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1989, Del Sur Ranch, LLC, Healy Enterprises, Inc., John and Adrienne Reca, Sahara Nursery, Sal  
13 and Connie L. Cardile, Gene T. Bahlman, collectively known as the Antelope Valley Ground  
14 Water Agreement Association ("AGWA")

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 FOR THE COUNTY OF SANTA CLARA

17 ANTELOPE VALLEY )  
GROUNDWATER CASES )  
18 Included Actions: )  
19 Los Angeles County Waterworks District No. )  
20 40 v. Diamond Farming Co. Superior Court of )  
California County of Los Angeles, Case No. BC )  
21 325 201 Los Angeles County Waterworks )  
22 District No. 40 v. Diamond Farming Co. )  
Superior Court of California, County of Kern, )  
23 Case No. S-1500-CV-254-348Wm. Bolthouse )  
24 Farms, Inc. v. City of Lancaster Diamond )  
Farming Co. v. City of Lancaster Diamond )  
25 Farming Co. v. Palmdale Water Dist. Superior )  
Court of California, County of Riverside, )  
26 consolidated actions, Case No. RIC 353 840, )  
27 RIC 344 436, RIC 344 668 )

Judicial Council Coordination Proceeding  
No. 4408

Santa Clara Case No. 1-05-CV-049053  
Assigned to The Honorable Jack Komar

OPPOSITION TO WATER PURVEYORS'  
BRIEF RE JURY TRIAL

Date: April 24, 2009  
Time: 9:00 AM  
Department: LA Superior Court, Dept. 1

1 The Antelope Valley Groundwater Agreement Association (“AGWA”) hereby submits this  
2 Opposition to the Water Purveyors’ Brief re Jury Trial (“Brief”), in preparation for the April 24,  
3 2009 hearing.

4 The Purveyors have attempted by all means possible to ensure that the landowner parties to  
5 this litigation are denied their constitutionally guaranteed right to a determination of the Phase 3 trial  
6 issues by a jury. For the reasons described below, AGWA opposes the Purveyors’ attempts and  
7 believes that the Phase 3 trial should be a jury trial.

8 **I. THE RIGHT TO A JURY TRIAL EXISTS FOR THE ESTABLISHMENT OF A**  
9 **PRESCRIPTIVE PROPERTY RIGHT**

10 The right to a jury trial on the claims of prescription is a fundamental constitutional right  
11 under the California State Constitution. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124-  
12 25; *Frahm v. Briggs* (1970) 12 Cal.App.3d 441, 445; see also, 7 Witkin, Cal. Procedure (4th ed.  
13 1997) Trial, § 96, p. 115.) Each party to such an action – including the defendant – has the right to  
14 insist upon a jury trial on the claimant's attempted establishment of such a right. (See *Frahm*, 12  
15 Cal.App.3d at 445-46 (lower court erred in denying defendants the right to have a jury determine  
16 whether plaintiffs had obtained prescriptive rights); Cal Judges Benchbook: Civil Proceedings  
17 Before Trial, § 2.70.)

18  
19 The Purveyors have attempted to distinguish the precedent cited above by dismissing any  
20 analogy between prescriptive groundwater rights and a prescriptive easement. However, it is well  
21 established that this right is considered a real property right just like a right to land. (Arthur L.  
22 Littleworth and Eric L. Garner, *California Water II*, (2d ed. 2007), p. 32 (“Water rights, no matter  
23 how acquired, are generally considered to be real property”); see also *Schimmel v. Martin* (1923)  
24 190 Cal. 429, 432; *California v. Riverside County Superior Court* (2000) 78 Cal.App.4th 1019,  
25 1025; see also *Arizona v. California* (1983) 460 U.S. 605, 620.)

26  
27 Under the California Revenue and Tax Code, “real property” includes “[t]he possession of,  
28

1 claim to, ownership of, or right to the possession of land.” (Cal. Rev. & Tax Code § 104(a).)  
2 Pursuant to this definition, the County of Los Angeles taxes water rights as real property. (See *Faix,*  
3 *Ltd. v. County of Los Angeles* (1976) 54 Cal.App.3d 992, 998-99 (where plaintiff's complaint alleged  
4 that his interest in taxed water rights was a nontaxable interest because it was not real property, court  
5 held water rights are properly taxed as real property in Los Angeles County); see also *Lockheed*  
6 *Aircraft Corp. v. Los Angeles County* (1962) 207 Cal.App.2d 119, 125-26 (discussing taxation of  
7 water rights as real property).)

8  
9 Within the rubric of real property rights, water rights and easements across land are virtually  
10 identical:

11 The common law offers many examples of rights very similar in  
12 nature to water ... The fact that the water right is (1) a right of use (2)  
13 in a resource that the right holder does not own, invites a natural and  
14 instructive comparison with easements--the most common and familiar  
of nonpossessory use rights...

15 (David B. Anderson, *Water Rights as Property in Tulare v. United States*, 38 McGeorge L. Rev 461,  
16 497.) A water right is considered an usufructuary right, entitling the holder to the right to use water,  
17 as opposed to the right to a particular corpus of water. Like a water right, an easement represents a  
18 limited privilege to use the land of another for the benefit of the easement holder's land, but does not  
19 create an interest in the land itself. (*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990)  
20 51 Cal.3d 845, 865; 6 Miller & Starr, *Cal Real Estate* (3d Ed.), Easements, § 15:5; 4 Powell on Real  
21 Property (1999) Easements and Licenses, § 34.02[2][d].)

22  
23 Any attempt to deny the right to a jury trial based upon a distinction between water rights and  
24 easements across land must therefore fail. Water rights and easements across land are, in fact,  
25 virtually identical, rendering *Arciero Ranches v. Meza, supra*, directly on point in guaranteeing a  
26 right to a jury trial in this case.  
27  
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1 **II. PHASE 3 INVOLVES ESSENTIAL ELEMENTS OF THE PURVEYORS' CLAIMS**  
2 **OF PRESCRIPTION**

3 The issues of historical safe yield and overdraft are relevant only in the context of the  
4 Purveyors' alleged prescriptive groundwater rights. The Purveyors emphasize the types of relief that  
5 the parties have requested in this case – equitable relief such as declaratory relief and requests for  
6 injunction – in order to shift the focus from their own claims as to prescriptive rights. But all of  
7 these other claims have been raised derivatively in response to the claim of prescription by the  
8 Purveyors. The allegation of prescription by the Purveyors forms the foundation of this case without  
9 which the case would likely not even exist.

10 If the purpose of Phase 3 is to establish the factual basis for the imposition of a physical  
11 solution, then the need for this phase of trial disappears altogether since every party has alleged the  
12 need for a physical solution. This is the one issue that does not need to be tried since all parties  
13 agree that a physical solution for the Antelope Valley is necessary whether there has been overdraft  
14 or not.

15 The existence of overdraft for a period of five years constitutes the adversity or hostility  
16 element of a claim of prescriptive groundwater rights. (*City of Los Angeles v. City of San Fernando*  
17 (1975) 14 Cal.3d 199, 278; Arthur L. Littleworth and Eric L. Garner, *California Water II*, (2d ed.  
18 2007), pp. 77-78.) The Purveyors, if they are to establish prescriptive rights, must, among other  
19 things, prove that the Basin was in overdraft for a five year period. This requires the proof of the  
20 Basin's safe yield and that pumping exceeded safe yield during that time period. "Safe yield" and  
21 "overdraft" are technical legal terms that have little relevance outside the context of a determination  
22 of prescriptive groundwater rights.

23 The issue of the Basin's safe yield, to be determined in Phase 3, is only relevant to the  
24 Purveyors' claims of prescription. The safe yield of a groundwater basin is dynamic. It fluctuates  
25 depending on the cultural conditions present at the time the safe yield is evaluated. The Basin's safe  
26 yield during the five year period for which historic overdraft is claimed may not be the same as the  
27 Basin's safe yield at present, or the same as the safe yield of the Basin in the future. This is the  
28

1 result of the changing cultural conditions within the Basin. It is disingenuous for the Purveyors to  
2 claim that the Phase 3’s determination of safe yield and overdraft – other than for the determination  
3 of baseline rights – have to do with a physical solution going forward in this case. These  
4 determinations are necessary for the Purveyors’ attempts to prove up their alleged prescriptive rights  
5 – and, as described herein, the private landowners are constitutionally guaranteed a trial by jury as to  
6 the existence of the alleged rights.

7 The characterization of Phase 3 as part of landowner claims of inverse condemnation is  
8 similarly disingenuous. Purveyors correctly state that before the private parties can successfully  
9 assert inverse condemnation, they must establish that their “property” was taken. They then  
10 characterize the central legal question at issue in Phase 3 – the existence of prescriptive rights – as an  
11 element of making out a prima facie case for inverse condemnation. The Purveyors’  
12 characterization distorts the purpose of a phased trial, and attempts to transform an action at law, to  
13 which the right to a jury trial is guaranteed, into a judicial question of whether the landowners have  
14 met their burden of proof on a sub-element<sup>1</sup> of an inverse condemnation claim.

15 The Purveyors’ references to inverse condemnation claims at issue in this proceeding as the  
16 time at which landowners may have their jury trial are both illusory and irrelevant to Phase 3. The  
17 Phase 3 trial will determine whether the Purveyors have established prescriptive rights in the Basin,  
18 not whether the landowners have met the burden of proof on an element of an inverse condemnation  
19 claim. The fact that the Phase 3 trial may concern an element of an inverse condemnation claim  
20 does not change the fact that the proving up of the prescriptive rights existence is an action at law, as  
21 to which the right to a jury trial exists. (*Arciero Ranches, supra.*) The Purveyors’ seeming  
22 stipulation that landowners may have a right to a jury trial as to one aspect of this case is illusory –  
23 there will be no valuation phase in the case that prescriptive rights are established.

24  
25 <sup>1</sup> To recover compensation in an inverse condemnation case, the plaintiff must allege and prove the  
26 following: (1) ownership (*Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711; (2) that the  
27 defendant planned, approved, constructed, or operated a public project (*Stoney Creek Orchards v.*  
28 *State* (1970) 12 Cal.App.3d 903); (3) that his or her real property was taken or damaged (*People ex*  
*rel Dep't of Pub. Works v. Romano* (1971) 18 Cal.App.3d 63, 72); and (4) that the defendant's  
activity or failure to act as planned was the proximate (or substantial) cause of the physical taking or  
damaging (*Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77).

1 **III. THERE HAS BEEN NO WAIVER OF THE RIGHT TO REQUEST A JURY**

2 The Purveyors, along with the City of Los Angeles, have proffered many justifications that  
3 they believe would allow the Court to avoid a jury trial in Phase 3. The issues raised are red  
4 herrings. There is no issue as to waiver in this case, as parties are continually being named and  
5 served in this case, and based on the responses to the class notices, many parties have yet to be  
6 named and served. These parties cannot be deemed to have waived their rights to a jury trial based  
7 on actions taken by other parties consenting to jurisdictional phases of trial having proceeded  
8 without a jury.  
9

10 AGWA itself has not waived this right. AGWA reasonably relied upon the Court's  
11 representation at the February 14, 2007 hearing that the parties would be able to indicate their option  
12 to request a jury at the time the matter is set for trial. This could not have been a reference to the  
13 procedural trials associated with Phases 1 and 2 since the February hearing took place four months  
14 *after* the conclusion of the Phase 1 trial. AGWA reasonably believed this statement referred to the  
15 setting of the substantive trial on the elements of prescription. Since the Phase 3 trial date has not  
16 yet been set, there has been no waiver.  
17

18 If Phases 1 and 2 are in fact to be construed as substantive phases that can serve as a basis for  
19 a waiver of rights, then significant due process issues exist for having proceeded with these phases  
20 prior to this case being at issue.  
21

22 **IV. THE PURVEYORS HAVE PRESENTED NO SUBSTANTIVE REASON THAT A**  
23 **JURY TRIAL SHOULD NOT BE GRANTED**

24 The Purveyors have presented no credible argument why the landowner parties should not be  
25 entitled to exercise their constitutionally guaranteed right to a jury trial in this case. As AGWA has  
26 reiterated throughout this case, the issues to be determined in this case are fundamentally of local  
27 concern, adjudicating the rights of the local public water purveyors and, most importantly, of local  
28

1 landowners. As discussed in the context of the location of the Phase 3 Trial, the community's  
2 confidence in the equity and validity of the court's proceedings in this phase must be preserved, and  
3 the determination of the factual issues by a jury will aid in preserving that confidence.

4  
5 The Purveyors cite to the appellate court's decisions in past California groundwater  
6 adjudications, stating that a jury trial did not take place in any of those trials. Whether that is the  
7 case is not clear, but even so, the Purveyors have offered no evidence that any party to those  
8 adjudications had ever sought to exercise its right to a trial by jury, as the landowner parties now  
9 seek.

10 The Purveyors attempt to reframe this case in a manner that would eliminate the right to a  
11 jury trial, and the Court must take care in making its determination. "The jury as a fact-finding body  
12 occupies so firm and important a place in our system of jurisprudence that any interference with its  
13 function in this respect must be examined with the utmost care." (*Dorsey*, 38 Cal.2d at p. 356;  
14 *Beacon Theaters, Inc. v. Westover* (1959) 359 U.S. 500, 501.) While AGWA believes the case to be  
15 clear, as the California Supreme Court has said:

17 In case of doubt...the issue should be resolved in favor of preserving a  
18 litigant's right to trial by jury.

19 (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 411.) AGWA asks that the court order that a  
20 Phase 3 proceed as a trial by jury.

21 Dated: January 26, 2008

**BROWNSTEIN HYATT FARBER  
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24 By: 

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA,  
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On January 26, 2009, I served the foregoing document described as:

**OPPOSITION TO WATER PURVEYOR BRIEF  
RE JURY TRIAL**

on the interested parties in this action.

By posting it on the website at 2:00 p.m./a.m. on January 26, 2009.  
This posting was reported as complete and without error.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Santa Barbara, California, on January 26, 2009.

*Maria Glachko-Blair*

\_\_\_\_\_  
**TYPE OR PRINT NAME**



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**SIGNATURE**