

Civ. No. _____

**IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO**

**ANTELOPE VALLEY GROUND WATER AGREEMENT
ASSOCIATION (AGWA); U.S. BORAX, INC.; BOLTHOUSE
PROPERTIES, LLC; WM. BOLTHOUSE FARMS, INC.; CRYSTAL
ORGANIC FARMS, A LIMITED LIABILITY COMPANY,
GRIMMWAY ENTERPRISES, INC.; LAPIS LAND COMPANY,
LLC.; A.V. UNIFIED MUTUAL GROUP; SHEEP CREEK WATER
COMPANY; and SERVICE ROCK PRODUCTS CORPORATION,**

Petitioners,

v.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,**

Respondent.

**LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40,
et al.**

Real Parties In Interest

Appeal from the Judgment of the Superior Court
State of California, County of Los Angeles
The Honorable Jack Komar (Ret.)
Telephone No. (408) 882-2286
Los Angeles County Superior Court Case No. JCCP 4408

**EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE
AND REQUEST FOR TEMPORARY STAY OF PROCEEDINGS
EXHIBITS 28-36 [VOLUME 3 OF 3]**

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CREEK WATER COMPANY, and SERVICE ROCK PRODUCTS
CORPORATION

LIST OF EXHIBITS

Exhibit 1	Reporter's Transcript of Proceeding and Order Granting Petition for Coordination - June 17, 2005, Judicial Council Proceeding No. 4408, Superior Court of the State of California for the County of Orange, the Honorable David C. Velasquez presiding, filed June 17, 2005.
Exhibit 2	Respondent Court's Order After Hearing on Jurisdictional Boundaries, entered November 3, 2006.
Exhibit 3	Respondent Court's Revised Order After Hearing on Jurisdictional Boundaries, entered March 12, 2007, filed March 16, 2007.
Exhibit 4	Plaintiff Rebecca Willis' Response to Ex Parte Application For Order Continuing Trial Date and to AGWA's Request for Order Protecting Phase 2 Findings, filed October 1, 2008.
Exhibit 5	Respondent Court's Order After Phase Two Trial on Hydrologic Nature of Antelope Valley, entered November 6, 2008, filed November 12, 2008.
Exhibit 6	Reporter's Transcript of Proceedings - April 24, 2009, Judicial Council Proceeding No. 4408, the Honorable Jack Komar presiding, filed April 24, 2009.

Exhibit 7	Federal Defendants' Reply to Landowner Defendants' Motion to Dismiss Public Water Suppliers' Cross-Complaint and Responses Thereto, filed June 18, 2009.
Exhibit 8	<p>Los Angeles County Waterworks District No. 40, Palm Ranch Irrigation District, Littlerock Creek Irrigation District, Palmdale Water District, Quartz Hill Water District, Rosamond Community Services District, City of Palmdale, California Water Service Company, City of Lancaster's Notice of Motion and Motion to Transfer and to Consolidate for all Purposes; Memorandum of Points and Authorities; Declaration of Whitney G. McDonald, filed July 15, 2009.</p> <p>Attachment 1: Judicial Council Order Granting Petition for Coordination, June 17, 2005.</p> <p>Attachment 2: Judicial Council Amended Order Assigning Coordination Trial Judge, August 31, 2005.</p> <p>Attachment 3: Los Angeles County Waterworks District No. 40, Palm Ranch Irrigation District, Littlerock Creek Irrigation District, Palmdale Water District, Quartz Hill Water District, Rosamond Community Services District, City of Palmdale, California Water Service Company, City of Lancaster's List of Operative Complaints.</p>

Exhibit 9	Federal Defendants' Response to Motion to Transfer and Consolidate, filed August 3, 2009.
Exhibit 10	Reporter's Transcript of Proceedings - October 13, 2009, Judicial Council Proceeding No. 4408, the Honorable Jack Komar presiding, filed October 13, 2009.
Exhibit 11	U.S. Borax, Inc., Sheep Creek Water Company, Service Rock Products Corporation, Grimmway Enterprises, Inc., Diamond Farming Company, Crystal Organic Farms LLC, Bolthouse Properties, LLC, Lapis Land Company, LLC, A.V. United Mutual Group, Wm. Bolthouse Farms, Inc., Antelope Valley Ground Water Agreement Association's (Cross-Defendants) Peremptory Challenge to Assigned Judge (C.C.P. § 170.6), filed October 13, 2009.
Exhibit 12	Santa Clara County Superior Court Minute Order from October 13, 2009, filed October 13, 2009.
Exhibit 13	Santa Clara County Superior Court Minute Order from October 15, 2009, filed October 15, 2009.
Exhibit 14	Santa Clara County Superior Court Minute Order from October 16, 2009, filed October 16, 2009.

Exhibit 15	North Edwards Water District, Big Rock Mutual Water Company, Palm Ranch Irrigation District, Llano-Del Rio Water Company, Littlerock Creek Irrigation District, Palmdale Water District, Little Baldy Mutual Water Company, Llano Mutual Water Company, Desert Lakes Community Services District, City of Palmdale's Opposition to Peremptory Challenge to Assigned Judge (CCP § 170.6), filed October 19, 2009.
Exhibit 16	City of Los Angeles' Joinder in Opposition to Peremptory Challenge to Assigned Judge, filed October 19, 2009.
Exhibit 17	Phelan Piñon Hills Community Services District's Opposition to Peremptory Challenge (C.C.P. § 170.6), filed October 19, 2009.
Exhibit 18	Federal Defendants' Response to Peremptory Challenge to Assigned Judge (CCP 170.6), filed October 19, 2009.
Exhibit 19	Los Angeles County Waterworks District No. 40 and Rosamond Community Services District's Joinder in Opposition to Peremptory Challenge to Assigned Judge, filed October 20, 2009.

Exhibit 20	U.S. Borax, Inc., Sheep Creek Water Company, Service Rock Products Corporation, Grimmway Enterprises, Inc., Diamond Farming Company, Crystal Organic Farms LLC, Bolthouse Properties, LLC, Lapis Land Company, LLC, A.V. United Mutual Group, Wm. Bolthouse Farms, Inc., Antelope Valley Ground Water Agreement Association's (Cross-Defendants) Reply to Oppositions to Peremptory Challenge to Assigned Judge, filed October 22, 2009.
Exhibit 21	Santa Clara County Superior Court Minute Order from October 22, 2009, filed October 22, 2009.
Exhibit 22	Santa Clara County Superior Court Minute Order from October 23, 2009, filed October 23, 2009.
Exhibit 23	Santa Clara County Superior Court Minute Order from October 23, 2009 (2nd), filed October 23, 2009.
Exhibit 24	Reporter's Transcript of Proceedings - October 27, 2009, Judicial Council Proceeding No. 4408, the Honorable Jack Komar presiding, filed October 27, 2009.

Exhibit 25	Respondent Court's Order after Hearing re Re-Setting Hearing Dates for Motions to Approve Settlements and Other Motions; Case Management Conference being scheduled to February 5, 2010, entered October 28, 2009.
Exhibit 26	Order of the Court of Appeal – State of California Fourth District, Division Two, Antelope Valley Groundwater Agreement Association et al. v. Superior Court of Los Angeles County, E049581, filed November 19, 2009.
Exhibit 27	Respondent Court's Order Transferring and Consolidating Actions for All Purposes, filed February 19, 2010.
Exhibit 28	U.S. Borax, Inc., Sheep Creek Water Company, Service Rock Products Corporation, Grimmway Enterprises, Inc., Diamond Farming Company, Crystal Organic Farms LLC, Bolthouse Properties, LLC, Lapis Land Company, LLC, A.V. United Mutual Group, Wm. Bolthouse Farms, Inc., Antelope Valley Ground Water Agreement Association's (Cross-Defendants) Peremptory Challenge to Assigned Judge (C.C.P. § 170.6), filed February 19, 2010.
Exhibit 29	Los Angeles County Superior Court Minute Order from February 19, 2010, filed February 19, 2010.

Exhibit 30	Public Water Suppliers' Opposition to Code of Civil Procedure Section 170.6 Peremptory Challenge, filed February 26, 2010, and Joinders of City of Los Angeles, Phelan Piñon Hills Community Services District, and State of California.
Exhibit 31	Federal Defendants' Response to Peremptory Challenge to Assigned Judge (CCP § 170.6), filed February 26, 2010.
Exhibit 32	Minute Order from February 26, 2010 regarding late add-ons to Willis Class, filed February 26, 2010.
Exhibit 33	Cross-Defendants' Reply to Oppositions to Peremptory Challenge to Assigned Judge, filed March 4, 2010.
Exhibit 34	Reporter's Transcript of Proceedings – March 8, 2010, Judicial Council Proceeding No. 4408, the Honorable Jack Komar presiding.
Exhibit 35	Order Denying the Challenging Parties' Peremptory Challenge pursuant to CCP section 170.6, filed March 9, 2010.
Exhibit 36	Order and Notice to All Counsel Regarding Phase 3 Trial on Status of Aquifer and Issue of Overdraft, filed March 10, 2010.

PROOF OF SERVICE BY PERSONAL DELIVERY

I am over the age of eighteen years and not a party to this action.
My business address is 21 East Carrillo Street, Santa Barbara, CA 93101.
On March 18, 2010, I caused to be served via attorney service, First Legal
Support the:

**EXHIBITS IN SUPPORT OF PETITION
FOR WRIT OF MANDATE AND
REQUEST FOR TEMPORARY STAY OF
PROCEEDINGS**

EXHIBITS 28-36 [VOLUME 3 OF 3]

by delivering copies thereof to:

The Hon. Jack Komar
Santa Clara County Superior Court
c/o Clerk, Rowena Walker
191 North First Street
San Jose, CA 95113

The Hon. Jack Komar
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

Further, I posted the document(s) to the website
<http://www.scefiling.org>, a dedicated link to the Antelope Valley
Groundwater Cases. This posting was reported as complete and without
error.

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

Executed on March 18, 2010, at Los Angeles, California.



Maria Klachko-Blair

Exhibit 28

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 MARLENE L. ALLEN-HAMMARLUND (BAR NO. 126418)
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 12 and WM. BOLTHOUSE FARMS, INC.

13 *(List of Counsel Continues on Next Page)*

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

16	Coordination Proceeding Special Title (Rule 1550(b))	)	Judicial Council Coordination Proceeding No. 4408
17	ANTELOPE VALLEY GROUNDWATER CASES	)	For Filing Purposes Only:
18	Included Actions:	)	Santa Clara Case No. 1-05-CV- 049053
19	Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.	)	Assigned to the
20	Superior Court of California, County of Los Angeles,	)	Honorable Jack Komar,
21	Case No. BC 325 201	)	Department 17C
22	Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.	)	PEREMPTORY CHALLENGE
23	Superior Court of California, County of Kern, Case	)	TO ASSIGNED JUDGE
24	No. S-1500-CV-254-348	)	(C.C.P. § 170.6)
25	Wm. Bolthouse Farms, Inc. v. City of Lancaster	)	Date: February 5, 2010
26	Diamond Farming Co. v. City of Lancaster	)	Time: 8:30 a.m.
27	Diamond Farming Co. v. Palmdale Water Dist.	)	Dept: 1
28	Superior Court of California, County of Riverside, consolidated actions, Case Nos. RIC 353 840, RIC 344 436, RIC 344 668 (Consolidated Actions))	Judge: Jack Komar

1 *List of Counsel (Continued):*

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14 FARMS, a limited liability company, GRIMMWAY
15 ENTERPRISES, INC. and LAPIS LAND
16 COMPANY, LLC.

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33 *Email: mfife(@)bhfs.com*
34 Attorneys for the ANTELOPE VALLEY
35 GROUNDWATER AGREEMENT
36 ASSOCIATION ("AGWA")

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1 TO ALL PARTIES, THEIR COUNSEL OF RECORD AND THE COURT:

2 We, the undersigned counsel, declare as follows:

3 1. We are all attorneys duly licensed to practice law in the courts of the State of
4 California. We submit this declaration as Cross-Defendants' Peremptory Challenge to the
5 Honorable Jack Komar. We have personal knowledge of the facts stated herein, and we make
6 this declaration based upon personal knowledge, and, if called as a witness, could and would
7 competently testify thereto.

8 2. On February 19, 2010, despite significant opposition from numerous parties,
9 including our clients, Judge Komar signed an order granting Public Water Suppliers' Motion to
10 Transfer and Consolidate for All Purposes each of the actions pending as part of Judicial Counsel
11 Coordination Proceeding 4408 (also known as the Antelope Valley Groundwater Cases). This
12 consolidation, among other things, has the effect of unwillingly making our clients parties to two
13 class actions involving separate causes of action in which they have not been named.

14 3. The law provides that upon consolidation, the opportunity to exercise a
15 peremptory challenge under California Civil Procedure Code section 170.6 is available.

16 A party's acquiescence of a judge to hear one action does not
17 impair his or her right to exercise a challenge to prevent that judge
18 from hearing another matter, even if that matter raises issues
19 closely related to those in the first action. [Citations.] 'Assigning
20 the same judge to hear a series of complex actions, such as these
where there exists subject mater overlap, may promote judicial
efficiency. However, judicial efficiency is not to be fostered at the
expense of a litigant's rights under section 170.6 to peremptorily
challenge a judge.'

21 *Nissan Motor Corp. v. Super Ct.*, 6 Cal.App.4th 150, 155 (1992).

22 A party to any of the consolidated cases may disqualify the
23 assigned judge by a timely challenge under CCP section 170.6
24 even where that party previously acquiesced to the judge in one of
the consolidated cases, i.e., consolidation with another case may
create a second chance for a section 170.6 challenge.

25 *Weil & Brown*, Section 12:369, Civil Procedure Before Trial (2009) (citing *Nissan Motor Corp.*)

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28 ///

1 4. The Honorable Jack Komar is prejudiced against the Cross-Defendants, or the
2 interests of the Cross-Defendants, in this newly consolidated action so that we believe the Cross-
3 Defendants cannot have a fair or impartial trial or hearing before him.

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

6 Executed this 19th day of
7 February, 2010 at
8 San Francisco, California.

EDGAR B. WASHBURN
WILLIAM M. SLOAN
MORRISON & FOERSTER, LLP

9
10 By: William M. Sloan
11 William M. Sloan
12 Attorneys for U.S. BORAX, INC.

13 Executed this ____ day of
14 _____, 2010 at
15 Bakersfield, California.

RICHARD G. ZIMMER
T. MARK SMITH
CLIFFORD & BROWN

16 By: _____
17 Richard G. Zimmer
18 Attorneys for BOLTHOUSE PROPERTIES, LLC and
19 WM. BOLTHOUSE FARMS, INC.

20 Executed this ____ day of
21 _____, 2010 at
22 Bakersfield, California.

BOB H. JOYCE
ANDREW SHEFFIELD
KEVIN E. THELEN
LAW OFFICES OF LEBEAU THELEN, LLP

23
24 By: _____
25 Bob H. Joyce
26 Attorneys for DIAMOND FARMING COMPANY, a
27 California corporation, CRYSTAL ORGANIC
28 FARMS, a limited liability company, GRIMMWAY
ENTERPRISES, INC. and LAPIS LAND COMPANY,
LLC.

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WILLIAM M. SLOAN
MORRISON & FOERSTER, LLP

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10 By: _____
11 William M. Sloan
12 Attorneys for U.S. BORAX, INC.

13 Executed this 19th day of
14 February, 2010 at
15 Bakersfield, California.

RICHARD G. ZIMMER
T. MARK SMITH
CLIFFORD & BROWN

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17 Richard G. Zimmer
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19 WM. BOLTHOUSE FARMS, INC.

20 Executed this ____ day of
21 _____, 2010 at
22 Bakersfield, California.

BOB H. JOYCE
ANDREW SHEFFIELD
KEVIN E. THELEN
LAW OFFICES OF LEBEAU THELEN, LLP

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24 By: _____
25 Bob H. Joyce
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27 California corporation, CRYSTAL ORGANIC
28 FARMS, a limited liability company, GRIMMWAY
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8 San Francisco, California.

EDGAR B. WASHBURN
WILLIAM M. SLOAN
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10 By: _____
11 William M. Sloan
12 Attorneys for U.S. BORAX, INC.

13 Executed this ____ day of
14 _____, 2010 at
15 Bakersfield, California.

RICHARD G. ZIMMER
T. MARK SMITH
CLIFFORD & BROWN

16 By: _____
17 Richard G. Zimmer
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19 WM. BOLTHOUSE FARMS, INC.

20 Executed this 17th day of
21 February, 2010 at
22 Bakersfield, California.


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27 FARMS, a limited liability company, GRIMMWAY
28 ENTERPRISES, INC. and LAPIS LAND COMPANY,
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Executed this 19th day of February, 2010 at Riverside, California.

MICHAEL DUANE DAVIS
MARLENE L. ALLEN-HAMMARLUND
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By: 

Michael Duane Davis
Attorneys for SERVICE ROCK PRODUCTS CORPORATION, SHEEP CREEK WATER COMPANY, INC. and A.V. UNITED MUTUAL GROUP

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MICHAEL T. FIFE
BRADLEY J. HERREMA
BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

Michael T. Fife
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Executed this _____ day of _____, 2010 at
Riverside, California.

MICHAEL DUANE DAVIS
MARLENE L. ALLEN-HAMMARLUND
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CORPORATION, SHEEP CREEK WATER
COMPANY, INC. and A.V. UNITED MUTUAL
GROUP

Executed this 19th day of
February, 2010 at
Santa Barbara, California.

MICHAEL T. FIFE
BRADLEY J. HERREMA
BROWNSTEIN HYATT FARBER SCHRECK, LLP



By: 
Michael T. Fife
Attorneys for the ANTELOPE VALLEY
GROUNDWATER AGREEMENT ASSOCIATION
("AGWA")

Exhibit 29

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

FEB 24 2010

<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>John A. Clarke, Executive Officer/Clerk By  PAUL SANCHEZ Dept</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>
--	--

Date/Time: Friday, February 19, 2010 (no time)

Location: Los Angeles County Superior Court 111 North Hill Street
Los Angeles, CA 90012

Present: Hon. Jack Komar, Judge M. Godderz, Clerk

*Antelope Valley Groundwater Cases (JCCP 4408)
Los Angeles County Superior Court, Case No. BC 325 201
Friday, February 19, 2010 (no time) / Hon. Jack Komar*

F:\Komar\Antelope Valley\2010-02-19 MO regarding setting hearing date on peremptory challenge.doc

MINUTE ORDER RE:

On October 13, 2009, following a hearing on a noticed motion to consolidate the various coordinated cases herein, the Court indicated its intent to grant the motion to consolidate and directed the parties to meet and confer on the form of the order. Immediately following the Court's statement of intent to order consolidation, a motion was made to disqualify the undersigned judge who is the assigned coordination trial judge. The motion was made pursuant to Code of Civil Procedure Section 170.6. The asserted ground for re-opening the right to exercise such a challenge was the Court's order granting consolidation. No formal order of consolidation had yet been signed by the Court and the Court deemed the peremptory challenge to be premature and ordered it stricken.

A subsequent hearing was held on the form of the Order of Consolidation on February 5, 2010 and an Order granting the consolidation motion was filed on February 19, 2010. On the same date, a new Motion pursuant to Code of Civil Procedure Section 170.6 was filed by several of the parties.

The Court sets hearing on the peremptory challenge for **March 8, 2010 at 9:00 a.m. in Department 1 of the Los Angeles Superior Court**, immediately preceding the time set for hearing on continued motions and the scheduled Case Management Conference. Any parties in opposition to the peremptory challenge motion should file opposition no later than February 26, 2010 at 12:00 p.m. and replies must be posted no later than March 4, 2010 at 12:00 p.m. Any briefs by any party are requested to address the applicability of California Rule of Court 1516.

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	
Phelan Pinon Hills CSD	Susan Trager	
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	Scott Kuney	

Antelope Valley Water Storage		
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 30

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and Cross-Defendant CITY OF PALMDALE

9
10 [See Next Page For Additional Counsel]

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SANTA CLARA**

14
15 **ANTELOPE VALLEY GROUNDWATER**
16 **CASES**

Judicial Council Coordination
Proceeding No. 4408

17 **PUBLIC WATER SUPPLIERS'**
18 **OPPOSITION TO CODE OF CIVIL**
19 **PROCEDURE SECTION 170.6**
20 **PEREMPTORY CHALLENGE**

21 Date: March 8, 2010
Time: 9:00 a.m.
Dept.: 1

22 (Hon. Jack Komar)

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28 Attorneys for PALMDALE WATER DISTRICT

1 **I. INTRODUCTION**

2 On August 31, 2005, approximately four years and five months ago, Judge Komar
3 received a Judicial Council appointment to act as the coordination trial judge for these
4 coordinated cases, which now include two plaintiffs’ class actions and which comprise
5 the structure for the adjudication of all rights to produce water from the Antelope Valley
6 Groundwater Basin. On February 19, 2010, Judge Komar entered an order consolidating
7 the cases for all purposes. As expected, on the same day, a group of overlying landowner
8 parties filed a peremptory challenge of Judge Komar pursuant to Code of Civil Procedure
9 Section 170.6 (“Section 170.6”). Also as expected, the stated basis of the challenge is
10 that consolidation causes the water production rights of the challenging parties to be
11 prioritized against those of the members of the two classes, without those groups of
12 parties otherwise being adverse by virtue of specific pleadings. The challenging parties
13 erroneously claim a “new” adversity created a new opportunity to file a peremptory
14 challenge of Judge Komar pursuant to Section 170.6.

15 Moving parties have no authority for their motion but a misplaced reliance upon
16 *Nissan Motor Corp. v. Superior Court* (1992) 6 Cal.App.3d 150. However, *Nissan* does
17 not concern a coordination proceeding and, therefore, is neither useful nor controlling
18 precedent. Instead, *Industrial Indemnity Co. v. Superior Court* (1989) 214 Cal.App.3d
19 259, a case concerning coordinated cases and the relationship between Section 170.6
20 challenges and Rule of Court 3.516 (formerly 1515), is controlling precedent and, as
21 explained below, requires denial of the challenge.

22 **II. RULE OF COURT 3.516 PROVIDES THE ONLY PERIOD IN WHICH A**
23 **COORDINATION TRIAL JUDGE MAY BE CHALLENGED PEREMPTORILY,**
24 **NAMELY, A TWENTY-DAY PERIOD FOLLOWING THE APPOINTMENT OF**
25 **THAT JUDGE**

26 In *Nissan*, the court created a new ten-day period to make a Section 170.6
27 challenge for parties to three distinct automobile accident cases, commencing to run from
28 the date when those cases were ordered consolidated. That consolidation order caused

1 two of the three cases to be heard by a judge *not* previously assigned to those cases,
2 thereby providing a basis for a new ten-day challenge period pursuant to Section 170.6.
3 But, the challenged judge in *Nissan* was not a coordination judge appointed under the
4 rules governing coordination proceedings established by the Judicial Council. In fact, the
5 *Nissan* Court recognized that the holdings in that case do not apply to a coordinated
6 proceeding, making the following pertinent statements:

7 “Two cases which the respondent found to be analogous are inapposite...
8 In *Industrial Indemnity Co. v. Superior Court* [citation], the trial judge
9 denied peremptory challenges by add-on parties in a coordination action.
10 The Court of Appeal denied the add-on parties’ petition holding that the
11 Judicial Council rules governing coordination proceedings do not provide
12 for parties to an add-on petition to file a peremptory challenge to the
13 coordination judge, and that the Judicial Council has the authority to
14 exclude parties to an add-on petition from the exercise of peremptory
15 challenges. [Citation.]” 6 Cal.App.3d at 154, n.2.

16 The *Nissan* Court understood that the cases before it had no bearing on, and, in
17 turn, were not controlled by a published opinion involving coordinated cases and,
18 particularly, the special Judicial Council rules which control the handling of coordinated
19 cases.

20 *Industrial Indemnity* is the controlling authority on the issue before the Court here.
21 In *Industrial Indemnity*, a judge was assigned as coordination trial judge for multiple
22 actions by investors against Technical Equities Corporation. After several of the
23 coordinated complaints were reduced to judgments, individual plaintiffs in the
24 coordination proceedings filed eight new separate actions as judgment creditors seeking a
25 declaration that, as judgment creditors, they could directly sue Technical Equities’ insurer
26 and that the subject insurance policies covered their losses. Those plaintiffs petitioned to
27 coordinate those new lawsuits with the other cases. They also made a Section 170.6
28 peremptory challenge of the judge in question.

1 The Court of Appeal held that the challenges were not timely because they were
2 not filed within twenty days of the original appointment of that judge as the coordination
3 trial judge, citing Court Rule 1515 [now Rule 3.516]. In so doing, the Court concluded:

4 “... [T]he authority given to the Judicial Council over coordinated actions is broad
5 enough to empower the Judicial Council to exclude parties from the right to
6 exercise a Section 170.6 challenge. Section 404.7 [of the Code of Civil
7 Procedure] empowers the Council to provide ‘by rule the practice and procedure
8 for coordination of civil actions...’ ‘notwithstanding any other provision of
9 law....’ ‘The practical effect of such a grant of powers is to remove any restraints
10 of statutory consistency on the Judicial Council’s rules.’ [Citation.]” 214
11 Cal.App.3d at 263

12 The Court went on to state: “Nor does the exclusion of one category of parties
13 from the right to exercise a peremptory challenge necessarily violate federal and state
14 constitutional provisions.” *Id.* at 253. The Court then observed that the Judicial Council
15 was reasonable in not according an add-on party the right to a peremptory challenge,
16 stating that “[t]he Council could well have concluded that add-on cases were peculiarly
17 subject to abuse of the peremptory challenge since the coordination trial judge may, as in
18 this case, have participated in the case for years and the nature and the extent of his
19 rulings could be well known. This presents an unusual opportunity to challenge for
20 reasons unrelated to bias or prejudice...” *Id.* at 254.

21 This last observation by the *Industrial Indemnity* Court, that a later challenge
22 period could afford an opportunity to forum shop, is applicable here. In this matter, all of
23 the parties to the subject challenge have for years participated in these proceedings,
24 including trial phases and motions, and are aware of Judge Komar’s many decisions
25 made herein during those years. The type of forum shopping which is now occurring in
26 the form of the instant challenge, as well as the waste of judicial resources and delay in
27 the proceedings inherent in now bringing on a new coordination judge, are negative
28 impacts on the proceedings which the application of Rule of Court 3.516 precludes.

1 In summary, Rule of Court 3.516 established by the Judicial Council provides for
2 a single twenty-day period in which a party may make a peremptory challenge of the
3 assigned coordination judge. The peremptory challenge is untimely, and has been so for
4 more than four years.

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III. CONCLUSION

For the foregoing reasons, the Public Water Suppliers submit that the Peremptory Challenge to the Assigned Judge under discussion must be denied.

Dated: February 26, 2010

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JEFFREY V. DUNN
STEFANIE D. HEDLUND

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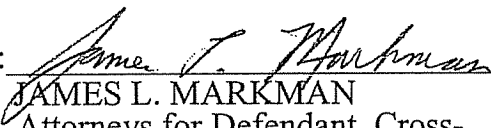
CALIFORNIA WATER SERVICE COMPANY
JOHN TOOTLE

CHARLTON WEEKS, LLP
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WM. MATTHEW DITZHAZY
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City of Palmdale

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JAMES L. MARKMAN
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WHITNEY G. MCDONALD

By: 
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21 SUPERIOR COURT OF THE STATE OF CALIFORNIA

22 COUNTY OF LOS ANGELES

23 ANTELOPE VALLEY
24 GROUNDWATER
25 CASES

26 Included Actions:

27 Los Angeles County Waterworks District
28 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-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]

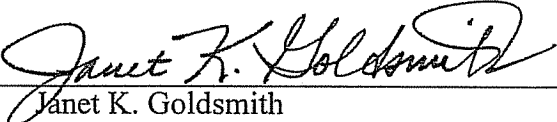
**CITY OF LOS ANGELES' JOINDER IN
OPPOSITION TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE
(CCP § 170.6)**

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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 and would create undue delay and inefficiency in the administration of justice

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
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. [...]

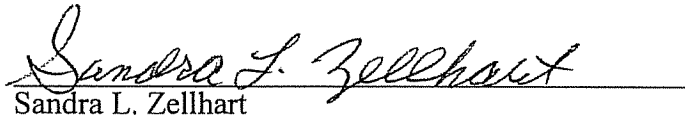
1 PROOF OF SERVICE

2 I DECLARE THAT:

3
4 I am employed in the County of Sacramento, State of California. I am over the age of
5 eighteen years and not a party to the within action. My business address is 400 Capitol Mall,
6 Suite 2700, Sacramento, California 95814.

7 On February 26, 2010, I served the CITY OF LOS ANGELES' JOINDER IN
8 OPPOSITION TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6).
9 posting the document to the Santa Clara Superior Court website in regard to the Antelope Valley
10 Groundwater matter.

11 I declare under penalty of perjury under the laws of the State of California that the above
12 is true and correct and that this document was executed on February 26, 2010.

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15 Sandra L. Zellhart

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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.,)
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)
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

CROSS-COMPLAINANT PHELAN
PINON HILLS COMMUNITY SERVICES
DISTRICT'S JOINDER IN OPPOSITION
TO THE SECTION 170.6 PEREMPTORY
CHALLENGE TO THE ASSIGNED
JUDGE (CCP § 170.6)

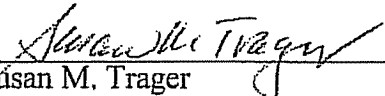
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1 Cross-Complainant Phelan Piñon Hills Community Services District ("PPHCSD")
2 hereby joins in the Public Water Suppliers' Opposition to the Code of Civil Procedure Section
3 170.6 Peremptory Challenge filed against the sitting judge in these consolidated proceedings by
4 certain landowner parties.
5

6 The peremptory challenge must be overruled because it is untimely, would create undue
7 delay, would frustrate the administration of justice in coordinated proceedings, and provide
8 endless opportunities for forum shopping in cases initiated more than a decade ago..
9

10 Dated: February 26, 2010

SmithTrager LLP

11
12
13 By 
14 Susan M. Trager
15 Attorneys for Defendant and Cross-
16 Complainant Phelan Piñon Hills
17 Community Services District
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3 **PROOF OF SERVICE**

4 I, Marie W. Young, declare:

5 I am employed in the County of Orange, State of California. I am over the age of 18 and
6 am not a party to the within action; my business address is 19712 MacArthur Blvd., Suite 120,
Irvine, California 92612.

7 On February 26, 2010, I served the foregoing document(s) described as **CROSS-
8 COMPLAINANT PHELAN PINON HILLS COMMUNITY SERVICES DISTRICT'S
9 OPPOSITION TO THE PEREMPTORY CHALLENGE TO THE ASSIGNED JUDGE
10 (CCP § 170.6)**, as follows:

11 X **(ELECTRONIC SERVICE)** By posting the document(s) listed above to the Santa Clara
12 County Superior Court website in regard to the Antelope Valley Groundwater matter
13 pursuant to the Court's Clarification Order. Electronic service and electronic posting
14 completed through www.scefiling.org.

15 _____ **(REGULAR MAIL)** By enclosing the document(s) listed in sealed envelope(s),
16 addressing as shown below, and placing the envelope for collection and mailing
17 following our ordinary business practices. I am readily familiar with this firm's practice
18 for collection and processing correspondence for mailing. On the same day that
19 correspondence is placed for collection and mailing, it is deposited in the ordinary course
20 of business with the United States Postal Service in a sealed envelope with postage fully
21 prepaid. I am aware that on motion of the party served, service is presumed invalid if
22 postal cancellation date or postage meter date is more than one day after date of deposit
23 for mailing in affidavit.

24 _____ **(FEDERAL EXPRESS)** By placing the document(s) listed above in a sealed overnight
25 envelope, with delivery fees paid or provided for; addressed as shown below, and
26 depositing it for overnight delivery at a facility regularly maintained by the express
27 service carrier or delivered to a courier or driver authorized to receive documents on its
28 behalf, for delivery on the next business day.

_____ **(FACSIMILE)** by transmitting the document(s) listed above via facsimile to the office of
the addressee(s) shown below. A true and correct copy of the transmission report
indicating transmission without error is attached hereto.

_____ **(PERSONAL SERVICE)** By delivering the document(s) listed above in a sealed
envelope addressed to the parties as noted by hand to the offices of the addressee.

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

Executed this 26th day of February, 2010, in Irvine, California.

/s/
Marie W. Young

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7 Mountains Conservancy, and 50th District
Agricultural Association*
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF LOS ANGELES

11
12 **Coordination Proceeding
Special Title (Rule 1550(b))**

13 **ANTELOPE VALLEY GROUNDWATER
14 CASES**
15 **Included Actions:**

16 **Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.
Superior Court of California County of Los
17 Angeles, Case No. BC 325 201**

18 **Los Angeles County Waterworks District
No. 40 v. Diamond Farming Co.
19 Superior Court of California County of
Kern, Case No. S-1500-CV-254-348.**

20
21 **Wm. Bolthouse Farms, Inc. v. City of
Lancaster, Diamond Farming Co. v. City of
22 Lancaster, Diamond Farming Co. v.
Palmdale Water Dist. Superior Court of
23 California, County of Riverside,
consolidated Actions, Case Nos. RIC 353
24 840, RIC 344 436, RIC 344 668**

25 **AND RELATED ACTIONS.**
26
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Judicial Council Coordination
Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053

**STATE OF CALIFORNIA'S JOINDER
IN OPPOSITION TO PEREMPTORY
CHALLENGE TO ASSIGNED JUDGE
(CCP § 170.6)**

[Assigned for All Purposes to the Honorable
Jack Komar]

Date: March 8, 2010

Time: 9:00 a.m.

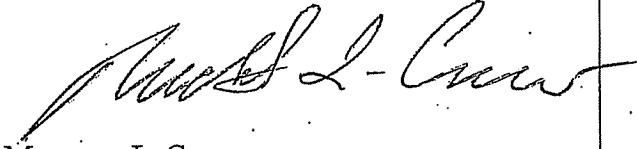
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The State of California hereby joins in the opposition presented on behalf of the Public Water Suppliers and in the opposition presented by the United States to the peremptory challenge to Judge Komar filed by certain landowner parties.

Dated: February 26, 2010

Respectfully Submitted,
EDMUND G. BROWN JR.
Attorney General of California



MICHAEL L. CROW
Deputy Attorney General
Attorneys for State of California

SA2005900420
30959504.doc

PROOF OF SERVICE

I declare that:

I am employed in the Office of the Attorney General, which is the office of a member of the State Bar of California. I am 18 years of age or older and not a party to the within action. My business address is 1300 I Street, Sacramento, CA 95814.

On February 26, 2010, I served the STATE OF CALIFORNIA'S JOINDER IN OPPOSITION TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6) posting the document to the Santa Clara Superior Court website in regard to the Antelope Valley Groundwater matter.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this document was executed on February 26, 2010.

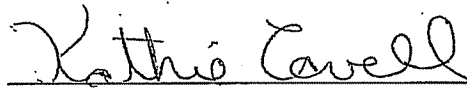

Kathie Covell

Exhibit 31

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IGNACIA S. MORENO
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EXEMPT FROM FILING FEES
GOVERNMENT CODE SECTION 6103

Attorneys for the United States

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Coordination Proceeding)
Special Title (Rule 1550(b)))
Judicial Council Coordination)
Proceeding No. 4408)
ANTELOPE VALLEY GROUNDWATER CASES)
[Assigned for all Purposes to the)
Honorable Jack Komar])
Included actions:)
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 peremptory challenge to
2 presiding Honorable Judge Jack Komar filed by certain landowner parties in the above captioned
3 cases. *See Peremptory Challenge to Assigned Judge (C.C.P. § 170.6)* (hereinafter the “*Perempt.*
4 *Chall.*”), filed February 19, 2010. The movants allege that Judge Komar’s consolidation of these
5 complex, coordinated actions provides the opportunity to exercise a peremptory challenge under
6 Cal. Code Civ. Proc. § 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 draw ground water from 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 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 correlative
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 ruling as a matter of fact
7 that the area within the jurisdictional boundaries of the valley constituted one aquifer. *See Order*
8 *After Phase Two Trial on Hydrologic Nature of Antelope Valley*, dated November 6, 2008.
9 Both Phase I and II of trial determined contested factual issues that relate to the merits of the
10 ultimate issue common to all of the parties - that of the relative rights to withdraw water from
11 the Antelope Valley Groundwater Basin.

12 By Order Transferring and Consolidating Actions for All Purposes (the "Consolidation
13 Order"), entered on February 19, 2010, the Court ordered that these coordinated cases, including
14 the two add-on class actions, be consolidated in order to determine the relative rights of all
15 parties to withdraw groundwater and to enter one judgment binding on all the parties.

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

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

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

1 However, in a coordination proceeding the time to file a § 170.6 challenge to the
2 assigned judge is short. 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. The February 19, 2010 peremptory challenge was filed
9 1631 days later. Therefore, the peremptory challenge is 1611 days past due.

10 The Landowners argue that “consolidation, among other things, has the effect of
11 unwillingly making [us] parties to two class actions involving separate causes of action in which
12 [we] have not been named.” *Perempt. Chall.* at 3. Thus, they argue, the consolidation gives
13 them the opportunity to exercise a peremptory challenge under § 170.6. *Id.* The Landowners are
14 mistaken. Consolidation of these already coordinated cases does not re-set the clock on
15 peremptory challenge or void the rule that the challenge must be brought within 20 days of the
16 coordination judge’s assignment.

17 First of all, the original actions were coordinated because they are complex cases in
18 which common questions of law or fact are predominating or significant to the litigation. Cal.
19 Civ. Proc. Code § 404.1. Specifically, the “Complaints and Cross-Complaints all include, in one
20 form or other, declaratory relief causes of action seeking determinations of the right to draw
21 ground water from the Antelope Valley basin.” Consolidation Order at 2. Similarly, cases may
22 be consolidated if they involve a common question of law or fact. Cal. Civ. Proc. Code §
23 1048(a). Because all actions pending “involve common issues of law and fact relating to the
24 determination of the relative rights to withdraw water from the Antelope Valley Groundwater
25 Basin,” the Court found it necessary and desirable to consolidate these coordinated actions.
26 Consolidation Order at 2-3.

27 The consolidation, therefore, does not change the reason this case was coordinated in the
28 first place - to declare all parties’ rights to water. The consolidation does allow the Court to
potentially satisfy the McCarran Amendment, 43 U.S.C. § 666, and enter a single judgment

1 which may result in a comprehensive adjudication of all rights to water, and enforce that
2 judgment in a single consolidated case. But, there is nothing new in terms of actions or claims
3 that would or should re-set the clock for purposes of peremptory challenge.

4 The Landowners cite to one case in arguing that peremptory challenge is available at this
5 late date, *Nissan Motor Corp. v. Superior Court* 6 Cal.App.4th 150 (1992). This case involved
6 unrelated products liability actions filed against the same defendant (Nissan) by different
7 plaintiffs at different times for injuries arising out of the same alleged defect in Nissan
8 automobiles. On its own motion, the Superior Court consolidated the three actions and
9 transferred the later two actions to the judge assigned to the first lawsuit, who had already made
10 pretrial rulings. Nissan filed peremptory challenges and the trial court denied them as untimely.
11 The Court of Appeal disagreed and found the two later actions could not be characterized as
12 "continuations" of the first, because

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

17 *Id.* at 155. In contrast, the Antelope Valley Groundwater Adjudication does involve common
18 issues of law and fact regarding correlative rights to water and the coordinated and now
19 consolidated actions cannot be characterized as separate and distinct cases.

20 More importantly, however, the *Nissan* case did not involve a coordinated action and
21 gives no guidance on whether the 20 day limit to bring a challenge under Rule 3.516 is trumped
22 by subsequent consolidation. In fact, the Court of Appeal found that a case relied upon and
23 described by the trial court as "analogous" to the situation in *Nissan* was inapposite precisely
24 because the cited case involved a coordinated action. *Id.* at 154 n. 2 (citing *Industrial Indemnity*
Co. v. Superior Court, 214 Cal.App.3d 259, 263, 262 Cal.Rptr. 544, 546 (1989)).

25 Therefore, whether the Landowners can bring their peremptory challenge almost four and
26 a half years after the underlying cases were coordinated rests on the special nature of this lawsuit
27 as a coordinated action, not on the consolidation. A chief reason for coordination is "the
28 efficient utilization of judicial facilities and manpower." Cal. Civ. Proc. Code § 404.1; *Abelson*

1 v. *Nat'l Union Fire Ins. Co.*, 28 Cal.App.4th 776, 786, 35 Cal.Rptr.2d 13, 18 (1994) (purposes of
2 coordination include promoting the efficient use of judicial resources.) In a coordination
3 proceeding such as this one, where the Court and parties have a significant interest in not losing
4 a presiding judge who has almost five years of experience in the case, the Landowners' untimely
5 challenge certainly contravene the coordination proceeding goals. *Compare Jane Doe 8015 v.*
6 *Superior Court*, 148 Cal.App.4th 489, 498, 55 Cal.Rptr.3d 708, 714 (2007) (rejecting arguments
7 against a peremptory challenge and noting that Petitioner's "complaints about 'delay and
8 disruption' would be well taken if this were a complex case involving numerous coordinated
9 actions with difficult or disparate issues; but that hypothetical situation is not presented here.")

10 In the above cited *Industrial Indemnity Co.* case, the court held that add-on plaintiffs who
11 came into a coordination proceeding two years after the coordination judge was assigned could
12 not exercise a section 170.6 peremptory challenge. The court declared that the effect of rule
13 1515 (now Rule 3.516) is to "exclude add-on parties from the right to peremptorily challenge the
14 coordination trial judge." *Id.* at 263, 262 Cal.Rptr. 544, 546. The court reasoned that the
15 Judicial Council's powers to provide the rules of practice and procedure for coordination
16 "[n]otwithstanding any other provision of law" . . . is an express authorization sufficiently broad
17 to empower the council to formulate its own rules for judicial challenges independent of the
18 provisions of section 170.6," including the right to limit peremptory challenges to within 20
19 days after coordination. *Id.* at 547 (*citing* Cal. Code .Civ. Proc. § 404.7).^{1/}

20 Consequently, Rule 3.516 makes no allowance for peremptory challenges except within
21 20 days of the coordination judge's assignment. *Paterno v. Superior Court*, 123 Cal.App.4th
22 548, 555, 20 Cal.Rptr.3d 282, 286 ("We agree that once the coordination judge is assigned and
23

24 ^{1/} Even if allowed to bring a peremptory challenge upon the addition of the class action
25 complaints, the challenge is untimely. The Willis Class' Second Amended Class Action Complaint
26 was posted on May 6, 2008. *See* Order Granting Plaintiff Rebecca Willis Leave to File Second
27 Amended Class Action Complaint [nunc pro tunc], dated May 21, 2008. The Wood Class' First
28 Amended Class Action Complaint was added on June 20, 2007. Based on either the original
coordination order or the class actions added to the coordination proceeding, the peremptory
challenge was not brought within the 20 days deadline prescribed by Rule 3.516.

1 all available peremptory challenges are exhausted, the Judicial Council's rules leave no room for
2 additional challenges until the case is tried and judgment rendered.”); *Jane Doe 8015*, 148
3 Cal.App.4th at 497-98, 55 Cal.Rptr.3d 708, 713 (2007) (“The 20-day time limit and the
4 collective denomination of a "side" in rule 3.516 preclude a succession of challenges that would
5 delay the efficient resolution of coordinated actions”); *Philip Morris Inc. v. Superior Court*, 71
6 Cal.App.4th 116, 122, 83 Cal.Rptr.2d 671, 674 (1999)(“rule 1515 contemplates and controls the
7 exercise of any challenge to any assigned judge in a coordination proceeding including
8 peremptory challenges under section 170.6”).^{2/} The Landowners did not bring their challenge
9 within 20 days of the coordination order and accordingly are time-barred.

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

13 Even if the landowners were correct that consolidation awards a new opportunity to file
14 their § 170.6 peremptory challenge, their challenge must be denied because earlier hearings in
15 these proceedings involved determinations of contested factual issues relating to the merits.

16 Where a judge has presided over hearings or trial that involved determinations of
17 contested facts related to the merits, a subsequent peremptory challenge motion is precluded as
18 untimely. *Stephens v. Superior Court*, 96 Cal. App. 4th 54, 59, 116 Cal. Rptr. 2d 616, 620-21
19 (2002). In *Stephens*, it was argued that a late-appearing party could exercise a peremptory
20 challenge within 10 days of appearing, regardless of whether the judge had previously
21 determined contested fact issues in the case. The Appellate Court rejected this position, holding
22 that a late appearing party is precluded from peremptory challenge under section 170.6 if the
23 judge had “determined a contested fact issue relating to the merits and the party appears *in the*
24 *proceeding in which the judge made the determination or a subsequent proceeding that is a*

25 ^{2/} Only in the situation, not presented here, in which a coordinated action has proceeded to
26 judgment and that judgment is reversed on appeal and remanded for a new trial may a peremptory
27 challenge of the coordination judge outside of the 20 day limit be allowed. *Paterno*, 123
28 Cal.App.4th at 555 (After an appellate reversal, “[i]t is at this point that the Legislature has
determined that a trial judge who has been reversed may be removed from the case if one party feels
that judge's future impartiality might be compromised.”)

1 *continuation of the proceeding in which the judge made the determination.” Stephens* at 61.

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

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

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

15 In the instant case, the proceedings have clearly progressed beyond the point where the
16 judge has presided over the determination of contested fact issues relating to the merits. This
17 Court has taken significant evidence, and determined contested issues of fact that relate to the
18 merits of the determination and adjudication of relative rights to withdraw ground water from the
19 Antelope Valley Aquifer. Consolidation Order at n. 1 (“In an earlier phase of the proceedings,
20 the court found as a matter of fact that the area within the jurisdictional boundaries of the valley
21 constituted a single aquifer.”) The two trial segments in the coordinated proceedings, and the
22 determination of facts material to the common issues that bind these proceedings stand as a bar
23 to the timeliness of any peremptory challenge to the presiding judge.

24 The public policy grounds for barring such challenge in the instant case is neatly
25 summarized by the California Supreme Court:

26 [I]t would mean that the judge who tried the case, and who is ordinarily in the
27 best position to pass upon the questions involved, could by a mere general
28 allegation of prejudice, and without any judicial determination of the facts, be
disqualified. . . . Such procedure would 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.

Jacobs v Superior Court, 53 Cal.2d 187, 190, 1 Cal.Rptr. 9, 10 (1959). This public policy

1 against judge-shopping also prevents prejudice to the parties. In the instant case, parties who
2 have already spent numerous years and abundant resources advancing this case would be
3 prejudiced if they were forced to relitigate matters already determined. Accordingly, a
4 peremptory challenge to the presiding Judge in this matter at this point in the proceedings is
5 unavailable.

6 **CONCLUSION**

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

9 Respectfully submitted this 26th day of February, 2010.

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/s/

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PROOF OF SERVICE

I, Linda Shumard, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environmental and Natural Resources Section, 1961 Stout Street, 8th Floor, Denver, Colorado 80294.

On February 26, 2010, I caused the foregoing documents described as; **FEDERAL DEFENDANTS' RESPONSE TO PEREMPTORY CHALLENGE TO ASSIGNED JUDGE (CCP § 170.6)**, to be served on the parties via the following service:

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

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

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

Executed on February 26, 2010, at Denver, Colorado.

/s/ Linda Shumard
Linda Shumard
Legal Support Assistant

Exhibit 32

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

OF ORIGINAL FILED
Superior Court of California
County of Los Angeles
MAR 03 2010
John A. Clarke, Executive Officer/Clerk
By RUCENA LOPEZ, Deputy

<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>
--	--

Date/Time: Friday, February 26, 2010 (no time)

Location: Los Angeles County Superior Court 111 North Hill Street
Los Angeles, CA 90012

Present: Hon. Jack Komar, Judge M. Godderz, Clerk

*Antelope Valley Groundwater Cases (JCCP 4408)
Los Angeles County Superior Court, Case No. BC 325 201
Friday, February 26, 2010 (no time) / Hon. Jack Komar*

F:\komar\antelope Valley\2010-02-26 MO re late add ons to Willis Class.doc

MINUTE ORDER RE:

WILLIS CLASS

The following parties have requested and received the Court's permission to re-join the Willis Class, and have been instructed to return their signed forms to the address listed on the form:

1. Helen Holt and Bill Holt
2. Investco AB8, LLC (Chris Epscha)

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	
Phelan Pinon Hills CSD	Susan Trager	
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 33

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6 A. Godde, Lawrence A. Godde and Godde Trust, Kootenai Properties, Inc., Gailen Kyle, Gailen
7 Kyle as Trustee of the Kyle Trust, James W. Kyle, James W. Kyle as Trustee of the Kyle Family
Trust, Julia Kyle, Wanda E. Kyle, Eugene B. Nebeker, R and M Ranch, Inc., Edgar C. Ritter Paula
8 E. Ritter, Paula E. Ritter as Trustee of the Ritter Family Trust, Trust, Hines Family Trust , Malloy
Family Partners, Consolidated Rock Products, Calmat Land Company, Marygrace H. Santoro as
9 Trustee for the Marygrace H. Santoro Rev Trust, Marygrace H. Santoro, Helen Stathatos, Savas
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10 Groven Trust, Scott S. & Kay B. Harter, Habod Javadi, Juniper Hills Water Group, Eugene V.,
Beverly A., & Paul S. Kindig, Paul S. & Sharon R. Kindig, Jose Maritorena Living Trust, Richard H.
11 Miner, Jeffrey L. & Nancee J. Siebert, Barry S. Munz, Terry A. Munz and Kathleen M. Munz,
Beverly Tobias, Leo L. Simi, White Fence Farms Mutual Water Co. No. 3., William R. Barnes &
12 Eldora M. Barnes Family Trust of 1989, Del Sur Ranch, LLC, Healy Enterprises, Inc., John and
13 Adrienne Reca, Sahara Nursery, Sal and Connie L. Cardile, Gene T. Bahlman, collectively known
14 as the Antelope Valley Ground Water Agreement Association ("AGWA")

15 [See Next Page For Additional Counsel]

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

18 ANTELOPE VALLEY) Judicial Council Coordination Proceeding
GROUNDWATER CASES) No. 4408
19 Included Actions:)
20 Los Angeles County Waterworks District No.) Santa Clara Case No. 1-05-CV-049053
40 v. Diamond Farming Co. Superior Court of) Assigned to The Honorable Jack Komar
21 California County of Los Angeles, Case No. BC)
22 325 201 Los Angeles County Waterworks)
District No. 40 v. Diamond Farming Co.) CROSS-DEFENDANTS' REPLY TO
23 Superior Court of California, County of Kern,) OPPOSITIONS TO PEREMPTORY
Case No. S-1500-CV-254-348Wm. Bolthouse) CHALLENGE TO ASSIGNED JUDGE
24 Farms, Inc. v. City of Lancaster Diamond) (C.C.P. § 170.6)
Farming Co. v. City of Lancaster Diamond)
25 Farming Co. v. Palmdale Water Dist. Superior)
Court of California, County of Riverside,)
26 consolidated actions, Case No. RIC 353 840,)
RIC 344 436, RIC 344 668)
27)
28)

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

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26 SERVICE ROCK PRODUCTS CORPORATION

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 Cross-Defendants’ motion for disqualification is timely in response to the Court’s February
9 19, 2010 *Order Transferring and Consolidating Actions for All Purposes* (the “Order”). Upon such
10 consolidation, Code of Civil Procedure section 170.6 guarantees a litigant the extraordinary right to
11 disqualify a judge. Cross-Defendants previously attempted to exercise their 170.6 challenge right
12 upon Judge Komar’s announcement of his inclination to transfer and consolidate actions in these
13 proceedings, only to be told by both Judge Komar and the Court of Appeals that such exercise was
14 “premature” absent a signed order. (See *Order Striking Peremptory Challenge*, filed October 27,
15 2009, pp. 1:27-3:2; Court of Appeal, Fourth District’s *Order*, filed November 19, 2009, in *Antelope*
16 *Valley Groundwater Agreement Association et al. v. Superior Court of Los Angeles County*,
17 E049581.) The Court has issued the signed Order effecting consolidation, meaning that Cross-
18 Defendants’ 170.6 Challenge is no longer premature, but is appropriately filed at this time. Any
19 argument that Cross-Defendants previously missed their opportunity to exercise such a challenge
20 and waived this right is not well taken, as it contradicts the prior findings of both Judge Komar and

21 ¹ On February 19, 2010, Judge Komar set a hearing on the 170.6 Challenge for March 8, 2010.
22 (February 19, 2010 Minute Order, at 2.) He ordered any oppositions to be filed by February 26,
23 2010 and any replies to such oppositions to be filed by March 4, 2010. On February 26, 2010, the
24 Public Water Suppliers jointly filed their *Opposition to Code of Civil Procedure Section 170.6*
25 *Peremptory Challenge*, claiming that Cross-Defendants’ Peremptory Challenge is untimely. The
26 same day, the City of Los Angeles and Phelan Piñon Hills Community Services District separately
27 filed a *Joinder in Opposition to Peremptory Challenge to Assigned Judge*. The United States also
28 filed its *Federal Defendants’ Response to Peremptory Challenge to Assigned Judge*, on February 26,
2010, claiming Cross-Defendants’ 170.6 Challenge is untimely. The State of California
subsequently joined in the oppositions of the Public Water Suppliers and the United States after the
12:00 pm filing deadline. The oppositions of the Public Water Suppliers, City of Los Angeles,
Phelan Piñon Hills Community Services District, the United States and the State of California are
hereafter collectively referred to as the “Oppositions.”

1 the Court of Appeals. As the Court has issued the signed Order, the 170.6 Challenge is timely and
2 the consolidated cases must be transferred to another judge.

3 The right to disqualify a judge is a “substantial right” and an “important part of California’s
4 system of due process that promotes fair and impartial trials and confidence in the judiciary.”
5 (*Stephens v. Superior Court* (2002) 96 Cal. App. 4th 54, 61-62 (citations omitted).) The
6 Oppositions’ arguments do not address the effect of the Court’s Order. As Cross-Defendants have
7 previously explained,² a party to any consolidated case may exercise its right to peremptorily
8 challenge a judge under *Code of Civil Procedure* section 170.6 when actions are consolidated,
9 notwithstanding that the party had previously acquiesced to that judge presiding in one of the
10 consolidated cases.

11 Prior to the Court’s February 19, 2010, *Order Transferring and Consolidating Actions for All*
12 *Purposes*, Cross-Defendants were not parties to either *Willis v. Los Angeles County Waterworks*
13 *District No. 40*, LASC Case No. BC 364 553 (the “Willis Class Action”) or *Wood v. Los Angeles*
14 *County Waterworks District No. 40*, LASC Case No. BC 391 869 (the “Wood Class Action”). The
15 act of consolidation fundamentally altered the nature of the case, such that parties and pleadings are
16 realigned. After the Court issued its Order, Cross-Defendants’ peremptory challenge was timely
17 filed.

18 As discussed below, the law that applies in such circumstances is clear—in two successive
19 actions, a party does not waive its right to disqualify a judge in the later action by failing to so move
20 in the earlier action. When the Court issued its Order, a right to exercise a peremptory challenge
21 pursuant to *Code of Civil Procedure* section 170.6 (“170.6 Challenge”) arose for Cross-Defendants.
22 Because Cross-Defendants filed their 170.6 Challenge immediately upon the Court’s issuance of its
23 Order and in conformity with the form set forth in section 170.6(a)(5), Cross-Defendants’
24 peremptory challenge was timely and proper, the Court must now transfer the case for reassignment.

25 **II. CROSS-DEFENDANTS’ 170.6 CHALLENGE IS TIMELY AND IN PROPER FORM**

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

27 ² (*Cross-Defendants’ Peremptory Challenge to Assigned Judge*, filed October 13, 2009, p. 1:14-25.)

1 A peremptory challenge is timely if exercised "... within 10 days after notice of the all
2 purpose assignment," and applies upon consolidation. (*Code of Civil Procedure*, section
3 170.6(a)(2); *Nissan Motor Corp. v. Superior Court* (1992) 6 Cal. App. 4th 150, 154-55.) The
4 substantial form of the peremptory challenge is set forth at *Code of Civil Procedure*, section
5 170.6(a)(5). Despite significant opposition from many parties including Cross-Defendants, on
6 February 19, 2010, the Court issued its Order, which, among other things, had the effect of making
7 Cross-Defendants unwilling parties to the Willis Class Action and the Wood Class Action in which
8 they had not been named.

9 As soon as reasonably possible after the Court's issuance of the Order, Cross-Defendants
10 filed their 170.6 Challenge, which included their good-faith assertion that Judge Komar is prejudiced
11 against the Cross-Defendants, or the interests of the Cross-Defendants, such that in the newly
12 consolidated action Cross-Defendants cannot have a fair or impartial trial or hearing before him.
13 Cross-Defendants' filing of the 170.6 Challenge the same day as the Order is within the timeframe
14 required under the statute, and the 170.6 Challenge is fully in compliance with the substantial form
15 set forth in subsection (a)(5) of the peremptory challenge statute.

16 None of the Oppositions challenge the form of the 170.6 Challenge or that it was filed within
17 ten days after the issuance of the Order. Rather, the Oppositions *solely* challenge Cross-Defendants'
18 ability to exercise their rights to peremptorily challenge Judge Komar because they had previously
19 acquiesced to him presiding in the coordinated cases.

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

21 A party to any consolidated case may exercise its right to challenge the assigned judge under
22 Code of Civil Procedure section 170.6, notwithstanding that the party previously acquiesced to the
23 judge's assignment in one of the consolidated cases. (CAL. CIV. CTRM. HBOOK. & DESKTOP
24 REF. § 14:50 (2009 ed.), citing *Nissan Motor Corp. v. Superior Court* (1992) 6 Cal. App. 4th 150,
25 155; *Philip Morris Inc. v. Superior Court* (1999) 71 Cal. App. 4th 116, 123.) Here, just as the
26 defendant did in *Nissan*, Cross-Defendants properly moved to disqualify Judge Komar pursuant to
27 section 170.6, by timely filing their 170.6 Challenge immediately after the Court's Order.

1 Nevertheless, the oppositions state that consolidation of coordinated cases does not provide Cross-
2 Defendants a renewed right to a peremptory challenge. (See *Federal Defendants' Response to*
3 *Peremptory Challenge to Assigned Judge*, filed February 26, 2010, p. 1:12-16.)

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

7
8 A party's acquiescence of a judge to hear one action does not impair
9 his or her right to exercise a challenge to prevent that judge from
10 hearing another matter, even if that matter raises issues closely related
11 to those in the first action." (*Id.* at 155 [citations omitted].)

12 In arguing its inapplicability, the Oppositions incorrectly frame the Court's decision in
13 *Nissan*, positing that it turned on the fact that the uncommon parties to three consolidated cases had
14 not previously had the ability to challenge the judge assigned to the consolidated action. (See, e.g.,
15 *Public Water Suppliers' Opposition to Peremptory Challenge to Assigned Judge*, p. 1:28-2:4.)
16 However, in *Nissan*, the peremptory challenge was exercised by Nissan – the common defendant in
17 the three consolidated cases. Nissan was a party to the case overseen by the judge assigned to the
18 consolidated action. (6 Cal.App.4th at 154-55.) Contrary to the Oppositions' characterization of the
19 case, the appellate court's decision was not based on the imposition of a new judge because no new
20 judge was being imposed on the party exercising the peremptory challenge. The appellate court's
21 decision was instead based on the consolidation's creation of a newly configured case – precisely the
22 situation here.

23 It should be noted that in *Nissan*, the party exercising the peremptory challenge was a party
24 to all three consolidated cases and had therefore previously been afforded an opportunity to exercise
25 a 170.6 challenge to any of the judges in any of the three cases. In the Antelope Valley cases, Cross-
26 Defendants were never parties to the two class action cases and thus never had the opportunity to
27 exercise a 170.6 Challenge in those cases. Thus, the peremptory rights that the appellate court
28 afforded to Nissan are even broader than those 170.6 Challenge rights exercised by Cross-

1 Defendants.

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

9 Contrary to the assertions of the Oppositions, the fact that Cross-Defendants had not
10 challenged Judge Komar’s assignment in any prior action does not render the 170.6 Challenge
11 untimely for purposes of the new consolidated cases. Consolidation provides a second chance at
12 exercising the statutory right to challenge a judge by alleging bias. (WEIL & BROWN, CIVIL
13 PROCEDURE BEFORE TRIAL, § 12:369 (2009) (citing to *Nissan*.) Furthermore, as stated in
14 *Nissan*, section 170.6 ““should be liberally construed with a view to effect its objects and to promote
15 justice.”” (6 Cal.App.4th at 154.) Since the Oppositions never take the issue of a peremptory
16 challenge after consolidation head on, they attempt to distract by framing the issue as if Cross-
17 Defendants seek to exercise a late challenge in a merely coordinated proceeding. This is not the
18 case—the newly consolidated case is not a continuation of the previously coordinated cases. As the
19 court stated in *Nissan*, “...judicial efficiency is not to be fostered at the expense of a litigant's rights
20 under section 170.6 to peremptorily challenge a judge.” (*Nissan*, 6 Cal.App.4th at 155).

21 Moreover, it is clear that the prior coordination of cases in these proceedings did not and was
22 not intended to have the same effect as the Court’s Order of consolidation. At the time of
23 coordination, Judge Vasquez of the Orange County Superior Court both knew and acknowledged the
24 difference between coordination and consolidation. Judge Vasquez’ comments at the time that
25 coordination was ordered:

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Let me start by saying what I am not going to be ordering today. The issue that was in the mind of many of the parties was whether or not the case should proceed on an individual basis or a basin-wide adjudication. That would not be what the court is going to be addressing today.

Whether or not the matter should proceed as individual quiet title actions or basin wide would be up to the judge who gets the case to decide, but I am still inclined to order coordination to have all those issues resolved, except with the tiny carve out for Diamond Farming on the trial that was aborted to make its motion for fees and costs in the Riverside Superior Court, so that trial judge has the best handle on addressing that issue. But for all other purposes the matters will be coordinated.

(See Reporter’s Transcript, June 17, 2005, Superior Court of the State of California for the County of Orange, the Honorable David C. Velasquez, presiding, pp. 2 & 3, attached hereto.) Thus, Judge Vasquez’ prior coordination of certain cases that were consolidated through the recent Order did not have the effect of consolidation, and did not give rise to the right to exercise a 170.6 challenge, as described in *Nissan*.

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

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

An example of the way in which consolidation changes the nature of the case can be seen in the sequence of class certification and the Phase I and II trials. As a matter of due process, neither the Willis Class members nor the Wood Class members can be bound by the Court’s rulings in Phases I and II, as notices of the class proceedings had not yet been disseminated. (See *Plaintiff Rebecca Willis's Response to Ex Parte Application for Order Continuing Trial Date and to AGWA's Request for Order Protecting Phase 2 Findings*, filed October 1, 2008, pp. 2:1-3, 2:26-3:7.) Further, the law is clear that prior to class notice, class members cannot be bound by a determination on the

1 merits; the defendants only gain the res judicata benefits of class certification after notice has been
2 disseminated. (*Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 372-74.) In
3 effect, the Classes have a right of “automatic reversal” as to any of the Court’s future rulings that are
4 predicated on the Court’s findings in Phases I and II. This gives the classes a procedural leverage
5 point that is not enjoyed by anyone who is a party to the other actions consolidated with the class
6 actions. This will make Cross-Defendants, as well as the rest of the parties and the Court, beholden
7 to the classes unless the parties are willing to take the risk that the many years of litigation will be
8 rendered moot and returned to the beginning.³

9 The *Nissan* Court touched briefly on the differences in the cases to be consolidated for the
10 purpose of dismissing the characterization of the two cases to be consolidated as “continuations” of
11 the third case. The Court briefly listed some of the distinguishing factors in the cases, but only as a
12 contrast to the fact that all the cases involved the same defendant (Nissan), the same model of car
13 (300ZX) and the same underlying defect (sudden acceleration). (*Nissan*, 6 Cal.App.4th at 153, 155.)
14 The *Nissan* Court felt compelled to identify differences in the cases because the cases to be
15 consolidated were otherwise nearly identical.⁴

16 Similarly here, the consolidation of the two class actions into the main action cannot be
17 considered “continuations” of the main action. By virtue of the structure of the cases as class actions
18 and the timing of creation of the classes, the relationship between plaintiffs and defendants is
19 significantly different than the relationship between plaintiffs and defendants in the main action,
20 both substantively and procedurally. Following completion of any settlement in the class actions,
21 these differences will be even more significant.

22 *Nissan* cited *City of Hanford v. Superior Court* (1989) 208 Cal.App.3d 580 with respect to
23 whether the cases at issue were continuations of previous cases. The discussion in *Hanford* is

24 ³ Even if the classes—who caused the need for consolidation in the first place—are somehow settled
25 out of the proceedings, Cross-Defendants’ 170.6 Challenge remains valid upon its filing. (*Louisiana-*
26 *Pacific Corp. v. Phil Lumber Co.* (1985) 163 Cal.App.3d 1212, 1219-1221 (Once properly exercised,
a peremptory challenge cannot be rescinded, and the dismissal of a party who asserted the challenge
does not cause rescission of the challenge).)

27 ⁴ 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 lengthy and no one factor is identified as determinative. However, *Hanford* identifies a subsequent
2 proceeding which results in new parties and results in a realignment of the original parties, as factors
3 weighing in favor of finding that the cases are not continuous.

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

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

10 Upon consolidation, a party may find itself to be made a party to an entirely different action
11 vis-à-vis new parties, which fundamentally changes the nature of the litigation in which it is
12 involved. Under *Nissan*, the simple fact of consolidation gives rise to another opportunity for Cross-
13 Defendants to exercise a 170.6 challenge, despite the fact that cases may have been previously
14 coordinated. Nowhere in the oppositions' moving papers do they mention the effect of
15 consolidation—they only discuss coordination in the previously unconsolidated cases.

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

26 In fact, the Federal Defendants argued that the cases could not proceed merely in a
27 coordinated fashion and that consolidation was imperative to resolution of this case, because the

1 “coordination of complex cases may lead to separate and non-mutually binding determinations of
2 rights and interests entered in separate decrees.” (*Federal Defendants' Response to Motion to*
3 *Transfer and Consolidate*, p. 1:12-14.) The Federal Defendants have further described how
4 consolidation creates a different sort of unification with different postures amongst the parties, such
5 that the consolidated case is not a continuation of the “separate actions and claims raised in the
6 various actions....” (*Federal Defendants' Reply to Landowner Defendants' Motion to Dismiss Public*
7 *Water Suppliers' Cross-Complaint and Responses Thereto*, filed October 19, 2009, p.2:21-23.) Now
8 that the cases have been consolidated, the Federal Defendants argue that “[t]he consolidation...does
9 not change the reason this case was coordinated in the first place—to declare all parties’ rights to
10 water....But, there is nothing new in terms of actions or claims that would or should re-set the clock
11 for purposes of peremptory challenge.” (*Federal Defendants' Response to Peremptory Challenge to*
12 *Assigned Judge*, pp. 3:25-4:3.) If the consolidation did not alter the nature of the case and realign
13 the parties, then the purpose of the consolidation is unclear. Obviously this is not the case, and the
14 Federal Defendants’ argument is simply a change of tune to achieve their latest goal—depriving the
15 Cross-Defendants’ of their guaranteed right to assure a fair and impartial trial. The Federal
16 Defendants are correct that the consolidation “does not change the reason the case was coordinated
17 in the first place – to declare all parties’ rights to water.” (*Federal Defendants' Response to*
18 *Peremptory Challenge to Assigned Judge*, p. 3:26-27.) But that does not mean that the consolidation
19 was simply for the sake of convenience and did not fundamentally reconfigure the coordinated
20 actions. The Federal Defendants quote the decision in *Jane Doe 8015* (2007) 148 Cal.App.4th 489,
21 497, where the court stated “The 20-day time limit and the collective denomination of a ‘side’ in rule
22 3.516 preclude a succession of challenges that would delay the efficient resolution of coordinated
23 actions.” Rather than show Cross-Defendants’ peremptory challenge as untimely, this statement
24 solidifies the point: there was no collective denomination of the current “sides” Cross-Defendants
25 now find themselves on until the order of consolidation.

26 Even if Rule 3.516 were applicable in this case, case law still allows a party to exercise a
27 170.6 challenge as to the assignment to consolidated cases of a judge that had previously been

1 assigned to one of the cases consolidated. In *Farmers Insurance Exchange v. Superior Court of*
2 *Contra Costa County* (1992) 10 Cal.App.4th 1509, three civil actions were consolidated and then
3 another action pending in another county was coordinated with them. The defendant filed a timely
4 section 170.6 challenge to the coordination judge, who had already ruled on contested matters in the
5 three consolidated cases. The court held that the challenge was not untimely, even though the judge
6 had previously ruled on contested matters in the consolidated cases, based on Rule 1515 (now Rule
7 3.516). Similar to the case in *Nissan* and the case at bar, the party filing the 170.6 challenge was the
8 common party to all the cases that were consolidated, including the one over which the judge
9 assigned to the consolidated cases had already been presiding.

10 The *Farmers* Court noted that the opposing parties

11
12 argue that Farmers' challenge was untimely because of Judge
13 O'Malley's prior rulings on contested motions, including a motion for
14 summary adjudication (section 437c) and a motion for class
15 certification. They accuse Farmers of judge shopping because it
16 challenged the very judge who previously made rulings adverse to its
17 interests on issues common to others of the coordinated cases. They
18 emphasize that even though the coordinated actions involve different
19 plaintiffs, all of them are members of the same class and the relief
20 sought is identical.

17
18 (*Farmers* 10 Cal.App.4th at 1511.) The *Farmers* Court rejected all of these arguments and found the
19 170.6 challenge to be timely and proper. The Oppositions' similar arguments should likewise be
20 rejected.

21 The Oppositions heavily rely upon *Industrial Indemnity Co. v. Superior Court* (1989) 214
22 Cal.App.3d 259 to claim that the 170.6 Challenge is untimely, claiming it is controlling authority.
23 (See *Public Water Suppliers' Opposition to Code of Civil Procedure Section 170.6 Peremptory*
24 *Challenge*, p.2:20-3:21; *Federal Defendants' Response to Peremptory Challenge to Assigned Judge*,
25 p. 5:10-21.) *Industrial Indemnity* is not controlling here, however, for a very simple reason - it did
26 not involve a consolidation. The Oppositions overlook that the *Nissan* Court considered *Industrial*
27 *Indemnity*, and held the case to be irrelevant, finding that the issue of a party's ability to exercise a

1 section 170.6 challenge *upon consolidation* was an issue of first impression. (*Nissan*, 6 Cal.App.4th
2 at 154, n. 2.) The *Industrial Indemnity* case and other cases cited by the Federal Defendants such as
3 *Jane Doe 8015 v. Superior Court* (2007) 148 Cal.App.4th 489, did not concern what is at issue here:
4 the effect of a consolidation with regards to the right to a peremptory challenge.

5 *Industrial Indemnity* dealt with “add-on” parties coming into a coordinated proceeding,
6 where several of the coordinated cases had already gone to judgment. The Oppositions analogize
7 Cross-Defendants’ 170.6 Challenge after consolidation with the attempt to thwart the add-on
8 procedure in *Industrial Indemnity*, and claim that Cross-Defendants’ 170.6 Challenge threatens
9 efficient utilization of judicial resources in this case. (See *Public Water Suppliers’ Opposition to*
10 *Code of Civil Procedure Section 170.6 Peremptory Challenge*, p.3:12-20; *Federal Defendants’*
11 *Response to Peremptory Challenge to Assigned Judge*, pp. 7:21-8:1-3.) However, as stated above,
12 and stated plainly in more recent case law, “judicial efficiency is not to be fostered at the expense of
13 a litigant’s rights under section 170.6 to peremptorily challenge a judge.” (*Nissan*, 6 Cal.App.4th at
14 155.) Here, Cross-Defendants were not parties to the class actions themselves and did not have the
15 ability at that point to exercise a section 170.6 challenge. Fundamentally, the policy of not allowing
16 a section 170.6 challenge when a petitioner could use it to thwart the add-on procedure simply does
17 not apply here; the Rules of Court add-on procedure is not involved, and the consolidation of the
18 parties was strongly protested by the Cross-Defendants in the first place.

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

20 The Federal Defendants claim that even if Cross-Defendants may file a peremptory challenge
21 after consolidation, the challenge must be denied because earlier hearing involved determinations of
22 contested factual issues relating to the merits. (*Federal Defendants’ Response to Peremptory*
23 *Challenge to Assigned Judge*, pp. 6:12-14, 7:12-16.) The Federal Defendants cite to *Stephens v.*
24 *Superior Court* (2002) 96 Cal.App.4th 54, where the Appellate Court held that a late appearing party
25 is precluded from peremptory challenge if the judge had determined a contested issue of fact and the
26 party had previously appeared in the proceeding or a subsequent proceeding that is a continuation of
27 the proceeding where the judge made the determination. (*Stephens, supra*, 96 Cal.App.4th at 61.) As

1 stated above, the two class actions consolidated into the main action are not “continuations” of the
2 main action. The relationship between plaintiffs and defendants with the classes is significantly
3 different than the relationship between plaintiffs and defendants in the main action, both
4 substantively and procedurally.

5 Furthermore, the determinations made by the Court in earlier “trial” phases were strictly
6 jurisdictional, necessary to determine which rights would be at issue in these proceedings. The
7 determination of the Basin boundaries in the first phase was a jurisdictional issue, not a substantive
8 ruling on the merits of any cause of action. The Court’s determination regarding the existence of
9 sub-basins was similarly predicated on certain parties wishing to be outside the adjudication, and
10 was a question of which water rights were at issue in the case. (*Federal Defendants’ Response to*
11 *Peremptory Challenge to Assigned Judge*, p. 7:13-20.) If the Phase I and II trials are to be
12 considered anything other than jurisdictional, then the parties face a different set of problems since
13 both of these phases were conducted prior to the case being at issue.⁵

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

21 **III. CONCLUSION**

22 The issuance of the *Order to Transfer and Consolidate* gave the Cross-Defendants the right
23 to file the 170.6 Challenge. That guaranteed right, sounding in principles of due process, existed
24 regardless of whether any of the Cross-Defendants had previously acquiesced to Judge Komar in any
25

26 ⁵ 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.” (*Federal Defendants’ Response to Peremptory Challenge to*
Assigned Judge, p. 7:14-16 (emphasis added).)

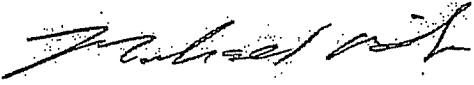
1 of the previously coordinated cases. The controlling case law and related authorities-*Nissan, Philip*
2 *Morris, Farmers* and other authority, such as the California Civil Courtroom Handbook and Desktop
3 Reference at § 14:50 (2009 ed.) – clearly establish Cross-Defendants’ right to exercise their 170.6
4 Challenge upon the Court’s issuance of the *Order to Transfer and Consolidate*.

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

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11 Dated: March __, 2010

LAW OFFICES OF LEBEAU THELEN, LLP

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13
14 By:

BOB H. JOYCE
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KEVIN E. THELEN
Attorneys for DIAMOND FARMING
COMPANY, CRYSTAL ORGANIC FARMS,
GRIMMWAY ENTERPRISES, INC., and
LAPIS LAND COMPANY, LLC.

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16
17 Dated: March 4, 2010

GRESHAM SAVAGE NOLAN & TILDEN

18
19
20 By:

M. Allen
MICHAEL DUANE DAVIS
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GROUP, SHEEP CREEK WATER
COMPANY, INC., and SERVICE ROCK
PRODUCTS CORPORATION

1 **PROOF OF SERVICE**

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

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

7 On March 4, 2010, I served the foregoing document described as:

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

10 on the interested parties in this action.

11 By posting it on the website at 10:00 a.m. on March 4, 2010.
12 This posting was reported as complete and without error.

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

15 Executed in Santa Barbara, California, on March 4, 2009.

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19 MARIA KLACHKO-BLAIR
20 **TYPE OR PRINT NAME**



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29 SIGNATURE