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

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

Attorneys for Plaintiff

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 REPLY BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT OF EXPERT** Date: March 5, 2009 Time: 9:00 a.m. Dept.: 17

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In their Opposition, some of the public water suppliers advance a series of baseless arguments. What is worse, they fail to acknowledge a very real problem facing the Small Pumper Class and its counsel, a problem that was brought to everyone's attention before this case was ever filed (*See* May 14, 2008 letter to Judge Komar, Docket No. 1317). Instead of acknowledging the problem, or posing any sort of viable solution, the public water suppliers put forth a pile of bad arguments, and pretend that the existence of the classes is not critical to their goals in this litigation: a comprehensive adjudication culminating in a judgment solidifying their superior water rights at the expense of overlying landowners – in this case, small residential users who's land sit outside the water service areas.

The Court should find good cause, appoint the expert as requested, and order the public water suppliers to create a fund to pay the expert fees.

II. ARGUMENT

A. THE PUBLIC WATER SUPPLIERS CAN AND SHOULD BE MADE TO PAY FOR AN EXPERT WITNESS FOR THE SMALL PUMPER CLASS

The public water suppliers boldly assert there is "no authority for ordering a civil litigant to pay the adverse party's expert witness costs pending resolution of the case," ignoring the express authority cited verbatim in the Motion (Evidence Code section 731(c)).

Again, Section 731 reads as follows:

> Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may

thereafter be taxed and allowed in the like manner as other costs.

In this instance, a number of well-healed public agencies have filed an action alleging that they have, in effect, taken the water rights of members of the Small Pumper Class, without compensation. Notwithstanding their public agency status, these entities see set on depriving these taxpaying landowners of a fair day in court. They do not assert that the residential users who comprise the Class possess the ability or the means to adequately defend themselves, or much less to hire the expert necessary for them to defend their paltry water rights in the face of a 60-year prescription claim being advanced by a million dollar team of hired guns. They cannot, and everyone at the table understands that.

To achieve their goal of a comprehensive adjudication under the McCarran Amendment, the water suppliers would have to spend millions of dollars individually naming and serving landowners in the basin. Instead, they have opted to put their full weight and support behind the formation of two plaintiff class actions (that are indeed defensive class actions in all real purposes). To be blunt, the public water suppliers have supported the formation and prosecution of these two classes so that they could save a big pile of money on service costs, while achieving the goal of a comprehensive adjudication.

If these public agencies wish to take without compensation from the members of the Class, they should at least be compelled to do so in fair fight. It is not too much for to ask them to spend some of their cost savings on an expert that will enable the Class to put up a fair fight at trial.

B. APPOINTMENT OF AN EXPERT AT THIS TIME IS NOT PREMATURE

The public water suppliers have been pushing this case forward for trial as fast as they can, all the while doing every thing they can to stop the landowners from receiving a full and fair trial, including refusing to engage in proper discovery on nearly every issue

of concern to the landowners. The Small Pumper Class needs to begin preparing its self-help defense now, as that may take a year or more of work to complete. It will take at least six months to gather and assemble all the necessary information, primarily by way of questionnaires to the class members, and a considerable amount of time thereafter working that information into a useable format for trial.

Moreover, the interests of the Small Pumper Class are significant here, and they need to be able to access and consult with an expert in order to prepare for the issue of safe yield and overdraft, should those come next.[1] It should also be noted, as discussed further below, that the interests of members of this Class are not similarly aligned with the other landowners.

C. THE NOTION THAT THE CLASS CAN ADDUCE EVIDENCE TO PROPERLY SUPPORT A "SELF-HELP" DEFENSE WITHOUT AN EXPERT IS RIDICULOUS

The public water suppliers next contend the self-help defense is a factual issue that is not suited to expert testimony. If they are willing to stipulate that the facts relating to Richard Wood's water use will apply to all absent class members, this might be true. But as they are unwilling to offer that stipulation, the self-help defense remains an individualized analysis of between 7,500 and 10,000 landowners across a 62 year prescriptive period. The volume of facts necessary involved is staggering. If we follow the path suggested by the public water suppliers, and forgo expert assistance, the presentation of these facts will involve a trial that could last for years. The legal fees to be incurred by the public water suppliers in such a proceeding would exceed the cost of

[1] The public water suppliers seem to posit that this Motion seeks appointment of a work-product protected expert. (Opp., 1:24-2:3.) This is incorrect. The expert in question would be directed and supervised by the counsel for the Class, but the work would be entirely public.

the expert ten times over. Ultimately, this must become a question of not simply justice, but of economics.

D. THE SMALL PUMPER CLASS MEMBERS DO NOT HAVE THE SAME INTERESTS AS OTHER PRIVATE LANDOWNERS AND DO NOT HAVE ACCESS TO OTHER LANDOWNER EXPERTS

The public water suppliers also contend that the Small Pumper Class should be adequately represented by the interests of other large landowners and their experts. While this might be generally true for issues such as overdraft and safe-yield, the commonalities stop there.

It should be no secret that as this matter progresses, the small pumper, who has a statutory priority *vis a vis* his or her residential use as compared to the farmer, will want to point his finger at the farmers as the real source of problem (if one is actually shown to exist). Will those parties be willing to voluntarily share their experts with counsel for the Small Pumper Class, without compensation?

And even if the other landowners were willing to share their experts with the Class, it is absurd to think that any of them will voluntarily incur the costs to gather and assemble the data necessary to put on a meaningful self-help defense for the Small Pumper Class.

E. THE EVIDENCE CODE SECTION 352 ARGUMENT IS IRRELEVANT

The next argument advanced is barely intelligible. It would appear that the water suppliers have formed the opinion, without having seen any expert designations or having taken a single expert deposition on the topics of the next trial, that the testimony that would be adduced by the Court-appointed expert for the Small Pumper Class would be

cumulative under Evidence Code sections 352 and 723. (Opp., 3:27-4:4) All this argument does is underscore the bankruptcy of the opposition to this Motion.

As noted above, there is no chance that another landowner party will retain an expert to build a "self-help" defense for the Small Pumper Class. Indeed, given the cost of this work, it is very clear there will be only one such expert testifying. Hence, the testimony cannot be cumulative.

F. THE BENEFIT OF THE CLASS ACTIONS TO THE PUBLIC WATER SUPPLIERS IS MANIFEST AND CANNOT BE DENIED

As noted above, the assertion that this class benefits only the class members is patently wrong. The only real benefit to the class members is the potential ability to assert a common self-help defense. If they cannot do that, there is little or no benefit to this class action, and the class members are likely better off sitting the sidelines. In such case, the real benefit of maintaining this class is the money saved by the public water suppliers by not having to individually name and serve all of these landowners. The small pumpers care nothing of the McCarran Amendment and securing a comprehensive adjudication. They just want a fair shake at trial.

III. CONCLUSION

The position the water suppliers take by opposing this motion can be plainly stated as a request that this Court send the small pumpers off to fight a battle they did not seek, stripped of the ability to put on their one truly meaningful defense. This is simply not acceptable, and current class counsel cannot be party to it.

What is most conspicuously lacking from the opposition is any acknowledgement of the real problem this motion seeks to address. If the water suppliers do not want to pay for an expert witness, but wish to reap the benefits of the class mechanism, then they are obligated to come forward with some alternative solutions to the problem. They

could offer to stipulate to self-help for each of the class members over the course of the prescriptive period. This, in conjunction with an agreement that the self-reported water use of class members on questionnaires would be taken at face-value, might enable the class to continue without an expert (assuming opposition from other parties would not make such a deal unworkable). Yet, the public water suppliers have made no such offer, nor offered any other workable solution to the problem.

DATED: February 25, 2009

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

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

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action. My business address is 523 West Sixth Street, Suite 215, Los Angeles, California 90014.

On February 25, 2008, I caused the foregoing document(s) described as **RICHARD WOOD'S REPLY BRIEF IN SUPPORT MOTION FOR APPOINTMENT OF EXPERT** to be served on the parties in this action, as follows:

(X) (BY ELECTRONIC SERVICE) by posting the document(s) listed above to the Santa Clara County Superior Court website: www.scefiling.org regarding the Antelope Valley Groundwater matter.

( ) (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and processing of documents for mailing. Under that practice, the above-referenced document(s) were placed in sealed envelope(s) addressed to the parties as noted above, with postage thereon fully prepaid and deposited such envelope(s) with the United States Postal Service on the same date at Los Angeles, California, addressed to:

( ) (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other overnight delivery service, for delivery on the next business day. Each copy was enclosed in an envelope or package designed by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

( ) (BY FACSIMILE TRANSMISSION) I am readily familiar with the firm's practice of facsimile transmission of documents. It is transmitted to the recipient on the same day in the ordinary course of business.

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

( ) (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

_____//s//_____
Carol Delgado