

Exhibit 13

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

Coordination Proceeding
Special Title (Rule 1550(b))

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 325 201

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,
consolidated actions, Case Nos.
RIC 353 840, RIC 344 436, RIC 344 668

Willis v. Los Angeles County Waterworks District
No. 40
Superior Court of California, County of Los
Angeles, Case No. BC 364 553

Wood v. Los Angeles County Waterworks District
No. 40
Superior Court of California, County of Los
Angeles, Case No. BC 391869

Judicial Council Coordination
Proceeding No. 4408

For Court's Use Only:
Santa Clara County Case No.
1-05-CV-049053
(for E-Posting/E-Service
Purposes Only)

Date/Time: Thursday, October 15, 2009 (no time)

Location: Santa Clara County Superior Court 191 N. 1st Street, Department 17C
San Jose, CA 95113

Present: Hon. Jack Komar, Judge R. Gutierrez, Clerk

*Antelope Valley Groundwater Cases (JCCP 4408)
Los Angeles County Superior Court, Case No. BC 325 201
Thursday, October 15, 2009 (no time) / Hon. Jack Komar*

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MINUTE ORDER RE:

The following parties have requested and received the Court's permission to re-join the Willis Class, and have been instructed to return either Exhibit A or Exhibit B from the June 18, 2009 Stipulation & Order Defining Procedure for Parties to Participate as Members of the Willis Class to the address listed on the forms:

1. Josee (Marie) Kubiak, Trust of Kubiak

This matter was not reported.

PARTIES/ATTORNEYS OF RECORD: NO APPEARANCES

City of Lancaster	Douglas Evertz	
County of Los Angeles Waterworks District #40	Jeffrey Dunn	
Richard Wood	Daniel O'Leary Michael McLachlan	
Quartil Water District	Bradley Weeks	
City of Palmdale	Whitney McDonald	
Phelon Pinon Hills CSD	Francis Logan	
U.S. Borax	William Sloan	
Tejon Ranch Corp.	Robert Kuhs	
Antelope Valley Groundwater Agreement Association	Michael Fife	
Los Angeles Waterworks 40	Michael Moore	
Van Dam Antelope Valley Water Storage	Scott Kuney	
Rebecca Willis	Ralph Kalfayan	
Blum Trust	Sheldon Blum	
Palmdale Water District	Thomas Bunn	
United States	James Dubois R. Lee Leininger	
Diamond Farming, et al	Bob Joyce	
Bolthouse Farms	Richard Zimmer	

Exhibit 14

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

**CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court**

OCT 22 2009

John A. Clarke, Executive Officer/Clerk

By  **RAUL BANCHEZ**, Dept.

<p>Coordination Proceeding Special Title (Rule 1550(b))</p> <p>ANTELOPE VALLEY GROUNDWATER CASES</p> <p>Included Actions:</p> <p>Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California County of Los Angeles, Case No. BC 325 201</p> <p>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</p> <p>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, consolidated actions, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668</p> <p>Willis v. Los Angeles County Waterworks District No. 40 Superior Court of California, County of Los Angeles, Case No. BC 364 553</p> <p>Wood v. Los Angeles County Waterworks District No. 40 Superior Court of California, County of Los Angeles, Case No. BC 391869</p>	<p>Judicial Council Coordination Proceeding No. 4408</p> <p>For Court's Use Only: Santa Clara County Case No. 1-05-CV-049053 (for E-Posting/E-Service Purposes Only)</p>
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Date/Time: Friday, October 16, 2009 (no time)

Location: Santa Clara County Superior Court

191 N. 1st Street, Department 17C
San Jose, CA 95113

Present: Hon. Jack Komar, Judge

R. Gutierrez, Clerk

*Antelope Valley Groundwater Cases (JCCP 4408)
Los Angeles County Superior Court, Case No. BC 325 201
Friday, October 16, 2009 (no time) / Hon. Jack Komar*

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

Coordination Proceeding
Special Title (Rule 1550(b))

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 v.
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No. 40
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Judicial Council Coordination
Proceeding No. 4408

For Court's Use Only:
Santa Clara County Case No.
1-05-CV-049053
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Date/Time: Friday, October 16, 2009 (no time)

Location: Santa Clara County Superior Court

191 N. 1st Street, Department 17C
San Jose, CA 95113

Present: Hon. Jack Komar, Judge

R. Gutierrez, Clerk

*Antelope Valley Groundwater Cases (JCCP 4408)
Los Angeles County Superior Court, Case No. BC 325 201
Friday, October 16, 2009 (no time) / Hon. Jack Komar*

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MINUTE ORDER RE:

The following parties have requested and received the Court's permission to re-join the Willis Class, and have been instructed to return either Exhibit A or Exhibit B from the June 18, 2009 Stipulation & Order Defining Procedure for Parties to Participate as Members of the Willis Class to the address listed on the forms:

1. Betty Jacobsen

This matter was not reported.

PARTIES/ATTORNEYS OF RECORD: NO APPEARANCES

City of Lancaster	Douglas Evertz	
County of Los Angeles Waterworks District #40	Jeffrey Dunn	
Richard Wood	Daniel O'Leary Michael McLachlan	
Quartil Water District	Bradley Weeks	
City of Palmdale	Whitney McDonald	
Phelon Pinon Hills CSD	Francis Logan	
U.S. Borax	William Sloan	
Tejon Ranch Corp.	Robert Kuhs	
Antelope Valley Groundwater Agreement Association	Michael Fife	
Los Angeles Waterworks 40	Michael Moore	
Van Dam Antelope Valley Water Storage	Scott Kuney	
Rebecca Willis	Ralph Kalfayan	
Blum Trust	Sheldon Blum	
Palmdale Water District	Thomas Bunn	
United States	James Dubois R. Lee Leininger	
Diamond Farming, et al	Bob Joyce	
Bolthouse Farms	Richard Zimmer	

Exhibit 15

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 LLANO DEL-RIO WATER CO., LLANO MUTUAL WATER CO., BIG ROCK MUTUAL WATER
 7 CO., and LITTLE BALDY WATER CO.

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 12 *Attorneys for Palmdale Water District*

13 [See Additional Counsel – next page]

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **COUNTY OF LOS ANGELES**

<p>16</p> <p>17 ANTELOPE VALLEY GROUNDWATER</p> <p>18 CASES</p> <p>19 Included Actions:</p> <p>20 Los Angeles County Waterworks District No. 40</p> <p>21 v. Diamond Farming Co. Superior Court of</p> <p>22 California, County of Los Angeles, Case No. BC</p> <p>23 325201; Los Angeles County Waterworks District</p> <p>24 No. 40 v. Diamond Farming Co., Superior Court</p> <p>25 of California, County of Kern, Case No. S-1500-</p> <p>26 CV-234348; Wm. Bolthouse Farms, Inc. v. City</p> <p>27 of Lancaster Diamond Farming Co. v. City of</p> <p>28 Lancaster v. Palmdale Water District, Superior</p> <p>Court of California, County of Riverside,</p> <p>consolidated actions, Case Nos. RIC 353840,</p> <p>RIC 344436, RIC 344668</p> <p>[Include class actions]</p>	<p>) Judicial Council Coordination</p> <p>) Proceeding No. 4408</p> <p>) [Santa Clara Superior Court Case No. 1-05-</p> <p>) CV-049053]</p> <p>) [Assigned for All Purposes to the</p> <p>) Honorable Jack Komar]</p> <p>) OPPOSITION TO PEREMPTORY</p> <p>) CHALLENGE TO ASSIGNED JUDGE</p> <p>) (CCP § 170.6)</p>
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1 I. INTRODUCTION

2 The following opposition to the peremptory challenge to Judge Komar filed by certain landowner
3 parties. This peremptory challenge must be overruled because it is untimely.

4 Consolidation does not provide a new opportunity for a peremptory challenge because judicial
5 coordination rules do not allow for it, and all parties have already appeared before Judge Komar on all
6 matters subject to consolidation. Judge Komar has already conducted two phases of trial and made
7 significant determinations of key, factual issues. The time to peremptorily challenge this court passed
8 years ago. This challenge is untimely.

9 II. PROCEDURAL HISTORY

10 On July 11, 2005 the Chief Justice of the California Supreme Court coordinated the various cases
11 which compose this action pursuant to Code of Civil Procedure section 404.3 and Court Rule 1540. On
12 August 31, 2005 the Chief Justice of California assigned the Honorable Jack Komar as the coordination
13 trial judge to hear all the coordinated actions in this case. Notice of Judge Komar’s assignment was given
14 on September 2, 2005.

15 On October 13, 2009, the court granted the motion of the public water suppliers to consolidate the
16 previously coordinated cases for all purposes. A number of landowner parties filed a peremptory
17 challenge the same day, 1,502 days after notice was given of Judge Komar’s assignment.

18 All of the parties who have peremptorily challenged Judge Komar either participated in the phase
19 2 trial or could have participated in the phase 2 trial which started on October 6, 2008. The court is
20 requested to take judicial notice of the Docket, which demonstrates that all of the parties which have
21 issued the preemptory challenge appeared in the cases which were consolidated prior to the trial on
22 October 6, 2008.

23 III. ARGUMENT

24 A. The challenge is untimely under Court Rule 3.516 because the challenge was not
25 issued within twenty days.

26 Coordinated proceedings, such as the instant case, have specialized timing provisions for
27 disqualification motions. Rule 3.516 provides that:

1 “A party making a peremptory challenge by motion or affidavit of prejudice regarding an assigned
2 judge must submit it in writing to the assigned judge within twenty days after service of the order
3 assigning the judge to the coordination proceeding.”

4 The case was ordered coordinated June 17, 2005. The order assigning Judge Komar to hear all the
5 coordinated cases was made on August 31, 2005. Service of this order was made on September 2, 2005.
6 (See Exhibit “A” attached hereto.) Defendants failed to issue a preemptory challenge within twenty days
7 of this date. Therefore, this challenge is more than four years too late.

8 The application of this rule to “new parties” was considered in a case arising from a complex
9 litigation filed in Santa Clara County. In *Industrial Indemnity Co. v. Superior Court* (1989) 214
10 Cal.App.3d 259, 262 Cal.Rptr. 544, newly added parties to a court proceeding attempted to disqualify the
11 Honorable Conrad L. Rushing. Judge Rushing denied the motion on the grounds that it was untimely. In
12 upholding this decision, the court of appeal’s held:

13 “The effect of rules governing coordination cases is to exclude add-on parties from the right
14 to preemptorily challenge the coordination trial judge.” (*Industrial Indemnity Co. v. Superior
15 Court, supra*, 214 Cal.App.3d at 263, 262 Cal.Rptr.
16 at 546.)

17 The landowners suggest they should be considered “new parties” to two class actions upon
18 consolidation. However, *Industrial Indemnity* makes it clear that even if the landowners were “new” to
19 any aspect of this case, the special timing provisions of Rule 3.516 bar their challenge as untimely.
20 Accordingly, the motion must be overruled.

21 **B. The challenge is also untimely under Code of Civil Procedure section 170.6**

22 By arguing that even under the terms of 170.6, the preemptory challenge fails, the PWS are not
23 conceding that Court Rule 3.516 does not apply. Nevertheless, addressing the preemptory challenge as
24 argued by the Landowners, the challenge still fails.

25 Even if Rule 3.516 somehow did not apply to this case, the motion would still be untimely for
26 three separate reasons. First, a challenge under 170.6 must be filed within 10 days after a party has
27 appeared in the action (Code of Civ. Proc. § 170.6(a)(2)). Prior to consolidation, Judge Komar was the
28 assigned judge for each case and had been the assigned judge since August 31, 2005. Since notice was

1 given to all parties that Judge Komar was assigned on September 2, 2005, under this section, the
2 challenge must have been made on or before September 12, 2005.

3 Next, Code of Civil Procedure section 170.6 provides in part:

4 “In no event shall any judge, court commissioner, or referee entertain the motion if it be made
5 after the drawing of the name of the first juror, or if there be no jury, after the making of an
6 opening statement by counsel for plaintiff, or if there is no opening statement by counsel for
7 plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the
8 cause has otherwise commenced.”

9 Here, this court has presided over two phases of trial involving the landowners. The first phase of
10 trial was for purposes of determining the significant, factual issue of the scope of the court’s jurisdiction,
11 including the identity of landowners who needed to be included in the case. All of the moving parties
12 were represented at this trial. The second phase of trial included a factual determination of the
13 characteristics of the basin, including a determination that water in the basin commingled throughout the
14 basin. Therefore, pursuant to C.C.P. § 170.6, landowners were required to submit this challenge no later
15 than the first phase of trial.

16 Finally, the challenge must be made prior to any hearing of any contested issues of law and fact.
17 (*Pacific etc. Conference of United Methodist Church v. Superior Court* (1978) 82 Cal.App.3d 72, 79.)

18 The court has held:

19 “[A]n otherwise timely peremptory challenge must be denied if the judge has presided at an
20 earlier hearing which involved a determination of contested factual issues relating to the
21 merits.” (*Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 525, 108 Cal.Rptr.2d 825.)

22 Even if the court hearings so far were not considered to be the trial of the case, they involved the
23 determination of contested factual issues relating to the merits. In particular, the determination in phase
24 two that there is but a single groundwater basin is essential to the comprehensive adjudication of water
25 rights which is at the heart of the case.

26 Therefore, even if the timing provisions of C.C.P. § 170.6 applied to this case, the landowners’
27 opportunity to challenge the judge would have expired approximately four years ago. The statute is
28 clearly designed to prevent precisely this situation: where a party is dissatisfied with the result and wishes

1 to “shop” for a new judge. Therefore, permitting this untimely challenge would be extremely unfair to the
2 remaining parties in this case, and would encourage sharp practices.

3 **C. *Nissan Motors v. Superior Court* affords Landowners no relief**

4 *Nissan Motors Corporation In USA v. Superior Court* (1992) 6 Cal.App.4th 150, the only case
5 cited by Defendants, has no application to this case. In *Nissan*, there were three separate lawsuits in three
6 courts before three separate judges. Judges Ross, Parslow, and Luesebrink. One of the judges, Judge
7 James R. Ross, ordered that all three actions be consolidated into his court. The litigants before Judge
8 Parslow and Judge Luesebrink therefore never had the opportunity to challenge Judge Ross. The
9 defendant in each of the three actions, Nissan Motor Corp., moved to disqualify Judge Ross pursuant to
10 CCP § 170.6 only *as to the actions that had not yet been before Judge Ross*. The appellate court ruled
11 that as to the actions that were new to Judge Ross, the challenge was timely because it was made within
12 ten days after the assignment of those cases to Judge Ross.

13 The important component of this decision was the fact that Judge Ross had never before presided
14 over the two new cases. The court made a special point to note that:

15 “The three cases arise out of different injuries and damages, occurring in different accidents
16 involving different vehicles at different times and places, and under different fact patterns.
17 They are thus three separate and distinct cases, entitled to separate challenges under Section
170.6.” (*Nissan, supra*, 6 Cal.App.4th at 155, 7 Cal.Rptr.2d at 303.)

18 The difference between *Nissan Motors* and the case at hand is that here, all parties were before
19 Judge Komar prior to consolidation. The act of consolidation did not result in a new judge being assigned
20 to the case, as it did in *Nissan Motors*. Since the act of consolidation did not impose a new judge on
21 anybody, there is no basis to revive the right to make a preemptory challenge.

22 The *Nissan Motors* court comments that “A party's acquiescence of a judge to hear one action
23 does not impair his or her right to exercise a challenge to prevent that judge from hearing another matter”
24 *Nissan Motor Corporation In USA v. Superior Court, supra*, 6 Cal.App.4th 150, 155. Defendants had the
25 right to challenge Judge Komar. Defendants failed to timely exercise that right over four years ago.

26 The landowners would argue that consolidation equals the right to a preemptory challenge.
27 Because all of the parties have appeared before Judge Komar more the ten days before the challenge was

1 issued, and because a contested hearing of law and fact has occurred, section 170.6 does not allow a
2 preemptory challenge.

3
4 **III. CONCLUSION**

5 Whether the timing of this motion is governed by Rule 3.516 or C.C.P. § 170.6, the motion has
6 been made several years too late. Since Judge Komar has already conducted two phases of trial, and
7 decided significant factual issues applicable to *all claims* in each case, disqualification of the judge at this
8 point would seriously prejudice the non-moving parties. Accordingly, the motion must be denied.

9
10 DATED: October 19, 2009.

LEMIEUX & O'NEILL

11 By: _____
12 W. Keith Lemieux
13 Attorneys for Littlerock Creek Irrigation
14 District, et al.

15 **LAGERLOF, SENEAL, GOSNEY & KRUSE, LLP**

16 /s/
17 By: _____
18 Thomas S. Bunn
19 Attorneys for Palmdale Water District

20 **RICHARD, WATSON & GERSHON**

21 /s/
22 By: _____
23 James L. Markman
24 Attorneys for City of Palmdale.

Exhibit 16

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9 ROCKARD J. DELGADILLO, City Attorney
10 RICHARD M. BROWN, Senior Assistant
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13 Assistant City Attorney
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Exempt from Filing Fee Pursuant to
Government Code Section 6103

Attorneys for Defendant CITY OF LOS ANGELES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

**ANTELOPE VALLEY
GROUNDWATER
CASES**

Included Actions:

Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co. Superior
Court of California, County of Los
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Angeles County Waterworks District No.
40 v. Diamond Farming Co., Superior
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No. S-1500-CV-234348; Wm. Bolthouse
Farms, Inc. v. City of Lancaster Diamond
Farming Co. v. City of Lancaster v.
Palmdale Water District, Superior Court of
California, County of Riverside,
consolidated actions, Case Nos. RIC
353840, RIC 344436, RIC 344668
[Include class actions]

Judicial Council Coordination

Proceeding No. 4408

**[Santa Clara Superior Court Case No. 1-05-CV-
049053]**

[Assigned for All Purposes to the
Honorable Jack Komar]

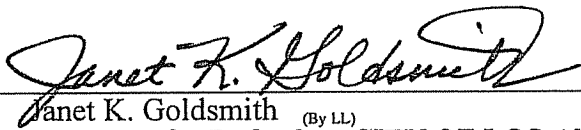
**CITY OF LOS ANGELES' JOINDER IN
OPPOSITION TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE
(CCP § 170.6)**

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The City of Los Angeles hereby joins in the opposition presented on behalf of the public water suppliers¹ to the peremptory challenge to Judge Komar filed by certain landowner parties. This peremptory challenge must be overruled because it is untimely.

ROCKARD J. DELGADILLO, City Attorney
Richard M. Brown, Senior Assistant City Attorney for
Water and Power

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By 
Janet K. Goldsmith (By LL)
Attorneys for Defendant CITY OF LOS ANGELES

¹ Opposing parties are as follows: 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., and Little Baldy Water Co. [...]

Exhibit 17

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SmithTrager LLP
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EXEMPT FROM FILING FEES UNDER
GOVERNMENT CODE § 6103

Attorneys for Cross-Complainant
Phelan Piñon Hills Community Services District

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT

Coordination Proceeding)
Special Title (Rule 1550(b)))
ANTELOPE VALLEY)
GROUNDWATER CASES)
Included Actions:)
Los Angeles County Waterworks District)
No. 40 v.)
Diamond Farming Co., et al.,)
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Lancaster)
Diamond Farming Co. v. City of Lancaster)
Diamond Farming Co. v. Palmdale Water)
Dist.)
Riverside County Superior Court,)
Consolidated Action, Case Nos. RIC 353)
840, RIC 344 436, RIC 344 668)
AND RELATED CROSS-ACTIONS)

Judicial Council Coordination Proceeding
No. 4408

For Filing Purposes Only: Santa Clara
County Case No.: 1-05-CV-049053

Assigned to the Honorable Jack Komar,
Department 17

**OPPOSITION TO PEREMPTORY
CHALLENGE (C.C.P. §170.6)**

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

I.

INTRODUCTION

Phelan Piñon Hills Community Services District (“PPHCSD”) opposes the peremptory challenge to Judge Komar filed by attorneys for U. S. Borax, Inc., Bolthouse Properties, LLC, Diamond Farming Company, Crystal Organic Farms, Grimmway Enterprises, Inc., Lapis Land Company, LLC, Service Rock Products Corporation, Sheep Creek Water Company, Inc., A. V. United Mutual Group, and Antelope Valley Groundwater Agreement Association (“AGWA”). Defendants’ peremptory challenge is untimely and is filed after two trials involving determination of law and fact.

On October 13, 2009, Judge Komar granted Public Water Suppliers’ Motion to Transfer and Consolidate for All Purposes each of the actions pending as part of Judicial Council Coordination Proceeding 4408, also known as Antelope Valley Groundwater Cases. Defendants immediately filed their Peremptory Challenge to Judge Komar.

Consolidation of cases in coordinated proceedings does not create a new opportunity for a peremptory challenge. Judicial coordination rules do not allow for it. The defendants have already appeared before Judge Komar on all matters subject to consolidation, and have participated in trials of fact and law before Judge Komar, in which he made significant determinations of key factual issues. The time to peremptorily challenge this judge passed over four years ago.

II.

THE PEREMPTORY CHALLENGE IS UNTIMELY

A. Timing for a Peremptory Challenge in a Non-Coordinated Action is Different Than in a Coordinated Action

A challenge under California Code of Civil Procedure §170.6 must be filed within 10 days after a party has appeared in the action (Code of Civil Procedure § 170.6). In addition, the challenge must be made prior to any hearing of any contested issues of law and fact.

Pacific/Southwest Annual Conference of the United Methodist Church v. Superior Court (1978) 82 Cal.App3d 72, 79. Where the judge is known 10 days before the date of the trial or hearing,

1 the challenge must be made at least 5 days before that date.

2 Section 170.6(2) provides that, “in no event shall any judge entertain ... a motion [for
3 peremptory challenge] ...” if it is made after commencement of trial. Since the parties who seek
4 to challenge Judge Komar now have participated in two trials and numerous hearings, under the
5 above criteria alone, the challenge is untimely.

6 **B. Special Rule in Cases Coordinated for Trial**

7 A peremptory challenge in coordinated actions is governed by California Rule of Court
8 No. 3.516, which states, “A party making a peremptory challenge by motion or affidavit of
9 prejudice regarding an assigned judge must submit it in writing to the assigned judge within 20
10 days after service of the order assigning the judge to the coordination proceeding.”

11 A Coordination Petition was filed on January 3, 2005. The case was ordered coordinated
12 on June 17, 2005, and designated as Judicial Council Coordination Proceeding No. 4408. The
13 Amended Order Assigning Coordination Trial Judge, assigning Judge Komar to sit as
14 coordination trial judge, was signed by the Chief Justice of California and Chair of the Judicial
15 Council on August 31, 2005 (*see* Exhibit “A”, attached hereto). Counsel for Los Angeles County
16 Waterworks District No. 40 filed a Notice of Entry of the Amended Order Assigning
17 Coordination Trial Judge on September 2, 2005 (*see* Exhibit “B”, attached hereto). Defendants
18 failed to issue a peremptory challenge within the time permitted under the law.

19 *Industrial Indemnity Co. v. Superior Court* (1989) 214 Cal.App.3d 259, 263 applied and
20 upheld the application of the requirement that peremptory challenges be made within twenty days
21 after the coordinated judge is assigned. Whether defendants are the initial parties or add-on
22 parties, their right to challenge Judge Komar is subject to Court Rule 3.516. Under this rule,
23 defendants had twenty days to challenge Judge Komar. Defendants chose not to do so, and this
24 challenge is untimely.

25 **C. This Peremptory Challenge Must be Denied Because the Judge has Presided**
26 **at Earlier Proceedings Which Involved Determinations of Contested Factual**
27 **Issues Relating to the Merits**

28 The case of *Swift v. Superior Court* (2009) 172 Cal.App.4th 878, holds that a Code of
Civil Procedure §170.6 challenge must be denied if the judge has presided at an earlier hearing

1 which involved a determination of contested factual issues relating to the merits. The case states
2 at page 883:

3 “At issue here is one of the limited exceptions to automatic
4 disqualification. An otherwise timely peremptory challenge must
5 be denied if the judge has presided at an earlier hearing which
6 involved a determination of contested factual issues relating to the
7 merits.” *Swift v. Superior Court* (2009) 172 Cal.App.4th 878,
8 citing *Grant v. Superior Court* (2001) 90 Cal.App4th 518-525.

9 In these coordinated actions, Judge Komar has presided over trials of significant factual
10 issues. Phase I of trial determined the significant factual issue of the scope of the court’s
11 jurisdiction, including the identity of landowners who needed to be included in the action. All of
12 the parties who now challenge Judge Komar were represented at this trial. Phase II of trial
13 included a factual determination of the characteristics of the basin, including a determination that
14 water in the basin commingled throughout the basin.

15 Allowing a challenge after the judge has ruled on contested fact issues relating to the
16 merits would make it possible for defendants to gamble on obtaining a favorable decision and
17 then disqualify the judge if confronted with an adverse ruling. The policy against judge-shopping
18 precludes such a result. *Stevens v. Superior Court* (2002) 96 CA4th 54, 60.

19 **III.**

20 ***NISSAN MOTOR CORPORATION v. SUPERIOR COURT***

21 **IS NOT APPLICABLE TO THIS ISSUE**

22 Defendants argue that *Nissan Motor Corporation In U.S.A. v. Superior Court* (1992)
23 6 Cal.App.4th 150 allows them to exercise a peremptory challenge under Code of Civil
24 Procedure § 170.6. However, *Nissan* was not a case that had been deemed coordinated pursuant
25 to Code of Civil Procedure § 404, *et seq.*, and thus California Rule of Court No. 3.516 was not
26 discussed. On this basis, *Nissan* is inapplicable to these coordinated actions.

27 *Nissan* is a case of three separate lawsuits in three courts before three separate judges.
28 One of the judges ordered that all three actions be consolidated into his court. Some of the

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litigants therefore never had the opportunity to challenge the judge that had ordered the cases be transferred to him. The appellate court ruled that as to the actions that were new to the challenged judge, the challenge was timely because it was made within ten days after the assignment of those cases.

Regardless of Rule 3.516, in *Nissan*, there was no dispute that the challenge in the consolidated actions was filed within ten days after notice of the assignment of those cases to the new judge. The appellate court's ruling in *Nissan* was thus compelled by the plain language of Code of Civil Procedure 170.6.

Nissan is distinguishable because in this case, all parties were before Judge Komar prior to consolidation, and the act of consolidation did not impose a new judge upon any of the defendants who now challenge Judge Komar. There is no dispute that defendants' challenge was filed more than twenty days after August 31, 2005, the date the actions were coordinated and assigned to Judge Komar. The plain language of California Rule of Court 3.516 compels the conclusion that the challenge is untimely by approximately four years.

V.

CONCLUSION

Defendants' motion has been brought several years too late. Judge Komar has already conducted two phases of trial and decided key factual issues applicable to the claims in each case. In addition, the timing of this motion is governed by Code of Civil Procedure § 170.6, and Rule 3.516, both of which specifically preclude a preemptory challenge by defendants.

Dated: October 19, 2009

SmithTrager LLP

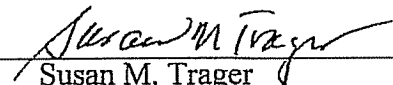
By 
Susan M. Trager
Attorneys for Defendant and Cross-Complainants Phelan Piñon Hills Community Services District

EXHIBIT "A"

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/23/05

DEPT. 57

HONORABLE RALPH W. DAU

JUDGE

M. NISALL

DEPUTY CLERK

HONORABLE
13

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

R. INNIS, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC325201

Plaintiff
Counsel

LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40
VS
DIAMOND FARMING COMPANY, A
CORPORATION, ET AL.

Defendant
Counsel

[No Appearances]

NATURE OF PROCEEDINGS:

NON-APPEARANCE CASE REVIEW;

The Amended Order Assigning Coordination Trial Judge in Judicial Council Coordination Proceeding No. 4408 was signed by the Chief Justice Of California and Chair of the Judicial Council on August 31, 2005.

The Honorable Jack Komar of the Superior Court of California, County of Santa Clara, has been assigned pursuant to Code of Civil Procedure Section 404.3 and Rule 1540 of the California Rules of Court to sit as coordination trial judge to hear and determine the coordinated actions and may exercise all the powers over each coordinated action of a judge of the court in which that action is pending.

Counsel for the Plaintiff shall give notice.

**CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER**

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on 09-26-05 I served Notice of Entry of the above Minute Order of 09-23-05 upon counsel named below by depositing in the United States Mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a sealed envelope and addressed as show below with the postage thereon fully prepaid.

MINUTES ENTERED 09/23/05 COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/23/05

DEPT. 57

HONORABLE RALPH W. DAU

JUDGE

M. NISALL

DEPUTY CLERK

HONORABLE
13

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

R. INNIS, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am BC325201

Plaintiff
Counsel

LOS ANGELES COUNTY WATERWORKS
DISTRICT NO. 40
VS
DIAMOND FARMING COMPANY, A
CORPORATION, ET AL.

Defendant
Counsel

[No Appearances]

NATURE OF PROCEEDINGS:

Date: September 26, 2005

John A. Clarke, Executive Officer/Clerk

By:

M. Nisall
M. Nisall, Judicial Assistant/Clerk

Best, Best & Krieger, LLP
Eric L. Garner, Esq.
5 Park Plaza, Suite 1500
Irvine, California 92614

MINUTES ENTERED
09/23/05
COUNTY CLERK

EXHIBIT "B"

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ERIC L. GARNER, Bar No. 130665
JEFFREY V. DUNN, Bar No. 131926
JILL N. WILLIS, Bar No. 200121
BEST BEST & KRIEGER LLP
3750 University Avenue
P.O. Box 1028
Riverside, California 92502
Telephone: (951) 686-1450
Telecopier: (951) 686-3083

Los Angeles County Waterworks District No. 40

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

Coordination Proceeding
**ANTELOPE VALLEY
GROUNDWATER CASES**

Wm. Bolthouse Farms, Inc. v. City of
Lancaster
Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water
District
Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.
Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.

Judicial Council Coordination Proceeding No.
4408

Hon. David C. Velasquez, Dept. CX101

**NOTICE OF ENTRY OF AMENDED
ORDER ASSIGNING COORDINATION
TRIAL JUDGE**

Riverside County Superior Court
Lead Case No. RIC 344436
Case No. RIC 344668
Case No. RIC 353840

Los Angeles Superior Court
Case No. BC 325201

Kern County Superior Court
Case No. S-1500-CV-254348

Coordination Petition Filed: January 3, 2005

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

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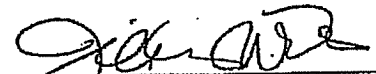
NOTICE OF ENTRY OF ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on August 31, 2005, the Chief Justice of California and Chair of the Judicial Council duly entered an Amended Order Assigning Coordination Trial Judge. A true and correct copy of the Court's order is attached hereto as Exhibit "A."

Dated: September 2, 2005

BEST BEST & KRIEGER LLP

By: 
ERIC L. GARNER
JEFFREY V. DUNN
JILL N. WILLIS
Los Angeles County Waterworks District
No. 40

CHAIR, JUDICIAL COUNCIL OF CALIFORNIA
455 Golden Gate Avenue, San Francisco, CA 94102-3688

Coordination Proceeding)	
Special Title (Rule 1550(b)))	
)	
)	
ANTELOPE VALLEY)	JUDICIAL COUNCIL
GROUNDWATER CASES)	COORDINATION PROCEEDING
)	NO. 4408
)	
)	

**AMENDED ORDER ASSIGNING
COORDINATION TRIAL JUDGE**

The order heretofore made authorizing the Presiding Judge of the Superior Court of California, County of Los Angeles to assign this matter to a judge of the court to sit as coordination trial judge is hereby terminated.

THE HONORABLE JACK KOMAR of the Superior Court of California, County of Santa Clara, is hereby assigned pursuant to Code of Civil Procedure section 404.3 and rule 1540 of the California Rules of Court to sit as coordination trial judge to hear and determine the coordinated actions listed below, at the site or sites he finds appropriate. Immediately upon assignment, the coordination trial judge may exercise all the powers over each coordinated action of a judge of the court in which that action is pending.

COORDINATED ACTIONS

<u>COURT</u>	<u>NUMBER</u>	<u>SHORT TITLE</u>
Superior Court of California County of Los Angeles	BC 325 201	Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.

<u>COURT</u>	<u>NUMBER</u>	<u>SHORT TITLE</u>
Superior Court of California County of Kern	S-1500-CV 254 348	Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.
Superior Court of California County of Riverside (Consolidated Actions)	(RIC 353 840 (RIC 344 436 (RIC 344 668 ((Wm. Bolthouse Farms, Inc. (v. City of Lancaster (Diamond Farming Co. v. (City of Lancaster (Diamond Farming Co. v. (Palmdale Water District

The coordination motion judge has designated the Court of Appeal, Fourth Appellate District, Division two as the reviewing court with appellate and writ jurisdiction. (Code of Civ. Proc., §404.2; rule 1505(a)).

Pursuant to rules 1501(17) and 1540, every paper filed in a coordinated action must be accompanied by proof of submission of a copy thereof to the coordination trial judge at the following address:


Hon. Jack Komar
Judge of the Superior Court
of California, County of Santa Clara
191 North First Street
San Jose, CA 95113

Pursuant to rule 1511, a copy of every paper required to be transmitted to the Chair of the Judicial Council must be sent to the following address:

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordination)
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Petitioner is directed to serve a copy of this order on (1) all parties to the included coordinated actions, and (2) the clerk of each court for filing in each included action, pursuant to rule 1540.

Dated: August 31, 2005



Chief Justice of California and
Chair of the Judicial Council

CHAIR, JUDICIAL COUNCIL OF CALIFORNIA

PROOF OF SERVICE BY MAIL

JUDICIAL COUNCIL COORDINATION NUMBER: 4408	CASE NUMBER:
---	--------------

1. I am over the age of 18 and not a party to this legal action.
2. I am employed in the City and County of San Francisco and my business address is

455 Golden Gate Avenue
San Francisco, CA 94102-3688


3. On August 31, 2005, I served a copy of the following documents:

- ORDER ASSIGNING COORDINATION MOTION JUDGE
- ORDER ASSIGNING COORDINATION TRIAL JUDGE
- ORDER ASSIGNING COORDINATION MOTION JUDGE AND SETTING DATE FOR HEARING
- AMENDED ORDER ASSIGNING COORDINATION MOTION JUDGE
- AMENDED ORDER ASSIGNING COORDINATION TRIAL JUDGE
- OTHER

on the interested parties listed on the attached mailing list by placing a true copy enclosed in a sealed envelope with postage fully prepaid in the outgoing mailbox in my office, in accordance with ordinary business practices for deposit with the United States Postal Service in San Francisco, California. I am readily familiar with my office's business practice for collection of and processing of correspondence for mailing, and under that practice the above document is being deposited with the United States Postal Service this date in San Francisco, California, in the ordinary course of business.

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

Date: August 31, 2005


Carlotta Tillman

MAILING LIST

JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

**Mr. Erick L. Garner
Mr. Jeffrey V. Dunn
Mr. Marc S. Ehrlich
BEST, BEST & KRIEGER, LLP
5 Park Plaza, Suite 1500
Irvine, CA 92614**

**Raymond G. Fortner, Jr.
County Counsel
Frederick W. Pfaeffe
Senior Deputy County Counsel
OFFICE OF COUNTY COUNSEL
COUNTY OF LOS ANGELES
500 West Temple Street
Los Angeles, CA 90012**

Exhibit 18

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R. LEE LEININGER
JAMES J. DUBOIS
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
1961 Stout Street, Suite 800
Denver, Colorado 80294
lee.leininger@usdoj.gov
james.dubois@usdoj.gov
Phone: 303/844-1364 Fax: 303/844-1350

Attorneys for the United States

EXEMPT FROM FILING FEES
GOVERNMENT CODE SECTION 6103

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

Los Angeles County Waterworks District No. 40 v.)
Diamond Farming Co., et al.)
Los Angeles County Superior Court, Case No. BC 325)
201)

Los Angeles County Waterworks District No. 40 v.)
Diamond Farming Co., et al.)
Kern County Superior Court, 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 District)
Riverside County Superior Court, Consolidated Action,)
Case nos. RIC 353 840, RIC 344 436, RIC 344 668)

AND RELATED CROSS ACTIONS)

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
with difficult or disparate issues; but that hypothetical situation is not presented here.”)

18 ^{5/} Movants cite *Nissan Motor Corp. v. Superior Court* 6 Cal.App.4th 150 (1992), in support
19 of their challenge. The *Nissan* court held that where separate cases are consolidated, the parties in
20 the consolidated cases retain the right to timely challenge the assigned judge. The case is easily
distinguishable from the present case because in *Nissan*

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

23 *Id.* at p 155. In contrast, the Antelope Valley Groundwater Adjudication involves common
24 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
25 judge had rendered pretrial rulings on the merits, no peremptory challenge was brought.

26 ^{6/} Judge Komar has ordered the parties to meet and confer as to the form of the consolidation
27 order and instructed the parties that the form of order include the causes of action common to all
28 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.

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Exhibit 19

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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

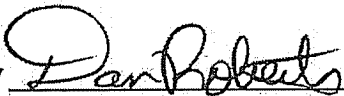
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Exhibit 20

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11 Paul S. & Sharon R. Kindig, Jose Maritorena Living Trust, Richard H. Miner, Jeffrey L. & Nancee J.
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13 and Connie L. Cardile, Gene T. Bahlman, collectively known as the Antelope Valley Ground
14 Water Agreement Association ("AGWA")

15 [See Next Page For Additional Counsel]

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 FOR THE COUNTY OF SANTA CLARA

18 ANTELOPE VALLEY) Judicial Council Coordination Proceeding
GROUNDWATER CASES) No. 4408
19 Included Actions:)
20 Los Angeles County Waterworks District No.)
21 40 v. Diamond Farming Co. Superior Court of)
California County of Los Angeles, Case No. BC)
22 325 201 Los Angeles County Waterworks)
District No. 40 v. Diamond Farming Co.)
23 Superior Court of California, County of Kern,)
Case No. S-1500-CV-254-348Wm. Bolthouse)
24 Farms, Inc. v. City of Lancaster Diamond)
25 Farming Co. v. City of Lancaster Diamond)
Farming Co. v. Palmdale Water Dist. Superior)
26 Court of California, County of Riverside,)
consolidated actions, Case No. RIC 353 840,)
27 RIC 344 436, RIC 344 668)
28)

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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26 SERVICE ROCK PRODUCTS CORPORATION

27
28

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. CTRM. 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
28

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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10 (Farmers 10 Cal.App.4th at 1511.) The *Farmers* Court rejected all of these arguments and found the
11 170.6 challenge to be timely and proper. The Oppositions' similar arguments should likewise be
12 rejected.

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

21 *Industrial Indemnity* dealt with "add-on" parties coming into a coordinated proceeding,
22 where several of the coordinated cases had already gone to judgment. Federal Defendants attempt to
23 analogize the current situation to that in *Industrial Indemnity* through their argument that "both
24 adding cases and consolidating actions allow one judge in a coordinated proceeding to hear all the
25 actions for all the purposes relating to common questions of fact or law" and that Cross-Defendants'
26 170.6 Challenge is merely an "attempt to thwart the consolidation procedure." (*Federal Defendants'*
27 *Response to Peremptory Challenge to Assigned Judge (CCP § 170.6)*, p. 4:14-19.) In this regard,
28 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
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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.)

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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18 Dated: October 22, 2009

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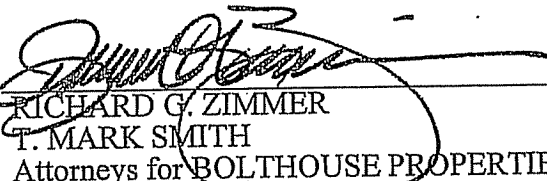
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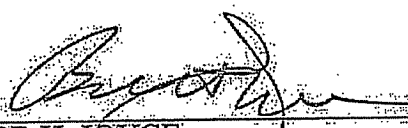
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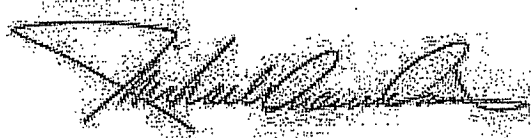
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PROOF OF SERVICE

**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

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