

FEE EXEMPT

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4 SPECIAL REFEREE

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By Swan King Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN BERNARDINO, RANCHO CUCAMONGA DIVISION

11 CHINO BASIN MUNICIPAL WATER)
DISTRICT,)
12)
Plaintiff,)
13)
v.)
14 THE CITY OF CHINO,)
15)
Defendants.)
16)

CASE NO. RCV 51010
Judge: Honorable J. Michael Gunn
SPECIAL REFEREE'S REPORT AND
RECOMMENDATION REGARDING
WATERMASTER'S MOTION TO
AMEND JUDGMENT
Date: September 28, 2000
Time: 2:00 p.m.
Dept: 8

18 I.

19 INTRODUCTION

20 A. Scope of Reference

21 In February 1998, the Court directed Watermaster to prepare an optimum basin management
22 program for the Chino Basin ("OBMP"). I was directed as the Court's Special Referee "to report
23 and make recommendations concerning the contents, implementation, effectiveness and
24 shortcomings" of the OBMP. The Watermaster's motion to amend the Judgment in furtherance of
25 the OBMP is within the scope of the Court's reference.

26 B. Conditional Approval of OBMP

27 On July 13, 2000, the Court found, subject to certain conditions precedent, that Watermaster
28 had satisfied its obligation to prepare an OBMP through its approval of the Peace Agreement and

1 adoption of the Implementation Plan. One of the conditions precedent to that finding is Court
2 approval of all Judgment modifications in furtherance of the OBMP.

3 The Judgment provides for the Court's continuing jurisdiction "for the purpose of enabling
4 the Court, upon application of any party, the Watermaster, the Advisory Committee or any pool
5 Committee...to make such further or supplemental orders or directions as may be necessary or
6 appropriate for interpretation, enforcement or carrying out of this Judgment..." (Judgment, ¶15.) It
7 is essential to the Court's continuing jurisdiction to ensure that Watermaster's actions, including
8 actions to implement the OBMP, are consistent with the Judgment, because the Judgment provides
9 for judicial review of Watermaster decisions.

10 **C. Watermaster's Motion to Amend the Judgment**

11 Watermaster has submitted a motion to amend the Judgment in furtherance of the OBMP.
12 No other party has submitted proposed modifications. Watermaster asserts that the signatories to
13 the Peace Agreement ("Agreement") have agreed that the proposed amendments are the only
14 Judgment modifications necessary to achieve consistency between the OBMP and the Judgment.

15 Set forth below is my report to the Court on the proposed Judgment modifications. Included
16 in this report is a discussion of those provisions in the Peace Agreement for which no modifications
17 are proposed and the ostensible reasons or logic for not including modifications for such provisions.

18 **D. Need for Supplemental Briefing**

19 Since the parties to the Peace Agreement are in agreement that only the Judgment
20 modifications sought by Watermaster counsel are required, extensive briefing on Judgment
21 modification issues is not anticipated. The need for additional modifications is likely to be raised,
22 however, at such time as the Watermaster takes an action or seeks Court approval for such action
23 where the Judgment may not provide authority for that action to be taken. I note some of the
24 instances in which this concern might arise.

25 The Court has the option to wait until such an issue arises and to request briefs on the need
26 for additional Judgment modifications at that time. Alternatively, the Court can ask the parties to
27 provide detailed post-hearing briefs after the close of the hearing scheduled for September 28, 2000,
28 to set forth the basis upon which the parties, Watermaster, and the Court can proceed without

1 Judgment modifications other than those which Watermaster has requested. The benefit of calling
2 for post-hearing briefs is that the parties would be providing a timely and, it is to be hoped, detailed
3 explanation of their interpretation of the Judgment with relation to the Peace Agreement and
4 Implementation Plan. There is precedent for such post-hearing briefs in this case; Mr. Stark's brief
5 titled Plaintiff's Post Trial Memorandum, filed July 12, 1978, on behalf of Chino Basin Municipal
6 Water District shortly after the Judgment was entered, has been a useful and informative reference.

7 **E. Discussion Topics**

8 In the discussion below, I address first the transfer and conversion provisions in the Peace
9 Agreement for which modifications are proposed. Thereafter, I discuss selected provisions in the
10 Peace Agreement for which no modifications are proposed: transfer provisions related to
11 Agricultural Pool transfers; provisions affecting Safe Yield and Operating Safe Yield; provisions for
12 Local Storage and Storage and Recovery; provisions for assessments and credits; provisions for
13 water rights to be held in trust; and new or revised definitions. I also include a brief discussion
14 concerning the impact of the Peace Agreement on the Court's continuing jurisdiction and judicial
15 review of Watermaster decisions.

16 **II.**

17 **DISCUSSION**

18 **A. Transfer Provisions of the Peace Agreement for which Modifications Are Proposed**

19 **1. Overlying (Non-Agricultural) Pool Transfers**

20 Watermaster's motion recommends amendment of Judgment ¶8 and Exhibit G, ¶6, to allow
21 members of the Overlying (Non-Agricultural) Pool to transfer or lease quantified production rights
22 within that pool or to Watermaster in conformance with the procedures described in the Peace
23 Agreement. The Peace Agreement provides at Section 5.3(e) that Watermaster shall approve the
24 transfer or lease of quantified production rights of non-agricultural producers for transfer within the
25 pool to other members of the non-agricultural Overlying Pool or transfer to Watermaster; Section
26 5.3(e), however, includes the limitation that transfer of such rights to Watermaster is to be "for the
27 purposes of Replenishment for a Desalter or for a Storage and Recovery Program."

28 Watermaster's proposed modification is necessary since the Judgment now provides:

1 All overlying rights are appurtenant to the land and cannot be assigned or conveyed
2 separate or apart therefrom. [Judgment ¶8] Rights herein decreed are appurtenant
3 to the land and are only assignable with the land for overlying use thereon . . .
[pursuant to provisions for agency agreements with appropriators to serve water back
to the land of the overlying (non-agricultural) user]. [Judgment at Exhibit G, ¶6]

4 Watermaster proposes that Exhibit G, ¶6 of the Judgment be amended to add:

5 The members of the pool shall have the right to Transfer or lease their quantified
6 production rights within the pool or to Watermaster in conformance with the
7 procedures described in the Peace Agreement between the Parties therein, dated June
29, 2000 for the term of the Peace Agreement.

8 Watermaster also proposes to replace the last sentence in ¶8 of the Judgment with the following:

9 All overlying rights are appurtenant to the land and cannot be assigned or conveyed
10 separate or apart therefrom except that for the term of the Peace Agreement the
11 members of the Overlying (Non-Agricultural) Pool shall have the right to Transfer
12 or lease their quantified production rights within the Overlying (Non-Agricultural)
Pool or to Watermaster in conformance with the procedures described in the Peace
Agreement between the Parties therein, dated June 29, 2000.

13 As you can see, the proposed Judgment modification does not mention that the transfer of
14 water to Watermaster is only for the purpose of replenishment for a Desalter or for a Storage and
15 Recovery Program. It would aid the Court in its continuing jurisdiction if the parties would confirm
16 that the proposed modification is intended to be so restricted. The most effective way to do so would
17 be to add such restrictive language to the modifications proposed for ¶8 and Exhibit G, ¶6.
18 Alternatively, the restriction may be addressed in supplemental briefing by Watermaster, either post-
19 hearing or at such time as judicial review of Watermaster's decisions with respect to applications
20 for these water transfers may be required as provided for in Section 5.3(b)(vi) of the Peace
21 Agreement, or through adoption of uniform rules and regulations by Watermaster related to these
22 transactions (which regulations and rules, in turn, require Court approval).

23 2. Overlying (Agricultural) Pool Transfers

24 As to members of the Agricultural Pool, Judgment ¶8 also applies to prohibit assignment or
25 conveyance of overlying rights separate or apart from the land to which the overlying rights are
26 appurtenant. There is, however, a mechanism for the effective "transfer" of water out of the
27 Agricultural Pool, by reallocation of unused Agricultural Pool water as provided for in Judgment
28 Exhibit H, ¶10 (page 73). That provision allows ". . . any portion of the share of Safe Yield allocated

1 to the Overlying (agricultural) Pool” that is not produced “in any five years” to be reallocated to
2 members of the Appropriative Pool. The reallocated unused Agricultural Pool water must be first
3 allocated to supplement Operating Safe Yield to compensate for any reduction in Safe Yield by
4 reason of recalculation in the first ten years (which did not occur), then pursuant to conversion
5 claims, and finally to “supplement Operating Safe Yield, without regard to reductions in Safe Yield.”
6 The conversion claims provisions in ¶10(b) (amended in 1995) are satisfied by reallocated unused
7 Agricultural Pool water.

8 Watermaster’s Motion proposes to modify the amended Judgment Exhibit H ¶10(b)(3)(i)
9 conversion provisions “to allow 2.0 acre-feet of unallocated Safe Yield water for each converted
10 acre.” This modification is necessary to remove a clear conflict with the Judgment. Watermaster’s
11 Motion also states: “Appendix 1 to the Judgment [referring to the 19-page “Appendix 1 to Chino
12 Basin Watermaster Amendment [to Judgment Exhibit H] Regarding Land use Conversions”] shall
13 be construed to be consistent with this amendment. All other parts of the 1995 Amendment shall
14 remain the same.”

15 Specifically, Watermaster proposes to amend the 1995 Judgment modification to provide:

16 For the term of the Peace Agreement, in any year in which sufficient unallocated Safe
17 Yield from the Overlying (Agricultural) Pool is available for such conversion claims,
18 Watermaster shall allocate to each appropriator with a conversion claim, 2.0 acre-feet
of unallocated Safe Yield water for each converted acre for which conversion has
been approved and recorded by Watermaster.

19 No modification is proposed with respect to “Appendix 1.”

20 Appendix 1 explains the basis for the 1.3 acre-feet per acre conversion factor. The
21 methodology used is described as a “gross water duty method.” It consists of taking the total
22 agricultural water use and dividing it by the total acreage remaining to be converted to develop the
23 gross average agricultural water use per acre. At the workshop conducted in January 1995, the
24 conversion factor was determined by taking the 1978 agricultural water use of 84,095 acre-feet and
25 dividing it by 32,343 acres in agricultural production (the total number of agricultural acres proposed
26 for conversion) which resulted in a use of 2.6 acre-feet per acre. Fifty percent of that per acre use
27 was to be allocated to the appropriator. (Appendix 1 does not discuss how the remaining 1.3 acre-
28 feet per acre is to be accounted for.) The parties decided to use the 1978 water use instead of the

1 1994 water use (which was significantly less), because the consensus was that many of the
2 conversions that potentially could have taken place since 1978 had not been submitted by the
3 appropriators for approval. Appendix 1 notes that “there was a consensus that the 1.3 af/ac
4 conversion factor yields a more realistic conversion water use number that if the conversion water
5 use determinations were based only on 50% of the current average use.” (Appendix 1 at page 2.)

6 The parties have not offered an explanation of why that 1.3 acre-feet per acre would be
7 changed to 2.0 acre-feet per acre. Watermaster Counsel should be prepared to explain on September
8 28, 2000, the basis and logic for this revision in the context of the detailed “Appendix 1” analysis
9 that supports the 1.3 acre-feet per acre conversion factor.

10 **B. Transfer provisions of the Peace Agreement for which No Modifications Are Proposed**

11 **1. Agricultural Pool Transfers**

12 The Peace Agreement adds new constraints to the reallocation of unused Agricultural Pool
13 water. It specifically directs the Watermaster to make a transfer in 1999-2000 of unallocated Safe
14 Yield for fiscal year 1998-99 to the Appropriative Pool (35,262.452 acre-feet “consistent with
15 Watermaster Resolution 88-3”). It also provides for “Early Transfer” of 32,800 acre-feet of water
16 per year to the Appropriative Pool. These provisions raise several questions. The 32,800 appears
17 to be the minimum that will be “transferred” (Section 5.3(g)). It is not clear, therefore, how these
18 “Early Transfer” allocations can occur and yet the Overlying (Agricultural) Pool still be entitled to
19 pump 82,800 acre-feet (or 414,000 acre-feet in five years) without reduction. This is an issue that
20 Watermaster Counsel should clarify at the September 28, 2000 hearing.

21 There is also a provision at page 35 of the Peace Agreement (Section 5.3(i)) that allows a
22 member of the Agricultural Pool to enter into what would seem to be an agency agreement with an
23 appropriator to serve water to the overlying land on behalf of the Agricultural Pool member. This
24 type of agency agreement is provided for in the Judgment (Exhibit G, ¶6), only for the benefit of
25 Overlying (non-agricultural) Pool members. There may need to be a Judgment modification to
26 explicitly allow Agricultural Pool members to enter into agency agreements with Appropriative Pool
27 members. If Watermaster were asked to approve such an agency agreement, it does not have
28 authority under the Judgment to do so. It is also not clear when such an agency agreement would

1 be used instead of using conversions.

2 The Peace Agreement introduces the new term "Early Transfer" when the same accounting
3 might instead have been described in terms of the Judgment's phrase "reallocation of unused
4 Agricultural Pool water." Further, the five-year provision in Exhibit H, ¶10 could plausibly be
5 construed to allow an average to be used with periodic adjustments made to reflect the actual
6 quantity of Overlying (Agricultural) Pool water not produced in any five years. Watermaster's
7 counsel should clarify what the historical application of the five-year provision has been and whether
8 "Early Transfer" can be characterized as an alternative accounting for reallocation. Counsel should
9 also clarify whether the 32,800 will be adjusted from year to year to reflect actual agricultural
10 pumping. Presumably, Watermaster efforts to meter and collect complete data on agricultural
11 pumping are underway.

12 **C. Provisions Affecting Safe Yield and Operating Safe Yield for which No Modifications**
13 **Are Proposed**

14 Watermaster's Motion is silent as to modification of the Judgment related to Operating Safe
15 Yield, although the Peace Agreement provides at Section 4.5:

16 Construction of "Operating [Safe] Yield" under the Judgment. Exhibit I to the
17 Judgment shall be construed to authorize Watermaster to include New Yield as a
18 component of Operating Safe Yield.

18 The Judgment ¶6 provides that: "The Safe Yield of Chino Basin is 140,000 acre-feet per
19 year." "Safe Yield" is defined at definition (x) as:

20 The long-term average annual quantity of ground water (excluding replenishment or
21 stored water but including return flow to the Basin from use of replenishment or
22 stored water) which can be produced from the Basin under cultural conditions of a
23 particular year without causing an undesirable result.

23 The Judgment does not explicitly provide that Safe Yield can be redetermined, but that is clearly
24 implied. The Court's continuing jurisdiction applies to "all matters contained in this Judgment"
25 except redetermination of Safe Yield during the first ten years of operation of the Physical Solution.
26 (Judgment ¶15) Paragraph 44 allocates the "declared Safe Yield" and provides: "Any subsequent
27 change in the Safe Yield shall be debited or credited to the Appropriative Pool." Given the
28 Paragraph 6 provision stating that the Safe Yield is 140,000 acre-feet per year, however, a Judgment

1 modification would be required if Safe Yield is recalculated. The Peace Agreement is silent as to
2 recalculation of Safe Yield.

3 The Peace Agreement does, however, make several significant changes to the calculation of
4 Operating Safe Yield. As noted, the Peace Agreement provides at Section 4.5 that Judgment Exhibit
5 I is to be construed to authorize Watermaster to include New Yield as a component of Operating
6 Safe Yield. The Judgment provides at Exhibit I, ¶2, that: "Operating Safe Yield in any year shall
7 consist of the Appropriative Pool share of Safe Yield of the Basin, plus any controlled overdraft of
8 the Basin which Watermaster may authorize" The initial Operating Safe Yield is explicitly set at
9 54,834 acre-feet per year (which is consistent with Exhibit H, but not apparently consistent with
10 ¶44). Paragraph 2(b) explicitly provides:

11 (b) Quantitative Limits. In no event shall Operating Safe Yield in any year be less
12 than the Appropriative Pool share of Safe Yield, nor shall it exceed such share of
13 Safe Yield by more than 10,000 acre-feet [from "accumulated overdraft"]. The
initial Operating Safe Yield is hereby set at 54,834 acre-feet per year. Operating Safe
Yield shall not be changed upon less than five (5) years' notice by Watermaster.

14 The Judgment also recognizes the potential for reallocating unused Overlying (Agricultural) Pool
15 water to the Appropriative Pool. Judgment Exhibit H, ¶10(a), allows reallocation: "(3) As a
16 supplement to Operating Safe Yield, without regard to reductions in Safe Yield."

17 The Peace Agreement adds two new categories of ways to increase the Appropriative Pool's
18 Operating Safe Yield; through inclusion of "New Yield" in Operating Safe Yield and through
19 inclusion of "Recharge Supplemental Water" in Operating Safe Yield. The Peace Agreement
20 definition of Operating Safe Yield (definition (ee)) provides: "Watermaster shall include any New
21 Yield in determining Operating Safe Yield." Peace Agreement Section 5.1(g)(ii) provides: "The
22 Recharge Supplemental Water shall increase the Operating Safe Yield under the Judgment." Under
23 the Peace Agreement, therefore, Operating Safe Yield is a compilation of:

- 24 • The initial share of Safe Yield set at 54,834 acre-feet per year, as provided in the
25 Judgment.
- 26 • Reallocated unused Overlying (Agricultural) Pool water, as provided in the Judgment.
- 27 • Recharge Supplemental Water.
- 28 • New Yield.

1 Just as the Judgment implicitly anticipates changing Safe Yield, it anticipates year-to-year
2 variations in the determination of Operating Safe Yield. Paragraph 44 provides:

3 Any subsequent change in the Safe Yield shall be debited or credited to the
4 Appropriative Pool. Basin water available to the Appropriative Pool without
5 replenishment obligation may vary from year to year as the Operating Safe Yield is
6 determined by Watermaster pursuant to the criteria set forth in Exhibit I.

6 Whether there are additions to the Operating Safe Yield, or Safe Yield is recalculated, it is the
7 Appropriative Pool that will either be debited or credited as a result. Watermaster's Motion does
8 not seek modification of the Judgment Safe Yield number, but essentially seeks to modify the factors
9 to be considered from year to year in determining Operating Safe Yield. One construction of the
10 Peace Agreement provisions for Recharge Supplemental Water and New Yield additions to
11 Operating Safe Yield is that these factors are factors to be considered for an interim period in order
12 ultimately to revisit the issue of redetermining Safe Yield.

13 The capture of available storm flow was factored into the original calculation of Safe Yield.
14 Additional measurements and study will be done to determine whether the original assumption as
15 to storm water additions to the Basin on an average annual basis should be revised, with the result
16 that the Safe Yield would be redetermined. New Yield is to be composed of capture of available
17 storm flow, capture of rising water, operation of desalters, and other management activities. This
18 list raises questions: For example, it is not obvious why desalter operations would be considered
19 "New Yield." However, if these components of New Yield were to be determined to represent actual
20 additions to Safe Yield of the Basin, those additions would be considered in an eventual
21 redetermination of Safe Yield.

22 The provisions regarding Recharge Supplemental Water are limited to an initial five-year
23 period during which 32,500 acre-feet of water would be recharged in certain spreading facilities.
24 The results of this activity could also be reflected in redetermining Safe Yield.

25 To the extent that calculation of Operating Safe Yield is to take into account Recharge
26 Supplement Water and New Yield on an interim basis, with the ultimate intention of redetermining
27 Safe Yield, then it is plausible to construe the Judgment as allowing these considerations to be
28 included for some interim period in determining Operating Safe Yield and, in the long term, for

1 redetermination of Safe Yield. The Peace Agreement did not characterize these new additions to
2 Operating Safe Yield in this fashion, but it is reasonable to anticipate that further analysis will be
3 necessary before Safe Yield is redetermined. As noted in the OBMP Implementation Plan at page
4 44:

5 The safe yield in the Judgment was developed over the period 1965 to 1974 using the
6 procedure described in Section 2 of the OBMP Phase I Report. The safe yield will
7 be re-determined in year 2010/11 using the ten-year period 2000/01 to 2009/10
8 because it will contain accurate production data and groundwater level data. A ten-
9 year period is proposed to be consistent with the method used in the engineering
10 work for the Judgment and is the minimum necessary to estimate a safe yield.

11 **D. Provisions on “Local Storage” and “Storage and Recovery Program” for which No
12 Judgment Provisions Are Proposed**

13 Provisions in the Peace Agreement differentiate between Recharge Supplemental Water and
14 New Yield (which are included in Operating Safe Yield) and activities involving the storage and
15 recovery of water. Within the activities for storage and recovery of water are Local Storage and
16 Storage and Recovery programs. The Peace Agreement provisions regarding Storage and Recovery
17 (Section 5.2) provide: “No person shall store water and recover water from the Chino Basin without
18 an agreement with Watermaster.” (Section 5.2(a)(ii)) The requirement for a local storage agreement
19 is reiterated at Section 5.2(b)(ii) and the requirement for a storage and recovery agreement with
20 Watermaster is reiterated at Section 5.2(c)(i). The Peace Agreement contemplates that only
21 Watermaster approval of such agreements is required, but that: “Any party to the Judgment may
22 seek judicial review of Watermaster’s decision [on a local storage agreement].” (Peace Agreement
23 Section 5.2(b)(ix)) Judicial review may be sought by any party for review of a Watermaster decision
24 regarding a Storage and Recovery Program, as well. (Section 5.2(c)(x))

25 The Judgment requires a written order of the Court to approve storage agreements:

26 28. Ground Water Storage Agreements. Watermaster shall adopt, with the approval
27 of the Advisory Committee, uniformly applicable rules and a standard form of
28 agreement for storage of Supplemental Water, pursuant to criteria therefor set forth
in Exhibit “I”. Upon appropriate application by any person, Watermaster shall enter
into such a storage agreement; provided that all such storage agreements shall first
be approved by written order of the Court, and shall by their terms preclude
operations that will have a substantial adverse impact on other producers.

The Exhibit I provisions on groundwater storage agreements provides a list of the minimum to be

1 included in Supplemental Water storage agreements (including procedures for calculation of losses
2 and annual accounting of water and storage by Watermaster). Judgment ¶29 also addresses
3 accounting for stored water, including calculation of “losses of water supplies or Safe Yield of Chino
4 Basin resulting from such Stored Water.” The Judgment very clearly provides that the Watermaster
5 must control and regulate storage and conjunctive use of Supplemental Water in the Basin “. . . in
6 order to protect the integrity of both such Stored Water and Basin Water in storage in the Safe Yield
7 of Chino Basin.” (Judgment at ¶11)

8 The procedural provisions in the Peace Agreement would appear to be encompassed by the
9 Watermaster’s general authority over the use of available groundwater storage capacity in the Basin.
10 The Peace Agreement provisions indicate that Watermaster approval of Local Storage agreements
11 or Storage and Recovery agreements is required, but leaves unaddressed whether Court approval
12 is required if no party seeks judicial review of the Watermaster’s decision. The Judgment appears
13 to require Court approval of any storage agreement. The fact that various types of storage
14 agreements (Local Storage and Storage and Recovery) have been created in the Peace Agreement
15 would not seem to create any inconsistency with the Judgment; the concern, rather, is whether Court
16 approval of each such agreement or standard forms of agreement must be obtained.

17 The Judgment recognizes that there is a substantial amount of available groundwater storage
18 capacity in the Chino Basin that is not utilized, but which may appropriately be utilized for storage
19 and conjunctive use of supplemental water with Basin Waters. The Judgment provides that, in the
20 allocation of such storage capacity, the needs and requirements of overlying lands and the owners
21 of rights in the Safe Yield or Operating Safe Yield shall have priority and preference over storage
22 for export. (Judgment, ¶¶11 and 12, p. 8-9.) The Judgment enjoins the parties thereto from storing
23 or withdrawing supplemental water, except pursuant to the terms of a written agreement with
24 Watermaster and in accordance with Watermaster regulations. However, the injunction does not
25 apply to supplemental water spread or provided in lieu by Watermaster pursuant to the Physical
26 Solution. (Judgment, ¶14, p. 10.) The Judgment also mandates that any agreement for storage of
27 supplemental water (imported or reclaimed water) shall include: (1) the quantities and term of the
28 storage right; (2) a statement of the priority or relation of the right as against overlying or safe yield

1 uses and other storage rights; (3) the procedure for establishing delivery rates, schedules and
2 procedures, which may include spreading or injection, or in lieu deliveries of supplemental water
3 for direct use; (4) the procedures for calculation of losses and annual accounting for water in storage;
4 and (5) the procedures for establishment and administration of withdrawal schedules, locations and
5 methods. (Judgment, Exhibit I, ¶3, p. 80 ¶ 81.) Finally, the Judgment provides that “all such storage
6 agreements” shall first be approved by written order of the Court, and shall by their terms preclude
7 operations that will have a substantial adverse impact on other producers. (Judgment ¶28.)

8 This provision was clarified in the Court’s January 9, 1979 Order Approving the Uniform
9 Local Storage Agreement; Amplifying and Clarifying Procedures under ¶28 of the Judgment;
10 Approving a Cyclic Storage Agreement. The Order provides that the standard form of Local Storage
11 Agreement, as submitted and approved by the Court, may be used without further Court approval
12 in connection with the local storage of groundwater by parties to the Judgment. The Order further
13 provides that each groundwater storage agreement for cyclic and/or conjunctive use must be
14 approved individually by order of the Court before it shall become effective.

15 If the Watermaster intends to change the form of “Uniform Local Storage Agreement” as
16 approved by the Court in 1979, the Watermaster would be required to seek Court approval of any
17 uniform storage agreement. As ordered by the Court in 1979, each groundwater storage agreement
18 for cyclic and/or conjunctive use must be individually approved by the Court. It would be helpful
19 if Watermaster Counsel would clearly describe the uniform and specific groundwater storage
20 agreements which it intends to use and clarify for the Court the process Watermaster intends to use
21 with respect to obtaining Court approval of storage agreements.

22 **E. Provisions on Assessments and Credits for which No Judgment Provisions Are**
23 **Proposed**

24 The Peace Agreement provides a definition of “OBMP Assessments” at definition 1.1(cc):

25 “OBMP Assessments” means assessments, other than the assessments levied as
26 provided in Section 5.1(g) [for Recharge Supplemental Water which is added to
27 Operating Safe Yield], levied by Watermaster for the purpose of implementing the
28 Optimum Basin Management Program (OBMP) which shall be deemed
Administrative Assessments under ¶54 of the Judgment.

The Judgment provisions on administrative expenses (Judgment ¶54) include two categories of

1 expenses of administering the Physical Solution: general watermaster administrative expenses and
2 special project expenses. It is unclear from the definition provided in the Peace Agreement whether
3 the parties intend the OBMP expenses to be classified as general watermaster expenses or as special
4 project expenses. The Judgment would appear to better include OBMP expenses in the category of
5 "Special Project Expense." Inclusion of OBMP expenses as a general watermaster administrative
6 expenses does not necessarily create a conflict with the Judgment, but it would be helpful if
7 Watermaster Counsel would clarify why OBMP expenses are not defined as special project
8 expenses. There is obviously confusion as to this terminology. The "Fiscal Year 2000-2001
9 Proposed Watermaster Budget" shows OBMP expenses as "Special Project Administrative
10 Expenses" (page 3) and as "OBMP Special Projects" (pages 5 *et seq.*).

11 The Peace Agreement also introduces the concept of "salt credits" which is not a concept that
12 is addressed in the Judgment. Watermaster Counsel should clarify whether "Salt Credits" will be
13 integrated into Watermaster accounting, and in what manner, or whether "salt credits" are relevant
14 only to Regional Water Quality Control Board authority.

15 **F. Provisions that Water Rights to Be Held in Trust by Watermaster**

16 The Peace Agreement provides at page 22 that:

17 [5.1(h)] Watermaster shall not own Recharge projects, including but not limited to
18 spreading grounds, injection wells, or diversion works. It shall never own real
19 property. However, Watermaster may own water rights in trust for the benefit of the
parties to the Judgment. . . .

20 The Judgment provides at ¶19:

21 Acquisition of Facilities. Watermaster may purchase, lease, acquire and hold all
22 necessary facilities and equipment; provided, that it is not the intent of the Court that
Watermaster acquire any interest in real property or substantial capital assets.

23 The extent of the Watermaster's power to cause the OBMP to be implemented is an issue
24 which has not been addressed by the Court. To the extent Watermaster and parties follow the
25 direction of the Peace Agreement, that Watermaster will enter into contracts for facilities and
26 arrangements to provide for recharge of the Basin, the issue of whether the Watermaster could
27 acquire facilities for recharge itself is not directly raised. It is important to note that this question
28 is not resolved by the Peace Agreement.

1 There is no clear authority in the Judgment for the Watermaster to acquire water rights
2 permits, whether “in trust for the benefit of the parties to the Judgment” or otherwise. Whether
3 Judgment modification to expressly allow Watermaster to obtain water rights permits is required or
4 not, Watermaster should obtain Court approval for proceeding to obtain water rights. The review
5 procedures provided for at Judgment ¶31 provide that:

6 All actions, decisions or rules of Watermaster shall be subject to review by the Court
7 on its own motion or on the motion by any party, the Watermaster (in the case of a
8 mandated action), the Advisory Committee, or any Pool Committee. . . .

9 Proceeding to obtain water rights would be an action which, because it is not clearly authorized by
10 the Judgment, should be reviewed by the Court.

10 **G. New or Revised Definitions**

11 There are new definitions contained in the Peace Agreement which do not appear in the
12 Judgment. Several of these could affect interpretation of the Judgment and amendment of the
13 Judgment to add various new definitions (or revise existing definitions) could help to clarify the
14 meaning of the Judgment in the future. The most significant of the new or revised definitions are:
15 “Early Transfer,” “In-Lieu Recharge,” “Local Storage,” “New Yield,” “OBMP Assessments,”
16 “Operating Safe Yield,” “Recharge and Recharge Water,” “Recycled Water,” “Salt Credits,”
17 “Storage and Recovery Program,” and “Transfer.” The Motion to amend the Judgment does not
18 propose any Judgment modifications related to any definitions. It is not clear why modification of
19 the Judgment to clarify the definition of terms should not be done to avoid confusion.

20 **H. Court’s Continuing Jurisdiction and Judicial Review of Watermaster Decisions**

21 With the exception of redetermination of Safe Yield during the first ten years of operation
22 of the Physical Solution, the allocation of Safe Yield as between the various pools, the determination
23 of specific quantitative rights in the declared Safe Yield, and the calculation of replenishment
24 assessments against the Appropriative Pool, full jurisdiction, power and authority are retained and
25 reserved to the Court as to all matters contained in the Judgment. (Judgment, ¶15.) Modification
26 of the Judgment with respect to the Court’s continuing jurisdiction is unnecessary because the
27 provisions of the Peace Agreement do not purport to alter the Court’s continuing jurisdiction.

28 Judgment ¶31 provides for judicial review of all Watermaster actions, decisions, or rules.

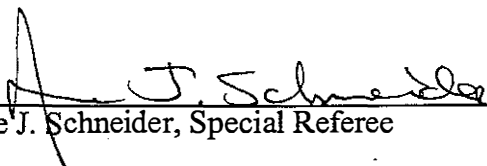
1 Specific provisions are included as to the effective date of any Watermaster decision, action or rule,
2 the notice required, the timing of the motion, the nature of the proceeding and the finality of the
3 court's decision. (Judgment, ¶31(a)-(e).) The Peace Agreement confirms the parties' right of judicial
4 review for Watermaster decisions with respect to storage and recovery and water transfers. The
5 Peace Agreement thus does not appear to conflict with the Judgment. However, the Peace
6 Agreement's silence with respect to the right to judicial review of all Watermaster decisions, actions
7 or rules could be construed as a limitation on the right to judicial review. Watermaster Counsel may
8 wish to clarify that the Peace Agreement is not intended to limit the parties' right of judicial review
9 provided under the Judgment.

10 **III.**

11 **CONCLUSION AND RECOMMENDATION**

12 From the discussion above it should be apparent that the Special Referee agrees that the
13 modifications proposed by the Watermaster are necessary in order for the Peace Agreement to be
14 consistent with the Judgment. It should also be apparent that I have some reservations as to whether
15 all Judgment modifications necessary to provide consistency between the Judgment and Peace
16 Agreement have been addressed. Many of my concerns can be alleviated by the filing of a
17 post-hearing memorandum clarifying the parties' intentions with respect to provisions discussed in
18 Sections II B through II F above. Therefore, it is my recommendation that the parties be ordered to
19 provide the Court with detailed supplemental briefs setting forth the basis upon which the parties and
20 the Court can proceed without further Judgment modifications.

21 Dated: September 13, 2000

22
23
24 
25 Anne J. Schneider, Special Referee
26
27
28

PROOF OF SERVICE

FILED - West District
San Bernardino County Clerk

SEP 14 2000

By Susan King
Deputy

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 8632 Archibald Avenue, Suite 109, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On September 14, 2000, I served the attached:

Chino Basin Watermaster Hearing Date: 9/28/2000 2:00 p.m.

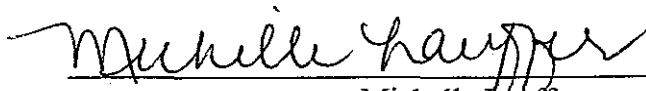
**SPECIAL REFEREE'S REPORT AND RECOMMENDATION REGARDING
WATERMASTER'S MOTION TO AMEND JUDGMENT**

in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addressed as follows:

See attached service lists:

- Attorney Service List
- Mailing List A

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Rancho Cucamonga, California, on September 14, 2000.


Michelle Lauffer

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UPDATED 9/14/2000

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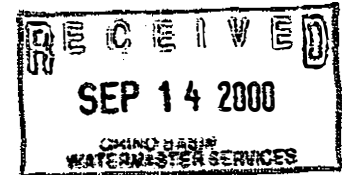
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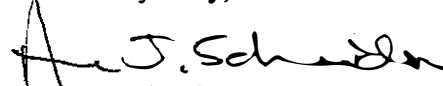
Re: Chino Basin Municipal Water District v. The City of Chino
Case Number: RCV 51010

Dear Traci:

Enclosed is the Special Referee's Report and Recommendation Regarding Watermaster's Motion to Amend the Judgment. Please serve this document on all parties, persons and entities included on the Watermaster's service list. Please also file a proof of service with the Court.

Thank you for your assistance. If you have any questions, please call Ron O'Connor at (916) 447-2166.

Yours very truly,


Anne J. Schneider
Special Referee

AJS:rko

cc: Scott Slater
Joe Scalmanini
Judith Schurr

ELLISON & SCHNEIDER L.L.P.

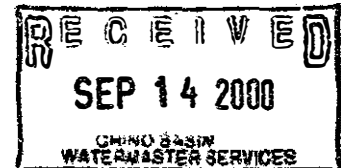
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September 13, 2000

Susan King, Department 8
Clerk of the Superior Court
San Bernardino County
8303 N. Haven Ave.
Rancho Cucamonga, CA 91730



Re: Chino Basin Municipal Water District v. The City of Chino
Case Number: RCV 51010

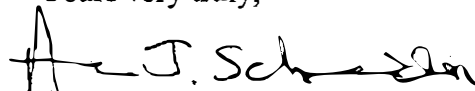
Dear Ms. King:

Enclosed is the Special Referee's Report and Recommendation Regarding Watermaster's Motion to Amend the Judgment. One copy of the report is to be filed with the Court in connection with the hearing scheduled for September 28, 2000. The other copy is to be delivered to the Honorable J. Michael Gunn.

Under separate cover a copy of the report is being sent to Traci Stewart, Chief of Watermaster Services, with a request that copies of the Report be sent to all parties, persons and entities included on the Watermaster's service list. Ms. Stewart will also be asked to file a proof of service with the Court.

Thank you for your assistance. If you have any questions, please call Ron O'Connor at (916) 447-2166.

Yours very truly,


Anne J. Schneider
Special Referee

AJS:rko

cc: Traci Stewart
Scott Slater
Joe Scalmanini
Judith Schurr