

Exhibit 6

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GOVERNMENT CODE SECTION 6103

Attorneys for the United States

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550(b)))	Judicial Council Coordination Proceeding No. 4408
ANTELOPE VALLEY GROUNDWATER CASES)	[Assigned for all Purposes to the Honorable Jack Komar]
Included actions:)	FEDERAL DEFENDANTS'
<u>Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., et al.</u>)	RESPONSE TO PEREMPTORY
Los Angeles County Superior Court, Case No. BC 325 201)	CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6)
<u>Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., et al.</u>)	
Kern County Superior Court, Case No. S-1500-CV- 254-348)	
<u>Wm. Bolthouse Farms, Inc. v. City of Lancaster</u>)	
<u>Diamond Farming Co. v. City of Lancaster</u>)	
<u>Diamond Farming Co. v. Palmdale Water District</u>)	
Riverside County Superior Court, Consolidated Action, Case nos. RIC 353 840, RIC 344 436, RIC 344 668)	
AND RELATED CROSS ACTIONS)	

FEDERAL DEFENDANTS' RESPONSE TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6)

1 The United States respectfully submits this response to the motion for peremptory
2 challenge to presiding Honorable Judge Jack Komar filed by certain landowner parties in the
3 above captioned cases. *See Peremptory Challenge to Assigned Judge (C.C.P. § 170.6)*
4 (hereinafter the “*Chall. Mtn.*”), filed October 13, 2009. The movants allege that Judge Komar’s
5 consolidation of these complex, coordinated actions provides the opportunity to exercise a
6 peremptory challenge under California Civil Procedure Code § 170.6.

7 The movants’ argument is not persuasive. A peremptory challenge must be timely; in a
8 coordinated case a § 170.6 challenge to the assigned judge must be made within 20 days after
9 service of the coordination order and, in any case, before the judge has determined contested fact
10 issues relating to the merits of the case. Here, the challenge comes over four years after the
11 cases were coordinated and well after the judge has heard and made substantive rulings on
12 factual issues related to the merits. Consolidation of the coordinated cases in this matter does
13 not reset the clock for peremptory challenge. While consolidation does allow the judge to issue
14 one final decree that will be binding on all parties, the relief sought - a declaration on the rights
15 to use groundwater in the Antelope Valley basin - has not changed. Accordingly, the
16 peremptory challenge must be stricken.

17 **1. Background.**

18 By Order dated July 11, 2005, the above captioned cases were ordered coordinated. By
19 Order dated August 31, 2005, the Chair of the Judicial Council, Chief Justice Ronald George of
20 the California Supreme Court confirmed the coordination of these actions pursuant to Cal. Civ.
21 Proc. Code § 404 *et seq.* Notice of Judge Komar’s assignment to the coordinated cases was
22 given on September 2, 2005. Cross-complaints were filed in the cases, and subsequently the two
23 class action complaints were added on to the coordinated action. In the instant case,
24 coordination was deemed appropriate because each case shares the need to define the relative
25 rights to ground water in the Antelope Valley Aquifer.

26 Following coordination, Judge Komar held three days of trial in October, 2006, taking
27 factual evidence from half a dozen witnesses and dozens of exhibits. This Phase I trial resulted
28

1 in Court findings and rulings that defined the jurisdictional boundaries of the aquifer to be
2 adjudicated, thus defining the geographical scope of the relative rights to be determined. *See*
3 Order After Hearing on Jurisdictional Boundaries, dated November 3, 2006. In October and
4 November, 2008, a second phase of trial was held before Judge Komar. Over a week of
5 testimony was taken, and extensive factual evidence developed. On November 6, 2008, the
6 Court entered its findings and Order regarding hydraulic connectivity. *See* Order After Phase
7 Two Trial on Hydrologic Nature of Antelope Valley, dated November 6, 2008. Both Phase I and
8 II of trial determined contested factual issues that relate to the merits of the ultimate issue
9 common to all of the parties - that of the relative rights to withdraw water from the Antelope
10 Valley Aquifer.

11 By Order entered on October 13, 2009, the Court has ordered that these coordinated
12 cases, including the two add-on class actions, be consolidated, at least to the extent of the
13 common issues related to the determination of the relative rights to withdraw ground water of all
14 of the parties. The extent or limitations on the consolidation are to be determined pursuant to the
15 parties obligation to meet and confer in order to propose a consolidation order, and at the hearing
16 currently scheduled for January 8, 2010.

17 **2. The Landowners' Peremptory Challenge Must Be Stricken Because It Is Untimely.**

18 **A. The Landowners' challenge is untimely because it was filed beyond the 20**
19 **day limit provided for in Rule 3.516.**

20 Pursuant to Cal. Civ. Proc. Code § 170.6, parties in civil and criminal actions may
21 disqualify an assigned judge without a showing of good cause on the basis of an affidavit
22 asserting that the party believes the judge is prejudiced or biased. *See Solberg v. Superior Court*,
23 19 Cal. 3d 182, 197-98, 561 P.2d 1148, 1157-58 (1977). Section 170.6 is to be liberally
24 construed, and if in proper form and timely filed, it must be accepted without further inquiry.
25 *Davcon, Inc. v. Roberts and Morgan*, 110 Cal. App. 4th 1355, 1359, 2 Cal. Rptr. 3d 782, 786
26 (2003). If the peremptory challenge motion is timely and in the proper form, a new judge must
27 be assigned "to try the cause or hear the matter." *Peracchi v. Superior Court*, 30 Cal.4th 1245,
28 1252, 135 Cal. Rptr.2d 639, 644 (2003).

1 However, a § 170.6 challenge to the assigned judge in a coordination proceeding is
2 limited. Cal. Rules of Court, Rule 3.516 provides that:

3 A party making a peremptory challenge by motion or affidavit of prejudice
4 regarding an assigned judge must submit it in writing to the assigned judge within
5 20 days after service of the order assigning the judge to the coordination
6 proceeding.

7 This case was coordinated and assigned to presiding Judge Komar by order of the
8 Judicial Counsel, on September 2, 2005. Thus, the movants' October 13, 2009 peremptory
9 challenge is 1502 days past due.

10 While not clear in their motion to disqualify Judge Komar, the movants appear to argue
11 that because the coordinated cases were subsequently consolidated by order of the Court on
12 October 13, 2009, they "unwillingly" became parties to cases in which they have not been
13 named. *Chall. Mtn.* at 1. Specifically, they claim that the class actions filed by non-pumping
14 overlying landowners (the Willis Class) and by small pumpers (the Wood Class) involve
15 separate causes of action. *Id.* As such, they apparently argue that the opportunity to assert a §
16 170.6 challenge is now available.^{1/}

17 The movants are mistaken. Rule 3.516 "exclude[s] add-on parties from the right to
18 peremptorily challenge the coordination trial judge." *Industrial Indemnity Co. v. Superior Court*,
19 214 Cal.App.3d 259, 263, 262 Cal.Rptr. 544, 546 (1989). In *Industrial Indemnity*, the presiding
20 judge to a coordinated action struck peremptory challenges as untimely. Section 170.6 motions
21 were filed immediately after eight separate actions were added on to the coordinated case, but
22 over two years after the case was assigned a coordination trial judge and after several of the
23 complaints had gone to judgment. The appellate court held that add-on parties who came into a
24 coordination proceeding long after the coordination judge was assigned could not exercise a

24 ^{1/} Even accounting for the addition of the class action complaints, the motion is untimely. The
25 Willis Class' Second Amended Class Action Complaint was posted on May 6, 2008. *See Order*
26 *Granting Plaintiff Rebecca Willis Leave to File Second Amended Class Action Complaint* [nunc pro
27 tunc], dated May 21, 2009. The Wood Class' First Amended Class Action Complaint was added
28 on June 20, 2008. Based on either the original coordination order or the class actions added to the
coordination proceeding, the movants have not brought their peremptory challenge within the 20
days deadline prescribed by law.

1 section 170.6 peremptory challenge. The court reasoned that when the Judicial Counsel adopted
2 Rule 3.516

3 [t]he council could well have concluded that add-on cases were peculiarly subject
4 to abuse of the peremptory challenge since the coordination trial judge may, as in
5 this case, have participated in the case for years and the nature and the extent of
6 his rulings could be well known. This presents an unusual opportunity to
7 challenge for reasons unrelated to bias or prejudice. It also presents the possibility
8 that by use of the challenge, the add-on party can effectively thwart the add-on
9 procedure and prevent the benefits the Legislature sought to achieve by the
10 add-on process.

11 214 Cal.App.3d at 264.^{2/}

12 The rationale for barring peremptory challenges to the coordination judge by add-on
13 parties applies equally to peremptory challenges by parties once a coordinated case has been
14 consolidated. Complex cases may be coordinated and additional cases added if common
15 questions of law or fact are predominating or significant to the litigation. Cal. Civ. Proc. Code §
16 404.1; Cal. Rules of Court, Rule 3.544. Similarly, cases may be consolidated if they involve a
17 common question of law or fact. Cal. Civ. Proc. Code § 1048(a) (2009). As a result, both
18 adding cases and consolidating actions allow one judge in a coordinated proceeding to hear all
19 the actions for all the purposes relating to common questions of fact or law.^{3/} Movants' attempt
20 to thwart the consolidation procedure, therefore, is no different than an attempt to thwart the add-
21 on procedure which was rejected in *Industrial Indemnity*. Both are inimical to an efficient
22 utilization of judicial resources in this coordinated proceeding.^{4/}

23 ^{2/} *Industrial Indemnity* addressed Rule 1515 which was subsequently renumbered Rule 3.516,
24 effective January 1, 2007.

25 ^{3/} Consolidation provides the additional benefit of a final, single decree binding on all parties
26 and potentially satisfying the McCarran Amendment's requirement of comprehensively adjudicating
27 all rights to water in the Antelope Valley basin.

28 ^{4/} Starting over with a new judge after five years of litigation would raise efficiency concerns
in any proceeding, but is a particular concern in a complex, coordinated action. A chief reason for
coordination is "the efficient utilization of judicial facilities and manpower." Cal. Civ. Proc. Code
§ 404.1. In a coordination proceeding such as this one, where the Court has a significant interest
in not losing a presiding judge who has almost five years of experience in the case, the movants
untimely motion would certainly contravene the coordination proceeding goals. *Compare Jane Doe*
8015 v. Superior Court, 148 Cal.App.4th 489, 498, 55 Cal.Rptr.3d 708, 714 (2007) (rejecting

1 Moreover, in the instant case we are not even dealing with what might be considered an
2 “add-on” proceeding, or new parties, as was the case in *Industrial Indemnity*.^{5/} The nature and
3 the extent of Judge Komar’s rulings on substantive issues of law and fact are well known.
4 Indeed, the moving parties were parties to and active in the prior Phase I and II trials before this
5 Court. With respect to the class actions, the moving parties were party to, and participated in
6 hearings related to the notice to the class actions. They can hardly be considered strangers to the
7 proceeding, even if not technically joined.^{6/}

8 **B. A peremptory challenge is untimely because the Court has decided factual**
9 **issues related to the merits of the issues common to the coordinated and**
10 **consolidated Actions.**

11 Even if movants had filed their § 170.6 motion within 20 days after service of the order
12 assigning the Judge to the coordination proceeding (as required by Rule 3.516), their peremptory
13 challenge must be denied because earlier hearings in these proceedings involved determinations
14 of contested factual issues relating to the merits.

15 Where a judge has presided over hearings or trial that involved determinations of

16 _____ arguments against a peremptory challenge and noting that Petitioner’s “complaints about ‘delay and
17 disruption’ would be well taken if this were a complex case involving numerous coordinated actions
18 with difficult or disparate issues; but that hypothetical situation is not presented here.”)

19 ^{5/} Movants cite *Nissan Motor Corp. v. Superior Court* 6 Cal.App.4th 150 (1992), in support
20 of their challenge. The *Nissan* court held that where separate cases are consolidated, the parties in
21 the consolidated cases retain the right to timely challenge the assigned judge. The case is easily
22 distinguishable from the present case because in *Nissan*

23 [t]he three cases arise out of different injuries and damages, occurring in automobile
24 accidents involving different vehicles at different times and places, and under
25 different fact patterns. They are thus three separate and distinct cases, entitled to
26 separate challenges under Section 170.6.

27 *Id.* at p 155. In contrast, the Antelope Valley Groundwater Adjudication involves common
28 questions of law and fact. Moreover, the defendant in *Nissan* successfully challenged the assigned
judge only to the two new cases over which he had not presided. In the original action, in which the
judge had rendered pretrial rulings on the merits, no peremptory challenge was brought.

29 ^{6/} Judge Komar has ordered the parties to meet and confer as to the form of the consolidation
order and instructed the parties that the form of order include the causes of action common to all
parties. Thus, even assuming *arguendo* the motion was timely, it is entirely premature to argue, as
plaintiffs do, that the consolidated action will involve separate causes of action unrelated to the
predominating issues of fact and law.

1 contested facts related to the merits, a subsequent peremptory challenge motion is precluded as
2 untimely. *Stephens v. Superior Court*, 96 Cal. App. 4th 54, 59, 116 Cal. Rptr. 2d 616, 620-21
3 (2002). In *Stephens*, it was argued that a late-appearing party could exercise a peremptory
4 challenge within 10 days of appearing, regardless of whether the judge had previously
5 determined contested fact issues in the case. The Appellate Court rejected this position, holding
6 that a late appearing party is precluded from peremptory challenge under section 170.6 if the
7 judge had “determined a contested fact issue relating to the merits and the party appears *in the*
8 *proceeding in which the judge made the determination or a subsequent proceeding that is a*
9 *continuation of the proceeding in which the judge made the determination.*” *Stephens* at 61.
10 (emphasis in original).

11 This exception under which a peremptory challenge is precluded strikes a balance
12 between ensuring a fair and impartial court and discouraging “judge shopping.” *Id.* at 60. The
13 Court in *Stephens* reasoned that

14 Once a case has progressed to the point where an assigned judge has presided over trial
15 or any other proceedings involving the determination of contested fact issues relating to
16 the merits, the policy of avoiding possible judicial bias by allowing a party to remove a
17 judge without having to establish the judge’s prejudice to the satisfaction of a judicial
18 body must yield to the policy against judge shopping-i.e., removing an assigned judge
19 from a case for reasons other than a good faith belief the judge is prejudiced.

20 *Stephens* at 60. Thus, once a judge has tried a portion of the case, and is ordinarily in the best
21 position to pass on the questions involved, mere unsupported allegations of unfairness are
22 insufficient.

23 In the instant case, the proceedings have clearly progressed beyond the point where the
24 judge has presided over the determination of contested fact issues relating to the merits. This
25 Court has taken significant evidence, and determined contested issues of fact that relate to the
26 merits of the determination and adjudication of relative rights to withdraw ground water from the
27 Antelope Valley Aquifer. The two trial segments in the coordinated proceedings, and the
28 determination of facts material to the common issues that bind these proceedings stand as a bar
to the timeliness of any peremptory challenge to the presiding judge. *Id.* at 63.

The public policy grounds for barring such challenge in the instant case is neatly

1 summarized by the California Supreme Court:

2 It would mean that the judge who tried the case, and who is ordinarily in the best position
3 to pass upon the questions involved, could by a mere general allegation of prejudice, and
4 without any judicial determination of the facts, be disqualified. . . . Such procedure would
5 make it possible for litigants to gamble on obtaining a favorable decision from one judge,
and then, if confronted with an adverse judgment, allow them to disqualify him . . . in the
hope of securing a different ruling from another judge in supplementary proceedings
involving substantially the same issues.

6 *Jacobs v Superior Court*, 53 Cal.2d 187, 190, 1 Cal.Rptr. 9, 10 (1959). This public policy
7 against judge-shopping also prevents prejudice to the parties. In the instant case, parties who
8 have already spent numerous years and abundant resources advancing this case would be
9 prejudiced if they were forced to relitigate matters already determined. Accordingly, a
10 peremptory challenge to the presiding Judge in this matter at this point in the proceedings is
11 unavailable.

12 **CONCLUSION**

13 Wherefore, for the reasons set forth herein, the peremptory challenge to the assigned
14 Judge is untimely and should be stricken.

15 Respectfully submitted this 19th day of October, 2009.

16
17 JOHN C. CRUDEN
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19 _____ /s/
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PROOF OF SERVICE

I, Linda Shumard, 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, Environmental and Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

On October 19, 2009, I caused the foregoing documents described as; **FEDERAL DEFENDANTS' RESPONSE TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6)** , to be served on the parties via the following service:

BY ELECTRONIC SERVICE AS FOLLOWS by posting the documents(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 October 19, 2009, at Denver, Colorado.

/s/ Linda Shumard
Linda Shumard
Legal Support Assistant

Exhibit 7

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EXEMPT FROM FILING FEES
UNDER GOVERNMENT CODE
SECTION 6103

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER
CASES
Included Actions:
Los Angeles County Waterworks District No.
40 v. Diamond Farming Co., Superior Court of
California, County of Los Angeles, Case No.
BC 325201;
Los Angeles County Waterworks District No.
40 v. Diamond Farming Co., Superior Court of
California, County of Kern, Case No. S-1500-
CV-254-348;
Wm. Bolthouse Farms, Inc. v. City of
Lancaster, Diamond Farming Co. v. City of
Lancaster, Diamond Farming Co. v. Palmdale
Water Dist., Superior Court of California,
County of Riverside, Case Nos. RIC 353 840,
RIC 344 436, RIC 344 668

RELATED CASE TO JUDICIAL
COUNCIL COORDINATION
PROCEEDING NO. 4408

LOS ANGELES COUNTY
WATERWORKS DISTRICT NO. 40
AND ROSAMOND COMMUNITY
SERVICES DISTRICT'S JOINDER IN
OPPOSITION TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE

[Code of Civil Procedure § 170.6]


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Los Angeles County Waterworks District No. 40 and the Rosamond Community Services District hereby join in the Opposition filed by Littlerock Creek Irrigation District, Palm Ranch Irrigation District, North Edwards Water District, Desert Lakes Community Services District, Llano Del-Rio Water Co., Llano Mutual Water Co., Big Rock Mutual Water Co., Little Baldy Water Co., Palmdale Water District, and City of Palmdale to the peremptory challenged to Judge Komar filed by certain landowner parties. The peremptory challenge is untimely and should be rejected.

Dated: October 20, 2009

Respectfully submitted,
BEST BEST & KRIEGER LLP

By 
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PROOF OF SERVICE

I, Kerry V. Keefe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 5 Park Plaza, Suite 1500, Irvine, California 92614. On October 20, 2009, I served the within document(s):

LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40 AND ROSAMOND COMMUNITY SEVICES DISTRICT'S JOINDER IN OPPOSITION TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE

- by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.
- by causing personal delivery by ASAP Corporate Services of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by Federal Express following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 20, 2009, at Irvine, California.


Kerry V. Keefe

Exhibit 8

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21 1989, Del Sur Ranch, LLC, Healy Enterprises, Inc., John and Adrienne Reca, Sahara Nursery, Sal
22 and Connie L. Cardile, Gene T. Bahlman, collectively known as the Antelope Valley Ground
23 Water Agreement Association ("AGWA")

24 [See Next Page For Additional Counsel]

25 SUPERIOR COURT OF THE STATE OF CALIFORNIA
26 FOR THE COUNTY OF SANTA CLARA

27 ANTELOPE VALLEY)
28 GROUNDWATER CASES)
29 Included Actions:)
30 Los Angeles County Waterworks District No.)
31 40 v. Diamond Farming Co. Superior Court of)
32 California County of Los Angeles, Case No. BC)
33 325 201 Los Angeles County Waterworks)
34 District No. 40 v. Diamond Farming Co.)
35 Superior Court of California, County of Kern,)
36 Case No. S-1500-CV-254-348Wm. Bolthouse)
37 Farms, Inc. v. City of Lancaster Diamond)
38 Farming Co. v. City of Lancaster Diamond)
39 Farming Co. v. Palmdale Water Dist. Superior)
40 Court of California, County of Riverside,)
41 consolidated actions, Case No. RIC 353 840,)
42 RIC 344 436, RIC 344 668)

Judicial Council Coordination Proceeding
No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

CROSS-DEFENDANTS' REPLY TO
OPPOSITIONS TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE
(C.C.P. § 170.6)

Date: October 27, 2009
Time: 9:00 AM
Dept.: 17C

REPLY TO OPPOSITIONS TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (C.C.P. § 170.6)

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27 FARMS, a limited liability company, GRIMMWAY
28 Enterprises, Inc., and LAPIS LAND COMPANY, LLC.

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1 Cross-Defendants Antelope Valley Groundwater Agreement Association (“AGWA”),
2 Service Rock Products Corporation, Sheep Creek Water Company, the Antelope Valley United
3 Mutual Group, U.S. Borax, Inc., Bolthouse Properties, Inc., Wm. Bolthouse Farms, Inc., Diamond
4 Farming Company, Crystal Organic Farms, Grimmway Enterprises, Inc., and Lapis Land Company,
5 LLC (collectively, “Cross-Defendants”) submit this *Reply to Oppositions to Peremptory Challenge*
6 *to Assigned Judge*.¹

7 **I. INTRODUCTION**

8 The only question presented for this hearing is whether the Cross-Defendants’ motion for
9 disqualification is timely – it is. Section 170.6 *guarantees* a litigant an extraordinary right to
10 disqualify a judge. This right has been held to be a “substantial right” and is an “important part of
11 California’s system of due process that promotes fair and impartial trials and confidence in the
12 judiciary.” (*Stephens v. Superior Court* (2002) 96 Cal. App. 4th 54, 61-62 (citations omitted).) The
13 oppositions that have been filed wish to deprive the moving parties of their guaranteed right. Given
14 the oppositions’ inability to point to any applicable law, however, their extraordinary request –
15 where fundamental due process concerns are implicated – must be denied.

16 Simply stated, a party to any consolidated case may exercise its right to peremptorily
17 challenge a judge under *Code of Civil Procedure* section 170.6 when actions are consolidated,
18 notwithstanding that the party had previously acquiesced to that judge in one of the consolidated
19 cases.

20
21 ¹ At the October 13, 2009 hearing, Judge Komar set a hearing on the 170.6 Challenge for October
22 27, 2009. (October 13, 2009 Minute Order, at 4.) He ordered any oppositions to be filed by October
23 19, 2009 and any replies to such oppositions to be filed by October 22, 2009. On October 19, 2009,
24 counsel for Littlerock Creek Irrigation District, Palm Ranch Irrigation District, North Edwards Water
25 District, Desert Lakes Community Services District, Llano Del-Rio Water Co., Llano Mutual Water
26 Co., Big Rock Mutual Water Co., Little Baldy Water Co., Palmdale Water District, and the City of
27 Palmdale jointly filed their *Opposition to Peremptory Challenge to Assigned Judge*, claiming that
28 Cross-Defendants’ Peremptory Challenge is untimely. On October 19, 2009, the City of Los
Angeles filed its *Joinder in Opposition to Peremptory Challenge to Assigned Judge*. Cross-
Complainant Phelan Piñon Hills Community Services District filed its *Opposition to Preliminary
Challenge (170.6)*, and the United States filed its *Federal Defendants’ Response to Peremptory
Challenge to Assigned Judge (170.6)*, on October 19, 2009, claiming Cross-Defendants’ 170.6
Challenge to be untimely. The oppositions of the Public Water Suppliers, City of Los Angeles,
Phelan Piñon Hills Community Services District and the United States are hereafter collectively
referred to as the “Oppositions.”

1 Prior to the Court's ruling granting the *Motion by the Public Water Suppliers to Transfer and*
2 *to Consolidate Cases for All Purposes All Matters Presently Pending under Judicial Council*
3 *Proceeding No. 4408 from the Superior Courts of Riverside County, Los Angeles County and Kern*
4 *County, Specifically Assigned to the Honorable Jack Komar* (the "Order to Transfer and
5 Consolidate"),² Cross-Defendants were not parties to either *Willis v. Los Angeles County*
6 *Waterworks District No. 40*, LASC Case No. BC 364 553 (the "Willis Class Action") or *Wood v.*
7 *Los Angeles County Waterworks District No. 40*, LASC Case No. BC 391 869 (the "Wood Class
8 Action"). When the Court issued its *Order to Transfer and Consolidate*, Cross-Defendants'
9 peremptory challenge was timely filed.

10 As discussed below, the law that applies in such circumstances is unanimous—in two
11 successive actions, a party does not waive its right to disqualify a judge in the later action by failing
12 to so move in the earlier action. When the Court granted the Purveyors' *Motion to Transfer and*
13 *Consolidate for All Purposes*, a right to exercise a 170.6 peremptory challenge arose for Cross-
14 Defendants. Because Cross-Defendants filed their 170.6 Challenge, pursuant to *Code of Civil*
15 *Procedure* section 170.6 (the "170.6 Challenge") immediately upon the Court's issuance of its
16 *Order to Transfer and Consolidate* and in conformity with the form set forth in section 170.6(a)(5),
17 Cross-Defendants' peremptory challenge was timely and proper.

18 **II. THE 170.6 CHALLENGE**

19 Despite significant opposition from many parties including Cross-Defendants, on October 13,
20 2009, the Court issued its Order to Transfer and Consolidate; which, among other things, had the
21 effect of making Cross-Defendants unwilling parties to the Willis Class Action and the Wood Class
22 Action in which they had not been named. The Court also set a further hearing for January 8, 2010
23 to consider the form of the Order to Transfer and Consolidate (October 13, 2009 Minute Order, p. 2)
24 and the specific conditions under which the consolidation is to occur (Reporter's Transcript of
25 Proceedings, October 13, 2009, p. 42:21-23.) The hearing date was chosen specifically in order to
26 allow both classes to finalize a settlement with the Purveyors and the United States so that the

27 _____
28 ² See, October 13, 2009 Minute Order, p. 2.

1 conditions of consolidation could be considered in tandem with the class settlement. (Reporter's
2 Transcript of Proceedings, October 13, 2009, 15:14-16:20, 30:27-31:1.) The settlement with the
3 classes is inexorably tied³ to the consolidation, and it is the clear intention of the Purveyors and the
4 Classes that when consolidation of the class actions with the adjudication is completed, the Classes
5 will come in to the action with a finalized settlement. The Court facilitated this intention by
6 specifically scheduling the settlement approval hearings on the same day as the hearing to consider
7 the terms of consolidation. (Reporter's Transcript of Proceedings, October 13, 2009, pp. 34:15-21,
8 42:21-23.)

9 Immediately after the Court's issuance of the Order to Transfer and Consolidate, Cross-
10 Defendants filed the 170.6 Challenge, which contained their good-faith assertion that Judge Komar
11 is prejudiced against the Cross-Defendants, or the interests of the Cross-Defendants, such that in the
12 newly consolidated action Cross- Defendants cannot have a fair or impartial trial or hearing before
13 him.

14 **III. THE COURT MAY EVALUATE ONLY THE TIMELINESS AND TECHNICAL**
15 **SUFFICIENCY OF THE 170.6 CHALLENGE**

16 Review of Cross-Defendants' 170.6 Challenge is limited to its timeliness and technical
17 sufficiency. If a section 170.6 challenge is timely and in proper form, immediate disqualification is
18 mandatory. (*Grant v. Superior Court* (6th Dist. 2001) 90 Cal. App. 4th 518; *Barrett v. Superior*
19 *Court* (3d Dist. 1999) 77 Cal. App. 4th 1.) "Accordingly, if a party or attorney makes a proper,
20 timely challenge under this statute, disqualification is instantaneous and irrevocable; the judge has
21 no discretion to reject it, inquire about the party's motives, or require a showing of prejudice." (*Id.*;
22 see also *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1359-1360; *Peracchi v.*
23 *Superior Court* (2003) 30 Cal.4th 1245, 1249, 1251.)

24 Once it is properly exercised, a party's section 170.6 peremptory challenge terminates the

25 ³ The settlement process was prompted by the Court and the Court facilitated the use of a settlement
26 judge (Justice Robie). (Reporter's Transcript of Proceedings, April 24, 2009, pp. 19:14-20:4, 69:7-
27 28; see also Reporter's Transcript of Proceedings, July 24, 2009 pp. 36:15-39:25.) Cross-Defendants
28 were excluded from the settlement process at the direction of the Court. (See Reporter's Transcript
of Proceedings, July 24, 2009, pp. 36:18-23-37:15.) At this date Cross-Defendants still have been
provided no information about the nature of the "finalized" settlement.

1 judge's authority to act in any manner in the case, other than to transfer the case to another judge. (*In*
2 *re Jenkins* (2d Dist. 1999) 70 Cal. App. 4th 1162). The challenged trial court judge has jurisdiction
3 solely to "inquire into the timeliness of the affidavit or its technical sufficiency under the statute."
4 (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531-32 (citing to
5 *Andrews v. Joint Clerks, etc., Committee* (1966) 239 Cal.App.2d 285, 293-299 (upholding court's
6 power to inquire as to timeliness), and *Lewis v. Linn* (1962) 209 Cal.App.2d 394, 399-400
7 (upholding court's power to inquire into technical sufficiency of the affidavit).⁴ If either another
8 party or the court itself objects to the timeliness or propriety of the motion, the challenged judge
9 must conduct a hearing. (*Andrews*, 239 Cal.App.2d at 294; see also *Shipp v. Superior Court* (1992)
10 5 Cal.App.4th 147.) Therefore, the review and hearing on Cross-Defendants' 170.6 Challenge is
11 limited to a determination as to its timeliness and technical sufficiency.

12 **IV. CROSS-DEFENDANTS' 170.6 CHALLENGE IS TIMELY AND IN PROPER FORM**

13 **A. The 170.6 Challenge is Timely and Technically Sufficient**

14 A peremptory challenge is timely if made "... within 10 days after notice of the all purpose
15 assignment," and applies upon consolidation. (*Code of Civil Procedure*, section 170.6(a)(2); *Nissan*
16 *Motor Corp. v. Superior Court* (1992) 6 Cal. App. 4th 150, 154-55.) The substantial form of the
17 peremptory challenge is set forth at *Code of Civil Procedure*, section 170.6(a)(5). In this case,
18 immediately after the Court's issuance of the Order to Transfer and Consolidate, Cross-Defendants
19 filed their 170.6 Challenge, which contained their good-faith assertion that Judge Komar is
20 prejudiced against the Cross-Defendants, or the interests of the Cross-Defendants, such that in the
21 newly consolidated action Cross- Defendants cannot have a fair or impartial trial or hearing before
22 him. "Immediate" is certainly within such period and the 170.6 Challenge is fully in compliance
23 with the substantial form set forth in subsection (a)(5) of the peremptory challenge statute.

24 None of the Oppositions challenge the form of the 170.6 Challenge or that it was filed within
25 ten (10) days after the issuance of the *Order to Transfer and Consolidate*. Rather, the Oppositions

26 ⁴ Following the filing of the 170.6 challenge the Court issued two Minute Orders on issues unrelated
27 to the 170.6 challenge. (See Minute Orders dated October 15, 2009 and October 16, 2009.)
28 Depending on the determination regarding the 170.6 challenge, the validity of these Minute Orders is
subject to challenge.

1 only challenge the ability of the Cross-Defendants to exercise their rights to peremptorily challenge
2 Judge Komar because they had previously acquiesced to him in the coordinated cases.

3 **B. Consolidation Provides a New Right to a Peremptory Challenge**

4 A party to any consolidated case may exercise its right to challenge the assigned judge under
5 Code of Civil Procedure section 170.6, notwithstanding that the party previously acquiesced to the
6 judge's assignment in one of the consolidated cases. (CAL. CIV. CTM. HBOOK. & DESKTOP
7 REF. § 14:50 (2009 ed.), citing *Nissan Motor Corp. v. Superior Court* (1992) 6 Cal. App. 4th 150,
8 155; *Philip Morris Inc. v. Superior Court* (1999) 71 Cal. App. 4th 116, 123.) Here, just as the
9 defendant did in *Nissan*, Cross-Defendants properly moved to disqualify Judge Komar pursuant to
10 section 170.6, by timely filing their 170.6 Challenge immediately following the Court's *Order to*
11 *Transfer and Consolidate*. (Reporter's Transcript of Proceedings, October 13, 2009, pp. 39:25-
12 40:28.) The substantial form of the peremptory challenge is set forth at *Code of Civil Procedure*,
13 section 170.6(a)(5), which was followed by the Cross-Defendants.

14 The Oppositions misinterpret *Nissan* and its application to this case. The *Nissan* court held
15 where separate cases are consolidated, the parties in each of the consolidated cases retain their rights
16 to timely challenge the assigned judge upon consolidation.

17
18 A party's acquiescence of a judge to hear one action does not impair
19 his or her right to exercise a challenge to prevent that judge from
20 hearing another matter, even if that matter raises issues closely related
21 to those in the first action." (*Id.* at 155 [citations omitted].)

22 In arguing its inapplicability, the Oppositions incorrectly frame the Court's decision in
23 *Nissan*, positing that it turned on the fact that the uncommon parties to three consolidated cases had
24 not previously had the ability to challenge the judge assigned to the consolidated action. (See, e.g.,
25 *Littlerock Creek, et al. Opposition to Peremptory Challenge to Assigned Judge (CCP 170.6)*, filed
26 October 19, 2009, p. 6:13-14 ["The important component of this decision was the fact that Judge
27 Ross had never before presided over the two new cases."] and *Phelan Piñon Hills Community*
28 *Services District's Opposition to Preliminary Challenge (170.6)*, filed October 19, 2009, p. 5:9-13

1 ["*Nissan* is distinguishable because in this case, all parties were before Judge Komar prior to
2 consolidation, and the act of consolidation did not impose a new judge upon any of the defendants
3 who now challenge Judge Komar."].)

4 However, in *Nissan*, the peremptory challenge was exercised by Nissan – the common
5 defendant in the three consolidated cases. Nissan was a party to the case overseen by the judge
6 assigned to the consolidated action. (6 Cal.App.4th at 154-55.) Contrary to the characterization
7 framed by the oppositions, the appellate court's decision was not based on the imposition of a new
8 judge because no new judge was being imposed on the party exercising the 170.6 challenge. The
9 appellate court's decision was instead based on the consolidation's creation of a newly configured
10 case – precisely the situation here.

11 It should be noted that in *Nissan*, the party exercising the 170.6 challenge was a party to all
12 three consolidated cases and had therefore previously been afforded an opportunity to exercise a
13 170.6 challenge to any of the judges in any of the three cases. In the Antelope Valley cases, Cross-
14 Defendants were never parties to the two class action cases and thus never had the opportunity to
15 exercise a 170.6 Challenge in those cases. Thus, the 170.6 Challenge rights that the appellate court
16 afforded to Nissan are more duplicative than those 170.7 Challenge rights exercised by Cross-
17 Defendants.

18 The *Nissan* court explained that section 170.6 must be construed to mean that in two
19 successive actions a party may move to disqualify in each, or may disqualify in the later action
20 without waiving that right by failing to so move in the earlier action. (6 Cal.App.4th at 154-155.)
21 Similarly here, Cross-Defendants were party to separate actions before Judge Komar, when
22 consolidation created a later action, as to which Cross-Defendants immediately exercised their rights
23 to a section 170.6 challenge. This challenge was properly and timely filed under the rule set forth in
24 *Nissan*.

25 That Cross-Defendants had not challenged Judge Komar's assignment in any prior action
26 does not render the 170.6 Challenge untimely for purposes of the newly consolidated cases.
27 Consolidation provides a second chance at exercising the statutory right to challenge a judge by

1 alleging bias. (WEIL & BROWN, CIVIL PROCEDURE BEFORE TRIAL, § 12:369 (2009) (citing
2 to *Nissan*.) Furthermore, as stated in *Nissan*, section 170.6 ““should be liberally construed with a
3 view to effect its objects and to promote justice.”” (6 Cal.App.4th at 154.) Cross-Defendants should
4 not be deprived of their guaranteed right to exercise a peremptory challenge in the consolidated
5 cases. “Assigning the same judge to hear a series of complex actions, such as these where there
6 exists subject matter overlap, may promote judicial efficiency. However, judicial efficiency is not to
7 be fostered at the expense of a litigant's rights under section 170.6 to peremptorily challenge a
8 judge.” (*Nissan*, 6 Cal.App.4th at 155.)

9 **C. The Consolidated Case and the Previous Cases Are Not Continuous**

10 The ability of a party to exercise a 170.6 Peremptory Challenge upon the consolidation of
11 cases is based on a recognition that consolidation alters the nature of the actions, essentially creating
12 a new case. Consolidation of the diverse actions involved in Judicial Council Coordination
13 Proceeding 4408, especially though not exclusively with reference to the two class actions, changes
14 the alignment of the parties so fundamentally that the cases cannot be considered continuous.

15 An example of the way in which consolidation changes the nature of the case can be seen in
16 the sequence of class certification and the Phase I and II trials. As a matter of due process, neither
17 the Willis Class members nor the Wood Class members can be bound by the Court's rulings in
18 Phases I and II, as notices of the class proceedings had not yet been disseminated. (*Plaintiff Rebecca*
19 *Willis's Response to Ex Parte Application for Order Continuing Trial Date and to AGWA's Request*
20 *for Order Protecting Phase 2 Findings*, filed October 1, 2008, pp. 2:1-3, 2:26-3:7.) Further, the law
21 is clear that prior to class notice, class members cannot be bound by a determination on the merits;
22 the defendants only gain the res judicata benefits of class certification after notice has been
23 disseminated. (*Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 372-74.) In
24 effect, the Classes have a right of “automatic reversal” as to any of the Court's future rulings that are
25 predicated on the Court's findings in Phases I and II. This gives the classes a procedural leverage
26 point that is not enjoyed by anyone who is a party to the other actions consolidated with the class
27 actions. This will make Cross-Defendants, as well as the rest of the parties and the Court, beholden

1 to the classes unless the parties are willing to take the risk that the many years of litigation will be
2 rendered moot and returned to the beginning.

3 Another example of the alteration of the nature of the actions is to be found in the very
4 process of consolidation itself. The Court has set a hearing to consider the conditions of
5 consolidation for January 8, 2010 and has set a hearing to consider a settlement between the Classes
6 and the Purveyors on the same day. (Reporter's Transcript of Proceedings, October 13, 2009, p.
7 42:21-23.) As described above, these two matters were specifically calendared in this way so that
8 the manner of consolidation of the cases would be considered in tandem with approval of the class
9 settlements. Thus, in the newly consolidated case, the Cross-Defendants will be faced with a vast
10 number of landowners who have settled with the Purveyors at the prompting of the Court.⁵ This will
11 place these other landowners in a procedural and substantively different position than all the other
12 landowners currently on the "landowner side" of the case. It may even result in an adverse
13 relationship between these landowners and the landowner side of the case. This circumstance did not
14 exist prior to consolidation.

15 The *Nissan* Court touched briefly on the differences in the cases to be consolidated for the
16 purpose of dismissing the characterization of the two cases to be consolidated as "continuations" of
17 the third case. The Court briefly listed some of the distinguishing factors in the cases, but only as a
18 contrast to the fact that all the cases involved the same defendant (Nissan), the same model of car
19 (300ZX) and the same underlying defect (sudden acceleration). (*Nissan*, 6 Cal.App.4th at 153, 155.)
20 The *Nissan* Court felt compelled to identify differences in the cases because the cases to be
21 consolidated were otherwise nearly identical.⁶

22 Similarly here, the two class actions to be consolidated into the main action cannot be
23 considered "continuations" of the main action. By virtue of the structure of the cases as class actions
24 and the timing of creation of the classes, the relationship between plaintiffs and defendants is
25 significantly different than the relationship between plaintiffs and defendants in the main action,

26 ⁵ In fact, the Court went so far as to prompt the Purveyors to drop their claim of prescription against
27 at least the Wood Class. (Reporter's Transcript of Proceedings, April 24, 2009, p. 15:13-24.)

28 ⁶ Of course, the similarities in the cases are the reason they were consolidated in the first place.
Without sufficient commonality, they could not be consolidated.

1 both substantively and procedurally. Following completion of the settlement in the class actions,
2 these differences will be even more significant.

3 *Nissan* cited *City of Hanford v. Superior Court* (1989) 208 Cal.App.3d 580 with respect to
4 whether the cases at issue were continuations of previous cases. The discussion in *Hanford* is
5 lengthy and no one factor is identified as determinative. However, *Hanford* identifies a subsequent
6 proceeding which results in, "new parties and results in a realignment of the original parties," as
7 factors weighing in favor of finding that the cases are not continuous.

8 **D. Rule 3.516 Does Not Control for Consolidation Purposes**

9 *California Rule of Court*, Rule 3.516, as cited by the Oppositions, is not applicable to this
10 case, as the Cross-Defendants have exercised their right to file the 170.6 Challenge upon the Court's
11 issuance of the *Order to Transfer and Consolidate*. Rule 3.516 expressly deals with the ability of a
12 party to exercise such a right upon the *coordination* of actions, and is not applicable where the issue
13 is one of *consolidation* rather than coordination.

14 Upon consolidation, a party may find itself to be made a party to an entirely a different action
15 vis-à-vis new parties, which fundamentally changes the nature of the litigation in which it is
16 involved. Under *Nissan*, the simple fact of consolidation gives rise to another opportunity for Cross-
17 Defendants to exercise a 170.6 challenge.

18 As set forth above, the differences between coordination and consolidation are fundamental.
19 Prior filings by the Federal Defendants make clear the manner in which consolidation fundamentally
20 alters cases, though they may have been previously coordinated. (*Federal Defendants' Reply to*
21 *Landowner Defendants' Motion to Dismiss Public Water Suppliers' Cross-Complaint and Responses*
22 *There to*, filed June 18, 2009, 2:19-3:18; *Federal Defendants' Response to Motion to Transfer and*
23 *Consolidate*, filed August 3, 2009, p. 1:12-14.) With coordination, "...beyond the limited
24 overlapping issues, the cases remain separate actions and the claims raised by plaintiffs in the
25 various actions are, and remain, piecemeal." (*Id.*, p. 2:21-23.) Further, "The limitation of
26 coordination as a means to achieve a mutually binding adjudication of all of the correlative rights is
27 illustrated by the problems inherent in enforcement of the separate decrees." (*Id.*, p. 3:1-3.)

1 In fact, the Federal Defendants have argued that the cases could not proceed merely in a
2 coordinated fashion and that consolidation was imperative to resolution of this case, as without
3 consolidation, the "coordination of complex cases may lead to separate and non-mutually binding
4 determinations of rights and interests entered in separate decrees." (*Federal Defendants' Response to*
5 *Motion to Transfer and Consolidate*, p. 1:12-14.) The Federal Defendants have further described
6 how consolidation creates a different sort of unification with different postures amongst the parties,
7 such that the consolidated case is not a continuation of the "separate actions and claims raised in the
8 various actions...." (*Federal Defendants' Reply to Landowner Defendants' Motion to Dismiss Public*
9 *Water Suppliers' Cross-Complaint and Responses Thereto*, filed October 19, 2009, p.2:21-23.) If the
10 consolidation did not alter the nature of the case and realign the parties, then the purpose of the
11 consolidation is unclear. Obviously this is not the case, and the Federal Defendants' argument is
12 simply a change of tune to achieve their latest goal—depriving the Cross-Defendants' of their
13 guaranteed right to assure a fair and impartial trial.

14 Even if Rule 3.516 were applicable in this case, case law still allows a party to exercise a
15 170.6 challenge as to the assignment to consolidated cases of a judge that had previously been
16 assigned to one of the cases consolidated. In *Farmers Insurance Exchange v. Superior Court of*
17 *Contra Costa County* (1992) 10 Cal.App.4th 1509, three civil actions were consolidated and then
18 another action pending in another county was coordinated with them. The defendant filed a timely
19 section 170.6 challenge to the coordination judge, who had already ruled on contested matters in the
20 three consolidated cases. The court held that the challenge was not untimely, even though the judge
21 had previously ruled on contested matters in the consolidated cases, based on Rule 1515 (now Rule
22 3.516). Similar to the case in *Nissan* and the case at bar, the party filing the 170.6 challenge was the
23 common party to all the cases that were consolidated, including the one over which the judge
24 assigned to the consolidated cases had already been presiding.

25 The *Farmers* Court noted that the opposing parties:

26
27 argue that Farmers' challenge was untimely because of Judge
28 O'Malley's prior rulings on contested motions, including a motion for

1 summary adjudication (section 437c) and a motion for class
2 certification. They accuse Farmers of judge shopping because it
3 challenged the very judge who previously made rulings adverse to its
4 interests on issues common to others of the coordinated cases. They
5 emphasize that even though the coordinated actions involve different
6 plaintiffs, all of them are members of the same class and the relief
7 sought is identical.

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(Farmers 10 Cal.App.4th at 1511.) The *Farmers* Court rejected all of these arguments and found the 170.6 challenge to be timely and proper. The Oppositions' similar arguments should likewise be rejected.

The Oppositions' reliance upon *Industrial Indemnity Co. v. Superior Court* (1989) 214 Cal.App.3d 259 to claim that the 170.6 Challenge is untimely is entirely misplaced. (See *Littlerock Creek et al. Opposition to Peremptory Challenge to Assigned Judge (CCP 170.6)*, p.4:7-18; *Phelan Piñon Hills Community Services District's Opposition to Preliminary Challenge (170.6)*, p. 3:19-24; *Federal Defendants' Response to Peremptory Challenge to Assigned Judge (CCP 170.6)*, pp. 3:16-5:2.) The Oppositions overlook that the *Nissan* Court considered *Industrial Indemnity*, and held the case to be irrelevant, finding that the issue of a party's ability to exercise a section 170.6 challenge upon consolidation was an issue of first impression. (*Nissan*, 6 Cal.App.4th at 154, n. 2.)

Industrial Indemnity dealt with "add-on" parties coming into a coordinated proceeding, where several of the coordinated cases had already gone to judgment. Federal Defendants attempt to analogize the current situation to that in *Industrial Indemnity* through their argument that "both adding cases and consolidating actions allow one judge in a coordinated proceeding to hear all the actions for all the purposes relating to common questions of fact or law" and that Cross-Defendants' 170.6 Challenge is merely an "attempt to thwart the consolidation procedure." (*Federal Defendants' Response to Peremptory Challenge to Assigned Judge (CCP § 170.6)*, p. 4:14-19.) In this regard, Federal Defendants claim Cross-Defendants' 170.6 Challenge is no different than an attempt to thwart the add-on procedure in *Industrial Indemnity*, which they claim threatens efficient utilization of judicial resources in this case. (*Id.*) However, as stated above, and stated plainly in more recent case law, "judicial efficiency is not to be fostered at the expense of a litigant's rights under section

1 170.6 to peremptorily challenge a judge.” (*Nissan*, 6 Cal.App.4th at 155.)

2 Further, while the Federal Defendants claim that Cross-Defendants were party to and
3 participated in the hearings related to the notice of class actions and “can hardly be considered
4 strangers to the proceeding, even if not technically joined,” (*Federal Defendants’ Response to*
5 *Peremptory Challenge to Assigned Judge (CCP § 170.6)*, p. 5:1-7) Cross-Defendants were not
6 parties to the class actions themselves and did not have the ability at that point to exercise a section
7 170.6 challenge. Fundamentally, the policy of not allowing a section 170.6 challenge when a
8 petitioner could use it to thwart the add-on procedure simply does not apply here; the Rules of Court
9 add-on procedure is not involved, and the consolidation of the parties was strongly protested by the
10 Cross-Defendants in the first place.

11 **E. The Court’s Determinations in this Case have been Jurisdictional**

12 The Oppositions further contend that the Section 170.6 Challenge cannot be exercised
13 because the Court has made determinations as to contested facts relating to the merits of this case –
14 specifically in regard to the phases of trial that have previously occurred. (See *Federal Defendants’*
15 *Response to Peremptory Challenge to Assigned Judge (170.6)*, pp. 5:10-6:26; *Public Water*
16 *Suppliers’ Opposition to Peremptory Challenge to Assigned Judge (170.6)*, p. 5:15-23; *Phelan Piñon*
17 *Hills Community Services District’s Opposition to Peremptory Challenge*, p. 4:9-18.) However, the
18 determinations made by the Court in those “trial” phases were strictly jurisdictional, necessary to
19 determine which rights would be at issue in these proceedings. As described Phelan Piñon Hills
20 Community Services District, the determination of the Basin boundaries in the first phase was a
21 jurisdictional issue, not substantive. (*Phelan Piñon Hills Community Services District’s Opposition*
22 *to Peremptory Challenge*, p. 4:10-12.) The Court’s determination regarding the existence of sub-
23 basins was similarly predicated on certain parties wishing to be outside the adjudication, and was a
24 question of which water rights were at issue in the case. (See *Federal Defendants’ Response to*
25 *Peremptory Challenge to Assigned Judge (170.6)*, p. 6:21-26.) If the Phase I and II trials are to be
26 considered anything other than jurisdictional, then the parties face a different set of problems since

1 both of these phases were conducted prior to the case being at issue.⁷

2 However, even if this were a case where rulings on the merits did occur, such circumstances
3 would not be controlling regarding whether a 170.6 challenge could be properly asserted. Indeed,
4 the ruling in the *Nissan* case applies even where the judge to be disqualified has made legal or
5 factual rulings. “. . . [T]he fact that a party can peremptorily challenge a judge after he has ruled in a
6 case involving related factual or legal issues may result to some extent in forum shopping by parties
7 filing later similar suits. However, collateral estoppel does not apply to disqualification motions.”
8 (*Nissan*, 6 Cal.App.4th at 155.)

9 Similarly, Cross-Defendants are not asking for a redetermination of the jurisdictional issues
10 previously determined by Judge Komar (as suggested by the *Federal Defendants' Response to*
11 *Peremptory Challenge to Assigned Judge (170.6)*, p. 7:7-11.) In fact, the right to exercise the 170.6
12 peremptory challenge is predicated upon the Granting of the Motion to Consolidate.

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26 ⁷ The Federal Defendants suggest that the Court has already “determined contested issues of fact that
27 relate to the *merits* of the determination and adjudication of relative rights to withdraw ground water
28 from the Antelope Valley Aquifer.” (emphasis added) (*Federal Defendants' Response to Peremptory
Challenge to Assigned Judge (170.6)*, p. 7:23-24.)
15

1 **V. CONCLUSION**

2 The issuance of the *Order to Transfer and Consolidate* gave the Cross-Defendants the right
3 to file the 170.6 Challenge. That guaranteed right, sounding in principles of due process, existed
4 regardless of whether any of the Cross-Defendants had previously acquiesced to Judge Komar in any
5 of the previously coordinated cases. The controlling case law and related authorities-*Nissan, Philip*
6 *Morris, Farmers* and other authority, such as the California Civil Courtroom Handbook and Desktop
7 Reference at § 14:50 (2009 ed.) – clearly establish the right of the Cross-Defendants to file the 170.6
8 Challenge upon the Court’s issuance of the *Order to Transfer and Consolidate*.

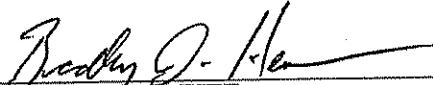
9 The only questions before this Court are the timeliness and the form of the peremptory
10 challenge. Cross-Defendants’ immediate filing of the 170.6 Challenge was certainly timely, and the
11 statutory requirements for the peremptory challenge have clearly been met.

12 Based upon the foregoing, the 170.6 Challenge was timely and proper; and the consolidated
13 case must be assigned to another judge.

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Dated: October 22, 2009

**BROWNSTEIN HYATT FARBER
SCHRECK, LLP**

By: 
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BRADLEY J. HERREMA
Attorneys for AGWA

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Dated: October 22, 2009

MORRISON & FOERSTER LLP

By: William M. Sloan

EDGAR B. WASHBURN
WILLIAM M. SLOAN
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Attorneys for U.S. BORAX, INC.

Dated: October 22, 2009

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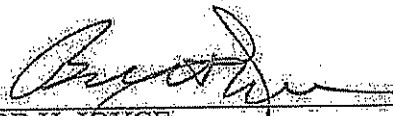
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Dated: October 22, 2009

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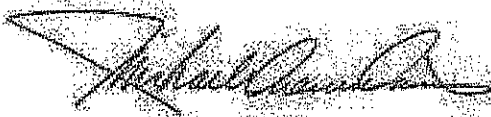
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Dated: October 22, 2009

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PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On October 22, 2009, I served the foregoing document described as:

**CROSS-DEFENDANTS' REPLY TO OPPOSITIONS TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE (C.C.P. § 170.6)**

on the interested parties in this action.

By posting it on the website at 4:00 p.m. on October 22, 2009.
This posting was reported as complete and without error.

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

Executed in Santa Barbara, California, on October 22, 2009.

APRIL A. ROBITAILLE
TYPE OR PRINT NAME


SIGNATURE

Exhibit 9

1 Ralph B. Kalfayan, SBN133464
 David B. Zlotnick, SBN 195607
 2 KRAUSE, KALFAYAN, BENINK
 & SLAVENS LLP
 3 Tel: (619) 232-0331
 Fax: (619) 232-4019

4 Attorneys for Plaintiff and the Class
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 9 **FOR THE COUNTY OF LOS ANGELES**

10 **ANTELOPE VALLEY**
 11 **GROUNDWATER CASES**

12 This Pleading Relates to Included Action:
 13 REBECCA LEE WILLIS, on behalf of herself
 and all others similarly situated,

14 Plaintiff,

15 vs.

16 LOS ANGELES COUNTY WATERWORKS
 17 DISTRICT NO. 40; CITY OF LANCASTER;
 18 CITY OF LOS ANGELES; CITY OF
 PALMDALE; PALMDALE WATER
 19 DISTRICT; LITTLEROCK CREEK
 IRRIGATION DISTRICT; PALM RANCH
 20 IRRIGATION DISTRICT; QUARTZ HILL
 WATER DISTRICT; ANTELOPE VALLEY
 21 WATER CO.; ROSAMOND COMMUNITY
 SERVICE DISTRICT; MOJAVE PUBLIC
 22 UTILITY DISTRICT; and DOES 1 through
 1,000;

23 Defendants.

) RELATED CASE TO JUDICIAL
) COUNCIL COORDINATION
) PROCEEDING NO. 4408
)

) PLAINTIFF REBECCA WILLIS'
) RESPONSE TO EX PARTE
) APPLICATION FOR ORDER
) CONTINUING TRIAL DATE AND TO
) AGWA'S REQUEST FOR ORDER
) PROTECTING PHASE 2 FINDINGS
)

) Date: October 6, 2008
) Time: 9:00 a.m.
) Dep't: 1
) Judge: Hon. Jack Komar
)

24
 25 Plaintiff Rebecca Willis responds to Fred Kia's Ex Parte Application for an Order
 26 Continuing the Trial Date and to AGWA's Request for an Order Protecting Phase 2 Findings.
 27 For the reasons stated below, the Willis Class has not sought and does not seek to postpone the
 28 Phase 2 trial. But no Order can or should be entered "protecting" the Court's findings from later

1 challenge by parties who were not timely made parties to this proceeding. In particular, as a
2 matter of due process, the Willis Class members cannot be bound by the Phase II findings since
3 they have not yet had notice of these proceedings.

4 **RELEVANT PROCEDURAL BACKGROUND**

5 For approximately two years, this Court and parties have worked to make this proceeding
6 comprehensive and binding to the extent possible upon all parties in interest. We will not
7 recount the entire lengthy history. For present purposes, the critical facts are that the Court's
8 Amended Order of June 3, 2008 approved the form of Notice to be sent to the Willis Class and
9 required L.A. County Waterworks District No. 40 to "compile a list of Class members and
10 propose a means for disseminating the Class Notice to such persons, which it shall post on the
11 case website." L.A. County District No. 40 has not yet done so, apparently because it is trying
12 to work with counsel for the small pumpers Class to craft a Notice to that Class. The Willis
13 Class notice was finalized by counsel and approved by the court but was delayed by the Public
14 Water Suppliers in order to achieve one mass mailing. In any event, there is no way that the
15 members of the Willis Class will get Notice prior to the currently schedule Phase 2 trial.

16 **ARGUMENT**

17
18
19 **1. As a Matter of Due Process, Mr. Kia and Others Similarly Situated Should Not
Be Bound By the Findings Reached at the Phase 2 Trial.**

20 Mr. Kia, as well as other persons who were not timely served by the purveyors and have
21 not had adequate notice of the proposed Phase 2 trial, should not be forced to participate in that
22 trial and, as a matter of due process, cannot be legally bound by the Court's findings. Any other
23 ruling would be unfair and would not hold up on appeal.

24
25 **2. The Members of the Willis Class Should Not Be Bound by the Findings at the
Phase 2 Trial.**

26 Due to the Purveyors' delays in sending Notice, the members of the Willis Class have
27 also not had Notice of this action or the opportunity to opt out. Under these circumstances, the
28

1 Class Members cannot be properly bound by the trial findings. The law is clear that prior to class
2 notice, class members cannot be bound by a determination on the merits; the defendants only
3 gain the res judicata benefits of class certification after notice has been disseminated. *Civil*
4 *Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal. 3d 362, 372-74.

5 Given the Purveyor's delays in effecting service and Class notice, they must bear the
6 risks of "One Way Estoppel."

7
8 **3. At a Minimum, the Collateral Estoppel Consequences of Any Findings Reached**
9 **at the Phase 2 Trial Should Be Decided Based on a Noticed Motion.**

10 This Court should reject AGWA's invitation to order "on the Court's own Motion" that
11 the Phase 2 Trial findings may **not** be challenged "by parties who have not yet appeared." That
12 is simply an invitation to reversal and will not serve to protect those findings. At a bare
13 minimum, the complicated issue of the collateral estoppel consequences of any Phase 2 findings
14 should be decided based on a noticed motion, not on an "off the cuff" basis.

15 **4. As a Practical Matter, There Is No Need to Delay The Next Phase of Trial.**

16 Notwithstanding the above, the Willis Class does not seek to continue the trial date. The
17 simple fact is that the Class members, almost by definition, may not have adequate economic
18 interests in the pending issues to spend the many thousands of dollars that would be required to
19 take a position regarding the next phase of the trial. We understand that virtually everyone who
20 does have such a significant interest has been served and has been given the opportunity to
21 participate. Thus, there is little risk of any meaningful challenge to the Court's findings being
22 asserted at a later date. In that regard, we note that the boundaries of the adjudication area were
23 determined prior to certification of the Class, and, to our knowledge, no one has challenged those
24 findings. Hopefully, proceeding through the next phase of trial will advance a final resolution.

25
26 **5. Class Notice Should Be Served Promptly After This Phase of Trial.**

27 From the Class' perspective, much more significant issues will be raised at the
28

1 subsequent phases of trial; and it is imperative that Notice be sent to the Class and that Class
2 Members be given an opportunity to exclude themselves well before any further phases. We
3 trust that the purveyors will work with us to make sure that happens.

4 CONCLUSION

5 For the reasons stated above, the Willis Class does not object to the Phase 2 trial going
6 forward, but maintains that any findings rendered should not be binding on the Class Members.
7

8
9 Dated: October 1, 2008

KRAUSE KALFAYAN BENINK
& SLAVENS LLP

10
11
12 

13 Ralph B. Kalfayan, Esq.
14 David B. Zlotnick, Esq.
Attorneys for Plaintiff and the Class

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PROOF OF SERVICE

I, Ashley Polyascko, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 625 Broadway, Suite 635, San Diego, California, 92101. On **October 1, 2008**, I served the within document(s):

PLAINTIFF REBECCA WILLIS' RESPONSE TO EX PARTE APPLICATION FOR ORDER CONTINUING TRIAL DATE AND TO AGWA'S REQUEST FOR ORDER PROTECTING PHASE 2 FINDINGS.

- by posting the document(s) listed above to the Santa Clara County Superior Court website in regard to the Antelope Valley Groundwater matter.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below:
- by causing personal delivery by Cal Express of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by UPS following the firm's ordinary business practices.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with the postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **October 1, 2008**, at San Diego, California.


Ashley Polyascko

Exhibit 10

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 2 IN AND FOR THE COUNTY OF SANTA CLARA
 3 BEFORE THE HONORABLE JACK KOMAR, JUDGE
 4 DEPARTMENT 19

5 ---000---

6 COORDINATION PROCEEDING
 7 SPECIAL TITLE (RULE 1550(B))
 8 ANTELOPE VALLEY GROUNDWATER)
 CASES) JUDICIAL COUNCIL
 9 INCLUDED ACTIONS:) COORDINATION PROCEEDING
) NO. 4408
 10 LOS ANGELES COUNTY WATERWORKS) SANTA CLARA COUNTY
 DISTRICT NO. 40 V.) CASE NO.1-05-CV-049053
 11 DIAMOND FARMING CO.)
 SUPERIOR COURT OF CALIFORNIA)
 12 COUNTY OF LOS ANGELES, CASE)
 NO. BC 325 201)
 13))
 14 LOS ANGELES COUNTY WATERWORKS))
 DISTRICT NO. 40 v.))
 15 DIAMOND FARMING CO.))
 SUPERIOR COURT OF CALIFORNIA,))
 16 COUNTY OF KERN,))
 CASE NO. S-1500-CV-254-348))
 17))
 18 WM. BOLTHOUSE FARMS, INC., V.))
 CITY OF LANCASTER))
 19 DIAMOND FARMING CO. V. CITY))
 OF LANCASTER))
 20 DIAMOND FARMING CO. V.))
 PALMDALE WATER DISTRICT))
 21 SUPERIOR COURT OF CALIFORNIA,))
 COUNTY OF RIVERSIDE,))
 22 CONSOLIDATED ACTIONS,))
 CASE NOS. RIC 353 840,))
 RIC 344 436, RIC 344-668))
 23))
 24 WILLIS v. LOS ANGELES COUNTY))
 WATERWORKS DISTRICT NO. 40))
 25 SUPERIOR COURT OF CALIFORNIA,))
 COUNTY OF LOS ANGELES,))
 CASE NO. BC 364 553))
 26))
 27 WOOD v. LOS ANGELES COUNTY))
 WATER WORKS DISTRICT NO. 40))
 SUPERIOR COURT OF CALIFORNIA,))
 COUNTY OF LOS ANGELES,))
 28 CASE NO. BC 391869))
 /)

---000---

REPORTER'S TRANSCRIPT OF PROCEEDINGS
OCTOBER 13TH, 2009

A P P E A R A N C E S:

FOR THE CITY OF PALMDALE:	JAMES MARKMAN ATTORNEY AT LAW
FOR DIAMOND FARMING, ET AL:	BOB JOYCE ATTORNEY AT LAW
FOR U.S. BORAX:	WILLIAM SLOAN ATTORNEY AT LAW
FOR ANTELOPE VALLEY UNITED GROUP:	MICHAEL DAVIS ATTORNEY AT LAW
FOR BOLTHOUSE PROPERTIES:	RICHARD ZIMMER ATTORNEY AT LAW
FOR ANTELOPE VALLEY GROUNDWATER AGREEMENT ASSOCIATION:	MICHAEL FIFE ATTORNEY AT LAW
FOR RICHARD WOOD:	MICHAEL MCLACHLAN ATTORNEY AT LAW
FOR REBECCA WILLIS:	RALPH KALFAYAN ATTORNEY AT LAW
FOR LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40:	JEFFREY DUNN ATTORNEY AT LAW
FOR AGWA:	BRADLEY J. HERREMA ATTORNEY AT LAW
FOR NORTHROP GRUMMAN, ET AL.: (VIA COURT CALL)	TAMMY L. JONES ATTORNEY AT LAW
FOR COPA DE ORA LAND CO.:	STEPHEN M. SIPTROTH ATTORNEY AT LAW
FOR ANTELOPE VALLEY JOINT UNION HIGH SCHOOL DISTRICT: (VIA COURT CALL)	ANNA MILLER ATTORNEY AT LAW
FOR CAMERON PROPERTIES: (VIA COURT CALL)	CLIFF MELNICK ATTORNEY AT LAW

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5	FOR UNITED STATES: (VIA COURT CALL)	R. LEE LEININGER ATTORNEY AT LAW
6		
7	FOR VAN DAM & ANTELOPE VALLEY: (VIA COURT CALL)	SCOTT K. KUNEY ATTORNEY AT LAW
8	OFFICIAL COURT REPORTER:	ALICIA PLANCARTE CSR# 12161
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1 SAN JOSE, CALIFORNIA

OCTOBER 13TH, 2009

2
3 P R O C E E D I N G S

4
5 THE COURT: We have a sign in-list. Let's
6 find out by calling roll who on the Court Call list is
7 present. As your name is called answer present or
8 here.

9 THE CLERK: Tammy Jones.

10 MS. JONES: Present.

11 THE CLERK: Michael Crow, Michael Crow.
12 Steven Siptroth.

13 MR. SIPTROTH: Present.

14 THE CLERK: Mr. Herrema is here.

15 John Tootle, John Tootle. Bradley Weeks.
16 Christopher Sanders. Ana Miller.

17 MS. MILLER: Present.

18 THE CLERK: Edward Renwick, Edward Renwick.
19 John Ukkestad, Robert Kuhs, Keith Lemieux. Malissa
20 McKeith. Cliff Melnick.

21 MR. MELNICK: Present.

22 THE CLERK: Mike Flood.

23 MR. FLOOD: Present.

24 THE CLERK: Richard Wood, Susan Trager, Amy
25 Gantvoort.

26 MS. GANTVOORT: Present.

27 THE CLERK: R. Lee Leininger.

28 MR. LEININGER: Present.

1 THE CLERK: Scott Kuney.

2 MR. KUNEY: Present.

3 THE COURT: Is there anybody on the
4 telephone whose name has not been called? All right.

5 Well, we've got principally a motion here in
6 connection to the previous motion to transfer and
7 consolidate.

8 Who is going to speak to that opposition?

9 MR. MARKMAN: James Markman for the City of
10 Palmdale for the moving party.

11 THE COURT: Who is going to speak on the
12 opposition?

13 MR. JOYCE: Bob Joyce --

14 THE COURT: I'm asking you to step forward
15 to counsel table, identify yourself at that time. And
16 try and stay where you are so that the court reporter
17 can follow.

18 MR. JOYCE: Bob Joyce on behalf of Diamond
19 Farming, Crystal Organic Enterprises Inc. and Office
20 Land Company.

21 MR. SLOAN: William Sloan on behalf of U.S.
22 Borax.

23 MR. DAVIS: Michael Davis on behalf of
24 Antelope Valley United Mutual Group, Service Rock
25 Product Corporation Enterprises Inc. and Sheet Creek
26 Water Company.

27 MR. ZIMMER: Richard Zimmer on behalf of
28 Bolthouse Properties and Bolthouse Farms.

1 MR. FIFE: Michael Fife on behalf of
2 Antelope Valley Groundwater Agreement Association.

3 MR. MCLACHLAN: Michael McLachlan on behalf
4 of the small pumper class.

5 MR. KALFAYAN: Ralph Kalfayan on behalf of
6 the Willis class.

7 MR. DUNN: Jeffrey Dunn on behalf of
8 Rosenbaum Community Services District and Los Angeles
9 County Waterworks District Number 40.

10 THE COURT: Moving party first.

11 MR. MARKMAN: Well, your Honor, this has
12 been briefed back and forth about six times. I think
13 when I sum this up as a bit of a surprise on my part
14 that any party presently in this proceeding that's seen
15 all these papers will so oppose having one trial and
16 having one judgment that manages the water rights of
17 the resources of this basin.

18 The only reason we are even having these
19 discussions is because we needed MacKaren (phonetic)
20 Act jurisdiction so two classes were created at the
21 Court's suggestions, plaintiffs classes. And in those
22 pleadings filed by those plaintiffs class attorneys who
23 are here they actually prayed for declaratory relief
24 and a declaration of all the water rights that are
25 present in the basin, including theirs, comparing
26 theirs to everybody else. Even though there were only
27 certain defendants named they ask for that kind of
28 broad relief and management of the basin. So it's more

1 interesting to me what nobody has disagreed with.
2 Number one, common issues of law and fact are pervasive
3 in this case, there's not much difference between these
4 and the Indian Wells or redevelopment plants as far as
5 we can see, or any other case, that is the, that is the
6 benchmark for consolidation. That's the substantive
7 criteria.

8 Secondly, we have procedural issues, any of
9 which I'd discuss in detail, if the Court sees fit, but
10 basically service of process, a method of serving
11 process on everybody, suggesting somehow that didn't
12 occur when we obviously served this motion in
13 accordance with the way you present motions in this
14 proceeding pursuant to the Court's coordination powers,
15 and we did so.

16 Furthermore, everyone argues that obviously
17 received notice. I don't know whose right they are
18 asserting that may not have received notice, but
19 nobody's even been drenched up to come and make that
20 claim even after this state, after two or three
21 continuances. This just seems to be simple to me than
22 it has been made out to be by some of these arguments.

23 The one argument, for example, that you
24 can't consolidate cases that have been coordinated
25 because by definition they are complex based on a Court
26 Rule that only applies to noncomplex cases doesn't make
27 sense to me. It seems to me that there's been a lot of
28 hurdles put in front of getting to a process that

1 everybody must agree with. One trial, not multiple
2 trials, one disposition of all the substantive issues
3 in this case that applies to everybody at one time
4 resulting in one judgment where everybody's rights,
5 whether they're intersaying against everybody else or
6 only against some select parties, are all there in one
7 document so that the Court and the parties subject to
8 it can see that it's administered properly. So I don't
9 want to go over the details of all these arguments.

10 THE COURT: Mr. Dunn, did you want to add
11 anything?

12 MR. DUNN: Yes, your Honor.

13 When we went back and looked at the Court
14 record to see if in fact a consolidation order had been
15 put in place the one thing that we came to understand
16 or realize is we did have that, we went back over
17 through this extensive record is that if there has not
18 been an order put in place, the proceedings, all
19 proceedings today have been conducted as if such an
20 order had been in place. All of the hearings have
21 involved both the classes and involved issues involving
22 the United States and MacKaren. There's been no
23 division by pleading or by party, instead what has
24 happened is as I look to my right and I see this
25 distinguished group of counsel, all of them have
26 voluntarily weighed in on issues involving both classes
27 that grade in on issues involving service.

28 The record will also reflect that on the

1 matters involving the two class action complaints that
2 the various landowner parties were active in this case
3 that participated in those discovery proceedings
4 including the meet and confer letters, and without, you
5 know, taking much more of the Court's time here, it
6 simply comes down to this. If there has not yet been
7 an order consolidating these cases for all purposes
8 we've had that certainly as a de facto consolidation,
9 and the reason it's been done that way is it has to be
10 done that way in a case like this to have the
11 multiplicity of proceedings as Mr. McLachlan and
12 Mr. Markman described would create such an undue burden
13 and, and the impracticality upon the Court, I really
14 can't see that.

15 So I'll close though with the comment that I
16 think there has been a consolidation for all purposes
17 today by conduct of the parties, and to the extent that
18 there's any remaining concern that somehow
19 consolidation, you know, either expands the scope of
20 the pleadings and makes people adverse or not adverse,
21 it does no such thing. It simply allows for the
22 judicial use, excuse me, the efficient use of judicial
23 resources both the courts and the parties and so we can
24 continue to move this case towards a resolution. Thank
25 you.

26 THE COURT: Thank you.

27 All right. Your position?

28 MR. JOYCE: Your Honor, I'll make just an

1 initial observation.

2 THE COURT: I just ask that you really don't
3 repeat what's in your papers because your papers have
4 been very clear as to the position of the case.

5 MR. JOYCE: I understand that, your Honor,
6 and Bob Joyce on behalf of Diamond Farms.

7 COURT CALL: Who's my driver?

8 THE CLERK: Excuse me, you're coming through
9 the court.

10 THE COURT: Go ahead, Mr. Joyce.

11 MR. JOYCE: Yes, your Honor. Bob Joyce on
12 behalf of Diamond Farming, Crystal Organic Enterprises
13 and Office Land Company.

14 My observation is, your Honor, that rules of
15 civil procedure, court rules, those are designed and
16 intended to aid both parties and the court is
17 administering our system to ultimately achieve a sound
18 and a just conclusion. Common vote is between civil
19 litigants an incorrect observation made by opposing
20 counsel is that the affect of this court order would
21 not do any of the things that we point out in our
22 opposition that it would have a tendency to do, one of
23 which is obviously it turns the situation where I am
24 neither a defendant in an action involving, in that
25 brought by the United States against my client, nor
26 have I sued the United States, suddenly I will be put
27 into a situation where I'm adverse to the interest of
28 the United States. Same situation now pertains to the

1 classes in a sense that I have not sued any member of
2 the class nor the class representative, neither have
3 they sued myself. Most significantly, your Honor, this
4 motion to consolidate is merely the flip side of the
5 same coin of the motion to dismiss for failure to join
6 indispensable parties. For the Court to deny that
7 motion the Court --

8 THE COURT: Let me ask you a question,
9 Mr. Joyce, what do you make of California Rule of Court
10 2.541(b)(1)?

11 MR. JOYCE: The Court would have to assist
12 me. I'm not -- I don't know off the top of my head --

13 THE COURT: That provides that the
14 coordination judge has the power to transfer cases from
15 one court to another within the discretion of the Court
16 for good cause.

17 MR. JOYCE: And your Honor, I think there's
18 a distinction between transferring and consolidation.

19 THE COURT: Well, isn't that a first step?

20 MR. JOYCE: Assuming the Court --

21 THE COURT: Lays a foundation for
22 consolidation under 1048 of the Code of Civil
23 Procedure.

24 MR. JOYCE: The practical outcome is that
25 assuming that you're transferring, and I'm not aware of
26 any case that's not presently pending by virtue of the
27 coordination order before this Court in any event.

28 THE COURT: Well, there's a difference

1 though between a coordination order and transfer
2 pursuant to the coordination order in terms of them
3 affixing the venue of that case. Each one of these
4 cases that were filed in separate counties, remain
5 cases within those counties even though they are being
6 adjudicated pursuant to the coordination order. Let's
7 see if I can jump ahead a little bit and move this
8 along.

9 It seems to me that there are substantial
10 issues in this case that every pleading, every pleading
11 without exception implicates. And that is the
12 declaratory relief as to the status of the rights to
13 use the groundwater within the basin.

14 The Court has previously found that there's
15 a single aquifer. That seems to me, given the nature
16 of water law in California, groundwater law, to put
17 every party who is here, whichever court they may have
18 started in, with correlative rights that are
19 essentially making them a necessary party to any
20 ultimate judgment in this case. In other words, the
21 Court cannot adjudicate the rights of a party in one
22 part of the aquifer to -- without considering the
23 rights of the parties in another part of the aquifer
24 because those rights are correlative and they are
25 subject to the consequences of one part as to the
26 other.

27 So it seems to me that perhaps not all of
28 the causes of action related to the right to use the

1 water, some of them are damage actions, some of them
2 relate to settlement, some of them relate to inverse
3 condemnation and the like, but the central core of
4 every cause of action of every pleading, of every
5 complaint really relates to the right to use water and
6 those rights are correlative and they implicate every
7 other party in this proceeding, and that's why we have
8 attempted, and the Court has encouraged the parties to
9 join together to deal with these issues. The issues
10 that have arisen, whether they are the class action
11 issues or the other issues, all fall within the same
12 basic core principal. Now I understand your
13 consternation and the concern of everybody in terms of
14 the causes of action that really are not part of the
15 question concerning declaratory relief and the request
16 that the Court find there's a physical solution.

17 All of the parties here have participated in
18 the issues that have been adjudicated thus far with
19 regard to the nature and jurisdiction of the Court, the
20 nature of the aquifer, whether it's a single aquifer or
21 not, and now we are moving into another issue that
22 still relates directly to the question of water rights
23 and whether or not the basin is in a condition of
24 overdraft, the safe field is and the like. And while I
25 understand the technical objections which you've raised
26 and frankly I don't think are valid --

27 And I intend -- I'm intending at this point
28 to overrule your objections and to do two things. One,

1 order a transfer of these proceedings from Riverside
2 and Kern County to Los Angeles County, and then take up
3 the issue of how we consolidate the various causes of
4 action, so that we don't do an injustice to anybody in
5 terms of affecting whatever rights they may have to
6 some of the causes of action, yet bringing together in
7 a single proceeding the cause of action for declaratory
8 relief, which seems to me to be the principal one that
9 we have to deal with here first in determining whether
10 or not we can have a sufficient adjudication of
11 everybody's rights, and also to comply with the
12 Maclaren Act.

13 And so that's where I'm headed and if you
14 want to address those issues I'd be happy to hear
15 whatever other argument you might have.

16 MR. JOYCE: Well, your Honor, actually
17 before the Court expressed its views I was headed to
18 some extent in the very same direction, but what I
19 really wanted the Court to both appreciate and fully
20 understand, and that was why I prefaced my comment as I
21 did, and that is as things currently stand there are
22 pending motions before the Court to allocate expert
23 witnesses' fees, costs from Mr. MacLachlan's class.
24 There's prospectively from what I've been hearing
25 settlements, there may be applications for attorney's
26 fees. Under the current posture of the case I have no
27 exposure to any of those.

28 The effect of the order of consolidation

1 that the Court is heading towards is essentially to
2 certify a cross-defendant class, i.e. presumably under
3 the purveyors' first amended cross-complaint, thus then
4 in subjecting myself and Mr. MacLachlan's people under
5 the same litigation under the same complaint, the same
6 with Mr. Kalfayan. Suddenly I'm now a party to the
7 same action, consequently theoretically exposed. That
8 is a significant shift in the posture of the case from
9 my vantage point, that is the reason I have resisted
10 consolidation primarily because -- and that's the
11 reason why I proposed a single judgment, because as it
12 currently stands the pleadings will not permit the
13 outcome that I can see coming.

14 THE COURT: Well, the Court does have
15 discretion to deal with the question of allocation of
16 fees and costs and obviously the role various parties
17 play in litigation and the extent of their causes of
18 action, the defenses will have some significant bearing
19 upon. I understand that there's been a tentative
20 settlement reached between the classes in the water
21 purveyors. I have not seen that. I don't know what
22 the terms are. I don't know what the agreement is. So
23 it's really premature for me to, as the Court to run
24 conclusions, inferences at all about that, but I would
25 not do anything with regard to consolidation that would
26 impact negatively the settlement that these parties
27 have entered into. I want to see what it is. And I
28 want to see what the agreement is and what the impact

1 of the consolidation might have on that.

2 The United States has responded to the
3 objection filed under this class, and at this point I
4 can't really decide that issue 'cause I don't know what
5 the settlement is, but it seems to me that a settlement
6 that puts that settlement into a single judgment
7 ultimately carries out the purpose of the Maclaren Act,
8 is not contrary to it and ultimately benefits all the
9 parties to this adjudication, whatever the ultimate
10 determination might be as to the status of the aquifer
11 and the rights of the parties to that water. So it's a
12 little bit premature. And I think that the form of the
13 order of consolidation is something we are going to
14 have to work on. I don't think that we are in a
15 position at all to be able to actually formulate that
16 order, but I do think that the Court can make it a
17 generalized order at this point that the parties engage
18 in a meet and confer to prepare a consolidation order
19 because I am ordering a transfer of these actions to
20 Los Angeles County.

21 MR. JOYCE: Your Honor, I just reiterate
22 that any order that would create a circumstance where I
23 am now a party to the same action as the classes raises
24 the very concern I have because the Court has
25 articulated the Court has discretion. Currently the
26 Court does not have discretion. I am not a party,
27 therefore I'm not exposed. Once the Court has the
28 discretion, in my mind, I'm significantly exposed.

1 THE COURT: Well, you may be, but the
2 ultimate effect to that is I don't know at this point.

3 MR. JOYCE: And I can't gamble on that, your
4 Honor.

5 THE COURT: All right. Mr. Dunn?

6 MR. DUNN: Your Honor, I'd like to make an
7 observation relative to the small pumper class. Some
8 of these I believe Mr. Kalfayan agrees with, but I
9 won't necessarily speak for him.

10 My concern is that -- well, let's start from
11 the foundation, which is do we have an existing
12 precedent for what we are trying to do here? No.

13 If there was a case out there in which class
14 action was consolidated into another civil litigation I
15 was not able to find it. There is one in Southern
16 District of New York that looks like it possibly might
17 have been going that way, but there's not really. I
18 couldn't find any published authority on it.

19 My concern is that in order to -- we are now
20 in the process of trying to document the settlements
21 that were reached with Justice Robie, and then we'll
22 take some time more with the various public bodies that
23 have to approve these things and so forth before it
24 reaches your desk.

25 It is ultimately that settlement in either
26 of the class cases needs to result in final judgment
27 for the class. I think we can put the classes to bed
28 once and for all and not jeopardize the MacKaren

1 jurisdiction without having to consolidate. And I
2 think that we may end up blowing the classes up if we
3 consolidate them into this litigation because there's a
4 dearth of applicable law, it's hard to really say, we
5 are in effect charting new grounds here.

6 So in that sense it makes me want to be more
7 conservative and my suggestion to the Court is that we
8 let the settlements come to the Court in their current
9 case, their current case number, and have those
10 reviewed by the Court and then at some later date if
11 for some reason they don't work or there's a problem
12 with them and the classes are still around then you can
13 consolidate into a larger proceeding. We can always do
14 that. But I think -- I don't want to -- I can't, I'm
15 not at liberty to disclose specific terms of the
16 settlement, but I think it's a possibility that the
17 classes can be put to bed and all issues resolve
18 between the class members and the public water
19 suppliers, and allow the rest of the litigation to
20 proceed and still have jurisdiction over the United
21 States because the claims of the class would have been,
22 have been resolved. And so there is no need for
23 another judgment down the road.

24 THE COURT: The difficulty as I see it, you
25 know, the difficulty for me to really express an
26 understanding 'cause I don't know what your settlement
27 is, but each member of that class has a reciprocal
28 right to water that relates to every other pumper or

1 overlying owner in the valley. So that I really don't
2 understand the surrender to a separate judgment on
3 behalf of the classes and ensure that there would be no
4 further litigation between the members of the class and
5 any of the other overlying landowners.

6 And you may settle out the purveyors, the
7 water suppliers, but you don't settle out the other
8 overlying landowners, I think. But it's premature for
9 me to draw any conclusion at all about that. But I
10 think that ultimately what is necessary in this case,
11 whatever the ultimate facts might be that you find that
12 there be a judgment that affects every party to the
13 litigation, a single judgment. How we go about
14 achieving that without consolidation seems to me to be
15 a puzzle that I don't fully understand and -- but at
16 this point I think that it's in everybody's best
17 interest that there be a single judgment.

18 Now Mr. Joyce's concern about having to pay
19 somebody else's fees, I understand that because at this
20 point in time he has no obligation whatsoever to class
21 members to compensate for Court ordered expert fees.
22 And I would say this --

23 MR. DUNN: I think he was referring to
24 attorney's fees. Were you not?

25 MR. JOYCE: I was referring to the
26 attorney's fees, but also fees respective to
27 application fees at a later date.

28 THE COURT: That may be. But the only order

1 that I made at this point that would impact whatsoever
2 is the order of authorizing the appointment of an
3 expert to assist the Court, not to assist the parties,
4 and that's what that ruling was. And I know that you
5 disagree with the implications of that, but that's the
6 order that I made.

7 In terms of attorney's fees, because you're
8 not a direct -- it seems to me there's not a direct
9 relationship between Mr. Joyce's complaint and the
10 complaint that has been filed by the class. I fail to
11 see how at this point there could be attorney's fees
12 involving of any resolution there as to Mr. Joyce's
13 clients. And to the extent that the Court orders
14 consolidation, the Court does have the power and the
15 discretion, it seems to me, to ensure that parties are
16 not affected adversely by areas that they are not
17 interested.

18 MR. DUNN: There's a practical concern which
19 I've discussed with some of the public water suppliers,
20 but I think before we go on record on this issue is
21 that if, you know, it's hard to say exactly how the
22 cards play out, but there's a theoretical possibility
23 that if the book is not closed on the class members'
24 rights vis-a-vis, the settlement. In other words, if
25 they still can get their turn the class members' rights
26 are affected by the third or fourth phases of the trial
27 or whatever even comes beyond that.

28 Class counsel is obligated legally and

1 ethically to stay in the case and continue protecting
2 those rights, whatever they may be left over for any
3 number of years, and that's a prospect that I know the
4 public water suppliers do not like because the legal
5 bills are mounting, they are getting rather high.

6 I want everybody to be on record that if we
7 don't find a way to, to -- there is a way to do it. I
8 think -- I can't, you know, divulge the terms of the
9 settlement because of the confidentiality stipulation.
10 Once that's papered we can do that. But I think that
11 should be explored first. It sounds like your Honor is
12 going to do a two phase deal where we transfer and we
13 talk about consolidation.

14 THE COURT: I'm going to order that there be
15 a meet and confer in terms of that and recognizing
16 concerns of the issues that various parties might have,
17 but it does seem to me that there's no question the
18 Court has the authority to order a transfer. If
19 anybody disagrees with that I'd be happy to hear their
20 arguments concerning that. And then we'll deal with
21 the form of -- some form of consolidation which I think
22 has to happen in order to result in a single judgment.

23 And of course, I would invite the parties to
24 propose settlements, to talk to each other about
25 potential for unifications that have been. There are
26 future claims made by other overlying landowners to the
27 extent that Mr. McLachlan was talking about having
28 future liabilities which he has to protect against. It

1 seems there are a variety of ways of dealing with that.
2 That gets to settlement discussions, and that I don't
3 want to engage in that discussion here.

4 Mr. Zimmer, you have something?

5 MR. ZIMMER: Just for clarification, your
6 Honor.

7 My understanding what the Court is saying is
8 Mr. Joyce's client and my client for that matter or any
9 of the other defendants do not have exposure to
10 attorneys' fees or expert fees from the classes because
11 the matter has not yet been consolidated?

12 THE COURT: That's correct.

13 MR. ZIMMER: I agree with that. I disagree
14 with Mr. Dunn's comments about a de facto
15 consolidation.

16 But what I'm curious about is -- is the
17 Court's intention to stay with this case after whatever
18 happens today?

19 THE COURT: Yes. You're asking about
20 whether or not the Court can take an assignment to
21 continue hearing this case. I have communicated with
22 the assignment's office and the chief justice as
23 indicated. He's doesn't mind me staying on the case
24 and I'll agree to do that. I would not want to abandon
25 this case for, pardon the expression, midstream.

26 MR. ZIMMER: My concern is this, we started
27 out with a quiet title action down in Riverside and
28 that action still exists as to Mr. Joyce's client and

1 my client. The only reason that these classes ever
2 became an issue was because of the actions that were
3 filed by Los Angeles County and Kern County and L.A.
4 County, filing a comprehensive adjudication and asking
5 for declaratory relief of all the rights of all the
6 parties in the case. My client Bolthouse never asked
7 for that. Mr. Joyce's client never asked for that. We
8 simply asked --

9 THE COURT: You are a defendant in those
10 cases?

11 MR. ZIMMER: We are a defendant in those
12 cases.

13 So what happened after that was the county
14 was unable or did not want to have to serve all the
15 people that they should serve to properly bring the
16 action for declaratory relief of all rights in that
17 water basin. So the first discussion came up about
18 having a class. Now in my view there's absolutely no
19 question that this should be a defendant class. If
20 there had been a defendant class in this matter we
21 wouldn't be having the issues that we have now because
22 there would be a defendant class with an action brought
23 against them by Los Angeles County as it should because
24 those landowners are indispensable parties.

25 Now we are in a situation where we have
26 plaintiff classes in an attempt to settle their action
27 as plaintiffs, which does absolutely nothing to resolve
28 the problem that L.A. County has to have all landowners

1 in there as defendants to resolve the claims that they
2 have pleaded.

3 And we are, we are really ending up with a
4 procedural nightmare. I'm sure the Court didn't
5 contemplate that at the outset. We are ending up with
6 a procedural nightmare here that I'm not sure we are
7 able to fix. And I don't want to come back eight years
8 from now again. We were in Riverside for five years.
9 We have now been here for five years. And I don't want
10 to come back again and have to retry this case because
11 it benefits the purveyors. It spends everybody else
12 into the ground. We've been spending money, spending
13 money, and spending money.

14 And we are simply back in a situation where
15 they can't get their reliefs they claim and where
16 there's no conformance with the MacKaren Act, that's a
17 significant problem. I understand, and it's my
18 understanding that the Court today is intending to
19 consolidate this or not consolidate it.

20 Is that correct?

21 THE COURT: Yes.

22 MR. ZIMMER: I think that's all the comments
23 I have and the rest is in the papers.

24 THE COURT: What do you see is the
25 difference between a plaintiffs class and a defendants
26 class vis-a-vis the water purveyors? The classes have
27 sued for declaratory relief among other things of the
28 water providers, and it seems to me that that creates

1 the same issue that you would have if they were being
2 sued as a defendant class.

3 MR. ZIMMER: Well, I think the answer to
4 that is obvious, the classes don't feel that way.
5 You've heard both Mr. McLachlan and Mr. Kalfayan came
6 into this court on numerous occasions saying, we have
7 limited action. We are only seeking a determination of
8 our -- there's no proscriptive rights against us. I
9 asked Mr. Dunn at the last hearing, is L.A. County
10 still making the same claims against the classes that
11 they're going to determine the classes' rights as
12 correlative rights holders? He said, yes, we are still
13 making that claim.

14 The classes still think they are getting out
15 by simply dealing with proscriptive rights. The
16 difference is huge. The differences between solely
17 being plaintiffs and the difference between being
18 defendants to a declaratory relief action is seeking to
19 declare their overlying rights. That's a huge
20 difference in my mind.

21 THE COURT: Well, it seems to me that the
22 issue is ultimately going to be assuming that the
23 aquifer is an overdraft, assuming so then it's going to
24 be a question of a physical solution, and that physical
25 solution is going to impact the class as well as every
26 other party in this action. And it seems to me that's
27 the ultimate objective, to get everybody's correlative
28 rights at issue and resolved. And I don't understand,

1 of course, I don't know what the settlement is, but I
2 don't understand that anything I've heard from the
3 purveyors or anybody else is looking to a different
4 result than that. I mean, if the basin is in overdraft
5 there's a serious issue that has been presented to the
6 Court for resolution.

7 MR. ZIMMER: I agree that in the end if
8 there is a physical solution you may end up at the same
9 point, but from a pleading standpoint, from a burden of
10 proof standpoint there are huge issues that relate to
11 the burden of proof, who is bringing the action under
12 case law, who is required to prove what, and that's the
13 critical issue.

14 Now if, if the Court consolidates you're
15 still going to have to have determinations of pleadings
16 who is suing who for what. But my view is it shouldn't
17 be consolidated. The county should name defendants,
18 they should serve those defendants and they should
19 proceed on their claims. Procedurally that -- to me
20 that's the right way to do it. We are not in that
21 context. I understand what the Court is saying about a
22 physical solution. I just disagree that procedurally
23 it's the correct way to do it.

24 THE COURT: You know, creating a defendant
25 class is a very difficult problem, unless somebody
26 steps forward and volunteers to, to represent that
27 class, an individual, and then obtaining counsel and
28 that's why I ultimately suggested that we go to a

1 plaintiffs class. I think that so far it is achieving
2 the result. There's no argument, a lot of discussion,
3 a lot of angst among a lot of people based on
4 uncertainties. We are moving along.

5 We, I think finally have jurisdiction over
6 all of the component parts of the valley that need to
7 be within the Court's jurisdiction. And now we are
8 trying to work through the adjudication process to get
9 a fair just resolve and determine what the facts are.

10 And I frankly, I think that we are charting
11 into some new ground here. I think Mr. McLachlan is
12 correct, there's not a lot of case law dealing with
13 this type of situation. But there needs to be, and
14 maybe that's what this case is going to be all about, I
15 don't know.

16 But in any event, there are other people who
17 want to argue.

18 MR. DAVIS: Your Honor, Mike Davis.

19 I'm not going to reiterate everything that's
20 in the pleadings, but I would respectfully disagree
21 with Mr. Dunn, this case has not, to this point been
22 tried as if it was consolidated. If it were we would
23 have all been able to participate in these discussions
24 with Justice Robie, we were not. We were excluded. We
25 have no clue what's happened there. And quite honestly
26 when discovery was submitted by Mr. Kalfayan and
27 others, we refused to respond because we were not
28 parties to their case, and they have not objected to

1 that because in fact they recognize that we are not
2 parties to their case.

3 I would simply like to make it clear from my
4 perspective we have never acted as if this was a de
5 facto consolidated action and the implication that it
6 is I think is significant.

7 THE COURT: Well, okay. I don't disagree
8 with you, that there's been no consolidation. But
9 there has been a joinder with regard to the
10 adjudication of the common issues that we've dealt with
11 at this point. Every party has participated or had an
12 opportunity to participate fully in the adjudication of
13 the jurisdictional bounds, the single aquifer and other
14 issues that have come up incident to those.

15 If you want to call that a de facto
16 consolidation fine, it's certainly not a technical or a
17 correct use of the phrase of art. I agree with you,
18 but that's where we are headed. And I want to make
19 sure that everybody has an opportunity to be heard with
20 regard to these issues.

21 And Mr. Davis, with regard to the settlement
22 conference that was discussed between the purveyors and
23 the two classes, I don't think that's inconsistent with
24 anything that has happened here. I think that's
25 perfectly appropriate.

26 The parties sometimes will sit down with a
27 third party, not all parties to the action are involved
28 in that discussion, to try to settle some aspect of the

1 case or their portions of the case, that happens very
2 commonly. I can't think of a large case that I've ever
3 handled where it hasn't happened. And I think it's a
4 very important thing to do. That has nothing to do
5 with the question of the ultimate adjudication of
6 rights here. Not every lawyer, not every party has a
7 right to join in discussions that several of the
8 parties may be having with a third party mediator, and
9 Justice Robie was a third party volunteer mediator. I
10 appreciated that very much. He's a very knowledgeable
11 person. I just might add that to the extent that this
12 case moves on in the manner which it is, he may well be
13 available to assist us in resolving other aspects of
14 this case and he certainly was very gracious in
15 participating -- the parties who did participate. That
16 has nothing to do with really the progress of the
17 litigation or any other aspect.

18 MR. DAVIS: Your Honor, my point simply was
19 that it is not, as Mr. Joyce was indicating, it was not
20 a significant issue if we are not parties to those
21 actions and their isolated actions, even though they've
22 been coordinated and their common issues have been
23 tried, not all of the issues in our opinion in those
24 two class cases are issues that are common to the rest
25 of the case that we are in.

26 THE COURT: Well, there's no question about
27 that.

28 MR. DAVIS: And so there's a reason that it

1 was not a big issue, but as Mr. Joyce indicated to us
2 it would be a huge issue upon the consolidation, which
3 I anticipate the Court is going to order today without
4 putting specificity as to how that's implemented. I
5 understand the Court is saying I'm going to order
6 transfer. I'm going to order consolidation. I simply
7 am not going to put the details on how that's going to
8 happen.

9 THE COURT: I can't at this point because
10 there are a multitude of causes of action some of which
11 really belong together and some of which do not, but
12 the declaratory relief actions and the quiet title is
13 really a form of that, it's an effaceable action,
14 anyway seems to me is essentially the same side of the
15 coin or different side of the same coin.

16 In any event, anybody else want to say
17 anything?

18 MR. KALFAYAN: Yes, your Honor.

19 If I had concern initially that complete
20 consolidation might somehow conflict with the
21 settlement that we have with the public water suppliers
22 in the U.S., however, earlier today I met with counsel,
23 and I believe we have worked that out so that, so that
24 that issue will no longer be there. So we just need to
25 put the settlement agreement together and put a motion
26 for you to approve that settlement.

27 THE COURT: Yeah. And I cannot and will not
28 make a final order of consolidation until I've heard

1 that motion to approve the settlement.

2 MR. DUNN: Your Honor, this is just a little
3 bit off topic, but it does -- all the things we are
4 doing here do bear upon the settlement agreement and
5 the terms that we are putting in there.

6 Down in Los Angeles, certainly I don't know
7 how the practice is going up here, but in some cases in
8 situations where parties are trying to move things
9 along we have done the preliminary approval process by
10 way of stipulation and order as opposed to scheduling a
11 hearing out 60 days. It's, actually I've done some
12 research for some of my colleagues in Central Civil
13 West it's been done a number of times this year, and I
14 was thinking about trying to do that in this case. I
15 don't know if your Honor has had any experience with
16 that, but if your Honor has some objection to that then
17 the public water suppliers, at least in my class and I
18 believe Mr. Kalfayan's class, is considering doing that
19 once we get things approved. And the concern there is
20 that if, possibly that the settlement process of the
21 few classes could hold -- continue to hold up the phase
22 three trial date.

23 And as a way to move to the -- 'cause the
24 thing that really matters is the fairness hearing, a
25 day where everybody gets to voice their objections.
26 And if we set that trial date at some point for let's
27 say the springtime Mr. Kalfayan and I are obligated to
28 -- with our firms to go to, you know, I don't know

1 50 days of expert deposition and go through all the
2 litigation, and do all the stuff that's going to happen
3 because the classes' rights have not been laid to rest.

4 So I wanted to raise the question if your
5 Honor had a strong objection to the -- at least the
6 theoretical possibility of doing the preliminary
7 approval by way of stipulation and order, then we can
8 do it the old fashioned way and set a hearing date.

9 THE COURT: Well, I would want the request
10 for preliminary approval, whether it will be by
11 stipulation or otherwise, to be set for a hearing so
12 that I can review it and determine whether or not it
13 should be preliminary approval granted, that means that
14 at least 20 days notice to do that. And I would urge
15 you to do that. I don't want to have it just an
16 in-chambers conference.

17 MR. DUNN: Well, your Honor, the hearing is
18 down in Los Angeles at the end of the month?

19 THE COURT: I think for the most part that's
20 what we would do. It is a Los Angeles case. We are
21 going to continue to use the electronic website for
22 filing orders made previously in Santa Clara County for
23 the most part in Los Angeles filing under those
24 circumstances.

25 MR. DUNN: Well -- does your Honor have a
26 plan as far as a designated date in which things can be
27 noticed? I assume you are probably going to be doing
28 some mediation or arbitration or something.

1 THE COURT: I'll be doing private work.

2 MR. DUNN: Just as a practical matter when
3 we want to set things, I understand Rowena said that we
4 will probably still be going through her. And I'm
5 curious if your Honor has in your head set particular
6 days of the week or how that would work for noticing
7 things.

8 THE COURT: Actually I have not. I think
9 that we tentatively set a hearing for November the
10 30th --

11 MR. DUNN: Yes.

12 THE COURT: -- on a couple of these matters
13 including the settlement approval I presume. That's a
14 Monday. I don't have a preference as to any particular
15 days. I think my schedule can be rather flexible until
16 it becomes inflexible. I don't know when that's going
17 to happen. You know, I would just ask you to call Mrs.
18 Walker and schedule whatever you want to schedule.
19 She'll be in touch with me and confirm it.

20 MR. KALFAYAN: Your Honor, I was told that
21 we'll need a week to complete the draft of the
22 settlement agreement. And the public supplier is going
23 to need about 45 days.

24 THE COURT: How many?

25 MR. KALFAYAN: 45 days.

26 MR. BUNN: For governing board approval.

27 MR. KALFAYAN: For governing board approval
28 and then we can set it for a hearing 20 days after

1 that.

2 THE COURT: Will not be ready -- you will
3 not be ready on November 30th.

4 MR. BUNN: I don't see that possible.

5 MR. DUNN: Not with 20 days notice. I think
6 realistically, so we are probably looking at the first
7 week of January or something or the last week of
8 December.

9 MR. SLOAN: Your Honor, William Sloan on
10 behalf of U.S. Borax. Would it be possible if we could
11 perhaps recess for five minutes just to discuss some
12 logistics and then reconvene?

13 THE COURT: Sure.

14 MR. SLOAN: Thank you.

15 THE COURT: In terms of a date for a hearing
16 on that motion I would like a firm date and schedule
17 it. And I would like to avoid repetitive trips to Los
18 Angeles as much as we can and to the extent that we
19 have to, but if we can set it for let's say the first
20 week in January, like January the 7th or 8th and do the
21 other motions at that time.

22 MR. JOYCE: Your Honor, can we hold that
23 date open.

24 THE COURT: Yes. I just want you to be
25 thinking about that date. Okay. Let's take a maybe
26 five minute recess.

27 MR. JOYCE: Ten if we could, your Honor.

28 (Whereupon, a break was taken.)

1 THE COURT: Do you have anything to report
2 to the Court?

3 MR. ZIMMER: Thank you for the chance to
4 talk among ourselves. Obviously there's several
5 different motions here on calendar here today.

6 I want to make it clear that it's our
7 understanding that the Court is granting the motion to
8 consolidate and that the Court is intending to seek
9 further details. We just want to make sure that's
10 decided one way or the other before we get into these
11 other motions.

12 THE COURT: Let me clarify where we are.

13 I am granting the motion to the extent that
14 I'm ordering transfer of the Kern, Riverside County
15 cases to the County of Los Angeles. I am indicating
16 and intend to consolidate. I want to schedule a
17 hearing on the form of that order for a date that
18 coincides with the request for preliminary approval of
19 the class settlements in the Willis cases. And
20 ordering that the parties meet and confer concerning
21 the form of the order of consolidation so that we
22 ensure that only the causes of action that should be
23 consolidated are consolidated. Some of the causes of
24 action one party may not have an interest in with
25 regard to the other causes of action. So I'm thinking,
26 for example, in terms of inverse condemnation, damages
27 caused by settlement, and the like.

28 MR. ZIMMER: I guess our question is, the

1 motion was a motion to consolidate there was no motion
2 to transfer.

3 THE COURT: I am doing that out of my own
4 motion.

5 MR. MARKMAN: That's not true, your Honor.
6 Since I drafted that it was a motion to transfer to the
7 extent a transfer hasn't already occurred and to
8 consolidate.

9 MR. ZIMMER: So the question is, is the
10 Court granting the motion to consolidate at this point?

11 THE COURT: As I have expressed it,
12 Mr. Zimmer?

13 MR. ZIMMER: The Court said it's granting a
14 motion to transfer, is the Court granting a motion to
15 consolidate?

16 THE COURT: It is my intent to sign an order
17 to consolidate once the transfer has been completed and
18 after counsel have had an opportunity to meet and
19 confer concerning the form of the order.

20 MR. ZIMMER: Is the Court intending to hear
21 the other motions that are currently scheduled today?

22 THE COURT: As I understand it the motion to
23 allocate costs was continued to November the 30th.
24 That will be continued again to the date of the
25 approval of the -- maybe in fairness here to -- 'cause
26 I don't know what's transpired with the appointment of
27 that expert at this point. The motion to dismiss the
28 first amended cross-complaint which was filed on

1 January 10th, I don't think I've seen any recent papers
2 concerning that request. The motion by Lancaster is
3 stay the case for six months, continue the trial
4 setting conference. We can take that up today if we
5 want to do that. The motion by Bolthouse to amend the
6 exhibits to its amended cross-complaint --

7 MR. ZIMMER: I put that off until the next
8 hearing.

9 THE COURT: Well, that's my point, I haven't
10 seen anything on that lately.

11 MR. ZIMMER: We can't make any decision
12 until we find out what's happening with consolidation.

13 THE COURT: The further motion to disqualify
14 the Blue (phonetic) Firm was reset to November the
15 30th, that will again be reset to a date that coincides
16 with the motion to approve, the next hearing date. I
17 think those are the only motions that were referred to
18 for today's hearing.

19 There was a request by the Willis class to
20 dismiss the Mohave Employment Utility District from the
21 second class action complaint on grounds that they
22 don't occupy any land or pump water within the Antelope
23 Valley. If there's no objection I'll grant that.

24 MR. KALFAYAN: Thank you, your Honor.

25 THE COURT: Anybody have any idea that
26 there's anything else pending?

27 MR. ZIMMER: So was the Court still
28 intending to take up anything today other than what

1 we've done so far?

2 THE COURT: We do have a case management
3 conference scheduled as we always do. I'd be happy to
4 take that and anything else that's appropriately before
5 the Court.

6 MR. ZIMMER: Can we have another five
7 minutes, your Honor.

8 THE COURT: Can you just step to the back of
9 the courtroom and see if you've got something else to
10 talk about.

11 (Whereupon, a break was taken.)

12 MR. ZIMMER: Thank you for the Court's
13 indulgence on that. I think we have nothing else
14 further to discuss, but we would request that nothing
15 further happen on the case substantively or in terms of
16 case management conference until there's a ruling on
17 the motion to consolidate.

18 THE COURT: You mean in the form of an
19 order?

20 MR. ZIMMER: I would say on the motion.
21 Unless the Court is saying that the motion is granted
22 today to consolidate, then my understanding is the
23 Court is going to look at what's going to be submitted
24 later and determine whether the Court is going to grant
25 it. If the Court is granting it today then we need to
26 know that.

27 THE COURT: Well, I think that the Court is
28 granting it today, but the exact form of that order and

1 what exactly is going to be consolidated is not clear
2 to me at this point. I want counsel to meet and confer
3 concerning that and provide the Court with some
4 proposals for how that consolidation should work. This
5 is as you know a very complicated complex case with a
6 series of pleadings that are somewhat disparate, but
7 which as I've indicated, have an accord that is common
8 to all of them. And I want to make sure that the form
9 of the order is appropriate to achieve the objectives
10 of litigation. And I can't do that without some
11 proposals.

12 So I think you understand what I think the
13 issues are with regard to that, we've had enough of a
14 discussion about that, make sure that what we do is
15 fair to all parties and that no party is prejudiced as
16 a result of what it is that we are attempting to
17 accomplish, which I think is to provide a benefit to
18 all the parties to the adjudication of the valley
19 water.

20 MR. MARKMAN: Your Honor, we have a few
21 requests when you went through your list of motions
22 pending. We would ask that you grant -- deny the
23 motion to dismiss the cross-complaint filed by Public
24 Water Suppliers and also deny the motion for a stay.

25 MR. SLOAN: Your Honor, before you even act
26 on that several of the parties have prepared a 170.6
27 challenge. We believe that upon consolidation that
28 gives us the right to exercise the 170.6. I'd like

1 permission to provide it at this time to the clerk.

2 THE COURT: You certainly may file that.

3 MR. SLOAN: I also have additional copies
4 here for everybody.

5 MR. KALFAYAN: Your Honor, we haven't seen
6 that. Can I get a copy.

7 THE COURT: Would you like to set that for a
8 hearing?

9 MR. SLOAN: We don't believe it requires a
10 hearing.

11 THE COURT: It's going to have a hearing.

12 MR. SLOAN: If your Honor would like to set
13 a date.

14 THE COURT: When would you like to have a
15 hearing?

16 MR. LEININGER: Your Honor, this is Mr.
17 Leininger. We couldn't hear Mr. Sloan's comments on
18 the motion.

19 MR. SLOAN: I indicated that several of the
20 parties are filing a 170.6.

21 MR. LEININGER: I'm still having
22 difficulty --

23 MR. SLOAN: Several of the parties are
24 filing a 170.6 preemptory challenge to disqualify the
25 judge. It's our understanding upon consolidation the
26 parties are afforded a renewed right to exercise that
27 challenge. And I believe we are now going to set a
28 hearing for that.

1 THE COURT: All right. When would you like
2 to have a hearing? We can do that do that up here.
3 Would you like to do that within ten days?

4 MR. BUNN: If we can have that on a Monday
5 or Tuesday. I'm currently in trial on Wednesdays,
6 Thursdays or Fridays.

7 MR. SLOAN: So your Honor knows, I'm not
8 available Monday or Tuesday of next week.

9 MR. BUNN: I'm sorry. Preferably a Tuesday
10 if that would please the Court.

11 THE COURT: How about October 27th?

12 MR. SLOAN: Is that two weeks from today?

13 MR. BUNN: Yes, your Honor, that's fine.

14 MR. MARKMAN: Would that be at nine or ten?

15 THE COURT: Let's make it at nine o'clock.

16 MR. EVERTS: Your Honor, we can appear by
17 court call.

18 THE COURT: Now I do want some briefing by
19 anybody who is opposed to the motion. And I'd like an
20 opposition filed by the 20th. Next Tuesday seven days.

21 MR. Defense 2: Yes, your Honor.

22 THE COURT: And response no later than --
23 let's make the opposition the 19th and have the
24 response no later than the 22nd. I should say the
25 reply. Okay.

26 MR. FIFE: Your Honor, we are hearing that
27 up here. Several of us catch a flight out of Burbank
28 that gets here just after nine. Can we set it for

1 ten o'clock.

2 THE COURT: I really don't think I can do
3 that under the circumstances. The nine o'clock has to
4 be it so if you are a few minutes late I'll understand.

5 MR. KALFAYAN: Your Honor, I've conferred
6 with the Public Water Suppliers. Should we reserve
7 January 7th or 8 for the motion?

8 THE COURT: I think that's a smart thing to
9 do.

10 MR. KALFAYAN: January 8th.

11 THE COURT: Well, that's a Friday that
12 sounds about right. January the 8th reserve it.

13 MR. KALFAYAN: Yes, your Honor.

14 MR. EVERTZ: Doug Evertz for the City of
15 Lancaster with the Court's permission we agree to have
16 our motion stayed and continued to that particular date
17 too.

18 THE COURT: Okay.

19 MR. EVERTZ: If you want argument I'd be
20 happy to do that.

21 THE COURT: All right. All pending motions
22 with exception to the hearing on the 170.6 will be
23 reset to January 8th.

24 Okay. Thank you very much.

25

26 (Whereupon, the proceedings concluded.)

27

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1 STATE OF CALIFORNIA)
2 COUNTY OF SANTA CLARA)

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I, Alicia Plancarte, Certified Shorthand Reporter, do hereby certify:

That I am the reporter, duly appointed and sworn, who reported the above and foregoing proceedings at the time and place therein stated.

That I reported the said proceedings; and that the foregoing pages are a full, true, complete and correct transcript of my shorthand notes taken at said time and place to the best of my ability.

I further certify that I have complied with CCP 237 (A) (2) in that all personal juror identifying information has been redacted, if applicable.

DATED: This _____ day of _____, 2009

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