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IRISH BEACH WATER DISTRICT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

WILLIAM H. MOORES, TONA ELIZABETH MOORES,

Plaintiff,

v.

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

Defendant.

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

Real Parties in Interest.

CASE NO. SCUKCVG 0954665

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

Judge: Honorable Ann Moorman

Action Filed: September 10, 2009

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

INTRODUCTION

There has been no taking in this matter. Defendant, Irish Beach Water District ("IBWD") proceeded at all times in a manner allowed by law and allowed by, and directed by, the stipulated deeds and agreements. IBWD contends that it simply constructed a new well to replace an existing well that IBWD contends was failing in another location within IBWD's *own* easement in order to continue to provide water service to properties within the District. The irony in this case is that the Stipulated Deeds and Documents directed IBWD to operate and develop a water supply system to, in part, serve over 50 properties owned by the Moores, and now the Moores are suing IBWD for doing exactly what was agreed to and anticipated by the parties under those documents.

SUMMARY OF ARGUMENT

The Moores' arguments fail on multiple levels:

- IBWD has the right under applicable law to replace and relocate vital public water supply facilities within IBWD's own easement boundaries.
- IBWD has the right, and the obligation, under the stipulated deeds and agreements to construct the T5 Well.
- The Moores have no present vested right to groundwater because they are not presently pumping any water from the property and do not own any wells on the property. More significantly, all rights the Moores might have had to pump groundwater from the property were severed (e.g. lost) when the Moores assigned all of their water rights to IBWD.
- The Moores have failed to meet their burden of proof. The Moores fail to provide any evidence to show there has been any taking. Instead, the Moores entire argument is based on presumptions, speculation, and conjecture.

SUMMARY OF STIPULATED FACTS AND EVIDENCE

1. Stipulated Facts and Documents

The Moores' Property at issue is undeveloped except for the two (2) wells (and related facilities such as Tank 5) both owned by IBWD: the T5 and Unit 9 Wells (Stipulated Facts Nos. 3, 5, 6, 7; See also Stipulated Deeds and Documents, No. 1 Map 1 Aerial Photo and No. 12, survey). IBWD has pumped water from the Moores' Property since at least 1989 and currently uses the T5 Well. (Stipulated Facts Nos. 12, 17).

Moores does not own any well(s) on the Property at issue and presently does not pump any groundwater from the property (Stipulated Facts Nos. 3, 5, 6, 7; See also Stipulated Deeds and Documents, No. 1 Map 1 Aerial Photo and No. 12, survey). Although undeveloped, the Moores' Property is within the IBWD's service boundaries and has the ability to receive water from IBWD, including water from the T5 Well (Stipulated Facts Nos. 4, 6, 18) .

The Moores previously owned the Unit 9 Well and the related improvements (Stipulated Facts Nos. 5, 7, 8). However, the Moores conveyed all of these to IBWD in or about 1988 – including all associated appurtenant rights. (Stipulated Facts Nos. 5, 8; Stipulated Deeds and Documents Exhibits 4, 6, 11). In return, the Moores received: a commitment from IBWD to provide water to over 50 undeveloped lots owned by the Moores; exemptions from certain assessments; and a commitment from IBWD to develop sufficient water resources to serve the Moores' Properties (Stipulated Deeds and Exhibits, No. 11, paras, 5, 6, 7).

The Unit 9 Well is located roughly in the middle of the Moores' Property. (Stipulated Deeds and Exhibits, No 12, Well Surveys). The T5 Well is located within the existing Tank 5 site, which is a fenced and gated facility on the southeast portion of the Moores' Property. (Stipulated Deeds and Exhibits, No. 12, Well Surveys). IBWD's T5 Well and Tank 5, as well as, Tank 3 and Tank 4 (and associated facilities) are all accessed from Alta Mesa Road (Stipulated

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

2. Stipulated Deeds and Documents

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

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

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

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

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

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

well and appurtenances.[1] (emphasis added)

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

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

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

Section 7 (a) provides that:

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

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

b. Grant Deed - Tank Site and Water System Appurtenances Easement (Stipulated Deeds and Documents, No. 4): Following the execution of the 1988 WDA, on or about July 20, 1988, the Moores granted IBWD a *single integrated* water supply system easement titled: "Soderberg Tank Site, Well, and Pipeline Easement." The Moores attempt to portray the easement as several

[1] The 1988 Agreement recognized the potential that the Unit 9 Well could in fact fail (1988 WDA, section 2(e).

separate and distinct easements. However, this is contrary to the plain language of the Deed that clearly describes the grant as a: "60 Foot tank site and water system appurtenances easement." ("Water System Easement"). The single, integrated Water System Easement includes the following principle components and appurtenances:

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

The Water System Easement is illustrated in the survey provided in the Stipulated Deeds and Documents, No. 12. There are no prohibitions on use set forth in the grant. The Tank Site is the *principal* facility and the well(s) and water rights are appurtenances (e.g. indispensable components of the system) to the tank site. See *Trask v. Moore* (1944) 24 Cal.2d 365, 368. [2]

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

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

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

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

> Appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing. (Bouvier, Law Dict., Sub., Appurtenances.) Here the principal 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 to the neighboring homes in the tract.* By being so joined and essential to the function of the apparatus as a whole, the distributing system contained and combined in itself all of the elements and attributes of a fixture or appurtenance to real estate.

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

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

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

3. IBWD's Contentions

IBWD contends it had a right to construct the T5 Well under the applicable stipulated

documents and as a matter of law. IBWD contends that it built the T5 Well to replace the Unit 9 Well that IBWD contends is failing and to replace the permit to divert from Mallo Pass Creek that IBWD contends was not renewed by the State Water Resources Control Board.

LEGAL STANDARDS

Inverse Condemnation – Physical Takings

The Moores, bear the burden of proof to show that IBWD has actually taken any of their property by inverse condemnation. *Marshall v. Dept. of Water and Power* (1990) 219 Cal.App.3d 1124, 1138. The standard of proof for an inverse condemnation cause of action based on a physical taking requires the plaintiff to prove that the alleged taking results in property damage, other depreciation in market value, or unlawful dispossession of the owner. *Jordan v. Santa Barbara* (1996) 46 Cal.App.4th 1245, 1257. There must be evidence of an invasion or appropriation of property that results directly and specifically in damage to the landowner. *Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 355-356. Claims of potential future acts or damages do not constitute a taking. *Jordan v. Santa Barbara* (1996) 46 Cal.App.4th 1245, 1257.

As discussed, *infra*, the Moores have failed to provide any evidence whatsoever to meet their burden of proof. The Moores' entire case relies on the presumption that because IBWD built a replacement well that "damage" is somehow automatically presumed and that the Moores do not need to show any evidence of actual damage or depreciation or dispossession. However, this presumption by the Moores is contrary to the authorities cited above that require a showing of actual damage. See *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1367-1372 [mere change in use of a license not sufficient to show damage to underlying property]. Instead, as explained above, the Moores have in fact benefited from the construction of the T5 - just as intended under the 1988 WDA and the 2002 Agreements.

IBWD's OPENING ARGUMENT

1. IBWD Has NOT Taken Any Groundwater

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

a. Groundwater Rights Overview

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

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

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

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

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

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

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

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

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

For a "taking" to occur, the Plaintiff must demonstrate a present water right and a substantial interference of the ability to divert water under such a right.[4] *Peabody v. City of Vallejo*,(1935) 2 Cal.2d 351, 374. There is <u>no</u> physical taking (e.g. substantial interference) in relation to an overlying groundwater user where a public entity appropriator uses ***surplus*** groundwater. In *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, the California Supreme Court held that there is no taking where an appropriator pumps only the "surplus" water:

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

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

> the appropriator may take the surplus or excess ***without compensation***.[5] (emphasis added)

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

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

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

b. IBWD has NOT Taken any Groundwater Rights.

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

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

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

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

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

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

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

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

2. IBWD's Construction of the T5 Well is NOT a Taking

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

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

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

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

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

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

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

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

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

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

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

> conditions require reevaluation of restrictions placed upon the use of real property.' (emphasis added)

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

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

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

boundaries:

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

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

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

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

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

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

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

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

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

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

3. IBWD's Use of Alta Mesa Road and the "Improvements" does NOT Constitute a Taking

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

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

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

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

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

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

was enough to show a violation of a easement/license and damage to underlying properties. The Barnes court, however, rejected this argument:

> The Hussas point 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 because such a change necessarily increases the burden on the land through which the pipeline runs.

In the present case, there is no evidence whatsoever, none, showing that IBWD's use of existing roads, water lines and utilities that previously served the Unit 9 Well to serve the T5 Well resulted in any increased burden or damage to the Moores' Property(ies). There has been ***no*** taking.

CONCLUSION

Again, it is important to keep this matter in perspective: the Moores' are suing IBWD for taking measures to ensure the Moores' properties will have an adequate water supply – the very measures anticipated by the parties under the stipulated deeds and documents. The T5 Well is in fact the very type of "compensation" to the Moores anticipated under those documents. IBWD acted as allowed by law and directed by the deeds and agreements. The Moores have failed to meet their burden of proof to show there has been any taking whatsoever – relying on presumptions in place of actual evidence. Therefore, IBWD respectful requests this Court hold in its favor.

RESPECTFULLY SUBMITTED,

DATED: January 19, 2012 LAW OFFICES OF MATTHEW EMRICK

By: _____
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