Filed 11/30/21

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WILLIAM H. MOORES et al., Plaintiffs and Appellants, v. IRISH BEACH WATER DISTRICT, Defendant and Appellant.	A151867 (Mendocino County Super. Ct. No. SCUKCVG0954665)

This appeal is the latest chapter in a water development dispute now spanning more than three decades. It involves two sets of claims, one of which we refer to as the "well claims" (which include claims for inverse condemnation, trespass and unjust enrichment) and the other which we refer to as the "Mallo Pass Creek project claims" (which include claims for breach of contract and for incorrect implementation of a special assessment enacted pursuant to Proposition 218). These claims were tried in three phases over the course of several years.

The claims and issues now on appeal are so numerous and disparate in substance, any attempt at a cogent, introductory summary is impossible. Accordingly, we leave to the lengthy discussion that follows the reasons why we conclude the judgment must be reversed in part and the case remanded for further proceedings consistent with this opinion.

I. The "Well" Claims

Background

Plaintiff William Moores began developing property in the northern California coastal area of Irish Beach in 1967. That same year, Moores and his father played a significant role in creating the Irish Beach Water District, a public entity, to facilitate and serve their anticipated development. Over the years, Moores acquired more than 100 parcels in the area. As of the time plaintiffs filed the instant lawsuit, Moores still owned most of them. The parcels also remained largely undeveloped, although he had subdivided several, including one known as "Unit 9."

In 1974, Moores's father acquired from the State Water Resources Control Board a permit for a surface water diversion project on Mallo Pass Creek. Around the same period of time, Moores drilled a well, referred to as the "No. 9 well," to service the anticipated Unit 9 subdivision. The well lies to the east and about 200 feet above the Unit 9 parcel, which, itself, is higher in elevation than most of the property in the Irish Beach area. Moores did not, however, put the well into operation.

Some 13 years later, in 1988, plaintiffs and the District entered into a water development agreement. Plaintiffs did so to secure a commitment from the District to provide water to their anticipated development. This lengthy agreement referenced various easements and rights-of-way necessary for the development of two water sources—the No. 9 well and the Mallo Pass Creek diversion project.

The agreement provided, inter alia, that plaintiffs would assign to the District "all of their rights, titles and interests in the existing 276.5 foot well located east of Unit #9 and more specifically described" in an attached exhibit. This "assignment to the DISTRICT of all rights, titles and interests

in the No. 9 well [was] intended to facilitate, in part, the DISTRICT's ability to provide water to the existing eleven (11) acreage parcels north of Irish Creek and east of Units 7, 8 and 9" developed by plaintiffs. The agreement also spelled out plaintiffs' reimbursement obligations to the District should the No. 9 well fail in "years one (1) through nine (9) of its operation," which ranged from $25,000 to $2,777.78.[1]

The agreement also included provisions pertaining to the Mallo Pass Creek project, the details of which are not pertinent to the well claims.[2]

Plaintiffs duly executed an assignment of rights in the No. 9 well. They also granted an easement for the No. 9 well, as set forth in a conveyance entitled, "Soderberg Tank Site, Well, and Pipeline Easement" (Soderberg easement).[3] (Some capitalization omitted.) It is this document that is the source of the well claims, and we discuss it in detail in subsequent sections of this opinion.

In 2000, more than a decade after the parties entered into the water development agreement, the District enacted a temporary moratorium on new wells, consistent with the policy of the County Division of Environmental Health to notify and obtain the approval of any water district prior to issuing

---

[1] The agreement also defined the term "fails" and provided for some adjustments to the District's water delivery obligations to the enumerated parcels in the event of a failure.

[2] We discuss these provisions, *infra*, in connection with our discussion of the Mallo Pass Creek claims.

[3] Plaintiffs additionally granted "an easement(s) to use (a) electricity and other utilities, including water distribution lines and telephone lines, to operate and run service to and from the Unit 9 Well on [plaintiffs'] Property and (b) water distribution lines to operate and run service to and from the water storage tank located on the aforementioned 60' by 60' tank site easement."

a permit to drill a well and pursuant to the District's statutory authority to protect and maintain the water resources within its jurisdiction. Although denominated a "temporary" moratorium, it was still in effect at the commencement of trial in 2012 (and apparently remains in effect).

On application, the District could grant an exception to the moratorium, and as the time of trial, had granted two exceptions, both with usage limits of 300 gallons per day (commensurate with the average residential daily per-gallon use number the District used for certain regulatory reporting purposes). However, only one of these wells was developed. Moores, himself, submitted an application for a well for "Community/Industrial" use on property referred to as the "acreage parcels," which were "next to" a tank site referenced in the Soderberg easement. The application was denied on the ground "private wells are currently not allowed" within the District, citing the well moratorium. Moores did not seek an exception.

The year the District adopted the moratorium, plaintiffs sued to resolve issues concerning development of the Mallo Pass Creek project. In 2002, the parties entered into a settlement agreement which, among other things, mutually rescinded the 1988 water development agreement. The only detail of the 2002 settlement agreement pertinent to the well claims is that the agreement left intact all of the easements and assignments plaintiffs had previously conveyed to the District, and also confirmed the District's rights in the No. 9 well.[4]

---

[4] We discuss this settlement agreement, as well as a previous lawsuit brought by plaintiffs that was settled in 1995, *infra,* in connection with our discussion of the Mallo Pass Creek claims.

Several years later, in 2005, the District began discussing at publicly-noticed Board meetings concerns about the output of the No. 9 well. The minutes for the Board's May 14 meeting state, for example, "[t]he Unit #9 well is slowly starting to fail and exploration would be prudent at this point before it becomes inoperative. The well started production at 35 [gallons per minute (gpm)] and is now down to 12 gpm."[5] The reduced production was due to the condition of the aging well, itself, and not to any impairment of the subterranean water source.

The District's operational manager, Charles Acker, made several efforts to clean and rehabilitate the No. 9 well. Although flow would improve for a time, production largely remained in the vicinity of 12 gpm.

By mid-January 2006, Acker had met with Moores to talk about a replacement well. Moores suggested, in a letter to Acker, that the easement for the No. 9 well be slightly enlarged to accommodate a new well immediately next to the existing one, and Moores supplied a form easement for Acker to use. In exchange, Moores wanted the District to provide one additional hook up, should he need it for additional future development.[6]

At the March Board meeting, Acker reported the District had "an easement" and the District would need to confer with Moores or go through condemnation proceedings if it needed an additional easement. It is apparent from the record that in referring to "an" easement or "the" easement, Acker

---

[5] Apparently, the well had been producing at this rate since at least 1992, but at times prior to that, had produced considerably more water.

[6] Prior to a special assessment passed by District property owners in 2002 (which we discuss, *infra,* in connection with the Mallo Pass Creek claims), the charge for a new hook was $4,000. After the assessment, the charge was $150, since funding from the assessment largely subsidized the cost.

and the Board were referring to the Soderberg easement and viewed it as conveying a singular easement. The Board indicated a preference for reaching a negotiated agreement.

Six months later, at a September Board meeting, Acker advised that if the District was able to site a new well within the existing easement, it did not need "special permission" from Moores. If the District needed to "drill outside the easement," however, it would need to negotiate with him. In the latter event, the District was prepared to offer $.34 cents per foot for a new easement. Moores was present at this meeting.

By the middle of the following year, 2007, Acker had a description of several parcels the District was considering for new wells, one of which was owned by Moores' brother, Gordon Moores. Acker had also contacted a consultant to analyze whether the No. 9 well was in a confined aquifer and whether it would be feasible for the District to dig a new well at the same site.

In February 2008, Acker reported to the Board that the aquifer was not confined and it also appeared feasible to drill a new well near the No. 9 well. At that point, the District's goal was to drill two new wells, one next to the No. 9 well within the metes and bounds set forth in the Soderberg easement, and a second well at another location.

By June, Acker had met with Gordon and provided him with a map showing the possible well sites. Acker told Gordon the District's goal was to drill two new wells, "one next to the current well and within the easement and the second well at another location up on the hill." Gordon "seemed very willing to work with the District," telling Acker the District should "figure out where it wants to drill then inform him." Gordon also gave the District "permission to drill an exploratory well."

At the June Board meeting, Acker reported he had met with Gordon several times, and the minutes state, "At this point there appears to be 3 potential sites in addition to drilling near the existing well. A well driller had informed [Acker] that when drilling adjacent to the existing Unit #9 well, it is best to drill at least 30' away. [Acker] said he would look at the current site and talk to [William Moores], if needed, to go over the easement boundaries. Mr. Acker said he will get a driller lined up for the fall of 2008." Moores was also present at this Board meeting.

The District began drilling the new wells in August and began on a small site owned by the District. This well, referred to as the T2 well, produced water. However, the District has been unable to bring this well on line because of a dispute with Moores over access to electricity (which also became part of the instant lawsuit but is not at issue on appeal). The driller next moved to Gordon's property. This effort, however, did not produce water.

The driller then moved to the Soderberg easement area where the No. 9 well is located. In light of the well driller's reiterated and strong recommendation that a new well not be drilled immediately adjacent to that well, Acker indicated a second area delineated in the Soderberg easement about 500 feet away and in which the tank for the No. 9 well was situated. Given the severe incline of the access road to that area, Acker doubted it was passable for a well drilling rig. After taking a reconnoiter, the driller said he could get to the site and it was worth a try.

Before drilling commenced at the tank site, Acker had to get a permit from the county Planning Department. To get a permit, an applicant had to provide proof of a right to access the site. Acker therefore took a copy of the

Soderberg easement and submitted it with the application. The county duly issued the permit.

Drilling commenced at the tank site and the driller struck water, but required additional equipment to continue.

As Acker was leaving the site at the end of that first day of drilling, he met Moores on the access road. Acker was ebullient that they had hit water and eager to share the good news with Moores. According to Acker, Moores did not share his enthusiasm and said, "I don't want a well there." Acker was taken aback and pointed out it was an ideal location, since it was within the existing easement and the infrastructure was already in place in connection with the No. 9 well. According to Acker, Moores did not tell him to stop drilling. According to Moores, he did tell Acker to stop drilling.

In any case, the drilling resumed, and the well, referred to as the "T5 well," initially produced a generous amount of water.[7] The well draws from the same underground water source as the No. 9 well.

In mid-November, Moores' attorney wrote to the District, stating Moores and Acker had had a meeting set for September 18 to "discuss the District's undisclosed plans to drill test wells and to obtain any permissions that may be required," but had met each other on the access road the day before, at which time Acker told Moores a well had been successfully drilled on Gordon's property and the well driller was "setting up" to drill near the tank. The letter continued that Moores "had promptly informed" Acker that he (Moores) had "reviewed the recorded conveyances," it did not appear the District had been granted the right to develop a well at the tank site, and Acker should "not proceed with the drilling." Acker "then left to attend the

---

[7] It is not unusual for the initial output of a new well to far exceed what can be sustainably drawn over time.

activities at the well drilling rig," and it was "understood" the meeting the following day was cancelled. The letter "instructed" the District not to use the new well "for any purpose" until the parties reached "reasonable terms."

The District responded through counsel that it disagreed with Moores' view of the Soderberg conveyance.

Nearly one year after the T5 well was drilled, the State Department of Public Health, in August 2009, issued a permit for the District to begin using the well for public water purposes. New source capacity tests for the well done in 2008 had indicated a flow rate of approximately 40 to 50 gpm. The state applied a 75 percent reduction to this figure (reflecting the unreliability of new source testing) and approved a public use permit at a pumping rate of approximately 10 gpm.

Experience bore out that once the well was connected to the District's water system, 40 gpm was not a sustainable rate. In 2010, capacity tests indicated an average sustainable flow between 23 and 25.6 gpm. At trial, Acker described the output as "to a point where it's now a fraction of what it was to begin with."

The District historically used, and as of the time of trial continued to use, the No. 9 and T5 wells only when the surface flow in Irish Beach Creek, the District's principal water source, was too turbid to be efficiently filtered.[8] Thus, as of the time of trial, the District was pumping on average only six to nine gpm of water from the two wells, combined. The No. 9 well production had, by that time, also continued to decrease, and by the time of the phase III trial, was around 8 gpm.

---

[8] Due to an aging pipeline, by the time of trial, the No. 9 and T5 wells were also the only potential sources of water to service development of the Unit 9 parcel.

Shortly after the state issued the public use permit, plaintiffs filed the instant lawsuit, alleging, inter alia, causes of action for inverse condemnation, unjust enrichment, and trespass.

The trial court ruled on these claims over the course of three phases of trial. In phase I, on the basis of documents and stipulated facts, the court ruled the District, in drilling the T5 well, exceeded the scope of use allowed by the Soderberg easement and found it liable for inverse condemnation. In phase II, the court awarded $401,000 in compensation for the condemned property.[9] In phase III, the court found the District also liable for trespass and unjust enrichment, but ruled the damages were duplicative of the condemnation award.

Inverse Condemnation

Elements of An Inverse Condemnation Claim

"An inverse condemnation action, in contrast to a condemnation action initiated by the condemning public agency, is an eminent domain action initiated by one whose property was taken or damaged for public use. The principles of eminent domain law apply to inverse condemnation proceedings. [Citation.] The fundamental policy underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those benefited rather than allocated to a single member of the community." (*Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 601–602.)

Thus, to prevail on an inverse condemnation claim, the plaintiff "must establish (1) it has a protectable property interest, (2) there has been a taking

---

[9] The court also awarded pre-judgment interest ($163,232) and post-judgment interest ($11,560), as well as attorney fees ($553,637) and pre-judgment interest on part of these fees ($51,921.54).

of the property, and (3) the taking was for a public use." (*Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988, 1030.) "[I]n an inverse condemnation action, the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property before he or she can reach the issue of 'just compensation.' "[10] (*Scott v. City of Del Mar* (1997) 58 Cal.App.4th 1296, 1302.)

The Taking Determination

Scope of The Soderberg Easement[11]

The District's threshold defense to the well claims, advanced in the trial court and on appeal, is that the Soderberg easement "expressly granted"

---

[10] Whether there has been an inverse condemnation "is a mixed question of law and fact. [Citation.] In deciding a mixed question, the trial court must: (1) establish the historical facts; (2) select the applicable law; and (3) apply the law to the facts. We review the trial court's determination of the historical facts for substantial evidence but afford questions of law plenary review. If application of the law to the facts is essentially factual, the trial court's determination is reviewable under the clearly erroneous standard. ' "If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." ' " (*CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 391.)

[11] "The interpretation of an easement, which does not depend upon conflicting extrinsic evidence, is a question of law. [Citations.] [¶] . . . [¶] 'It is fundamental that the language of a grant of an easement determines the scope of the easement.' (*County of Sacramento v. Pacific Gas & Elec. Co.* (1987) 193 Cal.App.3d 300, 313 . . . ; see also Civ. Code, § 806 ['The extenet of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.'].) 'In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply. If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of

it "a well easement and water system appurtenances easement," which authorized the District to drill a well within the metes and bounds of either of the two areas described in the Soderberg easement.

The Soderberg easement states, in its entirety, as follows:

"Soderberg Tank Site, Well, and Pipeline Easement

"[(1)] A 60' Tank Site and water system appurtenances Easement lying within Section 32, Township 14 North, Range 16 West, M.D.B. & M. and being *more particularly described as follows*:

"[(2)] Beginning at a 3/4" rebar tagged LS3889 and being the Southeast corner of Parcel 2 as recorded in Case 2, Drawer 27, Page 41, Mendocino County Records; thence North 4° 43' 28" East along the easterly line of said Parcel 2, 60.00 feet; thence South 88° 49' 21" West, 60.00 feet; thence South 4° 43' 28" West, 60.00 feet to the southerly line of said parcel; thence along said line North 88° 49' 21: East 60.00 feet to the point of beginning, together with a 1 foot wide non-access strip along the easterly boundary of said tank site and a 14' road access and water system appurtenances and 30' diameter well easement lying within Section 32, Township 14 North, Range 16 West, M.D.B. & M. and being *more particularly described as follows*:

"[(3)] Commencing at a 3/4" rebar tagged LS3889 and being the Southeast corner of Parcel 2 as recorded in Case 2, Drawer 27, Page 41, Mendocino County Records; thence South 88° 49' 21" West, 60.00 feet; thence North 4° 43' 28" West, 30.00 feet to the point of beginning of the easement to be herein described and lying equally left and right of the following line: thence South 86° 19' 31" West, 178.67 feet; thence North 43° 24' 17" West, 254.97 feet to an existing well; thence South 47° 46' 12" West 229.30 feet, more or less, to an existing road as shown per said parcel map and a 30' diameter well easement around the well

---

the rights acquired.' " (*Van Klompenburg v. Berghold* (2005) 126 Cal.App.4th 345, 349; see *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 777 ["As with all contracts, the paramount goal of interpreting a writing creating an easement is to determine the intent of the parties. [Citation.] The parties' intent is ascertained from the language of the contract alone, 'if the language is clear and explicit, and does not involve absurdity.' "].)

referred to above, together with all water in said well and the right to extract said water." (Underscoring & italics added.)

As the underlined language shows, this conveyance essentially granted two easements: (1) "[a] 60' Tank Site and water system appurtenances Easement" and (2) "a 14' road access and water system appurtenance and 30' diameter well easement."

The first easement—for a "Tank Site and water system appurtenances"—contains no reference to a well. Nor does it contain any provision concerning the right to water drawn through a well. The metes and bounds of this 60' by 60' easement are described in the first and most of the second paragraphs of the conveyance.[12]

The second easement—for "a 14' road access and water system appurtenance and 30' diameter well easement"—is identified in the last three sentences of the second paragraph and is "more particularly described" in the

---

[12] A second conveyance pertaining to the tank, itself, was set forth in another document, recorded the same day as the Soderberg easement, and states as follows:

"100' Diameter Water Tank"

"A water tank and water system appurtenance easement as follows:

"Commencing at a 1 inch rebar with brass tag marked LS3889, per the Parcel Map recorded December 1, 1975; filed in Map Case 2; Drawer 27, Page 31, Mendocino County Records.

"Said point of commencement is the South 1/16 corner between Sections 31 and 32, Township 14 North, Range 16 West, Mount Diablo Meridian, and running thence North 56° 21" 35° West, 158.22 feet, thence South 53° 28", 05' West 388.35 feet, thence South 57° 26" 55' West, 228.31 feet to a point along the existing road and utility easement. Said point of beginning of the center line of a 20 foot easement, thence North 11°, 21" 37' East, 182.00 feet to a point which is the center of a Water Tank Easement with a 100 foot diameter."

third paragraph. This second easement, in contrast to the first, does refer to a "30' diameter well easement." It also grants rights to "all water in said well and the right to extract said water." The "more particular[]" description of this easement, set forth in the third paragraph, describes the situs of the No. 9 well, as shown by a comparison with the No. 9 well assignment of rights[13] and the description of the No. 9 well set forth in the water development agreement.[14]

---

[13] The assignment of rights in the No. 9 well reads as follows:

"Assignment of Water Rights in Well No. 9

"For good and valuable consideration, Moores Associates, a California partnership, and William M. Moores and Tona E. Moores, husband and wife, hereby assign to the Irish Beach Water District all of their rights, titles and interests in that existing 276.5 foot well ('the No. 9 well') located as described below:

"Commencing at a 3/4" re-bar tagged L.S. 3889 and being the Southeast corner of Parcel 2 as recorded in Case 2, Drawer 27, Page 41, Mendocino County Records; thence South 88° 49' 21" West, 60.00 feet; thence North 4° 43' 28" West, 30.00 feet; thence South 86° 19' 31" West, 178.67 feet; thence North 43° 24' 17" West, 254.97 feet to an existing well." (Some capitalization omitted.)

[14] The pertinent language of the water development agreement reads as follows:

"Description of the No. 9 Well

"The existing 276.5 foot well, referred to in that July 6, 1988 Water Development Agreement between William Moores, Tona Moores, Moores Associates, and the Irish Beach Water District as 'the No. 9 well,' is the well described below:

"Commencing at a 3/4" re-bar tagged L.S. 3889 and being the Southeast corner of Parcel 2 as recorded in Case 2, Drawer 27, Page 41, Mendocino County Records; thence South 88° 49' 21" West, 60.00 feet; thence North 4° 43' 28" West, 30.00 feet; thence South 86° 19' 31" West, 178.67 feet; thence North 43° 24' 17" West, 254.97 feet to an existing well."

Thus, the only "well" easement provided by the Soderberg easement was for the No. 9 well. It is also understandable why this conveyance expressly included an easement for the No. 9 well. Prior to its execution, there had been no conveyance granting a right of access to and use of that well. Neither the assignment of rights in the No. 9 well, nor the description of the No. 9 well in the water development agreement, constituted a recordable property interest in the well site.

As we have recited, the record reflects that the District consistently viewed the Soderberg easement as a singular easement and never doubted a replacement well could be sited within the metes and bounds of either locale identified in the conveyance. The District advances a number of arguments in defense of its reading.

It points out, for example, that the word "Well" appears in the title of the Soderberg easement and the phrase "water system appurtenances easement" appears in the first sentence of the first paragraph. This phraseology, says the District, means the "deed does not specify or limit the type of water system appurtenances"; rather, the "only limitation of appurtenances that may be used on the Soderberg easement is that they must appertain to a " 'water system.' " And according to the District, a well plainly "appertain[s]" to a water system. But this focus on a single word in the title and a single phrase in the first sentence, disregards the remainder of the document. Read in its entirety, it is apparent the Soderberg easement grants easements over two areas, only one of which is for a well, and that, specifically, is for the site of the No. 9 well.

The District also points out the "Soderberg deed and the Unit 9 well deed conveyed different interests in two different properties." The District asserts the No. 9 "well deed" conveyed "all rights in the well and a 30-foot

surrounding service easement," and the Soderberg easement conveyed "easement rights to a separate parcel about 450 to 600 feet away." The only record citation provided in support of this assertion is to the Soderberg easement, so we presume the District's point is that the Soderberg easement describes two different locales on plaintiffs' property. And, indeed, it does so—the tank site and the No. 9 well site. The salient point is that only the second locale is for a well.

The District additionally claims it is significant that the "words 'existing well' do not appear in the Soderberg deed" but rather, "appear only in portions of the [water development agreement] and other documents referring to the Unit 9 well." However, as we have discussed, a comparison of the metes and bounds description of the second easement conveyed by the Soderberg easement, with the metes and bounds description of the No. 9 well in the water development agreement shows the two descriptions are identical. The District further asserts it was "natural that the parties would reference the 'existing' Unit 9 well in the [water development agreement]" because it was the only well in existence at the time the agreement was made, and also claims use of the word " 'existing' " "implies that other wells not yet in existence were within the parties' contemplation." These assertions founder for all the reasons we have discussed.

The District further maintains that since the parties "contemplated" in the water development agreement the possibility the No. 9 well could fail within 10 years, but included no provisions addressing the consequences of such failure, this suggests the District had the authority to drill a replacement well, because if it did not, that "would have the absurd result of leaving the property owners on the 500-foot high ridge where the Unit 9 [well] was located literally high and dry," given the District's continuing

obligation to provide water. This eventuality, of course, was a matter the parties could have addressed in the relevant documents. But they did not. Furthermore, the agreement did address refund obligations and some modification of water delivery obligations in the event of a failure. The District also overlooks that at the time the parties executed these documents, the Mallo Pass Creek project was identified as a future, additional water source. In any case, the inferences the District urges us to draw do not, and cannot, alter the plain language of the Soderberg easement. (See *Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2014) 229 Cal.App.4th 549, 569 [" 'Courts will not add a term about which a contract is silent.' "]; *Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 59 ["We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there."].)

The District's reliance on cases such as *Barton v. Riverside Water Co.* (1909) 155 Cal. 509, *Ward v. City of Monrovia* (1940) 16 Cal.2d 815 (*Ward*), and *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358 (*Barnes*), is misplaced. In *Barton,* the high court held that the fact the defendant water company installed new wells in light of its failing wells to continue to extract the same amount of water to supply to its customers, did not entitle the overlying owners to an injunction, as the company had simply changed the point of diversion, which does not forfeit appropriative rights. (*Barton,* at p. 517.) There was no claim, however, that the company did not own or have the right to access the property on which it drilled the new wells.

In *Ward,* the high court held that the city did not forfeit its prescriptive easement to lay pipelines through a part of the plaintiff's property by replacing the deteriorated lines, at some points in a slightly different locale.

It was "well recognized," said the court, "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 material changes therein." (*Ward, supra,* 16 Cal.2d at pp. 821–822.) It has also been recognized that "an insubstantial change in the location of the means of diversion will not destroy the easement." (*Id.* at p. 822.) Even where the city had shifted the location of the line, it was not "placed on land over which the [city] had no right whatsoever," as its prescriptive easement carried 10- and 20-foot strips for maintenance for the enjoyment of its prescriptive water line easement. (*Ibid.*) While *Ward* suggests the District may have a secondary easement associated with the easement for the No. 9 well to replace that well, it does not suggest that the tank easement carries a secondary easement for an entirely different use, namely a well.

In *Barnes*, the Court of Appeal held the plaintiff first-priority appropriators did not lose their pre-existing right to lay a pipeline through an intervening property when they used the water on a different parcel. (*Barnes, supra,* 136 Cal.App.4th at pp. 1367–1371.) The court applied the principle discussed in the foregoing cases—that an owner of an easement can, within the confines of the easement, " 'make repairs, improvement, or changes that do not affect its substance.' " (*Id.* at p. 1370.) It ruled that conveying the same amount of water through the same pipeline, but to a different end location, did not materially increase the burden of the pipeline on the servient property. The court therefore rejected the defendants' assertion that the plaintiffs had exceeded the permissible scope of use of the

easement. (*Ibid.*) The defendants cited "to no authority holding that a person with a pipeline easement is forbidden from changing the destination of the water that runs through the pipeline" under the theory that this, in and of itself, "increase[d] the burden on the land through which the pipeline runs." (*Ibid.*) Again, while *Barnes* may pertain to the District's use of its pipeline and utility easements, it does not pertain to the use of the tank easement for a well.

The District also complains the "trial court based its decision" on "inapposite authority," *Woods Irrigation Co. v. Klein* (1951) 105 Cal.App.2d 266. We, however, are reviewing the Soderberg easement *de novo*, so while we may consider the basis for the trial court's decision, we are not bound by it. As we have discussed above, the plain language of the Soderberg easement, read fully and in context with the companion documents executed at the same time, evidences that two easements were conveyed by the Soderberg easement. *Woods* adds nothing to our analysis.

Finally, the District's reliance on *Trask v. Moore* (1944) 24 Cal.2d 365 (*Trask*), is misplaced. The issue in that case was whether an *existing* water piping system that lay outside the bounds of property acquired by the plaintiff was appurtenant to an *existing* well and pump on the property, and as such, had the "attributes of a fixture or appurtenance to real estate" and thereby passed to the plaintiff on acquisition of the property. (*Id.* at pp. 367–368.) The Supreme Court held that it did, pointing out the piping system was "not separable from . . . the whole" and the waterworks that had been constructed on and off the property "were functioning as an integrated system." (*Id.* at p. 368.) "Here the principle thing was the pumping works, and the piping system attached thereto was an incident to the main machinery—the pumps and the wells. Such pipe extension was necessary to

the enjoyment of the principal thing and indispensable in the supply of water. . . ." (*Ibid.*)

Thus, *Trask* has no bearing on the issue here—the interpretation of the Soderberg easement and whether it authorized the District to drill a second well sometime in the future, within the metes and bounds of the first easement granted by that conveyance, i.e., the water tank easement. We also note that *Trask* held the existing piping system was appurtenant to the existing *pumps and wells* (*Trask, supra,* 24 Cal.2d at p. 368), whereas here the District is claiming the opposite—that the new well is appurtenant to the existing storage tank. This is not only a strained reading of *Trask*, it is, more fundamentally, contrary to the plain language of the Soderberg easement.

In sum, we conclude, as did the trial court, that the District exceeded the scope of use of the Soderberg easement and, specifically, the tank easement.

The Property "Taken"

Based on its conclusion that the District exceeded the scope of use of the tank easement, the trial court concluded the District not only took what was essentially an additional easement within the bounds of the existing tank easement, but additionally took the T5 well and plaintiffs' "overlying" water rights. In its statement of decision on liability for inverse condemnation, the court stated, for example, that the District had "taken and damaged, and it continues to 'take' or 'damage' . . . [plaintiffs'] property by . . . pumping water from [the T5] well" and the court would determine the appropriate compensation "for the water taken and to be taken in the future." The court, thus, "adjudged" the District to be "liable to [plaintiffs] for inverse condemnation" of, among other things, "the T5 Well" and "water taken or pumped on a measure of damages yet to be determined from the T5 Well."

Accordingly, the court would, in the next phase of trial, determine the appropriate valuation of "the well" and the "water taken or pumped or to be taken or pumped from the T5" well.

The District maintains the trial court erred as a matter of law in ruling that it took the T5 well, itself, and on this point the District is correct. What the District took was an enlarged easement—enlarged in the sense that the District put the tank easement to an additional use. Or stated another way, what the District took was an additional easement within the bounds of the existing easement, and it took this new easement for the purpose of developing an appropriative well.

The purpose for which an agency condemns property—or the use to which the condemning agency intends to put the condemned property—is *not* property that is "taken." Rather, a condemning agency can only take property that exists at the time of the taking and in which the owner has a property interest. In short, a condemning agency, by definition, cannot "take" the very property *it* constructs on the property it has condemned. (See *City of Perris v. Stamper* (2016) 1 Cal.5th 576, 600–601 (*Stamper*) [fair market value of condemned property shall not include any increase or decrease in value attributable to the " 'project for which the property is taken,' " quoting Code Civ. Proc., § 1263.330]; see generally 1 *Condemnation Practice in California* (Cont.Ed.Bar 3d ed. 2020) *Condemnation Practice,* §§ 4.24, p. 4-57 (*Condemnation Practice*) [condemnation compensation includes "value of fixtures and other improvements *in place*" at the time of condemnation (italics added)], 4.55, pp. 4-91 to 4-92.) Thus, a condemning agency that takes an easement to build a sewer line, for example, does not "take" the line it subsequently constructs. (See, e.g., *County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1273 (*County Sanitation Dist.*)

[condemning easement for replacement sewer line].) Nor does a condemning agency that takes an easement to build a high voltage transmission line "take" the line and stanchions it subsequently erects. (See, e.g., *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1286 (*San Diego Gas & Electric Co.*) [condemning easement for electric transmission lines].)

Here, the District took an additional easement over property that, at the moment of taking, was raw mountain terrain within the tank easement. The District did not take the well it then constructed and paid for with public funds. Accordingly, the T5 well stands in marked contrast to the No. 9 well, which plaintiffs drilled (but did not make operational) and in which they had a property interest, which they subsequently conveyed to the District.

The District also maintains the trial court erred as a matter of law in ruling that it took the water rights plaintiffs had by virtue of their ownership of the overlying property. On this point, the District is again correct.

At this juncture, we turn to *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 (*Barstow*), in which our Supreme Court clarified and definitively explicated the fundamental principles that control in this complex area of the law.

"Courts typically classify water rights in an underground basin as overlying, appropriative, or prescriptive. [Citation.] An overlying right, 'analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto.' [Citation.] One with overlying rights has rights superior to that of other persons who lack legal priority, but is nonetheless

restricted to a reasonable beneficial use."[15] (*Barstow, supra,* 23 Cal.4th at p. 1240, fn. omitted.)

"In contrast to [overlying] owners' legal priorities, . . . '[t]he right of an appropriator . . . depends upon the actual taking of water. Where the taking is wrongful, it may ripen into a prescriptive right. Any person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes. . . . Any water not needed for the reasonable beneficial use . . . is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed [citation]. When there is a surplus, the holder of prior rights [such as an overlying owner] may not enjoin its appropriation [citation]. Proper overlying use, however, is paramount and the rights of an appropriator, being limited to the amount of the surplus [citation], must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the [adverse, open and hostile] taking of nonsurplus waters. As between overlying owners, the rights, like those of riparians, are correlative; . . . each may use only his reasonable share when water is insufficient to meet the needs of all [citation]. As between appropriators, however, the one first in time is the first in right, and a prior appropriator is entitled to all the water

---

[15] California law further distinguishes between two classes of subterranean waters: a "subterranean watercourse (or definite underground stream) underflow of a surface stream" and "percolating groundwater." (1 Slater, *California Water Law and Policy* (2020) § 3.01 at p. 3-6.) "Riparian rights" attach to "watercourses, including subterranean streams and subsurface flows." (*Ibid.*) "[O]verlying rights" are "appurtenant to real property overlying sources of percolating groundwater." (*Ibid.*) These classifications bear principally on the extent of regulatory control over the water. (*Id.* at p. 3-7.) In this case, we are dealing with water rights possessed by an overlying owner, not by a riparian owner.

he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any [citation]." (*Barstow, supra,* 23 Cal.4th at p. 1241.)

Thus, " '[p]rescriptive rights are not acquired by the taking of surplus or excess water,' " because the overlying property owner has no right to or interest in such water and therefore the taking of such water is not "adverse" to the "overlying owner." (*Barstow, supra,* 23 Cal.4th at p. 1241, quoting *California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 726.)

" '[But] [a]n appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right [supplanting the overlying owner's right to apply the water to reasonable and beneficial use] where the [appropriator's] use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right.' " (*Barstow, supra,* 23 Cal.4th p. 1241.)

The principle of "reasonable use," which limits the rights of riparian owners and overlying owners was made a part of the state's water law by constitutional amendment in 1928. (*Barstow, supra,* 23 Cal.4th at pp. 1241–1242.) " '[T]he rule of reasonable use as enjoined by . . . the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right.' [Citation.] 'Under this new doctrine, it is clear that when a riparian or overlying owner brings an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such action are riparian or overlying owners, and, on the basis of such finding, issue [an] injunction. It is now necessary for the trial court to determine whether such owners,

considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. From a consideration of such uses, the trial court must then determine whether there is a surplus in the water field subject to appropriation.' " (*Id.* at pp. 1241–1242.)

Thus, while " 'the law at one time was otherwise, it is now clear that an overlying owner or any other person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes. [Citations.] Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those [riparian or overlying owners] who have a lawful priority. [Citation.] Any water not needed for the reasonable beneficial uses of those [owners] having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for nonoverlying uses, such as devotion to a public use or exportation beyond the basin or watershed.' " (*Barstow, supra*, 23 Cal.4th at p. 1244; see generally 1 Slater, *California Water Law and Policy*, *supra*, §§ 3.07[4]-[5] at pp. 3-19 to 3-21, 3.08 at pp. 3-21 to 3-22.)

Accordingly, " 'when there is a surplus, whether of surface or ground water, the [riparian or overlying owner holding] prior rights may not enjoin its appropriation. [Citations.] Proper overlying use, however, is paramount, and the right of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the taking of nonsurplus waters.' " (*Barstow, supra,* 23 Cal.4th at pp. 1244–1245, quoting

City of Pasadena v. City of Alhambra (1949) 33 Cal.2d 908, 925–926 (*City of Pasadena*).)

Thus, as *Barstow* spells out, plaintiffs' water rights as overlying property owners extended *only* to that amount of the subterranean water they could put to reasonable and beneficial use on their overlying property. They had no rights to any additional—or "surplus"—water under their property unless they made actual use of such surplus and thereby established appropriative rights thereto.

Accordingly, under *Barstow* and other controlling authority, plaintiffs had no inherent "rights" as overlying owners to all the water under their property and, likewise, no inherent "rights" to all the water drawn or to be drawn through the T5 well. To establish that the District took or interfered with their *overlying* water rights, plaintiffs had to prove that the District used *more* than the surplus water under their property. (See *Barstow, supra,* 23 Cal.4th at pp. 1241–1242 [overlying owner cannot obtain relief against an appropriator unless the owner's reasonable and beneficial use is imperiled]; *City of Pasadena, supra,* 33 Cal.2d at pp. 926, 930 [same].) Plaintiffs presented no such evidence. To the contrary, it was undisputed plaintiffs never drew water from the No. 9 well, and there was no evidence they ever drew subterranean water from any other source on their overlying property.

Plaintiffs point out that they claimed, and the trial court, in turn, found, that by drilling and casing the No. 9 well, they put the subterranean water to use. Plaintiffs cite no authority supporting the notion that merely drilling and casing a well that is never made operational constitutes reasonable and beneficial use of the water. Nor is there any such authority. To the contrary, it is abundantly clear from controlling Supreme Court cases and other relevant authority that reasonable and beneficial use means *actual*

reasonable and beneficial use, since until *actual* use is made by an overlying owner, subterranean waters remain available for appropriation.[16] (See, e.g., *Barstow, supra,* 23 Cal.4th at p. 1241; *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 85 (*Wright*) [until a riparian or overlying owner actually puts water to reasonable and beneficial use, it is all available for appropriative use].)

Thus, under the fundamental principles set forth in *Barstow* and other water rights cases, the District did not take or impair plaintiffs' overlying water rights. (See *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 142–145 [while plaintiffs had riparian rights of reasonable use, they had no right to any additional flow and therefore did not prove that the water district took or impaired a compensable property interest].) To the contrary, the District has acknowledged that any appropriative right it has, or may acquire, in connection with the T5 well is secondary to plaintiffs' overlying rights, and that if plaintiffs should, in the future, put the water to reasonable and beneficial use on their overlying property, their use would have priority over any appropriative use by the District.[17] (See *Wright, supra,*

---

[16] In the trial court, plaintiffs further argued that their assignment of all rights to the No. 9 well and the water drawn therefrom, merely authorized the District to act as the manager of *their* water system. In other words, according to plaintiffs, they were "using" the underground water through the efforts of the District. Again, plaintiffs cited no authority supporting this notion of supposed use of the underground water, and it is contrary to the plain language of the assignment of rights in the No. 9 well and the Soderberg easement.

[17] This is in contrast to the District's rights in connection with the No. 9 well. Because plaintiffs conveyed their rights to "all water in said well and the right to extract said water," they conveyed their overlying rights to the non-surplus water to the extent drawn through that well. However, they did not, and could not, convey any appropriative rights to the surplus water, since they had no such rights.

174 Cal.App.3d at p. 84 [overlying right does not depend on use and is not lost by non-use unless extinguished by a prescriptive user drawing non-surplus water].)[18]

The trial court appears to have ultimately conflated overlying water rights and appropriative water rights, as reflected by its statement of decision on compensation. This statement of decision, like the court's takings statement of decision, variously—and incorrectly—describes plaintiffs' loss as follows: The District's "usurpation of water through this new T5 well was a taking of Moores rights as overlyers." The District's drawing of water through the T5 well "was nothing else but a piracy of Moores' rights as overlyers to water beneath their land." The District has offered no method of determining fair compensation "for the loss to Moores of their right as overlyers to the water being extracted."

The court also stated, in the course of rejecting the District's assertion that it was an appropriator, that if a public utility could "intrude[] on adjoining private property and drill[] a well . . . and extract[] water for a public purpose" that would "leave[] the owner of the overlying water rights unable to sell those rights taken by the utility. The landowner could also by law be left in a legally subrogated position of priority to the offending utility company should any subsequent well be developed" by the property owner. In short, the trial court viewed the District as having taken from plaintiffs a supposed right to become an appropriator at some unspecified time in the

---

[18] Because the District exceeded the scope of use of the tank easement, it could not claim an appropriative right in the water drawn through the T5 well. (See generally *California Water Law and Policy, supra,* § 2.16[2] at pp. 2-103 to 2-105.) Rather, in using the T5 well, the District commenced prescriptive use of both the easement and surplus water, which uses could, had they continued for the requisite period of time, have ripened into legally protected rights of access and appropriation.

future, which right has been permanently impaired because, should they someday become appropriators, their appropriative rights will be secondary to the District's appropriative right. In other words, the court recognized, as within the ambit of an overlying owner's water rights, a supposed inchoate appropriative right to become an appropriator at some unknown time in the future—which inchoate right a public entity can "take," as the District purportedly did here, and for which it must pay just compensation.[19]

However, as *Barstow* explains, *overlying* water rights do not encompass any right to divert subterranean waters for use outside the overlying property, let alone any right to divert surplus water for such use. (*Barstow, supra,* 23 Cal.4th at pp. 1240–1244; *City of Pasadena, supra,* 33 Cal.2d at p. 927.) Accordingly, overlying rights, by definition, do not encompass any supposed inchoate appropriative right to future appropriative use. Furthermore, appropriative water rights come into existence upon *actual* diversion and use of surplus water. The notion that an overlying owner has a compensable right to the mere potentiality of establishing appropriative rights at some unknown time in the future, cannot be reconciled with this authority. (*Barstow,* at p. 1241; see generally *California Water Law and Policy, supra,* § 2.17 at p. 2-106 [California water policy weighs against "inchoate" appropriative rights].)[20]

---

[19] This tracks Moores' testimony at trial, where he claimed to have "lost" the ability to drill the T5 well, himself, and to sell it and the water it produces (he presumed to the District) for use on other parcels. In fact, he admitted to claiming he had lost "appropriative" rights.

[20] Courts have excused actual diversion and use only in exceptional circumstances, in a handful of appropriator priority disputes, for example, where the appropriator has put in place all of the infrastructure necessary to make the diversion, the appropriative use is imminent, and the appropriator acts with due diligence to fully perfect the appropriative right. (See generally

Nor is there any way of measuring the extent of a supposed inchoate appropriative right to become an appropriator at some unknown time in the future. The extent of an appropriative right is defined by the amount of water actually diverted and used. (See generally, *California Water Law and Policy, supra,* §§ 2.20 at p. 2-123 [an "appropriator possesses a right to use a specific quantity of water" based "upon actual use"], 2.21 at 2-123 to 2-124 [discussing quantification of appropriative right].) An inchoate right to become an appropriator at some unknown time in the future is utterly unmeasurable. Further, priority among appropriators has, since the inception of water rights under California law, been governed by the first-in-time rule. (See *Barstow, supra,* 23 Cal.4th at p. 1241; *City of Pasadena, supra,* 33 Cal.2d at p. 927; see generally *California Water Law and Policy, supra,* § 2.19 at p. 2-122; *id.* Part J. at p. 2-144.) We cannot fathom how an inchoate appropriative right to divert water at some unknown time in the future could be accounted for in this established order of appropriative rights.[21]

California Water Law and Policy, supra, § 2.17, pp. 2-106 to 2-113.) That plaintiffs drilled the No. 9 well to provide water for their anticipated development of the nearby Unit 9 parcel suggests they may have, decades ago, entertained the idea of establishing appropriative rights. But they never made the well operable and, more than a decade later, conveyed all of their rights in that well and in the water drawn therefrom to the District. Accordingly, the circumstances here do not come close to those required before a court will give legal protection to an imminent appropriative right.

[21] As we have discussed, appropriative rights can also be established by prescription. (See generally *California Water Law and Policy, supra,* Ch. 4, Part A at p. 4-4.) Once such wrongful use continues for the requisite period of time, it ripens into a fully protected appropriative water right. (See *Barstow, supra,* 23 Cal.4th at p. 1241; *City of Pasadena, supra,* 33 Cal.2d at p. 925 ["Where a taking is wrongful, it may ripen into a prescriptive right."].) Again, we cannot see how the creation and protection of prescriptive

Finally, the notion of an inchoate appropriative right to divert and use surplus water at some unknown time in the future is at odds with one of the fundamental public policies that underlie California's water law—maximizing the employment of our state water resources for the benefit of our citizenry. (Cal. Const., art. X, § 2 ["because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable"].) "Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority." (*City of Pasadena, supra,* 33 Cal.2d at p. 925; accord, *Bartow, supra,* 23 Cal.4th at p. 1244.) This is one of the reasons why appropriative rights can be lost through non-use. (See generally *California Water Law and Policy, supra,* §§ 2.31 at pp. 2-147 to 2-150, 4.14[4] at pp. 4-33 to 4-34.) The notion of an inchoate—i.e., an unused—appropriative right to divert and use surplus water at some unknown time in the future is wholly antithetical to the constitutionally ensconced policy to maximize beneficial uses of our state waters. (See *Wright, supra,* 174 Cal.App.3d at pp. 86–87 [unexercised water rights are "unrecorded, of unknown quantity," and outside any regulatory control, and "wasteful to the extent it deters others from using water for fear of its ultimate exercise"].)

Thus, under the fundamental principles set forth in *Barstow* and other pertinent authorities, plaintiffs did not, by virtue of their status as overlying

---

appropriative rights can be reconciled with the notion that inherent in an overlying owner's water right is a legally protected inchoate appropriative right to divert and use surplus water at some unknown time in the future.

owners, have any legally protected right to become appropriators at some unknown time in the future.

Nor can plaintiffs recharacterize their asserted loss as loss of their "right to develop" the surplus water under their property. This is simply another way of saying they had an inchoate appropriative right to divert and use the surplus water at some unknown time in the future. However, no such right exists under our water law. There are, indeed, condemnation cases where owners have been compensated for loss of the " 'right to future exploitation of the undeveloped natural resources,' " such as mineral deposits and petroleum reserves, laying within the condemned property. (E.g., *San Diego Gas & Electric Co v. Schmidt* (2014) 228 Cal.App.4th 1280, 1287, 1289–1290 [land taken had minable granite deposits]; *Ventura County Flood Control Dist. v. Campbell* (1999) 71 Cal.App.4th 211, 219–220 (*Campbell*) [land taken had aggregate deposits].) In those cases, however, the property owners *owned* the natural resources in their property. That is not the case when it comes to underground water. As we have discussed, overlying owners have only a limited right to use such water—specifically, to make reasonable and beneficial use of the water on their overlying property. They have no other legally protected water right.

The Compensation Determination

Fundamentals of Just Compensation

The constitutional requirement that a private property owner must be paid just compensation for property taken for public use "is based on the 'basic premise that just compensation is measured by the damage to the condemnee—what the property owner has lost—rather than the benefit to the condemner. [Citations.] "The principle sought to be achieved by the concept of just compensation is to reimburse the owner for the property

interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken." ' " (*Redevelopment Agency v. Tobriner* (1989) 215 Cal.App.3d 1087, 1098 (*Tobriner*), quoting *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 83.) However, while an owner must be paid the fair value of the property, he or she " 'is not entitled to more.' " (*Tobriner,* at p. 1098, quoting *United States v. Virginia Electric Co.* (1961) 365 U.S. 624, 633.) The condemnee is entitled to be reimbursed "for the actual value of what he or she has lost—no more and no less." (*Tobriner,* at p. 1098; accord, *County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1279 (*County Sanitation Dist.*).)

"The Legislature has defined the measure of just compensation as 'the fair market value of the property taken.' (Code Civ. Proc., § 1263.310.) 'The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.' ([Code of Civ. Proc.,] § 1263.320, subd. (a).) 'As [Code of Civil Procedure] section 1263.320 indicates, the fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the "highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value." ' " (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 965 (*Metropolitan Water Dist.*), fn. omitted, quoting

City of San Diego v. Neumann (1993) 6 Cal.4th 738, 744; accord, *Stamper, supra,* 1 Cal.5th at pp. 598–599.)

Generally, "[t]he method of valuation of an easement imposed upon property by a public agency (an easement in gross) is determined as follows. (Clarke, *Easement and Partial Taking Valuation Problems* (1969) 20 Hastings L.J. 517, 518–535.) First, the fee simple of the strip taken, before and after imposition of the easement, is valued. [Citation.] The difference in the before and after values is the value of the easement. [Citation.] This computation is made based on the quantity and quality of the rights in the fee taken by the easement, equated to a percentage of the fee value. For example, a right to use the surface of the land takes essentially the entire fee interest, leaving the owner of the fee with only a nominal value or right of reverter. [Citation.] In such a case, the value of the easement may be 99 percent of the fee value. On the other hand, an underground sewer easement may leave the fee owner with substantial use of the strip. In such a case, the value of the easement may be a much smaller percentage of the fee value, e.g., 25 to 50 percent. [Citation.] Alternatively, if a public entity seeks to condemn an easement over land already subject to an easement, the value of the second easement is the difference in value of the strip of land before and after the imposition of the second easement. This value may only be nominal." (*County Sanitation Dist., supra,* 17 Cal.App.4th at pp. 1279–1280; see generally 1 *Condemnation Practice, supra,* § 4.80 at pp. 4-130 to 4-132.1.)

In cases where the burden of the easement goes "beyond the strip" of land acquired for the easement, "[a]nother approach to the valuation of the taking" is "to consider the burden placed on the entire property, not just the area of the easement itself." This approach "of considering the entire parcel

does not separate the value of the taking of the specific easement area condemned from any damage to the balance of the land; the totality of the burden is addressed." (1 *Condemnation Practice, supra,* § 4.80 at p. 4-131.)

As we have observed, it has been "repeatedly reiterated that just compensation is measured by the damage, if any, to the condemnee, rather than the benefit to the condemnor. [Citations.] Only the change in the value of the condemnee's property is relevant, not the effect of the condemnation on the value of the property taken." (*Tobriner, supra,* 215 Cal.App.3d at p. 1100.) " 'The beneficial purpose to be derived by the condemner's use of the property is not to be taken into consideration in determining market values, for it is wholly irrelevant.' " (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 491, quoting *People v. La Macchia* (1953) 41 Cal.2d 738, 754, overruled on another ground as stated in *Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679–680.)

This does not mean, however, that an owner cannot show that one of the highest and best uses of his or her property in the reasonably near future is the same use for which the condemner is acquiring the property. Thus, in *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860 (*Decker*), for example, our Supreme Court concluded the property owner was entitled to present evidence that the highest and best uses of her residential property, which lay in the landing path for the Los Angeles Airport, included use as a parking facility, even though that was among the uses contemplated by the city in condemning the property for expansion of the airport facilities. (*Id.* at pp. 867–869.) The high court explained that *if* (a) the property was zoned for such use, or there was a reasonable probability it could be rezoned for such use in the near future, and (b) there was a need for such use and a private market to develop the property for such use, then the owner would not

transgress the general rule that the condemned property cannot be valued on the basis of the condemnor's use of the property. (*Id.* at pp. 868-869.)

By the same token, where "the government provides the only market or demand for the proposed use," the owner cannot claim that that use is among the highest and best uses of his or her property. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1062 (*Rancho Vista*). Valuing the property on the basis of such use would be "tantamount to a valuation of the property in the hands of the condemner," rather than its value to property owner. (*Ibid.*) Accordingly, the owner in *Rancho Vista*, whose undeveloped property was being condemned for a county jail, could not claim the highest and best use of his property was for a "private" prison facility, as incarceration facilities exist and operate only pursuant to government action and direction. (*Id.* at p. 1064 [there is no "private sector 'supply and demand' " for prisons].)

As *Decker* makes clear, regulatory constraints on use must be taken into account in determining highest and best use and, in turn, the value, of condemned property. (See *Decker, supra,* 18 Cal.3d at p. 869 [owner had the "burden of establishing that it was reasonably probable under the zoning restrictions that private developers would put the property to such use," namely a commercial parking lot]); see also *Stamper, supra,* 1 Cal.5th at p. 599 [factors in determining just compensation include " 'lawful legislative and administrative restrictions on property, which a buyer would take into consideration in arriving at fair market value' "]; *San Diego Gas & Electric Co., supra,* 228 Cal.App.4th at p. 1289 ["The highest and best use is defined as 'that use, among the possible alternative uses, that is physically practical, legally permissible, market supportable, and most economically feasible.' "]; see generally 1 *Condemnation Practice, supra,* §§ 4.9 at pp. 4-27 to 4-28, 4.12

at pp 4-35 to 4-39 [zoning restrictions], 4.17 at pp. 4-44 to 4-45 [other land use controls].)

In many cases, application of these basic just compensation principles is relatively straightforward, even where the condemning agency takes an easement. For example, if an entity condemns an easement for a road that, for all practical purposes, prevents access to a reasonably accessible gold deposit in the condemned property, the entity will effectively take the fee and the owner would be entitled to compensation reflecting the value of that mineral resource. But that is because, as we have discussed, the property owner owns the mineral rights (unless they have been severed and sold to another party) and therefore has a legally protected property interest in the mineral resource capable of being sold in the private marketplace. That is *not* the case with respect to subterranean water. The only legally protected right an overlying property owner has to that water is the right to reasonable and beneficial use on the overlying property. And, here, the District did not take or impair plaintiffs' overlying rights. Rather, it took an additional easement for the purpose of developing a well to acquire an appropriative right in the underground water—a right plaintiffs did not possess. Accordingly, the instant case does not fit neatly into the traditional just-compensation paradigm.

The Condemnation Award

We now turn our attention to the trial court's condemnation award. The court adopted the compensation methodology and valuation opinion—$401,000—of one of plaintiffs' experts, Deborah Stephenson. Stephenson was asked to render an opinion on, and prepared a report on, the "Valuation of Developed Groundwater From the T5 Well." To do so, she utilized a "replacement cost approach," which "estimate[d] the cost of reproducing or

replacing an equivalent quantity and quality of water" as that supplied by the T5 well. "The premise of the methodology," Stephenson explained, "uses the costs of a replacement alternative to signify the value of the subject asset," the "subject asset" being the asset that has been taken. Or stated another way, "[t]he replaced asset is assumed to provide a direct substitute for the original" property that has been taken, the "original" property here being the T5 well and all the water it produced. (Italics omitted.)

Stephenson acknowledged her replacement cost analysis *assumed*, based on the trial court's takings decision, that both the T5 well and all of the water that had been drawn and would be drawn through that well "was part of the assets inversely condemned" (the other supposed "parts" being the existing infrastructure and access serving the No. 9 well and tank easements, which she did not value and which we discuss, *infra*).

Stephenson first concluded the previously planned Mallo Pass Creek project served as the most appropriate comparative replacement asset. She next determined the respective costs to build the T5 well and the Mallo Pass Creek project as of the time of the taking. She then backed out what she characterized as *pre*-condemnation costs, or "sunk" costs. For the T5 well, these included the cost of drilling the well. The resulting post-condemnation costs for the T5 well totaled $33,714; those for the Mallo Pass Creek project totaled $522,414. Stephenson next adjusted for a difference in the water production of the two. She assumed the T5 well produced 40 gpm, and the Mallo Pass Creek project would produce 48 gpm, and accordingly reduced the Mallo Pass Creek post-condemnation comparative cost to $435,345. She then subtracted the T5 post-condemnation costs, which resulted in a cost for the comparative asset of $401,631, which represented the value of the "developed water from the T5 well."

Stephenson's valuation opinion suffers from the same analytical errors that afflict the trial court's takings determination. First, she assumed, based on the court's takings determination, that the District took the T5 well, itself. Her report states, for example, that "[a]t the time of the inverse condemnation, the subject property [i.e., the T5 well] was in the mid stages of development. The well was drilled, however some of the testing, control panels, wiring and other improvement items were not yet completed." As we have discussed, the District did not take the well *it* drilled and developed with public funds. What the District took was an additional easement on the raw land within the tank easement, for the purpose of developing an appropriative well. Indeed, Stephenson's (inaccurate) statement in her report—that all of the associated components required to make the T5 well operational "were not yet completed"—is a non sequitur. A condemning agency does not "condemn" *post*-condemnation improvements *it* makes on the condemned property.

Stephenson next assumed, based on the trial court's takings determination, that plaintiffs had rights to *all* of the water drawn through the T5 well and that the District, in turn, took those rights, leaving plaintiffs with no rights to the underground water source from which the T5 well draws. She acknowledged she made no determination as to how much of the underground water plaintiffs could even theoretically put to reasonable and beneficial use on their overlying property, let alone how much they actually put to such use. She further acknowledged she had not been retained to render an opinion, nor did she have any opinion, as to whether plaintiffs actually owned all of the water drawn through the T5 well. In short, she had no idea whether plaintiffs, in fact, owned the property she valued.

As we have discussed at length, contrary to Stephenson's assumptions, plaintiffs did not own or, more accurately, have rights to, all of the water drawn through the T5 well. Rather, they had only overlying rights, entitling them to reasonable and beneficial use of the water on their overlying property. Nor, as we have discussed, did the District take or impair those rights. Indeed, Stephenson's opinion ultimately assumed, based on the trial court's taking determination, that plaintiffs had inchoate appropriative rights to divert and use the surplus water under their property at some unknown time in the future. However, as we have discussed, no such inchoate appropriative right exists under our water law.

Thus, while "replacement value" may be an appropriate methodology in some condemnation cases, the validity of its application in any particular case depends on correctly identifying the property that was taken and is theoretically being replaced. (See generally 1 *Condemnation Practice, supra,* § 4.27 at p. 4-60.) Here, Stephenson valued property that, as a matter of law, was *not* taken.

In sum, under Stephenson's methodology, plaintiffs were compensated as though they had drilled and developed, and thus owned, the T5 well—which they did not. They were further compensated as though they had actually diverted the surplus water drawn through that well and put it to beneficial use on property outside their overlying property, and thus had established appropriative rights—which they did not. Stephenson's valuation opinion was therefore predicated on erroneous assumptions and cannot support the condemnation judgment.[22] (See *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1128 (*Zuckerman*).)

---

[22] We therefore need not, and do not, address any of the other challenges the District makes to Stephenson's testimony.

Plaintiffs maintain that, regardless of any shortcomings in Stephenson's methodology, we can affirm the condemnation judgment given the testimony of their other expert, Robert Dietrich. Dietrich offered the opinion that plaintiffs were entitled to $3.219 million in compensation, based on a "market approach" that sought to determine "the compensation due for the taking of the developed T5 Well water based on its value put to use," and specifically "the value of developed water as delivered to lots within [the District's] service area." Dietrich identified as a comparable coastal enclave the town of Cambria (several hundred miles south of the Irish Beach area) in which significant growth controls, including limits on wells, were in place and which in more recent years faced serious water shortages. He then determined the "water service value" based on sales of the service (which was severable from the property) and sales of lots without service. Taking into account the difference in real estate market values between Cambria and the Irish Beach area, Dietrich concluded the "value of water service per lot in Irish Beach" at the time of the taking was $87,000. He then multiplied that by the number of additional water service connections supported by the T5 well—37 lots—assuming a state approved water production of 10 gpm and a use rate of 389 gallons per day, concluding that the value of the water service to these additional lots was $3.219 million. He thus opined this was the value of the "Subject Interests taken by [the District]," as described in the trial court's taking determination.

The trial court rejected Dietrich's opinion as inconsistent with the fair market value requirement set forth in Code of Civil Procedure section 1263.320, stating it did not "adequately take into account the fact that the vast majority of the power system and distribution system" for the T5 well was already in place in connection with the No. 9 well, and his "market

approach [was] not reflective of the 'market' between Moores and Irish Beach."

More fundamentally, Dietrich's opinion suffers from the same legal infirmities as Stephenson's. He, like Stephenson, relied on, as the starting point of his analysis, the trial court's taking determination. He therefore assumed the "property interests taken" were the "water and use of private property." And he, accordingly, rendered an opinion as to "the compensation due for the taking of the developed T5 Well water based on its value as put to use." Thus, Dietrich's opinion, like Stephenson's, cannot support the condemnation judgment.[23] (See *Zuckerman, supra,* 189 Cal.App.3d at p. 1128.)

We therefore reverse the inverse condemnation judgment and remand for a new trial limited to the just compensation owed for the additional easement the District took within the confines of the tank easement.

Given the history of this case, we conclude it is necessary to provide additional guidance on retrial on the following issues:

The District has maintained throughout this case that the use for which it took the additional easement—to develop a well to appropriate surplus water—cannot be considered in valuing the additional easement. As we have discussed, as a general matter the District is correct—just compensation is measured by the damage, if any, to the condemnee, rather than the benefit to the condemnor. But as *Decker* makes clear, that principle does not prevent a property owner from proving that the highest and best uses of his or her property within the reasonably near future, include the use

---

[23] We therefore need not, and do not, address any of the other challenges the District makes to Dietrich's testimony.

for which the condemning agency is condemning the property. (*Decker, supra,* 18 Cal.3d at pp. 867–869.)

As *Decker* also makes clear, however, the property owner has the burden of proof in this regard, and the owner must prove that at the time of the taking (a) "it was reasonably probable under" applicable land use controls that a private party could "put the property to such use" in "the near future" and (b) there was a need for such use and a private market to develop the property for such use. (*Decker, supra*, 18 Cal.3d at pp. 868–869.) This showing is a prerequisite to presenting evidence as to the dollar amount of the compensation owed for the property taken. (See *San Diego & Electric Co.*, *supra,* 228 Cal.App.4th at p. 1289 ["After the highest and best use of the property has been determined, the Evidence Code sets forth various methodologies sanctioned for use by valuation experts for determining the market value of the property."].)

We note in this regard the evidence in the record that a well moratorium had been in place for eight years prior to the date of the taking,[24] and was still in place as of the date of trial (and apparently is still in place). Only two exceptions to the moratorium had been granted (and only one well developed) by the time of trial, and these had usage limitations of 300 gallons per day (commensurate with residential use).[25] Moores, in turn, had applied

---

[24] Accordingly, plaintiffs cannot claim the moratorium was essentially illegal spot zoning that was directed at them and enacted to depress the value of their property. (See generally 1 *Condemnation Practice, supra,* at § 4.15 at pp. 4-41 to 4-42.)

[25] Such water use restrictions have been upheld against "takings" challenges. (E.g., *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1267 [well pumping restrictions upheld]; see *Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 239, 249–259 [moratorium and restrictions on new water service connections upheld].)

to develop a "Community/Industrial" well in the vicinity of the tank easement, and that application was denied.

Moreover, under *Decker*, even if plaintiffs prove a commercial appropriative well was a legally permissible use, or a reasonably probable permissible use in the near future, they must further prove that there was both a need for the use *and* a private market to develop the property for such use. That the District may have had a need for water and a captive market for such water, namely the parcels within its jurisdiction, does not mean there was also a private market to develop their property for such use. (See *Rancho Vista, supra,* 16 Cal.App.4th at pp. 1062, 1064.) In this regard, we note the references to statutory rights accorded to water districts to preclude competitive private water companies within their jurisdiction. (See *San Bernardino Valley Municipal Water District v. Meeks & Daley Water Co.* (1964) 226 Cal.App.2d 216, 219 (*San Bernardino Valley*) [action by water district to condemn water rights and facilities of private water companies].); see generally 2 *California Water Law and Policy, supra,* §§ 14.04 at pp. 14-14.6 [authority of municipal water districts], 14.05, 14-14.6 to 14-14.7 [approvals required and constraints on private water companies, including likely denial of Public Utilities Commission where there is an existing water service].)

We further observe that if the cost to extract an underground resource and transport it to the nearest feasible market is prohibitively expensive, there may be no private market, or an extremely depressed market, to develop the property for such use. (See *Yuba County Water Agency v. Ingersoll* (1975) 45 Cal.App.3d 452, 454 [owner not entitled to compensation for rock excavated by district from easement condemned for diversion tunnel where there was "no market for the sale of the material in place" due to the

high cost of extraction]; see generally 1 *California Water Law and Policy, supra,* § 10.02[1][b], p. 10-12 ["Without the means or access for transportation to a willing buyer, water, like oil, gas and electricity, is of limited value."].)

Thus, on remand, the threshold issue the trial court will need to decide following retrial is whether plaintiffs carried their burden of proof under *Decker* and proved that, at the time of the taking, (a) a commercial, appropriative well was a legally permissible, or a "reasonably probable" permissible use in the near future, of the property, and (b) there was both a need for such use *and* a private market to develop the property for such use.[26] (See *Decker, supra,* 18 Cal.3d at p. 869; *San Diego & Electric Co., supra,* 228 Cal.App.4th at p. 1289.)

The District has also maintained throughout the case that because plaintiffs did not, and cannot, prove that the only water rights they had at the time of the taking—namely, overlying water rights—were taken or imperiled, they necessarily are entitled to no more than nominal compensation for the additional easement taken by the District. However, as the case law reflects, as does the record here, easements are acquired for specific uses of the burdened tenement. Indeed, the cases involving disputes over the permissible uses of easements are legion, this case being one in point. It is also beyond cavil that the value of an easement depends on the use it allows, or stated another way, the use for which the easement is acquired. No reasonable purchaser, for example, would pay the same amount for a 60' by 60' easement for use as a camp site, as they would to use the site to develop an appropriative well. Accordingly, the fact that the District did

---

[26] If plaintiffs prove it was reasonably probable a private party could have used an easement for a well with a 300 gallon per day use limitation, that would, of course, also profoundly affect the value of the easement.

not take or impair plaintiffs' overlying water rights does not *ipso facto* mean just compensation for the additional easement it took is confined to the value of the site as raw, mountainous property. Rather, as we have discussed, if plaintiffs carry their burden under *Decker*, they can present evidence on the value of an easement acquired for the same use for which the District took the additional easement.

The District similarly has maintained that because it already had an easement over the property on which it took an additional easement, there was no conceivable private market for the additional easement. It points to the general rule that "if a public entity seeks to condemn an easement over land already subject to an easement, the value of the second easement is the difference in value of the strip of land before and after the imposition of the second easement" and that value "may only be nominal." (*County Sanitation Dist., supra,* 17 Cal.App.4th at p. 1280.) While this may be the general rule, it does not provide guidance here because of the unique context with which we are dealing. To begin with, the tank easement did not grant the District exclusive use of the property. More significantly, the additional easement overlies a *nonconfined* underground water source accessible *beyond* the metes and bounds of the tank easement, as evidenced by the No. 9 well. Accordingly, in this particular case, limiting plaintiffs to only nominal compensation pursuant to the general second-easement rule, would not comport with the overarching principle of just compensation (this assumes, of course, that plaintiffs carry their burden under *Decker*). (See 1 *Condemnation Practice, supra,* § 4.80, p. 4-131.)

Finally, if plaintiffs carry their burden of proof under *Decker* and prove that the highest and best use of the additional easement the District took was the same as the use for which the District took the easement, any evidence as

to the dollar amount of just compensation for that easement must take into account the following:[27] First, the additional easement the District took is for only an appropriative water right, the *extent* of which is measured by the amount of water the District has diverted and put to reasonable and beneficial use. Second, the additional easement the District took does not impinge on or interfere with plaintiffs' overlying rights to reasonable and beneficial use of the water on their overlying property. Accordingly, the easement is subject to plaintiffs' overlying rights and second in priority thereto. Third, had plaintiffs sold the easement the District took to a purchaser in the private marketplace, that purchaser's appropriative right would be subject not only to the plaintiffs' overlying rights, but also to the District's appropriative right acquired through its use of the No. 9 well, as well as its paramount right to nonsurplus water drawn from that well pursuant to the Soderberg easement—since both the No. 9 well and the T5 well draw from the same underground water source. Thus, the purchaser would be third in line in terms of the priority of water rights. (See *Barstow, supra,* 23 Cal.4th at pp. 1248–1249, 1251–1252.) Fourth, had plaintiffs sold the same additional easement the District took to a purchaser in the private marketplace, the value of the easement would reflect the cost of extracting, storing and transporting the appropriated water to the nearest feasible market.[28]

---

[27] The following discussion also applies if plaintiffs prove it was reasonably probable a private party could have used the easement for a well with a 300 gallon per day use limitation.

[28] Notably, other than the costs of drilling and making the T5 well operational, the District did not incur such costs given its rights in the existing infrastructure and access associated with the No. 9 well and tank sites. A private purchaser, of course, would have had no pre-existing rights in the existing infrastructure.

In sum, the additional easement the District took is limited in scope in several important respects. Accordingly, if, on remand, plaintiffs carry their burden of proof under *Decker,* they are entitled only to compensation commensurate with the value such a limited easement would have had in the private marketplace at the time of the taking.

Attorney Fees

Since we are reversing the inverse condemnation judgment, we likewise reverse the attorney fees and interest awarded in connection therewith and remand for a redetermination of *reasonable* fees following the retrial on condemnation compensation. (Code Civ. Proc., § 1036; see *Andre v. City of West Sacramento* (2001) 92 Cal.App.4th 532, 535–537 (*Andre*) ["fees actually incurred are a ceiling to any fee award" and "fees may be reduced because they are unreasonable and pose an unnecessary burden on public funds"].)[29]

Plaintiffs raise one additional attorney fee issue in connection with the fees previously awarded in connection with a premature appeal that the District took following the trial court's takings determination, which was dismissed pursuant to the parties' stipulation. The court refused, in connection with those fees, to award fees and costs incurred in bringing the motion for fees. However, it is well-established that a prevailing party

---

[29] Accordingly, when the trial court revisits attorney fees at the conclusion of the proceedings on remand, it should view with extreme skepticism fees associated with the plaintiffs' *legally untenable* theories that the District "took," and they were therefore entitled to compensation for, the "T-5 well" and all the water that has been, and can be, drawn through that well. (See *Andre, supra,* 92 Cal.App.4th at p. 539 ["We reiterate that it is the taxpayers, not the clients, who pay the attorney fees in inverse condemnation cases, and the Legislature can rationally opt to protect the public fisc by limiting these awards to reasonable amounts that were actually incurred."].)

entitled to recover fees is entitled to the fees incurred in moving for such fees. (See, e.g., *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141 ["an award of fees may include not only the fees incurred with respect to the underlying claim, but also the fees incurred in enforcing the right to mandatory fees"].) This principle will apply on remand when the trial court takes up the issue of attorney fees at the conclusion of the proceedings.

Plaintiffs' Cross-Appeal

Plaintiffs maintain the District took not only the T5 well and all the water drawn through it (neither of which the District, in fact, took as we have discussed), but also took the "entire water-delivery system constructed by Moores" to transfer water from the T5 well. (Some capitalization omitted.) Virtually all of the infrastructure and road access that comprised what plaintiffs refer to as their "delivery system" had been in place for decades, and had been used, and was still being used at the time of the taking, in connection with the No. 9 well and the water tank.

Plaintiffs asked their expert Dietrich to render an opinion as to the asserted replacement value of this infrastructure and access, or as Dietrich characterized it, the "value of the improvements needed to deliver water from the T5" well. He based his opinion on a report prepared by Dee Jaspar, an engineer plaintiffs retained to prepare a report on the "Current Costs to Construct Pipelines and Access Roadways to the T-5 Well Site."[30] (Italics omitted.) Adjusting for the date of the supposed taking and for depreciation,

---

[30] Jaspar's replacement costs included the costs of all water related facilities serving the Unit 9 subdivision and the adjacent "acreage" parcels. These facilities included, inter alia, the infrastructure and access that had been conveyed to the District and used in connection with the No. 9 well and water tank, as well as facilities that had been dedicated to the District as a condition of approval of the Unit 9 subdivision and thus were also already owned by the District.

Dietrich opined that the replacement cost of the "improvements inversely taken" totaled $2.67 million. Thus, under this approach, Dietrich opined plaintiffs were entitled to a total condemnation award of $3.07 million—$400,000 for the "value of developed water inversely taken" (as testified to by Stephenson) and $2.67 million for value of the "improvements" taken to transport that water (as testified to by Dietrich).

The trial court rejected plaintiffs' additional compensation theory. To begin with, the court could "not overlook the fact that the easement for use of the private portion of the [access road] was conveyed to the District in 1989 along with the then existing improvements for distribution of the water extracted from the Unit 9 well." It also observed Acker testified there "ha[d] not been any significant increase in use of the road or any of the other improvements due to the operation of the T5 well." In addition, plaintiffs' theory improperly focused on the value to District customers, not on any demonstrated damage to plaintiffs' property. Finally, had the District negotiated with plaintiffs to expand the scope of use of the tank easement, "certainly the District would not have been expected to pay the equivalent of Moores cost to build or develop that same distribution system in 2008"—indeed, as the court commented, one of the advantages of the tank easement for the new well was its proximity to the existing distribution system.

The trial court also rejected plaintiffs' alternative theory—that they had been deprived "of their right to sell to the District the necessary infrastructure to distribute the water taken via the T5 well." Again, the court pointed out "that the road and other infrastructure already existed and the right to use them was already conveyed to the District for valuable consideration—a promise to supply water to Moores 44 parcels in Unit 9." Further, plaintiffs had been required to dedicate some of the infrastructure to

the District as a condition of approval of the Unit 9 subdivision. Collectively, these facts "compel[led] th[e] Court" to reject plaintiffs' theory that the District was required to pay them a second time for the existing infrastructure and access.

Plaintiffs insist the trial court's refusal to award additional compensation is "inconsistent" with the court's taking determination, wherein the court stated the District took not only the T5 well and all the water drawn therefrom, but also took use of part of the access road "along with other Improvements to operate and service the T5 Well."

The trial court did not err in refusing to award plaintiffs additional compensation. To begin with, plaintiffs fail to appreciate that the mere fact an existing easement has been burdened by a second easement does not mean the owner is entitled to compensation if there is no additional loss as to the underlying fee. (See *County Sanitation Dist., supra,* 17 Cal.App.4th at pp. 1279–1280.) Further, plaintiffs are maintaining that the District essentially took from *itself* infrastructure and access for which it had already paid—a theory totally at odds with condemnation law. Finally, in contrast to the entirely new use to which it put the tank easement, the District not only was continuing the same use of the existing infrastructure and access, but, because the No. 9 well and the T5 well draw from the same water source, the District was also continuing to transport exactly the *same water* by way of this infrastructure and access.

Plaintiffs rely on *San Bernardino Valley, supra,* 226 Cal.App.2d 216, to support their claimed entitlement to additional compensation for the existing infrastructure and access. Their reliance is misplaced.

In *San Bernardino Valley*, a municipal water district exercised its statutory right to condemn a private water company operating within its

boundaries and sought to condemn the appropriative and prescriptive rights of the private company. (*San Bernardino Valley, supra,* 226 Cal.App.2d at p. 219.) While the source of diversion for the private company's water source was in San Bernardino County, the vast majority of its infrastructure and service was in Riverside County. The private company thus asserted as a special statutory defense that the water district had failed to obtain the consent of Riverside County to the condemnation. (*Ibid.*) The trial court agreed and dismissed the action. (*Id.* at pp. 219–220.)

On appeal, the water district maintained it did not need Riverside's consent because the condemned water rights were located at the point of diversion in San Bernardino County, which had approved the condemnation. (*San Bernardino Valley, supra*, 226 Cal.App.2d at p. 219.) The appellate court rejected the district's argument for several reasons, including because the point of diversion theory was primarily a principle of tax law and not pertinent to the statutory condemnation scheme at issue. (*Id.* at pp. 220–221.) The court also pointed out appropriative and prescriptive rights come into existence only upon actual diversion *and* use, and the latter necessarily entails means of transport. (*Id.* at pp. 221–222.) Further, as a matter of public policy, the court concluded the Legislature could not have intended, in granting water districts the power of eminent domain, that districts could withdraw water with impunity from counties previously served by private water companies without the consent of the county's governing body. (*Id.* at pp. 223–225.) Accordingly, the appellate court upheld the special defense. (*Id.* at p. 226.)

The facts and compensation issue here bear no similarity to the facts and condemnation issue in *San Bernardino Valley,* and the case provides no support for plaintiffs' claim that the trial court erred in declining to order the

District to pay them a second time for infrastructure and access that had long been in place and for which the District had already paid fair value.

Trespass and Unjust Enrichment

Trespass

At the conclusion of the phase III trial, the trial court ruled, on the basis of its phase I takings determination, that the District also committed trespass. It found damages in "the same amount and for the same reasons articulated in its ruling in the Inverse Condemnation action," but did not award them a second time since the trespass cause of action addressed "the same harm" as the inverse condemnation claim and plaintiffs were not entitled to a double recovery.

The trial court again rejected plaintiffs' claim for an additional $2.67 million in damages based on their theory that in exceeding the scope of use of the tank easement, the District had also damaged the existing infrastructure and access. "To require [the District] to pay twice for the improvements (once at the time of the negotiated transfer of the Unit 9 well and the improvements and again now)," said the court "would far exceed the damage to plaintiffs" from the trespass. "There is no evidence that the plaintiff has been damaged due to the use of the roadway or the access or the distribution system during the construction or maintenance of the T5 well in *any increased wear and tear*, diminution in value or other damage to plaintiff resulting from the trespass relating to the T5 well. The road, access, and distribution system were already in use in relation to the Unit 9 well."

For all the reasons we have discussed, plaintiffs' insistence that they are entitled to additional compensation for trespass for the use of the existing infrastructure and access is meritless, and the trial court correctly refused to compensate them for it a second time.

The District maintains for the first time on appeal that it cannot, under the Tort Claims Act, be liable for "trespass." In its opening brief, it makes a rather generic argument that public entities can no longer be sued for common law torts because their liability is governed by the provisions of the Tort Claims Act (Gov. Code, § 810 et seq.). Plaintiffs, in turn, in their respondents' brief, cite to Government Code section 821.8—which states "A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law" (*id.*, § 821.8)—and the correlative principle that government entities can be liable for unauthorized entries. In its closing brief, the District responds that it was authorized to enter the tank easement under provisions of the Water Code and therefore benefits from this statutory immunity. (See *id.*, § 815.2; *Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 462, 464 [where employee entering property would be immune, public entity for which the employee works is also immune].)

Plaintiffs further assert that the District, in any case, forfeited any Tort Claims Act defense by failing to raise it by appropriate pleading in the trial court. Given our Supreme Court's recent decision in *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 802–803, holding that Tort Claims Act immunities are waived if not raise by appropriate pleading, we must agree.

The District's remaining arguments as to the trespass claim are essentially variations of its claim that it was authorized to drill a well within the tank easement, which we have already rejected.

However, the fact we have rejected the District's arguments bearing on its liability, does not mean plaintiffs are entitled to recover *both* just compensation in inverse condemnation and tort damages for trespass. To the

contrary, as the trial court recognized, where a property owner asserts claims for both inverse condemnation and trespass based on the same facts, they are simply different theories of recovery for the same injury. (See *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 364–365.) Thus, at this juncture, having succeeded on their inverse condemnation claim, plaintiffs have effectively elected to recover under that theory.[31] In other words, having compelled the District (through inverse condemnation) to "purchase" the additional use it has made of the easement *as of the moment it commenced*, plaintiffs cannot also claim that the District's occupancy is unlawful and a trespass, entitling them to tort damages.[32] So that there is no mistaking as to our holding, plaintiffs *cannot* on remand abandon their inverse

---

[31] Contrary to plaintiffs' assertion at oral argument, the District did not "forfeit" the issue of election of remedies, having raised it during the Phase III proceedings. In any case, the issue here is not the typical election of remedies issue, but rather, the recovery of duplicative damages and, as discussed *infra* in footnote 32, the legal ability of plaintiffs to obtain any recovery other than through inverse condemnation.

[32] Indeed, we note that had plaintiffs wanted to confine the District's use of the tank easement to the scope set forth in the Soderberg Easement (rather than to require the District to "buy" the additional use it was making of the easement for an appropriative well), they could have promptly filed suit and recovered injunctive relief and damages, if any. However, since they did not file suit until after the District received a permit from the State Department of Public Health for public use and commenced such use, they were no longer entitled to injunctive relief and associated tort damages, but rather, to recover just compensation through inverse condemnation. (See *Hillside Water Co. v. Los Angeles* (1938) 10 Cal.2d 677, 687-688; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 378-379; *Antelope Valley Groundwater Cases* (2020) 59 Cal.App.5th 241, 269 [where defendant's public use of water commences before lawsuit to establish water rights, plaintiff cannot enjoin agency from taking the water, but is limited to recovering just compensation and/or a "physical solution" minimizing or eliminating any compensation otherwise recoverable]; see generally *California Water Law and Policy, supra,* § 9.04[3][d] at pp. 9-53 to 9-55 [discussing "intervening public use" doctrine].)

condemnation claim and "elect" to proceed on a trespass claim and recover tort damages.

Accordingly, we not only reverse the judgment as to trespass given the legal errors afflicting the damages award, but also direct that no recovery may be had under this theory, given that we have upheld the inverse condemnation liability determination.

Unjust Enrichment

Plaintiffs also asserted a cause of action for unjust enrichment. The majority of appellate courts, including divisions of this court, have concluded there is no independent cause of action for unjust enrichment; rather, it is an equitable remedy that may be sought in connection with a substantive claim. (E.g., *De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 870; *Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1307; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.) We therefore do not address this cause of action further and also reverse the judgment as to this cause of action without remand.

II. Mallo Pass Creek Claims

Background

As we have briefly recited, the 1988 water development agreement included extensive provisions pertaining to the Mallo Pass Creek diversion project. One of the stated purposes of this project was to "provide a water supply for 54 hook ups . . . at Irish Beach Unit #9 and the Inn site, north of Unit #1 . . . , if and when the Inn site has received all necessary permits and approvals for development." Plaintiffs additionally "intend[ed] to seek the necessary permits to develop Irish Beach Unit #6 within the next thirty-six

(36) months," and if they were successful, the District would "provide service to 46 hook ups in Unit #6."

Under the agreement, plaintiffs agreed to transfer to the District the permit Moores' father had obtained in 1974 for the diversion project. They also agreed to pay for most of the costs of the project. They additionally agreed to provide the District with the "complete set of the engineering plans for the facilities [such as the water storage tanks and distribution lines] necessary to distribute water" to the Unit 9 parcels—plans they had prepared in connection with subdividing Unit 9.

The agreement did not obligate the District to proceed with the Mallo Pass Creek project within any specific time frame, leaving that to "the sole discretion of the District." The agreement further stated the District had no plans to develop the project "for approximately fifteen years."

Within four years, however, plaintiffs sued the District because Moores "was upset over the fact that the District wasn't moving toward constructing the Mallo Pass project." He "wanted a date or a definition of when they were going to do it." The parties settled this lawsuit in 1995, agreeing, among other things, that the District would not proceed with the project until 197 connections had been made to the District's water system. Even as of 2000, "only about 167 active connections" had been made.

Five years after entering into the settlement agreement, plaintiffs again filed suit in 2000 (the same year the District adopted the temporary well moratorium), this time seeking declaratory relief "as to the construction of certain water facilities" and declaratory relief and to quiet title as "to 'service water rights.' " The parties settled this lawsuit in 2002, agreeing, among other things, that both the 1988 water development agreement and the 1995 settlement agreement were rescinded, and "all obligations,

requirements, covenants and conditions" arising therefrom were "extinguish[ed]." The "effect of this recission and extinguishments" was as if the two agreements had "never existed as to the Parties." The parties also mutually "release[d], acquit[ted] and forever discharge[d]" each other "from any and all . . . damages, costs, loss of use, loss of revenue, expenses, compensation, reimbursements and other forms of damages arising from the 1974 [Mallo Pass Creek] Water Permit, the 1988 Water Development Agreement, the 1992 Litigation, the 1995 Settlement Agreement, or this [the 2000] Action."

The District was obligated under this settlement agreement to "provide water service to the 44 parcels in Unit 9 when hook-up is requested" and "to provide up to 21 water service obligations to the acreage parcels"—each of these water service obligations "consist[ing] of the equivalent of one customary residential connection of 300 gallons of water per day." The District was also obligated to provide "the equivalent of ten (10) hook-ups for the 'Inn Site' at the rate of 500 gallons per day."

The District further agreed it would "attempt to process a Proposition 218 capital improvement and capital replacement rate structure" (in other words, to impose a special assessment) to pay for, among other things, the Mallo Pass Creek project. Plaintiffs, however, would be exempt from paying certain assessments until 2005 or until their parcels were sold, and they would be exempt from certain assessments on the Inn Site until it was brought within the District's service jurisdiction.

Plaintiffs were also refunded "the entire proceeds of the Mallo Pass Trust Fund," which had been established, and which they had funded, pursuant to the 1988 water development agreement.

The settlement agreement additionally stated: "The District agrees 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 Mallo[] Pass project to the District's water system." As of the time of trial, the Irish Creek lower diversion was not yet being fully utilized.

The settlement agreement also specified the District would "retain all rights" to the 1974 Mallo Pass Creek permit and "any and all easements" plaintiffs had "at any time" conveyed to the District. The District additionally retained "all rights to" the Unit 9 well.

The District duly initiated the special assessment process in accordance with Proposition 218, and a special assessment was approved by vote of the property owners in the District in 2002.[33]

In the meantime, in 2000, the District had also applied to the State Water Resources Control Board for a 10-year extension of the 1974 permit. At the time the permit was issued to Moores' father, the permit required that construction of the diversion project be completed by December 1977 and that actual diversion and beneficial use be occurring by December 1984. Plaintiffs had therefore sought and obtained extensions, as did the District after plaintiffs transferred the permit to it pursuant to the 1988 water development agreement.

In its application for the 10-year extension, the District stated construction would not begin for "2 to 5 years or more" and the diverted surface water would not be "fully used" for "40 to 50 years."

---

[33] Despite having just agreed to the 2002 settlement agreement, Moores voted against the Assessment.

"[A]s a condition of renewal," the Control Board requested an environmental impact report (EIR) for the project. The District's Board president was in "communication" with the Control Board, and the state agency was "aware the District [was] working on getting the EIRs completed which must be accomplished before they can act on the permit renewal."

In 2004, the Control Board notified the District that because no CEQA documentation had yet been submitted, the permit might be revoked due to non-use if the District was unable to show it would "diligently pursue" the project. The District filed a response stating there were currently 180 homes in the community, it was committed to providing service to "the equivalent of 477 homes," and it had sufficient water from its Irish Creek surface water diversions and from groundwater sources to serve 336 homes, "mean[ing] [it] . . . ha[d] sufficient water for 15 years." It did not state when it would provide CEQA documentation.

As of 2006, the District had not supplied the environmental documentation, and the Control Board Division of Water Rights issued a notice that the Control Board was "denying the District's petition for an extension of time . . . and that it would issue of notice of proposed revocation."

The District requested a hearing and engaged special counsel. Special counsel recognized the District "was in a difficult position" because the Control Board "frowns upon people not developing their water rights," a concept known as " 'cold storage,' " and the Control Board would be "looking for any new evidence from the District as to why it should obtain the water."

The District also hired a hydrologist, Terri Jo Barber, to prepare the required environmental impact report. Barber appeared at the July 2006 District Board meeting to report on the status of the EIR. She asked about "when the District intend[ed] to move on development of Mallo Pass." The

Board replied it was "of the opinion that it was being prudent in not developing Mallo Pass until such time as it was actually needed." The Board cited "financing," and that the District "currently ha[d] sufficient water from Irish Gulch to provide [for] 358 households @300 gallons per day and there [were] only 180 active connections" at that time. Barber told the Board that since the District, as to Mallo Pass Creek, would be "under appropriative right," if " 'we don't stick the straw in we may lose our appropriative right.' " After an off-the-record discussion, "The [District] Board agreed to begin moving forward to develop Mallo Pass by putting in a diversion, a pipe line of the appropriate size for the subdivision and a small treatment plant at the corporation yard. Planning [was] to commence as soon as possible and to be completed by 2012."

The following year, in September 2007, the Control Board issued the forecasted proposed notice of revocation. The District timely requested a hearing.

In February 2008, Barber advised the District that "a new policy has been proposed by the Department of Fish and Game with even more serious bypass flow restrictions," which would potentially "have a very serious impact on the District's ability to extract water from Mallo Pass allowing diversion only during approximately two months of the year in Spring and the Fall." Barber "emphasized that the District must press to finish renewing rights under the present policy before the new policy can be adopted" and urged it to continue to demand a hearing.

The Control Board eventually scheduled a hearing for February 26, 2009.

Three months before the scheduled hearing, the District Board approved "the abandonment of the Mallo Pass permit . . . if by December 1,

2008 the accumulative discharge of all three wells currently in operation [i.e., the Unit 9 well, the T5 well, and the T2 well] is 60 gpm or more." As we have discussed, the initial testing of the T5 and T2 wells, plus the output of the Unit 9 well, indicated this was an achievable number. In January 2009, the Board "approved the abandonment of Mallo Pass permit."

The Control Board, in turn, canceled the hearing, and in March 2009, formally revoked the 1974 permit, stating the Mallo Pass Creek water was now available for appropriation, subject to applicable regulatory restrictions and water availability.

The revocation order does not foreclose the District from applying for a new permit.

Breach of the 2002 Settlement Agreement

Nine months after the Control Board revoked the 1974 permit, plaintiffs filed the instant lawsuit alleging, in addition to their well claims, that the District breached the 2002 settlement agreement by failing to develop the Mallo Pass Creek project.

In their trial brief and pre-trial conference statement, plaintiffs claimed the District breached its "promise to develop Mallo Pass" and they had been damaged because they had "expended significant funds in the permitting and engineering of the Mallo Pass project and [had given] those plans and permit to [the District], along with the treatment site property." "Simply put," said plaintiffs, the District had "never performed its promise to develop Mallo Pass. Consequently, Moores is entitled to recover damages."

The District disputed that it had breached the 2002 settlement agreement, and further maintained plaintiffs had not, in any case, sustained any damage caused by the District's purported breach of that agreement. Rather, plaintiffs were in exactly the same position they would have been had

the asserted breach not occurred—namely, the District had provided and continued to provide water and commitments for water service for their development.

With respect to plaintiffs' claim that the District had breached the settlement agreement, the District maintained the agreement contained "no timeline or deadline" to proceed with the Mallo Pass Creek project "other than it would occur sometime after the connection and development of the Irish Gulch Lower Diversion." The latter project, however, was still not fully developed.

With respect to damages, the District maintained plaintiffs had "long been compensated for Mallo Pass to the extent any such compensation was ever owed." (Underscoring omitted.) Plaintiffs had obtained the Water Resources Control Board permit "solely on their own in 1974." Because the water would be used within the District, the Control Board had "put a condition in the Permit requiring that the Moores convey the Mallo Pass permit to the District a[t] some point in the future." In 1988, when the parties entered into the water development agreement, in part to meet that requirement and facilitate Moores' subdivision of the Unit 9 property, the District had "agreed to accept the Mallo Pass Permit to demonstrate to . . . Mendocino County and the Coastal Commission that there was far more than enough water available for those subdivisions." In return, plaintiffs had "received their subdivision approvals; $25,000 payment from the District"; and a commitment by the District for "75 guaranteed water service connections." Under the 2002 settlement agreement—which rescinded all prior agreements and extinguished all obligations therein—plaintiffs were refunded all of the cash contributions they had made to the Mallo Pass trust account pursuant to the 1988 agreement, they "were exempted from paying

certain assessments and fees on their properties," the costs of maintaining the Unit 9 water system was shifted from plaintiffs to District users through connection fees, and they had a commitment for 75 water connections. The District had not failed to deliver any of these benefits inuring to plaintiffs pursuant to the 2002 settlement agreement.

In reply, plaintiffs claimed they were entitled to recover as damages "the consideration" they had provided "in exchange for [the District's] promise to develop Mallo Pass." In this regard, Moores testified that in accordance with the 1988 water development agreement he had "made good on [his] promises to make payments" toward the Mallo Pass Diversion Project Capital Improvement Fund, contributed the Mallo Pass project permits and engineering plans, and deeded a "water treatment facility site" to the District. He acknowledged that under the 2002 settlement agreement, his payments to the Improvement Fund were refunded, but complained the District retained the permit, engineering plans, and the treatment facility land he had provided pursuant to the 1988 water development agreement. Moores prepared a list of $397,514 in expenses he claimed he had incurred in connection with the project, which was admitted as Exhibit 162.[34]

---

[34] These expenses included (1) $2,955 for "Pre-1987 costs"; (2) $4,400 for "Legal research and opinion on Riparian Rights in Mallo Pass Creek"; (3) $1,740 for "Mallo Pass Creek gravel bar testing and intake basket design for diversion 1986"; (4) $14,750 for "Costs to obtain Coastal Permit 1–87–142 for Mallo Pass Creek Project"; (5) $7,778 for "Application for Caltrans Encroachment Permit for Mallo Pass Project"; (6) $14,500 for "Engineering Costs of Chris Erikson to survey and locate treatment plant site, access easements and HP Bashford to design Slow Sand Filter and Chlorination plant 1988"; (7) $214,682 for "Legal fees and office fees paid to [the District] to create and revise the 1988 Mallo Pass Project contract and pay Cunnihan to review HB MP Plans"; (8) $42,259 for "Legal fees paid to Mikel Bryan and Bettinelli (Jams arbitrator) to negotiate a 2002 contract modification of the

In its tentative decision, the trial court ruled that even if "a breach could be found based on a strained reading of the contract that somehow obligated the District to develop Mallo Pass immediately following development of the Irish Creek lower diversion, there has been no failure of consideration and no damage to plaintiffs. [The District] has not reneged or failed to supply plaintiffs with the hook ups at the Inn Site or failed to provide water service to the Unit 9 subdivision or the acreage lots. Plaintiff has suffered no damage from such a purported breach."

Plaintiffs objected, claiming the court had not addressed their "claim of failed consideration associated with their Mallo Pass expenditures." Plaintiffs asserted that, in consideration for continued water service, they had "conveyed to the District the real property, plans, and permit, etc.," and while they had "fulfilled their promise," the District assertedly "Rob[bed] Peter to Pay Paul" to fulfill its promise—i.e., the District "invaded Moores' property and utilized the ill-gotten T5 Well in order to provide the continued water service."

The trial court did an about-face. The court now read the 2002 settlement agreement as "expressly requir[ing] the development of Mallo Pass as a water source for the District which in turn would benefit Moores' parcels. As part of this agreement, the Moores contributed to [the District], the [1974] permit to develop, the engineering plans and water treatment plant development as well as other items necessary to that development as part of this agreement." The District, however, while "contractually

---

para 5[] of the 1988 contract [the District] refund obligations on the Mallo Pass Project to provide for a Prop 218 funding of the Project and restate the [District] promise to build it"; and (9) $76,450 for "Mallo Pass project treatment plant site and access easements."

obligated" to develop Mallo Pass Creek, made a "unilateral decision to abandon" the project.

With respect to damages, the court concluded the parties had "intended" through the settlement agreement "to incorporate specified Moores' properties into the District and to obligate the District to provide water to those parcels." The "prospect of developing Mallo Pass gave some assurance," said the court, "that this goal was achievable," noting there was evidence the Irish Creek diversions, alone, "would not assure the District of having sufficient water to fulfill its responsibilities to all parcel holders in the District including the Moores." "When the District abandon[ed] the project, it did not abandon its obligations to Moores or any other parcel holder." The court again found, however, "[t]here is also no evidence that water has not been supplied."

The court awarded $133,649 in damages and $121,270.12 in prejudgment interest.[35]

The District renews its assertion that plaintiffs' breach of contract claim fails because there is no substantial evidence they have been damaged by the District's purported breach of the 2002 settlement agreement. We agree with the District that the trial court had it right in its tentative decision, and that plaintiffs' "Rob[bing] Peter to Pay Paul" argument does not alter the fact that the District remains committed to, and is able to, deliver water to their development. Indeed, having chosen to force the District to condemn and pay them for the additional easement to develop the T5 well, which the evidence indicates is an adequate substitute for the Mallo Pass

---

[35] The damages consisted of items 1-7(A) in Moores' list of expenses (excluding a $50,000 transcript cost included in item 7(A)). Thus, the damages did not include, for example, the value of the treatment facility site or the access easements.

Creek project, plaintiffs have ensured that their position will remain unchanged and that they will not sustain any damage due to the District's supposed breach of the 2002 settlement agreement.

As a preliminary matter, we harbor considerable doubt there has been a breach of the 2002 settlement agreement. While the District agreed therein "that its plan for obtaining additional water source supply will consist of first connecting to the existing Irish Creek lower diversion and, second[], developing and connecting a Mallo[] [*sic*] Pass project to the District's water," (italics and boldface omitted) this language did not fix a time for commencement of the Mallo Pass Creek project. Rather, it contemplated that the District would first complete its Irish Creek diversion works, which as of the time of trial, was not yet being fully utilized. In fact, it was estimated that that project would not be fully utilized "until a time when there is at least . . . another 50 to 100 connections within the District," which, in turn, was "estimated to occur in about 15 to 25 years based on the rate of development." Thus, any claim of a supposed breach of this provision seems decidedly premature, given that the revocation of the 1974 permit does not foreclose the District from applying for a new permit.

Turning to damages, " '[u]nder contract principles, the nonbreaching party is entitled to recover only those damages . . . which are "proximately caused" by the specific breach. [Citations.] Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain.' " (*St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, 1061; Civ. Code,

§ 3300 ["For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."].)

The damages plaintiffs sought, and which the trial court awarded, consist of expenses they incurred either *before* entering into the 1988 water development agreement or pursuant to *that* agreement. None of these expenses were incurred in reliance on the 2002 settlement agreement, which the parties entered into more than a decade later. Indeed, plaintiffs cannot even claim that most of these expense items—which they unilaterally incurred in acquiring the 1974 permit or in subdividing their property—were incurred in connection with the 1988 water development agreement, let alone the 2002 settlement agreement.

Furthermore, the 2002 settlement agreement rescinded the 1988 water development agreement and extinguished "all obligations, requirements, covenants and conditions between" the parties—the "effect" of which was "as if the [water development agreement] never existed." Accordingly, plaintiffs cannot now rely on any obligation they had under the 1988 water development agreement as the basis for a damages claim for a purported breach of the 2002 settlement agreement, as those obligations, by agreement of the parties, ceased to exist. In addition, by the time the parties entered into the 2002 settlement agreement—which was, at that point, the *sole* agreement between the parties—the District had long since owned the 1974 permit and the Unit 9 subdivision water distribution plans plaintiffs had conveyed pursuant to the 1988 water development agreement. The 2002 settlement agreement also comprehensively released the parties "from any and all existing and future actions, causes of action, claims, request for

equitable relief, demands, damages, costs, loss of use, loss of revenue, expenses, compensation, *reimbursements and other forms of damages arising from the 1974 Water Permit, the 1988 Water Development Agreement, the 1992 Litigation, the 1995 Settlement Agreement, or this Action.*" (Italics added.) We are hard pressed to see how, in light of this language, plaintiffs can now recover as "damages" expenses they either incurred decades ago in connection with their own, volitional efforts to obtain the 1974 permit and in subdividing their property, or incurred pursuant to an obligation set forth only in the now vitiated 1988 water development agreement.

Plaintiffs maintain they were "induced" to "part with assets including their rights to a surface water diversion permit and real property" necessary for the Mallo Pass Creek project. As we have noted, the trial court did not award damages for the real property plaintiffs conveyed for the treatment plant, presumably because that property had ended up in the hands of Moores' siblings, apparently in connection with a dispute over the family's development of the area. Moreover, plaintiffs were *not* induced by the District to incur any of the expenses they incurred of their own volition in obtaining and maintaining the 1974 permit and subdividing their property *prior* to entering into even the 1988 water development agreement. Nor were they induced to enter the *2002 settlement agreement* by virtue of any commitment in the 1988 water development agreement. Indeed, those commitments were expressly extinguished by the settlement agreement.

Asserting that "the District unilaterally opted . . . to take the risky track of lowering the diversity of its water sources," plaintiffs posit it is "reasonable to infer that the trial court found the Moores may have water today for a finite set of parcels; but the certainty of that water in the future and availability of additional water for future parcels are impaired." This is

sheer speculation. Moreover, the record does not, in any case, support a finding that the District's delivery of water to plaintiffs' development might be "impaired" by the District's development of the T5 well instead of developing the Mallo Pass Creek project. Rather, the evidence indicated the T5 well is an adequate substitute for the Mallo Pass Creek surface water. Indeed, the trial court found, even in its final decision, that there is "no evidence that water has not been supplied." Furthermore, plaintiffs' speculation does not address the fundamental infirmities with their claimed breach of contract damages—that none of these supposed damages were *caused* by the District's purported breach of the 2002 settlement agreement. Plaintiffs are, in short, in no different position today with respect to the delivery of water to their properties than they were when they entered into the 2002 settlement agreement.

Plaintiffs also suggest the trial court's "award is perhaps best viewed through the lens of a quasi-rescessionary remedy." They assert "the trial court—at least implicitly—concluded that [rescission] was an appropriate remedy. In essence, if the District was not going to do what they said they were going to do, then the Moores should be given what they gave in reliance. What the Moores gave was a permit, real property, and the like. Since these specific things could not be returned in the condition conveyed (e.g., the permit was abandoned by the time of the ruling) the trial Court instead essentially liquidated the damages by reducing the conveyances to a money judgment."

Again, this is sheer speculation. Furthermore, we know of no such thing as a "quasi-rescissionary remedy," and plaintiffs cite no authority supporting such a remedy. Rescission relieves *both* parties of their obligations under the contract. (See *Marzec v. Public Employees' Retirement*

System (2015) 236 Cal.App.4th 889, 913–914 [" ' "Rescission not only terminates further liability but restores the parties to their former position by requiring each to return whatever he or she received as consideration under the contract, or, where specific restoration cannot be had, its value." "].) What plaintiffs are advocating, however, is a one-sided recission—they recover back their supposed consideration, but the District remains bound by its ostensible contract obligations.

In sum, there is no evidence plaintiffs sustained any damage caused by the District's purported breach of the 2002 settlement agreement, and we therefore reverse the judgment as to this cause of action and direct that judgment thereon be entered in favor of the District.

Challenges to the Proposition 218 Assessment

Capital Replacements Component

In the 2002 settlement agreement, the District agreed that it would "attempt to process a Proposition 218 capital improvement and capital replacement rate structure." It also agreed "all future assessments for water source development shall be shared equally among all parcels, including those with houses, pursuant to the intent of Proposition 218."

In accordance with the settlement agreement, and in compliance with Proposition 218, the District sent to all property owners within the District a "Notice of Proposed Property Assessment and Public Hearing" packet, which included the notice, an assessment ballot, and an engineer's report that explained the purpose and nature of the proposed assessment.[36]

The notice informed owners the proposed assessment would be used "to fund capital improvements, replacements and additions to the water system

---

[36] Under Proposition 218, a special assessment proposal must be "supported by a detailed engineer's report." (Art. XIII D, § 4, subd. (b).)

designed to improve, expand, and support water availability, quality, and delivery. The capital replacements and additions, when applied to property in the District, will create special benefits for each property in the District. . . . [Therefore, the assessment is] calculated so that each parcel in the District pays an equal share of the cost of providing the improvements identified as necessary in the Engineer's Report."

The Engineer's Report discussed the following topics: "METHOD OF APPORTIONMENT," which included the sub-topics of "Special Benefit," "Assessment Allocation," and "Appeals and Interpretation," and "ASSESSMENT," which included the sub-topics of "Annual Adjustment for Inflation," and "Duration of Assessment."

The report identified "the special benefit improvement items whose costs will be included in the Assessment." These items, or "assessment components," were: (1) the "System Wide Capital Improvements" component; (2) the "Mallo Pass capital improvement" component; (3) the "Capital Replacements" component; and (4) the "Loan Payment" component. Each parcel owner would be charged a monthly "fixed or flat assessment" which would, in turn, be allocated among the components.

Plaintiffs advanced a number of claims pertaining to the District's implementation of the Assessment, and the trial court agreed with many of them. The District challenges the court's ruling in only one respect, specifically its ruling as to the amount of the Capital Replacements component cash reserve fund. In brief, the District maintains the court erroneously disregarded the plain language of the Engineer's Report and the accompanying notice to owners. We agree.

As pertinent here, the Engineer's Report stated the "Capital Replacements component of the Assessment" was "set to recover a portion of

the cost of replacing the District's fixed assets . . . whose lives are greater then 40 years," such as pipelines, filter systems, and fire hydrants. The engineer set the Assessment "to recover only 50 percent of the replacement value of the assets over 40 years." The engineer explained, "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."[37]

The Engineer's Report listed the replacement value of the "District's existing fixed assets with lives greater than 40 years" in an attached appendix, Appendix A. The stated value of those assets was $1.397 million. Thus, "50 percent of replacement value to be recovered in this component of the Assessment" was $698,500.

The Engineer's Report went on to state that the total amount to be recovered by the Assessment, annually, for all four components was $81,000—$17,500 of that amount being for the Capital Replacements component. The "average annual cost to be recovered for capital replacements is $17,500 based on funding replacements at a 50 percent level."

Thus, there are several pertinent benchmarks set forth in the "METHOD OF APPORTIONMENT" section of the Engineer's Report. The total, maximum amount that can be collected over the lifetime of the Assessment to fund the Capital Replacements component is $698,500, subject to adjustment for inflation. The total amount to be recovered for the Capital Replacements component in any one year is $17,500, also subject to adjustment for inflation.

---

[37] The engineer did not testify at trial, but his deposition testimony was admitted.

In addition to these benchmarks, there is another benchmark set forth in the "Duration of Assessment" subpart of the "ASSESSMENT" section of the report, which states: "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." Once the cash reserve reaches this amount, "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."

The Notice to property owners likewise stated the Capital Replacements component of the Assessment "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 capital assets has been funded as determined by the District's Treasurer. At that time, the Capital Replacement component of the proposed assessment will be adjusted as needed to maintain the 10% capital fund reserve."

Commencing in 2003, the District annually collected approximately $17,500 for the Capital Replacements component with the understanding that "10% of the replacement value of the District's assets" as specified in the Engineer's Report referred to the stated replacement "value of the District's existing fixed assets with lives greater than 40 years," i.e., $1.397 million. The lifetime $698,500 limit of the Assessment was never exceeded.

In 2015, plaintiffs filed a second supplemental complaint (their final pleading in the case), alleging for the first time that the District had, for more than a decade, misread the language in the Engineer's Report pertaining to

the cash reserve fund.[38] According to plaintiffs, the District was required to stop collecting the annual $17,500 amount when the cash reserve fund reached "10% of 50% of the replacement value of existing fixed assets with lives greater than 40 years."

The trial court agreed with plaintiffs.

The court acknowledged "there is no reference to the 50% limit in the 'Duration' section of the Engineer's Report," but concluded "that omission [did] not logically compel a conclusion that this language should be ignored." The court pointed to the $17,500 figure "referenced in Tables 7[39] and 8[40] wherein the total parcel assessment is broken down according to stated purpose." This "express language," said the court, "controls how the ceiling should have been determined." The court therefore concluded the "reserve ceiling was set at 10% of one-half (50%) of the total value of the existing, i.e. greater than 40 year assets included in Appendix A of Exhibit 19."

The court also acknowledged the notice to owners that accompanied the Engineer's Report "did not advise the voters of the 50% replacement value principle that was an essential underpinning as to how the reserve ceiling was to be determined. In fact, the notice advised that the ceiling would be

---

[38] Plaintiffs' other claims pertaining to the Assessment had been raised in earlier pleadings.

[39] Table 7, "Calculation of Capital Improvement Assessment" lists the "Annual Cost Recovery" for each component, including the Capital Replacements component ($17,500).

[40] Table 8, "Calculation of Annual Capital Improvement Assessment," lists the "Total Annual Cost" of the Capital Replacements ($17,500), and then provides a breakdown of what the "Annual Per Parcel" amount would be for that component ($38.04), and what the "Monthly Per Parcel" amount would be ($3.17). The table also provides that information for each of the other components.

determined based on 10% of the total value of the assets included in Appendix A." But, said the court, "[t]his failure to properly explain in a ballot summary sent to parcel owners does not override or contravene the otherwise plain intent of the Engineer's Report."

We first observe this is not a "typical" challenge to a special assessment in that plaintiffs do not claim the Assessment does not provide a "special benefit" to the subject properties, or that the Assessment lacks "proportionality." (Art. XIII D, §§ 2, subd. (b), 4, subd. (a); see generally *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443 (*Silicon Valley*).) Nor do they claim the District failed to adhere to the basic procedural requirements for enacting a special assessment. (Art. XIII D, § 4, subds. (b)–(d).)

Rather, plaintiffs have challenged the District's implementation of the Assessment, claiming, as pertinent here, that the District failed to comply with the provisions pertaining to the Capital Replacements component cash reserve fund set forth in the "Duration of Assessment" section of the Engineer's Report. Accordingly, they have raised an issue of construction, which we review de novo. (*Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC* (2020) 53 Cal.App.5th 807, 818–819.)

Whether the Assessment is considered akin to an initiative measure, or a statutory measure, or a contract, the basic rules of construction are the same.

For example, " '[i]n interpreting a voter initiative . . . , we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the [initiative], giving the words their ordinary meaning." [Citation.] The [initiative's] language must also be construed in the context of the statute as a whole and the [initiative's] overall . . . scheme.'

(*People v. Rizo* (2000) 22 Cal.4th 681, 685. . . .) 'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.' (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 [(*Lesher*)]. . . .) Where there is ambiguity in the language of the measure, '[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.' (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14. . . .)" (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.)

Similarly, in interpreting a contract, we ascertain the parties' "intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (Civ. Code, §§ 1639, 1647.) We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation. (*Id.,* § 1641.) We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (*Id.,* § 1644.) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (*Id.,* § 1638.)' " (*Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2014) 229 Cal.App.4th 549, 567.) " 'Courts will not add a term about which a contract is silent.' " (*Id.* at p. 569.) "In the construction of a[n] . . . instrument, the office of the Judge 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." (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.)

The trial court erred in two respects. First, it conflated the $17,500 annual recovery limit, with the cash reserve fund limit. The $17,500 limit is the amount per year that can be assessed for the Capital Replacements component of the Assessment. It is the "average annual cost to be recovered for capital replacements . . . based on funding replacements at a 50 percent level." It is therefore discussed in the "METHOD OF APPORTIONMENT" section, and specifically the "Assessment Allocation" sub-section of the Engineer's Report.

The "cash reserve fund" limit, in turn, is discussed in the "ASSESSMENT" section, and specifically the "Duration of Assessment" sub-section, of the report. This limit imposes a cutoff as to the period of time the District can collect the annual $17,500 assessment. In other words, the District can annually collect $17,500 until the cash reserve fund reaches "10% of the replacement value of the District's assets," at which point the assessment must stop until the District makes expenditures from the Capital Replacements component.

Thus, the $17,500 annual recoupment limit, and the 10 percent of the replacement value cap on the cash reserve fund, address different issues.

Second, the trial court failed to apply the governing language, namely the language of the Engineer's Report, according to its plain terms. The report does, indeed, use the language "50 percent of the replacement value" a number of times—in the "Assessment Allocation" sub-section of the "METHOD OF APPORTIONMENT" section of the report. However, the report also uses the language "10% of the replacement value of the District's assets"—in the "Duration of Assessment" sub-section of the "ASSESSMENT"

section of the report. There is nothing vague or ambiguous about this language. Nor is there anything internally inconsistent in the use of the differing terminology in the different sections of the report given that the sections address different topics. Again, it is not the role of the courts to "add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Lesher, supra,* 52 Cal.3d at p. 543.)

Furthermore, where, as here, we are dealing with a measure that is akin to a statute governing an agency's action, we ordinarily accord "great weight and respect" to the agency's construction of the law it is charged with administering. (*Sheet Metal Workers' Internat Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 207, disapproved on another ground as stated in *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118, 1139.) Moreover, "[a]n agency's interpretation is . . . given greater credit when it is consistent and long-standing," and "[a] long-standing and consistent interpretation should generally not be disturbed unless it is clearly erroneous." (*Ibid.*) The District had been implementing the capital replacement cash reserve fund in accordance with the plain language of the Engineer's Report since its inception and for more than a decade, and that reading of the report is not "clearly erroneous."

Finally, we observe that under plaintiffs' reading of the Engineer's Report, the cash reserve fund would total $69,850, whereas pursuant to the report's plain language, the fund totals $139,700. Given the cost of capital improvements, the latter reading results in an amount that is imminently reasonable.

The judgment pertaining to the Capital Replacement component cash reserve fund is therefore reversed and the District is entitled to judgment on this claim.

Capital Replacements Component Limitations Period

The District raised the three-year limitations period set forth in Code of Civil Procedure section 338 as a defense to plaintiffs' claim pertaining to the Capital Replacements component cash reserve fund. The trial court rejected the District's defense, and the District maintains the court erred in its ruling. It is unclear from the parties' briefs whether we need to reach this issue, given that we have upheld the District's implementation of the pertinent provisions of the Engineering Report. We do so, however, to ensure that this Assessment claim is fully resolved.

The trial court ruled that, "while the issue of the Capital Replacement Fund reserve calculation was not challenged until May 2011, every year the assessment was collected once the ceiling (had it been properly computed) had been reached or exceeded, triggered a new accrual date for limitations purposes." Accordingly, under the "continuing accrual" doctrine, the plaintiffs' claim was not time barred, and the court ordered refunds of assessments supposedly in excess of the cash reserve fund limit, from 2008 onward.

The District maintains the trial court "improperly measured the period for which it could order a refund" because "[t]he 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" and plaintiffs did not allege such a claim until they filed their August 2015 second supplemental complaint. The District therefore contends the court erred in ordering refunds to commence as of 2008. The District is correct on this point.

Plaintiffs' original complaint, first amended complaint, and second amended complaint alleged, in pertinent part, counts for "assessment on

parcels owned by plaintiffs" and for "Mallo Pass Capital Improvements Assessments." (Some Capitalization omitted.) Their third amended complaint alleged, in pertinent part, only a count for "Assessments on Parcels Owned by Plaintiffs," although another count, entitled "Breach of Settlement Agreement," mentioned the Mallo Pass Capital Improvement component and the Engineer's Report. Plaintiffs' first supplemental complaint, filed in May 2011, alleged, in pertinent part, counts for "Assessments on Parcels Owned by Plaintiffs" and for "Mallo Pass Capital Improvements Assessments."

None of the counts in these pleadings challenged the way in which the District determined the Capital Replacements component cash reserve fund limit. It was not until plaintiffs filed their second supplemental complaint, in August 2015, that they raised this claim.

Plaintiffs respond that "[e]ven if one assume[d] that the May 2011 supplemental complaint did not precisely allege that the District was miscalculating the ceiling on the capital replacement fund and over collecting the assessment . . . and the assessment refund was first raised in the second supplemental complaint . . . the issue still relates back" to the original complaint—filed in September 2009—because it "specifically raised at least some Proposition 218 Issues."

As plaintiffs note, there is disagreement among Courts of Appeal as to whether a supplemental complaint can relate back to the original complaint. "Some cases hold that supplemental complaints do *not* relate back. A supplemental complaint does not supersede the original complaint [citation] and, therefore, claims asserted by supplemental complaint must stand on their own as far as the statute of limitations is concerned." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2021) ¶ 6:803, p. 6-207, citing *ITT Gilfillan, Inc. v. City of Los Angeles* (1982)

136 Cal.App.3d 581, 589 [holding "supplemental complaints do not relate back to the original filing of the complaint"].) "But there are other cases . . . , holding that where the original complaint gives notice that alleged wrongful conduct is of a continuing nature, a supplemental complaint based on the same conduct *does* relate back to the original pleading for statute of limitations purposes." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 6:806, p. 6-208, citing *Bendix Corp. v. City of Los Angeles* (1984) 150 Cal.App.3d 921, 926 [holding supplemental complaints do relate back to the original complaint].)

We need not weigh in on this debate because plaintiffs' second supplemental complaint does not, in any case, satisfy the requirements to relate back to their original pleading.

"The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408–409.) " 'The "relation back" doctrine focuses on *factual similarity* rather than rights or obligations arising from the facts, and permits added causes of action to relate back to the initial complaint so long as they arise from the *same injury*. [Citations.] A new cause of action rests upon the same set of facts when it involves the *same accident* and the *same offending instrumentality*.' " (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 266, italics added.)

Plaintiffs' cash reserve fund limit claim is based on facts and injury wholly different from the facts and injuries alleged in their original complaint with respect to different components of the Assessment. While plaintiffs assert their September 2009 original complaint alleged "at least some Proposition 218 Issues," those "issues" related only to the Mallo Pass

Improvement Component and had no bearing on the claim they raised as to the Capital Replacements Component and, specifically, the cash reserve account limit for that component. Thus, it is no surprise the original complaint made no mention of the Capital Replacements component, let alone the cash reserve fund limit for that component.

Accordingly, the three-year limitations period should have been measured from the filing of the August 2015 second supplemental complaint, not from the filing of the May 2011 first supplemental complaint. Ordinarily, this would mean relief for periods prior to August 2012 would be foreclosed. However, because a tolling agreement was in place, relief can, as the District acknowledges, be granted for an additional two-plus year period.[41]

Cross-Appeal: Assessment Claims Attorney Fees

Plaintiffs sought attorney fees incurred in connection with their claims pertaining to the Assessment. As we have observed, these claims included not only their claim with respect to the Capital Replacements component cash reserve fund, which we have rejected, but also claims pertaining to other aspects of the District's implementation of the Assessment.[42] The court denied their request for fees. On appeal, plaintiffs maintain the court errored

---

[41] The parties agreed to toll unexpired statutes of limitations as of March 11, 2013. The agreement was still in effect when plaintiffs filed their second supplemental complaint. The District thus states, and plaintiffs do not dispute, that the "tolling period, from March 2013 to August 2015," means "the period for which the court could order refunds should be extended that long, from 2012 to the fiscal year ending September 2010."

[42] As to these other claims, the trial court granted injunctive and declaratory relief, and ordered the District to reimburse $170,829 to the "System Wide component" and $432,792 to the "Mallo Pass component," and to refund property owners $68,434 on a proportionate basis.

in its rulings pertaining to the private attorney general doctrine (Code Civ. Proc., § 1021.5) and the common fund doctrine.[43]

Private Attorney General Doctrine

Code of Civil Procedure section 1021.5 " 'codifies California's version of the private attorney general doctrine, which is an exception to the usual rule that each party bears its own fees. [Citation.] The purpose of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases.' " (*People v. Investco Management & Development LLC* (2018) 22 Cal.App.5th 443, 456 (*Investco*).)

"The statutory language of [Code of Civil Procedure] section 1021.5 'can be divided into the following separate elements. A superior court may award attorney fees to (1) a successful party in any action (2) that has resulted in the enforcement of an important right affecting the public interest if (3) a significant benefit has been conferred on the general public or a large class of persons, (4) private enforcement is necessary because no public entity or official pursued enforcement or litigation, (5) the financial burden of private enforcement is such as to make a fee award appropriate, and (6) in the interests of justice the fees should not be paid out of the recovery.' [Citation.] 'As [Code of Civil Procedure] section 1021.5 states the criteria in the conjunctive, each of the statutory criteria must be met to justify a fee award.' " (*Investco, supra*, 22 Cal.App.5th at p. 456.)

We review an award of attorney fees after trial for an abuse of discretion. (*Investco, supra*, 22 Cal.App.5th at p. 456.) " ' "Whether a party has met the requirements for an award of fees and the reasonable amount of

---

[43] The trial court also declined to award fees under the substantial benefit doctrine, but plaintiffs do not pursue that theory on appeal.

such an award are questions best decided by the trial court in the first instance. [Citations.] That court, utilizing its traditional equitable discretion, must realistically assess the litigation and determine from a practical perspective whether the statutory criteria have been met. [Citation.] Its decision will be reversed only if there has been a prejudicial abuse of discretion. [Citation.] To make such a determination we must review the entire record, paying particular attention to the trial court's stated reasons in denying or awarding fees and whether it applied the proper standards of law in reaching its decision. [Citation.]" ' [Citation.] However, '[w]here the material facts are undisputed, and the question is how to apply statutory language to a given factual and procedural context, the reviewing court applies a de novo standard of review to the legal determinations made by the trial court.' " (*Id.* at pp. 456–457.)[44]

In requesting fees, plaintiffs maintained they "mounted a highly-successful Constitutional challenge to [a] serious misuse of assessment funds by a public agency," that "resulted in several substantial benefits: definitive assessment time frames and ceilings; substantial adjustments to fund balances; required reimbursement from unrestricted funds; and refunds to all District parcel owners totaling nearly $1 million." Plaintiffs also asserted the "litigation costs for these claims far exceed the personal benefit" they gained. Plaintiffs noted that the "approximate amount of the Prop. 218 recovery" on

---

[44] The parties dispute the standard of review. The District asserts abuse of discretion is warranted. Plaintiffs assert "independent review is proper" because the trial court assertedly "utilized improper criteria" and "applied an incorrect legal standard." As stated above, within our review of the trial court's exercise of discretion, we " ' "pay[] particular attention to the trial court's stated reasons in denying or awarding fees and whether it applied the proper standards of law in reaching its decision." ' " (*Investco, supra*, 22 Cal.App.5th at pp. 456–457.)

all claims was $923,000, as owners of 19 percent of the assessed parcels they would receive $175,370, and they had incurred "$275,866.69 in fees" in connection with the Assessment claims.

The trial court denied fees, ruling there was "no legitimate equitable or factual basis on which to ground a finding that in the interest of justice, the fees should not be paid out of the recovery." The court observed "[s]ubstantial damages" had been awarded in connection with the inverse condemnation, breach of contract, trespass, and unjust enrichment claims, as well as substantial attorney fees in connection with the inverse condemnation claim,[45] and concluded justice did not require that the fees plaintiffs incurred in connection with their Assessment claims "should be paid by the District or from any monies generated by court ordered refunds," as there was "no showing of a financial burden to plaintiff from bringing and pursuing this litigation." To the contrary, the court found "quite the opposite has been demonstrated," as plaintiffs stood to recover a substantial boon due to the "significant number of parcels" they owned. "[A]n award of attorneys' fees . . . under Code of Civil Procedure § 1021.5 is appropriate only when the cost of plaintiff's legal victory transcends the personal interest in the matter," and, here, plaintiffs' "personal interest in the outcome of this litigation undermines awarding attorneys' fees."

Plaintiffs claim the trial court "erred in presumptively disqualifying the Moores from recovery of their Proposition 218 related attorney fees under Code of Civil Procedure section 1021.5 by failing to balance their expected litigation costs against any potential recovery." (Boldface & some capitalized

---

[45] Plaintiffs had been awarded approximately $1.4 million dollars in damages and attorney fees in connection with these claims.

omitted.) They rely on two cases, neither of which calls for reversal of the court's section 1021.5 ruling.

In *Conservatorship of Whitley* (2010) 50 Cal.4th 1206 (*Whitley*), our Supreme Court held that a "litigant's personal *non*pecuniary motives may not be used to disqualify that litigant from obtaining fees under Code of Civil Procedure section 1021.5." (*Id.* at pp. 1211, italics added.) "[T]he purpose of section 1021.5," stated the court, "is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms." (*Id.* at p. 1211.) Here, the trial court did not deny fees on the basis of any nonpecuniary interest of plaintiffs.

In *City of Oakland v. Oakland Police & Fire Retirement System* (2018) 29 Cal.App.5th 688, 699 (*City of Oakland*), the appellate court set forth a four-step inquiry "for weighing costs and benefits of litigation," which was first enunciated in *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1 (*Los Angeles Police*). Under this inquiry, a court: (1) "must estimate the expected monetary value of the case at the time the party seeking fees made vital litigation decisions"; (2) "must next discount that value by ' "some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome" ' "; (3) "must determine ' "the costs of the litigation—the legal fees, deposition costs, expert witness fees, etc., which may have been required to bring the case to fruition" ' "; and (4) "must ' "place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case." ' " (*City of Oakland,* at pp. 699–

700.) As the appellate court noted, the Supreme Court, in *Whitley*, cited to the *Los Angeles Police* case "with approval." (*Id.* at p. 699.)

Plaintiffs assert the trial court was required to undertake this four-step inquiry but failed to do so. We rejected this contention in *Millview County Water Dist. v. State Water Resources Control Bd.* (2016) 4 Cal.App.5th 759 (*Millview*), concluding the Supreme Court in *Whitley* did not "approve[] the analysis of *Los Angeles Police*," but rather, "characterized it merely as 'illustrat[ive]' of a 'method for weighing costs and benefits' in evaluating a request for fees under [Code of Civil Procedure] section 1021.5." (*Id.* at p. 772.) Indeed, in *Whitley* the high court discussed several cases, including *Los Angeles Police*, all of which were "intended simply to demonstrate that courts have focused on monetary, as opposed to nonmonetary, benefits in evaluating 'financial burden' under [Code of Civil Procedure] section 1021.5," and the court "did not purport to adopt any of them." (*Ibid.*) Moreover, since the sole issue in *Whitley* "was the relevance in a 'financial burden' analysis of the *non*financial interest of a party," any pronouncement by the court regarding the methodology of evaluating financial interest "would have constituted dictum." (*Ibid.*, italics added.)

Plaintiffs claim the financial burden they shouldered in litigating the Assessment claims far eclipsed the personal benefit they obtained. According to plaintiffs, "[n]o rational actor is going to spend $275,866 to gross $175,370" and they "could have forgone arguing the Proposition 218 issues . . . and netted far more than they did by raising" them. They "made a selfless choice to pursue an issue of public import, and this [is] precisely the type of decision Code of Civil Procedure section 1021.5 was meant to promote."

However, we "consider a party's financial *incentives* to participate in litigation—that is, the potential financial benefits, broadly defined—

regardless of the actual recovery, if any, from the litigation." (*Millview, supra*, 4 Cal.App.5th at p. 772.) Here, plaintiffs' incentive for pursuing the claims was manifest. As the trial court observed, plaintiffs own a "significant number of [the] parcels" that not only would generate a significant refund, but would also benefit from lower assessments in the future, if they prevailed. In addition, the fruits of their success would inure to any property they owned that might, within the lifetime of the Assessment, be subdivided or brought into the District.

We therefore discern no abuse of discretion in the trial court's conclusion that the financial burden of private enforcement was not such to make a fee award appropriate under Code of Civil Procedure section 1021.5. (*Millview, supra*, 4 Cal.App.5th at p. 773.)[46]

Common Fund Doctrine

"The common fund doctrine is based on the principle that 'where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund.' [Citation.] The purpose of the doctrine is to allow a party, who has paid for counsel to prosecute a lawsuit that creates a fund from which others will benefit, to require those other beneficiaries to bear their fair share of the

---

[46] Having concluded the trial court did not abuse its discretion in concluding plaintiffs failed to clear the financial burden versus anticipated gain hurdle to Code of Civil Procedure section 1021.5 fees, we need not, and do not, address their additional claim that the court "improperly lumped" the damages awards for all the claims when considering their financial burden. (See *Investco, supra*, 22 Cal.App.5th at p. 456 [party seeking Code of Civil Procedure section 1021.5 fees must meet all six requirements].) Nor do we address the District's assertion that plaintiffs invited the error they complain of on appeal.

litigation costs. [Citation.] In other words, the common fund doctrine permits the plaintiffs' attorneys to recoup their fees from the fund." (*Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 878 (*Northwest Energetic*).) "[W]here plaintiffs' efforts have not effected the creation or preservation of an identifiable 'fund' of money out of which they seek to recover their attorney fees, the 'common fund' exception is inapplicable." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 37–38.)

The trial court ruled the "common fund doctrine [was] not a basis for an award of attorneys' fees" because the "refunds ordered are not going into a created common fund at all." The court expressly rejected plaintiffs' claim that a " 'fund' will be developed from the refunds ordered." That was not, said the court, "truly the case at all; refunds should go to the specific property owners in the District all of whom may also suffer from the financial strain to their community water district arising from management decisions leading up to and resulting in this litigation."

Plaintiffs maintain the trial court erred "in requiring a literal fund need be created as a predicate to consideration of the common fund theory's applicability." (Boldface & capitalization omitted.) They assert the court's ruling "elevate[d] form over substance" and "ignore[d] the plain creation or preservation of earmarked Proposition 218 funds that will be refunded."

Plaintiffs are mistaken. This case did not generate a "common fund" as that term is understood in the attorney fee context. Rather, the court made a series of rulings as to each Assessment component claim, providing various forms of relief. For example, with respect to the "System-wide" component claims, the court (1) determined the District "improperly expended money" and granted a permanent injunction, (2) ordered the District to maintain an

accounting, "including all additional assessments collected and proper expenditures," using a corrected balance, (3) ordered the District to reimburse the System-wide component fund "from the District's unrestricted, non-Proposition 218, monies," (4) ordered the District, after reimbursement, to "refund the entire remaining balance," "as properly accounted for and as corrected (including collected assessments and approved expenditures subsequent to February 2016), at the conclusion of the assessment," for the System-wide component, and (5) in the interim, allowed the District to use funds in the System-wide component fund "to construct the enumerated capital improvement project(s) detailed in the [E]ngineer's [R]eport for this component of the Proposition 218 assessment, so long as the expenditure thereof does not exceed the total approved assessment amount for this component." Only then, would "[r]efunds of remaining monies . . . be made at the conclusion of this component of the assessment as specified above, on a proportionate basis, to the owner of record for each and every parcel on which said owner paid assessments."

This is a far cry from the "common fund" in cases in which fees have been awarded. For example, *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, which plaintiffs cite, dealt with the refund of an invalidly collected supplemental tax which had been set aside in a *preserved* fund. (*Id.* at pp. 1423, 1426.) Here, there was no such preserved fund but rather claims based on three different Assessment components, each of which generated varied relief.

Plaintiffs assert "[e]ven if a fund was not preserved by the litigation, a fund will need to be created by the District to refund assessments as a direct consequence of the judgment." However, "to constitute a common fund within the meaning of the doctrine, the fund *must be created or preserved by the*

litigation, not created in response to it." (*Northwest Energetic, supra*, 159 Cal.App.4th at p. 878, italics added.)

Knoff v. City & County of San Francisco (1969) 1 Cal.App.3d 184, which plaintiffs also cite, did not involve a common fund fee award. Rather, it involved fees for a successful class mandamus proceeding. (*Id.* at pp. 202–204.) Although there was no common fund, since the case involved "a class action . . . to which equitable principles applied because it was in the nature of mandamus," the court concluded it necessarily followed that "the award of attorneys' fees and the details thereof were proper exercises of the trial court's broad equitable powers." (*Id.* at p. 203.) The instant case is neither a class action nor a writ proceeding.

DISPOSITION

The judgment is reversed in part and affirmed in part, and the case remanded for further proceedings consistent with this opinion. Parties to bear their own costs on appeal.

Banke, J.

We concur:

Margulies, Acting P.J.

Sanchez, J.