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.	Case No. SCUK CVG 09-54665 STATEMENT OF DECISION FOR PHASE ONE OF TRIAL – LIABILITY FOR INVERSE CONDEMNATION Judge: Hon. Ann Moorman
GORDON MOORES, SANDY MOORES, MENDOCINO COAST PROPERTIES, a California Corporation, and MOORES ASSOCIATES, a partnership, Real Parties in Interest.	

I. INTRODUCTION

Upon motion of defendant, this matter was bifurcated into several phases. (See Order filed June 21, 2011.) Phase 1 of trial presented only the issue of whether Defendant Irish Beach Water District (hereinafter, "IBWD") is liable to plaintiffs William and Tona Moores (hereinafter "Moores") for inverse condemnation.[1] Monetary damages or other relief for inverse condemnation, if any, are to be determined by a jury in a trial presently set for August 2012.

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[1] See Stipulation for Proceeding on Phase I Trial filed December 27, 2011,

As to this initial liability phase, the parties agreed to proceed on stipulated facts. The parties also stipulated in their joint filing of December 21, 2011 that the issue for determination was "IBWD's liability, if any, to Moores for inverse condemnation, or a taking if any without just compensation, of: the T5 Well, water taken and that which may be taken, from the T5 well; and, use of access roadways and other improvements to operate and service the T5 well." (See pp 1:23 – 2:2- Dec. 21, 2011 Stipulation)

As noted above, the parties agreed to reserve only oral argument and asked the Court to make its determination on a series of stipulated facts, reserving the right of rebuttal but offering no live testimony or other credible evidence in any form. To this end, on December 21, 2012, the parties filed jointly a pleading entitled, *Stipulation for Phase 1 Trial – Liability of Inverse Condemnation.* Submitted therein was Phase 1 Trial Exhibits 1-12 and 7A, which consisted of various deeds, plans and specifications, a survey, agreements, and other relevant materials. On December 27, 2011, the parties submitted a *Stipulation for Proceeding on Phase 1 Trial – Liability for Inverse Condemnation*,[2] wherein the parties further agreed upon, among other things, to certain briefing parameters.

There was however extensive briefing. On January 12, 2012, Moores filed their Opening Brief. On or about January 20, 2012, IBWD filed its Opening Brief. On January 30, 2012, and February 7, 2012, Moores filed their Reply Brief and Notice of ERRATA thereto, respectively. On or about February 10, 2012, IBWD filed "Objections and Rebuttal." On or about February 15, 2012, the parties submitted a *Stipulation re Rebuttal Evidence for Phase One Trial* and submitted therewith Phase 1 Trial Exhibits

[2] The parties later agreed to modify the timing of some submissions made to the court.

13-26 and 40-53.[3] On February 15, 2012, Moores filed "Objections to IBWD's Rebuttal Materials." On or about February 20, 2012, IBWD filed a "Response to Moores Objections; Supplemental Objections to Rebuttal Documents..." On February 23, 2012, Moores filed "Objections to Stephen Whitaker (IBWD) Declaration" and "Reply to 'IBWD's Response to Moores Objections...' "

The Court heard extensive oral argument on March 1 and 16, 2012. Moores was represented by Donald J. McMullen, Esq. and IBWD by Matthew L. Emrick, Esq. On March 16, 2012, the Court announced its ruling on liability in favor of plaintiffs and requested counsel for plaintiffs to prepare a draft Statement of Decision. The draft was lodged with the Court on April 2, 2012. Defendant IBWD filed objections and a proposed alternative Statement of Decision on April 11, 2012. Plaintiffs filed a reply to the objections on April 19, 2012 and defendant filed a response to the reply on April 25, 2012. The hearing on objections was held on April 26, 2012. On May 29, 2012, the Court extended the time for filing the final Statement of Decision until June 18 and again on June 18 to June 22, 2012.

The Court finds IBWD liable to Moores for inverse condemnation, or a taking, without just compensation, of: the well developed by IBWD but located on Moores Property known as the "T5 Well", and, IBWD's use of the Private Portion of Alta Mesa Road, which is the access roadway to the T5 Well, along with the use of other Improvements to operate and service of the T5 Well. Because IBWD had no right to the water taken from the T5 well, there is a taking, however, to what extent monetary compensation is owed for the taking of the water underlying Moores property from the

[3] Phase 1 Trial Exhibit 53 was lodged separately on a different date.

T5 well requires the application of unique principles of law aside from the physical invasion that occurred when the T5 well was developed. While IBWD had no legal right to develop the T5 well and pump water from it, plaintiff does not own all the water underneath their property and compensation may likely be limited by their reasonable and beneficial use (see discussion below)

II. FINDINGS & DISCUSSION

III.

The Court makes the following findings based upon the litany of stipulations of fact and foundation for many documents filed in advance of oral argument as well as the argument at trial.

The Moores own several parcels of real property in Irish Beach, CA. Included in their holdings is an 18-acre parcel referred to in this action as "Moores Property." Moores Property is located in the West half of the Southwest quarter of Section 32, Township 14 North, Range 16 West, Mount Diablo Basin Meridian. It is depicted as the "well parcel" in Exhibit 2.

IBWD is a California Water District, organized and existing under the laws of the State of California. IBWD is a public agency that operates wells and water facilities and provides water to properties within its service boundaries for public purposes. The Moores Property is located within the service boundaries of IBWD and it, along with other similarly-situated real property owned by Moores and unnamed third parties, maintains the right to receive water from IBWD.

In or about 1988-1990, several recorded grants, agreements, and assignments were made between the parties.[4] Among other things, in 1988, Moores conveyed to

[4]Said conveyance and agreements were, among other materials, referred to by the parties as

IBWD an interest in an existing 276.5-foot water well ("Unit 9 Well") located on Moores Property along with easements related to said well's use and operation. Also in 1988, the parties entered into an agreement known as the Water Development Agreement ("WDA" or Exhibit 6), which itself attached as exhibits, various deeds, assignments, and plans and specifications for water distribution facilities, lines, and components. Included was a physical description of the Unit 9 Well and rights granted IBWD in relation thereto. Furthermore, the WDA and its exhibits described, among other things, a water-storage tank, distribution system, and other related easement rights (*e.g.* access, water and utility lines) conveyed by Moores to IBWD in relation to properties commonly known as "Unit 9." Unit 9 is to be distinguished from the "Unit 9 Well." While the Unit 9 Well is located on Moores Property, Unit 9 is located to the West of Moores Property. It is designated as parcel "132-320" in Exhibits 2 and 3 and has been largely subdivided as noted therein. Moores owned all parcels within Unit 9 at the time of the referenced conveyances and still owns the majority thereof. No well or other groundwater rights such as Moores' rights as an overlying user were conveyed by Moores as part of said Unit 9 conveyances. Further grants were later made in accordance with the provisions of the WDA.

Also included in the WDA was Moores' conveyance to IBWD of certain rights to a water system known as the "Mallo Pass Project." This included, among other things, an assignment by Moores of their rights in a permit to appropriate water from a stream located on the "Mallo Pass" property, along with easements for distribution facilities and a water-distribution plant site. As part of the parties' agreements, IBWD agreed to

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"Stipulated Deeds and Documents" and included within the *Stipulation for Phase 1 Trial – Liability of Inverse Condemnation*, filed December 21, 2011.

develop the Mallo Pass property as a water source. The Mallo Pass Project property, facilities, and incidental easements are not located on Moores Property. IBWD never developed the Mallo Pass property as a water source and by virtue of its inaction, the State of California eventually revoked the permit to appropriate water.

In 2002, the parties entered into the "2002 Settlement Agreement" (Exhibit 11 to the parties Stipulation of Facts). Therein, among other things, the parties noted IBWD's continuing obligation to provide water-related services to Moores and various Moores properties. IBWD again agreed to develop Mallo Pass as a water source, and IBWD retained its rights to the Unit 9 Well. While the 2002 Settlement Agreement contained references to IBWD planned future development, there was no mention of planned development of any water well or other water source on Moores' Property other than continued use of the existing Unit 9 Well.

The scope of a conveyance is generally determined by the "four corners" of the instrument by which said conveyance was made. *Civil Code* section 806 provides: "The extent of a servitude is determined by the terms of the grant . . ." (See also, *Woods Irrigation Co. v. Klein* (1951) 105 Cal.App.2d 266, 269 ["Under section 806 of the Civil Code, which defines the extent of all servitudes, the controlling factor is the terms of the grant"].)

It is abundantly clear from the express terms of the grant deeds and other written instruments by which Moores' conveyances were made, that Moores conveyed the following, to IBWD in relation to the unit 9 well on Moores Property:

- An "existing" 276.5-foot deep water well on Moores Property, which was in existence in 1988 at the time of the grant, commonly known as the "Unit 9 Well" or "Number (No.) 9 Well," and which is located within the 30-foot diameter well easement area described in Phase 1 Trial Exhibit 4.

The grant limited IBWD's rights to that particular well only but it conveyed all water that IBWD could draw from that particular well. In the grant deed itself as well as all subsequent references to the conveyance, IBWD was not conveyed any other rights water on Moores' Property.

- A non-exclusive easement for IBWD to use a specifically described 60-foot by 60-foot square of Moores Property for a water storage tank.

- A water storage tank located on the referenced 60-foot by 60-foot tank site easement

- A non-exclusive 14-foot road access and water system appurtenances easement to allow IBWD to operate the Unit 9 Well, which easement is located on Moores Property. This easement commences at the center point of the western boundary line (running more or less north and south) of the 4-sided square created by the 60-foot by 60-foot water storage tank site easement (above). From that center point, the easement traverses west, then north west to the point of the referenced 30-foot diameter well easement around the existing Unit 9 Well, and finally south west to its point of termination. Exhibit 12 paints a clear picture of this easement, as well as the square created by the 60-foot by 60-foot water storage tank site easement. The T5 Well is not located within, and is some distance away from, the legally-described parameters of this easement; it is approximately 150-200 yards from the Unit 9 Well and 30' diameter well easement.

- Certain Unit 9 Well Facilities on Moores Property used to operate the Unit 9 Well.

- A non-exclusive right to access Unit 9 and the Unit 9 Well via the Private Portion of Alta Mesa Road, which roadway is particularly described in the parties' *Stipulation for Phase 1 Trial – Liability of Inverse Condemnation*, filed December 21, 2011, at pp. 3-4, ¶9.) Said road is further delineated in Exhibits 1 through 3 as explained in the referenced *Stipulation* on pages 3-4. ¶ 9.

- In order to allow IBWD to operate the Unit 9 Well, Moores granted IBWD a non-exclusive easement 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 the Moores 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 and Unit 9 Well on the Moores Property," i.e. the "Improvements."[5]

[5] For purposes of this action, the parties stipulated that the referenced electricity and other utilities, water distribution lines, and telephone lines may be collectively referred to as the "Improvements." (*Stipulation*,

There seems no genuine disagreement that the Improvements run adjacent to the private portion of Alta Mesa Road. In or about 1988, Moores constructed and installed both the private portion of Alta Mesa Road and the Improvements at Moores' expense. The Unit 9 Well was drilled by Moores in approximately 1975, and it was the only water well on Moores Property until IBWD drilled and constructed the "T5 Well." Through the Unit 9 Well, IBWD supplies water for public purposes to properties within the service boundaries of IBWD, including properties Moores owns. IBWD has done so since at least 1989.

Said conveyances by Moores were done subject to IBWD's obligation to provide water to Moores, and to persons to whom Moores had previously granted water rights in the Moores Property, for Moores' continued use.

In August 2008, without the consent or permission of Moores, IBWD drilled and constructed a well known T5 Well[6]. The T5 Well is located within the South-East corner of the 60' x 60' water storage tank site easement referred to above, which is itself located in the far South-East corner of Moores Property. It is depicted on the second page of Exhibit 12, which is IBWD's official property survey of the area, with the letter "W" circled. The T5 Well is approximately 150-200 yards from the Unit 9 Well, and the T5 Well is not located within the 30-foot diameter space referenced in the easement made part of Exhibit 4.

Since the T5 Well was drilled and constructed in August 2008, IBWD has used Moores property and other properties owned by Moores to access the T5 Well, including

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filed Dec. 21, 2011, p. 3 ¶ 8.)

[6] Also known as the "Tank 5 Well" and identified in Moores' complaints in this action as the "new well."

the Private Portion of Alta Mesa Road. Furthermore, since that time, IBWD has used the other Improvements developed by Moores for the Unit 9 well and conveyed in 1988 to IBWD, to operate and run service to and from the T5 Well. Since the T5 Well was developed in 2008, IBWD exclusively has operated the T5 Well and taken water from that well for its use, including sale, in providing water to properties within its service boundaries as part of IBWD's operation as a public agency. All such activities by IBWD were and are for public purposes. IBWD provided Moores no consideration or compensation for this use.

The parties stipulated that Moores' property is undeveloped. (See ¶ 3 of the Stipulation of Facts.) There was no evidence presented in this phase that Moores has developed any other wells on the property or is otherwise using the groundwater in the location of the T5 well. The Unit 9 Well and the T5 Well are the only wells or methods of extraction on Moores' property.

The United States Constitution provides, "No person shall be deprived of property, without due process of law; nor shall private property be taken for public use without just compensation." (U.S. Const., Amend V.) The California Constitution provides, "Private property may be taken or damaged for public use only when just compensation has first been paid to the owner." (Calif. Const. (Art. I) § 19.) There is no prohibition on the government taking private property for public use. (*Brown v. Legal Foundation of Washington* (2003) 538 U.S. 216, 233.) Rather, the United States and California Constitutions require that the government pay just compensation for the taking. (*Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson* City (1985) 473 U.S. 172, 194; superseded by statute.)

A public agency has the power to take private property by an action in eminent domain as an inherent attribute of governmental sovereignty. (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal. App. 4th 556, 561.) A property owner also may have his or her property rights and interests "taken" or "damaged" by the acts or conduct of a public agency which requires the property owner to initiate an action to recover just compensation. "'Inverse condemnation' occurs when there is a public taking of, or interference with, land without formal eminent domain proceedings." (29 Cal. Jur. 3d Eminent Domain § 332 Inverse Condemnation.)

An inverse condemnation cause of action derives from article I, section 19 of the California Constitution, noted above. "Property is 'taken or damaged' within the meaning of article I, section 19 of the California Constitution, so as to give rise to a claim for inverse condemnation, when: (1) the property has been physically invaded in a tangible manner; (2) no physical *invasion* has occurred, but the property has been physically *damaged;* or (3) an intangible intrusion onto the property has occurred which has caused no damage to the property but places a *burden* on the property that is direct, substantial, and peculiar to the property itself." (*Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029, 1048.) *See also, Oliver v. AT&T Wirless Services* (1999) 76 Cal.App.4th 521,530. The property owner has the burden of establishing that the public entity has, in fact, taken or damaged his or her property. (*San Diego Gas Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 940.)

It is important to note that in this action, plaintiffs proceeded on a theory of physical invasion. (*See, inter alia,* plaintiff's reply brief re: phase one trial filed January 30, 2012 at p. 12:11 – 13:24: " IWBD physically invaded both the surface land and

subsurface water of Moores property . . . . ") As stated in *San Diego Gas & Electric Co. v. Superior Court, supra* 13 Cal.4th 893, 940, "[a] public entity also 'takes or damages' private property when it physically invades that property in *any* tangible manner." Permanent physical invasions of property are takings "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land. (*Ibid.*)

The basic issues under these provisions are: (1) whether private property was "taken" or "damaged"; and (2) whether the taking or damage was for a public use. (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 279-284, judgment affirmed in *Agins v. City of Tiburon* (1980) 447 U.S. 255; abrogated on other grounds by *Lingle v. Chevron U.S.A. Inc* (2005) 544 U.S. 528.)

The Court finds that IBWD—a public agency— developed a second well (T5) on Moores' property without permission, is taking water from the T5 Well and providing the same to property owners including Moores for public purposes, thus satisfying the second element.

Regarding the first element, the express terms of Moores' conveyances to IBWD in 1988 were that IWBD had unlimited access to all water it could extract from the Unit 9 well, use of access roads, and use of Improvements. The language of the deed was not ambiguous: it conveyed an easement specific in size and configuration and "a water well commonly known as the Unit 9 Well which is located within the 30' diameter area described . . .." (See Exhibit 4 to Stipulations of Fact filed December 21, 2011.)

The Court rejects defendant's argument that the principal component of the 1988 conveyance as set forth in the grant deeds and other documents was the tank storage site,

therefore rendering the Unit 9 well an appurtenance. This makes no sense. A water storage tank and easement for the tank site have no function or purpose without water to store. This Court finds it would be unreasonable to interpret the grant deed and other relevant documents to find the tank to be the principle component of the conveyance. IBWD was looking for *water* in 1988 as evidenced by the Unit 9 well conveyance and the unequivocal language that it could take all the water that could be extracted therefrom. The well was the principal feature of the conveyance. This interpretation is corroborated by the fact that the Water Development Agreement talked further of developing "other water sources" in other locations. Specifically it acquired Moores had rights as an appropriator in the Mallo Pass Project, the permit for which IBWD later forfeited. The Water Development Agreement shows that the parties knew the difference between granting rights to water and granting rights to an existing well.

There would have been no reason to purchase the water storage tank or tank site in isolation. As it was, plaintiff had already developed the #9 Well and the extension to the road and other mprovements and had plans for the distribution system. The principal thing purchased by IWBD was the Unit 9 Well and all water that could be pumped from it.

If the parties had intended to convey to IBWD Moores rights as an overlying user or the right to develop additional wells on Moores property, they easily could have done so. Wells do not last forever and the parties recognized that fact. Of note is the fact that failure of the Unit 9 Well *was* contemplated by the parties and specific levels of monetary reimbursement to IBWD were included within the Water Development Agreement had a well failure occurred with first nine years of IBWD operation. (See Exhibit 6 to parties'

stipulation of fact – Water Development Agreement, page 5, ¶(e).) Since the parties specifically contemplated well failure, had they been agreeing to provide give IBWD unlimited ability to develop other wells or gain access to groundwater underneath Moores' property, they would have said as much and likely would have paid much more in consideration.

The silence on the subject of what would happen if and when the Unit 9 well dried up or ceased to function after ten years of operation, leaves this Court with no other conclusion to reach but that Moores did not grant to IBWD any other right to develop a well, rights to water, rights of access, or rights to use Improvements other than in and to the Unit 9 Well specifically.

For these same reasons, the Court rejects IBWD's contention that "Moores granted to IBWD all of the Moores' right to pump groundwater from the property." (IWBD Opening brief at p 12:6.) The facts of this case are not like those of Orange *County Water Dist. v. City of Colton* (1964) 226 Cal.App.2d 642. There, the language of the deed and other agreements relevant to the conveyance, described the conveyance as to "all of the undersigned's right, title and interest in and to the waters underlying the property." Based on that language, the court interpreted the right conveyed as severing from the land its natural appurtenant right to the groundwater as an overlying user. The language in the deeds and other instruments here is not nearly as broad; in fact it is expressly limited to all water that can be taken from the Unit 9 well and nothing more. Therefore the right conveyed was, as stated above, a right to capture the water from that specific well and distribute the water to, among others, the overlying user, to wit, Moores. IBWD was granted rights only to that water which may be taken from the

specifically described 276.5-foot Unit 9 Well only. The Court is persuaded that this is the only reasonable interpretation to be taken from the plethora of deeds and other instruments created at or soon after the parties had agreed originally to the conveyances in 1988.

Additional relevant legal principles support this conclusion. Where a conveyance is general in its terms, the use made by the grantee pursuant to the conveyance "fixes and limits" the scope of rights so granted to the particular course or manner in which the grantee commenced use and such rights cannot be changed as the pleasure of the grantee. (*Woods, supra*, at pp. 269-270.) Prior to its construction of the T5 Well in August 2008, the only water pumped by IBWD from Moores Property pursuant to the subject grants was via the Unit 9 Well only. Given that, even if the Court were to find the conveyances general, which it does not, the scope of rights acquired by IBWD would remain limited to water which it could pump from the Unit 9 Well and use of the access road and Improvements for that specific purpose. The Court is not persuaded that any so-called "secondary" easement or repair rights afforded IBWD any right to construct an entirely new well system approximately 150-200 yards from the Unit 9 Well, a well it had used for 20 years and the only water well on Moores Property until 2008.

Aside from the issue of whether the 1988 grant deeds and other documents gave to IWBD a right to all the groundwater under this property, the extent of the water taking upon which damages can be based is a different and more complex issue to decide. While the grant deeds and Water Development Agreement, in the view of this Court did not convey any rights to water (such as Moores' rights as an overlying user) to IBWD other than what it could extract from the Unit 9 well, whether plaintiff is entitled to

compensation for all the water taken and all that may be taken from the T5 well in the future is a fundamentally different issue.

Water rights in an underground basin fall into one of three categories: 1) "overlying", 2) "appropriative", or 3) "prescriptive". An overlying right is "analogous to that of the riparian owner in a surface stream. It is the right of the owner to take water from the ground underneath for use on his or her land within the basin or watershed: it is based on the ownership of the land and is appurtenant thereto. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.

> 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. Thus after considering this first priority, courts may limit it to present and prospective reasonable beneficial uses consistent with article X, section 2 of the California Constitution. *Ibid.*

As the owner of the real property involved, Moores have overlying rights to the groundwater underneath the property. Defendant argues that that Moores overlying rights either never vested or were not perfected because Moores is not presently operating another well on this property. The Court disagrees with IBWD on the legal interpretation of overlying rights.

Beyond the definition of overlying rights set forth above, the Court in *City of Barstow* quoted with approval from a lower court opinion in the same case, that "overlying rights are dependent on land ownership over groundwater, and are ***exercised*** by extracting and using that water . . . ." *City of Barstow, supra* at 1251-52. There is no authority for the proposition that somehow overlying rights must vest beyond land ownership otherwise they are forfeited as IBWD suggests.

In this case, there is no dispute that Moores own the property where the T5 and

Unit 9 wells were developed. Furthermore, Moores exercised their overlying rights to the water underneath when they developed the Unit 9 Well before IBWD acquired it. In addition, the terms of that acquisition included a condition that IWBD provide water taken from the Unit 9 Well, using the Improvements that Moores also developed. back for use on Moores property and to other properties to whom he had previously obligated the water. The 1988 deeded easement to the Unit 9 Well, the storage tank and tank site along with the Improvements described above. conveyed to IBWD only a right to capture the groundwater being pumped from the Unit 9 Well and that right to capture came with the obligation to distribute it to the overlying owners, i.e. the Moores. Therefore, Moores right to water is clearly as an overlying user and those rights are therefore superior to that of others who lack legal priority. Moores overlying rights are restricted however, to the reasonable and beneficial use of the water. The Moores do not own the water underneath their property; they simply have the same rights of any overlying user: to the reasonable and beneficial use of the water.

In contrast to overlying rights, the right of an appropriator depends on the actual taking of water. "Any person having a legal right to surface or ground water may take only such amount as he or she reasonably needs for beneficial purposes. . . . Any water not needed for the reasonable or beneficial use of those having prior rights 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." *City of Barstow supra* at 1241. When there is a surplus, the holder of prior rights may not enjoin its appropriation. Proper overlying use is paramount and the rights of an appropriator, being

limited to the amount of surplus must yield to that of the overlying owner in the event of a shortage unless the appropriator has gained prescriptive rights. *Id.*

Plaintiff argues that IBWD does not have appropriator rights because there was no evidence presented that it ever acquired a permit from the State Water Resources Control Board to appropriate water. Plaintiff is correct in this regard.[7] It was initially the law of this state that a person could appropriate water merely by diverting it and putting it to use. *People v. Shirokow* (1980) 26 Cal.3d 301, 308. Another method of acquiring appropriative rights was adopted in 1872. It provided for the initiation of appropriative rights by posting and recordation of notice. *Ibid.* Both methods were superseded by the 1913 enactment of the Water Commission Act which created a Water Commission and provided a procedure for the appropriation of water for useful and beneficial users. "The main purpose of the Act was to 'provide an orderly method for the appropriation of [unappropriated] waters.' (citations omitted.) By amendment in 1923, the statutory procedure became the exclusive means of acquiring appropriative rights." *Ibid.* The provisions of the Water Commission Act, are codified in Water Code, divisions 1 and 2.

> "Part 2 of division 2 provides a comprehensive scheme for the appropriation of water. It defines water subject to appropriation (§§ 1200-1203); declares compliance with the provisions of division 2 to be the exclusive means of acquiring the right to appropriate or use water subject to appropriation (§ 1225); authorizes the board to act upon all applications for permits to appropriate water, to grant permits to take and use water subject to the terms and conditions of the permit, and to collect fees (§§

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[7] Plaintiff's argument that the evidence did not establish whether the water pumped from the Unit 9 Well and the T5 Well come from the same underground basin or whether it flows through known and definite is not relevant to the determination of liability because all unappropriated subsurface water not subject to overlying or riparian uses is subject to the provisions of Water Code 1200 *et seq.* *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925

> 1250-1550); and provides for the issuance of licenses confirming the right to appropriate such amount of water as has been beneficially used by the permittees (§§ 1600-1677). Thus it is clear that if the water diverted by defendant is water subject to appropriation, then it is water subject to the provisions of division 2 and any use thereof is conditioned upon compliance with the statutory procedure."

In *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75-76, the Supreme Court stated that section 1201 of the Water Code reflects the intention of the legislative authorities to declare the waters of this state to be subject to appropriation in so far as that can be done without interfering with vested rights. "The Constitution too, provides for the protection of appropriators, but only to the extent the appropriator is *lawfully entitled* to water." (Cal. Const. art. X §2.)(emphasis added.) The rights not subject to the statutory appropriation procedures are narrowly circumscribed by the exception clause of the statute and include only riparian rights and those which have been otherwise appropriated prior to December 19, 1914. IWBD falls in neither of these exceptions. Any other use other than those excepted, is conditioned upon compliance with the appropriation procedures of division 2. *People. v. Shirokow, supra* at 309, Water Code §§1052, 1225, *State v. Hanson* (1961) 189 Cal.App.2d 604, 610. Because IWBD has not complied with the appropriation procedures set forth in division 2 of the Water Code, as a matter of law, it cannot be deemed a lawful appropriator of the water pumped from the T5 Well.

Nevertheless, both riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse. No private party, individual or otherwise, *owns* the water. *People v.Shirokow, supra* at 307. Therefore, this Court reserves for determination, the appropriate valuation method of compensatory damages (versus equitable damages) that should be used for the water taken from the T5.

Since August 2008, IBWD has taken and damaged, and it continues to "take" or "damage," Moores property by way of drilling into and beneath Moores Property, constructing the T5 water well; pumping water from that well and, using the access roads (Private Portion of Alta Mesa Road) and other Improvements to operate and service the T5 Well. IBWD pumps (captures), transports, and sells the water to property owners within its service boundaries for public purposes. The amount of monetary damages to which plaintiffs are entitled for the physical invasion and damage outside the scope of the easement will be for a jury to determine. With respect to proper valuation method to determine monetary compensation (i.e. damages other than equitable relief), for the water taken and to be taken in the future, if any, the parties are ordered to submit to the Court additional briefing on the method of computing monetary damages that should be applied. [8] The Court notes that Evidence Code section 823 may apply.

III. CONCLUSION

IBWD had no right—without payment of just compensation—to drill, construct, or take water from Plaintiffs' property via the T5 Well. IBWD maintains no right—without payment of just compensation—to use the Private Portion of Alta Mesa Road or the Improvements for purposes associated with the T5 Well.

The Court finds for Moores and against IBWD. IBWD is adjudged liable to Moores for inverse condemnation, or a taking, without just compensation, of: the T5 Well located on Moores Property; water taken or pumped on a measure of damages yet to be determined, from the T5 Well; and, IBWD's use of the Private Portion of Alta Mesa

[8] A date for further briefing will be set once the parties receive the July 9, 2012 trial date proposals.

Road, which is the access roadway to the T5 Well, along with other Improvements to operate and service the T5 Well. Judgment shall be entered accordingly.

The value of the following matters shall be determined in Phase #2 of Trial in this action: the damage to the property for the drilling of the T5 well, the value of the well and property on and in which it lies; use of the Private Portion of Alta Mesa Road for IBWD's operation of, and service to the T5 Well; and, use of other Improvements in IBWD's operation of, and service to, the T5 Well. With respect to the value of any water taken or pumped or to be taken or pumped from the T5 well, valuations may be limited by the standard of reasonable and beneficial use rights by plaintiff, unless the Court rules otherwise. Equitable relief may also be appropriate. Evidence concerning appropriate set-offs may also be considered.

Dated: June 20, 2012

ANN MOORMAN
JUDGE OF THE SUPERIOR COURT

DECLARATION OF SERVICE BY MAIL

CCP Section 1013(a), 2015.5

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 Courthouse, Ukiah, California 95482.

I am familiar with the County of Mendocino's practice whereby each document is placed in an envelope, the envelope is sealed, the appropriate postage is placed thereon and the sealed envelope is placed in the office mail receptacle. Each day's mail is collected and deposited in a U.S. mailbox at or before the close of each day's business.

On the date of this Declaration, I served the attached on the party(s) listed below by mailing a true copy thereof, with postage fully prepaid, deposited in the United States mail to:

Donald J. McMullen, Esq.
Law Offices of Duncan M. James
445 N. State Street
Ukiah, CA 95482
(Interoffice mail)

Matthew Emrick, Esq.
Law Offices of Matthew Emrick
6520 Lone Tree Blvd., Suite 1009
Rocklin, CA 95765

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.

Dated: June 21, 2012

Frances Proteau

FRANCES PROTEAU, Deputy Clerk