

1 Michael D. McLachlan (State Bar No. 181705)
2 **LAW OFFICES OF MICHAEL D. McLACHLAN, APC**
3 523 West Sixth Street, Suite 215
4 Los Angeles, California 90014
5 Telephone: (213) 630-2884
6 Facsimile: (213) 630-2886
7 mike@mclachlanlaw.com

8 Daniel M. O'Leary (State Bar No. 175128)
9 **LAW OFFICE OF DANIEL M. O'LEARY**
10 523 West Sixth Street, Suite 215
11 Los Angeles, California 90014
12 Telephone: (213) 630-2880
13 Facsimile: (213) 630-2886
14 dan@danolearylaw.com

15 Attorneys for Plaintiff

16 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
17 **COUNTY OF LOS ANGELES**

18 Coordination Proceeding
19 Special Title (Rule 1550(b))

Judicial Council Coordination
Proceeding No. 4408

20 ANTELOPE VALLEY GROUNDWATER
21 CASES

(Santa Clara Case No. 1-05-CV-049053,
Honorable Jack Komar)

22 RICHARD A. WOOD, an individual, on
23 behalf of himself and all others similarly
24 situated,

Case No.: BC 391869

25 Plaintiff,

**RICHARD WOOD'S AND THE
SMALL PUMPERS CLASS'
SUPPLEMENTAL BRIEF ON THE
RIGHT TO JURY TRIAL; JOINDER
IN BRIEFS OF OTHER OVERLYING
LANDOWNERS**

26 v.

27 LOS ANGELES COUNTY
28 WATERWORKS DISTRICT NO. 40; et al.

**Date: April 24, 2009
Time: 9:00 a.m.
Dept.: 1**

Defendants.

Plainiff Richard Wood ("the Small Pumpers Class") submits this supplemental
brief on the right to a jury trial, and joins in the briefs of Diamond Farming, Bolthouse
Properties, Rebecca Willis, AGWA, and U.S. Borax.

1 **I. THE SMALL PUMPERS CLASS HAS A JURY RIGHT ON THE ISSUES**
2 **OF SAFE YIELD AND OVERDRAFT.**

3 **A. Background**

4 All parties that filed briefs on the question of a right to a jury trial agreed that
5 California law protects the right to a jury if the ‘gist’ of the action is legal; conversely, no
6 right to a jury exists if the ‘gist’ of the action is equitable. The public water purveyors
7 argued strenuously against a jury right. The thesis of their argument is summarized in
8 two sentences of their brief:

9 The gist of this proceeding invokes the court’s equitable powers of injunction
10 and declaratory relief to fashion a physical solution of remedy to control
11 groundwater pumping in the basin. For this reason, courts have historically
12 resolved groundwater adjudication through a bench trial.

13 (Water Purveyors Brief, p. 4:13-15.)¹

14 With respect to the Small Pumpers class, the purveyors’ gist argument is wrong:
15 the gist of this action is demonstrably legal. Thus, the Small Pumpers class has a right to
16 a jury trial on the Phase III issues of overdraft and safe yield.

17 **B. The Matters Before the Court are Legal In Nature**

18 The Small Pumpers class, by definition, consists of overlying owners of land in
19 the area of adjudication who pump small amounts of groundwater. They have **legal**
20 water rights that are not subject to diminution in an equitable proceeding. In other words,
21 from their perspective, the gist of this action is legal. Therefore, they have a right to a
22 jury trial.

23 In the only recent analogous case, the Supreme Court stated the issue this way:
24 We granted review to determine whether a trial court may definitively resolve
25 water right priorities in an overdrafted basin with a “physical solution” that

26
27 ¹ The purveyors concede that the landowners may have a right to a jury on the single issue of
28 damages. (Water Purveyors’ Brief, p. 7:15-16.)

1 relies on the equitable apportionment doctrine but does not consider the
2 affected owners' legal water rights in the basin. We conclude it may not.
3 (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1233 (footnote
4 omitted.) While *City of Barstow* admittedly did not involve the question of a right to jury
5 trial, it did involve the rights of overlying owners in an overdrawn groundwater basin.
6 Moreover, the Court focused on the law/equity distinction by noting that the “physical
7 solution” under consideration was the ‘equitable distribution of water use in relation to
8 the many who stipulated to it.’ (*Id.*, at 1233, fn. 1.)

9 In *City of Barstow*, the Court reviewed a stipulated physical solution to
10 groundwater allocation in an overdrawn basin. One holdout to the stipulation had its
11 right to pump groundwater diminished in a trial and then appealed, arguing that the
12 physical solution was effectively an equitable re-distribution of water rights in conflict
13 with its legal right to pump. The Court summarized the trial court’s ruling in language
14 that is not only echoed by the purveyors’ brief but anticipates issues that will arise in the
15 Phase III trial:

16 Several factors influenced the trial court's decision to enforce the physical
17 solution. For example, the court noted the overdraft had existed for several
18 years, the parties disputed the asserted water rights priorities, and a mechanical
19 allocation of legal water rights could lead to an inequitable apportionment and
20 impose undue hardship on many parties. For these reasons and more, the trial
21 court enjoined all parties from asserting special priorities or preferences.
22 (*Id.*, at 1237.)

23 The Court reversed, holding that adjudicated groundwater rights allocations must
24 always start with the overlying owners’ legal water rights. In other words, for
25 landowners (like those in the Small Pumpers class), groundwater adjudications are at
26 least initially legal—as opposed to equitable—proceedings. In the Court’s words:

1 But [*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199] is not
2 precedent for wholly disregarding the priorities of existing water rights in favor of
3 equitable apportionment in this state, where water allocation has been based on an
4 initial consideration of owners' legal water rights. Case law simply does not
5 support applying an equitable apportionment to water use claims unless all
6 claimants have correlative rights; for example, when parties establish mutual
7 prescription.

8 (*Id.*, at 1247-48.)

9 As explained below, the Small Pumpers class members' status as pumping
10 overlying owners gives them prior, as opposed to correlative, rights to groundwater as
11 compared to the purveyors. They may have correlative rights among themselves, but the
12 issue of overdraft, as it relates to the Small Pumpers class, only has relevancy to the
13 purveyors' efforts to establish prescription. Stated another way, if the purveyors establish
14 prescription, this Court may then have to ability to fashion a purely equitable solution to
15 groundwater allocation. But until that happens, the gist of this proceeding remains legal.

16
17 **II. OVERDRAFT AND SAFE YIELD NECESSARILY RELATE TO THE**
18 **SMALL PUMPERS CLASS'S LEGAL WATER RIGHTS.**

19 In the absence of overdraft, the purveyors would not be able to limit the amount of
20 pumping by the Small Pumpers class. Indeed, “[p]roper overlying use . . . is paramount,
21 and the right of an appropriator, being limited to the amount of the surplus, must yield to
22 that of the overlying owner in the event of a shortage *unless the appropriator has gained*
23 *prescriptive rights through the taking of nonsurplus waters.*” (*Hi-Desert County Water*
24 *Dist. v. Blue Skies Country Club, Inc.*, *supra*, 23 Cal.App.4th 1723, 1730-1731 (emphasis
25 added).)

26 So the existence and amount of overdraft, i.e., the issues being considered for
27 Phase III, relate to the purveyors' attempt to defeat the superior right of the landowners to

1 pump groundwater for their reasonable beneficial use. Indeed, the issue of overdraft is
2 the adversity element in the claim for prescription. (*City of Los Angeles v. City of San*
3 *Fernando* (1975) 14 Cal.3d 199, 278.) The “issues” of safe yield and overdraft are not
4 causes of action or independent legal rights, but rather just an element of a claim that is
5 legal in nature.

6 To repeat a point made in the Small Pumpers class’s initial brief on this issue, the
7 Small Pumpers class members, as overlying landowners, have a right superior to all
8 others to pump groundwater for their reasonable beneficial use. (*City of Barstow*, 23
9 Cal.4th at 1240.) That right will always be superior to non-owners’ pumping rights,
10 unless non-owners can show they have obtained rights as appropriators, i.e., through
11 prescription. As the Court summarized,

12 Proper overlying use, however, is paramount and the rights of an appropriator,
13 being limited to the amount of the surplus, must yield to that of the overlying
14 owner in the event of a shortage, unless the appropriator has gained prescriptive
15 rights through the [adverse, open and hostile] taking of nonsurplus waters.
16 (*Id.*, at 1241.) “Nonsurplus waters” are those pumped in excess of a basin’s safe yield,
17 i.e., when the basin is in overdraft.

18 The gist of this superior right will always be essentially legal, as it derives from
19 the ownership of the overlying land.

20
21 DATED: January 26, 2009

LAW OFFICES OF MICHAEL D. McLACHLAN
LAW OFFICE OF DANIEL M. O’LEARY

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23
24 By: _____ //s//

25 Michael McLachlan
26 Attorneys for Plaintiff
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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 523 West Sixth Street, Suite 215, Los Angeles, CA, 90014. On the date set forth below, I served the within document(s) by posting the document(s) listed below to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter:
RICHARD WOODS AND THE SMALL PUMPERS CLASS' SUPPLEMENTAL BRIEF ON THE RIGHT TO JURY TRIAL; JOINDER IN BRIEF'S OF OTHER OVERLYING LANDOWNERS

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 26, 2009, at Los Angeles, California.

Carol Delgado