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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 RENEWED
MOTION FOR APPOINTMENT OF
EXPERT; DECLARATION OF
MICHAEL D. MCLACHLAN**

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

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

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 24, 2009, in Department 1 of the Lo
3 Angeles Superior Court, located at 111 North Hills Street, Los Angeles California, a
4 hearing will be held on plaintiff Richard A. Wood's Renewed Motion for Appointment of
5 an 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: March 30, 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.

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

17 Class counsel has located a qualified expert who is willing to be appointed by the
18 Court. It is anticipated that this expert will be directed and supervised in his work by
19 class counsel, with the involvement of counsel for the public water suppliers.

20 Finally, under Evidence code section 731, the cost of such expert should be borne
21 by the public water suppliers, as they are the parties asserting prescription against the
22 class and they benefit greatly from the existence of the class *vis a vis* the public benefit
23 the class creates in furthering a comprehensive adjudication.

1 **II. ARGUMENT**

2 **A. THE COURT NEEDS TO APPOINT AN EXPERT TO PREPARE**
3 **THE SELF-HELP DEFENSE**

4 **1. Class Counsel Cannot Recover Expert Fees Absent a Court**
5 **Order: The *Olson* Decision and Section 1021.5**

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

10 In 2008, the California Supreme Court issued its opinion in *Olson v. Automobile*
11 *Club of Southern California*, holding that expert witness fees may not be awarded under
12 Section 1021.5, unless expressly ordered by the court. 42 Cal.4th 1142, 1150-51 (*citing*
13 C.C.P. § 1033.5(b)(1).) This opinion expressly overruled *Beasley v. Wells Fargo Bank*,
14 (1991) 235 Cal.App.3d 1407, which had previously held that experts witness fees were
15 recoverable under Section 1021.5. (*Id.* at 1151.)

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

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

1 **2. The Class Cannot Proceed Without Expert Testimony On the**
2 **Critical Defense of Self-Help and the Threshold Showing of**
3 **Reasonable and Beneficial Use**

4 The primary issue requiring a Court-appointed expert is the so called “self-help”
5 defense, under which an overlying landowner may defeat a claim of prescription by
6 pumping water on his property during the prescriptive period. (*City of Pasadena v. City*
7 *of Alhambra* (1949) 33 Cal.2d 908, 931-32.) In *City of Los Angeles v. City of San*
8 *Fernando*, the California Supreme Court held that such rights of self-help persist in an
9 overdrafted groundwater basin. ((1975) Cal.3d 199, 293, fn.101; *Hi-Desert County*
10 *Water District v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1731.)

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

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

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

4 Given the number of class members and the asserted 63-year prescriptive period,
5 this analysis will likely require historical land use research and analysis, and substantial
6 amounts of mathematical, statistical, and extrapolative calculation to adequately
7 encompass the water use activities of the Class members. For example, given that it is
8 likely that most of the Class members did not install meters on their wells, substantial
9 analysis of secondary records (such as electrical bills), may be necessary to formation of
10 expert opinions on quantities of water usage.

11 This expert will also need to assist in gathering information necessary to establish
12 that the Class members were engaged in a “reasonable beneficial use,” a threshold
13 requirement to establishing their overlying rights. (*City of Los Angeles v. City of San*
14 *Fernando*, Cal.3d at 293.)

15 To this end, class counsel has located a qualified, willing, and available expert
16 witness, Timothy J. Thompson of Entrix, who has prepared an estimated budget for some
17 of the work reference above. (*Thompson Decl.*, Exhibit 2.) Mr. Thompson is willing to
18 be appointed by the Court, and will be supervised by class counsel with oversight from
19 the public water suppliers’ counsel.

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

22 **1. Evidence Code section 730**

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

25 When it appears to the court, at any time before or during the trial of an action,
26 that expert evidence is or may be required by the court or by any party to the
27 action, the court on its own motion or on motion of any party may appoint one or
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1 more experts to investigate, to render a report as may be ordered by the court, and
2 to testify as an expert at the trial of the action relative to the fact or matter as to
3 which the expert evidence is or may be required. The court may fix the
4 compensation for these services, if any, rendered by any person appointed under
5 this section, in addition to any service as a witness, at the amount as seems
6 reasonable to the court.

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

8 This code section is very broad in its scope, and the fact in this case fit squarely
9 within the statute. In this instance, we have a class formed largely by the initiation of the
10 public water suppliers to assist in their desire for a comprehensive adjudication under the
11 McCarran Amendment. The presence of the class notice mechanism saves them vast
12 sums of money they would need to spend individually naming and serving thousands of
13 landowners. Further, the class at issue by definition consists of individuals who do not
14 have the means to retain an expert. And after the Supreme Court's decision in *Olson v.*
15 *Automobile Club of Southern California*, class counsel cannot retain an expert and obtain
16 reimbursement for those fees at the conclusion of the case.

17 While Section 730 is most often applied in criminal and family law matters, it is
18 not limited to those areas, and applies equally in civil law proceedings where the court
19 finds its application necessary. For example, this statute has been applied to appoint an
20 expert to advise a court in a consumer class action brought against a public agency, the
21 California DMV. (*State of California ex. rel. DMV v. Superior Court* (1998) 66
22 Cal.App.4th 421, 425-26.) In *Ex. rel. DMV v. Superior Court*, the trial court appointed
23 an expert under Section 730 and ordered that the DMV pay the expert fees. (*Id.* at 439.)
24 The appellate court approved of the use of Section 730 to appoint and expert in this
25 context, ordering the trial court to delineate the tasks to be performed by such expert
26 under Section 730. (*Id.* at 440.)

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

5 It is also important to note, as the California Supreme Court in *Olsen* did, that
6 Section 1033.5, which sets for scope of recovery costs in a civil action, expressly
7 contains an exception for expert witnesses ordered by the Court. (C.C.P. § 1033.5(a)(8);
8 *Olsen*, 42 Cal.4th at 1149.) Obviously if Evidence code section 730 was not meant to
9 apply broadly in the civil context, Section 1033.5 would be more restricted in its language,
10 or Section 730 would be worded more narrowly. Neither contain any restriction that
11 would impair this Court's exercise of sound discretion to appoint an expert on the issues
12 at hand.

13 2. Allocation of the Expert Costs

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

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

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

5
6 **III. CONCLUSION**

7 The Court should appoint Entrix as an expert to analyze and develop a report on
8 the self-help and reasonable and beneficial use issues. Without such an expert, class
9 counsel cannot advance the primary defense of the class members.

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

17 DATED: March 30, 2009

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

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19
20 By: _____ //s//

21 Michael D. McLachlan
22 Attorneys for Plaintiff
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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 30th day of March, 2009, at Los Angeles,
15 California.

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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 March 30, 2009, I caused the foregoing document(s) described as **RICHARD WOOD'S**
6 **RENEWED MOTION FOR APPOINTMENT OF EXPERT; DECLARATION**
7 **OF 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.

//s//
Carol Delgado