

ENDORSED-FILED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

MAR 04 2015

COUNTY OF MENDOCINO

CLERK OF MENDOCINO COUNTY
SUPERIOR COURT OF CALIFORNIA
PEGGY MELLO

WILLIAM H. MOORES, TONA)
ELIZABETH MOORES,)

Plaintiffs,)

v.)

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

Defendants.)

Case No. SCUJ CVG 09-54665

STATEMENT OF DECISION
RE COMPENSATION TO PLAINTIFFS
FOLLOWING PHASE ONE TRIAL ON
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.)

The Court issued its Statement of Decision and Supplemental Statement of Decision in 2014 and outlined the relevant findings of fact. That background will not be repeated here but the findings, both factual and legal, set forth therein are obviously pertinent to the ruling herein.

In September 2008 Irish Beach Water District (hereafter "IWBD" or "the District") violated the terms of an existing easement on Moores' property by entering and drilling a new and water well (T5) over the objection of Moores. The well drilled is within an easement for a water storage tank that was part of a limited conveyance from the Moores to the District in 1989. Nothing about that easement permitted the District to enter the Moores' property in 2008 and drill a wholly new and different well. The question now before the Court is to what extent, if at all, Moores is entitled to compensation.

The parties presented briefing both before and following a court trial on the issue of compensation that commenced on August 18, 2014. At the conclusion of the post-trial briefing, the District ultimately argues the plaintiff should not be compensated or only compensated nominally and the Moores argue for an award in excess of \$3,000,000. The Court disagrees with both conclusions and awards compensation as follows.

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Relevant Legal Principles

With respect to compensation for property taken, Cal. Civ. Pro. §1263.310 provides that “compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken.” (“The normal measure of “just compensation” in most inverse condemnation cases is the same as that which applies in eminent domain proceedings: “fair market value.” *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 707).)

Cal. Civ. Pro. §1263.320 – defines “fair market value” as

(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

(b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.¹

The measure of compensation is not based on what the taker has gained, but *rather is based on what the owner has lost.* (*Tilem v. City of Los Angeles, supra* at 702.) (*Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 807 (emphasis added).) “There's no fixed rule for the measure of damages in inverse condemnation. The measure of damages may be the cost of repairs, the diminution in value of the property, or any other method that measures the damages resulting from the injury to the property.” *Ibid*

California courts recognize what has been referred to as the “appraisal trinity.” (*State of Cal. ex rel. State Pub. Wks. Bd. v. Stevenson* (1970) 5 Cal.App.3d 60, 63.) This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the “market data” value as indicated by recent sale of comparable properties; and (3) the “income approach,” or the value of which the property's net earning power will support based upon the capitalization of net income. (*Stevenson, supra*, at p. 63; *State of Cal. ex rel. State Pub. Wks. Bd. v. Covich* (1968) 260 Cal.App.2d 663, 665-666.) In 1965, the state Legislature codified these three approaches in Evidence Code §§ 815-820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to

¹ The Date of Valuation is the Date of Taking and in this case that is September 19, 2008.

ascertain the fair market value of the condemned property. (*Stevenson, supra.*, 5 Cal.App.3d at 63.)

However, underlying the entire valuation process is the concept of "just compensation." The principle sought to be achieved by this concept "is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken." (*People ex rel. Dept. of Transportation v. Southern Pacific Transportation Co.* (1978) 84 Cal.App.3d 315, 324.) Accordingly, neither the Legislature nor the courts of this state have singled out any one appraisal technique as an exclusive method of valuation. (*Napa Union High School Dist. v. Lewis* (1958) 158 Cal.App.2d 69, 73.) In most instances, the nature of the property condemned will determine which of the three approaches provides the best estimate of fair market value.

Naturally, the condemnee will seek to employ that method which establishes the highest approximation of value and the condemner, the lowest. The [finder of fact], after hearing evidence from both parties and [in consideration of these legal principles], *must sift through the morass of conflicting testimony and determine the level of just compensation.* *Redevelopment Agency v. First Christian Church* (1983) 140 Cal.App.3d 690, 705 [189 Cal.Rptr. 749] disapproved of by *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694. (emphasis added.)

The parties have presented wildly different proposals for compensation in this case. Plaintiff has presented the highest approximation and the defendant, the lowest. The focus of the Court's Order is determining, now, after hearing all the evidence, what the Moores have lost and what is fair compensation for that loss.

1. The District's Position on Compensation

It is apparent that defendant District seeks to minimize the loss to Moores from the condemnation here. The District argues that the case really just involves a condemned easement upon an easement and the before and after approach of valuing any damage is appropriate.

The Court disagrees. This is not just a physical easement of access to land acquired under condemnation that can be described as layered upon a preexisting easement acquired through a negotiated contract and conveyance. The District tested and then drilled a brand new well on property belonging to the plaintiffs. The only right anyone had to extract the water through this well lies in the fact that Moores own the property and therefore have rights to extract the water as overlying water users. They had perfected that right by drilling and developing the Unit 9 well. The fact that the District had a lawful right to access because of the original easement that included a water storage tank and other equipment necessary to the operation of the Unit 9 well, did not give the District any legal right to access and then penetrate the surface of the land and extract water through a new and separate well. This usurpation of water through this new T5 well was a taking of Moores rights as overlayers.

Water rights can be inversely condemned. (*San Bernadino Val. Municipal Water Dist. v. Meeks & Daley Water Co.* (1964) 226 Cal.App.2d 21.) Notably in *Santa Clarita Water Co. v.*

Lyons (1984) 161 Cal.App.3d 450 the trial court awarded damages to private property owners for, *inter alia*, “the value of future water removal by the [Water Co.]” from the strip of land owned by Lyons and inversely condemned by the water company. This was in part based on a finding that the public utility company had been a negligent trespasser and had incurred liability in condemnation for the surface and subsurface trespass. The facts of that case are very similar to the facts in the case at bar.

The Court notes that in valuing the right to develop a right to water, it must be kept in mind that a water right itself has neither physical form nor substance; it is more nearly correct to define it as a legal interest or a legal right giving rise to a legal relationship. *San Bernadino Val Muniipal Water District v. Meeds and Daley Water Co. supra* 226 Cal.App.2d at 221, 223.

This was nothing else but a piracy of Moores’ rights as overlyers to water beneath their land. The District used an access easement to intrude on Moores property and invade the subsurface of Moores’ property. The District then drilled a separate well (labeled the T5 well). The District is now pumping and using water from that well for District customers but it only has access to this water because because Moores have rights to that water as overlyers. The District has now acquired that legal right through condemnation and now must pay fair compensation for the acquisition of this right. The fact that the District and not Moores’ drilled the well and the District is now using the water and not Moores does not detract, in this court’s view, from the fact that this is a loss to Moores. This is not a *de minimis* loss characterized as a small (3’x3’) physical invasion resulting in well cap that protrudes barely above the surface. The District’s argument that no compensation or nominal compensation is due defies reason and in this Court’s view defies the constitutional principles in play when a public utility takes from a private individual an asset such as a right to extract water.

The District repeatedly tries to characterize itself as an appropriator of this water. The Court has rejected this contention in both the Statement of Decision and the Supplemental Statement of Decision. This is because it did not acquire water arguably lying beneath Moores property from a well drilled on the District’s own land. And, the easement concerning the Unit 9 well did not give the District any right to penetrate the surface of the ground and drill a well on Moores’ property. The argument by the District that Moores should take nothing because Moores did not drill the T5 well and were not using the water before the District took the water for a beneficial use, is anachronistic. If this were the case, any public utility would be insulated from having to pay compensation when it intrudes on adjoining private property and drills a well where none existed before and extracts water for a public purpose leaving the owner of the overlying water rights unable to sell those rights taken by the utility. The landowner could also by law be left in a legally subrogated position of priority to the offending utility company should any subsequent well be developed. The District argues it should pay nothing for this taking or pay nothing more than nominal damages. That result is not just nor fair.

Other than offering to pay nothing, the District offered no method of determining fair compensation for the loss to Moores of their right as overlyers to the water being extracted from the T5 well or for the other takings found by the Court. This position assisted very little in the Court’s determination of just compensation.

2. Plaintiffs' Position on Compensation

The plaintiff offered other approaches at valuing the rights and interests condemned. One approach was referred to in the proceedings as the "Market Approach." The analysis offered under this approach was based on "various sales data from" a similar coastal community in Cambria, California. The expert (Dietrich) was able to determine the value of a water connection in Cambria and then compare and chart overall sales of property and water connections between Cambria and Irish Beach. "Dietrich was able to determine the portion of Cambria's property sales pricing that related to the water service connection right." (Moore's closing brief at 17:6) Using pricing trends and other information, Dietrich then adjusted the Cambria water connection value to IBWD. This resulted in an estimated value of \$87,000 per IBWD water connection in 2008. Multiplying the 37 water connections within Irish Beach that the T5 well can support, with the water connection value of \$87,000 per connection resulted in a proposed compensation figure of \$3.2 million.

The Court is not persuaded that this is consistent with CCP §1263.320. First, it assumes that the only purpose for Moore's development of the overlying right to the water being taken by the T5 well would have been to sell the right to the water and access to that water to IBWD. This is a logical premise given IBWD's need for the water in 2008 and its proximity and access to the existing distribution and maintenance system. The value of the development right is premised on the value of *the water connection right to IBWD property owners and/or the District*. It does not adequately take into account the fact that the vast majority of the power system and distribution system was already in place when the T5 well was developed. It is difficult to imagine that had a negotiated transaction for the right to construct and use this well been undertaken between these parties, it would not have taken into account the existing and working infrastructure used to transport and distribute the water to parcels within IBWD. The Dietrich market approach is not reflective of the "market" between Moore's and Irish Beach and there was no evidence of any other "market." For these reasons, the Court will not award compensation to Moore's based on an opinion that the value of a single water connection within IBWD is \$87,000.²

The other approach at valuation offered by the plaintiffs is the "Cost Approach". This approach has two parts: 1) identifying the value of the right to develop the T5 well water and 2) the value of the right to use the subject roadway and improvements for the T5 well operations. Expert Deb Stephenson provided her analysis and opinion regarding the first component.

Ms. Stephenson's report (Exhibit 88) states that her effort to value the right to develop the T5 well water was premised on applying an accepted method of appraisal: the Replacement Cost analysis. Her report states that:

² The Court notes that the analysis does not account for the other possible reasons for developing that well or the right to access the water now being captured through the T5 well, but put to a different purpose. The Court recognizes that this is because the highest and best use of the water being extracted from the T5 well is residential, and residentially related.

In areas where infrequent market transactions occur and in areas where alternative water supply development opportunities are available, the Replacement Cost approach can be utilized. (See page 6, Exhibit 88.)

She concluded that the northern coast of California is an area where sales are rare and new water supplies can be obtained through the development of new surface water appropriations, desalination or drilling groundwater wells.

The ability to obtain additional water supplies through on-market mechanisms reduces the need to acquire water rights and/or developed water supplies from existing entities. As a result there are limited water market transactions. In this [geographical] area, new water supplies can be developed by obtaining new surface water right permits and/or developing groundwater resources. The lack of comparable sales, and the ability to obtain additional water supplies through non-market mechanisms provides support to the application of the Replacement Cost method." (See page 7 of Exhibit 88.)

The Replacement Cost Approach estimates the cost of reproducing or replacing an equivalent quantity and quality of water supplied by the subject property. This valuation methodology relies on the premise that market participants or water users, will relate the value of a water supply to the cost of developing an alternative source. The cost of developing an alternative water source theoretically represents the value that a buyer would pay for water associated with an existing supply source with comparable characteristics (e.g., quality and reliability). Stated another way, the Replacement Cost Approach estimates the benefits of an environment asset, water in this circumstance, based on the costs of replacement. *The replaced asset is assumed to provide a direct substitute for the original.* (emphasis added.)

Ms. Stephenson then explained that the most feasible alternative for the District to pursue in the absence of the T5 well, was the Mallo Pass Project. This approach was reinforced in her view, because there was readily available data and information that the District had acquired as of September 2008 showing with some precision what the actual cost(s) would have been.

The logic of her approach was further buttressed by the fact that the Mallo Pass permit to develop had been part of the original 1989 conveyance from Moores to the District. There is significant evidence in the record that the District had intended to develop that alternative both before and after the Unit 9 well began showing signs of faltering. The District's decision to abandon the Mallo Pass Project was, from the evidence in this proceeding, clearly based on the decision to drill the T5 well and the information acquired from testing showing the T5 well to be an adequate alternative in terms of volume and quality of the water and its predicted longevity. In other words, there is direct evidence that as of the date of the taking, the District chose to develop one water right (albeit it belonged to Moores) and abandon another it had acquired in an earlier negotiated transaction. Ms. Stephenson concludes that just compensation to Moores for the taking of their right to develop water now taken by way of the T5 well is the known costs as of September 2008 to develop the Mallo Pass Project with a downward adjustment in favor of

the District representing the expected decrease in volume of water to be produced and used via the T5 well compared with the Mallo Pass Project.

She concludes that just compensation to Moores for the taking of the right to develop the water via the T5 well is \$401,000 (representing the remaining costs to develop the Mallo Pass Project as of September 2008 minus the remaining development costs for the T5 well as of September 2008 adjusted downward by approximately 17% for reduced anticipated volume from the T5 well.) See Tables 3 and 4, pp.17-18 of Exhibit 88.

Because this approach is recognized as an appropriate basis for valuation or appraisal under the circumstances presented here, and it is based on firm cost figures and not "benefits" to the District, this approach is the most articulate and fair. The Mallo Pass Project was abandoned simultaneously with the development of the T5 well. The development of the T5 well was a taking for which the District paid nothing. The Court will adopt the component of the Cost Approach recommended by Ms. Stephenson and award \$401,000 as just compensation for the taking of the right to develop the T5 well and the water extracted via the District's taking and ensuing development of that right.

The other component of the "Cost Approach" proposed for adoption by the plaintiff included an estimate of the cost to reproduce the private portion of the Alta Mesa Road and the water delivery system and infrastructure used by IBWD to convey water from the T5 well. This estimate was based on the costs to develop that portion of the roadway and improvements constructed by Moores in the late 1980's and adjusted to 2008 dollars. This resulted in a figure of \$3,690,872.

Moores argues they are entitled to compensation for the taking of the private portion of the Alta Mesa Road and the improvements previously conveyed to operate the Unit 9 well because the water taken from the T5 well "inures to the benefit of IBWD's remaining 416 service connection obligations." Therefore, plaintiff reasons, Moores should not have to pay IBWD's water developments costs for these 416 connections. Nevertheless, in recognition that the water from the T5 well will inure to the benefit of Moores' 44 Unit 9 parcels, the total estimate was adjusted by 44/460 resulting in a total estimate of compensation under this part of the "Cost Approach" of \$3,337,832.

In the Court's view, there are a number of problems in adopting wholesale the proposed Cost Approach to determining the value of the loss to Moores, or, just compensation. With respect to the infrastructure, the Court will not overlook the fact that the easement for use of the private portion of the Alta Mesa road was conveyed to the District in 1989 along with the then existing improvements for distribution of the water extracted from the Unit 9 well. Charles Acker testified that aside from the initial construction, there has not been any significant increase in use of the road or any of the other improvements due to the operation of the T5 well. Plaintiffs argument that they should be compensated for the T5 well because the water taken from it inures to the benefit of the 416 other service connections conflicts with what this Court is using to determine just compensation: "The measure of compensation is not based on what the taker has gained, but *rather is based on what the owner has lost.*"

The evidence is clear that Moores had previously conveyed an easement to use the road as well as the other improvements to the District in 1989 for use in connection with the Unit 9 well. The Court acknowledges it was for that limited purpose in connection with that particular well. Had the District negotiated to purchase Moores overlying rights in connection with the T5 well, certainly the District would not have been expected to pay the equivalent of Moores costs to build or develop that same distribution system in 2008 dollars. One advantage of the proximity of the T5 well to the existing distribution system would have been to reduce the cost of connecting the T5 well into the existing distribution system.

Plaintiff argues the District deprived Moores of their right to sell to the District the necessary infrastructure to distribute the water taken via the T5 well. The Court would be more sympathetic to this argument were it not for the fact that the road and other infrastructure already existed and the right to use them was already conveyed to the District for valuable consideration—a promise to supply water to Moores 44 parcels in Unit 9. The District has been maintaining that infrastructure as well. This evidence and the evidence of the necessary dedications of some of these improvements to the District to gain county approval of the Unit 9 development compel this Court to decline to award additional compensation based on an amount reflecting the cost to re-create the private portion of the Alta Mesa Road and the water delivery system.

There is no evidence that the additional pipe-line, and other infrastructure that were constructed to connect the T5 well to the existing infrastructure caused anything other than a temporary increase in use to the private portion of the Alta Mesa Road and the other improvements. The Court is unable to find a basis to award any compensation for this temporary use.

CONCLUSION

The Court awards just compensation to Moores in the amount of \$401,000 as explained. The parties bifurcated on the issue of fees and costs, the Court orders the parties to appear on April 3, 2015 at 2:00 pm in Department A on this or for further proceedings.

IT IS SO ORDERED

DATED: March 4, 2015

ANN MOORMAN

ANN MOORMAN
JUDGE OF THE SUPERIOR COURT