SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

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WILLIAM H. MOORES, TONA ELIZABETH MOORES, Plaintiffs, v. IRISH BEACH WATER DISTRICT, DOES 1 through 10, inclusive, Defendants. GORDON MOORES, SANDY MOORES, MENDOCINO COAST PROPERTIES, a California Corporation, and MOORES ASSOCIATES, a partnership, Real Parties in Interest.	Case No. SCUK CVG 09-54665 PROPOSED STATEMENT OF DECISION Judge: Hon. Ann Moorman

Set forth herein, is the Court's Statement of Decision after a court trial on the issues raised in Phase 3 of the above referenced action.

A. Proposition 218 Assessments

1. <u>System Wide Fund</u>

a. Duration of the Assessment

Article XIIID, subsection (4)(c) of the California Constitution refers to the calculation of the Proposition 218 assessment, and requires notice to be given to each affected parcel owner. The "notice" requirement specifically requires each parcel owner to be advised regarding the "duration of the payments" to be collected. As IBWD points out, the "Duration" section of the Engineer's report does not specify a time period for the assessment. Rather it states the assessment shall be collected until "the improvements described have been completed or resolved and all related financial obligations have been satisfied." (Exhibit 19, page 12.) In contrast, page 7 of the same Engineer's report references a "time-line" of 15 years.

To resolve this dispute, the Court turned to the actual notice sent to parcel owners which is included as part of Exhibit 19. On page one of that July 26, 2002 notice (which was required by subsection 4(c)), it informs parcel owners that:

> "The Capital Improvements component of the proposed assessment will be collected at the maximum voter approved amount for 15 years through the 2016-17 fiscal year or until the Capital Improvements component has been completed or resolved and all financial obligations generated by the Capital Improvement component have been satisfied."

Reviewing the totality of the language in Article XIIID and the stated purpose of Proposition 218, an assessment with an indefinite duration is inconsistent with this provision of the California Constitution. The notice sent to voters at the time the assessment was proposed, clearly specified a maximum duration of 15 years for this assessment. Injunctive Relief ***is hereby*** granted to limit collection of this assessment to the prescribed 15 year maximum, to wit, through the conclusion of the 2016/2017 fiscal year. ***The District must halt all assessments directed to the System Wide Fund as of the imposition of the April 2017 property tax bill***

b. Improper Expenditures

This fund must be reimbursed from unrestricted funds to replace improper expenditures, unsupported expenditures and unrealized investment/interest income. The Court elects to adopt Alternative II from Celeste Plaister's Report and Testimony (Exhibit 167, SW-1 II) to determine the amount of the reimbursement.

c. Tanks 1 and 3 and the Excavator –

While the actual costs associated with Tanks 1 and 3 exceeded the Engineering Report estimates, the total amount expended for all approved capital improvements has not exceeded the assessment ceiling. Therefore, the Court does not find any violation of Proposition 218 based on the actual costs associated with replacing Tanks 1 and 3.

This conclusion is buttressed by the testimony in the record that the valuations for the tanks as set forth in the Engineer's Report were estimates at the time of the approval of the assessment as evidenced within the report itself. Furthermore, it was foreseeable that the District would have to forego or abandon certain enumerated projects that were properly contemplated by the Engineers Report for a variety of reasons including but not limited to a cost over-run for one of the projects approved by the voters. The costs associated with Tanks 1 and 3 did exceed the estimates but there was no evidence those excesses were a result of malfeasance.

The cost of the excavator by all accounts was not included within the proposed Capital Improvements included in the Engineer's Report. (See Exhibit 19, p. 6, Table 3.) It is also, by definition, not a capital improvement. The testimony of Mr. Acker confirmed that while this has been a useful piece of equipment, it does meet the definition of a capital improvement.

d. Inter-Fund Loans

Interest on the loan between funds should be paid in accordance with the Plaister proposal. While the loan itself may not violate Proposition 218, repayment must include compensation for lost income that would have been realized had the principal remained invested. The Court was given only one proposal as to how to calculate that lost income and that was through Ms. Plaister.

e. Unsupported expenditures

The Plaister Forensic Accounting also revealed some unsupported expenditures and a variety of errors. Correcting the errors and replacing the cost associated with the excavator as well as the lost interest income results in a corrected balance of $170,829 as of February 2016.

f. Refunds

The Court declines to order a refund from this fund to property owners until the expiration of the 15 year assessment period. The funds remaining may still be devoted to specifically enumerated capital improvement projects including the raw water line. Refunds on any remaining funds at the conclusion of the 15 year assessment period should be distributed on a proportionate scale to all parcel owners of record paying the assessment. The District is obligated to develop and maintain an accounting of all assessments for this Fund collected after February 2016 (the end-date of the Plaister Accounting) until the assessment is halted. This does not prohibit the District from pursuing an alternative use of the funds with parcel owner/voter approval.

2. <u>Mallo Pass Fund</u>

a. Based on all the testimony and documentary evidence, the Court finds that IBWD abandoned the Mallo Pass Project as of September 12, 2009 (See Exhibit 69). Given the abandonment of the SWRCB permit and the lack of any evidence pointing to any remaining or viable interest in this water source, it is not credible to claim that Mallo Pass development would be anything other a potential source of water that could *possibly be developed some time in the future*. Therefore, continuing to collect the assessment for this project which is specifically defined in the Engineer's report at page 8, after the project was abandoned violated Proposition 218 (as now reflected in sections 1-4 of Article XIIID of the California Constitution.)

b. The Court also concludes for the same reasons applicable to the System Wide fund, that the maximum duration of this assessment is 15 years. This is because the July 26, 2002 notice to parcel owners expressly stated as such. See July 26, 2002 notice included in Exhibit 19.

c. The court concludes that the expenditures from this fund prior to the abandoning the project including consulting and legal fees associated with extending the SWBCB permit were appropriate with the exception of the $9001 expenditure in 2008 for which no explanation or support for such an expenditure was offered.

The $110,000 spent in 2010 and 2011 from this fund for legal representation associated with the instant litigation is not consistent with the purpose of the assessment. It did not assist in conferring the special benefit to affected parcel owners in a manner consistent with Proposition 218.

The Court rejects the argument that such legal expenses are "associated with the project" when the record shows the legal bills were not related to the project itself but were spent resisting a property owner's challenge to the propriety of continuing the assessment given the project had been abandoned.The project would not have been advanced, preserved or benefitted in any way from the attorneys' fees and costs incurred in relation to this litigation. This conclusion is buttressed by the fact that the Mallo Pass Assessment is limited in duration to 15 years. Some conceivable interest in developing Mallo Pass in the future falls far outside that time period. The fees and costs incurred were solely related to protecting the District from liability and not furthering the Mallo Pass project.

d. The Court hereby orders injunctive relief requiring IBWD to immediately cease collecting this assessment. The District is further ordered to reimburse the Mallo Pass Fund from unrestricted monies for the legal bills paid from this fund in 2010 and 2011 and for the $9001 spent in 2008 for which no support was supplied along with unrealized investment/interest income as set forth Alternate 2 under Tab 1Bi of Exhibit 167. (The Plaister Report.)

    i. In this connection, the Court rejects requests to strike the testimony and report of Ms. Plaister. While proper arguments have been advanced urging the Court to place little or no weight on her opinions and findings, there is no proper legal basis to strike the evidence she provided. Furthermore, the evidence concerning her background and experience support a finding of her expertise in forensic accounting regardless of a lack of experience with Proposition 218 assessments.

e. IBWD is further ordered to refund to all property owners on a proportionate scale the total funds remaining (including the reimbursements referenced in Section A.2 (d) and all assessments collected in 2016). This Court will allow 180 days from the date of the entry of judgment to effectuate this aspect of the Court's ruling.[1]

To be clear, the Court is not finding that any Mallo Pass Assessment collected prior to the project abandonment was improper. Only those amounts collected

[1] With regard to any and all refunds of assessment monies ordered herein, Moores' proportionate amount obviously shall not include parcels owned by either or both plaintiffs for which assessments have not been paid.

after the abandonment were improper and, based on the evidence that appears to be assessments levied for the 2010/2011 fiscal year and thereafter.

3. **Capital Replacement Fund**

a. Inter-Fund Transfers – The Court was not presented with sufficient evidence upon which to conclude that the inter-fund transfer between the Capital Replacement Fund and the System Wide fund was a violation of Article XIIID. The Court has concluded that interest would have been earned on the funds had the transfer not occurred or if it had been fully repaid in a timelier manner. The only proposal presented for determining lost interest income was that of Ms. Plaister. The proposal adopted as explained above is reasonable in light of all the information provided.

b. The Cash Reserve Limit -Unlike the System Wide Fund and the Mallo Pass Fund, the Engineer's Report is quite specific concerning the reserve ceiling for this Fund. At page nine of Exhibit 19, the report states:

> "The Capital Replacements component of the assessment is set to recover a portion of the cost of replacing the District's fixed assets. . . . Furthermore the Engineer has set the Assessment to recover only 50 percent of the replacement of the assets over 40 years. The listing of and the replacement value of the District's existing fixed assets is contained in Appendix A of this Report."
>
> "Table 6 lists the value of the District's existing fixed assets with lives greater than 40 years as well as the 50 percent of replacement value to be recovered in this component of the Assessment. The average annual cost to be recovered for capital replacements is $17,500 based on funding replacements at a 50 percent level."

This is a very clear statement of what the Engineer intended. And it is the Engineer's report that was approved by the voters. The $17,500 figure is again referenced in Tables 7 and 8 wherein the total parcel assessment is broken down according to stated purpose. Even though there is no reference to the 50% limit in the "Duration" section of the Engineer's Report, that omission does not logically compel a conclusion that this language should be ignored. The express language used by the Engineer in the body of the Report controls how the ceiling should have been determined. 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. (See also Dove Deposition at page 13.)

Nevertheless, all available public documents show that from inception, IBWD considered the appropriate ceiling to be 10% of the total value (100%) of the assets at issue. It would appear that the voters may have thought the same. The same notice referenced above, dated July 26, 2002 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 determined based on 10% of the total value of the assets included in Appendix A. The 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.

c. Limitations Period - No objection had been raised as to how the reserve ceiling was being determined until Moores' Supplemental Complaint was filed in May of 2011. The District argues that Moores' claims regarding the calculation of the reserve ceiling and any potential refund arising from that improper calculation are barred by the statute of limitations.

The Court rejects this argument. The challenges brought by plaintiffs with respect to each of the Proposition 218 assessments, are refund proceedings arising from the collection of a tax assessment. The Moores' have never challenged the validity of these assessments at their inception. The statute of limitations for such a challenge is three years. (See Cal. Code Civ. Pro. §338(a).)

And, while the issue of the Capital Replacement Fund reserve calculation was not challenged until May of 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. (*See Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809.) In other words, the challenges here to each of the Proposition 218 assessments fall within the continuous accrual doctrine as explained in *La Habra.*[2] Applying that analysis, renders a finding that plaintiffs' claims are timely.

d. Recalculation of the Reserve Ceiling - Plaintiffs seek a recalculation of the reserve based on the correct fundamentals. As stated above, the reserve fund should have been based on a calculation of 10% of 50% of the total value of the existing assets included in Appendix A of Exhibit 19.

Applying the correct calculation requires a re-examination of the assessments collected for the Capital Replacement Fund to determine when "over-collections" began. Exhibit 167, Tab 4(c)(i) applies the proper fundamentals and determines that over collections began with the assessment levied September 30, 2007.

The court adopts the analysis presented through Ms. Plaister in exhibit 167, and specifically those proffered under Tab 4(c)(i) including her calculations as to what the balance of the fund should be, the reserve ceiling and the corresponding over collections starting fiscal year ending in September 2008. Under this scenario, as of February 28, 2016 the reserve fund balance should be $332,657, and the reserve ceiling should be $112,247 with total over-collections of $213,552. Refunds to the parcel owners affected (both for over-collections identified by Ms. Plaister and for not using the correct formula for determining

[2]Ironically, Ms. Plaister's forensic accounting review demonstrates at Tab 4(c)(i) that improper assessments for the Capital Replacement fund did not begin until after fiscal year-end 2007. This means that improper assessments were not *collected* from property owners until sometime in 2008. It would appear that Moores' Supplemental Complaint was timely filed within the three year period. IBWD presented no evidence to the contrary.

the reserve ceiling after February 2016) obviously will reduce the fund balance below that articulated here. All refunds should be issued within 180 days of the entry of judgment in this action and must be from unrestricted funds.

The assets to be included in the "greater than forty year" account are those included in Appendix A to the Engineer's report, except those that were resolved.

Given the Plaister proposal at Exhibit 167, tab 4(c)(i) includes the assets the court intends to be included on the asset list, and calculates the assessment, ceiling and reserve using the correct formula, the District must use this same formula when computing the reserve ceiling for the time period following February 2016. In sum, the Court adopts the formula set forth at Tab 4(c)(i) of Exhibit 167 for purposes of calculating the ceiling moving forward.

B. Trespass

1. The Court has previously found a trespass in connection Phase I of this litigation. The actions of IWBD in entering onto the Moores' property without permission to drill an unauthorized well was both an intentional and negligent act. [3]
2. Plaintiffs are not precluded from an award of damages under a trespass cause of action and an inverse condemnation claim although double recovery is prohibited. *See, e.g., San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 894.
3. In any trespass case, the proper measure of damages is the one that will fully compensate the plaintiff for **damages** that have occurred or can with certainty be expected to occur. (See *Basin Oil Co. v. Baash–Ross Tool Co.* (1954) 125 Cal.App.2d 578, 606, 271 P.2d 122 [there are many ways to measure damages for wrongful occupation of property and courts must be flexible and choose measure allowing full recovery as appropriate to circumstances]; *Cassinos v. Union Oil Co.*, (1993)14 Cal.App.4th 1770, 1785 [each case must be determined on its facts applying rule best suited to determine amount of loss].) Further, **damages** may cover the loss or injury sustained and no more. (*Estate of de Laveaga* (1958) 50 Cal.2d 480, 488, 326 P.2d 129.)
4. The Court awards damages in trespass in the same amount and for the same reasons articulated in its ruling in the Inverse Condemnation action, to wit, $401,000. Damages sought by Plaintiffs for use of the roadway and the water distribution system are not awarded here. To require IBWD 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) would far exceed the damage to plaintiffs for the action of drilling a new well on property belonging to plaintiff.
5. This cause of action addresses the same harm as that addressed in Phases I and II and therefore, double recovery is prohibited.
6. Plaintiff claims that the decision not to award further damages for trespass on the roadway and other improvements is inconsistent with the Court's earlier decision in Phase I of this litigation. The Court disagrees because the damages for trespass is intended to compensate the plaintiff for damages due to the trespass. There is no

[3] The only reasonable conclusion based on the evidence is that the trespass was both negligent and intentional. Any suggestion by the Court to the contrary during the underlying proceedings was not binding as to the ultimate findings.

evidence that the plaintiff has been damaged due to the use of the the roadway or the access or the distribution system during the construction or maintenance of the T5 well resulted 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.

C. Unjust Enrichment.

1. Under California law, the elements of unjust enrichment are: (1) receipt of a benefit; and (2) the unjust retention of the benefit at the expense of another. *In re ConAgra Foods Inc.* 908 F.Supp.2d 1090. (N.D. Cal 2012)
2. The Court will sustain this cause of action based on the evidence presented. The benefit to IBWD was the construction and use of the T-5 well which served as a valuable connection to groundwater. The benefit will be valued based on Ms. Stephenson's methodology adopted by the trial court in Phase I (damages). The Court adopts its reasoning for using her method of calculating damages in that proceeding and finds it applicable here as well. Therefore, the retained benefit will be valued at $401,000. The Court finds no unjust enrichment based on its use of the water distribution or the road due to its negotiated purchase of the same right in connection with the Unit 9 well.
3. This award of damages addresses the same harm as that addressed in trespass and inverse condemnation and double recovery is prohibited.
4. In its objections to the Proposed Statement of Decision, plaintiffs argue that additional damages are merited. Plaintiffs assert correctly that unlike the Unit 9 well, the Mallo Pass project would have provided water to all 460 parcels. As this Court has found, the decision to abandon the Mallo Pass Project was directly tied to the decision to develop the T5 well. The T5 well was projected to have the capacity to provide water to all 460 parcels. Therefore plaintiff concludes, that IBWD was unjustly enriched by now having available water to all 460 parcels and not just the limited properties served by the Unit 9 well. The Court agrees with the principle but concludes that Ms. Stephenson's rationale for arriving at the $401,000 figure addresses the benefit retained by the District for the unjust enrichment.

D. Breach of Contract – 2002 Settlement Agreement

1. Breach of the Settlement Agreement for Failure to require all Parcel Owners to Share in the Cost of Future Water Development.

Plaintiffs' argue that the 2002 Settlement Agreement was breached because an express term of that Settlement Agreement required all 460 parcels to share equally in the development costs for new water sources consistent with the intent of Proposition 218. Plaintiffs further argue that the District parcel owners did not share the costs related to the development of the T5 well and IBWD's failure to enforce this provision of the settlement agreement was therefore a breach.

The 2002 Settlement agreement at page 3 states, "t]he District further agrees that 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." (See Para 7.)

The Court concludes that this provision was not breached by the development of the T5 well. The language used in this provision speaks to assessments imposed pursuant to 218 for future water development. It does not speak to the costs of development for any future project.

Use of the term "assessment" is not synonymous with "cost." (See Civil Code §1645.)The parties specially chose the term "assessment" and referenced Proposition 218 in conjunction with it. The Court finds this provision to require assessments to be shared equally among parcel holders and does not speak to equal sharing of costs related to a development that was clearly not contemplated by the parties at the time of the agreement. (See Civil Code §1636.)

The Court specifically finds no breach of this provision.

2. Breach of the Settlement Agreement for IBWD's Failure to Develop Mallo Pass

Plaintiffs argue that the Court's tentative decision denying this breach of contract claim is erroneous. Upon reconsideration, the Court agrees in the following respects:

Paragraph 7 on page 3 of Exhibit 18 (the 2002 Settlement Agreement) states that the District's "plan for obtaining additional water source supply will consist of first connecting to the existing Irish Creek lower division and secondly, developing and connecting a Mallow [sic] Pass project to the District's water system."

The Court is resistant to read into this provision a binding requirement on IBWD to develop Mallo Pass sequentially following the connection to the lower diversion, without regard to other potential sources for water that may have become viable after the 2002 Agreement was executed. However, a reconsideration of this provision of the 2002 Settlement Agreement is necessary in light of the objections raised by plaintiffs.

This provision of the Settlement Agreement expressly requires 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 IBWD, the SWRCB 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. Plaintiffs claim of breach lies on the factual premise that IBWD gave up or abandon any notion of developing Mallo Pass even though it was contractually obligated to do so. Plaintiffs' claim of breach is not based on the decision to develop the T5 well; rather it rests on IBWD's unilateral decision to abandon the Mallo Pass project.

As discussed elsewhere herein, the evidence demonstrated that the District abandon Mallo Pass as a water source in 2008/2009. This is evidenced by District meeting minutes, relinquishing the permit and other conduct by the District indicating it had abandon its intention to pursue that project. The clear signs of abandonment support a conclusion that this provision of the 2002 Agreement was breached.

The damages to be awarded however are a separate matter. Clearly damages are not precluded simply because the Court has found the District inversely condemned the T5 well from Moores. That is a separate claim guided by different legal principles and different factual findings.

The parties intended via this Agreement, inter alia, 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 that this goal was achievable. The evidence showed that only connecting the lower diversion 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 the project, it did not abandon its obligations to Moores or to any other parcel holder. There is also no evidence that water has not been supplied.

The measure of damages for the breach of an obligation arising from contract is the amount that 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." (Civil Code §3000.) Recoverable damages are those that could fairly be seen as arising naturally from a breach. *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 456.) This includes those that should habe been reasonably contemplated or foreseen in light of all of the known facts or facts the breaching party should have known, at the time of contracting. (*Ibid.*)

Applying these principles, the Court awards damages to the Moores for acquiring the SWRCB permit and the other costs of development of the Mallo Pass water project that he had incurred at the time the 2002 Agreement was executed (except legal fees incurred in negotiating the 2002 agreement). The various costs incurred are set forth in Exhibit 162. He contributed the benefit of this work as consideration on the belief and condition that development of Mallo Pass would go forward under IBWD jurisdiction. This would reasonably assure he and others had sufficient water to support their properties and any development plans with respect to those properties. While he has not been damaged for lack of sufficient water, he provided significant consideration in exchange for a specific promise of developing Mallo Pass and that promise was breached when IBWD abandon the Mallo Pass project.

Damages are awarded in the amount of $133,649 representing plaintiff's expenses as reflected on Exhibit 162 items 1-7(a) (excluding the $50000 cost for a transcript.)

Plaintiffs' counsel is instructed to prepare a judgment in accordance with this Statement of Decision.

Dated: October 26, 2016

ANN MOORMAN

ANN MOORMAN
Judge of the Superior Court

Superior Court of California, County of Mendocino

PROOF OF SERVICE

Case: **SCUK-CVG-2009-54665**

Document Served: STATEMENT OF DECISION

I declare that I am employed in the County of Mendocino, State of California; I am over the age of eighteen years and not a party to the within action. My business address is:

☒ Mendocino County Courthouse, 100 North State Street, Ukiah, California 95482.
☐ Ten Mile Branch, 700 South Franklin Street, Fort Bragg, CA 95437

I am familiar with the County of Mendocino's practice whereby each document is placed in the Attorneys' boxes, located in Room 107 of the Mendocino County Courthouse and the Public Access Room of the Ten Mile Branch, transmitted by fax or e-mail, and/or placed in an envelope that is sealed with appropriate postage is placed thereon and placed in the appropriate mail receptacle which is deposited in a U.S. mailbox at or before the close of the business day.

On the date of the declaration, I served copies of the attached document(s) on the below listed party(s) by placing or transmitting a true copy thereof to the party(s) in the manner indicated below.

Party Served	Ukiah US Mail	Ten Mile US Mail	Ukiah Attorney Box	Ten Mile Attorney Box	Inter Office Mail	Fax	E-mail
Matthew Emrick, Esq. 6520 Lone Tree Blvd., Ste. 1009 Rocklin, CA 95765	☒	☐	☐	☐	☐	☐	☐
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	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed at:

☒ Ukiah, California ☐ Fort Bragg, California

Date: October 27, 2016

CHRISTOPHER D. RUHL, Clerk of the Court

PEGGY MELLO

By: LIST.UNV_UPDINITNAME, Deputy Clerk