

# Exhibit C

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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 NOTICE OF  
MOTION AND MOTION TO  
DECERTIFY SMALL PUMPER  
CLASS**

[filed concurrently with Declaration of  
Michael D. McLachlan]

Date: July 9, 2012  
Time: 9:00 a.m.  
Dept.: 316 (Room 1515)

**RICHARD WOOD'S NOTICE OF MOTION AND MOTION TO DECERTIFY  
SMALL PUMPER CLASS**

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TO THE COURT AND ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that on July 9, 2012, at 9:00 a.m., in Department 316 of the Los Angeles Superior Court, located at 600 S. Commonwealth Avenue, Los Angeles, California, a hearing will be held on plaintiff Richard A. Wood's Motion to Decertify the Small Pumper Class.

The motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration and attached exhibits, and such other and further evidence as the Court adduces at the hearing.

DATED: June 13, 2012

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

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

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Richard Wood brings this Motion to Decertify the Small Pumper Class because class counsel cannot adequately represent the interests of the class at the next phase of trial. If the Court sets further trial in this matter as planned on July 9, 2012, but does not authorize the court-appointed expert to complete the work necessary to properly assess the water use of the Class, there will be no reliable evidence of the Class' water use at trial.

Due process requires that any class judgment be entered only upon adequate representation of the class. If such adequate representation is lacking, the Court must decertify the Class.

**II. FACTUAL BACKGROUND**

The initial Class Complaint was filed on June 2, 2008. The Court certified the Small Pumper Class on September 2, 2008. The Class is defined as currently consists of approximately 3,800 parcels. (McLachlan Decl., ¶ 2.)

On February 9, 2009, Plaintiff filed his initial Motion for Appointment of Expert, which included a scope of work attached to the Declaration of Timothy Thompson. (McLachlan Decl., Ex. 1; D.E. 2527.) On April 24, 2009, the Court granted Plaintiff's motion for a court-appointed expert, thereby designating Timothy Thompson of Entrix to perform expert services relative to the assessment of water use of the Small Pumpers' class. (McLachlan Decl., Ex. 2.) At that time, the Court stayed the order pending determination of the issues of overdraft and safe yield:

**MR. MCLACHLAN:** It is not limited in the fact -- what we are asking is for the court to appoint an expert that would come in and testify on the issue of self-help for the court. And, obviously, that issue is one that is only germane largely to the small pumpers. . .

There is always a particular party that's being represented, and that party -- the key thing that crosses those parties and underlies that -- that code is -- that the fact that that party does not have the ability to retain its own expert.

That is clearly manifested and demonstrated here. Richard wood can't afford it.

1 THE COURT: let me stop you for a minute.

2 MR. MCLACHLAN: Sure.

3 THE COURT: I don't disagree with anything that you have said to this point.  
4 That is a little different than what we originally talked about in Santa Clara  
5 County.

6 But beyond that, I need some indications that I thought the request was  
7 premature until such time as we established that there was, in fact, an overdraft  
8 based upon the yield and the pumping in various -- total pumping within the  
9 antelope valley.

10 And I can assure you that in the event that it is determined that there is  
11 overdraft in this case and that there is a contention of prescription against the small  
12 pumpers, then certainly I would agree with you. You are entitled to a neutral --  
13 and the court would be wanting to hear a neutral expert dealing with those issues.

14 \* \* \*

15 THE COURT: Well, I have indicated to Mr. McLachlan that I am going to grant  
16 his request and understanding Mr. Fife's concern about it, I'm going to grant it  
17 nevertheless. I think there is good cause for it, and I'm going to stay it until the  
18 issues of overdraft and safe yield have been adjudicated.

19 (Ex. 3, Hearing Transcript, April 24, 2009, 9:27-11:6, 25:8-13; *see also* Ex. 2.)

20 Mr. Thompson has conducted limited preliminary work involving review of other  
21 expert reports and file materials necessary to familiarize himself with the background and  
22 technical issues of this case and the adjudicated basin. (McLachlan Decl., ¶ 6.) Entrix  
23 has been paid for that work -- by order of this Court allocating that to the water supplies  
24 in equal shares -- but has not commenced the substantive work regarding the  
25 quantification of the class members' water use. (*Id.*, Ex. 4 (May 25, 2010 Order), 3:20-5.)

26 In May of 2009, the water suppliers stipulated to the lifting of the stay on the  
27 court-appointed expert work, and the Court signed this order, which stated that the Court-  
28 appointed expert would "formulate reliable estimates of the water use of the Class." (*Id.*,  
Ex. 5.) Nevertheless, the Court later determined that this work should not occur prior to  
the Phase 3 trial. (*Id.*, Ex. 4, 4:6-9.)

On June 16, 2011, the Court denied Plaintiff's motion for preliminary approval of  
the Small Pumper Class Settlement, in part because of the lack of evidence of the  
pumping of the class, which the Court felt would be necessary to establish the *di minimis*

1 exemption and the water rights of the class members. (*Id.*, Ex. 6, 3:8-18.) The Court  
2 suggested that the Class negotiate a global settlement with all of the parties, not just those  
3 the Class had sued. (*Id.*, at 22:1-11.) Class counsel then redrafted the settlement  
4 agreement to remove the portions found objectionable by the Court (in part removing  
5 specific allocation of Class water rights), thereby creating an agreement that mirrored the  
6 earlier settlement of the Willis Class, which the Court approved. (McLachlan Decl., ¶ 9.)  
7 For reasons that are unclear, the water suppliers' decided not to resolve the Small Pumper  
8 Class on similar terms used in the Willis case.<sup>1</sup>

9 On July 13, 2011, the Court issued its Statement of Decision for the Phase Three  
10 Trial, in which the Court found that the basin has been in a state of overdraft since 1951.  
11 (McLachlan Decl., Ex. 7, pp. 5-6.) On July 12, 2011, Plaintiff filed a motion to authorize  
12 the court-appointed expert work (D.E. 4521.), which was heard on August 30, 2011.  
13 The Court took the Motion under submission pending further settlement discussions.  
14 (*Id.*, Ex. 8.)

15 On January 18, 2012, after further settlement discussions and the prospect of the  
16 Court setting the next phase of trial regarding water rights, Plaintiff re-filed his motion to  
17 authorize the court-appointed expert to assess the water use of the Class. (D.E. 4761.)  
18 This Motion was heard on February 14, 2012, and continued to March 14, 2012. (D.E.  
19 4881.) The Motion was later continued to April 17, 2012, at which time the Court stated  
20 that it should be re-noticed for the date of trial setting. (D.E. 4926; Ex. 9 (Transcript of  
21 April 17, 2012 Hearing), 14:22-15:1.)

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23 <sup>1</sup> The water suppliers have shown no interest of revising and re-submitting the  
24 Wood Class Settlement, leaving the prescription claims hanging over the Class members'  
25 proverbial heads. Within a few days after the Wood Class Settlement was not approved,  
26 class counsel circulated a revised settlement agreement, with very limited modifications  
27 tracking the Court's comments at the June 16, 2011 hearing. The lack of a report from  
28 the court-appointed expert has put class counsel in a very difficult negotiating position  
with respect to proper and fair allocation of the available water for overlying use.  
(McLachlan Decl., ¶ 9-10.)

1 The motion to authorize the court-appointed expert work is set for further hearing  
2 concurrently with this Motion to Decertify, on July 9, 2012, as is the trial setting  
3 conference.

4 **III. ARGUMENT**

5 **A. The Legal Necessity for the Court-Appointed Expert Work**

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

12 The result of the *Olsen* case is that class counsel cannot recover expert witness  
13 fees at the end of the case. In other words, if class counsel were to expend funds toward  
14 expert witness fees, they would be doing so on a *pro bono* basis.

15 The primary reasons the Court-appointed expert is necessary is to gather evidence  
16 of the Class' water use for both settlement and litigation purposes, e.g. establishing the  
17 self-help defense, under which an overlying landowner may defeat a claim of prescription  
18 by pumping water on his property during the prescriptive period.<sup>2</sup> (*City of Pasadena v.*  
19 *City of Alhambra* (1949) 33 Cal.2d 908, 931-32.) In *City of Los Angeles v. City of San*  
20 *Fernando*, (1975) Cal.3d 199, 293, fn.101, the California Supreme Court held that such  
21 rights of self-help persist in an overdrafted groundwater basin.<sup>3</sup>

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23 <sup>2</sup> The court-appointed expert work may also be used to establish that the Class  
24 members were engaged in a "reasonable beneficial use," a threshold requirement to  
25 establishing their overlying rights and an issue that other overlying landowners have  
26 disputed as the Class. (*City of Los Angeles v. City of San Fernando*, Cal.3d at 293.)

26 <sup>3</sup> Conceptually, the burden rests with the Public Water Purveyors to establish  
27 prescriptive rights in an overdrawn basin: "[p]roper overlying use . . . is paramount, and  
28 the right of an appropriator, being limited to the amount of the surplus, must yield to that  
of the overlying owner in the event of a shortage *unless the appropriator has gained  
prescriptive rights through the taking of nonsurplus waters.*" (*Hi-Desert County Water*

1 In the case at hand, the public water suppliers have alleged in their pleadings that  
2 the basin at issue has been in continuous overdraft since 1946 and that the prescriptive  
3 period runs from that date to the present (the filing of the various complaints). (*See, e.g.,*  
4 *D.E. 503, First Amended Cross-Complaint of Public Water Suppliers (March 13, 2007).*)

5 The Court has stated on many occasions that the next phase of trial will  
6 necessarily involve a determination of the water rights of the parties – e.g. prescription,  
7 allocation of water rights, and/or physical solution – unless those rights are agreed upon  
8 by all parties. There has been no agreement on the water rights of the parties, and it  
9 appears none is forthcoming. It is also undisputed that none of the experts (all of whom  
10 are retained by parties adverse to the Class) have conducted any assessment of the Class’  
11 actual water use.

12 The Court has set a trial setting conference for July 9, 2012. If the Court sets trial  
13 without authorizing the work of the court-appointed expert and providing sufficient time  
14 for that work to occur, then class counsel will be put in a position in which they can no  
15 longer adequately represent the interests of the Class.<sup>4</sup> This situation mandates  
16 decertification of the Class.

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21 *Dist. v. Blue Skies Country Club, Inc.*, 23 Cal.App.4th 1723, 1730-1731, emphasis  
22 added.) But prescriptive rights cannot be established to the extent the overlying owner is  
23 pumping groundwater for a reasonable beneficial use, for example domestic use, during  
24 the prescriptive period. (*City of Pasadena v. City of Alhambra (1949)* 33 Cal.2d 908,  
931-32.)

25 <sup>4</sup>This problem was addressed at length with the Court prior to the conception of  
26 the Small Pumper Class, and has persisted ever since. As the Court probably recalls,  
27 prior to filing the complaint in this matter, class counsel had several conversations with  
28 the Court at hearings and through written correspondence in May of 2008, concerning  
this fundamental problem confronting class counsel in the representation of the class.  
(*D.E. 1317, Ex. 10.*)



1           **B.     The Class Should Be Decertified Because Class Counsel Can Not**  
2                           **Adequately Represent the Interests of the Class**

3           One of the elements necessary for maintenance of class action is that the named  
4 representative and class counsel can and “will fairly and adequately protect the interests  
5 of the class.” (*Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4<sup>th</sup> 930, 943, review  
6 denied October 12, 2004.) “[A]s a matter of due process, class action judgments can bind  
7 absent class members only where ‘the interest of those not present are of the same class  
8 as the interests of those who are, and where it is considered that the latter fairly  
9 represent the former in the prosecution of the litigation.’” (*Id.* at 944, n.3, quoting  
10 *Hansberry v. Lee* (1940) 311 U.S. 32, 41.) “Hence, collateral attack upon a  
11 judgment entered in a class action on the ground that the interests of absent class  
12 members were not adequately represented has long been sanctioned.” (*Ibid.*)

13           “[C]lass members must have some remedy if inadequacy develops after they  
14 have remained in the class in reliance on the actions of the court and class  
15 counsel.” (*Janik*, 119 Cal.App.4<sup>th</sup> at 944, n.3, quoting *State v. Homeside Lending,*  
16 *Inc.* (Vt. 2003) 826 A.2d 997, 1017; *Gonzales v. Cassidy* (5<sup>th</sup> Cir. 1973) 474 F.2d  
17 67, 72-77.)

18           The lack of adequacy of representation is essential, and the lack of it prevents a  
19 class action from proceeding. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 847  
20 (reversing class judgment for lack of adequate representation). When class counsel  
21 cannot meet its fiduciary obligations to the class, it cannot be properly certified as class.  
22 (*Culver v. City of Milwaukee* (7<sup>th</sup> Cir. 2002) 277 F.3d 908, 913.)

23           By definition, all members of the Small Pumpers Class will be overlying  
24 landowners who have pumped groundwater on their property during the prescriptive  
25 period in question. (D.E. 1865, Order Certifying Small Pumpers Class Action.) There is  
26 no dispute that nearly all of the Small Pumper Class members are single family  
27 residential users who are outside the available public water supply network, and hence  
28 must rely upon their own pumping of groundwater to exist on their land. It should not go

1 unsaid that the rights at issue here are of great importance. The absence of thousands of  
2 class members from direct participation in this action, when combined with the nature of  
3 the rights being adjudicated, mandates the strictest observation of due process in these  
4 proceedings.

5 Absent a change in the posture of this case, which would entail the court-  
6 appointed expert conducting his analysis or the water suppliers resolving the Small  
7 Pumper Class action on similar terms to the Willis Class,<sup>5</sup> class counsel can no longer  
8 adequately represent the interest of the Class. Without the input of the court-appointed  
9 expert, Class Counsel cannot “prosecute the action vigorously on behalf of the class.”  
10 (*Staton v. Boeing Co.* (9<sup>th</sup> Cir. 2003) 327, F.3d 938, 957.) Therefore, fundamental due  
11 process requires the Class be decertified. (*In re American Medical Systems Inc.* (6<sup>th</sup> Cir.  
12 1996) 75 F.3d 1069, 1083; *Hansberry v. Lee* (1940) 311 U.S. 32, 41.)

13 “The ‘proper legal criterion’ for deciding whether to certify or decertify a class is  
14 simply whether the class meets the requirements for class certification.” (*Walsh v. IKON*  
15 *Office Solutions* (2007) 148 Cal.App.4<sup>th</sup> 1440, 1451.) In other words, if it appears that  
16 class counsel cannot adequately represent the Class going forward, the Court should  
17 consider a decertification request with the exact same standards on which it considers a  
18 certification request. Because the Class cannot proceed further without expert testimony  
19 regarding the Class’ water use, the element of adequacy is clearly lacking. Therefore, the  
20 Court should decertify the Class if such expert testimony is not authorized.

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23 <sup>5</sup> While the Court has expressed optimism about the prospect of settlement, it is  
24 simply not realistic given the history of failed settlement talks in this case, nor is it fair to  
25 use the ephemeral prospect of settlement as a justification to continue to keep class  
26 counsel in the untenable position of potential malpractice on the one hand, or the  
27 payment of substantial unrecoverable expert fees on the other hand. But in order to  
28 vigorously represent the interests of small pumpers at the settlement table, class counsel  
need to present a colorable self-help defense to show the likelihood that the prescription  
claim will be defeated. Similarly, in negotiating with other landowners regarding the  
division of overlying rights, class counsel have met with considerable trouble because the  
water use of the class is unknown. (McLachlan Decl., ¶ 10.)

1 **IV. CONCLUSION**

2 For the foregoing reasons, if the Court does not permit the court-appointed expert  
3 work to proceed and sets the next phase of trial, the Small Pumper Class should be  
4 decertified. In such case, mailed notice should be provided to the class members by the  
5 water suppliers (consistent with prior orders governing the initial class notice). Class  
6 counsel will submit the form of such notice for Court approval should the Court grant this  
7 Motion.

8  
9 DATED: June 13, 2012

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

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12 By: //s// Michael D. McLachlan

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