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1. Introduction

If the suppliers were not asserting common law prescriptive rights to the Basin’s groundwater, this case might well raise purely equitable issues. The prescription claim, however, is based on common law legal claims which mandates a trial by jury. The public water suppliers assert prescriptive rights as their first claim for affirmative relief in an attempt to subordinate or extinguish the overlying landowner's interests. That claim and its attendant elements of notice and adversity raise factual issues for which a right to jury existed at common law in 1850. As such, the Willis class has a constitutional right to have a jury determine whether or not those critical elements have indeed been met. Cal. Const., Article 1 section 16.

2. Elements of Prescription Raise Fact Issues for the Jury

In order to prevail on the claim of prescription, the public water suppliers bear the burden of proving the elements of notice and adversity by clear and convincing evidence. These elements raise questions of fact which must be tried to a jury. *See California Code of Civil Procedure §592.* In particular, whether sufficient notice was given to the class is a factual question for the jury to decide.

The court should try all the elements of prescription in one jury trial. Safe yield and overdraft will by necessity be part of this phase of trial as they specifically relate to the adversity element of the claim. By trying the action for prescription in one phase the court preserves the class’s right to jury trial, facilitates the discovery process for counsel, minimizes delay, and helps counsel focus on the exact nature of the claim to be tried. Separating safe yield and overdraft from the cause of action will delay the case, increase counsel’s discovery load and create an ambiguity as to relevant issues that need to be determined. The incremental benefit of adding notice to a safe yield and overdraft trial far outweighs the negatives from further bifurcation.

3. The Claim of Prescription Warrants a Right to Trial by Jury

The public water suppliers argue that the clear case law confirming a party’s right to a

1 Jury trial on prescription claims is not governing here because this is a water rights case based on
2 concepts of reasonable and beneficial use. That argument misses the mark.

3 First, it is important to bear in mind that water rights, although usufructory, are
4 "property" rights. (State of California v. Riverside County Superior Court (2000) 78 Cal.App.4th
5 1019; Wright v. Best (1942) 19C2d 368). As the United States stated in its Case Management
6 Conference Statement dated January 2, 2009: "It is well settled in California that "[w]ater rights
7 are a species of real property capable of acquisition by adverse user." Locke v. Yorba Irrigation
8 Co., 217 P2d 425, 429 (Cal.1950). See also Cal.Civ Code section 1007; City of Barstow v.
9 Mojave Water Agency, 5 P.3d 853, 863 (Cal. 2000). Indeed, even the public water suppliers
10 concede that these are property rights, claiming that "these rights were acquired by adverse
11 possession...." (Water Purveyor Brief Re Trial Phasing and Jury Trial dated January 2, 2009,
12 hereinafter "OB," Page 3, line 25); and they admit that if they fail to prove prescription
13 "compensation is constitutionally required to be fixed by a jury..." (OB, page 8, lines 22-24)

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15 Because water rights are property rights, the factual elements of prescription must be met
16 before the public water suppliers gain a prescriptive easement, regardless of the nature of the
17 property right, i.e usufructuary or otherwise. The United States quoted the law: ("[W]here the
18 taking [of water] is wrongful, it may ripen into a prescriptive right.") "The elements that create a
19 claim of prescriptive water right, like a claim for prescriptive easement, include use that is (1)
20 actual, (2) open and notorious, (3) hostile and adverse to the original owner, (4) continuous and
21 uninterrupted, (5) under a claim of right, (6) for the statutory period of five years." (US, CMC
22 statement of 1/2/09, page 5 line 26 to page 6 line 4). Because these property rights may be
23 subject to loss to an adverse user, the right to a jury trial cannot and should not have any less
24 weight in the context of water rights cases than any other type of prescriptive use cases. As to the
25 doctrine of reasonable and beneficial use, it only adds another prerequisite before the public
26 water suppliers can benefit from their alleged prescriptive use. Adding this requirement does not
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1 deprive the landowners of their right to trial by jury. Similarly, the right to a jury for valuation
2 purposes in an inverse condemnation case should not work against the landowners. It is a
3 constitutional and statutory right that cannot be used to defeat their right to jury trial to defend
4 claims of prescription. Such a result would be punitive to the landowners.

5 The fact that this case deals with rights that impact water as opposed to rights that impact
6 land does not obviate the legal elements of the claim of prescription. The elements of an
7 easement by prescription for water rights are the same as the elements of an easement by
8 prescription for other property rights. The legal nature of the claim does not change. Water
9 rights are still property rights. Indeed if they were not then the public water suppliers would
10 have no claim for prescription as there is no requisite property to prescribe against. The law is
11 clear and undisputed; every owner of land has the right to take subsurface water that flows
12 beneath the land or that percolates to the land for use on the land. *Hillside v. LA. The right to*
13 *take water is an interest in real property.* Wright v. Best (1942) 19 C2d 368. There is no reason
14 to treat water rights any differently than other property rights under the law.

15 **4. The Gist of the Action is Legal**

16 The public water suppliers contend that this case is in the nature of a "special proceeding"
17 to quiet title to property; which is by nature an equitable remedy, thereby making the
18 constitutional right to trial by jury inapplicable. (OB, page 3, lines 13-22; and page 4 lines 8-12).
19 Labeling the case as a special proceeding or looking solely to the type of relief sought elevates
20 form over substance.

21 The Court has expressly cautioned that the right to a trial by jury "cannot be avoided by
22 merely calling an action a special proceeding or equitable in nature." (*People v. One 1941*
23 *Chevrolet Coupe, supra*, 37 Cal.2d at p.299, 231 P.2d 832.) The constitutional right to a jury
24 trial "does not permit the Legislature to confer on the courts the power of trying according to the
25 course of chancery any question which has always been triable according to the course of the
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1 common law by a jury.” (*Ibid.*) In other words, the Legislature cannot, “by providing new
2 remedies ... in form equitable,” convert a legal right “into an equitable one so as to infringe upon
3 the right of trial by jury.” (*Ibid.*, fn.omitted.) Thus, “In determining whether the action was one
4 triable by a jury at common law, the court is not bound by the form of the action but rather by the
5 nature of the rights involved and the facts of the particular case – i.e., the gist of the action. A
6 jury trial must be granted where the gist of the action is legal, where the action is in reality
7 cognizable at law.” (*People v. One 1941 Chevrolet Coupe, supra*, 37 Cal.2d at p. 299, 231 P.2d
8 832.) “On the other hand, if the action is essentially one in equity and the relief sought ‘depends
9 upon the application of equitable doctrines,’ the parties are not entitled to a jury trial.” (*C & K*
10 *Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at p. 9, 151 Cal.Rptr. 323, 587
11 P.2d 1136 (*C & K Engineering*), quoting *Hartman v. Burford* (1996) 242 Cal.App.2d 268, 270,
12 51 Cal.Rptr. 309 [enforcement of a promise to make a will].) While the legal or equitable nature
13 of a cause of action is ordinarily determined by the mode of relief afforded, “ the prayer for relief
14 in a particular case is not conclusive...” (*C & K Engineering, supra*, 23 Cal.3d at p.9, 151
15 Cal.Prtr. 323, 587 P.2d 1136.)
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18 In determining whether an action was triable by a jury at common law, the court is not
19 bound by the form of the action and will inquire into the “gist of the action.” The “gist of the
20 action” means the nature of the rights involved as determined from the pleadings as a whole and
21 the facts of the case. If the gist of the action is legal, a right to a trial by jury exists. Nether the
22 caption of the pleading nor the prayer for relief can conclusively determine whether an action is
23 legal or equitable. The constitutional guaranty to the right to a jury trial is not limited strictly to
24 cases in which such a right would have existed at common law in 1850. It extends to cases of a
25 like nature that did not exist then. The legislature cannot convert a legal right into an equitable
26 one if it will infringe on the right of trial by jury. A jury trial is a matter of right for issues of
27 fact in actions for the recovery of specific real or personal property, with or without damages.
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1 It is established that whether a party has obtained a prescriptive easement is a legal question
2 as to which there is a right to a jury. See *Arciero Ranches v. Meza* (1993) 17 CA4th 114, 125, 21
3 CR2d 127 (when quiet title actions seeks declaration that party is owner of prescriptive
4 easement, party has right to have jury determine whether prescriptive easement exists) Cf.
5 *Baugh v. Garl* (2006) 137 CA4th 737, 40 CR3d 539 (in water rights action, it was undisputed
6 that plaintiffs had right to easement; thus, action at law was not necessary prerequisite for
7 injunctive relief.) Because the gist of this action involves the merits of the suppliers'
8 prescription claims, Willis and the Class have a right to a jury trial.

10 **5. That Inverse Condemnation Raises Jury Trial Issues Is Irrelevant**

11 The fact that the Willis Class' inverse condemnation claim, which has been stayed, raises jury
12 trial issues is irrelevant as to the present issue – whether the parties are entitled to a jury trial on
13 the suppliers' prescription claims. The class does not dispute the following points expressed by
14 the public water suppliers in their opening brief: (1) if public use attaches to the taking of water
15 then strong policy favors its continuance since the **landowners have damage remedies** (OB
16 page 8 lines 1-2); (2) Code of Civil Procedure section 534 provides a mechanism for damages to
17 the landowners for the public taking of groundwater (OB, page 8, lines 8-12); (3) prescription
18 and condemnation are directly related to one another and there are damage remedies for
19 condemnation (OB, page 8, lines 13-14); (4) a claim for prescription is a corollary to the claim of
20 inverse condemnation (OB, page 8, lines 16-17); and (5) compensation is constitutionally
21 required to be fixed by a jury (OB page 8, lines 22-24). There is no question that the Willis class
22 will ask for a jury to value damages in the condemnation phase of the case.

24 But that is entirely irrelevant as to whether the parties have the right to a trial by jury with
25 respect to the elements of the claim of prescription. These points do nothing to minimize that
26 fundamental constitutional right; rather, they in fact reinforce it. The suppliers' argument
27 relating to the condemnation claim is simply a "red herring."
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1 **6. Even the public water suppliers suggest that a right to a jury may exist in**
2 **prescription cases**

3 On page 7, lines 12-15, of the opening brief, the public water suppliers concede that if
4 prescription is raised as an affirmative defense then there is a right to a jury trial. They state:
5 "The public water suppliers claims of prescription can be viewed both as affirmative elements to
6 their request for declaratory relief, or as an affirmative defense to the overlying owners' claims of
7 infringement of their water rights. *It is only in the latter instance that the prescription claim*
8 *could arguably require a jury.*" (emphasis added) This distinction of whether prescription is
9 pled affirmatively or defensively carries no legal effect however on the right to jury trial. If the
10 issue is recognized as a legal issue at common law, the right to jury trial exists for either party,
11 whether they are assert it as a claim or in defense of a claim. The true significance of the
12 purveyor's comment is their admission that the right to a jury does indeed exist.

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14 Interestingly, one Public water supplier even demanded a right to trial by jury in their
15 complaint. See Phelan Pinon Hills Community Services District Cross-Complaint filed on
16 December 30, 2008. The only claim that may trigger the right in their complaint is the claim of
17 prescription. This public water supplier pled it and sought to preserve it.

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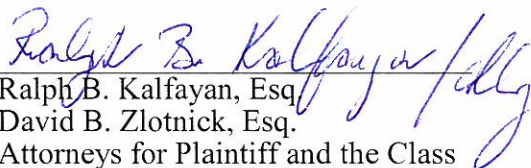
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7. Conclusion

The public water suppliers suggest in their opening brief that the physical solution should be tried by the court first without a jury and without a determination of the claim for prescription. Such a sequence would put the proverbial cart before the horse. Without determining the claim of prescription first, the court would not know what amount of groundwater to allocate in a physical solution. All aspects of the claim of prescription should be tried before a jury as splitting the cause of action would cause delay, confusion and inefficiency.

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