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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DEBBIE REID O'GORMAN, Plaintiff-Appellant, v. CITY OF CALISTOGA, Defendant-Respondent	CASE NO. A150972 (Superior Court Case No. 26-66119)

Appeal from a Judgment of the Superior Court, County of Napa
Honorable Rodney G. Stone

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: A150972
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 090907 NAME: Brian C. Leighton FIRM NAME: Law Offices of Brian C. Leighton STREET ADDRESS: 755 N. Peach Avenue, Suite G-10 CITY: Clovis STATE: CA ZIP CODE: 93611 TELEPHONE NO.: (559) 297-6190 FAX NO.: (559) 297-6194 E-MAIL ADDRESS: brian@lawleighton.com ATTORNEY FOR (*name*): Debbie Reid O'Gorman	SUPERIOR COURT CASE NUMBER: 26-66119
APPELLANT/ PETITIONER: Debbie Reid O'Gorman RESPONDENT/ REAL PARTY IN INTEREST: City of Calistoga	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Appellant Debbie Reid O'Gorman

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 30, 2017

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(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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FINAL DISPOSITION

This is an appeal by the Appellant, Debbie Reid O'Gorman (hereinafter "O'Gorman") from the final judgment of the Napa County Superior Court, the Honorable Rodney G. Stone, of the Court's order granting the Respondents', the City of Calistoga (hereinafter "the City"), motion for summary judgment on January 24, 2017. (Vol. 9, p. 2613.)[1]

Judgment was entered by the Court on February 1, 2017 (Vol. 9, p. 2631) and Notice of Entry of Judgment was filed on February 14, 2017 (Vol. 9, p. 2634). O'Gorman timely filed her Notice of Appeal on April 4, 2017 (Vol. 9, p. 2647).

INTRODUCTION AND SUMMARY OF THE CASE

This case presents the issue(s) of who owns certain water rights involving Kimball Creek and the City's parcel when it built a dam to be used for municipal purposes. The City had no rights to water until

[1]Vol. refers to the volume number of the Clerk's Record on Appeal. There are 9 volumes. Later references will be made to the volume number and the page number of the Clerk's Record on Appeal.

1939, when it entered into an agreement with O'Gorman's grandfather who owned said water rights.

Between 1882 through about 1892 O'Gorman's great-grandfather A.L. Tubbs purchased all of the riparian water rights found on the Mount St. Helena water shed as it drained from the lands surrounding Kimball Creek which is the head water of the Napa River (also known as Poulson Creek). Tubbs either purchased land with direct riparian water rights, or he appropriated riparian rights from land owners through various deeds whereby Tubbs would own the water but permit the land owner a small pipeline for the land owner's domestic use but not for resale. All of those purchases were contained in deeds filed with the County Recorder's Office. All those rights contained the provision that not only did A.L. Tubbs (O'Gorman's great-grandfather) own those rights, but it was also for the benefit of his heirs, assigns and successors. O'Gorman is the only surviving heir.

Later A.L. Tubbs died and all of said water rights were left to his son, Chapin F. Tubbs, Appellant's grandfather. Chapin Tubbs and his wife died by 1959 leaving O'Gorman's mother with all said

water rights. Appellant's mother died on September 7, 1981, leaving Appellant O'Gorman as the sole heir to the Tubbs' estate, including all of said water rights and easements. O'Gorman resides at the home place parcel (purchased by O'Gorman's great-grandfather A.L. Tubbs) which is approximately 36.4 acres and her water rights are sourced from the alienated rights of Respondent City's parcel since 1883.

In May of 1931, Bank of America acquired by foreclosure, the title to one of the parcels for which Tubbs had appropriated water rights. That parcel's water rights together with easements for delivery and restriction for diversion of water had been sold to Tubbs in 1883, with the subsequent owners –including the Respondent City being foreclosed from taking water for irrigation or for sale because of Tubbs' water easements and rights he had retained. The parcel purchased by the City on February 26, 1939 contained rights and restrictions between Tubbs' home place parcel (where Appellant resides) and his upper water sources, and was one of the parcels whose water rights had been sold to Tubbs in 1883, and at the same

time gave Tubbs the right to restrict the future owners from diverting water for irrigation or for sale.

From 1931 through 1939, the Respondent City was purchasing water from Tubbs for its municipal purposes with water derived from wells. The City, seeking its own water supply entered into two contracts with Chapin Tubbs in 1939. Instead of taking the water by eminent domain, the City and Tubbs worked out two agreements in 1939. First, in order to transport water to its yet to be built dam, the City was required to negotiate an easement with Tubbs that ran from the north western corner of the property in a southerly direction to connect with the City's distribution system. That was a right-of-way agreement which is attached as Exhibit 1 to the Reynold's declaration. (Vol. 7, pp. 1924-1929.) The second agreement referenced an "agreement related to water rights on Poulson Creek between Chapin Tubbs and the City of Calistoga," generally concerning water rights. Attached as Exhibit 2 to the Reynolds declaration is the water rights transfer contract dated November 3, 1939. (Vol. 7, pp. 1931-1935.) The City knew full well from the title reports that Tubbs owned the water rights it sought to contract for

with Tubbs. That second agreement, dated November 3, 1939, the Water Rights Agreement, the City repudiated in 2011 and again in 2013, claiming that since the agreement did not run with the land, the agreement became null and void after the last living Tubbs died (grandmother in 1959). The City took said position in a previous lawsuit brought by Grant Reynolds (through an assignment from Appellant O'Gorman to sue the City for breach of contract). That decision became final, and the court in that matter determined that said 1939 water rights agreement did not run with the land and expired in 1959.

O'Gorman then sued the City for inverse condemnation and associated claims claiming that since the City had repudiated the Water Rights Agreement in 2011, after having assured O'Gorman up until that time that agreement did run with the land, O'Gorman's suit was to reclaim said water rights. The City had been selling water outside its place of use (in violation of the 1939 agreement which restricted the City to sell only within its place of use, i.e., within the City limits) and the City was entering into contracts with wineries outside the City limits and reasserting in each of those contracts with

the wineries that the City's water rights were the City's only because of the two agreements entered into in 1939 with Chapin Tubbs.

On the inverse condemnation causes of action, the City moved for summary judgment as to all causes of action and on January 24, 2017, the Court below, the Honorable Rodney G. Stone, granted the City's motion for summary judgment holding that the water rights the City acquired from Chapin Tubbs in 1939 via the Water Rights Agreement, did not revert back to O'Gorman under any theory. (Vol. 9, p. 2613 et seq.) Surprisingly, the Court stated: "An extensive review of the factual and procedural background is unnecessary to the Court's determination." (Vol. 9, p. 2614.)

The Court further held that the Tubbs Water Rights Agreement:

> "permanently and forever relinquished the water rights at issue to the City of Calistoga. Nothing in the language of the WRA, nor in applicable legal authorities, supports Plaintiff's position that the quitclaim extinguished at Tubbs death. As such, Plaintiff cannot establish a property interest in the allegedly 'inherited rights'."

(*Id.* at 2617.)

Appellant contended to the court below that there were triable issues of material facts regarding evidence concerning the pre WRA

deeds, the City's POU [place of use], pre WRA water use and the City water contracts. The Court said "such evidence is simply not relevant, and thus, not material, as the central dispute here arises from the application of law to facts." (*Id.* at 2616.) O'Gorman vehemently disagrees with the Court.

Appellant contends that the Court below erred in misinterpreting what the previous court decided in the *Reynolds v. Calistoga*, Napa County Superior Court Case No. 26-46826 (hereinafter "*Reynolds*") action regarding the City's claim that the WRA expired in 1959 because it did not run with the land. The Court below erroneously construed that as only the fact that *Reynolds* lacked standing to sue for breach of the WRA.

Appellant further contends that if in fact Tubbs had "quitclaimed" all of his rights to the City the WRA was not the correct instrument. Tubbs only needed to sign a reconveyance deed, reconveying his rights and privileges of the 1883 property rights back in favor of the City's property – but that was not done. The City could have purchased said right, but there is no sign of consideration in the WRA substantial enough to prove that Tubbs had forever sold

his water rights. After all, a commonsense question is since Tubbs already owned the water rights, and already was using those water rights to run a pipe to his Home Place and to build a dam, why would he need to enter into a water rights agreement with the City. If the City actually believed that Tubbs had forever given up all of his water rights, it could have filed for a quiet title action, but it did not. Or, the City could have condemned through imminent domain – which it did not. That said, Appellant contends the 1883 fee/-exclusive negative easement in favor of Tubbs is still active and in force. The City has never taken any action to quiet title to the 1883 fee/exclusive negative easement in favor of Tubbs. (Reynolds Decl. ¶¶34 and 35, Vol. 8 at p. 1919 and Ex. 26.3 at p. 2188 et seq.) Also, if the City and the Court below are correct, why is it that O'Gorman, her mother and Tubbs have been paying all of the property taxes on said easement which the City received at no cost. (Reynolds Decl. ¶ 29, Vol. 8, p. 1918 and Ex. 20 at Vol. 8, pp. 2115-2134.)

Appellant also contends that there are material issues of disputed fact which precluded the Court's granting of summary judgment. In addition, said Water Rights Agreement only permitted

the City to use water for its "inhabitants" within its place of use (Vol. 7, pp. 1931-1935), and licenses provided by the State Water Resources Control Board (its predecessor) stated that the water could only be used for "municipal purposes." Instead, the City decades ago began selling water outside its place of use, like to wineries to make a profit.

I. Procedural History

Appellant filed her original complaint on June 13, 2014, and first amended complaint on August 6, 2014, for inverse condemnation and related claims in the Sacramento County Superior Court, as one of the Defendants was the State Water Resources Control Board. (Vol. 1, p. 1 & p. 21.) The Sacramento County Superior Court entered judgment for the State Water Resources Control Board (Vol. 1, p. 46) and then by way of a stipulation, an order to transfer venue to Napa County occurred on March 5, 2015. (Vol. 1, p. 57.) The City then answered the first amended complaint on April 22, 2015. (Vol. 1, p. 66.) On April 12, 2016, the City filed a motion for judgment on the pleadings. (*Id.*, pp. 75-78.) Appellant opposed said motion on April 27, 2016. (Vol. 3, p. 809.)

On May 11, 2016, the Court issued an order denying the motion for judgment on the pleadings (Vol. 3, p. 868) and permitted the Appellant to file a second amended complaint which she did on June 2, 2016. (Vol. 4, p. 874.) The City filed its answer to the second amended complaint on July 7, 2016. (Vol. 4, p. 902.)

Then on October 20, 2016, the City filed its motion for summary judgment, or in the alternative, summary adjudication. (Vol. 4, p. 910.) On the same date it filed its separate statement of undisputed material facts (*id.*, p. 939), its index to evidence in support of its motion for summary judgment (*id.*, p. 960), and its exhibits of evidence in support of its motion. (Vol. 5, p. 1160 & all of Vol. 6 and up to p. 1863 in Vol. 7.)

On December 27, 2016, Appellant filed her opposition to the City's motion for summary judgment. (Vol. 7, p. 1864.) On that same date, she also filed her response to the City's separate statement of undisputed material facts. (Vol. 7, p. 1889.) Appellant also filed the declaration of Grant Reynolds in support of plaintiff's opposition. (Vol. 7, p. 1914.) All of the exhibits attached to the Reynolds declaration are found in all of Volume 8 and part of Volume 9, up

through page 2477, and in part of Volume 7, beginning at page 1924. O'Gorman also filed her declaration in opposition. (Vol. 7, pp. 1912-1913.)

The City then filed its reply on January 5, 2017. (Vol. 9, p. 2494.) The City also filed its evidentiary objections and a request for judicial notice. (Vol. 9, p. 2522 & p. 2543.)

On January 24, 2017, the Court issued its order granting the City's motion for summary judgment. (Vol. 9, p. 2613.) Notice of entry of the order was filed on January 27, 2017. (Vol. 9, p. 2621.) Judgment was issued on February 1, 2017. (Vol. 9, p. 2631.) Notice of entry of judgment was filed on February 14, 2017 (Vol. 9, p. 2634.) Plaintiff filed her notice of appeal on April 4, 2017. (Vol. 9, p. 2647.) Appellant then filed her notice designating record on appeal on April 7, 2017. (Vol. 9, p. 2649.)

II. Statement Of Facts

The Defendant City does not dispute that Appellant O'Gorman is the sole heir to the Tubbs Estate. O'Gorman currently resides as 3225 Lake County Highway, Calistoga, California (APN 017-130-046 "O'Gorman's Home Place"). O'Gorman inherited the O'Gorman

Home Place and several other parcels in 1983. (City's statement of undisputed material facts in support of its motion for summary judgment; Vol. 4, pp. 939 at 940 ¶ 2.) The City has owned the parcel on which the Kimball Reservoir is located since approximately 1939. The parcel is located in the County of Napa, State of California and is designated as assessor parcel number 017-060-010 ("Reservoir Parcel"). (*Id.* pp. 940, ¶ 1.) Between 1882 through on or about 1892 O'Gorman's great-grandfather A.L. Tubbs had purchased all of the riparian water rights found on Mount Saint Helena Watershed as it drained from the lands surrounding Kimball Creek which is the headwater of the Napa River. (Reynolds Decl. ¶ 7, Vol. 7, p. 1915.) When the City of Calistoga purchased a parcel in 1939 to extract water from Kimball Creek, it required it to enter into two agreements with Tubbs in 1939 to acquire some of his water rights, or it would be forced to take said water rights by eminent domain (and of course pay just compensation). (*Id.*, ¶ 8 at p. 1915.) In order to transport water from its yet to be built dam, the City needed to negotiate an easement with Tubbs that ran from the north western corner of his property, in a

southerly direction to connect with the City's distribution system. (Reynolds Decl. ¶ 9, p. 1915, and Ex. 1, Vol. 7. p. 1925.)

The agreement referenced an "agreement related to water rights on Poulson Creek between Chapin Tubbs (O'Gorman's grandfather) and the City of Calistoga concerning water rights. (*Id.*, Reynolds Decl. ¶ 10, p. 1916, Ex. 2, Vol. 7, p. 1931.)

The City knew from the title report that Tubbs owned the water rights the City sought to contract for with Tubbs. (Reynolds Decl. ¶ 11, p. 1916, Ex. 3, Vol. 7, p. 1937.)

The issue in this case revolves around Exhibit 2 to the Reynolds Declaration. (¶ 10, Vol 7, p. 1916 and Ex. 2 is found in Vol. 7, pp. 1931-1935.) Said Exhibit 2 will be referenced as the Water Rights Transfer Contract or WRA. This is the contract that the City said that did not run with the land (but it stated five years earlier that it did run with the land; Vol. 7, pp. 1997-1998) and only belatedly argued that said 1939 agreement did not run with the land. (See Ex. 4 to the Reynolds Decl. ¶ 12, Vol. 7, pp.1916, 1939-1971.) Through the time and after the City's 2009 demurrer in the *Reynolds* action, the City treated the WRA as a binding contract but then

changed its mind to defeat Reynolds' breach of contract claim and only then stated the WRA did not run with the land.

In granting the City's motion for summary judgment (Vol. 9, p. 2613) the Court held that "an extensive review of the factual and procedural background is unnecessary to the Court's determination"; [and] the undisputed material facts relevant to the Court's determination established that the City's own parcel (APN 017-060-010) on which Kimball Reservoir is located since approximately 1939 (the 'Reservoir parcel'); [and] the City and Chapin Tubbs (O'Gorman's grandfather) entered into two agreements on November 3, 1939, namely the WRA (Reynolds Decl. ¶ 10, p. 1916 and Ex. 2, vol. 7, at pp. 1931-1935) and the indenture (Ex. 1 to the Reynolds Decl., Vol. 7., p. 1915 at ¶ 9 and Ex. 1, Vol. 7, pp. 1931-1935) which the City admitted did run with the land.

According to the Court (Vol. 9, p. 2614):

> "An extensive review of the factual and procedural background is unnecessary to the Court's determination" [because] "the undisputed material facts relevant to the Court's determination established that the City has owned the parcel (APN 017-060-010) on which Kimball Reservoir is located since approximately 1939 (Vol. 9, p. 2614), that since the WRA did not run with the land and

> since Chapin Tubbs "'forever quitclaim[ed], relinquish[ed] and releas[ed]' and to transfer those rights was not executory, it was completed upon the execution of the WRA and nothing in the language of the WRA suggests that it was a temporary transfer. Indeed, the use of the word 'forever' suggests the contrary." * * *
>
> "The WRA permanently and forever relinquished the water rights at issue to the City of Calistoga. Nothing in the language of the WRA, nor in applicable legal authorities, supports [O'Gorman's] position that the quitclaim extinguished at Tubbs death. As such [O'Gorman] cannot establish a property interest in the allegedly 'inherited rights'."

(Vol. 9, p. 2616.)

Appellant is the sole surviving heir to Alfred L. Tubbs. (Vol. 7, p. 1912.) Between 1882 through on or about 1892 A.L. Tubbs had purchased all of the riparian water rights found on the Mount Saint Helena Water Shed as it drained from the lands surrounding Kimball Creek which is the headwater of the Napa River. (Reynolds Decl. ¶ 7, Vol. 7, p. 1915.)

When the City of Calistoga purchased a parcel in 1939 to extract water from Kimball Creek, it required it to work out a deal with Tubbs, since he owned said water rights to said parcel. Thus, the City entered into two agreements with Tubbs in 1939 to acquire some

of his water rights – or be forced to take said water rights by eminent domain. (*Id.* ¶ 8, p. 1915.) In order to transport water from its yet to be built dam the City's only recourse was to negotiate an easement with Tubbs that ran from the north western corner of his property, in a southerly direction to connect with the City's distribution system. (*Id.* ¶ 9, p. 1915.) Said easement agreement (or right of away agreement) was executed November 3, 1939. (See Ex. 1 to the Reynolds Decl. at pp. 1931-1935.)

The said agreement referenced an "AGREEMENT RELATED TO WATER RIGHTS ON POULSON CREEK between Chapin Tubbs and the City of Calistoga" [Chapin Tubbs being the sole heir of Alfred Tubbs] and said WRA agreement is attached to the Reynolds Declaration at Exhibit 2, was dated November 3, 1939, and hereinafter will be referenced as the Water Rights Transfer Contract or "WRA." (¶ 10 of the Reynolds Decl., Vol. 7, p. 1916.) Said WRA is attached as Exhibit 2 to the Reynolds Declaration, Vol. 7, pp. 1931-1935.

The City knew full well from the title report that Tubbs owned the water rights it sought to contract for with Tubbs. (Reynolds Decl.

¶ 11, p. 1916.) Indeed, there was a letter written to the State Water Board by Tubbs' attorney, Lowell Palmer, advising that the agreements would be completed as soon as the "engineering data and title reports" had been received. (¶ 11 and Ex. 3 is at p. 1937.)

The second agreement, the November 3, 1939 agreement relating to water rights was later repudiated by the City in 2011 and again in 2013 claiming that since the agreement did not run with the land, the agreement became null and void after the last living Tubbs died (grandmother in 1959). (Reynolds Decl. ¶ 12 p. 1916, Ex. 4 to the City's MSJ in 2011 in the Reynolds action.) Said MSJ can be found in Vol. 7, pp. 1939-1971 at pp. 1952-1953 (and see Court's opinion below at Vol. 9, pp. 2613-2617).

Later contracts the City had with various wineries make it even more clear. See plaintiff's request for judicial notice in support of plaintiff's opposition to defendant's motion for summary judgment, Vol. 9, pp. 2543-2612, and as an example, at 2569 there was a supplemental agreement between the City and Pecota where the City acknowledged that it entered into two written contracts "one generally concerning water rights, and the other generally concerning

rights-of-way for facilities . . ..” (Vol. 9, p. 2584.) The agreement goes on to spell out that there were two agreements with Tubbs in 1939, with “agreement No. 1 concerning “the transfer of riparian rights by Tubbs to the City and storage in Kimball dam of such water and the rights and obligations of each party as set forth in such agreement” and the second agreement was the right-of-way water transmission pipeline. (*Id.* p. 2584.) The City then states in its winery contracts:

> “Affect on prior agreements. Except as specifically modified herein, the Tubbs agreements remain in full force and effect. This is a supplemental agreement and the parties intend that it be read, interpreted and carried out in conjunction with the aforesaid Tubbs Agreements. <u>This supplemental agreement is not intended to modify, alter or enhance any existing rights or obligations contained in the Tubbs agreements, except as specifically set forth herein</u>.” (Emphasis added.)

(*Id.* p. 2584.)

The City and said winery also stated that the term of this agreement “shall be the same as that set forth in the Tubbs agreement dated November 2, 1939.” (*Id.* p. 2585.) The City also stated that “the water furnished under this agreement shall be for use by Pecota only on its premises. Pecota will use the water only in accordance

with the Tubbs agreements and all applicable state and local laws [etc.]" (*Id.* p. 2585 at ¶ 4.) That agreement was entered into in 2007. (*Id.* p. 2586.)

Virtually identical language can be found in Exhibit 5 to the request for judicial notice at 2604 regarding the City of Calistoga and Chateau Montelena Winery agreement executed in July of 2005 discussing the two Tubbs agreements and also stating:

> "Except as specifically modified herein, the Tubbs agreements remain in full force and effect. This is a supplemental agreement and the parties intend that it be read, interpreted and carried out in conjunction with the aforesaid Tubbs agreements. This supplemental agreement is not intended to modify, alter or enhance any existing rights or obligations contained in the Tubbs agreements, except as specifically set forth herein."

(*Id.* p. 2605, ¶ 1.)

O'Gorman was misled by the City's Public Works Director, Paul Wade, in 2006, by telling her that the Tubbs agreements were intended "run with the land." (Reynolds Decl. ¶ 17 and Ex. 8, p. 1997.) The Water Board later stated the City was selling water to customers outside its POU in violation of the Water Board's water

licenses as well as the WRA. (Reynolds Decl. ¶ 23, p. 1918, Ex. 14, pp. 2081-2085.)

Exhibit 16 is a true and correct copy of a letter from the City to the Water Board indicating 115 customers located outside the City's 1939 POU. (Reynolds Decl. ¶ 25, p. 1918 and Vol. 8, pp. 2093-2099.) Shortly thereafter, the City in January of 2002, petitioned the Water Board for a change seeking authorization to increase the size of its place of use in violations of the provisions of the November 3, 1939 WRA. (Vol. 8, pp. 2101-2107.)

Exhibit 20 to the Reynolds Declaration are copies of O'Gorman's property tax bills (which were paid by Tubbs and thereafter O'Gorman), describing the springs and easements running from above the City's reservoir, down through the Kimball Canyon Creek and across the City's property and to O'Gorman's Home Place. (Vol. 8, pp. 2115-2134' Ex. 20.)

Exhibit 23 is a true and correct copy of a series of deeds establishing the genesis of Tubbs pre-1914 appropriative right to water. (Reynolds Decl. ¶ 32, pp. 1919, 2159-2169.)

Attached as Exhibit 26 (collectively 26.1 through 26.6) were copies of the deeds which gave Tubbs water rights to Tubbs at or below the City's present reservoir sight. (Reynolds Decl. ¶ 35 p. 1919, Vol. 8, pp. 2178-2223.

III. Facts Relevant To The Two 1939 Agreements Between Chapin Tubbs And The City Of Calistoga

At Volume 5, as exhibits to the index of evidence in support of the City's motion for summary judgment, at page 1262 et seq., is the indenture agreement for the laying of a pipeline and access to Tubbs water rights. The right-of-way was expressly stated to run with the land, and the said party to the second part [the City] by acceptance of this grant of right-of-way expressly agrees to all of the covenants and conditions herein contained and that it will." (Vol. 5, p. 1265.) There is no issue with respect to this 1939 agreement between Chapin Tubbs and the City of Calistoga.

Beginning at page 1269, Volume 5, is the WRA attached as an exhibit to the City's exhibits in support of its motion for summary judgment. When quoting below, instead of using "party of the first part" (which is Chapin F. Tubbs; O'Gorman's grandfather) and the

City of Calistoga (party of the second part), the "parties of the first part and the second part will be shortened for clarity to Tubbs (party of the first part) and the City (party of the second part).

WRA begins with the fact that the City then owns certain lands "through the boundaries of which runs Poulson Creek, also known as Kimball Creek. (*Id.*, Vol. 5, p. 1269.) Further, that the City was then in the process of constructing and erecting a storage dam to "impound certain of the water flowing in said Poulson Creek in order to provide a water supply <u>for the City of Calistoga</u>." (Emphasis added.)

At page 1270 the parties acknowledge that Tubbs is the owner of lands and easements of lands situated upstream from the lands of the proposed dam sight upon which were located springs and "other sources of water supply" including the tributary to said Poulson Creek, and "from which Tubbs now secures and for many years past has secured, his water supply for his lower lands, commonly known as the 'Tubbs Home Place' . . ." (*Id.* at 1270.)

The agreement goes on to state that Tubbs "has certain rights in said Poulson Creek and its tributaries as upper and lower riparian owner, appropriator and otherwise, and the parties hereto are desirous

of adjusting their respective rights in said Poulson Creek, to the end that each party may satisfy their respective needs therein without damaging the other." (*Id.* at 1270-1271.)

Tubbs and the City then agreed that his rights to take and use water from said creek "shall be subordinate and subject to the prior right of [the City] to store and impound the same in its storage dam, heretofore mentioned, and to use said water so impounded for its water supply." (*Id.* at 1271; emphasis added.)

Numbered paragraph 2 (Vol. 5, p. 1271) Tubbs "hereby forever quit-claims, relinquishes and releases to the [City] of all of his rights of every kind and description to erect dams and/or impound water and/or take water from said Poulson Creek of said lands [of the City]." (*Id.* at 1271.)

The parties agreed (¶ 3 at p. 1271) for Tubbs to have the right of a two-inch pipeline or any:

> "additional size or type of water pipe as [Tubbs] may from time to time hereinafter determine in his judgment as necessary, adequate, convenient or required to provide for the proper operation and maintenance of an adequate pipeline for the transmission of water from the [Tubbs] source of supply to his lower lands or his 'home place' and [Tubbs] right to change at will the route or location

> of said existing pipeline, or to build and lay any additional and further pipelines that may hereafter be deemed necessary by [Tubbs] to improve and increase the transmission of said water supply to said 'home place' and lower lands, upon the said lands of the [City] . . ."

(*Id.* at 1272.)

Then, at paragraph 4 of the WRA (Vol. 5, p. 1272) it states:

> "That it is expressly understood and agreed that nothing herein to the contrary notwithstanding shall <u>ever</u> be construed or intended to diminish, modify, reduce or limit in any manner or by any means any of the present existing sources of water supply of [Tubbs] or his right to take, develop and appropriate from said springs and/or said Poulson Creek and/or its tributaries upon said upper lands of [Tubbs] and <u>others</u>, except the lands of the [City] for use upon said lower lands of [Tubbs] known as the 'Tubbs Home Place,' as aforesaid, save and except [Tubbs] relinquishes to the [City] any right to erect dams on said Poulson Creek above said dam sight of the [City] except for in paragraph 5 herein following." (Emphasis added.)

(*Id.* p. 1272.)

Then at paragraph 5 at 1272-1276 it states that:

> "[Tubbs] shall have and by these presents is granted the right to construct, erect, repair, and maintain it anytime hereafter a small diversion dam to be located on Poulson Creek not less than seven hundred fifty (750) feet generally north and up said Poulson Creek from the northern property line of the [City], said dam not to exceed ten (10) feet in height for the purpose of

> appropriating, taking and using from said Poulson Creek and said diversion dam water sufficient to fill a 2-inch pipeline, also a convenient right-of-way sufficient to convey said water from said diversion dam by gravity to and for use upon said "Home Place" and lower lands of [Tubbs]." (Emphasis added.)

(*Id.* pp. 1272-1273.)

Then paragraph 6 of said WRA states that the City dam is only FOR ITS MUNICIPAL WATER SUPPLY "on KIMBALL CREEK for the City of Calistoga, dated June, 1939." (*Id.* at 1273.)

Thus, nothing in the WRA permitted the City to take water for anything else but its municipal water supply, not to supply wineries, and that Tubbs could take all of the water he wanted to his Home Place by whatever pipe size he wanted, not only to his Home Place, but other lands then owned by him. (That included the land now occupied by the wineries the City is now selling water to – when it was restricted for municipal purposes only.)

In the recitals of the WRA it states: "WHEREAS the [City] is now in the process of constructing and erecting a storage dam on its said lands . . . to impound certain [not all] of the water flowing in said

Poulson Creek in order to provide a water supply for the City of Calistoga . . .." (Emphasis added.) (*Id.* at 1270.)

As revealed by Exhibit 26, 26.1 through 26.6 attached to the Reynolds Declaration (Vol. 8, pp. 2178-2223) were all of the lands for which Tubbs had water rights at or below the City's present reservoir sight. (Reynolds Decl. ¶ 35, Vol. 8, pp. 2178-2223.)

STANDARD OF REVIEW

A defendant moving for summary judgment "must show that under no possible hypothesis that there is a material question of fact which requires examination by trial. (Citations omitted.)" *Chevron USA, Inc. v. Superior Court* (5DCA 1992) 4 Cal.App.4th 544, 548. (Emphasis added.)

The California Supreme Court stated in *Saelzler v. Advance Group 400* (2001) 25 Cal.4th 763, 768: "In performing our *de novo* review, we must view the evidence in a light favorable to plaintiff as the losing party, liberally construing her evidentiary submissions while strictly scrutinizing defendant's own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. (Citations

omitted.)" See also *Hutton v. Fidelity National Title Company* (2013) 213 Cal.App.4th 486, 494.

Further, evidentiary facts are required to support a summary judgment motion; conclusions or ultimate facts are not admissible and are insufficient. *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219, 1240.

The Court below ignored these rules, and instead, liberally construed the City's evidentiary submissions and strictly scrutinized the Appellant's.

Indeed, the Court below stated: "An extensive review of the factual and procedural background is unnecessary to the Court's determination" (Vol. 9, p. 2614), but both parties reviewed and included the factual and procedural background.

Further, the Court stated that it would not consider plaintiff's evidence "regarding pre-WRA deeds, the City's POU, pre-WRA water use and the City water contracts. Such evidence is simply not relevant, and thus, not material as the central dispute here arises from the application of law to facts." (*Id.* at 2616.)

The Court also ignored what was the parties' intent at the time the agreement was entered into which was relevant as to its legal effect. (*Id.* at 2616.)

SUMMARY OF LEGAL ARGUMENT

I. The Court's Ruling on the City's Motion for Summary Judgment

The Court stated (Vol. 9, p. 2617):

> "The Water Rights Agreement permanently and forever relinquished the water rights at issue to the City of Calistoga. Nothing in the language of the WRA, nor in applicable legal authorities, supports Plaintiff's position that the quitclaim extinguished at Tubbs death. As such, Plaintiff cannot establish a property interest in the allegedly 'inherited rights.'"

However, the same court in the *Reynolds* action determined in 2011 that the 1939 Water Rights Agreement (hereinafter "WRA") did not run with the land. The 1939 Water Rights Agreement contained quitclaim language pertaining to water rights associated with the City's reservoir parcel. The 1939 WRA's recitals mentioned that the rights were owned by Tubbs at that time. The 1883 Deed upon which the complaint was based was not considered by the Court in making its MSJ decision, but it was in denying the City's motion for

judgment on the pleadings. (Col. 3, p. 870.) The 1883 deed was the entire subject of the Second Amended Complaint. (Vol. 4, p. 874 at pp. 889-894.)

The quitclaim language contained in the WRA, was recorded against the City's property as required by Civil Code § 1213. Until such time as the document was executed and recorded, the quitclaim language is effective between Tubbs and the City, and no others as a promise.

After the recording of the WRA, Civil Code § 1217 barred any challenge to the City's claim to water rights because the recording put subsequent owners on notice (including O'Gorman – see Civil Code § 1468) that the City's parcel was not burdened by the Tubbs' ownership of the parcel's water rights. The prior *Reynolds* challenge concerned the quantity of the water the City was allowed to take under the WRA, and the geographical limitation placed upon the City's place of use ("POU"). It was these alleged breaches that inspired the *Reynolds* prior action, not the underlying right to take water.

The Court below in its 2017 decision on the City's motion for summary judgment stated:

> ". . . to the extent that Plaintiff invited this Court to reconsider the issue of whether or not the WRA was a covenant running with the land, such issue is not before the Court. Nor could have it been raised. *Reynolds* abandoned his appeal of the trial court's ruling dismissing – on the grounds that because the obligations are not covenants running with the land O'Gorman lacked standing – the private damages claims."

(See, *Reynolds v. City of Calistoga*, A134190, 2014 WL 2986515, at *2; fn 3, July 3, 2014.) (Vol. 9 at p. 2640.)

In the City's 2017 motion for summary judgment (MSJ) the City judicially admitted the following evidentiary facts:

The City argued in its motion for summary judgment in the *Reynolds* action that the WRA did not run with the land (citing Civil Code § 1461), and since the WRA did not meet the requirements of § 1461, the WRA merely became a personal promise between the original contracting parties, that neither binds the land nor allows the enforcement by future owners. (Ex. 4 to the Reynolds decl.; Vol. 7, pp. 1914 at 1916, ¶ 12; Ex. 4, pp. 1939 at 1952-1953.) Contrary to the Court's statement in its order granting defendant's motion for

summary judgment (Vol. 9, pp. 2613 at 2614-15) the City did repudiate the WRA and it was separate and apart from *Reynolds* alleged lack of standing. It was determined by the *Reynolds* Court that *Reynolds* lacked standing to enforce the WRA as a breach of contract, because the WRA did not run with the land and therefore was no longer in force and effect. The Court further ruled that the WRA and the transfer of said rights to the City that were "forever quitclaimed, relinquished and released," that the "transfer of those rights was not executory, it was completed upon the execution of WRA and nothing in the language of the WRA suggests that it was a temporary transfer. * * * As the City argued in the *Reynolds* action, the obligations of both Tubbs and the City were capable of and were discharged soon as the WRA was executed." (Vol. 9, p. 2617.)

The Court below incorrectly held that the City's argument regarding O'Gorman regarding O'Gorman's lack of standing to enforce the WRA is a repudiation of the WRA, and further said the City did not argue in the *Reynolds* action that there was no agreement to enforce, but the:

> "City argued that the plaintiff lacked standing to enforce it. Thus, it is not inconsistent for the City to take a position in the instant action that calls from the courts to interpret the 'quitclaim' language of the WRA."

(*Id.* at 2614-2615.) However, the City's argument regarding "standing" was based upon the City's contention that the WRA terminated in 1959 when Chapin Tubbs and his wife passed away, and did not run with the land, so therefore there was no WRA to enforce (i.e., no one had standing to enforce an agreement that was no longer in effect because it did not run with the land).

The trial court's 2017 order on the City's motion for summary judgment would not have been in error <u>only if the quitclaim language had been recorded in a separate document entitled "quitclaim"</u> but it was not. Instead it was included in a WRA made in 1939 (which had representations and promises by the City and restrictions on the City's use of the water), that has been interpreted by the same court in 2011 that the document and no covenants within it ran with the land.

The trial court's 2011 *Reynolds* decision determination was made possible by the City's own MSJ motion. It was not O'Gorman who obtained the 2011 ruling that changed the entire complexion of

the underlying claim from a breach of contract to enforcement of the terms of the pre-existing 1883 grant deeds with did run with the title to the City's reservoir parcel.

Indeed, when the City filed its motion for summary judgment in the *Reynolds* action it expressly stated that the WRA did not run with the land because under Civil Code § 1468 a covenant could only run with the land if it was made by the covenantor "expressly for his assigns or the assigns of the covenantee" and thus it is "merely a personal promise between the original contracting parties that neither binds the land or allows enforcement by future owners." (Vol. 7, pp. 1939 at 1952.) Thus the City argued that the no successors or assigns like O'Gorman could challenge it because the 1939 WRA terminated upon the death of O'Gorman's grandparents, Chapin and Merritt Tubbs (the last one passed away in 1959). However, six years earlier, in February of 2006, the City of Calistoga sent a letter to O'Gorman stating that both the WRA and the indenture agreement were valid and binding and were intended to "run with the land." (Reynolds Decl., Vol. 7, pp. 1914 at 1917; and Ex. 8 to said decl. p. 1997.)

The Court, in denying the City's motion for judgment on the pleadings in May of 2016, agreed, and stated: "By contrast, Plaintiff brings this litigation based on the vested water rights from the 1883 deed restriction itself, not the purported repudiated 1939 contract." (Vol. 3, pp. 868, 872.)

The Court below erred in stating that the transfer of the water rights was not executory because it was allegedly completed upon the execution of the WRA "and nothing in the language of the WRA suggests that it was a temporary transfer." (Vol. 9, p. 2617.) O'Gorman contends that the Court erred because the WRA was contingent upon several conditions including the fact that it was water only for the City's use within its own city limits, and not for use outside the city limits. (Vol. 5, p. 1269.) The agreement further provided that Tubbs had the continued right to reroute the pipeline to his lower lands/Home Place or to build and lay any additional and further pipelines that may hereafter be deemed necessary by [Tubbs] to improve and increase the transmission of said water supply to said "Home Place" and lower lands. (*Id.* p. 1271-1272, ¶ 3.) Then, in paragraph 6 of the WRA it states that the City dam is only for its

municipal water supply "on Kimball Creek for the City of Calistoga." (*Id.* p. 1273.)

Thus, nothing in the WRA permitted the City to take water for anything else but its municipal water supply, not to supply wineries, not to transmit water outside of its city limits, and that Tubbs could take all of the water he wanted to his Home Place by whatever pipe size he wanted, not only to his Home Place, but other lands then owned by him (which were several). That included the wineries the City is now selling water to – when it was restricted for municipal purposes only.

The Court also erred when it stated that there were no triable issues of material fact regarding damages, and that O'Gorman could not show damages but "must demonstrate that she would have been able to put the quitclaimed rights to beneficial use and construct a transportation system sufficient to get the water to the place of use. Conclusory allegations regarding prospective contracts with vineyards are insufficient to meet this requirement." (*Id.* p. 2618.) Facts that will dispute this in the record will be stated in the damage part of the argument.

ARGUMENT

I. The Court's Decision With Respect To The WRA Was In Error

It was clear from the City's pleadings both in the *Reynolds* action and the underlying action that since the WRA did not include the magic words about successors or assigns and fails to meet the statutory requirements of Civil Code § 1468 so the WRA "is nothing more than an exchange of personal promises between the City and Tubbs which O'Gorman had no standing to enforce. (City's 2010 MSJ Vol. 7, Ex. 4, p. 1939 at 1953:3-7.)

The Court below erroneously stated:

> "The City did not argue in the *Reynolds* action that there was no agreement to enforce, rather, the City argued that plaintiff lacked standing to enforce it. Thus, it is not inconsistent for the City to take a position in the instant action that calls for the Court to interpret the 'quitclaim' language in the WRA."

The Court erred. It was the City's precise argument in the *Reynolds* action that since the agreement did not have the magical language about successors or assigns or otherwise comply with Civil Code § 1468, the WRA did not run the land and merely became promises between Tubbs and the City. The City's argument that plaintiff

lacked standing to enforce it was the fact that the City argued that the agreement no longer existed because it did not run with the land.

In the *Reynolds* action, the City chose to treat the WRA as an expired contract that did run with the land. In the City's January 2017 MSJ, Vol. 4, p. 913 at 932-933, the City stated:

> "Thus, O'Gorman is really arguing that the City breached the WRA by arguing that its covenants do not run with the land. But O'Gorman has no standing to assert a breach of the WRA. In the *Reynolds* action, this Court held that O'Gorman lacked standing to sue for breaches of the WRA because the WRA's covenants do not run with the land. [Footnotes omitted.] Because O'Gorman has no standing to enforce the WRA's covenants, she cannot obtain a remedy (e.g., a reverter) for any alleged breach of those covenants. [Citations omitted.]"

(*Id.* pp. 932-933.)

When the Court below issued its order on the City's motion for judgment on the pleadings (Vol. 3, p. 868 at 872) the Court stated:

> "By contrast, plaintiff brings this litigation based on the vested water rights from the 1883 deed restriction itself, not the purported repudiated 1939 contract."

However, the Court below never even mentioned the 1883 contracts in granting the City's motion for summary judgment.

Exhibits 26.2, 26.3, 26.5 and 26.6 to the Declaration of Grant Reynolds (Vol. 8, p. 2178) the Wright's and also the Reid/Nolasco entities granted to A.L. Tubbs his heirs and assigns the right-of-way over that certain parcel of property and the right to divert all of said riparian rights from those parcels of property which later became the City's reservoir parcel. Those were for the benefit of Tubbs and his successors and assigns. Those 1883 deeds of Mr. Tubbs are still firmly in place and the WRA did not relieve O'Gorman from her water rights on those parcels of property.

Thus, the Court's review of the WRA was not liberally construing O'Gorman's evidentiary submissions and strictly scrutinizing the City's own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. But instead, construed the WRA as leaving O'Gorman with no said water rights. The Court erred.

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II. The Trial Court's Failure To Consider Plaintiff's Evidence Was Improper With Respect To A Motion For Summary Judgment

After misconstruing the WRA, the Court stated (Vol. 9, p. 2617):

> "The WRA permanently and forever relinquished the water rights at issue to the City of Calistoga. Nothing in the language of the WRA, nor in applicable legal authorities, supports plaintiff's position that the quitclaim extinguished at Tubbs death. As such, plaintiff cannot establish a property interest in the allegedly 'inherited rights'."

In making that decision, the Court specifically stated that it did not consider any of the evidence contained within the opposition. Had it done so, it would have reviewed O'Gorman's payment of the property tax bills by Tubbs and O'Gorman as prima facie evidence that the property interest (water rights granted by easement to Tubbs heirs and assigns) in the City's reservoir property had not been abandoned by O'Gorman. The easements dating to 1940 describe the three springs including the 1883 deeded water rights being described in the earlier tax bills that had been in her family continuously since 1883. The recitals contained in the WRA clearly admit that the upper springs and the 1883 easements remained her property. The springs

are riparian rights, which are the headwaters of the Napa River and cannot be lost by non-use as a matter of law.

Contrary to the City's judicial admissions that the none of the covenants contained within the WRA ran with the land, the Court further ignored the impact of the application of Water Code §§ 1016, 1706-1707 and 1810, all of which were included within O'Gorman's opposition to the MSJ. Water Code § 1710 allows O'Gorman to move her point of diversion from the 10 foot circular parcel located above the City's reservoir parcel. Water Code § 1810 entitles O'Gorman to use the City's excess capacity in its water facilities in order to assist her in selling water to third parties without the need to construct her own delivery system.

It cannot be said enough that the WRA was <u>only</u> to be used by the City for the City's residents within its city limits and not for sale outside the city limits for irrigation or to supply water to any of the wineries. Thus, Tubbs did not grant the City all of Tubbs water, only the amount of water that the City needed to service its citizens. The scheme was only made possible because the WRA covenants do not run with the land and have no effect on the underlying rights

referenced by the 1883 deeds that granted the City's parcel water rights to O'Gorman's great-grandfather and passed on to her through inheritance.

Under this scenario, the City's right to divert water from its parcel is the present right to limit the City's take of water to 30% of its storage capacity under Water Code § 1810, in order to facilitate to O'Gorman the sale of water to third parties such as Markham Vineyards. Exhibits 20 through 40 of the Reynolds Declaration (Vol. 9, pp.2398-2477) provides insightful evidence of the progress of contract negotiations between O'Gorman and the vineyards, making the damages not speculative but imminently real. But for the City's professed opposition to O'Gorman's rights, the contract for water sale was not speculative. But instead, the Court refused to consider such evidence and also stated "an extensive review of the factual and procedural background is unnecessary to the Court's determination." But the Court never even mentioned the 1883 deeds.

While the Court stated (Vol. 9, p. 2618):

> "Similarly, the whole of a contract is to be taken together, so as to give effect as to every part, if reasonable practicable, each clause helping to interpret

> the other. Whether there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. [Citation omitted.]"

Here, the Court ignored that quoted provision by not considering the historical evolution of these deeds and the Court did not give affect to every part of said WRA and the parties' intent because the City had to claim to Tubbs that it needed water for its city residents and that is the only water that Tubbs arguably quitclaimed. The easements dating back to 1940 described the three springs including the 1883 deeded water rights being described in earlier tax bills that had been in her family continuously since 1883. The recitals contained in the WRA, clearly admit that the upper springs in 1883 easements remained her property. The spring rights are riparian rights, which are the headwaters on the Napa River and cannot be lost by non-use as a matter of law.

It is the established law of this state that the riparian rights of an owner of real property to use and benefit thereof are an inherent part of the land, and the appropriation of such water is therefore an appurtenant to the real property as distinguished from a mere trespass. *Fallriver Valley Irrigation District v. Mount Shasta Power Corp.*

(1927) 202 Cal. 56, 65. As the *Fallriver* court stated, “We, therefore, here, reassert the riparian right to be a vested property right inhering and a part and parcel of the abutting lands – a right not gained by use or lost by disuse.

III. The Court Below Ignored The Law Regarding The 1939 WRA And The 1883 Deeds

The *Reynolds* court determined in 2011 that the 1939 WRA did not run with the land. The 1939 WRA contained quitclaim language pertaining to water rights associated with the City’s reservoir parcel. The 1939 WRA’s recital mentioned that the rights were owned by Tubbs at that time. The 1883 deed upon which the complaint was based was not considered by the Court in making its decision.

However, there was not a separate quitclaim deed filed with the county recorder – but instead the WRA was filed with the county recorder. The quitclaim deed was not a separate document filed but instead the WRA was filed. The WRA contained several restrictions on the City with respect to water rights and provided Tubbs with additional rights. The Court below never addressed the WRA as a whole. For example, why the WRA was entered into, the City’s

agreements pursuant to that WRA regarding what the water rights were to be used for; which was exclusively for the City to furnish water to those within the city limits. Under the WRA, and its geographical limitations, the City was only allowed to take water under the WRA and the geographical limitations placed upon the City's POU. That did not allow sales by the City outside of its POU to sell water to the wineries or anyone else outside the city limits.

The declaratory relief sought by O'Gorman alleged that the WRA was an unrecorded document, subject to Civil Code § 1217 because of the Court's 2011 decision that the WRA did not run with the land. Civil Code § 1462 states: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some, part of it then in existence runs with the land."

In light of the City's argument in the 2011 *Reynolds* action and the Court's agreement with the City that the WRA and its covenants do not run with the land, the City continued placement of the 1939 WRA within the reservoir parcel's chain of title as recorded by the Napa County Recorder's office, it is in direct conflict with Civil Code

§ 1462. The WRA should be removed or declared a nullity with the County Recorder's records. If the WRA document is no longer in existence by operation by the 2011 *Reynolds* court decision, then by application of law, the 1883 grant deeds transferring water rights on which O'Gorman continues to pay property taxes on, remain on title and control the use of the parcel's water rights.

In 2011, the City's main argument was that because the WRA made no provisions of heirs and assigns to be benefitted, the Court was obliged to find that the water rights could not be enforced by O'Gorman, rendering her assignment to Reynolds void and reducing the WRA to nothing more than a simple promise between the parties. (City's 2011 MSJ, Vol. 7, pp. 195-1953.)

A covenant running with the land is a contract appurtenant to land such that as it passes with the land, binding the successors and assigns, of the contracting parties as though themselves had been parties to the contracts. (Civil Code § 1460.) For a covenant to run with the land it must comply with the statutory requirements provided for in Civil Code § 1461. When the covenant does not meet those requirements, it is merely a personal promise between the original

contracting parties that neither binds the land or allows enforcement by future owners. (*Los Angeles Terminal Land Company v. Muir* (1902) 136 Cal. 36, 42.)

At the time the instant WRA was executed, Civil Code § 1468 laid out the requirements for a covenant between two independent land owners to run with the land. Under that section, a covenant could only run with the land if it was made by the covenantor "expressly for his assigns or the assigns of the covenantee." This express mention of assigns was mandatory. (12 Witkin, Summary 10th (2005) Real Property § 434 at p. 506.) If the parties "desire to create mutual rights in real property they must say so and say it in the only place where it can be given legal effect, namely in the written instruments exchanged between them which constitutes a final expression of their understanding." *Coulter v. Sausalito 18 Bay Water Company* (1932) 122 Cal.App. 480, 494-495.

The WRA does not state that it is made for the benefits of assigns, and it makes no reference to any parties to be benefitted or burdened other than the City and Tubbs. Consequently, it fails to meet the statutory requirements of § 1468, and is nothing more than

an exchange of personal promises between the City and Tubbs. However, that being said the 1883 deeds by the Wrights and Tubbs is in full force and effect.

The City wants its cake and eat it too: The WRA prescribed covenants that the City made to Tubbs which included the fact that the City was only going to take water sufficient to satisfy the City's residents within its POU, but did not authorize the City to sell water outside of its POU like to wineries or others.

Since the quitclaim language in the WRA is not a separately filed document with the County Recorder's office, as only the WRA was filed, then what the City filed with the County Recorder's office, that filed document comes with all of the restrictions and promises made by the City in the WRA.

The City was limited to selling water within its 1939 POU (the city limits municipal purposes). But instead, the City got greedy and decided to take water to sell to wineries and others outside the City's POU. The City is stuck with their representations in the WRA that it only required water to satisfy those within the City limits of Calistoga but it later decided to sell excess water outside of its POU and make a

large profit. The Court below erred in not considering the history of those water rights, and all of the agreements in the WRA. The Court only focused on the quitclaim language without considering all of the other promises and recitals in the WRA as described above. However, the Court decided that "an extensive review of the factual and procedural background is unnecessary to Court's determination." (Vol. 9, p. 2614.) The Court below utterly ignored the parties' intent with respect to the entire WRA and the conditions upon which Tubbs granted the City said water rights. Since the only thing the City filed was the WRA and not a simple quitclaim deed to all of Tubbs' water is reason enough to reverse the Court below because it showed a material issue of disputed facts.

IV. The Court's Decision That O'Gorman Could Not Show Damages On Her Inverse Condemnation Claims Was Erroneous And The Court Disregarded Material Facts

The Court ruled (Vol. 9, pp. 2618-2619) that O'Gorman's inverse condemnation claims failed because O'Gorman fails to demonstrate a triable issue of material fact regarding damages and

because the question is 'not what the taker has gained but what the owner has lost.' [Citations omitted.]" The Court stated:

> "'No appropriative or prescriptive right to water matures until and unless a means of transporting the water to the place of use is also constructed. Since the use of water is the *sine qua non* of an appropriative or prescriptive right, it follows that the transportation system necessary to get the water to the place of use is as much a part of such water rights as are the works constructed at the point of diversion.' (Citation to *San Bernardino Valley Municipal Water Dist. v. Meeks & Daley Water Co.* (1964) 226 Cal.App.2d 216, 221-222.)"

The Court's decision below at pp. 2618-2619.

The Court below stated (p. 2619):

> "Plaintiff may not rely on the value the City gained through the purported taking and selling of water of Kimball Creek, but must demonstrate that she would be able to the quitclaimed rights to beneficial use and construct a transportation system sufficient to get the water to the place of use. Conclusory allegations regarding prospective contracts with vineyards are insufficient to meet this requirement."

The Court's decision is based upon the Court's refusal to consider the WRA as a whole as opposed to just the quitclaim language. The City was only entitled to take water for its municipal purposes within the city limits of Calistoga, but did not allow the City to sell water outside of its city limits nor for irrigation for wineries.

The Supreme Court in *Selby Realty Company v. City San Buenaventura* (1973) 10 Cal.3d 110, 119-120, stated:

> ". . . in order to state a cause of action for inverse condemnation, there must be an invasion or appropriation of some valuable property right which the land owner possesses and the invasion or appropriation must directly and specifically affect that land owner to his injury. [Citations omitted.]"

Absent a formal resolution of condemnation, the public entity's conduct must have 'significantly invaded or appropriated the use or enjoyment of' the property. *Contra Costa Water District v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 899. Thus, decisions generally have required a showing that the public entity acted affirmatively to lower the value of the subject property, physically burdened the property, and/or decreased the income the property produced." (*Id.* at 901.)

The Court below stated (p. 2618) that "the question is 'not what the taker has gained, but what the owner has lost.'" *City of Ventura v. Channel Islands Marina, Inc.* (2008) 159 Cal.App.4th 615, 628.

The Court then stated (p. 2618) that:

> "That distinction is particularly relevant here given that 'no appropriative or prescriptive right to water matures

> until and unless a means of transporting the water to the place of use is also constructed. Since use of water is the *sine qua non* of an appropriative or prescriptive water right, it follows that the transportation system necessary to get the water to the place of use is as much a part of the water rights as are the works constructed to the point of diversion.' [Citations omitted.]"

In concluding with this Court's erroneous ruling, it stated that the plaintiff "may not rely on the value the City gained through the purported taking and selling of water from Kimball Creek, but demonstrate that she would have been able to put the quitclaim rights to beneficial use and construct a transportation system sufficient to get the water to the place of use." (*Id.* p. 2619.)

It is O'Gorman position that although recorded against the property, the representation by the City that the WRA, which includes the quitclaim covenant concerning the Tubbs' water rights, have been determined not to run with the land is in fact a recorded "nullity" because not running with the title the document provisions became void at the time the last Tubbs past after which the WRA had no continued binding effect upon the City's reservoir parcel's chain of title, making O'Gorman rights derived from the 1883 J.R. Wright and

Reid deeds paramount in control of the water rights in the City's reservoir parcel. (Exs. 26 et seq. at Vol. 8, pp. 2178-2223.)

However, the recording itself of the WRA grants no interest in the property and a void document "derives no validity from the mere fact that it is recorded." (*City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 733.)

However, the Court did not consider the pipeline tract within Exhibit 35 (Vol. 9, pp. 2432-2435, specifically at 2434-2435) it would have been apparent to the Court that O'Gorman had no need to "construct a transportation system sufficient to get the water to the place of use" because the City had already constructed the transportation system for her by constructing Kimball dam and the pipeline system. By application of Water Code § 1810, it allowed O'Gorman to use the City's facilities to transport water to a third-party end users, like the wineries.

Water Code § 1810 states, in pertinent part:

> "Notwithstanding any other provision of law, neither the state, nor any regional or local public agency may deny a bonafide transferor of water the use of a water conveyance facility which has unused capacity, for the period of time for which that capacity is available, if fair

> compensation is paid for that use, subject to the following . . ."

Water Code § 1706 allows a pre-1914 riparian rights such as O'Gorman to change her point of diversion down stream to the City's reservoir property to facilitate diversion and storage consistent with her rights under the 1883 Reid and J.R. Wright deeds with Tubbs.

Application of the Water Code § 1810 would have allowed O'Gorman to use the excess storage and facilities of the City in order to facilitate the transfer of water to third-party end users such as the City and the wineries. But for the trial court's interpretation, O'Gorman would now be the owner of the 1883 deeded water rights that allow diversion and storage from the City's reservoir parcel. As the owner of these rights, O'Gorman could limit the City's take of water to 30% of the City's present storage capacity. Although Water Code § 1706 limits the right to change a point of diversion if it harms others, no harm would visit the City because the City, by virtue of the fact that it had no water rights outside its city limits, it could prove no actual loss.

O’Gorman had a right to assert those rights and limit the City to use only 30% of its present capacity, leaving the remaining 70% to be used by O’Gorman as provided by Water Code § 1810. Under this scenario O’Gorman, not the City, would have been able to sell the water to third-party vineyards and those outside the city limits, because those users already are and still connected to the City’s system. Instead, the City has been selling the subdivided parcels’ water since at least 1954 (Ex. 6, last 3 pages, Vol. 7, pp. 1986-1988.) Such sales by the owners of the reservoir parcel are prohibited by the 1883 Reid and Wright deeds because those rights belong to O’Gorman.

The Court also ignored O’Gorman’s evidence that reveals that O’Gorman, through Grant Reynolds, already had made arrangements with Markham Vineyards (Reynolds Decl. Vol. 8, p. 1920, ¶ 36 and Ex. 7, Vol. 8, pp. 2225-2237) and Chateau Montelena (*id.* at ¶ 38, and Ex. 29 Vol. 9, pp. 2399-2402) to sell them water. Exhibit 30 (Vol. 9, pp. 2402-2411) was correspondence between Markham Vineyards and Reynolds wherein Markham Vineyards wished to pursue purchasing water from O’Gorman. (Reynolds Decl. ¶ 39.)

The WRA stated that Tubbs shall have "the perpetual right to connect to the said pipeline of [the City] for which this grant of right-of-way is granted, and any place on said right-of-way convenient to [Tubbs] and use and take such amount of water therefrom as [Tubbs] may require for use upon the lands then owned by [Tubbs]."

Between 1939 and 2011, according to the City Director of Public Works for the City of Calistoga in a letter written to O'Gorman on February 14, 2006 (Ex. 8, Vol. 7, pp. 1997-1998) the behavior of the parties was acknowledged by the City to still be governed by the terms of the WRA: To wit the City Director of Public Works stated that he has consulted with the City Attorney: "To begin, I agree that it is undisputed that the agreement and indenture (the "Agreements") between Mr. Tubbs and the City dated November 3, 1939 are valid and binding . . . It is our understanding that the Agreements were intended to run with the land."

The WRA and the Water Board's appropriative permit and subsequent license No. 9615 imposed a geographical limitation on the City's ability to take and sell water by limiting those activities to its city limits. The WRA at the same time gave Tubbs an exclusive

deeded right to connect to the City's water main any where it crossed his then-owned land consisting of 375 acres at that point in time and use that water exclusively as only he saw fit.

By misleading O'Gorman into believing that the WRA ran with the land in 2006 was valid and binding, the City went forward unchallenged and invaded the WRA right given to Tubbs and acquired by O'Gorman via her ownership of the Home Place.

Contrary to the Court's decision, all of the contracts the City made with wineries to sell water to said wineries, which the City was prohibited from doing under the WRA, are losses suffered by O'Gorman, because O'Gorman could have provided those services, and the City of Calistoga was not entitled to take that water for said wineries, nor for anyone outside the city limits.

V. Plaintiff Was Entitled To Prevail On Her Third Cause Of Action For Declaratory And Injunctive Relief

In O'Gorman's Second Amended Complaint (Vol. 4, pp. 874-895) she alleged in a third cause of action that she is entitled to declaratory relief, a declaration that O'Gorman and her alone has the sole right to sell or convey water from the headwaters of the Napa

River (APN 017-060-010), then known as Poulson Creek and now known as Kimball Creek, including certain springs of water that feed Kimball Creek during the summer months, and that the City has no such rights except through purchase or lease from O'Gorman or imminent domain with payment of just compensation.

Thus, even on the remote chance that the Court rules that O'Gorman has not presently shown damages, she would be entitled to declaratory and injunctive relief as stated in that third cause of action in the Second Amended Complaint.

CONCLUSION

Based upon foregoing points, authorities and argument, the record on appeal, and any reply brief filed by the O'Gorman in this matter, the Court's decision granting the City summary judgment must be reversed.

Dated: November 30, 2017 ____/S/ BRIAN C. LEIGHTON______

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of California Rules of Court, I hereby certify that the foregoing brief is produced in a proportional font (Times New Roman) of not less than 13 point type, utilizes double line spacing, except in footnotes, headings and extended quotations which are single spaced, and is 11,417 words.

Dated: November 30, 2017

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PROOF OF SERVICE

I declare that:

I am employed in the County of Fresno, California.

I am over the age of eighteen years and not a party to the within action; my business address is 755 N. Peach Avenue, Suite G-10, Clovis, California 93611-7264.

On November 30, 2017, I caused a copy of the attached **APPELLANT'S OPENING BRIEF** to be served by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on this same date, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system for the United States Postal Service located at 755 N. Peach Avenue, Clovis, California 93611, addressed as follows:

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I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 30th day of November, 2017, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

/S/ Kimberly R. Noble
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