property owners it serves. (*Trask v. Moore*, *supra*, 24 Cal.2d at p. 368.)

4. The trial court relied on inapposite authority.

The trial court based its decision on *Woods Irrigation Company v. Klein* (1951) 105 Cal.App.2d 266 ["*Klein*"].) The case is readily distinguishable. In *Klein*, the court interpreted contracts (not deeds) giving an irrigation company the general right to "construct, maintain, police, patrol, operate, extend, widen and repair" irrigation canals and ditches on defendant's land. (*Id*. at p. 268.) There was no description of a construction site or sites; the irrigation company was solely responsible for the initial layout and construction of the canals. (*Id.* at p. 269.) Because the grant was general, once the irrigation company finished construction of the canals, its easement rights were fixed. The company was limited to using the canals where the company located them, and the company could not relocate or extend part of the canal system. The company "at the inception of its contract elected to exercise the rights granted in a particular manner and hence, having exercised its rights, is limited thereby. . . ." (*Id*. at p. 269.) "Any other rule would make the burden imposed by the easement a matter of perpetual speculation." (*Id.* at p. 270.)

The present case is not at all like *Klein*. The District was not granted a general easement to the Soderberg plot to locate a tank and water system,

and the District did not limit its Soderberg easement rights by installing the tank and water system. They were already in place when Moores granted the easement.

Nor is this a case where allowing the District to install the T5 well "would make the burden imposed by the easement a matter of perpetual speculation." (*Id.* at p. 270.) The T5 well is located on the 60 by 60-foot plot that the easement conveyance specifically set aside for "WELL . . . EASEMENT" and "water system appurtenances Easement."

Another fact distinguishes this case from *Klein*. In *Haley v. Los Angeles County Flood Control District* (1959) 172 Cal.App.2d 285, the grant specified an easement with a metes and bounds description of the burdened property and expressly included the right to "construct, reconstruct, inspect, maintain, and repair" a flood control channel to confine a river in a single channel. (*Id*. at pp. 287-288.) The grant also included rights to excavate, widen and deepen or otherwise rectify the channel and other protection work. (*Ibid.*) The court held that the channel's location was not fixed where the district originally located it because the grant did "not stop with a right to an original construction." (*Id.* at p. 291.) Moreover, it is

> "'the well-recognized rule that an express or implied grant of an easement carries with it certain secondary easements essential to its enjoyment, such as the right to make repairs, renewals, and *replacements*. . . . Such incidental easements may be exercised so long as the owner thereof uses reasonable care and does not increase the burden on or go beyond the boundaries of the servient tenement, or make any material changes therein."

(*Id*., 172 Cal.App.2d at p. 290, quoting *Winslow v. City of Vallejo* (1906) 148 Cal. 723, 726; also citing *Woods Irrigation Co. v. Klein*, *supra*, 105 Cal.App.2d at p. 270.)

As in *Haley*, the Soderburg deed contains a metes and bounds description identifying the property subject to the easement. The District's construction of well T5 did not stray past the easement boundaries into Moores's servient tenement. The parties stipulated and the trial court found that the District constructed the T5 well entirely within the limits of the easement. (7 CT 1284:1-2, 9 CT 1928.)

The District's right to construct and use the T5 well is consistent with case law, the language of the instruments, and the purpose of the grant.

5. The Soderberg easement included incidental rights that embraced drilling and using the T5 well.

A grant passes to an easement holder not only those interests expressed in the grant, but also "those necessarily incident thereto." (*City of Pasadena v. California-Michigan Land & Water Co.* (1941) 17 Cal.2d 576, 579.) This includes incidental rights to make repairs, renewals and replacements so long as they do not increase the burden on or go beyond the boundaries of the servient tenement. (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 821-22.)

In *Ward,* the City changed the location of a water pipeline on the plaintiff's land. The change in location did not destroy the easement because the pipeline was not laid over land to which the city had no right, but was instead—like the T5 well here—laid within the limits of the original easement. (*Id.* at p. 822.)

In *Barton v. Riverside Water Co*. (1909) 155 Cal. 509, two water companies owned land above a basin. A prolonged drought reduced the water level in the basin and the companies drilled new wells into it. The

court held that the new wells, which merely changed the place of extraction without injury to others, was permitted. (*Id*. at pp. 517-518.)

In *Barnes v. Hussa*, *supra*, 136 Cal.App.4th at p. 1358, plaintiffs drew water from a creek and sent it to their property through a pipeline that crossed defendant's property with defendant's permission. The court held that plaintiffs' appropriative rights to the water included the right to extend the pipeline to a second, non-contiguous parcel despite defendant's purported withdrawal of permission. "'[T]he person entitled to the use of water by virtue of an appropriation . . . may change the point of diversion, the of use or purpose of use, if others are not injured by such change.'" (*Id*. at pp. 1364-1365, quoting Wat. Code § 1706.)

The fact that there was no well on the Soderberg easement at the time of the grant is of no moment. The permissible uses of an easement are not limited to those in existence at the time the easement is created; they are measured by uses the parties might reasonably have expected from future uses of the dominant tenement. (*Camp Meeker Water System Inc. v. Public Utilities Commission* (1990) 51 Cal.3d 845, 867.) The holder of an easement may change its use to accommodate future needs, so long as the new use is consistent with the primary object of the grant. (*E.g., id*. at pp. 855, 859 [easement conveying water system, which included "all water and water rights appurtenant to said system and used or useful in its operation," not limited to wells in existence at time of conveyance]; *Griffith v. City of Los Angeles* (1959) 175 Cal.App.2d 331, 337-338 [conveyance of land for purposes of public park included use of land as refuse dump to create fill for park construction purposes]; *Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 416-417 [approving installation of fiber optic cables on easement for public highway].)

Here, the primary object of the Soderberg easement grant was to facilitate the District's ability to provide water to Moores's parcels. (7 CT

1311 ¶ (d), 1333, ¶ 7(a).) Drilling the T5 well is entirely consistent with that purpose.

There is no evidence in the record that the T5 well unreasonably burdens Moores property or Moores's exercise of his overlying water rights. It is undisputed that Moores, himself, does not take water from the aquifer beneath his property and put it to beneficial use; his only use of the water is by way of the District's water system. (7 CT 1281:14-17, 1284 ¶ 18.) The WDA expressly contemplated that the District would use a well to obtain water from the property and the District has done so since 1989. (7 CT 1309, ¶ 2(b), 1283, ¶ 12.)

B. The District did not take Moores's property in using the T5 well.

The trial court's holding that the District is liable for inverse condemnation for "water taken or pumped" from the T5 well (9 CT 1939) is contrary to fundamental principles of California water law. As discussed above, Moores had no property interest in the water, only the right to use the groundwater for reasonable beneficial purposes. (*Barstow*, *supra*, 23 Cal.4th at pp. 1237, fn.7, 1241; *Allegretti & Co. v. County of Imperial*, *supra*, 138 Cal.App.4th at p. 1271.) Absent proof that the District was drawing groundwater that Moores needed to serve reasonable beneficial purposes on his land and there was no surplus—which Moores had the burden to prove—the District's right to appropriate the water it pumped through well T5 remained intact. (*Barstow*, *supra,* 23 Cal.App.4th at pp. 1241, 1244; *Barnes v. Hussa*, *supra*, 136 Cal.App.4th at p. 1366.)

In the trial court's view, however, "Moores exercised their overlying rights to the water underneath [their property] when they developed the Unit 9 Well before IBWD acquired it." (9 CT 1936.) Merely drilling the well was not an exercise of overlying rights. Those rights, like all water rights, are exercised only by using the water for reasonable beneficial

purposes. The overlying right is "restricted to a reasonable beneficial use." (*Barstow*, *supra*, 23 Cal.4th at pp. 1240-1241.) There no stipulation that Moores ever operated the well to draw water and put it to any beneficial use. Without doing that, he did not exercise overlying rights.

There is, likewise, nothing in the stipulated facts suggesting that the water the District drew through the T5 well prevented Moores from drawing as much water as he might need to meet a reasonable beneficial need.

In exercising its appropriative right to groundwater, the District did not take Moores's property.

III. THE COURT IMPROPERLY VALUED INVERSE CONDEMNATION DAMAGES (PHASE 2).

A. Summary of facts.

The facts regarding the Phase 2 trial on just compensation for what the trial court found to be inverse condemnation can be stated briefly. The trial was generally a battle of experts. One of Moores's experts was Deborah Stephenson, whose work includes water valuation. (4 RT 612:9-21; Exh. 88, 2 Evid. CT 720-75.)[4] She presented a written report and testimony setting out her opinion of the damages for which Moores should receive just compensation. The judge rested her award entirely on Stephenson's opinion that Moores's damages were $401,000, and awarded that as just compensation. (13 CT 2725-2732.)

[4] The clerk bound the exhibits that were designated as part of the record as separately numbered volumes of an Exhibit Clerk's Transcript. To distinguish them from the clerk's transcript of the pleadings and other filings, the exhibit clerk's transcript will be cited as "Exh. CT."

1. Plaintiff in an inverse condemnation action is entitled to just compensation, but no more.

"An inverse condemnation action . . . is an eminent domain action initiated by one whose property was taken or damaged for public use." (*Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 601.) Thus, the principles of eminent domain law, including the special evidentiary rules applicable to the determination of just compensation, apply to inverse condemnation proceedings. (*Ibid.*; *Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1198; *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877.)

"The principle behind the concept of just compensation is to put the owner in as good a position pecuniarily as he would have occupied if his property had not been taken." (*City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 678.) A compensation award must therefore be just to the public as well as to the plaintiff. (*Id.*)

"The basic measure of damages in inverse condemnation actions, as in all eminent domain proceedings, is 'market value.'" (*Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 707.) Such damages can only be established through the opinion of qualified experts and/or the property owners. (Evid. Code § 813 subd. (a); *Aetna Life & Casualty Co.*, 170 Cal.App.3d at p. 877.) "[T]his does not mean that any determination of value, no matter how excessive and absurd, will constitute substantial evidence simply because some expert is willing to state it as his opinion." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134 ["*Zuckerman*"].)

"'Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions.'" (*People v. Bassett* (1968) 69 Cal.2d 122, 141, quoting *People v. Martin* (1948) 87 Cal.App.2d 581, 584

[italics added by court].) "When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence." (*Zuckerman*, 189 Cal.App.3d. at 1135-1136.)

Stephenson's opinion, which was the sole basis of the trial court's damage award, rests on a legally incorrect premise: that Moores, as owner of the overlying property, was entitled compensation for water the District pumped from the T5 well. Furthermore, Stephenson's opinion violates fundamental principles governing just compensation in inverse condemnation actions: that the fair market value of taken property shall not include any increase in value attributable to the project for which the property is taken; and that just compensation must be based on what the property owner has lost, rather than on the benefit the condemnor has received.

2. Stephenson based her opinion on the Court's erroneous determination the District took water from the T5 Well.

What Stephenson valued was "the developed groundwater that is pumped, or which can be pumped, from the T5 well." (4 RT 617:15; Exh. 88, CT Exh. Binder 2 Vol. 2, Exh. 88, p. 723 [Stephenson's valuation report].) What that meant, she explained, was that "inherent in the subject property are the physical water, the right to develop the water or access the water through the development of the well, and the right to use the water." (4 RT 627:18-21, 642:9-15.)

In making that valuation, Stephenson "assume[d]" that "the right to use the water is part of the developed supply," but she had "no opinion what type of water right that is." (4 RT 648:23-25.) She accepted without question the court's determination that what the District took from Moores

was the water from the T-5 well. (4 RT 648:25-649:3.) She had no basis to know or assume whether the T5 well impaired Moores's ability to make full beneficial use of water in the aquifer. She made no determination how much water, if any, Moores beneficially used. (4 RT 641:9-13.) In her opinion, that was irrelevant. (4 RT 649:14-19.) Stephenson was as wrong as wrong can be.

The water, if any, that Moores used was of essential relevance. As discussed previously, the District had the absolute right to appropriate water from the aquifer unless it diminished Moores's rights as an overlying user to make beneficial use of the water. (*Barstow*, *supra*, 23 Cal.4th at p. 1244.) Without a determination that Moores was putting any of the groundwater to a reasonable beneficial use, and the amount of water used, there was no basis to determine that the District took anything in which Moores had an interest. And without that determination, there was no taking to value.

3. The trial court impermissibly included the value of the T5 Well in the damages award.

In determining just compensation, "the condemned property is not to be valued as part of the proposed improvement." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 866 ["*Decker*"]; *see also Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 491 [*"Woolstenhulme*"].) This long-standing principle is codified in Code of Civil Procedure section 1263.330: "The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to . . . (a) The project for which the property is taken." (Code Civ. Proc.

§ 1263.330(a).)[5] The comments of the Law Revision Commission, which proposed the section, explain that it was "intended to codify the proposition that any increase or decrease in value resulting from the use which the condemnor is to make of the property must be eliminated in determining compensable market value." (Cal. Law Revision Com. com., West's Ann. Code Civ. Proc. foll. § 1263.330.)

As the California Supreme Court declared in 1888, "it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of land." (*San Diego Land & Town Co. v. Neale* (1888) 78 Cal. 63, 74-75 ["*Neale*"]; *accord Woolstenhulme*, 4 Cal.3d at 491 [quoting *Neale*]); *Decker*, 18 Cal.3d at p. 866 [quoting *Neale*].) But that is exactly what Stephenson did in her valuation opinion, and what the trial court, by relying on her opinion, did in its just compensation award.

In valuing "the developed groundwater that is pumped, or which can be pumped, from the T5 well," (4 RT 617:15; Exh. 88, CT Exh. Binder 2 Vol. 2, Exh. 88, p. 723), Stephenson included "vertical access to the water"—the T5 Well—because it is "part of the developed groundwater." (4 RT 627-628.) "For the subject asset to be usable water for the District, it has to be developed, meaning a well put into the ground." (4 RT 630-631.)

But the T5 Well was the very project for which Moores's property was purportedly taken. The well did not exist on the property until the District installed it. Thus, the District could not have effected a taking of

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[5] See also Gov. Code §7267.2(a) [providing that offers to purchase property prior to initiating eminent domain proceedings shall be based on the fair market value of the property, provided that "[a] decrease or increase in the fair market value . . . caused by the public improvement for which the property is acquired . . . shall be disregarded. . . ."]

the T5 well for the simple reason that the well did not exist on the property at the time of the purported taking.[6]

Stephenson did not value the only thing that Moores may have lost—the small bit of land that the well occupied—a four by four-foot square. (13 CT 2666:10-12.) Rather, she gave Moores the value of the project improvements the District constructed, the T5 well.

Stephenson's opinion does not constitute substantial evidence of just compensation for any taking. Her opinion is based on improper matter; it violates the long-standing, fundamental rule of law that prohibits including any increase in the value of condemned property that is attributable to the project for which the property is taken. As her opinion falls, so falls the court's award of $401,000 as compensation for the taking.

4. The trial court impermissibly valued what the District gained, rather than what Moores lost.

Stephenson's opinion also violated another, related principle of just compensation in inverse condemnation actions. "The guiding principle of just compensation is reimbursement to the owner for the property interest taken. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." (*Redevelopment Agency v. Tobriner* (1989) 215 Cal.App.3d 1087, 1098 (internal quotation omitted) [quoting *U.S. v. Virginia Electric Co.* (1961) 365 U.S. 624, 633].) "In other words, the condemnee is entitled to be reimbursed for the actual value of what he or she has lost—no more and no less." (*Ibid.*)

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[6] By stipulation, when the District drilled well T5, the only thing on the 60 by 60-foot Soderberg easement plot was a water tank. (7 CT 1281, ¶ 5.c.) "Except as noted herein, the Moores Property is undeveloped." (*Id.*, ¶ 3.)

For this reason, "it is a firmly established principle that the compensation payable is to be based upon the loss to the owner rather than upon the benefit received by the taker." (*Zuckerman*, *supra*, 189 Cal.App.3d at p. 1127.) "Just as the property may not be valued based on its special value to the owner, the property may not be valued on the basis of its special value to the government." (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1061; see also *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 807.) The beneficial purpose the condemnor derives from use of the property is wholly irrelevant in determining the measure of damages for inverse condemnation: the fair market value of the property taken. (*Woolstenhulme*, 4 Cal.3d at 491, quoting *People v. La Macchia* (1953) 41 Cal.2d 738, 754.)

In opining on the fair market value of the purported taking, Stephenson employed what she called a "replacement cost methodology." (4 RT 618:9-12; Exh. 88, CT Exh. Binder 2 Vol. 2, p. 728.) Her use of that method to determine damages was multi-flawed.

First, "[w]hile cost of replacement or restoration of improvements ('cost of cure') may be relevant evidence on the issue of damages for inverse condemnation, it is not a measure of damages to be separately assessed without reference to the loss in fair market value of the property taken or damaged." (*Olson v. County of Shasta* (1970) 5 Cal.App.3d 336, 343.) But that is exactly what Stephenson did. She assessed only what she considered to be the cost of replacement of the well without reference to the market value of the only thing that was or could have been taken, the land into which the District bored the well.

Second, "[t]he accepted use of the cost-to-cure theory is restricted to repairing or reproducing improvements on the land of the individual whose property has been taken or damaged." (*Id.* at p. 342.) Moores made no claim that the well damaged or destroyed any improvement on the property;

nor could he, as the well was drilled into bare land. His claims rested solely on the fact that the District installed, operated, and maintained the well. Thus, it was not proper for Stephenson to use the replacement cost method, because Moores had no improvements to replace on the property purportedly taken by the District.

Third, assuming for the sake of argument that it was appropriate to use a replacement cost method, since replacement cost may be a factor in valuing what the *condemnee lost* (*Olson*, *supra*, 5 Cal.App.3d at p. 343), proper application of the theory would have been to determine the cost *to Moores* to replace or reproduce the T5 well on the property. That would have been oxymoronic, of course, since Moores could not have had occasion to suffer the loss of, and replace or reproduce, a well in which he never claimed to have an ownership interest.

Fourth, putting aside the oxymoron, Stephenson did not consider any cost to Moores at all. She considered only the replacement cost to the District. Even at that, she made no effort to determine what cost the District would incur to replace the well. Instead, she considered what the District saved—the costs it did not have—by using the well as a source of water instead of another source, Mallo Pass.

She began by "identifying the alternatives [to the well] *available to the District*." (4 RT 621-622 [emphasis added].) She analyzed value "*from the perspective of IBWD's costs to develop a similar water source*." (Exh. 88, CT Exh. Binder 2 Vol. 2, p. 728 [emphasis added].) She concluded that the "most feasible alternative water supply source IBWD would have pursued, in absence of the subject property, was the Mallo Pass Project." (*Ibid*.) She then calculated what she considered to be the cost to the District (after some adjustments) to construct the Mallo Pass project to determine what the District saved by using the T5 well instead as a source of water. (*Id.* at pp. 730-739.) Through some legerdemain, she then

transmogrified the District's saving, $401,000, into the value of Moores's supposed loss.

The District's saving from drilling and using well T5 has nothing to do with the cost, if any, *to Moores* to repair or replace an improvement on the property that was damaged or destroyed. Moores did not construct the well, suffer a loss by having the District take the well, then face a $401,000 cost to replace the well. To the contrary, the District drilled the well, and the well was never Moores's property to be taken. The construction and use of the well did not cause Moores to be confronted with the cost of replacing anything.

Stephenson wrongly valued the beneficial purpose derived by the condemnor's use of the property taken, rather than the actual fair market value of what the property owner lost. Her valuation opinion rests on improper and unwarranted assumptions and reasoning that contravene the well-settled rule that just compensation is to be based on what the property owner has lost, not what the condemning agency has gained.

Her opinion is not substantial evidence of just compensation to Moores. (*Zuckerman*, 189 Cal.App.3d. at pp. 1135-1136.)

5. *Santa Clarita* does not support the damages award.

In awarding $401,000 as compensation to Moores, the trial court relied heavily on *Santa Clarita Water Co. v. Lyons* (1984) 161 Cal.App.3d 450 ("*Santa Clarita*"). The decision is inapposite and does not support the damages award for several reasons.

First, *Santa Clarita* does not support the replacement valuation method the trial court adopted. The case does not approve use of that method to value water taken from an aquifer. The terms "replacement valuation," "cost-to-cure," or similar terms as a means to value loss of that right do not appear in the decision. "It is axiomatic that cases are not

authority for propositions not considered." (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626.)

Further, *Santa Clarita* involves different water rights altogether than the rights at issue here. *Santa Clarita* concerns riparian rights to surface water and subsurface stream water. The present case involves rights to groundwater. Riparian and appropriative rights to stream water are different from overlying and appropriative rights to percolating groundwater. (*North Gualala Water Co. v. State Water Resources Control Bd.*, (2006) 139 Cal.App.4th 1577, 1590-1591.)

Santa Clarita is also factually distinguishable. There, the plaintiff—a private water company, not a public water district—sought to condemn a strip of land riparian to a subterranean portion of a stream from which plaintiff was taking water through a well it drilled. (*Id*., 161 Cal.App.3d at p. 455.) The property owners cross-complained for trespass and conversion of the water plaintiff was taking. (*Id.* at p. 456.) The trial court awarded the property owners substantial damages that included compensation for the "value of future water removal by the plaintiff" from the underground stream. (*Id.*)

On appeal, plaintiff argued that it could not be assessed damages for the value of the water it took because it had an appropriative right that was equal or senior to the property owners' riparian right. (*Id.* at pp. 461-62.) Subsurface stream flows, however, are treated under the same legal rules that govern riparian rights to surface water. (*E.g., City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597 ["If a part [of a stream] sinks, and the remainder flows upon the surface, that which is invisible is as much a part of the stream as the surface flow."]; *Verdugo Canon Water Co. v. Verdugo* (1908) 152 Cal. 655, 665 [treating underflow and surface flows of stream as a single stream]; and see generally *North Gualala Water Co. v. State Water Resources Control Bd.*, *supra*, 139 Cal.App.4th at p. 1577.)

Since 1914, persons seeking an appropriative right to surface water have been required to first obtain a permit from the Board. (Wat. Code § 1200 *et seq.*) But the plaintiff water company in *Santa Clarita* conceded that it had never applied for a permit or license from the Board to take water from the property. (*Santa Clarita*, 161 Cal.App.3d at p. 462.) Thus, the appellate court concluded, plaintiff had never developed a valid right to appropriate water from the river basin underflow. (*Ibid*.)

Not so here. There is no evidence that the T5 well extracts water subject to the Board's permitting authority. As noted previously, groundwater is presumed to be percolating, and it is the overlying holder's burden to prove that it is stream water. (*North Gualala Water Co. v. State Water Resources Control Bd.*, *supra*, 139 Cal.App.4th at 1593.) Under the law governing groundwater rights, unlike the water company in *Santa Clarita*, the District did not need a permit from anyone to acquire appropriative rights to the groundwater under Moores's property. All the District had to do was to draw water from it and put it to reasonable beneficial use. (See *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC*, *supra*, 14 Cal.App.5th at p. 410.)

Finally, and not of least significance, here, the District already had the right to draw the water it required for reasonable, beneficial use from the groundwater under Moores's property. The deed to the Unit 9 well gave the District the right to all the water that could be pumped from the well. (1 RT 136:17-20.) The District also had the right, which Moores granted in accordance with the WDA, to be on the property subject to the Soderberg easement. (7 CT 1297-1300.) Thus, unlike the water company in *Santa Clarita*, when the District drilled the T5 well, it already had legal appropriative rights to the water the well bored into.

IV. THE COURT'S TRESPASS, UNJUST ENRICHMENT, BREACH OF CONTRACT, AND PROPOSITION 218 HOLDINGS CANNOT STAND (PHASE 3).

A. As the inverse condemnation judgment fails, so does the judgment for trespass and unjust enrichment.

In the Phase 3 decision and judgment, the trial court held that the trespass and unjust enrichment causes of action address the same harm as the inverse condemnation award and are "duplicative" of that award; therefore, no additional damages would be awarded on those claims. (21 CT 4319, ¶¶ B.4, C.3; 22 CT) These causes of action, in other words, are "merely a clone[s]" of the inverse condemnation cause of action "using a different label." (*El Escorial Owners' Assn. v. DLC Plastering, Inc*. (2007) 154 Cal.App.4th 1337, 1349.)

The court's damages award for trespass and unjust enrichment must therefore be reversed for the same reasons that the inverse condemnation award must be reversed. (*See, e.g., Bookout v. State ex re. Dept. of Transp*. (2010) 186 Cal.App.4th 1478, 1488 [affirming judgment on the pleadings as to nuisance, trespass and negligence after plaintiff failed to establish damages for inverse condemnation; "if the defendant did not cause harm, there is no causation no matter what the cause of action"].)

B. The Trespass Judgment Fails for Additional Reasons.

1. Under Government Code section 815, there is no cause of action against a public entity for trespass.[7]

[7] The District did not argue in the trial court that Moores did not have a cause of action against the District for trespass. Nevertheless, "the issue of whether a cause of action is stated is not waived by the failure to raise it in the trial court, and it may be raised for the first time on appeal. [Citations.]" (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 7.)

"Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code § 815, subd. (a).) Section 815 "abolishes public entity liability except when authorized by statute." (1 California Government Tort Liability Practice (4th ed Cal CEB) § 1.6.) There is no common law tort liability for public entities in California. (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897; *Miklosy v. Regents of University of Cal*. (2008) 44 Cal.4th 876, 899.)

Accordingly, to state a tort cause of action against a public entity, "every fact essential to the existence of statutory liability must be pleaded with particularity, including the existence of a statutory duty. [Citation.]" (*Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802.) And, as a governmental entity's duty can be created only by statute or other enactment, the complaint "must at the very least" identify the statute or enactment that plaintiff claims establishes the duty. (*Ibid*.)

Trespass is a tort cause of action. (*Odello Bros. v. County of Monterey* (1998) 63 Cal.App.4th 778, 793.) Moores's cause of action for trespass alleged in the supplemental complaint on which the case went to trial does not cite, refer to, or otherwise identify any supporting statute or other enactment. (6 CT 1215-1216, ¶¶ 21-24.) The supplemental complaint incorporated all of the allegations of the third amended complaint. (6 CT 1212, ¶ 1.) Count VIII of the third amended complaint included a count for trespass. (5 CT 937, ¶¶ 72-74.) It, too, was devoid of reference to any statute or enactment.

No statute provides that a public entity may be held liable for trespass. Trespass is a common law, not a statutory, tort. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 254; *Clarke v. Horany* (1963) 212 Cal.App.2d 307, 310–311.)

The District cannot be liable for trespass.

2. The District did not invade a superior possessory interest in the Soderberg easement property.

"Like larceny, trespass requires the invasion of a superior possessory interest in property." (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 406.) Moores had no superior possessory right to the Soderberg easement plot. The District, as easement holder, was fully entitled to occupy and use the 60 by 60-foot property subject to the Soderberg easement. The easement deed did not reserve any superior possessory interest to Moores. (7 CT 1359-1360.)

The District had to exercise its rights so as not to impose an unnecessary burden on Moores's property, the servient tenement. (*Atchison, Topeka & Santa Fe Ry. Co.* (1969) 275 Cal.App.2d 456, 464-465.) As discussed in the inverse condemnation section, *supra*, the District's exercise of appropriative rights by installing and using the T5 well to draw water from beneath Moores's property did not in any way burden his overlying rights.

3. There is no trespass cause of action for appropriating surplus groundwater.

In the trial court's view, the District could not have acquired appropriative water rights because it trespassed. "To be a lawful appropriator, IBWD would have to be appropriating water in a lawful manner not as a trespasser." (Supplemental CT 3.) The court did not cite any authority for that holding, and the District is unaware of any.

Further, the District did not commit trespass by taking water through the T5 well, even though the well is on Moores's property. Aside from the scope of the Soderberg easement for "WELL" and "water system appurtenances" (7 CT 1360), the place of taking is not a factor in acquiring

appropriative rights. (*City of San Bernardino v. City of Riverside*, *supra*, 186 Cal. at p. 29.)

Drawing the water from the basin under Moores's property did not and could not constitute trespass for another reason. In appropriating the water, the District did not invade any superior possessory interest of Moores. Moores had no possessory ownership interest in the groundwater. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC*, *supra*, 14 Cal.App.5th at pp. 406-408 [industrial contamination of water district's water basin was not trespass as district had no possessory right of ownership to the water].)[8]

There is no stipulation or evidence that the T5 well unreasonably burdens Moores's property or his exercise of overlying water rights. It is undisputed that Moores does not take water from the aquifer beneath his property; he obtains water from the District. (7 CT 1281, ¶ 4, 1284¶ 18.)

Rather than impairing Moores's rights, as contemplated by the WDA, the District's provision of water from the T5 well benefits him. (7 CT 1281, ¶ 4, 1284, ¶ 18.) And the benefit is substantial. In Mr. Moores's words, "If you don't have water to your property you're not going to have much to sell." (2 RT 269:14-15.) Without an assured source of sufficient water, he would be unable to develop his property and reap the profit. (2 RT 269:22-270:7.) The district's "continuing obligation to meet – to

[8] It is possible to commit trespass by unauthorized taking or use of water to which a holder of senior water rights is entitled, such as by appropriating more than surplus groundwater. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC*, *supra*, 14 Cal.App.5th at p. 414.) Unauthorized diversion or use of water subject to State Water Resources Control Board supervision and control is also a trespass. (Wat. Code § 1052.) There is no evidence here of either circumstance.

provide service and their ability to provide service is an essential element to maintaining property values and marketability and that kind of thing." (2 RT 270: 10-13.)

The court's finding of trespass fails.

C. The unjust enrichment judgment likewise fails for further reasons.

1. Unjust enrichment is not a cause of action.

Numerous courts have held that "there is no cause of action in California for unjust enrichment." (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370; *Melchior v. New Line Productions, Inc*. (2003) 106 Cal.App.4th 779, 793 [same].) Some courts hold that there is an unjust enrichment cause of action. (*See Peterson v. Cellco* (2008) 164 Cal.App.4th 1583, 1593 [stating elements of unjust enrichment]; *Elder v. Pacific Bell Telephone Co*. (2012) 205 Cal.App.4th 841, 857 [same].) If this Court concurs with the weight of authority holding that unjust enrichment is not a cause of action in California, then it must reverse the trial court's judgment for unjust enrichment.

2. As with trespass, a tort claim for unjust enrichment does not lie against a public entity.

Regardless of whether a cause of action for unjust enrichment exists in California as a general matter, it is tortious in this case. (*Janis v. California State Lottery Com*. (1998) 68 Cal.App.4th 824, 830-831.) In the Phase 3 statement of decision the trial court stated that the unjust enrichment damages award "addresses the same harm as that addressed in trespass and inverse condemnation," and in the judgment the court held the award of damages for unjust enrichment is "duplicative of the award for inverse condemnation. . . ." (21 CT 4358, ¶ 3; 4367-4367, ¶ C.) The unjust enrichment claim is yet another clone of the inverse condemnation

cause of action under a different label. (*El Escorial Owners' Assn. v. DLC Plastering, Inc*., *supra*, 154 Cal.App.4th at p. 1349.)

As with trespass, where the claim is tortious in nature, subdivision (a) of Government Code section 815 shields public entities from civil liability except as provided by statute. (*Guzman v. County of Monterey*, *supra*, 46 Cal.4th at p. 897; *Miklosy v. Regents of University of Cal*., 44 Cal.4th at p. 899.) Unjust enrichment is a common law, not statutory, obligation. (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346.)

The District is not and cannot be liable for unjust enrichment.

D. The Court erred in ordering the District to refund assessments relating to the capital replacement reserve.

1. Background facts regarding the assessment.

Pursuant to the 2002 Settlement Agreement, the District sought approval that summer to levy a Proposition 218 special assessment on properties within the District to fund water system improvements.[9] The assessment was approved by a majority of the owners of record of property within the District.

The notice sent to property owners of the District's intention to adopt the assessment included an engineer's report explaining that the

[9] Proposition 218 (1966) created Articles XIII C and XIII D of the California Constitution, restricting the power of local agencies to levy special assessments, fees and other charges. Under the constitutional provisions and implementing legislation, before a special assessment may be levied, notice must be given to all record owners of the affected properties with full information about the nature, need for, and duration of the assessment. The notice must include the provisions of Articles XIII C and D, and a mail-in ballot to vote in favor of or object to the proposed assessment. There must also be a public hearing. Unless a majority of votes cast are in favor, the assessment may not be imposed. See generally 9 Witkin, Summary of Cal. Law (11th ed. 2017) Taxation §§ 134, 143-146.

assessment comprised four components. (Exh. 19, 1 Exh. CT at pp. 151-164.) One component, "Capital Replacement," was to recover from the property owners a portion of the eventual cost of replacing large District assets and facilities such as pipe lines and storage tanks with expected lives of 40 years or more. (*Id*. at p. 161; see also *id*. at pp. 165-167 [Appendix listing assets]; 8 RT 1184:4-1185:9.) The capital replacement assessment essentially established a savings account holding the funds that would be needed. (8 RT 1185:17-19; 10 CT 2037, ¶ 7.A., 19 CT 3981:5; 3911:24.)

The total value of the assets subject to the capital replacement assessment was $1,397,000. (Exh. 19, 1 Exh. CT 161, 167.) But the engineer recommended that the assessment be for only half that value to avoid a possible overcharge if all of the assets did not need replacement after 40 years. (*Id*. at p. 161.) Consequently, the total to be recovered for capital replacement would be $698,500. (*Ibid*.; *id****Error! Bookmark not defined.***. at p. 164). Over 40 years, the annual assessment from all property owners would be $17,500 paid in equal shares. (*Ibid*.; 8 RT 1185:17-19, 1186:3-19, 1188:11-12.)

The fund had a limit. In summarizing the assessment and its duration, the engineer's report stated:

> The Capital Replacement component will be collected at the maximum voter approved amount until a capital replacement cash reserve fund of 10% of the replacement value of the District's assets has been funded as determined by the District's treasurer. At this time this component of the Assessment will be adjusted as needed to maintain the capital fund reserve at 10% of the replacement value of the District's assets.

(*Ibid*.)

The District's treasurer, Judy Murray, in calculating the annual assessment for the capital replacement assessment, read that literally: the capital replacement fund had a limit of "'10% of the replacement value of the District's assets.'" (9 RT 1205:22-1206:12, 1324:18-1325:11.)

Moores claimed, however, that the capital reserve limit should not be ten percent of the entire replacement value of the assets, but 10 percent of 50 percent of the value. (15 CT 3116-3117, ¶¶ 13-16.) He contended that by calculating the assessment at 10 percent of the assets' value, the District had exceeded the ceiling on the fund. (*Id*. at p. 3117, ¶ 17.) The trial court agreed and held that the District had over-collected the capital replacement assessment. In the judgment, the court ordered the District to refund $213,550, plus interest of $38,006.76, for a total refund of $251,558.76. (22 CT 4647, ¶ c.)

2. The court erred in holding that assessments for the capital reserve fund are to be at the rate of 10 percent of 50 percent of the value of the 40 year assets.

The engineer's report sent with the notice to the property owners, Exhibit 19 (1 Exh. CT 151), did two things. First, it fixed the total amount of the capital replacement assessment: 50 percent of the replacement value of assets with lives longer than 40 years, or $17,500 per year (with an annual inflation adjustment of up to 3 percent).

The second thing the engineer's report did was to provide a ceiling on the amount of cash held the capital replacement reserve account and the formula to determine the ceiling. The words were in clear, plain, unambiguous language: "The Capital Replacement component will be collected at the maximum voter approved amount until a capital replacement cash reserve fund of *10% of the replacement value of the District's assets* has been funded as determined by the District's treasurer." (Exh. 19, 1 Exh. CT 164 [emphasis added].)

The trial court, however, read the report this way: the capital replacement component of the Proposition 218 assessment was calculated as 10 percent of 50 percent of the value of all assets; that came to $17,500 annually; that figure appears three times in the report (Exh. 19, Tables 6, 8, and 9, 1 Exh. CT 161, 162, 163). Therefore, the reserve fund ceiling was also 10 percent of 50 percent. (21 CT 4355.) The court's reading of the report was badly flawed.

The formula in the report to determine the ceiling on the reserve fund does not say that it is 10 percent of 50 percent of the value of the assets. As the trial court recognized, "there is no reference to the 50% limit" in the portion of the report that describes and defines the reserve fund and the ceiling. (21 CT 4355.)

The court conflated two separate matters: the amount of the assessment to be levied, and the amount to be held in the replacement fund reserve. The two matters are connected only in the sense that funds in the reserve come from the assessments. How the amount was calculated that the property owners agreed to pay for the special benefits the Proposition 218 assessment offered has nothing to do with how the cap on the reserve fund is to be calculated.

There was no extrinsic evidence to support the court's interpretation. The engineer who authored the report, Douglas Dove, testified by way of a short deposition. (8 RT.) He explained why the assessment for capital replacement was based on 50 percent of the value of the assets. "Instead of recovering 100 percent of the calculated annual depreciation, if you will, since there's a lot of unknowns surrounding future replacement, we felt it was reasonable to charge 50 percent. We didn't want to overcharge." (8 RT 1185:23-1186:2.) He did not testify that the replacement reserve fund was also to be calculated based on 50 percent of asset value.

When interpretation of a written instrument does not turn on the credibility of extrinsic evidence, interpretation is a matter of law for the court and the appellate court is not bound by the trial court's interpretation. *Parsons v. Bristol Dev. Co., supra,* 62 Cal.2d at p. 865; *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1413 [same, quoting *Parsons*].) The court's role in interpreting an instrument "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . . ." (Civ. Code § 1858.) The trial court's interpretation of the engineer's report directly violates that fundamental principle two ways. It effectively omits the portion stating that the amount of the reserve fund will be 10 percent of the value of the District's assets. And it inserts language relating to the reserve fund that the report does not contain: that it will be 10 percent of 50 percent of the assets' value.

A related rule of interpretation of instruments is that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (*Ibid*.) The trial court's construction of the engineer's report violates that rule as well; it renders the reserve fund provision making the amount of the reserve fund 10 percent of the assets' value ineffective.

3. The court erred in ordering refunds of capital replacement assessments beginning in fiscal year 2007-2008; the court could not order refunds of assessments before fiscal 2009-2010.

When Moores filed the supplemental complaint challenging the way the District was calculating the capital replacement ceiling, the District, pleaded a statute of limitations affirmative defense, citing Code of Civil Procedure section 338, among others. (6 CT 1247, 1250 [Second Affirmative Defense].) Under subdivision (a) of section 338, the limitation

period is three years for "[a]n action upon a liability created by statute, other than a penalty or forfeiture."

The trial court agreed that section 338, subdivision (a) applied. (21 CT 4388.) The court also acknowledged that Moores did not raise an objection to how the District was determining the reserve ceiling until he filed a supplemental complaint, which the court identified as the supplemental complaint filed in May 2011. (*Ibid*.) Consequently, the court held, the District had to refund capital replacement assessments collected during the previous three years, since the fiscal year ending in 2008. (*Ibid*.)

The court was wrong. The May 2011 supplemental complaint did not allege that the District was mis-calculating the ceiling on the capital replacement fund and over-collecting the assessment. (6 CT 1211-1246.) Moores did not allege the assessment refund claim until the second supplemental complaint filed on August 4, 2015. (15 CT 3113, 3116-3117, ¶¶ 13-17.) That was four years after filing the May 2011 supplemental complaint.

The court thus erred in using May 2011 to determine the three years for which capital reserve fund assessments should be refunded. The refund period should have been measured from August 2015. That would have resulted in refunds of assessments collected beginning with the fiscal year ending in September 2012.

The parties, however, entered into an agreement tolling unexpired statutes of limitation as of March 11, 2013. (11 CT 2175-2181.) With amendments, the tolling agreement was still in effect when Moores filed his second supplemental complaint in August 2015. (11 CT 2182-2184.)

The tolling period, from March 2013 to August 2015, was just short of two years and five months. Therefore, the period for which the court could order refunds should be extended that long, from 2012 to the fiscal year ending September 2010.

The trial court's holding that the District was to refund capital replacement funds collected in and after the fiscal year ending in September 2008 improperly requires the District to make refunds for two years more than the statute of limitations and the parties' tolling agreement allow.

E. The Trial Court's Award of Damages for Breach of the 2002 Settlement Agreement Cannot Stand.

The last issue tried in Phase 3 was Moores's claim for damages from the District's failure to build the Mallo Pass project. Moores obtained the permit for diversion of water from Mallo Pass Creek in 1974 and had taken steps to develop the project before he assigned the permit to the District. (10 RT 1557:4-1558:5; Exh. 36, 1 Exh. CT 282, ¶ 6.1.A).) As part of the WDA, Moores also deeded the District a site for a water treatment plant. (10 RT 1560:3-1562:14; Exh. 110, 3 Exh. CT 996-997.)

At trial, Moores presented a binder with pages listing the expenses that he claimed were incurred for the Mallo Pass development, along with invoices and documents showing payment. (10 RT 1558:11-1560:2; Exh. 162, 4 Exh. CT 1461-1535.) The total was almost $400,000. (Exh. 162, 4 Exh. CT 1463.) That did not include the value of the parcel conveyed to the District for the water treatment plant.

The trial court found that the District breached the Settlement Agreement by abandoning the Mallo Pass project, and awarded Moores damages of $133,649 for a portion of his claimed expenses, plus another $121,270.12 in pre-judgment interest (21 CT 4392, 22 CT 4649, ¶ D.)

But there is no evidence that Moores was actually damaged by the breach of the 2002 Settlement Agreement.

In the 2002 Settlement Agreement, the District agreed to provide Moores 54 hook-ups to its water system for parcels that he owned, and up to another 21 residential connections to other parcels that he owned. (7 CT 1386-1387, ¶¶ 4-6.) The District further agreed that "its plan for obtaining

additional water source supply will consist of first connecting to the existing Irish Creek lower diversion and, secondly, developing and connecting a Mallow [sic] Pass project to the District's water system." (7 CT 1387, ¶ 7.) The court found that the intent of this agreement was "to incorporate specified Moores's properties into the District and to obligate the District to provide water to those parcels." (21 CT 4391.)

The court further found that Moores contributed all rights to the Mallo Pass diversion permit as consideration for the Settlement Agreement because the development of Mallo Pass "would reasonably assure he and others had sufficient water to support their properties and any development plans with respect to those properties." (21 CT 4392.) Finally, the court found that there was "no evidence that water has not been supplied," and that Moores "has not been damaged for lack of sufficient water." (21 CT 4391-4392.)

That should have ended the inquiry in the claim for contract damages. Those findings confirm that Moores was not damaged by the purported breach of the Settlement Agreement. The District fully performed by giving Moores exactly what the District promised to give him – water.

"Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides." (Civ. Code § 3358.)

> Damages awarded to an injured party for breach of contract seek to approximate the agreed-upon performance. The goal is to put the plaintiff in as good a position as he or she would have occupied if the defendant had not breached the contract. In other words, *the plaintiff is entitled to damages that are equivalent to the benefit of the plaintiff's*

> *contractual bargain. The injured party's damages cannot, however, exceed what it would have received if the contract had been fully performed on both sides*.

(*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist*. (2004) 34 Cal.4th 960, 967-968 [internal citations and quotations omitted; emphasis added; ("*Lewis Jorge Construction*").)

In short, "[a]n award of damages is judged solely by the losses suffered by the plaintiff as a result of the breach." (*Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 371, citing *Lewis Jorge Construction*].) Because "the purpose of contractual damages is to give the nonbreaching party the benefit of its contractual bargain," the court must ask: "What performance did the parties bargain for? General damages for breach of a contract 'are based on the value of the performance itself.'" (*Lewis Jorge Construction*, *supra*, 34 Cal.4th at 971, citing 3 Dobbs, *Law of Remedies* (2d ed. 1993) § 12.4(1), p. 62.)

Here, the court acknowledged that the purpose of the settlement agreement was to ensure that the District supplied sufficient water to the Moores's properties, and found that he was not been damaged for lack of such water. (21 CT 4391-4392.) In other words, there is no evidence that Moores suffered any losses as a result of the District's abandonment of the Mallo Pass project.

The trial court erred in awarding them damages for breach of contract.

CONCLUSION

The trial court granting judgment that was erroneous in:

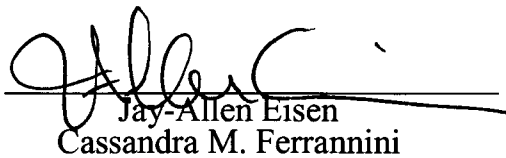
- Finding the District liable for inverse condemnation by taking Moores's property for the T5 well and the water drawn from it;
- Determining compensation for inverse condemnation;
- Finding trespass and unjust enrichment;

- Ordering an excessive refund of the assessments collected for the capital replacement reserve; and
- Finding breach of contract and awarding damages for the breach.

The judgment should be reversed and remanded with instructions to vacate the finding of inverse condemnation and the award of compensation for the condemnation; vacate the trespass and unjust enrichment holdings; vacate the order for refund of capital replacement funds back to fiscal year 2008 and order re-determination of the refund only to fiscal 2010; and vacate the finding of and award of damages for breach of contract.

Dated: March 20, 2019

DOWNEY BRAND LLP

By: 

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CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 13,618 words as counted by the Microsoft Word, Microsoft Office Professional Plus 2010, word processing program used to generate this brief.

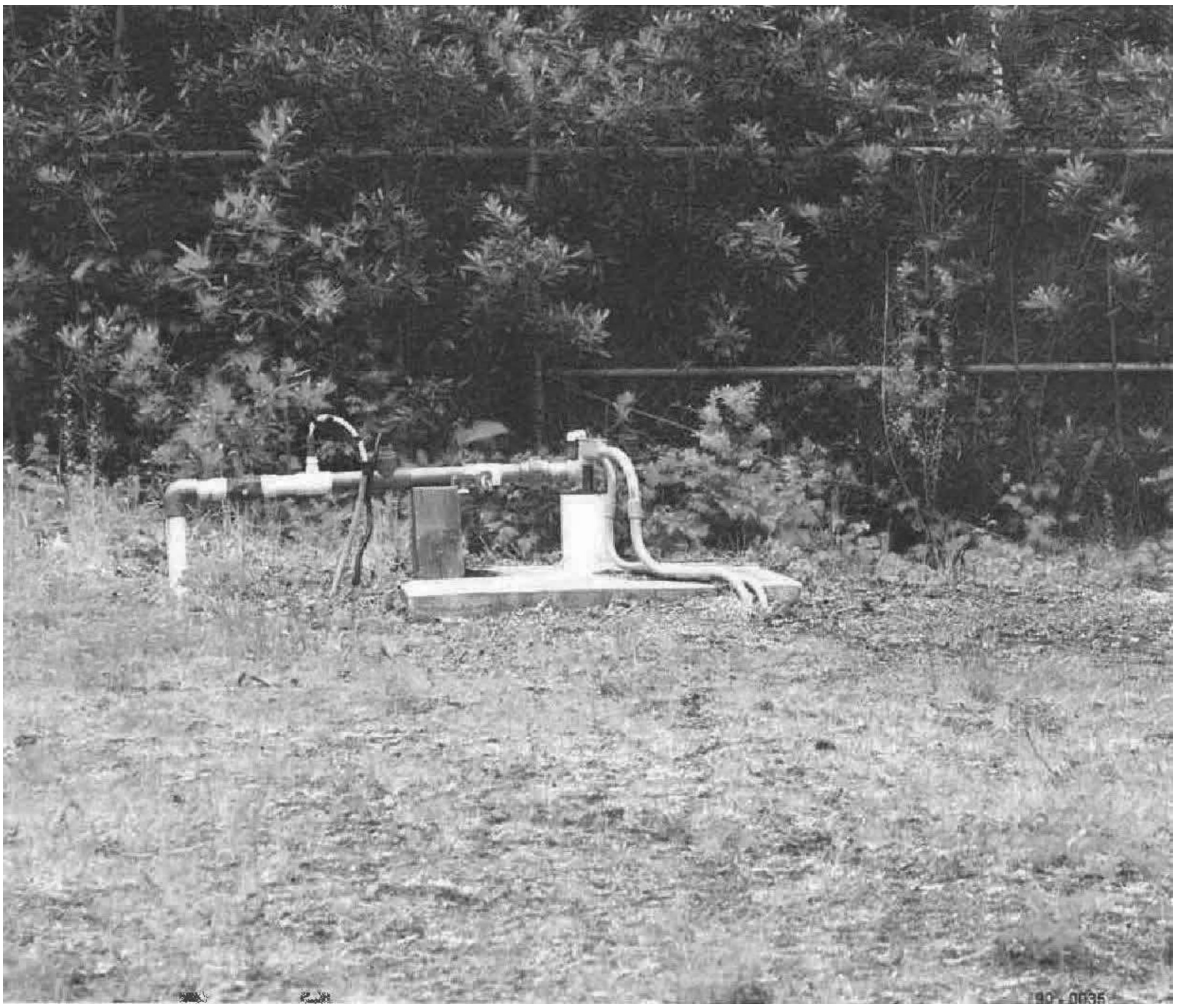
Dated: March 20, 2019

DOWNEY BRAND LLP

By: _____
Jay-Allen Eisen
Defendant, Appellant, Cross-Respondent
IRISH BEACH WATER DISTRICT

ATTACHMENTS

FROM EXHIBIT 99



FROM EXHIBIT 90

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California, 95814-4731. On the date below, I caused the within document to be served:

APPELLANT IRISH BEACH WATER DISTRICT'S OPENING BRIEF

X **BY MAIL:** I am readily familiar with the firm's practice of collection and processing correspondence for mailing deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business as set forth below.

Hon. Ann C. Moorman
Superior Court of Mendocino County
100 North State Street
Ukiah, CA 95482

X **BY E-SUBMISSION ON COURT'S WEBSITE:** California Superior Court

X **BY eSERVICE VIA TRUEFILING:**

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 20, 2019, at Sacramento, California.

Karen Gould