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Attorneys for the United States

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

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

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  
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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).<sup>1/</sup>

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  
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24 <sup>1/</sup> 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”).<sup>2/</sup> 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**  
**consolidated actions.**

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

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

24 \_\_\_\_\_  
25 <sup>2/</sup> 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  
prejudice to the satisfaction of a judicial body must yield to the policy against  
judge shopping-i.e., removing an assigned judge from a case for reasons other  
than a good faith belief the judge is prejudiced.

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

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

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

23 [I]t would mean that the judge who tried the case, and who is ordinarily in the  
24 best position to pass upon the questions involved, could by a mere general  
25 allegation of prejudice, and without any judicial determination of the facts, be  
26 disqualified. . . . Such procedure would make it possible for litigants to gamble on  
27 obtaining a favorable decision from one judge, and then, if confronted with an  
28 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 26<sup>th</sup> 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, 8<sup>th</sup> 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