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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER
CASES

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

Plaintiff,

v.

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

Defendants.

Judicial Council Coordination
Proceeding No. 4408

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

Case No.: BC 391869

**RICHARD WOOD'S MOTION FOR
APPOINTMENT OF EXPERT;
DECLARATION OF MICHAEL D.
MCLACHLAN**

**[filed concurrently with Declarations of
Richard Wood and Timothy J.
Thompson]**

Date: March 5, 2009
Time: 9:00 a.m.
Dept.: 17

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on March 5, 2009, in Department 17 of the Santa
3 Clara Superior Court, located at 161 North First Street, San Jose, California 95113, a
4 hearing will be held on plaintiff Richard A. Wood's Motion for Appointment of an
5 Expert.

6 This Motion is based on the enclosed Memorandum of Points and Authorities, the
7 Declaration of Richard Wood, the Declaration of Timothy J. Thompson, the Declaration
8 of Michael McLachlan, the Court's file in this matter, and such other filings and evidence
9 as may be submitted on the hearing of this Motion.

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11 DATED: February 9, 2009

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

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14 By: _____ //s//

15 Michael D. McLachlan
16 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Richard A. Wood filed this action on his behalf and that of all other landowners
4 within the adjudication boundary who are similarly situated (the “Small Pumper Class” or
5 the “Class”). The Small Pumper Class is defined as landowners who have pumped under
6 25 acre-feet per year in any year since 1946. Class specifically excludes any party who
7 has pumped in excess of this threshold during any calendar year in the prescriptive
8 period, as well as those who are shareholders in mutual water companies.

9 The proper management of the class requires assistance from expert consultants in
10 developing and advancing competent expert testimony on issues such as the reasonable
11 and beneficial nature of the class members’ water use, the primary defense of the Class,
12 the “self-help” defense, as well as general consulting issues of direct impact to the Class,
13 including questions of overdraft and safe-yield in the adjudicated basin.

14 The Court has authority under Evidence Code section 730 to appoint an expert in
15 this instance, and should do so because the continued viability of this case depends upon
16 it. The cost of such an expert should be apportioned among the defendants to this action,
17 each of whom is a public water supplier asserting prescriptive rights against the Class.

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19 **II. ARGUMENT**

20 **A. THE SMALL PUMPERS CLASS MUST HAVE AN EXPERT**
21 **APPOINTED TO ASSIST COUNSEL IN REPRESENTING THE**
22 **CLASSMEMBERS’ INERESTS**

23 **1. Expert Testimony is Necessary**

24 There are a number of issues relevant to the Small Pumper Class that require
25 expert witness consultation and/or testimony. One of the primary issues is the so called
26 “self-help” defense, under which an overlying landowner may defeat a claim of
27 prescription by pumping water on his property during the prescriptive period. (*City of*

1 *Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 931-32.) In *City of Los Angeles v.*
2 *City of San Fernando*, the California Supreme Court held that such rights of self help
3 persist in an overdrafted groundwater basin. ((1975) Cal.3d 199, 293, fn.101; *Hi-Desert*
4 *County Water District v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723,
5 1731.)

6 In the case at hand, the public water suppliers have alleged in their pleadings and
7 asserted in Court that the basin at issue has been in continuous overdraft since 1946 and
8 that the prescriptive period runs from that date to the present (the filing of the various
9 complaints). (*See, e.g.*, First Amended Cross-Complaint of Public Water Suppliers
10 (March 13, 2007), Santa Clara Sup. Ct. E-Filed Docket No. 503.)

11 By definition, all members of the Small Pumpers Class will be overlying
12 landowners who have pumped groundwater on their property during the prescriptive
13 period in question. (Order Certifying Small Pumpers Class Action, S.C. Sup. Ct. E-Filed
14 Docket No. 1865.) There is no dispute that the vast majority of the Small Pumper Class
15 members are single family residential users who are outside the available public water
16 supply network, and hence must rely upon their own pumping of groundwater to exist on
17 their land. (*See generally, Declaration of Richard Wood in Support of Motion for*
18 *Appointment of Expert* , ¶¶2-4.)

19 For these reasons, the self-help defense of primary concern to the Small Pumper
20 Class. It is difficult to image how this defense will be sufficiently established without
21 substantial work and the ultimate testimony of a qualified expert witness. This expert
22 will need to gather a substantial amount of data for the Class, which is estimated to
23 consist of between 7,500 to 10,000 landowners. (*McLachlan Decl.*, ¶2.) The information
24 necessary to establish this defense will include periods of ownership, the nature and
25 quantification of pumping, and the periods of pumping, among others.

26 Given the number of class members and the asserted 62-year prescriptive period,
27 this analysis will likely require historical land use research and analysis, and substantial
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1 amounts of mathematical, statistical, and extrapolative calculation to adequately
2 encompass the water use activities of the Class members. For example, given that it is
3 likely that most of the Class members did not install meters on their wells, substantial
4 analysis of secondary records (such as electrical bills), may be necessary to formation of
5 expert opinions on quantities of water usage.

6 This expert will also need to assist in gathering information necessary to establish
7 that the Class members were engaged in a “reasonable beneficial use,” a threshold
8 requirement to establishing their overlying rights. (*City of Los Angeles v. City of San*
9 *Fernando*, Cal.3d at 293.) Class counsel will also need an expert to consult with in
10 formulating a response to the opposing expert opinions on subjects like overdraft and
11 safe-yield, critical components of the prescription claims. The expert may also be called
12 on to assist in defeating other elements of the prescription claim, and in particular the
13 notice requirement.

14 To this end, class counsel has located a qualified, willing, and available expert
15 witness, Timothy J. Thompson of Entrix, who has prepared an estimated budget for some
16 of the work reference above. (*Thompson Decl.*, Exhibit 2.)

17 **2. Class Counsel Cannot Recover Expert Fees Absent a Court**
18 **Order: The *Olson* Decision and Section 1021.5**

19 Upon a showing of public benefit C.C.P. section 1021.5, the class counsel in this
20 matter will ultimately seek compensation for their time and costs in this action as against
21 the public water purveyors. An award under Section 1021.5, however, cannot include
22 expert witness fees.

23 In 2008, the California Supreme Court issued its opinion in *Olson v. Automobile*
24 *Club of Southern California*, holding that expert witness fees may not be awarded under
25 Section 1021.5, unless expressly ordered by the court. 42 Cal.4th 1142, 1150-51 (*citing*
26 *C.C.P. § 1033.5(b)(1).*) This opinion expressly overruled *Beasley v. Wells Fargo Bank*,
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1 (1991) 235 Cal.App.3d 1407, which had previously held that experts witness fees were
2 recoverable under Section 1021.5. (*Id.* at 1151.)

3 The result of the *Olsen* case is that, assuming class counsel were willing to
4 advance substantial funds to cover expert witness fees, they could not recover those fees
5 at the end of the case. In other words, if class counsel were to expend funds toward
6 expert witness fees, they would be doing so on a *pro bono* basis.

7 Given the amount of expert witness fees likely necessary to pursue this class
8 action, and the necessity of an expert witness to advance the interests of the class-
9 members, the continued viability of the Small Pumper Class requires the appointment of
10 an expert by the Court under Evidence Code section 730.

11 **B. THE COURT SHOULD EXERCISE ITS DISCRETION TO**
12 **APPOINT AN EXPERT IN THIS CASE**

13 **1. Evidence Code section 730**

14 The Court has authority to appoint an expert in this case under Evidence Code
15 section 730, which provides in relevant part:

16 When it appears to the court, at any time before or during the trial of an action,
17 that expert evidence is or may be required by the court or by any party to the
18 action, the court on its own motion or on motion of any party may appoint one or
19 more experts to investigate, to render a report as may be ordered by the court, and
20 to testify as an expert at the trial of the action relative to the fact or matter as to
21 which the expert evidence is or may be required. The court may fix the
22 compensation for these services, if any, rendered by any person appointed under
23 this section, in addition to any service as a witness, at the amount as seems
24 reasonable to the court.

25 (See also Witkin, Cal. Evidence 4th, Opinion Evidence § 81.)

26 This code section is very broad in its scope. While it is most often applied in
27 criminal and family law matters, it is not limited to those areas, and applies equally in

1 civil law proceedings where the court finds its application necessary. For example, this
2 statute has been applied to appoint an expert to advise a court in a consumer class action
3 brought against a public agency, the California DMV. (*State of California ex. rel. DMV*
4 *v. Superior Court* (1998) 66 Cal.App.4th 421, 425-26.) In *Ex. rel. DMV v. Superior*
5 *Court*, the trial court appointed an expert under Section 730 and ordered that the DMV
6 pay the expert fees. (*Id.* at 439.) The appellate court approved of the use of Section 730
7 to appoint and expert in this context, ordering the trial court to delineate the tasks to be
8 performed by such expert under Section 730. (*Id.* at 440.)

9 The use of Section 730 is common in other civil contexts as well, such as
10 condemnation proceedings, which some parties have argued bear great resemblance to
11 the case at hand.¹ (*Laguan Salada Union Elementary School District v. Pacific*
12 *Development Co.* (1953) 119 Cal.App.2d 470, 473-74.)

13 It should also be noted that the public water suppliers were and continue to be in
14 favor of the formation of the two class actions in this consolidated proceeding, largely
15 because of the great benefit that would accrue toward the goal of achieving a
16 comprehensive litigation under McCarran Amendment *vis a vis* the class notice vehicle.
17 The public benefit that accrues through a common representation of the Small Pumper
18 Class, along with the essentially indigent nature of its members, strongly favors the
19 continued prosecution of this action with appropriate expert representation.

20 **2. Allocation of the Expert Costs**

21 The proposed budget for the expert work to be performed by Entrix is Exhibit 2 to
22 the Declaration of Timothy J. Thompson. Plaintiff asks that the Court approve this
23 budget, the work outlined therein, and issue an order apportioning the costs among the
24 public water defendants in this action. Evidence Code section 731(c) states as follows:

25 Except as otherwise provided in this section, in all civil actions, the compensation
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1 fixed under Section 730 shall, in the first instance, be apportioned and charged to
2 the several parties in such proportion as the court may determine and may
3 thereafter be taxed and allowed in the like manner as other costs.

4 Plaintiff suggests that the allocation among the water supplier defendants be in the
5 same basis as that is being used to pay for the class notice, publication, and the class
6 action website. The Court has previously ordered these parties to pay the costs of class
7 notice, and they have indeed been doing so, albeit in an allocation unknown to Plaintiff.
8 In any event Plaintiff contends that the allocation would be something best agreed upon
9 among and between the defendants in this case. If such an agreement is not possible,
10 Plaintiff suggests that the allocation be made on the basis of the defendants' relative
11 production of groundwater in 2008, merely as a reflection of their relative size.

12 DATED: February 9, 2009

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

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

26 ¹ The water suppliers assert that the prescriptive claims in this proceeding are "directly
27 related" to those in a condemnation claim. (*Water Purveyor Brief Re Trial Phasing and*
28 *Jury Trial* (January 2, 2009), 8:13-26, S.C.Sup.Ct. E-Filed Docket No. 2354.)

1 I, Michael D. McLachlan, declare:

2 1. I am one of the appointed class counsel for the Small Pumper Class, and am
3 duly licensed to practice law in California. I make this declaration of my own personal
4 knowledge, except where stated on information and belief, and if called to testify in Court
5 on these matters, I could do so competently.

6 2. Over the past six months, I have seen a number of spreadsheet documents
7 representing the potential members of this class action. On February 5, I received
8 another rough draft of the newest version of this database (purportedly using 2008 data
9 from Kern and Los Angeles counties). Based on this data, I believe there will ultimately
10 be somewhere between 7,500 and 10,000 members of this class. I am informed that
11 counsel for Los Angeles County Waterworks District 40, who is assembling the
12 databases for class notice, generally agree with this estimation.

13 I declare under penalty of perjury under the laws of the State of California that the
14 foregoing is true and correct. Executed this 9th day of February, 2009, at Los Angeles,
15 California.

16
17 _____ //s//

18 Michael D. McLachlan
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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 523 West Sixth Street, Suite 215,
4 Los Angeles, California 90014.

5 On February 9, 2008, I caused the foregoing document(s) described as **RICHARD**
6 **WOOD'S MOTION FOR APPOINTMENT OF EXPERT; DECLARATION OF**
7 **MICHAEL D. MCLACHLAN** 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 Carol Delgado