

1 Michael Duane Davis, SBN 093678
2 Marlene L. Allen-Hammarlund, SBN 26418
3 **GRESHAM SAVAGE NOLAN & TILDEN,**
4 **A Professional Corporation**
5 3750 University Avenue, Suite 250
6 Riverside, CA 92501-3335
7 Telephone: (951) 684-2171
8 Facsimile: (951) 684-2150

9 Attorneys for Cross-Defendants, SERVICE ROCK
10 PRODUCTS CORPORATION, as successor-in-
11 interest to Owl Properties, Inc. and SHEEP CREEK
12 WATER COMPANY, INC., and Cross-Defendants
13 and Cross-Complainants, A.V. UNITED MUTUAL
14 GROUP

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **IN AND FOR THE COUNTY OF LOS ANGELES**

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

) Judicial Council Coordination
) Proceeding No. 4408

19 **ANTELOPE VALLEY GROUNDWATER**
20 **CASES**

) Santa Clara Case No. 1-05-CV-049053
) Assigned to the Honorable Jack Komar
) Department 17C

21 Including Actions:

) **CASE MANAGEMENT STATEMENT**
) **OF CROSS-DEFENDANTS, SERVICE**
) **ROCK PRODUCTS CORPORATION**
) **AND SHEEP CREEK WATER**
) **COMPANY, AND CROSS-**
) **DEFENDANTS / CROSS-**
) **COMPLAINANTS, A. V. UNITED**
) **MUTUAL GROUP**

22 Los Angeles County Waterworks District No.
23 40 v. Diamond Farming Co.
24 Superior Court of California, County of Los
25 Angeles, Case No. BC 325 201

26 Los Angeles County Waterworks District No.
27 40 v. Diamond Farming Co.
28 Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348

) Date: March 22, 2010
) Time: 9:00 A.M.
) Dept.: LA County Superior Court., Dept. 1
) Judge: Hon. Jack Komar

29 Wm. Bolthouse Farms, Inc. v. City of
30 Lancaster
31 Diamond Farming Co. v. City of Lancaster
32 Diamond Farming Co. v. Palmdale Water Dist.
33 Superior Court of California, County of
34 Riverside, consolidated actions, Case Nos. RIC
35 353 840, RIC 344 436, RIC 344 668

36 **AND RELATED ACTIONS.**

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 Cross-Defendants, **SERVICE ROCK PRODUCTS CORPORATION** ("**SERVICE**
3 **ROCK**") and **SHEEP CREEK WATER COMPANY, INC.** ("**SHEEP CREEK**"), and Cross-
4 Defendants / Cross-Complainants, **A.V. UNITED MUTUAL GROUP** (**A.V. UNITED**"), by
5 and through their attorneys of record, Gresham Savage Nolan & Tilden, APC, by Michael Duane
6 Davis and Marlene L. Allen-Hammarlund, hereby assert that Judge Komar is without authority
7 to take any action in this case due to the timely filing of a peremptory challenge under *Code of*
8 *Civil Procedure* § 170.6 (the "170.6 Challenge") by several parties; notwithstanding that Judge
9 Komar has taken the position that he is entitled to strike the 170.6 Challenge on the basis that it
10 was untimely. Judge Komar's ruling is contrary to the case of *Nissan Motor Corp. v. Superior*
11 *Court*, (1992) 6 Cal.App.4th 150, which holds that upon the granting of an order consolidating
12 cases, even if the parties were included in one of the cases being consolidated, a new time period
13 begins to run in order to permit the parties to file a 170.6 Challenge. The parties who joined in
14 the filing of the 170.6 Challenge are filing a writ with regard to Judge Komar's *Order Denying*
15 *the Challenging Parties' Peremptory Challenge Pursuant to CCP Section 170.6*. Accordingly,
16 until the issue of the peremptory challenge is resolved, **SERVICE ROCK, SHEEP CREEK**
17 and **A.V. UNITED** assert that Judge Komar is without authority to act in this matter, including
18 setting the case for Phase III trial or establishing the issues that will be tried in Phase III.

19 Without waiving this objection, **SERVICE ROCK, SHEEP CREEK** and **A.V.**
20 **UNITED** submit this Case Management Statement in connection with the Phase III Trial which
21 Judge Komar has now set for September 27, 2010.

22 CASE MANAGEMENT ISSUES

23 **1. Jurisdiction and Joinder of Indispensable Parties.**

24 Although it remains unclear how and to what extent the coordinated proceedings are now
25 aligned in these consolidated proceedings, it appears that the Court intends to proceed on an *in*
26 *personam* rather than *in rem* basis. If so, the Court still does not have complete jurisdiction over
27 all of the necessary and proper parties.
28

1 **SERVICE ROCK, SHEEP CREEK and A.V. UNITED** continue to assert that the
2 proceedings should be pleaded and tried as an *in rem* action. Unless the matter is litigated as an
3 *in rem* action, including the filing of *lis pendens* notice, many properties that should be subject to
4 the Court's jurisdiction will be omitted. The result will be that many parcels, the owners thereof
5 and/or the subsequent owners thereof, will never receive notice (i.e., due process) of the
6 litigation and be afforded the opportunity to protect themselves and their properties from the
7 potential effects of a judgment on the water rights relating to their property. The result will be a
8 legal quagmire of parcels not bound by the adjudication, parcel owners claiming that their
9 parcels are not bound, irreparable due process problems and the real potential that the
10 proceedings need to be re-litigated in their entirety.

11 Unless the pleadings are re-pled or amended such that these proceedings can be tried as
12 *in rem* actions, or until all necessary and indispensable parties are brought into the action, the
13 procedural requirements necessary to obtain proper jurisdiction have not been met.

14 **2. Service of Process.**

15 The true status of service of process remains unknown. Unless and until proofs of service
16 on all necessary and proper parties have been filed with this Court, this case cannot proceed to
17 trial. Mere representations by any counsel that all necessary and proper parties have been
18 named and served, is insufficient. California *Code of Civil Procedure* Section 417.30 requires
19 that: "After a summons has been served on a person, proof of service of the summons as
20 provided in Section 417.10 or 417.20 **shall be filed**, unless the defendant has previously made a
21 general appearance." (emphasis added)

22 Due to the fact that many properties continue to be transferred during the course of these
23 proceedings, there must be an appropriate procedure in place to give notice to new transferees.
24 As this case is apparently proceeding on an *in personam* rather than *in rem* basis, it is imperative
25 that all necessary and proper parties be served. Otherwise, any judgment ultimately entered in
26 this case will not be binding on hundreds, if not thousands, of landowners in the Antelope Valley
27 basin. There must be some reliable written record of all parties to each of the actions,
28 confirmation of service on all parties to each of the actions, and confirmation of the filing of

responsive pleadings by all parties in each of the actions, followed by the defaults of all parties who fail to file responsive pleadings.

No civil case should be set for a pretrial conference or for trial until it is at issue and unless a party thereto has served and filed therein a memorandum to set, stating that the case is at issue as to all parties served with process or appearing therein. (*Contract Engineers v. Welborn* (1968) 258 Cal.App.2d 553, 557-558; *Loney v. Superior Court* (1984) 160 Cal.App.3d 719, 723; Weil and Brown, Civil Procedure Before Trial, §12:116, p. 12-25.3.) The common understanding for the term “at issue” is when the pleading stage is complete: i.e., that all defendants as to whom judgment is sought have been served, that their answers are on file, and that no further pleadings are required or expected from any party. (Weil and Brown, Civil Procedure Before Trial, §12:116, p. 12-25.3.) This case is currently not at issue, and the Phase III trial should not proceed at this time.

3. The Class Actions.

The Class Actions have now been consolidated with all of the other non-class action cases. The effect of this on the non-class action cases, however, is not clear. It is undisputed, however, that the class members have not been given notice that the cases have been consolidated. Further, although a defendant class was previously certified by this Court, no counsel was willing to undertake representation of the parties of that defendant class. This Court then certified a plaintiff’s class of non-pumpers and a plaintiff’s class of small pumpers. However, it appears that the defendant’s class was ever decertified, and remains in limbo. The definitions of the various classes have changed over time; and even presently, there is less than unanimity amongst the various parties over the specific definitions of each of the classes.

4. Discovery.

The Court and the parties seem to have ignored many of the rules of *Civil Procedure* regarding pleadings, discovery and process. As discussed above, no one appears presently able to specifically name all of the plaintiffs, all of the defendants, all of the cross-complainants and all of the cross-defendants in each of the various consolidated proceedings, due in no small part to the ambiguities of and confusion caused by the pleadings and the process. Notwithstanding

1 that this court has ordered "complete consolidation," it is highly unlikely that the parties will
2 ever fully understand and mutually agree upon the effect of that "complete consolidation." The
3 rules of pleading were legislatively designed to confer due process and to avoid confusion of the
4 nature being experienced in these legal proceedings, by requiring that a complaint set forth all
5 allegations by one party against another, affording the opportunity for a cross-complaint, and
6 accommodating a party's right to legally challenge the sufficiency of each alleged cause of
7 action. Based on those requirements, parties are able to proceed with discovery with an
8 understanding of the certainties of the parties and issues confronting them. Due to the
9 ambiguities in these proceedings, the parties cannot properly engage in discovery in a cost
10 effective and legally appropriate manner. Accordingly, discovery has not taken place to the
11 extent that it must in order for the parties to adequately prepare for trial.

12 5. Trial.

13 Because the rules of *Civil Procedure* have been largely ignored by the parties and the
14 court, two phases of trial have already occurred, notwithstanding that many of the present and
15 potentially future parties had not yet been identified, named, served, or appeared.
16 Notwithstanding the frequent suggestions that personal jurisdiction over all potentially affected
17 necessary and proper parties was not required because these two phases of trial have been
18 procedural only, serious questions remain over whether subsequently appearing parties will be
19 able to establish that they were deprived of due process of law and at a later time, such as on
20 appeal, be able to invalidate or nullify the entire process. In truth, any presently unnamed, but
21 necessary or proper party could claim that, had they been afforded due process, they would have
22 been able to present evidence that would have brought about a totally different result in one or
23 the other of these two already tried phases of trial.

24 Because the rules of *Civil Procedure* have not been followed by the parties and the Court,
25 it is not clear what causes of action and claims are being asserted by each party as against each
26 other party; making it extremely difficult if not impossible to determine exactly what issues
27 should be tried in any particular phase of trial, and as against which party or parties. It has been
28 suggested that the next phase of trial will deal with issues of whether the basin is in overdraft

1 and, therefore, whether the basin needs to be managed by the Court. However, the context in
2 which those issues will be tried remains unclear, but critical.

3 The Court has asked for suggestions as to what should be included in a Case
4 Management Order on the Phase III trial. While **SERVICE ROCK, SHEEP CREEK and A.V.**
5 **UNITED** agree that the issue of the *current* state of the basin should be tried first, in order to
6 determine whether there is presently an overdraft condition in the basin, there is some confusion
7 as to what elements the Court wants presented as evidence in determining the current condition
8 of the basin. While the Court has stated that the historical condition of the basin is not relevant
9 for this phase of trial, according to Bulletin 118, California's Groundwater Update of 2003, p.
10 96, "Groundwater overdraft is defined as the condition of a groundwater basin or sub-basin in
11 which the amount of water withdrawn by pumping exceeds the amount of water that recharges
12 the basin over a period of years, during which the water supply conditions approximate average
13 conditions (DWR 1998). Overdraft can be characterized by groundwater levels that decline over
14 a period of years and never fully recover, even in wet years." Therefore, it appears that some
15 historical data will be necessary to ascertain whether the basin is in an overdraft condition. Since
16 no discovery has been conducted on the historical data of pumping by the various agencies and
17 other factors which would provide information "over a period of years", it is impractical that this
18 case will be ready to be tried by September 2010.

19 It is also unclear as to how the issue of *safe yield* will be dealt with in establishing
20 whether there is currently an overdraft. According to Bulletin 118, California's Groundwater
21 Update of 2003, p. 99, "Safe yield is defined as the amount of groundwater that can be
22 continuously withdrawn from a basin without adverse impact. Safe yield is commonly expressed
23 in terms of acre-feet per year. Depending on how it is applied, safe yield may be an annual
24 average value, or may be calculated based on changed conditions each year. Although safe yield
25 may be indicated by stable groundwater levels measured over a period of years, a detailed
26 groundwater budget is needed to accurately estimate safe yield. Safe yield has commonly been
27 determined in groundwater basin adjudications; although it must be established after the court
28 has determined that an overdraft condition exists. Proper application of the safe yield concept

1 requires that the value be modified through time to reflect changing practices within the basin.
2 *One of the common misconceptions is that safe yield is a static number.* That is, once it has been
3 calculated, the amount of water can be extracted annually from the basin without any adverse
4 impacts.” Accordingly, it would be disingenuous for the Court in Phase III of this case to
5 establish a safe yield number, especially since there has been no monitoring of the basin in order
6 to determine what the safe yield number is in the Antelope Valley. There will, most likely, be
7 different safe yield numbers in different areas of the basin, which again is subject to monitoring
8 various areas over time to establish what that number is. Unless there is sufficient monitoring
9 over a reasonable period of time (possibly five to ten years) before a safe yield number is
10 determined, or the Court selects the highest number within the range of generally accepted
11 figures for the safe yield, numerous businesses will be forced out of business if they are required
12 to pay for their share of water – especially if there is, in fact, no overdraft over the long term.

13 Until the pleadings are re-pled or amended so that the causes of action which are being
14 tried by specific parties against other parties are clearly established, it is difficult to know which
15 causes of action are being tried in Phase III. The Court should not permit definitions or numbers
16 that are established in this phase of the trial to be used for other purposes in this proceeding.
17 Unless that is clarified, it would be unfair to require the parties to proceed to trial.

18 As mentioned above, the terms “safe yield” and “overdraft” do not have clear, consistent
19 meaning. These terms are often used in different ways by hydrologists to define hydrogeologic
20 conditions for different purposes. There are no consistent meanings for these terms throughout
21 the water law cases in California. Discovery propounded upon the purveyor parties has been
22 responded to with objections and refusals to define these terms. The Court has not provided any
23 legal mechanism to define these terms. Even the experts used by the various parties in these
24 proceedings do not agree on the meaning of the terms. If the court intends to require the parties
25 to try “safe yield” and “overdraft” in the next phase, those terms have to be given clear, relevant
26 and hydrologically meaningful definitions that are legally consistent with authoritative California
27 case law.
28

1 These terms need to be defined in order to properly conduct discovery and engage in
2 litigation wherein rulings will be made by the Court regarding hydrogeologic conditions and
3 conclusions made using these terms. Likewise, the scope of litigation regarding these terms
4 needs to be determined. For example, assuming the terms are defined, is a factual determination
5 to be made by the Court in the next phase regarding “overdraft” and/or “safe yield” currently, as
6 of the date of the filing of the Complaint by Los Angeles County, as of the date of the filing of
7 the Complaint by Bolthouse and Diamond Farming (circa 2001) or as to some prior date or dates
8 over some extended period of time? These determinations must be clearly made in order for the
9 parties to conduct discovery, prepare for trial and conduct trial. Finally, such terms must be in
10 the context of the causes of action, in order for them to be properly tried. These issues need to be
11 resolved, along with the procedural issues discussed above, before another trial date can be set.

12 The idea that a generic “declaratory relief” cause of action somehow encompasses any
13 and all claims is insufficient both procedurally and as a practical matter, because it wholly fails
14 to place parties on notice of what is being litigated. Simply trying issues is neither sufficient nor
15 legally proper. Issues are non-dispositive. Which party bears the burden of proof is unclear and
16 the legal and/or factual significance of the issues is unclear. Furthermore, the parties are left to
17 guess about the significance of these issues, compelled to spend exorbitant amounts of money on
18 discovery without knowing the significance of the issues, and challenged to address legal rulings
19 regarding these issues with unknown and potentially devastating consequences.

20 **6. Demand for Jury Trial.**

21 The Court previously ruled and acknowledged that all parties may demand a jury trial as
22 to all matters as to which a jury trial is authorized. Issues related to “safe yield” and “overdraft”
23 depending on how they are defined, and depending upon the scope and burden of proof at trial,
24 may very well be necessary elements of a claim of prescription. Prescription is a central claim
25 by the purveyors against the landowners. **SERVICE ROCK, SHEEP CREEK and A.V.**
26 **UNITED** reserve and re-assert their rights to demand a jury trial on any claim of prescription,
27 including all required factual findings and elements of proof thereof, including the issues of
28

1 "overdraft" and "safe yield," especially since they have not been properly defined and the
2 meaning and legal impact thereof cannot be determined.

3
4 **CONCLUSION**

5 **SERVICE ROCK, SHEEP CREEK and A.V. UNITED** request that this Court require
6 that the statutes and rules of *Civil Procedure*, including pleading and practice be followed, that
7 the pleadings be clarified and that proper notice and service of process occur. Thereafter,
8 appearances of all parties need to be made and/or defaults taken. There must be a reasonable
9 window of opportunity for proper legal challenges to the sufficiency of the various pleadings.
10 Thereafter, all parties must be afforded a reasonable opportunity to engage in meaningful
11 discovery and to prepare for the next phase of trial. Finally, the next phase of trial must be well
12 defined including the legal causes of action that will be tried, including the issues that are
13 elements of each, and, if the Court is to rule on issues dependent on definitions, those definitions
14 must be properly, clearly and justifiably defined.

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16 DATED: March 15, 2010.

Respectfully submitted,

17 GRESHAM SAVAGE NOLAN & TIDEN, APC

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20 By: 

MICHAEL DUANE DAVIS, ESQ.
MARLENE L. ALLEN-HAMMARLUND, ESQ.
Attorneys for SERVICE ROCK PRODUCTS
CORPORATION, SHEEP CREEK WATER
COMPANY, and A.V. UNITED MUTUAL GROUP

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

Re: *ANTELOPE VALLEY GROUNDWATER CASES*
Los Angeles County Superior Court Judicial Council Coordinated
Proceedings No. 4408; Santa Clara County Superior Court Case No. 1-05-CV-049053

I am employed in the County of Riverside, State of California. I am over the age of 18 years and not a party to the within action; my business address is: 3750 University Avenue, Suite 250, Riverside, CA 92501-3335.

On March 15, 2010, I served the foregoing document(s) described as **CASE MANAGEMENT STATEMENTS OF CROSS-DEFENDANTS, SERVICE ROCK PRODUCTS CORPORATION'S AND SHEEP CREEK WATER COMPANY'S AND CROSS-DEFENDANTS AND CROSS-COMPLAINANTS, A. V. UNITED MUTUAL GROUP** on the interested parties in this action in the following manner:

(X) **BY ELECTRONIC SERVICE** – I posted the document(s) listed above to the Santa Clara County Superior Court website, <http://www.scefiling.org>, in the action of the Antelope Valley Groundwater Cases,

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

Executed on March 15, 2010, at Riverside, California.


TERI D. GALLAGHER