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11 Attorneys for the United States

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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF LOS ANGELES**

15	Coordination Proceeding)	Judicial Council Coordination
	Special Title (Rule 1550(b)))	Proceeding No. 4408
16	ANTELOPE VALLEY GROUNDWATER CASES)	
17	Included actions:)	[Assigned for all Purposes to the
)	Honorable Jack Komar]
18	<u>Los Angeles County Waterworks District No. 40 v.</u>)	FEDERAL DEFENDANTS'
	<u>Diamond Farming Co., et al.</u>)	RESPONSE TO RICHARD
19	Los Angeles County Superior Court, Case No. BC 325)	WOOD'S MOTION TO
20	201)	DECERTIFY SMALL PUMPER
)	CLASS
21	<u>Los Angeles County Waterworks District No. 40 v.</u>)	
	<u>Diamond Farming Co., et al.</u>)	
22	Kern County Superior Court, Case No. S-1500-CV-)	
	254-348)	
23	<u>Wm. Bolthouse Farms, Inc. v. City of Lancaster</u>)	
	<u>Diamond Farming Co. v. City of Lancaster</u>)	
24	<u>Diamond Farming Co. v. Palmdale Water District</u>)	
	Riverside County Superior Court, Consolidated Action,)	
25	Case nos. RIC 353 840, RIC 344 436, RIC 344 668)	
26	AND RELATED CROSS ACTIONS)	
27)	

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The United States respectfully submits this response in opposition to Richard Wood's

1 Motion to Decertify the Small Pumper Class (“Wood Mtn.”), filed June 13, 2012. Wood asks for
2 decertification arguing that due process is violated because class counsel cannot adequately
3 represent the interests of the Class absent a Court-appointed expert to assist the Class in
4 “establishing the self-help defense.” *Id.* at 6. The motion should be denied. The reasons cited
5 for decertification are not sufficient to warrant the loss of this class of potentially 3,800
6 groundwater pumpers.

7 First, as this Court has pointed out many times, a Court-appointed expert is “neutral and
8 objective, aligned with the court rather than with any party to the action.” *In re Marriage of*
9 *Lloyd*, 55 Cal.App.4th 216, 220 (Cal.App.1.Dist. 1997). Evidence Code § 730 authorizes the
10 Court to appoint an expert to investigate, report and testify on issues for which expert evidence is
11 required, but the expert is intended to assist the trier of fact rather than to advocate a position for
12 a party. *Lambert v. Carneghi*, 158 Cal.App.4th 1120, 1144 (Cal.App. 1 Dist. 2008).

13 Wood does not request a neutral expert. He asks for an expert to “gather evidence” and
14 “establish that the Class members were engaged in a ‘reasonable beneficial use.’” Wood Mtn. at
15 6 n.2. This is a partisan role and one not sanctioned by Evidence Code § 730. A Court-
16 appointed expert may assist the Court in examining the reasonableness of the Class’s claims to
17 beneficial use, or even independently determining the amount of water that can reasonably be
18 allocated to the Class, but the expert should not assist in establishing the Class’s case-in-chief or
19 its defense.^{1/}

20 Second, what class counsel claims is an inadequacy in representation due to a lack of
21 hired expertise is a problem that should be cured by class counsel, not the Court. “Class counsel
22 often pay, for example, expert witness fees and expenses.” Theodore Eisenberg, *Incentive*
23 *Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1350 (2006).
24 Alternatively, information on Class members’ reasonable groundwater use may derive from
25 inquiries to the Class itself. The Class bears the burden of establishing its reasonable use of

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27 ^{1/} The United States is not susceptible to costs for an expert, however, in light of the McCarran
28 Amendment’s express limitation on its waiver of sovereign immunity and express statement that
“no judgment for costs shall be entered against the United States in any [water rights adjudication]
suit.” 43 U.S.C. § 666(a).

1 groundwater and its members may and should provide evidence of their pumping and amount of
2 groundwater extraction. Wood has not shown that the Class members cannot establish their
3 reasonable beneficial use of groundwater other than by an expert witness.

4 Third, decertifying the class of small pumpers will leave up to 3,800 small pumpers non-
5 joined to this adjudication. As currently claimed or as estimated by various parties, this
6 represents roughly 5-10% of the pumping from the native safe yield of 82,300 acre-feet. The
7 McCarran Amendment, 43 U.S.C. § 666, requires that the adjudication be comprehensive and
8 include all of the rights to use water of the various owners in the Antelope Valley Groundwater
9 Basin. *See Dugan v Rank*, 372 U.S. 609, 618 (1963). If the Class is decertified, the former
10 members will have to be individually joined if this matter is to continue as a general
11 adjudication, and the Court maintain jurisdiction over the United States. Individual service will
12 be an unnecessarily expensive and time-consuming task that should be avoided.

13 In this case, it can be avoided. The Class members may, through discovery or informal
14 inquiry, provide the information necessary to form the basis to its claims to beneficial use. If an
15 expert is absolutely required, the Wood Class or its counsel should hire an expert. Alternatively,
16 the Court can appoint an expert to make an independent analysis of the Wood Class claims, but
17 not to represent or advocate for the Class.

18 Respectfully submitted this 26th day of June 2012.

19
20 /s/
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PROOF OF SERVICE

I, Amber Petrie, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environment and Natural Resources Section, 999 18th Street, South Terrace - Suite 370, Denver, Colorado 80202.

On June 26, 2012, I caused the foregoing document(s) described as: **FEDERAL DEFENDANTS' RESPONSE TO RICHARD WOOD'S MOTION TO DECERTIFY SMALL PUMPER CLASS** to be served on the parties via the following service:

☒

BY ELECTRONIC SERVICE AS FOLLOWS by posting the document(s) listed above to the Santa Clara website in regard to the Antelope Valley Groundwater matter.

☐

BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By placing true copies thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

☐

BY OVERNIGHT COURIER: I caused the above-referenced document(s) be delivered to FEDERAL EXPRESS for delivery to the above address(es).

Executed on June 26, 2012 at Denver, Colorado.

/s/ Amber Petrie
Amber Petrie
Legal Assistant