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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

PLAINTIFF'S *EX PARTE*
APPLICATION FOR ORDER
STAYING CLASS NOTICE AND
LIFTING STAY ON COURT
APPOINTED EXPERT

**[filed with Declaration of Michael D.
McLachlan and Richard Wood]**

Date: May 6, 2009
Time: 9:00 a.m.
Dept.: 17C (telephonic)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Richard Wood requests that this Court issue an order staying notice to the putative Small Pumper Class (the “Class”) pending resolution of serious defects in the list of proposed class members that render class formation untenable, and adverse to the interests of the Class. That notice is currently ordered to issue by May 15, 2009.

Because the solution to the problem at hand requires the commencement of some of the work contemplated in the scope of work for the Court-appointed expert for small pumping issues, the Plaintiff requests the Court lift the stay on that work.

II. THE PROBLEM

A. Major Defects in the Class Lists

Last week, counsel for the class was informed by counsel for the public water suppliers (specifically Los Angeles County Waterworks District 40 and Rosamond Community Services District), that the number of proposed members of the Class has jumped from 7,500 to approximately 15,000. (McLachlan Decl. ¶9.) Plaintiff knows of no one who believes there is anywhere near 15,000 small pumper wells in the area of adjudication, and such a number is inconsistent with the analyses done by the various experts in the case. A cursory review of the proposed class lists shows that there are substantial numbers of parcels that do not belong in the Class. Counsel for the Class conducted an informed survey of some of the newly-added parcels, confirming the fact that the current lists are defective. (McLachlan Decl. ¶¶11-13.)

Plaintiff believes there are likely at least 5,000 parcels on the current class lists that fall outside the definition of the Class. Many of these properties appear to be metered parcels connected solely to public water supplies, mutual water companies and

1 their shareholders, governmental agencies, large farmers, among others.¹ (McLachlan
2 Decl. ¶¶11-13.)

3 This is an “opt-out” class, meaning that anyone who does not respond to the class
4 notice is deemed to be a class member. The response rates in class actions are always
5 less than half, and often much lower as was the case with the Willis class, which had a
6 response rate of 25%. With regard to proposed Class noticees who do not pump
7 groundwater, we can expect a much lower response rate because they will read the notice
8 and discard it as erroneous, since they know they do not pump groundwater.
9 Consequently, if notices are sent out to thousands of parcels that do not pump, we will
10 end up with a Class filled with non-pumpers.

11 **B. Harm to the Class and Other Overlying Users**

12 The issuance of notice to this existing group of noticees would be prejudicial to
13 the Class, and/or the other overlying landowners. It is likely that any settlement or
14 judgment in this case would entail the allocation of some di minimis pumping exemption,
15 or free production allowance, to this group of largely single-family residential pumpers.
16 In this scenario, the case cannot be settled, or fairly adjudicated, using a fixed free-
17 pumping allowance without doing harm to the rights of either the small pumpers, or the
18 rights of the other overlying landowners. In other words, in a 15,000 member class that
19 consists of 7,500 actual small pumpers, and another 7,500 parcels that do not fit the class
20 definition, the allocation of water to those class members actually pumping must
21 necessary be reduced, lest the share available to other overlying uses by unfairly and
22 unnecessarily reduced to compensate for the allocation of water to parcels without wells,
23 mutual water company shareholders, and parcels only receiving municipal water service.

24 Moreover, if the basin is indeed in overdraft, it is a waste of this resource to
25 allocate water to parcels that do not need it or are not entitled to it. While the law allows
26

27 1 The Class definition excludes governmental entities, the defendants, and any person or entity
28 that is a shareholder in a mutual water company. (Order Certifying Small Pumpers Class Action,

1 for some tolerance in formation of a class – in this case likely a few hundred errant
2 members – it is not legally viable to form a class in which likely 30-50% of its members
3 do not meet the class definition.

4 More thorough investigation of the Class by the experts – including Court-
5 appointed expert Entrix – will allow the Court to properly calibrate its handling of the
6 Class and protect the interest of the Class (*See Generally* Response to AGWA’s Motion
7 to Decertify, May 1, 2009.)
8

9 **III. A SOLUTION**

10 While it is speculation, the confirmed presence of several foreclosed properties on
11 the current list might suggest that the public water supplier lists used to locate potential
12 class members inside the service areas (*See generally* McLachlan Decl. ¶3), may not have
13 been lists of metered parcels but rather lists of active customers. If this is indeed correct,
14 properties that are solely on public water supply would have ended up on the list if they
15 were vacant and the water service was shut off. Given the number of foreclosures in the
16 Antelope Valley, this could account for thousands of properties. The first step would be
17 to eliminate these parcels by checking water supplier records for metered parcels.

18 Simultaneously, customer lists should be obtained from the mutual water
19 companies, and those names should be excluded, along with public agencies such as the
20 City of Los Angeles and AVEK.

21 Remaining parcels inside, and potentially some outside, the public water service
22 areas may need to be physically surveyed to confirm their membership in the Class. This
23 can be done inexpensively with semi-skilled contract labor working in conjunction with
24 counsel for the water suppliers and the Class, and their experts. Counsel for the Class
25 will endeavor to meet and confer with counsel for the water suppliers and their
26 consultants in an effort to develop a mutually agreeable strategy.

27
28 September 2, 2008).

1 If such a strategy cannot be worked out, the Class should be decertified. The
2 interests of the small pumper are better served outside this adjudication or individually
3 represented, rather than inside a mal-formed class.
4

5 DATED: May 5, 2009

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

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7
8 By: _____//s//
9 Michael D. McLachlan
10 Attorneys for Plaintiff
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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 31, 2009, I caused the foregoing document(s) described as **PLAINTIFF'S EX**
6 **PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO**
SHOW CAUSE RE PRELIMINARY INJUNCTION to be served on the parties in this action, as
follows:

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

9 () (BY U.S. MAIL) I am readily familiar with the firm's practice of collection and
10 processing of documents for mailing. Under that practice, the above-referenced
11 document(s) were placed in sealed envelope(s) addressed to the parties as noted above,
12 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:

13 () (BY FEDERAL EXPRESS) I served a true and correct copy by Federal Express or other
14 overnight delivery service, for delivery on the next business day. Each copy was
15 enclosed in an envelope or package designed by the express service carrier; deposited in a
16 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.

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

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

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

23 _____//s//
24 Carol Delgado