

**FILED**

**NOT FOR PUBLICATION**

MAY 21 2015

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF  
CALIFORNIA and THE CITY OF SAN  
DIEGO,

Plaintiffs - Appellants,

v.

KINDER MORGAN ENERGY  
PARTNERS, LP; et al.,

Defendants - Appellees.

No. 13-55297

D.C. No. 3:07-cv-01883-MMA-  
WVG

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Michael M. Anello, District Judge, Presiding

Argued and Submitted February 3, 2015  
Pasadena, California

Before: PREGERSON and NGUYEN, Circuit Judges, and WHALEY, Senior  
District Judge.\*\*

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Robert H. Whaley, Senior District Judge for the U.S.  
District Court for the Eastern District of Washington, sitting by designation.

Plaintiffs the City of San Diego and the State of California (collectively, the “City”) appeal the district court’s orders relating to discovery and its grant of summary judgment in favor of Defendants Kinder Morgan Energy Partners, L.P., Kinder Morgan Management, LLC, SFPP, L.P., Kinder Morgan Operating, L.P. “D”, Kinder Morgan G.P., Inc., and Santa Fe Pacific Pipelines, Inc. (collectively, “Kinder Morgan”). We affirm in part, reverse and remand in part.

1. Discovery Rulings and Imposition of Sanctions

We review the district court’s discovery rulings for abuse of discretion, *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 822 (9th Cir. 2011), and affirm. First, the district court did not abuse its discretion in denying the City’s request for discovery into profits at the Mission Valley Terminal on the ground that the discovery sought is irrelevant under California law. *See Watson Land Co. v. Shell Oil Co.*, 29 Cal. Rptr. 3d 343, 349-50 (Ct. App. 2005). Similarly, the district court did not err in denying the City’s request for an order compelling Kinder Morgan to produce non-redacted versions of documents. The City cites no binding authority to support its claim that a party may never redact non-privileged information.

Further, the district court was well within its discretion in imposing sanctions based on the City’s violations of its orders. The City was not free to

disobey multiple court orders by repeatedly asserting that it could withhold non-expert, non-privileged factual information in its possession until the exchange of expert reports. Moreover, *Roberts v. Heim*, 130 F.R.D. 424 (N.D. Cal. 1989), the case on which the City relies, does not support the City's position. *See id.* at 428 (stating that "if Plaintiffs possess factual information independent of that to be furnished by their experts, it should be provided . . ."). And the district court did not abuse its discretion in finding that the City failed to make its reliance on *Roberts* clear in its answers to Kinder Morgan's interrogatories.

2. Proposition 65 Claim

We review de novo the district court's grant of summary judgment on the City's Proposition 65 claim, *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010), and affirm. The City argues that the Mission Valley aquifer is a "present source of drinking water" under Cal. Health & Safety Code § 25249.11(d) because two religious organizations proposed using it as a source of drinking water during the one-year statutory period. We begin with the plain language of the statute. *Voices of the Wetlands v. State Water Res. Control Bd.*, 257 P.3d 81, 93 (Cal. 2011) (stating, "When interpreting statutes, we begin with the plain, commonsense meaning of the language . . ."). The adjective "present" is defined as "now existing or in progress." Webster's Third New International Dictionary

1793 (2002). The district court correctly found that the City failed to present any evidence that the aquifer is presently used as a source of drinking water. Merely proposing to use the aquifer does not render it an existing source of drinking water. Further, while a “present source of drinking water” can include water sources “currently destined to be used as drinking water,” *People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 307 (1996), the City has put forth no evidence that the aquifer was “destined” to be so used.<sup>1</sup>

### 3. Exclusion of Ray Forrester

The City appeals the exclusion of Opinions 5 through 11 in Forrester’s expert report. We review for abuse of discretion, *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1191 (9th Cir. 2007), and reverse. The problems with Forrester’s opinions identified by the district court amount to impeachment and do not warrant exclusion under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). See *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014) (stating that under *Daubert*, “[t]he judge is ‘supposed to screen the jury from unreliable

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<sup>1</sup>The City also argues on appeal that the aquifer falls within Proposition 65 because it is “water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses” under Cal. Health & Safety Code § 25249.11(d). However, this claim was dismissed in 2008, and the City did not re-allege the claim in its First Amended Complaint.

nonsense opinions, but not exclude opinions merely because they are impeachable.”) (quoting *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013)). Forrester’s assumption about the pre-contamination condition of the City’s property goes to weight and not admissibility. Similarly, his testimony that he now prefers a remediation technique that differs from the one described in his expert report may undercut the accuracy of his analyses, but it is not “significant enough to render his entire analysis unreliable” and thus inadmissible. *See id.* at 1048.

#### 4. Damages

The district court granted summary judgment against the City on its alleged restoration damages on the ground that the City lacked evidence to support this theory due to Forrester’s exclusion. Because we reverse the exclusion of Forrester’s Opinions 5 through 11, it follows that we also reverse the district court’s grant of summary judgment as to the City’s restoration damages theory.

The district court also granted summary judgment against the City on its alleged real estate damages on the ground that nuisance and trespass damages under Cal. Civil Code § 3334 cannot be based on a hypothetical highest and best use, and are instead limited to “the rental value of its land as it existed”—*i.e.*, as a stadium. However, § 3334 damages can be proved through estimates of a

property's rental value based on hypothetical assumptions rather than its actual use. *See, e.g., Don v. Trojan Constr. Co.*, 178 Cal. App. 2d 135, 136-38 (1960) (permitting § 3334 damages to be proved by testimony about the rental value of the land based on a hypothetical use that was more valuable than the land's actual use); *Smpardos v. Piombo Constr. Co.*, 111 Cal. App. 2d 415, 417-19 (1952) (permitting damages to be proved by testimony about the rental value of the property based on a hypothetical use). We therefore reverse the district court's grant of summary judgment on the City's real estate damages theory.

Finally, the district court granted summary judgment against the City on its loss of use damages theory on the ground that the City failed to show that a drinking water project is viable. Reviewing the record in the light most favorable to the City, as we must, the evidence is sufficient to survive summary judgment. The City's witness, Michael Welch, testified that it is possible to extract water from the aquifer, and authored a concept study describing the development of a potable water supply facility. Prior to World War II, the aquifer was in fact used as a source of drinking water. Summary judgment was therefore improper because a rational jury could reasonably conclude that a drinking water project on the property is viable. Whether this evidence supports the amount of damages requested is a separate question, and it is up to the factfinder to determine whether

and to what extent it may rely on City expert Steven Waters's estimates as to the value of the water that the City claims it could have obtained from the aquifer. We therefore reverse the district court's grant of summary judgment on the City's loss of use damages theory.<sup>2</sup>

5. Nuisance and Trespass

The district court granted summary judgment against the City on its private nuisance and trespass claims on the ground that the City lacked evidence showing that its claims are timely and that its damages theories failed as a matter of law. In light of our conclusions above, we also reverse the district court's grant of summary judgment on the City's private nuisance and trespass claims.

The district court also granted summary judgment against the City on its public nuisance claim on the ground that the City lacked evidence to show the contamination "affects at the same time an entire community or neighborhood, or any considerable number of persons," Cal. Civ. Code § 3480, and that the City's damages theories failed as a matter of law. Viewing the evidence in the light most favorable to the City, we reverse because a rational jury could reasonably conclude

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<sup>2</sup>As part of its alleged water damages, the City also claimed it is entitled to damages for resources extracted without compensation. The district court granted summary judgment in favor of Kinder Morgan on that theory of damages and the City has not appealed that ruling.

that the alleged groundwater contamination affected an entire neighborhood if the contamination in fact delayed the City's construction of a viable drinking water project.<sup>3</sup>

**AFFIRMED IN PART, REVERSED AND REMANDED IN PART.**

Each party shall bear its own costs.

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<sup>3</sup>The district court granted summary judgment in favor of Kinder Morgan on the City's nuisance per se theory, and the City does not appeal that ruling.

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

### United States Court of Appeals for the Ninth Circuit

### BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

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Attorney for:

*(To Be Completed by the Clerk)*

Date

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Clerk of Court

By: , Deputy Clerk