

Exhibit B

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16 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
17 **COUNTY OF LOS ANGELES**

18 Coordination Proceeding
19 Special Title (Rule 1550(b))

20 **ANTELOPE VALLEY GROUNDWATER**
21 **CASES**

22 **RICHARD A. WOOD**, an individual, on
23 behalf of himself and all others similarly
24 situated,

25 Plaintiff,

26 v.

27 **LOS ANGELES COUNTY**
28 **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**

1 TO THE COURT AND ALL INTERESTED PARTIES:

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

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

9
10 DATED: June 13, 2012

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

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

14 Michael D. McLachlan
15 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.¹

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.)

22
23 ¹ 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.4th 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.² (*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.³

22
23 ² 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.)

27 ³ Conceptually, the burden rests with the Public Water Purveyors to establish
28 prescriptive rights in an overdrawn basin: "[p]roper overlying use . . . is paramount, and
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.⁴ 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 ⁴This 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.4th 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.4th at 944, n.3, quoting *State v. Homeside Lending,*
16 *Inc.* (Vt. 2003) 826 A.2d 997, 1017; *Gonzales v. Cassidy* (5th 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* (7th 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,⁵ 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.* (9th Cir. 2003) 327, F.3d 938, 957.) Therefore, fundamental due
11 process requires the Class be decertified. (*In re American Medical Systems Inc.* (6th 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.4th 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 ⁵ 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

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