

1 Plaintiffs filed their Motion for Class Certification seeking leave to pursue
2 their state wage and hour claims as a class action under Fed. R. Civ. P. 23(b)(3)
3 defining the class as all current and former employees of the PUD, who worked
4 unpaid shift-turnover time from July 18, 2000 through the date Judgment is entered
5 in this case. They also seek conditional certification of their Fair Labor Standards
6 Act Claims as a Collective Action and for Approval of Hoffman-LaRoche Notice.

7 Plaintiffs allege that there are common questions of law and fact, including
8 that the Plaintiffs were required to come to work 15 minutes before their shift to
9 get briefed of any problems by the person they were replacing on the job and did
10 not get paid for that 15 minutes of shift-turnover time as required by law.

11 Plaintiffs allege that the Defendant PUD owns and operates three hydro
12 electric projects in Eastern Washington: the Rock Island Dam, the Rocky Reach
13 Dam, and the Lake Chelan Dam, generating \$145 million in annual revenue in
14 2006. The PUD has approximately 714 employees. Over the past 7 years
15 approximately 60 of them, including the potential Plaintiffs, worked rotating 12
16 hour shifts from 7:00 a.m. to 7:00 p.m. or from 7:00 p.m. to 7:00 a.m. It is
17 Plaintiffs' claim that for years the PUD has required them to arrive 15 minutes
18 early for their shift so they can perform 15 minutes of shift-turnover time with the
19 departing employee. During this "shift-turnover" time, the 2 employees allegedly
20 discussed work problems and what happened on the prior shift. Plaintiffs claim this
21 is important to the oncoming employee, who has to be aware of any problems in
22 order to properly and safely do his job. Plaintiffs have identified as class members:
23 hydro operators, system operators, fish bypass operators, and mechanics and wire
24 men in the Pilot Program, all of whom it is claimed work 12 hour rotating shifts.

25 The Plaintiffs contend that they receive a base wage every two weeks and

1 also receive an overtime premium equivalent to 50% of their hourly rate for the 8
2 hours above 40 in the 48 hour weeks. This has allegedly been a regular work
3 practice requirement from the 1990s to early 2006. As one current employee
4 stated: Plant and personnel safety have relied on this practice for a long time
5 (decades) and [it] is an industry standard.

6 Plaintiffs allege that in 2006, the PUD acknowledged that federal and state
7 labor laws required it to pay the Plaintiffs for any shift turnover time, and therefore
8 directed the employees to either no longer work shift-turnover time or to seek
9 management approval before doing so. The PUD thereafter required that a
10 departing employee write a log entry to an oncoming employee describing what
11 had occurred on the previous shift. The Plaintiffs contend that numerous
12 employees have complained that this new procedure is inadequate and that a face-
13 to-face turn-over exchange is still required.

14 Discussion

15 FLSA Claims

16 The Fair Labor Standards Act (FLSA) established a cause of action by an
17 employee against an employer who fails to pay overtime wages. An employee
18 who files such a suit may bring a collective action on behalf of employees similarly
19 situated. *Does I through Xxiii v. Advanced Textile Corp.*, 214 F.3d 1058, 1064 (9th
20 Cir. 2000). Each employee who wishes to join the action must opt in to the suit by
21 filing a consent to sue with the district court. *Id.*

22 The district court has discretion to determine whether a collective action is
23 appropriate. *Luethold v. Destination Am. Inc.*, 224 F.R.D. 462, 466 (N.D. Cal.
24 2004). A court must decide whether the proposed lead plaintiffs and the proposed
25 collective action class are “similarly situated” for purposes of Section 216(b). *Id.*

1 The burden of making this showing is on the Plaintiffs. *Id.* The FLSA does not
2 define the term “similarly situated” and the Ninth Circuit has not yet addressed this
3 issue. Therefore, district courts have utilized different approaches to determine
4 whether plaintiffs are similarly situated, the majority of which have adopted the
5 two-tiered approach, which has also been adopted by the Eleventh Circuit.

6 The first decision under the two-tiered approach concerns whether the
7 potential class should be given notice of the action. *Luethold, supra* at 467. This
8 decision should be based on the pleadings and any affidavits submitted by the
9 parties. This decision is made under a fairly lenient standard and the usual result is
10 a conditional certification.

11 The allegations of the Complaint establish the basis for a collective action.
12 The Plaintiffs are employees of the Defendant, who worked 12 hour shifts and
13 contend they were required to show up 15 minutes early for every shift to be
14 briefed by the outgoing employee and were not paid for this overtime work.

15 The FLSA provides that an action to recover [minimum wages, overtime
16 compensation, liquidated damages or injunctive relief] may be maintained against
17 an employer . . . by any one or more employee for and on behalf of himself or
18 themselves and other employees similarly situated. No employee shall be a party
19 plaintiff to any such action unless he gives his consent in writing to become such a
20 party and such consent is filed with the court in which such action is brought. 28
21 U.S.C. § 216(b).

22 Plaintiffs’ complaint and memoranda support a finding that the individual
23 plaintiffs are similarly situated. Each worked 12 hour shifts who claim they were
24 not paid for shift-turnover time required by their employer. Therefore, the court
25 finds that the requirements of the Fair Labor Standards Act have been met and that

1 collective prosecution on Plaintiffs claims is appropriate. However, only those
2 persons who actually authorize this representation can be included within the class.
3 *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977).

4 The Plaintiffs have filed six affidavits, four from the potential class plaintiffs
5 and two others who claim to be similarly situated, but nowhere near the 60 claimed
6 to be Plaintiffs. In *Hoffmann -LaRoche v. Sperling*, 493 U.S. 165 (1989), the
7 Supreme Court established that named plaintiffs pursuing a collective action under
8 statutes such as the Age Discrimination in Employment Act and the Fair Labor
9 Standards Act are entitled to discover the identify of all “similarly situated”
10 individuals with potential claims and to send court-approved notice to those
11 potential plaintiffs informing them of the lawsuit and their right to opt in to the suit
12 by a specified deadline. *Id.* at 172-74. The purpose of sending this notice is to
13 alert potentially aggrieved individuals that if they want to pursue a similar claim in
14 the pending lawsuit, they must consent to join before the filing cutoff date set by
15 the court. *Id.* At 172. Providing such notice is integral to realizing the
16 congressionally-intended benefits and efficiencies of a collective action. *Id.* at
17 169-70. The FLSA does not define the term “similarly situated” and the Ninth
18 Circuit has never addressed the issue. Most courts who have addressed the issue
19 conduct the “similarly situated” analysis in two stages. At the initial stage, the
20 court determines whether the potential plaintiffs are sufficiently likely to be
21 similarly situated to justify mailing the notice. See *Hip v. Liberty Natal Life*
22 *Insurance Co.*, 252 F.3d 1208, 1218-19 (11th Cir. 2001); *Vaszlavik v. Storage*
23 *Tech. Corp.*, 175 F.R.D. 672, 678 (D. Colo. 1997). Once notice has been issued,
24 the opt-in period has expired, and discovery has been completed courts often make
25 a second-stage final determination of whether the named plaintiffs are “similarly

1 situated” to the opt-in parties. *See Hip*, 255 F.3d at 1217-18.

2 At the initial conditional certification stage, the standard is “fairly lenient”
3 and “typically results in granting of such certification. *See Romero*, 235 F.R.D. at
4 482, citing *Grayson v. K Mart Corp.*, 79 F.3d 1086 , 1096 (11th Cir. 1996); *Kane*
5 *v. Gage Merch. Servs. Inc.*, 138 F. Supp.2d 212, 214 (D. Mass. 2001).

6 Plaintiffs ask the court to approve notice to be distributed to all current and
7 former employees of the PUD who worked unpaid shift-turnover time from July
8 18, 2000 through the date judgment is entered in this action. Plaintiffs have made
9 a considerable showing that the PUD’s employees who worked the 12-hour shifts
10 were the victims of a single decision, plan, or policy. *See Vaszlavik*, 175 F.R.D. at
11 678, *Hoffman*, 982 F. Supp. At 261 (S.D. NY. 1997). Here, the Plaintiffs allege
12 that through the entire relevant time period, the PUD required class members to
13 regularly work shift-turnover time and did not pay them for it.

14 Plaintiff’s Motion to approve Notice to all current and former employees of
15 the PUD who worked unpaid shift-turnover time from July 18, 2000 through the
16 date judgment is **Granted**. Any additional consent to be represented by Plaintiffs;
17 counsel and to join this class action shall be served and filed on or before
18 September 10, 2007 in order for said individuals to be included in the prosecution
19 of the Fair Labor Standards Act claim.

20 **State Law Wage Claims**

21 In addition to their claim arising under the Federal Fair Labor Standards
22 Act, certification is appropriate for Plaintiffs’ state law wage per hour claims
23 pursuant to Federal Rules of Civil Procedure . Fed. R. Civ. P. 23(a) provides that
24 one or more members of a class may sue or be sued as representative parties on
25 behalf of all only if (1) the class is so numerous that joinder of all members is

1 impracticable; (2) there are questions of law or fact common to the class; (3) the
2 claims or defenses of the representative parties are typical of the claims or defenses
3 of the class; and (4) the representative parties will fairly and adequately protect the
4 interests of the class.

5 As for the first criteria, Plaintiffs claim that there are approximately 60
6 members of the potential class, and that joinder of all members would be
7 impracticable. In looking at this element, mere numbers have proven to be an
8 inconsistent guideline to determine the appropriateness of certification. *See*
9 *Wright, Miller & Kane, Federal Practice and Procedure Civil 2d § 1762*. Rather,
10 given a substantial number of potential plaintiffs, courts focus more on the
11 impracticality element, considering such factors as geographical dispersion, degree
12 of sophistication, and class members' reluctance to sue individually, to determine
13 whether joinder would be impracticable. *See Rodriguez ex. Re. Rodriguez. v. Berry*
14 *brook Farms, Inc.* 672 F. Supp. 1009 (W.D. Mich. 1987); *Arkansas Educ. Ass'n v.*
15 *Board of Educ.*, 446 F.2d 763, 765 (C.A. Ark. 1971); *Fernandez- Roque v. Smith*,
16 91 F.R.D. 117, 122 (N.D. Ga. 1981).

17 In the instant case, the joinder of 60 individual legally inexperienced
18 workers as plaintiffs would be very burdensome, especially in light of their lack of
19 legal sophistication, limited knowledge of the legal system, and a fear to jeopardize
20 their future by suing their employer .

21 The second element requires questions of law or fact common to the class.
22 Here all potential plaintiffs and members of the class worked 12 hours shifts for the
23 employer and claim they were not paid for mandatory shift-turnover time. While
24 their jobs differed, their conditions of employment were allegedly exactly the
25 same.

1 The third element is whether the claims or defenses of the representative
2 parties are typical of the claims or defenses of the class. Red. R. Civ. P. 23(a)(3).
3 As stated above the claims of the representative are exactly the same as those of the
4 proposed class.

5 The fourth element is that the representative parties will fairly and
6 adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). Under this
7 element, both the individual representative plaintiffs, and their counsel, must be
8 examined to determine whether their skill and competence are sufficient to
9 adequately prosecute the interests of the class. *Fendler v. Westgate*, 527 F.2d 1168
10 (9th Cir. 1975). In this case, Plaintiffs claim they were all personally injured by
11 the Defendant's failure to pay them for shift-turnover time and their counsel are
12 experienced and competent attorneys, who have brought numerous class actions
13 with clearly no conflict of interests. There have been no character attacks against
14 any of the representative Plaintiffs.

15 Plaintiffs have also met the criteria for certification under Rule 23(b)(3), which
16 requires that the common questions of law and fact predominate over those
17 affecting individual members, and that a class action is superior over other
18 available methods. The commonality issue of having exactly the same claim
19 supports class certification. Given the circumstances of the potential class, and
20 each potential Plaintiff, it is highly unlikely that individual Plaintiffs would pursue
21 this action if class certification was not allowed. There is currently no other
22 pending litigation on this matter and no difficulties in managing this as a class
23 action have been presented to the court.

24 It Is Hereby Ordered:

25 1. Plaintiffs Motion for Class Certification of their State Wage and Hour

1 Claims is **Hereby Granted** pursuant to Fed. R. Civ. P. 23. Frank Godfrey, Ed
2 Tippen, Ron Emter and Bryan Williams are hereby appointed as the class
3 representatives.

4 2. Plaintiffs' Motion for a Conditional Class of the Fair Labor Standards
5 Act claims is **Hereby Granted** pursuant to 29 U.S.C. § 216. Plaintiffs FLSA
6 claims are hereby certified as a collective action and counsel for the Plaintiffs shall
7 mail the Hoffmann-LaRoche notice to allow similarly situated employees to
8 consent to the FLSA cause of action.

9 3. Plaintiffs shall file any additional consents to sue under the Fair Labor
10 Standards Act on or before September 10, 2007.

11 **IT IS SO ORDERED.** The Clerk is directed to enter this Order and
12 forward copies to counsel.

13 **DATED** this 10th day of August, 2007.

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15 Justin L. Quackenbush
16 JUSTIN L. QUACKENBUSH
17 SENIOR UNITED STATES DISTRICT JUDGE
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