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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

**REPLY BRIEF IN SUPPORT OF
RICHARD WOOD'S MOTION IN
LIMINE NO. 1**

25 Plaintiff,

26 v.

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

Defendants.

1 **A. Introduction**

2 Boiled down, the relevant facts are as follows. Prior to agreeing to take this case,
3 at the request of the Court and Willis class counsel, Michael McLachlan brought to the
4 Court's attention the fundamental problem of the need for expert representation in the
5 case, and the fact that such expenses for the class are not recoverable costs absent a court
6 order appointing an expert. (May 14, 2008 letter to Judge Komar, Docket No. 1317.) At
7 the May 22, 2008 hearing, the Court recognized this problem, and deferred its resolution
8 to a future motion. Because of the inherent dilemma involved with class counsel
9 potentially being forced to commit malpractice by not retaining an expert on the one-
10 hand, or being forced to donate \$100,000 plus to the prosecution of the action, the Court
11 did appoint the necessary expert.

12 The public water suppliers have been the major proponent of the classes because it
13 allows them to obtain jurisdiction over the United States without the massive cost of
14 individual service of process. They have saved millions of dollars, but nevertheless have
15 consistently fought the appointment of the necessary expert. Why?

16 The small pumpers collectively use a substantial amount of water, perhaps as
17 much as 10,000 acre-feet per year, or more. The public water suppliers would like to
18 take as much of those water rights as they can without paying any compensation. In
19 short, the assertion of the prescription claims against the class is about forcing the small
20 pumpers to economically subsidize the expansion of the cities and their increasing
21 demand for water.

22 To that end, the Water Suppliers would be thrilled if the Court made a finding of
23 fact as to the class' water use based solely on the grossly under-inflated estimate of their
24 experts. Such a finding of fact would become binding in subsequent phases, and would
25 effectively kill the class' self-help rights.

26 While the Court has been hopeful that a settlement would eliminate these
27 problems, it is clear that the water suppliers have no intent upon settling the case as long
28 as they see the potential of taking a sizeable amount of free water from the class. The

1 settlement has been sitting essentially idle since last summer, and notwithstanding the
2 Court's prodding at the last hearing, the County has made no move toward approving the
3 settlement agreement. Class counsel has received no word of formal approval from any
4 public water supplier.

5
6 **B. The Water Suppliers' Argument About the Need to Violate the Court's**
7 **Order on the Scope of this Trial is Contradicted by Their Own Expert**

8 The crux of the water suppliers argument is that evidence of pumping from the
9 small pumper class is necessary to the phase 3 trial. They ignore the court's orders on
10 these issues, which were attached to the moving papers, as well as the transcripts of the
11 hearing at which these issues were addressed (March 8 and 22, 2010.) The utter
12 bankruptcy of this position is evident from the testimony of their own expert, Joseph
13 Scalaminini, who would be the person called upon to offer such testimony:

14 Q. At the next phase of trial in January,
15 assuming it occurs then, do you plan to offer
16 testimony on the gross water use of the rural
17 residential users? In other words, is that
18 necessary to get to the various opinions that you
19 need to offer at that trial?

20 A. *Left totally to my own devices, I'd*
21 *probably say the answer is no, it's not necessary.*
22 Given the amount of trivia I've read about and
23 listened to the last few weeks, I'd be surprised if
24 it escapes, but that's my best answer.

25 (Joseph Scalaminini, Volume 2, 330:14-24, Nov. 16, 2010 (Attached as Exhibit 2).)

26 Ironically, the water suppliers' argument is undercut by the very expert who would
27
28

1 be called upon to proffer the evidence in question.¹ Because the water suppliers own
2 expert deems the evidence in question to be unnecessary and trivial, it can be properly
3 excluded under Evidence Code sections 350 and 352. Mr. Scalaminini's testimony is
4 consistent with the Court's Orders, wherein the Court made it clear that "it expects to
5 hear evidence concerning total pumping and total recharge from all sources" (MIL
6 No. 1, Ex. 1, March 22, 2010 Order, 3:6-7.)

7 If the public water suppliers are allowed to present evidence of the small pumper
8 class' water use in absence of hearing evidence from the Court-appointed expert on this
9 issue, and the Court reaches findings of fact on this issue, the class members will have
10 been denied the necessary adequacy of representation, in violation of due process.

11
12 **C. The Due Process Arguments are Baseless**

13 The water suppliers next argue that forcing the small pumpers to trial without the
14 work of the Court-appointed expert, with a resulting finding of fact regarding the water
15 usage of the class, does not violate due process rights. Their first argument is that only
16 Richard Wood need adequately represent the class' interests, not the class counsel. This
17 is both legally incorrect, and stupendously absurd. The cases cited in the moving papers,
18 along with a litany of others, are clear about the necessity of adequate representation.
19 This requirement is so essential that it is even codified directly in Federal Rule of Civil
20 Procedure 23(g). As the Court is aware, California follows the federal standards and

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22 ¹ Additionally, the proffered testimony would also be subject to exclusion as
23 scientifically inadequate. There is no dispute that the water suppliers' experts conducted
24 no investigation of the actual water use of the small pumpers. Their analysis was entirely
25 extrapolated based on the water use of others including, ironically, the water suppliers
26 own customers, many of whom are living in multi-unit dwellings. (Joseph Scalaminini,
27 Volume 2, 323:3-12, 324:6-325:16, Nov. 16, 2010 (Attached as Exhibit 2).) The use of
28 the water consumption of City residents, including those in apartment buildings,
necessarily skews the estimate of small pumper water uses downward because it fails to
account for exterior water consumption. (*Id.* at 328:10-329:15.)

1 caselaw generally as to the procedural requirements for maintaining class actions.

2 In appointing the Court-appointed expert, the Court was cognizant of the fact that
3 class counsel cannot adequately protect the rights of the class members with regard to
4 their self-help defense to the pending prescriptive claims without a proper assessment of
5 the class' pumping. The Court elected to defer that work until after the phase 3 trial,
6 given the limitation placed on the scope of the trial. For the reasons noted above, and in
7 the related hearing transcripts, the Court should enforce its order on the scope of the next
8 phase of trial.

9 The water suppliers also argue that Plaintiff has had plenty of time to retain an
10 expert having had notice that these issues would be tried in phase 3. This argument is
11 directly contradicted by the Court's order regarding the scope of the trial. The class had
12 no notice, nor would it voluntarily participate in a phase 3 trial where its pumping rights
13 would be set based solely on the testimony of the water suppliers' experts. They further
14 argue that it is not clear that the cost of the expert "would not be reimburseable." This
15 issue is a settled matter of law in California, and has already been litigated extensively in
16 this case. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142,
17 1150-51 (*citing* C.C.P. § 1033.5(b)(1), and holding that expert witness fees may not be
18 awarded under Section 1021.5, unless expressly ordered by the court).)

19 20 **D. Conclusion**

21 Richard Wood cannot adequately represent the interest of the class at the Phases 3
22 trial if evidence of the class' water usage is presented. Without the testimony of the
23 Court-appointed expert, class counsel cannot properly rebut the testimony of the water
24 suppliers' experts. Furthermore, those experts contend that they do not need to present
25 evidence relative to the water usage of the class. Consequently, this court should issue an
26 order in limine precluding any evidence of the water use of the class or its individual
27 members.
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1 DATED: December 30, 2010

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

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By: _____ //s//
Michael D. McLachlan
Attorneys for Plaintiff

Exhibit 2

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF SANTA CLARA
3

4 -----
5 ANTELOPE VALLEY) Santa Clara Case No.
6 GROUNDWATER CASES,) 1-05-CV-049053
7) Volume II
8 -----

9
10
11 Continued Deposition of JOSEPH SCALMANINI,
12 taken at 301 North Lake Avenue, 10th Floor,
13 Pasadena, California, commencing at 9:29 a.m.,
14 Tuesday, November 16, 2010, before Janice
15 Schutzman, CSR No. 9509.
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25 PAGES 190 - 415

1 have been a big word.

2 Q. Yeah.

3 Do you know whether any fieldwork was done
4 by any experts involved in this litigation in terms
5 of actually going out and verifying the existence of 01:58PM
6 residents at many of these locations or water use?

7 A. No.

8 Q. That was a bad question. I'll try it
9 again.

10 Was there any fieldwork done on those two 01:59PM
11 topics, to your knowledge?

12 A. Not that I know about.

13 Q. Now, if we go down -- I think it's on
14 page D 20.

15 The next question is, how much water did 01:59PM
16 you determine the rural residential users are using?
17 And let's -- I guess let's start with the per capita
18 basis.

19 Actually, we can use -- on the bottom of
20 page D 20, I believe you'll see a reference in 2006 01:59PM
21 to approximately 1.2 acre feet per parcel.

22 Do you see that?

23 A. Yes.

24 Q. And that number there is the -- I don't
25 want to say "your," meaning you. I mean you the 01:59PM

1 collective expert team that was involved in putting
2 together that expert report. That's the estimate of
3 the usage of the rural residential user, that
4 1.2 acre feet per parcel number?

5 A. Yes.

02:00PM

6 Q. How is that number derived?

7 MR. KUHS: Mike, what page of the report
8 are you referring to?

9 MR. McLACHLAN: That number was on page
10 D 20.

02:00PM

11 MR. ZIMMER: It's in Appendix D.

12 THE WITNESS: In Appendix D 4, there's a
13 description of our interpretation of population
14 served, connections served, groundwater pumping,
15 surface water use, total water requirements, and
16 unitized versions of all that per capita and per
17 connection basis for a number of mutual water
18 companies for which data was available from the
19 state Department of Health Services, now state
20 Department of Public Health, also the USGS.

02:01PM

02:01PM

21 So in working down through all that, we,
22 depending on just how you use all this, because
23 there was one anomalous mutual water company that
24 tended to drive the numbers up, but concluded that
25 on a per-connection basis, that the range of

02:02PM

1 per-connection water use was between about 1.2 and
2 1.28. We used 1.2 acre feet per acre per year per
3 connection, connection being a house.

4 BY MR. McLACHLAN:

5 Q. And that number you just gave, was that 02:02PM
6 solely based upon the limited data you had on the
7 mutual companies, mutual water companies, or did it
8 include some of the data from the public water
9 suppliers?

10 A. Well, we compared it to the data from the 02:02PM
11 public water suppliers on a per-capita basis, which,
12 you know, varies between Lancaster and Palmdale, but
13 we used it on a per-connection basis. You know, we
14 did not compare it, that I recall anyway, to water
15 used by the public water purveyors and 02:03PM
16 per-connection basis.

17 Q. And the data on the -- remind me again,
18 where did you get the data relative to the mutual
19 water company water use? You got that from a public
20 source of some kind; is that right? 02:03PM

21 A. Yes.

22 Q. At any point in the expert analysis in this
23 litigation, have you ever requested that your
24 attorneys serve discovery on the mutual water
25 companies that are party to the litigation in order 02:03PM

1 thought that it was there. It never showed up. So
2 we did what we did, and that's kind of why.

3 Q. Do you know whether or not per capita water
4 use changes depending on whether it's a
5 single-family residence or a multi-family building? 02:06PM

6 A. The per capita use?

7 Q. Yeah, per capita.

8 A. Well, got to ask you a question back.
9 Inside or outside or both?

10 Q. Well, let's just make the hypothetical a 02:07PM
11 little more concrete, assume we're talking about a
12 large apartment building versus, you know, standard
13 single-family home of the type we see -- of the type
14 and size we see in the Antelope Valley.

15 Does per capita water usage change? 02:07PM

16 A. Well, to answer your question in the
17 context of water supply planning, watermaster
18 planning, the answer's yes.

19 It's fairly well recognized in the
20 literature, you know, from studies of various water 02:07PM

21 purveyors and cities and things of that type that
22 the inside water use on a per-capita basis is
23 somewhat inelastic. In other words, we use about
24 the same amount inside for all the things that you
25 do inside a house. So on a per-capita basis, that's 02:07PM

1 going to come out to be a number, typically
2 expressed in gallons per person per day as compared
3 to acre feet per person per year, you know, but you
4 can do the arithmetic to convert one to the another.

5 And the outside water use is more elastic 02:08PM
6 with everything from weather to location to
7 landscaping to density, and so if you amortize that
8 on a per-capita basis, it goes down with increasing
9 intensity of building occupancy.

10 Q. In other words, the single-family home 02:08PM
11 would tend to use more water on a per-capita basis
12 than would a multi-family dwelling --

13 A. If you do --

14 Q. -- on average?

15 A. Total inside and outside water use, yes. 02:08PM

16 Q. All right. So I want to just make sure I'm
17 clear on your general opinion on the importance of
18 rural residential water use, which I believe it
19 varies in your report year-to-year, but currently
20 it's somewhere in the 8,000, 9,000 acre foot range, 02:09PM
21 is that correct, total rural residential user water
22 use?

23 It's in figure D 5, maybe.

24 A. Give me a second.

25 Q. I think figure D 5 has the -- 02:10PM

1 A. I'm looking for numbers.

2 Q. Okay.

3 A. So on Appendix D 7, Table 4, there's an
4 estimate of rural residential groundwater use, which
5 is the same as total water use.

02:11PM

6 MR. KUHS: Which page are we on?

7 THE WITNESS: We're on table D 7,
8 Appendix D 7, Table 4. It ranges from an estimate
9 of around 500 acre feet back in the immediate post
10 World War II area to about 7,000 acre feet by 2009.

02:11PM

11 Rural residential, that's what you're asking me?

12 BY MR. McLACHLAN:

13 Q. Uh-huh.

14 At the next phase of trial in January,
15 assuming it occurs then, do you plan to offer
16 testimony on the gross water use of the rural
17 residential users? In other words, is that
18 necessary to get to the various opinions that you
19 need to offer at that trial?

02:11PM

20 A. Left totally to my own devices, I'd
21 probably say the answer is no, it's not necessary.
22 Given the amount of trivia I've read about and
23 listened to the last few weeks, I'd be surprised if
24 it escapes, but that's my best answer.

02:11PM

25 Q. Well, your last statement, was that in

02:12PM

1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and am not a party to the within action. My business address is 10490 Santa Monica Blvd., Los
4 Angeles, California 90025.

5 On December 30, 2010, I caused the foregoing document(s) described as **REPLY BREIF IN**
6 **SUPPORT OF RICHARD WOOD'S MOTION IN LIMINE NO. 1**
7 to be served on the parties in this action, as follows:

- 8 (X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa
9 Clara County Superior Court website: www.scefiling.org regarding the Antelope Valley
10 Groundwater matter.
11 () (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and
12 processing of documents for mailing. Under that practice, the above-referenced
13 document(s) were placed in sealed envelope(s) addressed to the parties as noted above,
14 with postage thereon fully prepaid and deposited such envelope(s) with the United States
15 Postal Service on the same date at Los Angeles, California, addressed to:
16 () (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other
17 overnight delivery service, for delivery on the next business day. Each copy was
18 enclosed in an envelope or package designed by the express service carrier; deposited in a
19 facility regularly maintained by the express service carrier or delivered to a courier or
20 driver authorized to receive documents on its behalf; with delivery fees paid or provided
21 for; addressed as shown on the accompanying service list.
22 () (BY FACSIMILE TRANSMISSION) I am readily familiar with the firm's practice of
23 facsimile transmission of documents. It is transmitted to the recipient on the same day in
24 the ordinary course of business.
25 (X) (STATE) I declare under penalty of perjury under the laws of the State of California that
26 the above is true and correct.
27 () (FEDERAL) I declare under penalty of perjury under the laws of the United States of
28 America that the foregoing is true and correct.

22 //s//
23 _____
24 Michael McLachlan