

1 MATTHEW L. EMRICK (SBN 148250)
LAW OFFICES OF MATTHEW EMRICK
2 6520 Lone Tree Blvd., Suite 1009
Rocklin, CA 95765
3 Telephone: (916) 337-0361
Email: matthew@mlelaw.com

4 Attorneys for Defendant
5 IRISH BEACH WATER DISTRICT

6
7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF MENDOCINO**

9
10 WILLIAM H. MOORES, TONA
ELIZABETH MOORES,

11 Plaintiff,

12 v.

13 IRISH BEACH WATER DISTRICT, DOES
14 1 through 10, inclusive,

15 Defendant.

16 GORDON MOORES, SANDY MOORES,
MENDOCINO COAST PROPERTIES, a
17 California Corporation, and MOORES
ASSOCIATES, a partnership,

18 Real Parties in Interest.
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CASE NO. SCUKCVG 0954665

**OPENING TRIAL BRIEF OF
DEFENDANT IRISH BEACH WATER
DISTRICT** (Inverse Condemnation Liability
Phase One)

Judge: Honorable Ann Moorman

Action Filed: September 10, 2009

Trial Date: Liability Phase of Inverse
Condemnation: February 17, 2012

1 Deeds and Exhibits, No. 7, Water System for Irish Beach sub. Unit 9).

2 **2. Stipulated Deeds and Documents**

3 The Stipulated Deeds and Documents demonstrate the following: IBWD’s rights are
4 broad; IBWD and the Moores agreed that IBWD would develop future water resources in order
5 for IBWD to, in part, provide water to the Moores’ undeveloped lots in Unit 9 (as well as the
6 acreage parcels); and the Moores are in large part the primary beneficiaries of the T5 Well.
7

8 a. 1988 Water Development Agreement (Stipulated Deeds and Documents, No. 6): On or
9 about July 6, 1988, the Moores and IBWD entered into a “Water Development Agreement”(“1988
10 WDA”). The 1988 WDA provided that for certain specific consideration set forth in the 1988
11 WDA, the Moores would assign IBWD all of the Moores’ rights to a permit to appropriate water
12 from Mallo Pass Creek and all of their rights to the existing Unit 9 Well system *and*
13 *appurtenances*. In return, IBWD would “develop” certain water resources to allow for the
14 development of the Moores Unit 9 Subdivision and their acreage Parcels. With respect to the Unit
15 9 Well, Section 2 (a) of the 1988 WDA provides that the Moores:
16

17 Assign to the DISTRICT ***all of their rights, title, and interest*** in the existing 276.5
18 foot well east of Unit 9 . . . (“the No. 9 Well”). (emphasis added).

19 Exhibit 2 to the 1988 WDA is an “*Assignment of Water Rights in Well No. 9.*” The
20 language in the 1988 WDA and in the assignment of Water Rights is significant because it grants
21 broad rights to IBWD – e.g. *all of the rights* that the Moores had to the No. 9 Well (e.g. water
22 rights, right to replace and relocate).

23 Section 2 (a) of the 1988 WDA provided further that IBWD agreed to “***Integrate*** the No. 9
24 Well into the existing DISTRICT water supply system” Section 11 (pg 31) of the 1988 WDA
25 provides IBWD with broad rights to construct, operate and maintain the Unit 9 Well and related
26 appurtenances:

27 Upon execution of this Agreement or within 30 days thereafter, William Moores,
28 shall provide the DISTRICT with a grant deed . . . conveying to the District all
easements and rights of way to ***construct, operate, and maintain*** . . . the ***Unit 9***

1 *well and appurtenances.*¹ (emphasis added)

2 Section 12 (pg 31) of the 1988 WDA provides access to the well.

3 Significantly, the 1988 WDA also provides the specific rationale for the Moores
4 assignment of rights to IBWD and the purpose of the 1988 WDA – e.g. it was to allow for Moores
5 to develop the Unit 9 Subdivision and the acreage parcels by ensuring that IBWD would have
6 sufficient facilities and water supply necessary to allow for such development. This development
7 included the Moores’ Property at issue in the present case. Section 2 (d) (pg. 4) provides:

8 The parties to this Agreement acknowledge that the assignment to the DISTRICT
9 of *all rights, titles, and interests* to the No. 9 Well *is intended to facilitate*, in part,
10 *the DISTRICT’s ability to provide water to the existing eleven (11) acreage
parcels.* (emphasis added)

11 Section 7 (a) provides that:

12 Assuming compliance with all provisions of this Agreement, the DISTRICT agrees
13 to provide a water supply to *54 hook ups* . . . for lots which may be approved for
the development within Irish Beach Unit #9. (emphasis added)

14 In sum, the 1988 WDA granted IBWD broad rights to the Unit 9 Well and appurtenances
15 and directed IBWD to incorporate this water supply into IBWD’s system to serve properties
16 throughout the District – including the Moores’ properties. This allowed the Moores to greatly
17 benefit because the Unit 9 Well could now be used to provide water to *multiple properties* owned
18 by the Moores via IBWD’s water system. Additionally, this meant that IBWD assumed the
19 responsibility to meet all drinking water standards and to maintain and operate the system in part
20 for the specific benefit of the Moores.
21

22 b. Grant Deed - Tank Site and Water System Appurtenances Easement (Stipulated Deeds
23 and Documents, No. 4): Following the execution of the 1988 WDA, on or about July 20, 1988,
24 the Moores granted IBWD a *single integrated* water supply system easement titled: “Soderberg
25 Tank Site, Well, and Pipeline Easement.” The Moores attempt to portray the easement as several
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27 ¹ The 1988 Agreement recognized the potential that the Unit 9 Well could in fact fail (1988 WDA, section 2(e).
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1 separate and distinct easements. However, this is contrary to the plain language of the Deed that
2 clearly describes the grant as a: “60 Foot tank site and water system appurtenances easement.”
3 (“Water System Easement”). The single, integrated Water System Easement includes the
4 following principle components and appurtenances:

- 5 • 60 x 60 foot tank site “together with a 1 foot wide non-access strip . . .and a 14’ road
6 access *and water system appurtenances* (e.g. groundwater rights, wells);
- 7 • a “30’ diameter well easement” around an existing well;
- 8 • “together with *all water* in said well and the right to extract said water”; and

9 The Water System Easement is illustrated in the survey provided in the Stipulated Deeds and
10 Documents, No. 12. There are no prohibitions on use set forth in the grant. The Tank Site is the
11 *principal* facility and the well(s) and water rights are appurtenances (e.g. indispensable
12 components of the system) to the tank site. See *Trask v. Moore* (1944) 24 Cal.2d 365, 368.²

13
14 c. Grant Deed – Improvement Facilities (Stipulated Deeds and Documents, No. 10) and
15 Grant Deed – Distribution Facilities (Stipulated Deeds and Documents, No. 9): These deeds
16 from the Moores granted IBWD *ownership* of all the facilities for the No. 9 Well including the
17 associated 10,000 gallon water tank and ownership of distribution facilities lien free.

18 d. Grant Deed – Access and Water Line Easements (Stipulated Deeds and Documents, No.
19 5). In or about July 5, 1988, the Moores granted IBWD access rights and water line easements
20 within the Unit 9 subdivision.

21 e. 2002 Settlement Agreement (Stipulated Deeds and Documents, No. 11): In 2002,
22 _____

23 ² The nature and importance of a water system appurtenance was described in the case of *Trask v. Moore* (1944) 24
24 Cal.2d 365, 368, as follows:

25 Appurtenances are things belonging to another thing as principal and which pass as incident to the principal
26 thing. (Bouvier, Law Dict., Sub., Appurtenances.) Here the principal thing was the pumping works, and the
27 piping system attached thereto was an incident to the main machinery--the pumps and the wells. *Such pipe
28 extension was necessary to the enjoyment of the principal thing and indispensable in the supply of water to
the neighboring homes in the tract.* By being so joined and essential to the function of the apparatus as a
whole, the distributing system contained and combined in itself all of the elements and attributes of a fixture
or appurtenance to real estate.

1 Moores and IBWD entered into an agreement to settle an action the Moores had filed against
2 IBWD in Mendocino County Superior Court, *William M. Moores & Tona E. Moores v. Irish*
3 *Beach Water District*, SCUK0CVG-0083930. For the purposes of the present action, the 2002
4 Settlement Agreement did the following:

- 5 • Provided for an exchange of *consideration* between the parties, including the Moores
6 exemption and deferment from certain fees and assessments (see Section II A);
- 7 • Extinguished all non-executed obligations that survived the 1988 WDA (see Section II A,
8 2);
- 9 • Provided specifically that IBWD retains *all easements* conveyed to the District at any time
10 (see Section II A, 8); and,
- 11 • Provided specifically that IBWD retains *all rights* to Well No 9. (see Section II A, 9).
- 12 • Specifically recognized IBWD’s plans *to develop future water* sources in order to be able to
13 serve, in part, the Moores’ Properties and meet its obligations set forth in the 2002
14 Agreement. (see Section II A, 7 – IBWD’s “plan for obtaining additional water source
15 supply”).

16 Significantly, once again the purpose of (and consideration for) the 2002 Settlement
17 Agreement was in part to facilitate IBWD’s ability to provide water service to the Moores’
18 properties within the Moores’ Unit 9 subdivision (see Section II A, 5) as well as to the Moores’
19 acreage parcels including the Property at issue in the present case (see Section II A, 6). This was
20 to be accomplished, in part, from the existing easements and IBWD’s rights to the Unit 9 well and
21 in part from future water development by IBWD. The Moores argue that they were somehow not
22 compensated for the T5 Well; however, in fact, the T5 Well is in fact *part of the compensation* to
23 the Moores under the 2002 Agreement in that it facilitates IBWD’s ability to provide water to the
24 Moores’ Properties as set forth in that Agreement (and in the 1988 WDA).

25
26 **3. IBWD’s Contentions**

27 IBWD contends it had a right to construct the T5 Well under the applicable stipulated
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1 documents and as a matter of law. IBWD contends that it built the T5 Well to replace the Unit 9
2 Well that IBWD contends is failing and to replace the permit to divert from Mallo Pass Creek that
3 IBWD contends was not renewed by the State Water Resources Control Board.

4 LEGAL STANDARDS

5 **Inverse Condemnation – Physical Takings**

6 The Moores, bear the burden of proof to show that IBWD has actually taken any of their
7 property by inverse condemnation. *Marshall v. Dept. of Water and Power* (1990) 219
8 Cal.App.3d 1124, 1138. The standard of proof for an inverse condemnation cause of action based
9 on a physical taking requires the plaintiff to prove that the alleged taking results in property
10 damage, other depreciation in market value, or unlawful dispossession of the owner. *Jordan v.*
11 *Santa Barbara* (1996) 46 Cal.App.4th 1245, 1257. There must be evidence of an invasion or
12 appropriation of property that results directly and specifically in damage to the landowner.
13 *Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 355-356. Claims of potential future
14 acts or damages do not constitute a taking. *Jordan v. Santa Barbara* (1996) 46 Cal.App.4th 1245,
15 1257.
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18 As discussed, *infra*, the Moores have failed to provide any evidence whatsoever to meet
19 their burden of proof. The Moores’ entire case relies on the presumption that because IBWD
20 built a replacement well that “damage” is somehow automatically presumed and that the Moores
21 do not need to show any evidence of actual damage or depreciation or dispossession. However,
22 this presumption by the Moores is contrary to the authorities cited above that require a showing
23 of actual damage. See *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1367-1372 [mere change in
24 use of a license not sufficient to show damage to underlying property]. Instead, as explained
25 above, the Moores have in fact benefited from the construction of the T5 - just as intended under
26 the 1988 WDA and the 2002 Agreements.
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1 IBWD’s OPENING ARGUMENT

2 **1. IBWD Has NOT Taken Any Groundwater**

3 The Moores’ Brief misconstrues groundwater law – particularly with respect to inverse
4 condemnation of groundwater rights.

5 a. Groundwater Rights Overview

6 First and foremost in this case, it is important to establish the paramount rule that all
7 groundwater within California belongs to the State. *Central and West Basin Water*
8 *Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, 905; Water Code
9 sections 102, 104-105. There is no private ownership of groundwater. *Central and West Basin*
10 *Water Replenishment Dist.* at 905. Groundwater rights carry no specific property right or right
11 of possession to the water itself. *Big Rock M.W. Co. v. Valyermo Ranch Co.* (1926) 78
12 Cal.App. 266, 275. Therefore, the Moores do not own any groundwater.

13 A conditional right to use groundwater, however, can be acquired by both private or
14 public parties. *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.*
15 (2003) 109 Cal.App.4th 891, 905. The groundwater right is a right of use not ownership.
16 *Central and West Basin Water Replenishment Dist* at 905.

17 In California, there are two (2) principal methods of *acquiring* the right to use
18 groundwater. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-1243. One
19 method of acquiring a right to groundwater is to own land overlying a groundwater basin
20 (“overlying right”). *Barstow* at 1240. Overlying groundwater rights are a considered an
21 “appurtenance” to the property. *Barstow* at 1240. Ownership of the overlying property gives the
22 overlying landowner a right to use groundwater beneath the property. *Barstow* at 1240

23 Significantly, however, (as the Moores’ brief conveniently ignores) the overlying
24 groundwater right is *not* vested or perfected until the property owner actually drills a well and
25

1 uses the water. *Barstow* at 1240, 1243-1245, 1251 [overlying rights established by “ownership,
2 extraction and beneficial use”]. In the present case, the Moores are overlying landowners;
3 however, the evidence shows the Moores do not presently own a well or pump groundwater from
4 the property. As a result, the Moores do not currently have a perfected groundwater right
5 associated with the Moores’ Property.
6

7 Another method of acquiring the right to use groundwater is known as “Appropriation.”
8 *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241. An appropriative
9 groundwater right is acquired not by ownership of property overlying the groundwater basin.
10 Instead, an appropriative groundwater right is acquired by “use” – e.g. drilling a well and taking
11 the water to non-overlying properties. *Barstow* at 1241. Public agencies such as IBWD that use
12 groundwater are “appropriators.” *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908,
13 927. Unlike surface water, no permit from the State is generally required to appropriate the
14 groundwater (well drilling permits and some county permits may be required). *Baldwin v. County*
15 *of Tehama* (1994) 31 Cal.App.4th 166. Whereas overlying users must use the water on the
16 property overlying the groundwater, appropriators may use the water on any property. *Burr v.*
17 *Maclay Rancho Water Co* (1908) 154 Cal. 428, 433-434. Further, of particular significance in
18 this case, an appropriator such as IBWD has the right to *change the location* of a well and still
19 divert water. *Barton v. Riverside Water Co.* (1909) 155 Cal. 509, 517-518.
20
21

22 All groundwater users are subject to the principles of reasonable and beneficial use.
23 *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383. These two principles establish the **amount**
24 **of water** a groundwater user can pump. *City of Barstow v. Mojave Water Agency* (2000) 23
25 Cal.4th 1224, 1240-1245. Under these principles, a groundwater user is limited to use only that
26 amount of water that can be put to a beneficial and reasonable use. *Barstow* at 1241-1243. In the
27 present case, the Moores have failed to present any evidence of their present reasonable or
28

1 beneficial use of water. In fact, the evidence shows conclusively that the Moores presently do not
2 pump *any* groundwater from the Moores Property. Therefore, the amount of water the Moores’
3 present reasonable and beneficial use is zero (0).³

4 Of prime significance in the present case, overlying users are entitled to use what is known
5 as the “*ordinary*” supply of groundwater, which is the amount of groundwater needed from the
6 underlying basin to supply the reasonable and beneficial needs of any overlying uses. *City of*
7 *Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241-1245. Appropriators are entitled
8 to use the “*surplus*” supply of groundwater. *City of Barstow v. Mojave Water Agency* (2000) 23
9 Cal.4th 1224. Surplus water is that amount of water not needed by the overlying users to meet
10 their reasonable and beneficial uses. *Barstow* at 1241. ***Significantly, however***, appropriators such
11 as IBWD also have a right to use this “ordinary” supply of groundwater when an overlying user is
12 not using such water. *Burr v. Maclay Rancho Water Co* (1908) 154 Cal. 428, 433-434.

13
14
15 For a “taking” to occur, the Plaintiff must demonstrate a present water right and a
16 substantial interference of the ability to divert water under such a right.⁴ *Peabody v. City of*
17 *Vallejo*, (1935) 2 Cal.2d 351, 374. There is no physical taking (e.g. substantial interference) in
18 relation to an overlying groundwater user where a public entity appropriator uses *surplus*
19 groundwater. In *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, the California
20 Supreme Court held that there is no taking where an appropriator pumps only the “surplus” water:
21
22

23
24 ³ Additionally, it is important to keep in mind that the Moores’ property is “undeveloped” – and therefore, even if the
Moores had a present ability to pump, the amount of water they could use would be extremely limited.

25 ⁴ In *Peabody v. City of Vallejo*, (1935) 2 Cal.2d 351, 374 the California Supreme court held that in order to show a
26 compensable taking, the Plaintiff must show a “substantial diminution” in the water available to the Plaintiff from the
27 Defendant appropriator’s actions. Otherwise, the Plaintiff’s action is limited to a judgment declaring the relative
priorities of the parties and for a potential injunction – but not compensation. In *City of Barstow v. Mojave Water*
Agency (2000) 23 Cal.4th 1224, 1251, the California Supreme Court defined an overlying right as consisting of owner
ship of overlying property, present extraction of groundwater (e.g. actual use), and beneficial use.

1 the appropriator may take the surplus or excess *without compensation*.⁵
2 (emphasis added)

3 Further, the Courts have held that there is no physical taking or interference with
4 groundwater right where an appropriator such as IBWD uses the *ordinary supply* of groundwater
5 when an overlying user is not using that water - as is in this case. This long held rule was set
6 forth in the historic case of *Burr v. Maclay Rancho Water Co* (1908) 154 Cal. 428, 433-434:

7 In the case of either class of owners of overlying lands, the appropriator for
8 use on distant land has the right to any *surplus* that may exist. If the adjoining
9 overlying owner does not use the water, *the appropriator may take all the*
10 *regular supply to distant land until such land owner is prepared to use it*
11 *and begins to do so*. It is not the policy of the law to permit any of the
12 available waters of the country to remain unused, or to allow one having the
natural advantage of a situation, which gives him a legal right to water, to
prevent another from using it, while he himself does not desire to do so.
(emphasis added).

13 Finally, there is no physical taking where an overlying user grants an appropriator the right
14 to pump and use the overlying groundwater rights as in this case. *Duckworth v. Watsonville*
15 *Water & Light* (1915) 17 Cal. 425. Where the rights to use groundwater are transferred
16 separately from the property (as in the present case), the groundwater rights are permanently
17 severed (e.g. lost) from the property. *Orange County Water District v. City of Colton* (1964) 226
18 Cal.App.2d 642, 648.

19
20 b. IBWD has NOT Taken any Groundwater Rights.

21 In the present case, the Moores do not own the groundwater beneath their property – it is
22 owned by the State of California. Further, the Moores have failed to show they have a present,
23 vested overlying groundwater “right” – or if they do, that they are presently exercising any such
24

25 ⁵ In *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, the court held:

26 It is the policy of the state to foster the beneficial use of water and discourage waste, and when there is a
27 surplus, whether of surface or ground water, the holder of prior rights [e.g. an overlying user] may not enjoin
28 its appropriation [e.g. by IBWD].

1 alleged right. The stipulated facts show that the only wells on the Moores' Property are both
2 owned by IBWD. Because the Moores are *not* presently pumping any groundwater from the
3 Moores Property, IBWD has the right to pump not only the *surplus* groundwater but also the
4 *ordinary* supply of groundwater. There is no taking.

5
6 Further, the Moores granted IBWD all of the Moores' rights to pump groundwater from
7 the property. In so doing, any rights the Moores may have had to pump groundwater have been
8 severed (lost) from the Moores' Property. In *Orange County Water District v. City of Colton*
9 (1964) 226 Cal.App.2d 642, 644-645, landowners granted (by deed and agreement) a water
10 district "all of the undersigned's *right, title, and interest* in and to the waters underlying the
11 property." The court found the "deed and agreement" severed the overlying groundwater rights
12 from the underlying property and that such rights were "lost" as to those properties. *Id.* at 648.

13
14 In the present case, the 1988 WDA (and Exhibit 2 to the 1988 WDA) granted IBWD all
15 "*rights, title and interest*" to the Unit 9 Well and further "assigned" IBWD *all water rights* to the
16 well. The Water Supply System easement also granted IBWD water rights and water system
17 appurtenances. Therefore, any groundwater rights the Moores may have had in the property at
18 issue have long been severed and lost and vested in IBWD. However, as explained above, the
19 Moores received a significant benefit from this arrangement because IBWD now distributes this
20 water in treated form throughout the District – including to the multiple parcels owned by the
21 Moores for future development.

22
23 Finally, even if the Moores arguably had a present right to any groundwater, the Moores
24 have still failed to show what amount of water they allege they are entitled to pump under the
25 doctrine of reasonable and beneficial use – or how allegedly IBWD has substantially interfered
26 with the Moores' ability to use this amount of groundwater. There is no evidence there is not
27 sufficient groundwater or that the District has increased pumping or that the T5 Well pumps any
28

1 more groundwater than the Unit 9 Well pumped. The Moores have simply failed to meet their
2 burden of proof and there is no taking.

3 **2. IBWD’s Construction of the T5 Well is NOT a Taking**

4 IBWD had the right to build the T5 Well to replace the Unit 9 Well as IBWD contends.
5 Even the older line of cases relied on by the Moores conclusively hold that a deeded easement
6 includes “secondary” easements essential to the use of the easement, including the right to make
7 “repairs, renewals, and replacements.” (emphasis added). *Ward v. City of Monrovia* (1940) 16
8 Cal.2d 815, 821-822. Not only is this secondary right included in all easements, the 1988 WDA
9 specifically provided IBWD with easements to “construct, operate, and maintain” the Unit 9 Well
10 and *appurtenances* (the 2002 Settlement Agreement preserved these rights).

11
12 In *Haley v. L. A. County Flood Control Dist.* (1959) 172 Cal. App. 2d 285, 290, Plaintiffs
13 attempted to limit the scope of a deeded public flood control easement to the original
14 construction. The Court held that the existing flood control channel could be widened and
15 deepened so long as it was within the original easement boundaries:

16
17 the grant does not stop with a right to an original construction. It also conveys
18 incidental easements for reconstruction, maintenance and repair of the channel
19 . . . and to take earth, rock, sand and gravel for the purpose of excavating,
20 **widening and deepening or otherwise rectifying the channel** and the
21 maintenance and repair of embankments and other protection work. (emphasis
22 added).

23 Modern court decisions (entirely ignored by the Moores in their Brief) have recognized the
24 right of public agencies to make improvements and to modify an easement in order to achieve the
25 underlying purpose of the easement for the benefit of the public. This is especially so where the
26 changed use is a reasonably foreseeable natural evolution of the purpose of the easement.
27 *Applegate v. Ota* (1983) 146 Cal.App.3d. 702, 711. In *Faus v. City of Los Angeles* (1967) 67
28 Cal.2d 350, 358-359, the owner of certain properties (e.g. the servient estates) sought
compensation for a taking of property when the local transit agency eliminated an electric railway

1 in favor of a motorbus service. The property owner claimed that the change in use violated the
2 original scope of the easements, which was for the construction and operation of a passenger
3 railway. The California Supreme Court held in favor of the changed use of the easement
4 rejecting the older more restrictive cases:

5
6 The right to substitute modern mechanisms of transportation for old ones under
7 the deeds in the present case must be viewed *in the light of its public effect.*
8 *We deal here with an improvement of public transportation by a public utility*
9 *for the benefit of the public.* We note that in the cases cited ... the courts dealt
10 with matters that affected the public interest. *In each of those cases the courts*
11 *sanctioned a more efficient and publicly beneficial means to achieve the*
12 *deeds' underlying and main purpose.* We fail to see why we should carve an
13 exception in the instant case and hold that the deeds fix forever the means of
14 public transport in the straitjacket of an outmoded method. (emphasis added)

15 Similarly, in *Griffith v. City of Los Angeles* (1959) 175 Cal.App.2d 331, 337, Plaintiff's
16 contended that the City of Los Angeles could not develop a park dedication for certain purposes
17 or use refuse as landfill within the park. The court held that such uses were allowed and within
18 the scope of the grant and that changes in use are allowed to achieve the underlying purpose of a
19 grant and due to changed circumstances:

20 a dedication must be understood and construed *with reference to its primary*
21 *object and purpose. Nothing is improper which conduces to that object. . . .*
22 The dedicator is *presumed to have intended the property to be used by the*
23 *public in such way as will be most convenient and comfortable*, and according
24 to not only the proprieties and uses known at the time of the dedication, but
25 also to those justified by lapse of time and change of conditions. (emphasis
26 added)

27 In *Anderson v. Time Warner* (2005) 129 Cal.App.4th 411, 417, the Court of Appeal held
28 that the scope of an easement includes intended *future needs*:⁶

29 The operation of easements must necessarily be prospective. *Thus easement*
30 *dedications are interpreted broadly and are deemed to have been intended to*
31 *accommodate future needs.* '[C]hanged economic and technological

32 ⁶ 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 407, p. 478 "Normal future uses [of an
33 easement] are within the reasonable contemplation of the parties and therefore permissible, but unanticipated
34 abnormal uses, which greatly increase the burden, are not."

1 conditions require reevaluation of restrictions placed upon the use of real
2 property.’ (emphasis added)

3 In the present case, IBWD contends it built the T5 Well to replace the Unit 9 Well (and the
4 non-renewed Mallo Pass Permit), which IBWD contends is failing. One of the primary reasons
5 for doing this is set forth under the various stipulated deeds and agreements which included an
6 obligation by IBWD to develop and provide water for the District including water to the over 50
7 properties owned by the Moores (e.g. properties in Unit 9 and the acreage parcels set forth in the
8 2002 Agreement). Further, as the discussion above indicates, the Moores are presumed to have
9 intended that IBWD develop the Water Supply System easement in such a way that would be
10 most convenient and comfortable in order to meet its public obligation. This would include
11 replacing a key component of the water supply system – e.g. building a replacement well or even
12 additional wells necessary to meet IBWD’s obligations under the agreements. The T5 Well is
13 necessary for the continued operation of the Water Supply Easement and is an indispensable
14 appurtenance to that easement. Finally, the Moores present no evidence that the T5 Well in any
15 way damages their property or in any way increased the burden on their property, which is
16 undeveloped.⁷

17
18
19 Having conclusively proven that IBWD has the right to replace a well it contends is failing
20 under applicable law, the law also establishes that IBWD has the right to relocate the replacement
21 well *within the existing* easement. In *Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 821-822,
22 the court upheld a City’s relocation of water pipelines within existing (prescriptive) easement
23

24
25 ⁷ The 1988 WDA granted IBWD the right to construct and repair the Unit 9 Well. It also recognized the potential
26 failure of the well within 10 years of its conveyance to IBWD. While the Unit 9 Well did not fail within the time
27 period of the 1988 WDA – it is evident that the parties anticipated it could happen. The 1988 WDA and the 2002
28 Settlement Agreement both obligate IBWD to develop water supply in part to serve the Moores. These surrounding
circumstances demonstrate that IBWD did nothing that was not long anticipated and expected by the parties in this
action. IBWD contends that the T5 Well was necessary to meet its obligations under the agreements given its
contentions that the Unit 9 well is failing and that the SWRCB did not renew the permit for Mallo Pass Creek.

1 boundaries:

2 The defendant was within the prescribed limits when it reconstructed the pipe
3 system. The evidence shows that it has not appropriated any land of the
4 plaintiff different from that to which its easements attached . . . The city,
 therefore, has not occupied any property to which it was not entitled.⁸

5 In *Chapman v. Sky L'Onda Water Co.* (1945) 69 Cal.App.2d 667, 681, the enlargement of
6 a Dam beyond its existing configuration was held to not exceed the scope of the easement. In
7 *Haley v. L. A. County Flood Control Dist.* (1959) 172 Cal. App. 2d 285, 290, the court found
8 that the widening and deepening of an existing flood control channel beyond its present location
9 but within the easement boundaries was permissible. In *People v. Olson* (1930) 109 Cal.App.
10 523, 532, the court held that a condemned right-of-way included the right to remove sand and
11 gravel on the outside of the right-of-way and that such right was appurtenant to the right-of-way
12 as an indispensable component (e.g. such as the wells and water rights in the present case).

14 Further as an appropriative groundwater rights holder, IBWD has the right to relocate its
15 diversion point (e.g. well). *Barton v. Riverside Water Co.* (1909) 155 Cal. 509, 517-518. Public
16 dedications are to be interpreted according to applicable law and both parties are charged with
17 knowledge of such law. *Griffith v. City of Los Angeles* (1959) 175 Cal.App.2d 331, 337. In
18 *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1367-1372, the court found that a change in
19 location and use of a pipeline was allowed under the law of easements and under the rights of an
20 appropriator of water. Plaintiffs argued (as the Moores do in the present case) that a mere change
21 in use or relocation of use was enough by itself to demonstrate an increased burden. The court,
22 however, rejected this claim holding that it was necessary to actually prove that a change in use
23 resulted in damage (e.g. increased burden).
24

26 ⁸ The present situation is distinguished from certain cases relied on by Moores. Here, IBWD relocated its facilities
27 within the existing easement to a location that specifically designated the easement as including “*water supply*
28 *appurtenances.*”

1 In sum, IBWD has the right to relocate deeded uses such as a water well to other locations
2 within existing easement boundaries where needed to meet the underlying purpose of the
3 easement and to meet its obligations under the applicable agreements with the Moores. Both
4 common sense and case law illustrate that it is not always possible to construct a new well next to
5 a failing well – wells have to be constructed where water is located. *Thromstrom .v Thromstrom*
6 (2011) 196 Cal.App.4th 1406 [new well on separate parcel from failing well]. The Moores have
7 failed to provide any evidence showing that the T5 Well in any way materially increases the
8 burden of the easement.
9

10 Finally, the language of the deeds and the agreements - and *the surrounding circumstances*
11 *of the grant* – are relevant to determining the scope of a public dedication. *Griffith v. City of Los*
12 *Angeles* (1959) 175 Cal.App.2d 331, 337; Civil Code section 806. Significantly, a deeded
13 easement is to be construed liberally in favor of the grantee (e.g. IBWD). *Pacific Gas & Electric*
14 *Co. v. Hacienda Mobile Home Park* (1975) 45 Cal.App.3d 519, 525.
15

16 As discussed above, the stipulated various grants and deeds provide IBWD with broad
17 rights. The Water Supply Easement specifically provides for “water supply appurtenances” to be
18 located within the Tank Site. Under the plain language of the Water Supply Easement, the well
19 and groundwater rights are appurtenances to the tank site. See *Trask v. Moore* (1944) 24 Cal.2d
20 365, 368. The plain language of the 1988 Agreement granted IBWD all *rights, title and interest*
21 to the Unit 9 Well, which would include the right to relocate the well within the IBWD easement
22 (e.g. certainly the Moores had such rights and these were granted to IBWD). Nothing in the
23 deeds or agreements prohibits such relocation. Again, as detailed above, one of the primary
24 purposes of these stipulated various deeds and agreements (liberally construed in favor of IBWD)
25 was to allow IBWD to develop a water supply, and future water supply, to allow the Moores to
26 develop their Unit 9 subdivision and acreage parcels. Under these easements and agreements,
27
28

1 IBWD not only had a right to build the T5 Well, it had an obligation to build the T5 Well.

2 The T5 Well is in fact part of the consideration to the Moores provided for under the 1988
3 WDA and the 2002 Agreement – this is the compensation the Moores allege they have not
4 received. IBWD’s construction of the T5 Well arguably adds significant value to the Moores
5 parcels. The Deeds and the 2002 Agreement are all based on IBWD’s ability to continue to
6 provide water service.
7

8 IBWD does not contend it can do anything on the Moores property or with the easements.
9 The law is clear, however, that a public agency providing a public service has the right to replace
10 and relocate facilities necessary to the underlying purpose of the easement, which in this case is
11 to provide water. Even adding additional wells within the easement is arguably allowed as a
12 natural development of the easement if necessary to supply water to the Moores’ properties as
13 provided by the stipulated deeds and agreements (as is the case here). Additionally, the Moores
14 have been compensated as set forth in the Stipulated Deeds and Agreements.
15

16 **3. IBWD’s Use of Alta Mesa Road and the “Improvements” does NOT Constitute a**
17 **Taking**

18 IBWD has not taken any of the Moores’ property with respect to the Access Road or the
19 “Improvements.” The Moores’ “argument” with respect to IBWD’s use of Alta Mesa road and
20 the improvements is as follows: because the Moores contend the construction of the T5 Well is
21 somehow allegedly a taking, then all “associated” uses of the T5 Well – electricity,
22 communication, access, water distribution – are presumed also to be a taking. The Moores’
23 “presumption” fails.
24

25 Under the easement and inverse condemnation standards set forth above, the Moores have
26 failed to meet their burden of proof. There is no evidence showing that any use of the T5 Well
27 increased the burden on the access road beyond that of access to the former Unit 9 Well. There is
28 no evidence of any increased use of the road by IBWD or that any such increased use resulted in

1 any damage to the Moores. As Stipulated Exhibit 7, Water Supply System for Irish Beach sub.
2 Unit 9 shows, IBWD has other long-existing facilities along Alta Mesa Road which are not
3 alleged to be associated with any taking such: as Tank 3, Tank 4 and Tank 5. The Moores fail to
4 present any evidence showing IBWD's percentage use of the road to access these tank sites as
5 opposed to IBWD's access to the T5 Well – or that such use has increased in any way.
6

7 The same is true with respect to the Moores' allegations associated with the improvements.
8 There is no evidence of any increase in the burden to the electrical facilities, telephone lines or
9 water lines. There is no evidence to show IBWD's use of the T5 Well somehow increased the
10 burden on these facilities and their associated easements in such a way as to cause damage to the
11 Moores. There are no records showing there has been any increase in water being pumped
12 through the existing pipelines or any damage from such use. There is no evidence showing any
13 increased burden to the pre-existing telephone lines or PG&E facilities. There is no evidence of
14 any increased burden on the Moores' Property from the use of the T5 Well. Again, the T5 Well
15 and these existing facilities allow IBWD to serve water to the Moores and benefit the Moores.
16

17 This situation is analogous to *Salvaty v. Falcon Cable Television* (1985) 165 Cal.App.3d
18 798, 803, where new cable television lines were placed on existing telephone poles. The *Salvaty*
19 court found that the new cable lines were within the scope of the general purpose of the existing
20 easement and did not place any increased burden on the existing easement – and so there was no
21 taking. The present situation is even less burdensome than *Salvaty*. IBWD is using long-
22 existing easements and improvements. There is no evidence that the T5 Well places any
23 increased burden on the existing easements or improvements beyond that of the former Unit 9
24 Well.
25

26 Similarly in *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1367-1372, Plaintiffs, as the
27 Moores here, argued that the mere change of use and expansion of use of an easement pipeline
28

